CR 2001/47 - Income tax: Q Invest Retirement Fund

Class Ruling
Income tax: Q Invest Retirement Fund

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Preamble

The number, subject heading, and the ***What this Class Ruling is about*** *(including* ***Tax law(s)****,* ***Class of persons*** *and* ***Qualifications*** *sections),* ***Date of effect, Withdrawal, Arrangement*** *and* ***Ruling*** *parts of this document are a 'public ruling' in terms of Part IVAAA of the* ***Taxation Administration Act 1953****. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are subsection 27A(1) and section 27H of the *Income Tax Assessment Act 1936.*

Class of persons

3. The class of persons to whom this Ruling applies is Q Invest Retirement Fund allocated pension plan members who have commenced to receive an allocated pension, and who transfer to QSuper under the arrangement described in this Ruling.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 23 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

(a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and

(b) this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 10 September 2001. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 December 2001. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from Q Invest Limited dated 23 May 2001, requesting Class Ruling, with accompanying documents;
- correspondence dated 15 May 2001 signed by the Executive Director of the Queensland Government Superannuation Office, giving consent to the naming of QSuper in this Ruling.

Note: certain information received from Q Invest Retirement Fund has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

11. The Q Invest Retirement Fund (hereafter referred to as QIRF) is considering the transfer of all members to the State Public Sector Superannuation Scheme (hereafter referred to as QSuper). Q Invest Limited, as Trustee, seeks a class ruling in relation to the treatment that will be applied for taxation purposes to members who transfer from the QIRF to QSuper.

Background

12. The QIRF was established in May 1994 as an allocated pension plan. In August 1994 a facility was introduced for the roll-over and retention of lump sums. As a result, the Fund has two classes of members:

(a) allocated pension plan members (pension members); and

(b) members with lump sum accumulation accounts (roll-over members).

13. The reason given for establishing the roll-over and retention facility was that there was some doubt that QSuper could provide an equivalent facility under the Commonwealth Government's *Occupational Superannuation Standards Act 1987* that existed at that time. QSuper is a public sector fund covering a wide range of public sector employees in Queensland.

14. Therefore, the creation of the QIRF and its facilities enabled QSuper to provide its members with investment options for the roll-over and retention of lump sums on retirement from the public service. Members can then elect to take an allocated pension or retain their lump sum in a superannuation environment.

15. The Trustee of the QIRF is Q Invest Limited, which is owned jointly by the QSuper Board of Trustees and another government statutory corporation. Q Invest Limited also provides financial and

retirement planning advice. QIRF's funds are managed by this other statutory corporation.

16. The membership of the QIRF substantially comprises former QSuper members or their spouses, with some members deriving from other public sector funds (substantially Queensland-based). Only 7% of the membership does not have a public sector background.

Reason for Proposed Transfer

17. Since the QIRF was established, changes have been made to the Commonwealth Legislation and State Legislation governing QSuper. One effect of these changes was to allow QSuper to set up its own allocated pension and expand lump sum investment options. Consequently, QSuper has established these products and they are now made available to QSuper retirees. The original purpose for setting up the QIRF therefore no longer exists, and as a result, both membership and funds under management have declined significantly in the past 12 months. The Trustee of the QIRF is of the opinion that the decline in membership is affecting the viability of the Fund and this trend is expected to continue.

18. QSuper is able to provide the allocated pension and lump sum roll-over facilities at lower cost and fees charged by QSuper are now significantly lower than fees charged by the QIRF.

19. The Trustee is therefore of the view that it is in the best interests of the members of the QIRF for all members to be transferred to QSuper. The Trustee has therefore made an arrangement with the Treasurer of Queensland for all members of the QIRF to be offered membership of the equivalent post-retirement product in QSuper. Provision has been made in the State Superannuation Legislation to allow for the transfer of all members of the QIRF to QSuper. The assets held by the Trustee of the QIRF will be assigned to the Trustees of QSuper. At the time of the transfer, the assets will be undissected and it is not possible to identify an individual's entitlements on transfer.

20. It is expected that the majority of members will transfer from the QIRF to QSuper. Those members who do not agree to transfer will be automatically transferred to an Eligible Roll-over Fund (ERF). It is possible that there may be some members who elect to transfer to a fund other than QSuper. The QIRF cannot stop these members from so transferring.

