LCG 2016/8A1- Addendum - Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds

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Addendum

Law Companion Guideline

Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds

This Addendum amends Law Companion Guideline LCG 2016/D8 to finalise the ruling following the enactment of the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016*.

LCG 2016/D8 is amended as follows:

1. Page status (all pages)

At the top of all pages, omit

Page status: **draft only – for comment**

Insert:

Page status: **legally binding**

2. First page header and all footers

Omit 'Draft Law Companion Guideline LCG 2016/D8'; substitute 'Law Companion Guideline LCG 2016/8'.

3. Preamble

Omit the preamble; substitute:

Relying on this Guideline

This Guideline is a public ruling for the purposes of the *Taxation Administration Act 1953*.

This Guideline describes how the Commissioner will apply the CGT relief reforms in Schedule 1, Part 3 of the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (the Act) to entities that rely on it in good faith.

If you rely on this Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Guideline if it does not correctly state how a relevant provision applies to you.

4. Table of contents

Omit the table; substitute:

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5. Paragraphs 1, 27, 36, 51, 69 and 81

Omit all occurrences of the word 'draft Guideline'; substitute 'Guideline'.

6. Paragraph 1

Omit the paragraph; substitute:

> 1. This Guideline provides guidance on the transitional CGT relief[A1] available for superannuation funds because of the transfer balance cap and transition-to-retirement reforms commencing on 1 July 2017 (the **CGT relief provisions**).

7. Paragraph 2

Omit the paragraph.

8. Paragraph 3

Omit the paragraph; substitute:

> 3. To prepare for the transfer balance cap reforms commencing on 1 July 2017, individuals may need to reduce amounts currently supporting superannuation income streams to comply with the new requirements. They might do this by withdrawing amounts from the superannuation environment, or by transferring value from the retirement phase to the accumulation phase.[1]
>
> 3A. The treatment of a transition-to-retirement income stream (**TRIS**), and similar superannuation income streams, has also been reformed. From 1 July 2017, these superannuation income streams will not be in the retirement phase.[2] Hence, a fund will lose the income tax exemption for assets supporting TRISs and similar superannuation income streams from this time.

[A1] Sections 294-100 to 294-120 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

[1] The Commissioner's view is that a member (or a dependant beneficiary) 'commutes' a superannuation income stream if they consciously and validly exercise their right to exchange some or all of their entitlement to receive future superannuation income stream benefits for an entitlement to be paid a lump sum (Taxation Ruling TR 2013/5 *Income tax: when a superannuation income stream commences and ceases*, at paragraph 110). The lump sum can be retained in the superannuation system as an accumulation interest, or paid out of the superannuation system.

[2] Section 307-75 and subsection 307-80(3) of the *Income Tax Assessment Act 1997* (ITAA 1997).The exclusion for TRISs is in paragraph 307-80(3)(a) of the ITAA 1997. Other relevant superannuation income streams that are excluded from being in the retirement phase include certain: non-commutable allocated annuities, non-commutable allocated pensions, and transition-to-retirement income pensions. In this Guideline, a reference to a TRIS covers all of these superannuation income streams (under subsection 307-80(3) of the ITAA 1997).

9. Paragraph 4

Omit the third sentence; substitute 'Alternatively, the values used to calculate the proportion of exempt income a fund has, using the proportionate method,[3A] may be adjusted.'.

10. Paragraph 5

(a) Omit from the first sentence '(see below). Relief'; substitute '(see paragraph 7 of this Guideline).'.

(b) Omit the second sentence' substitute 'CGT relief is provided because a member reduces the value of their superannuation income stream before 1 July 2017 to comply with the start of the transfer balance cap reforms. CGT relief is also provided because of the changed treatment of TRISs from 1 July 2017.'.

(c) Insert:

> 5A. The effect of the exempt current pension income provisions is preserved for the entire value of superannuation income stream interests until:
>
> (i) immediately before the time an asset ceased being a segregated current pension asset during the pre-commencement period, or
>
> (ii) 30 June 2017, where the proportionate method is used.

