

TAXATION RULING NO. IT 2388

INCOME TAX : ROLLING OVER ELIGIBLE TERMINATION PAYMENTS  
TO SECTION 23FB SUPERANNUATION FUND SUBSEQUENT TO  
RETIREMENT

F.O.I. EMBARGO: May be released

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REFERENCE NO: SUBJECT REFS: LEGISLAT. REFS:

I 1210660 SUPERANNUATION 23FB  
ROLL-OVER 27A(12)

PREAMBLE Sub-division AA of Division 2 of Part III of the Income Tax Assessment Act provides for eligible termination payments to be rolled-over into, among other things, superannuation funds. It has been brought to the attention of this Office that some retired persons who, upon retirement, receive eligible termination payments are seeking to roll-over the eligible termination payments into section 23FB superannuation funds. The attraction of section 23FB superannuation funds is their scope for deferral of tax, i.e. benefits may be retained until a member reaches 70 years of age.

2. This Ruling explains the tax implications of the roll-overs.

RULING 3. Sub-section 27A(12) specifies the funds, etc. into which eligible termination payments may be made. Sub-paragraph (a) refers to a superannuation fund which provides superannuation benefits for the taxpayer or for dependants in the event of the taxpayer's death. What is important to note is that an eligible termination payment cannot be paid to any superannuation fund - sub-paragraph (a) requires it to be paid to a superannuation fund which can provide superannuation benefits for the taxpayer and/or dependants.

4. Section 23FB exempts from income tax a superannuation fund established and maintained solely for either or both of the following purposes:-

- (i) the provision of superannuation benefits to a member in the event of the retirement from any business, trade, profession, vocation, calling, occupation or employment in which he is engaged; and/or
- (ii) the provision of superannuation benefits to the dependants of a deceased member.

5. Section 23FB is, for all practical purposes, a re-enactment of the former section 79. In the light of the

requirement of paragraph 4(i) above it has long been the practice of this Office to require a taxpayer to be engaged in gainful employment at the time of making any contribution to a section 79 (now section 23FB) superannuation fund. In other words, a section 23FB superannuation fund is not open to a person who is not engaged in gainful employment, i.e. it is not open to a person who derives income solely from investments or to a person who has retired and whose only income is a superannuation pension. The requirements are discussed in paragraph 18 of Canberra Income Tax Circular Memorandum 849 and paragraphs 15 and 54 of Canberra Income Tax Circular Memorandum 855. This general rule is modified in paragraph 40 of Taxation Ruling No. IT 2201 which permits persons who are temporarily unemployed to transfer superannuation benefits into a section 23FB fund provided they obtain gainful employment within six months.

6. In the context of sub-section 27A(12), therefore, a retired person who is not otherwise engaged in gainful employment cannot roll-over an eligible termination payment into a section 23FB superannuation fund. It is not a fund which can provide superannuation benefits for the person and/or dependants.

7. A section 23FB superannuation fund which accepted a payment from a person not engaged in gainful employment would not be considered to satisfy the requirement of being established and maintained solely for the purposes set out in the section. Consequently, it would not be treated as an exempt superannuation fund. Additionally, given that section 121DAB prescribes the same tests as section 23FB, the fund would fail to satisfy the provisions of section 121DAB. It would be taxed in accordance with section 121DA.

8. It is not necessary for the purposes of this Ruling to explain the operation of sections 121DAB and 121DA. It is sufficient to say that, if a fund is taxed under section 121DA, it is not a "superannuation fund" for eligible termination purposes as defined in sub-section 27A(1).

COMMISSIONER OF TAXATION  
9 April 1987