21. The opinion requested in this Ruling is in respect of those members transferring from the QIRF to QSuper only (that is, it is not in respect of members who may elect to go elsewhere or who are transferred to an ERF).

Transfer Details

22. For pension members, it is intended that they will be entitled to receive the same level of payments at the same intervals they currently receive and will have the same options for variation of their payment levels and the intervals at which they receive their payments.

23. The only substantive difference in the benefit design is the options for payment of a death benefit if the member has not nominated a reversionary pension. The QIRF may pay a death benefit to a dependant, as either a lump sum or a pension, or to the member's estate as a lump sum. QSuper normally pays a death benefit to the member's estate as a lump sum. QSuper also has a general discretion in paying death benefits. The different options for death benefits do not however affect the pension entitlements in any way.

Ruling

24. The transfer of members' benefits from the Q Invest Retirement Fund (QIRF) to QSuper under the arrangement described in this Ruling will not be treated as an eligible termination payment, as defined in subsection 27A(1) of the *Income Tax Assessment Act 1936*.

25. Accordingly, since there is no eligible termination payment and roll-over at the time of the transfer, there will be no re-calculation of the deductible amount required under section 27H of the Act in relation to their pension for those pension members who transfer from the QIRF to QSuper under this arrangement.

Explanations

26. The taxation treatment that applies to the class of persons identified in this Ruling upon the move of their member benefits from the QIRF to QSuper, depends on whether that transfer is an eligible termination payment (ETP) and roll-over under the *Income Tax Assessment Act 1936* (ITAA 1936), or a transfer of benefits without an ETP arising.

27. If the move is classed as an ETP and roll-over, the deductible amount in respect of each pension under section 27H of the Act will be required to be re-calculated.

28. If the move of members' benefits is not treated as an ETP and roll-over, but is a transfer without an ETP arising, then the deductible amount will not need to be re-calculated.

Does the transfer constitute an eligible termination payment?

29. The term "eligible termination payment" is exhaustively defined in subsection 27A(1) of the Act. The transfer of members' benefits under the arrangement referred to in this Ruling will be an ETP if it falls within any of the paragraphs of the definition set out in subsection 27A(1).

30. The class of persons covered by the Ruling have commenced to receive their benefits in the form of an allocated pension. Upon the move of benefits to QSuper, all of these members will continue to be paid an equivalent allocated pension from QSuper.

31. Accordingly, the question to be addressed is whether the proposed transfer of each member's pension will be considered to be either a commutation of the pension or a payment of the residual capital value in respect of a member's pension (paragraphs (d) and (e) respectively of the definition of an ETP in subsection 27A(1)), or will be treated as a payment from a superannuation fund under paragraph (b) of the definition.

32. It is therefore necessary to look at the circumstances of this case and the nature of the transaction which is occurring, and to apply the legislative provisions to these circumstances:

- The transferor fund is a public offer fund, of which the Trustee company is partly owned by the transferee fund, a public sector fund.
- The transferor fund (QIRF) was originally set up by the transferee fund (QSuper) to provide post-retirement products (namely, allocated pensions and lump sum roll-over products) because there was uncertainty that QSuper could provide these under its governing legislation.
- State and Commonwealth Legislation was subsequently amended and QSuper can now offer a full range of post-retirement products.
- The transfer of members' benefits is now occurring as a result of the restructure of both funds.
- The reason for the restructure is that the Trustee of QIRF has concluded that the decline in membership and funds invested is affecting the continued viability of the fund and that since QSuper offers the same products at a lower cost, it would be in the best interests of the members to be transferred to the transferee fund.

- The restructure is occurring pursuant to an arms' length decision by the trustee of the fund that was beyond the control or influence of the individual members.
- All members of the QIRF must leave the fund by a particular closing date as a result of the trustee's decision, with the bulk of members being transferred to QSuper, which will provide an equivalent benefit.
- Any members who fail to make an election will have their funds transferred to an ERF and the fund will be closed to members following the transfer.

33. Turning now to the relevant provisions of the definition of an ETP, it is to be noted that subsection 27A(3) of the Act defines the words "a payment made in respect of the taxpayer" as a payment made:

"*(a) during the life of a taxpayer:*

(i) to or for the benefit of the taxpayer;

(ii) to or for the benefit of a dependant of the taxpayer; or

(iii) to another person at the direction or request of the taxpayer; or

(b) after the death of the taxpayer – to the trustee of the estate of the taxpayer."