11. Paragraph 6

Omit the paragraph; substitute:

> 6. The relevant law is contained in sections 294-100 to 294-120 of the IT(TP)A 1997. CGT relief is not available for a life insurance company because comparable relief is already available under Division 320 of the ITAA 1997.

12. Paragraph 7

(a) Omit the word 'The' from the start of the first sentence; substitute 'CGT'.

(b) In the second sentence after the words 'start of'; insert '9 November 2016 ('.

(c) After the words 'House of Representatives[4]'; insert ')'.

13. Paragraph 8

Omit the paragraph; substitute:

> 8. The CGT relief provisions do not need to apply in situations where there is an actual disposal during the pre-commencement period of CGT assets used to support superannuation income streams.[5] For example, such assets might be realised to support a partial commutation of a superannuation income stream from

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[3A] Section 295-390 of the ITAA 1997.

[5] This is the effect of paragraphs 294-110(1)(c) and 294-115(1)(c) of the IT(TP)A 1997, which require an asset to have been held throughout the pre-commencement period for the CGT relief provisions to apply.

the superannuation environment. CGT relief is not required in this case because gains on such assets would already be exempt to the extent that current exemption rules apply.[6] Whether or not the disposal was action taken in response to the reforms commencing does not affect the application of the current pension income exemption rules.

14. Paragraph 9

Omit the paragraph; substitute:

9. The object of the CGT relief provisions is to provide temporary relief from certain capital gains that might arise as a result of individuals complying with the transfer balance cap, or TRIS reforms, commencing.[7] In respect of the transfer balance cap amendments, the use of the term 'as a result of' in the object clause indicates that CGT relief is connected with actions an individual takes so as to comply with the reforms starting. In the case of the TRIS reforms, the CGT relief provisions seek to preserve the exemption for unrealised gains that accrued during the period when, if the relevant assets had been disposed of, the gains would have been exempt in the fund.

15. Paragraph 10

(a) Omit from the second point ', and'; substitute '.'.

(b) Omit the third point.

16. Footnote 12

Omit the footnote; substitute:

[12] That is, a current-year capital loss is recognised at Step 1 of the method statement in section 102-5 of the ITAA 1997. If there is a net capital gain remaining at Step 5, that amount is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the income year, to determine the assessable amount. Any net capital loss at Step 5 is not proportioned before it is carried forward.

17. Paragraph 12

(a) In the first sentence after the word 'maximise'; insert 'CGT'.

(b) In the second sentence after the word 'commencing' omit the ','.

(c) In the first sentence after the word 'provided'; insert ', where relevant, that any'.

(d) In the second sentence omit the word 'consistent'; substitute: 'consistently'.

18. Paragraph 13

(a) In the second sentence after the words 'choose for' omit the word 'the'; substitute 'CGT'.

(b) Omit footnote 14.

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[6] The exemption rules are in Subdivision 295-F of the ITAA 1997, as it applied before 1 July 2017.
[7] Section 294-100 of the IT(TP)A 1997.

19. Paragraph 14

Omit the paragraph; substitute:

> 14. The choice is irrevocable, and must be made on or before the day a trustee is 'required to lodge' their fund's 2016-17 income tax return.[15]
>
> 14A. The trustee of a complying superannuation fund is 'required to lodge' their fund's 2016-17 income tax return on or before the date specified in the relevant notice published annually by the Commissioner (expected to be 31 October 2017).[15A] However, the Commissioner may exercise his discretionary power to defer a fund's lodgment day (for example, under the Tax Agent Lodgment Program, or because of exceptional and unforeseen circumstances).[15B] In this case, the fund's trustee would be required to make a choice to apply CGT relief on or before the deferred lodgement date.

20. Paragraph 18

(a) Insert the word 'CGT' in the first sentence after the words 'eligible for'.