34. Subsection 27A(1) states:

"eligible termination payment"*, in relation to a taxpayer, means-*

...

(d) any payment made in respect of the taxpayer in relation to the commutation, in whole or in part, of a superannuation pension that was payable to the taxpayer;"

35. In order that the transfer of the right to the pension be treated as a commutation for the purposes of paragraph (d) of the definition of an ETP, it is necessary to establish that the right to the benefit has been converted. In the case of a pension, it would be necessary to establish that the pension has been converted to a lump sum.

36. In this case, pension members will be entitled to receive an equivalent benefit, that is, they will receive the same level of payments at the same intervals they currently receive and will have the same options for variation of their payment levels and the intervals at which they receive their payments.

37. It is considered that the difference relating to the options for payment of a death benefit where a member has not nominated a reversionary pension (as outlined in 'Arrangement' above) does not have a material affect on the benefit entitlements of members, as the difference does not relate to the value or measure of their benefit entitlements.

38. It is considered that the circumstances which have led to the transfer result in the conclusion that the transaction does not result in a commutation of the pensions. That is, the transfers to QSuper are the result of the restructure of the QIRF and QSuper, pursuant to an arm's length decision by the Trustee that was beyond the control or influence of the individual members. The fund is effectively being closed down and all members of the QIRF must leave the fund by a stipulated closing date. The members' benefits are being transferred to QSuper which will provide an equivalent benefit. In these circumstances, since the pension members will be entitled to same right to, and payment of, the pension as they were before the transfer, it is considered that there has been no conversion of the pension by the transferred members. The right which existed prior to the transfer has not been materially altered on the transfer.

39. Paragraph (e) of the definition of an ETP in subsection 27A(1) provides that the following will be an ETP:

> *"(e) any payment made in respect of the taxpayer of the residual capital value of a superannuation pension that was payable to the taxpayer;"*

40. In order that the transfer of the members' benefits be treated as an ETP under paragraph (e) of the definition of an ETP in subsection 27A(1), the payment must be made in respect of the taxpayer of the residual capital value of the pension. In relation to a pension, the residual capital value is the amount payable on the termination of the pension. It is acknowledged that on the transfer of the benefit between funds the contractual right to the pension changes, in the sense that the contractual rights to the pension are between the pension member and the fund to which the pension right has been transferred. However, on transfer there is no termination of the pension as the pension member is entitled to the same right to, and payment of, the pension as they were before the transfer.

41. As mentioned previously, the transfers to QSuper are the result of the restructure of the QIRF and QSuper, pursuant to an arm's length decision by the Trustee of the fund that was beyond the control or influence of the individual members. All members of QIRF must leave the fund, with the bulk of members being transferred to QSuper which will provide an equivalent benefit. In these circumstances, since it is considered that, at the time of the transfer to QSuper, the pension member has not converted the pension entitlement to a lump

sum, he or she cannot be said to derive any benefit in respect of such sum.

42. Accordingly, the transfer does not result in the commutation of or the creation of a residual capital value of the members' superannuation pensions.

43. Paragraph (b) of the definition in subsection 27A(1) provides that the following will be an ETP:

> *(b) any payment made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund, not being a payment:*
>
> > *(i) that is income of the taxpayer;*
> >
> > *(ii) to which paragraph (d),(da) (e) or (ga) applies; or*
> >
> > *(iii) that is a benefit to which subsection 26AF(2), 26AFA(3) or 26AFB(2) or (3) applies,*
>
> *reduced by any amount that has been or will be included in the assessable income of the taxpayer under subsection 26AF(2), 26AFA(3) or 26AFB(5) in respect of the transfer by the taxpayer of a right to receive the payment or any part of the payment.*

44. In order that the transfer of the pensions be treated as falling within paragraph (b) of the definition of an ETP in subsection 27A(1), there must be a payment made from a superannuation fund in respect of the taxpayer.

45. To be an ETP, it must be 'paid' in the circumstances set out in subsection 27A(3) (above) either in money or as a transfer of property (subsection 27A(8) and (8A)).