(b) Delete the ':' after the word 'period'.

21. Paragraph 19 (heading)

Insert at the end of the heading ***'throughout the pre-commencement period'***.

22. Paragraph 19A

Insert paragraph:

> 19A. Sometimes, all of a fund's assets are held 'solely' to meet liabilities it has to pay, for example, superannuation income stream benefits (including TRISs for the 2016-17 income year). That is, 100% of the fund's assets are used to support pension liabilities, and all of its assets are classified as segregated current pension assets.[20A] In this case, CGT relief may be available under the segregated method if the conditions in paragraph 21 of this Guideline are satisfied.

23. Paragraph 20

(a) Omit the words 'a segregated'; substitute 'the'.

(b) Omit the word 'regarding'; substitute: 'in relation to'.

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[15] Subsections 294-110(2), 294-115(2) and 294-120(2) of the IT(TP)A 1997.

[15A] The relevant notice is usually made by way of legislative instrument under section 161 and related provisions of the *Income Tax Assessment Act 1936* (ITAA 1936). Incidentally, registration of the legislative instrument satisfies the Gazettal requirement in section 161 (section 56 of the *Legislation Act 2003*). At the time this LCG was published, the relevant legislative instrument for the 2016-17 income year had not yet been registered.

[15B] The Commissioner may defer lodgement times under section 388-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). Refer to Law Administration Practice Statement PS LA 2011/15 *Lodgment obligations, due dates and deferrals*, for further guidance.

[20A] Subsections 295-385(3) and 295-385(4) of the ITAA 1997.

24. Paragraph 21

Omit the paragraph; substitute:

21. CGT relief is available for such an asset provided:[22]

- the CGT asset was a segregated current pension asset at the start of the pre-commencement period, but stopped being such an asset at a time (the '**cessation time**') during that period
- the fund held the asset throughout the pre-commencement period (disregarding the deemed sale and repurchase of the asset by the fund because CGT relief applies)
- the fund is a complying superannuation fund from the start of the pre-commencement period to the time the asset stopped being a segregated current pension asset, and
- the trustee chooses for CGT relief to apply to the asset (in the manner discussed in paragraphs 13 to 16 of this Guideline).

21A Examples of circumstances in which an asset may cease being a segregated current pension asset during the pre-commencement period include where:

- a member transfers value back to the accumulation phase and the fund re-characterises an asset in that period as a segregated non-current asset to support the value transfer
- an individual discontinues their TRIS and transfers some or all of its value back to the accumulation phase during the pre-commencement period (an asset supporting that value transfer would cease being a segregated current pension asset), or
- a fund starts using the proportionate method during the pre-commencement period.

25. Paragraph 22

Omit the paragraph; substitute:

22. If the conditions described in paragraph 21 of this Guideline are satisfied, a fund using the segregated method may choose CGT relief for a CGT asset that supports value transferred by a member to the accumulation phase because of the transfer balance cap commencing. CGT relief may also be chosen for CGT assets that support TRISs during the pre-commencement period where those conditions are satisfied.

22A. In relation to TRISs, the transitional arrangements are intended to provide CGT relief by enabling complying superannuation funds to reset the cost base of assets to their market value where those assets are re-allocated or re-apportioned from the current pension phase to the accumulation phase in order to comply with the new law. It should be noted that members of funds using the segregated method may receive TRISs during the 2016-17 income year that continue past 1

[22] Sections 294-110(1) and 294-110(2) of the IT(TP)A 1997.

July 2017 and the TRISs will not be in the retirement phase from that date. That is, the value of the interest supporting the TRIS will not necessarily be transferred to the accumulation phase before 1 July 2017. The Explanatory Memorandum states that the CGT relief is intended to apply to this situation and the Government is currently considering legislative options to clarify this.

26. Paragraph 23

Omit the first sentence; substitute 'Sometimes, a member of a fund using the segregated method may need to transfer value back to the accumulation phase that is greater than the expected excess in their transfer balance account on 1 July 2017.'.

27. Paragraph 24

Omit the paragraph; substitute:

24. In other words, for a fund using the segregated method to access CGT relief, it is not a condition that total member transfers made in anticipation of the transfer balance cap start date are equal in value to the expected excess in a member's transfer balance account on 1 July 2017.[23A] The law also does not require the total deemed capital gains calculated under the CGT relief provisions to equal the sum of the expected excesses in all members' transfer balance accounts on 1 July 2017. Examples 1 and 2 illustrate these points.

Example 1: CGT relief and the segregated method – retirement-phase interest aligned to the $1.6m cap

24A. *Tina and Adam are members of their SMSF which has a corporate trustee. The SMSF is a complying superannuation fund that uses the segregated method for the 2016-17 income year.*

24B. *Tina receives a superannuation income stream from the fund. The value of the superannuation interest supporting her income stream is $2.5m. Her income stream is supported by the following segregated current pension assets:*

	Cost base	***Market value at the cessation time***
Asset A	*$100,000*	*$900,000*
Asset B	*$300,000*	*$400,000*
Asset C	*$200,000*	*$400,000*
Asset D	*$50,000*	*$500,000*
Asset E	*$280,000*	*$300,000*

24C. *The trustee holds all of these assets throughout the pre-commencement period.*

[23A] Note, however, the potential relevance of the general anti-avoidance rule (paragraph 42 of this Guideline and following) for arrangements entered into with a purpose of obtaining tax benefits.

24D. *Adam has an accumulation interest in the fund valued at $1m. His interest is supported by a segregated non-current asset (F) with a market value of $1m and cost base of $500,000.*

24E. *On 1 June 2017, Tina transfers $900,000 in value to the accumulation phase to reduce the value of her retirement phase interest, due to the impending commencement of the transfer balance cap reform.*

24F. *Assuming the fund remains segregated, the fund's trustee may give effect to the transfer by reclassifying the following assets as segregated non-current assets:*

(i) asset A only

(ii) assets B and D, or

(iii) assets C and D.

24G. *For the 2016-17 income year, the trustee may choose to apply the CGT relief for segregated current pension assets to any of the assets in one of these three scenarios. There is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline). Note, the fund could not use the segregated method for the 2017-18 income year because Tina's total superannuation balance exceeds $1.6m on 30 June 2017 (refer to paragraphs 25 to 27 of this Guideline).*

Example 2: CGT relief and the segregated method – retirement-phase interest reduced to less than the $1.6m cap

24H. *Assume the facts in Example 1, except that Tina transfers $1.3m in value on 1 June 2017 from the retirement phase back to the accumulation phase. This will reduce the value of her retirement-phase interest to $1.2m (that is, $2.5m - $1.3m).*

24I. *Assuming the fund remains segregated, the trustee may give effect to the transfer by reclassifying the following assets as segregated non-current assets:*

(i) assets A and B

(ii) assets A and C, or

(iii) *assets B, C and D.*

24J. *For the 2016-17 income year, the trustee may choose to apply the CGT relief for segregated current pension assets to any of the assets in one of these three scenarios. There is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline). The fund could not use the segregated method for the 2017-18 income year because Tina's total superannuation balance exceeds $1.6m on 30 June 2017 (refer to paragraphs 25 to 27 of this Guideline).*

28. Paragraph 25

Omit the heading and paragraph; substitute:

'Certain SMSFs and small-APRA funds may not be segregated from the 2017-18 income year'

25. A complying superannuation fund is excluded from using the segregated method from the 2017-18 income year if, for an income year:[24]

- the fund is either an SMSF, or a regulated superannuation fund that has fewer than 5 members (small-APRA funds), at any time during the year
- at any time during the year, there is at least one superannuation interest in the fund that is in the retirement phase
- all of the following apply:
  - a person has a 'total superannuation balance' exceeding $1.6m just before the start of the year
  - the same person is the retirement phase recipient of a superannuation income stream just before the start of the year (whether from the fund or another provider)
  - the same person has a superannuation interest in the fund at any time during the year.