46. In relation to the QIRF pension members to be transferred to QSuper, the trustees will transfer the assets relating to the current pension liabilities of the QIRF to QSuper. The transfer is to bring into effect the decision of the trustees to close the QIRF to members and transfer to the trustees of QSuper the obligation to continue the pensions of the former QIRF members. The transfer of the assets in an undissected form does not crystallise a lump sum benefit for each transferred pension member. It is considered that in these circumstances, notwithstanding that the assets will be leaving the control of the Trustee of the QIRF, no payment is being made in respect of each transferred member as set out in subsection 27A(3).

47. From the members' perspective, the allocated pension will continue to be paid with no material change to the pension entitlements. At the time that the obligation to provide the pension is

transferred to the trustees of QSuper, the member has no entitlement to any benefit other than a continuation of the pension.

48. Accordingly, it is considered that there is no 'payment' from the superannuation fund under paragraph (b) of the definition of an ETP. Since there is no 'payment' at the time of the transfer, it cannot be said that there is a payment to or for the benefit of the taxpayer (that is, the pension member) or a dependant of the taxpayer, nor is it a payment made to another person at the direction or request of the member under subsection 27A(3).

49. The situation in this case is to be contrasted with a situation where an individual member chooses to transfer from one pension provider to another. In such a case, the decision to transfer rests with the member, not the trustee and there will be an identifiable entitlement on transfer between from one fund to another, which will be considered to be a payment made in respect of a member, or more correctly, a payment of a commutation or residual capital value amount. That amount will then be rolled-over to the new fund and thus dealt with at the direction or request of that member.

50. The transfer of members' benefits between funds in this case resulting in an equivalent benefit cannot be considered to be an ETP. No payment has been made to or in respect of the taxpayer, or as otherwise set out in subsection 27A(3). It is considered that there is no ETP made to or for the benefit of the taxpayer, nor will there be any payment to or for the benefit of a dependant of a member (taxpayer) or to another person at the direction or request of the member.

Members who do not agree to move benefits from QIRF to QSuper under the arrangement

51. Whilst the Trustee of the QIRF expects that the majority of members will transfer from the QIRF to QSuper, not all members' benefits will be transferred to QSuper. It is possible that some pension members may choose to move their pension benefits to another superannuation fund. In addition, those members who fail to elect to move to any superannuation fund will have their benefits transferred to an Eligible Roll-over Fund (ERF). Transfer to an ERF may be done without the consent of members.

52. It is important to note that those members of the QIRF who choose to move their benefits to a fund other than QSuper or who are transferred to an ERF are not a part of the class of persons to whom this Ruling applies.

53. However, it is necessary to consider whether the move of these other members' benefits affects the nature of the transfers from the QIRF to QSuper. The transfer of members' benefits under the

arrangement to which this Ruling applies is as a result of a restructure of the two funds pursuant to an arm's length decision of the trustees over which the members had no control. All members must transfer out of the QIRF by a stipulated date. It would be very difficult to insist that all members move to QSuper. Accordingly, it is considered that the fact that some members do not transfer to QSuper does not materially affect the nature of the transaction in respect of the other members.

Other relevant information

54. As the move of members' benefits is not treated as an ETP or roll-over, Q Invest Limited is not required to make any Reasonable Benefit Limits (RBL) reports on transfer in respect of the class of persons to whom this Ruling applies. However, it is to be noted that if the pension is subsequently commuted or a residual capital value paid then the RBL report at that time should, for administrative matching purposes, reflect the details of the original pension. In addition, no roll-over elections are required to be made by the pension members as a result of the transfer.

Detailed contents list

55. Below is a detailed contents list for this Class Ruling:

Commissioner of Taxation
19 September 2001

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 92/20
TR 97/16

Subject references
- ETP roll-over
- superannuation pension income
- annuities and superannuation pension
- undeducted purchase price
- superannuation pensions
- commutation
- deductible amount

Legislative references:
- ITAA 1936 26AF(2)
- ITAA 1936 26AFA(3)
- ITAA 1936 26AFB(2)
- ITAA 1936 26AFB(3)
- ITAA 1936 27A(1)
- ITAA 1936 27A(1)(b)
- ITAA 1936 27A(1)(d)
- ITAA 1936 27A(1)(e)
- ITAA 1936 27A(3)
- ITAA 1936 27A(8)
- ITAA 1936 27A(8A)
- ITAA 1936 27H
- TAA 1953 Part IVAAA

ATO References
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