29. Paragraph 26

Omit the paragraph; substitute:

26. Broadly, a member's 'total superannuation balance' includes the sum of their accumulation and retirement-phase interests, and certain rollovers, in all of their funds.[25]

30. Paragraph 27

Omit the paragraph; substitute:

27. This means that, from 1 July 2017, an SMSF or small-APRA fund could have a member with a transfer balance under the $1.6m transfer balance cap, but who also has a total superannuation balance exceeding $1.6m. If so, the fund could not use the segregated method to calculate the amount of its exempt income from the 2017-18 income year onwards while this situation continued. However, for the 2016-17 income year, such funds can still choose CGT relief using the segregated method, provided the eligibility requirements in paragraph 21 of this Guideline are satisfied.

Fund starts using the proportionate method in the pre-commencement period

27A. Under the proportionate method, the earnings tax exemption is determined by dividing the average value of a fund's current pension liabilities for a year by the average value of its superannuation liabilities for the year. That proportion is then applied to the fund's assessable income for the year (subject to some exclusions) to determine the exempt amount.

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[24] The fund's assets will be treated as 'disregarded small fund assets', which are deemed not to be segregated current pension assets. Refer to subsection 295-385(7) and section 295-387 of the ITAA 1997.
[25] Section 307-230 of the ITAA 1997.

31. Paragraph 28

Insert after the words 'accumulation phase' insert 'during the pre-commencement period'.

32. Paragraph 29

Omit the sentence; substitute:

> 29. This could arise, for example, where a fund has a single asset supporting retirement-phase liabilities that must, because of a transfer made to reduce a member's expected excess transfer balance on 1 July 2017, also support an accumulation phase interest.[26] It could also arise if a member of a fund with segregated assets transferred value to the accumulation phase which was less than the market value of the asset required to support the transfer.

33. Paragraph 29A

Insert the paragraph:

> 29A. A further example is where a fund is paying a superannuation income stream to one member and a TRIS to another, and all of the fund's assets are used to support those superannuation income stream benefits. If the member in receipt of the TRIS decides to cease receiving the TRIS during the pre-commencement period but maintains the remaining value in an accumulation interest in the fund, the fund may need to start using the proportionate method to calculate the income tax exemption.
>
> 29B. The CGT relief that is potentially available for funds that start using the proportionate method in the pre-commencement period is under section 294-110 of the IT(TP)A 1997. That is, the trustee can choose to apply CGT relief to any, or all, of the fund's CGT assets that meet the conditions in paragraph 21 of this Guideline.
>
> 29C. CGT relief is unavailable under section 294-115 of the IT(TP)A 1997 (refer to paragraph 38 of this Guideline) because the fund's CGT assets would have been segregated assets until the time during the pre-commencement period when the proportionate method started being used. Hence, the condition that a CGT asset must have been neither a segregated current pension asset, nor a segregated non-current asset, throughout the pre-commencement period will not be met.[27]

34. Paragraph 30

Omit the paragraph; substitute:

> 30. Assets will cease being segregated current pension assets in the pre-commencement period when the fund gives effect to value transferred by a member during that period which results in the fund starting to have assets that support both accumulation and retirement-phase interests. This will be the cessation time.[28] Choosing CGT relief under section 294-110 of the IT(TP)A 1997

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[26] As the asset is not being dealt with for the sole purpose of enabling the fund to discharge all or part of its liabilities in respect of superannuation income stream benefits, it cannot be a segregated current pension asset under subsections 295-385(3) or 295-385(4) of the ITAA 1997.

[27] Subsection 294-115(1)(d) of the IT(TP)A 1997.

[28] Section 294-100 of the IT(TP)A 1997.

enables the fund to preserve the income tax exemption on capital gains accrued until that cessation time.

35. Paragraph 31

Omit the paragraph; substitute:

31. A fund might require an actuary's certificate to support its use of the proportionate method[29], which would be a new compliance obligation for funds that previously only had segregated current pension assets under subsection 295-385(4) of the ITAA 1997.[30]

36. Paragraph 32

(a) Insert the title '***Example 3: Choosing CGT relief when a fund starts using the proportionate method in the pre-commencement period***'.

(b) After the first sentence insert '*The SMSF is a complying superannuation fund with a corporate trustee.'.*

37. Paragraph 33

Omit the paragraph; substitute:

33. *On 1 July 2017, Ben expects to have a transfer balance of $1.8m and Sue a transfer balance of $600,000. The SMSF has three assets supporting Sue and Ben's pensions, each with a market value of $800,000 that are owned by the SMSF throughout the pre-commencement period.*

38. Paragraph 35

Omit the paragraph; substitute:

35. *In this example, the SMSF starts using the proportionate method for the 2016–17 year as a result of Ben complying with the start of the transfer balance cap reforms. CGT relief is potentially available under section 294-110 (and not section 294-115) of the IT(TP)A 1997 (refer to paragraphs 29B and 29C of this Guideline). The trustee may choose CGT relief for any, or all, of its CGT assets because they all stopped being segregated current pension assets on 30 June 2017.[30A] There is no evidence that circumstances have been contrived to enable the trustee to choose CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline).*

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[29] Subsections 295-385(3) and 295-390(4) of the ITAA 1997.

[30] Proposed regulation 295-390.01 of the *Income Tax Assessment Regulations 1997* prescribes certain superannuation income stream benefits for the purposes of subsection 295-390(7) of the ITAA 1997. If a fund only pays these kinds of income stream benefits at all times during the year, an actuary's certificate is not required. This regulation is proposed to apply for the 2017-18 income year and later income years. It had only been issued in draft form at the time this LCG was published.

[30A] The conditions in paragraph 24 are satisfied.

39. Paragraph 36

Omit the paragraph; substitute:

> 36. *CGT relief is still available even though the fund will, nonetheless, have to use the proportionate method from the 2017-18 year. This is because Ben has a total superannuation balance exceeding $1.6m on 30 June 2017, and the other conditions referred to in paragraph 25 of this Guideline are satisfied.*

40. Paragraph 37

(a) Insert the title '***Fund continues using the proportionate method in the pre-commencement period***'.

(b) Omit paragraph 37.

41. Paragraph 38

Omit the paragraph; substitute:

> 38. If a fund is using, and continues to use, the proportionate method throughout the pre-commencement period, it may choose CGT relief for a CGT asset provided:[32]
>
> - the fund is a complying superannuation fund throughout the pre-commencement period, and held the asset throughout that period
> - for the 2016-17 income year, the average value of the fund's current pension liabilities divided by the average value of its superannuation liabilities exceeds zero (that is, the proportion in subsection 295-390(3) of the ITAA 1997 exceeds zero)
> - throughout the pre-commencement period, the asset was not a segregated current pension asset or a segregated non-current asset, and
> - the trustee chooses for CGT relief to apply to the asset (in the manner discussed in paragraphs 13 to 16 of this Guideline).

42. Paragraph 39

Omit the paragraph; substitute:

> 39 A trustee may choose to apply CGT relief to any, or all, of their fund's CGT assets that meet the conditions in paragraph 38 of this Guideline.

43. Paragraph 40

Omit the last sentence; substitute 'Nor is CGT relief restricted to the total amounts members transferred back to the accumulation phase in anticipation of the transfer balance cap reforms commencing.[33A]'.

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[32] Subsections 294-115(1) and 294-115(2) of the IT(TP)A 1997.

44. Paragraph 41

Omit the paragraph; substitute:

41. The value of an interest supporting a TRIS does not need to be transferred to the accumulation phase for a fund to qualify for CGT relief where the fund continues to use the proportionate method in the pre-commencement period (and the conditions in paragraph 38 of this Guideline are met). Example 4 illustrates this point.

Example 4: Continuing TRISs and CGT relief under the proportionate method

41A. *Joe and Lin both turned 63 during the 2016-17 income year. They are the only members of their SMSF, which is a complying superannuation fund with a corporate trustee. The SMSF continues using the proportionate method for the 2016-17 income year.*

41B. *Joe has been receiving a TRIS from the SMSF since he turned 60. He does not transfer the value of the interest supporting his TRIS to the accumulation phase before 1 July 2017.*

41C. *Joe still works, and also makes contributions to an accumulation interest he has in the SMSF.*

41D. *Lin retired when she turned 61, and has been receiving an account-based pension from the SMSF since this time.*

41E. *The CGT assets supporting Joe and Lin's interests in the SMSF have been held by the trustee throughout the pre-commencement period.*

41F. *The trustee may choose to apply CGT relief to any, or all, of the SMSF's CGT assets for the 2016-17 year (under section 294-115 of the IT(TP)A 1997), as the conditions in paragraph 38 of this Guideline are satisfied. In addition, the trustee could choose to defer a portion of the deemed capital gain on the chosen assets (refer to paragraphs 87 to 103 of this Guideline). In this case, there is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply to any of the SMSF's assets.*

45. Paragraph 42

Omit the paragraph; substitute:

42. As already noted, the object of the CGT relief provisions is to provide transitional relief from certain capital gains arising in complying superannuation funds because members need to comply with the transfer balance cap or TRIS reforms commencing.

46. Paragraph 43

Omit the word 'CGT' from the second sentence.

[33A] Note, however, the potential relevance of the general anti-avoidance rule (paragraph 66 and following) for arrangements entered into with a purpose of obtaining tax benefits.

47. Paragraph 45

(a) In the first sentence omit the words 'is "attributable to" the'; substitute 'is 'attributable to' the'.

(b) Omit footnote 35.

48. Paragraph 46

Omit the word 'ITTPA'; substitute 'IT(TP)A'.

49. Paragraph 47

Insert the word 'commencing' in the second point after the word 'reforms'.

50. Paragraph 48

Omit the first sentence; substitute 'In relation to funds using the segregated method, two of the main requirements for making the choice are to have an existing segregated current pension asset pool, and to cause an existing segregated current pension asset to cease being one in the pre-commencement period.'.

51. Paragraph 50

Omit the paragraph; substitute:

> 50. Another example of an arrangement giving rise to Part IVA considerations involves accessing the CGT relief provisions to facilitate the swapping of assets between the segregated current pension asset and segregated non-current asset classes. Paragraphs 23 and 24 of this Guideline, and Examples 1 and 2, indicate that a fund is free to choose which assets are to be removed from the segregated current pension asset pool for CGT relief purposes in order to comply with the new rules. Those paragraphs also indicate that there may be circumstances where the value of assets removed could be greater than the amount by which the expected pension value exceeds the cap. Of itself, this is not likely to give rise to Part IVA considerations.
>
> 50A. However, the ATO would have concerns if a fund using the segregated method were to:
>
> (i) transfer assets out of the segregated current pension class in excess of what is necessary to comply with the new transfer balance cap, and
>
> (ii) as part of that arrangement, also transfer other fund assets into the segregated current pension asset class to maintain the pension at or near the level of the $1.6 million cap.
>
> 50B. An arrangement of this nature would raise questions about whether the steps beyond those necessary to comply with the new transfer balance cap rules were for the purpose of obtaining tax benefits. It could be expected that the ATO

would scrutinise such arrangements closely and seek explanations for any actions that involve the exchange of assets between classes.[37A]

50C. There may be other ways in which the CGT relief provided by these changes could be abused. Where arrangements of this nature come to the Commissioner's attention, further guidance may be issued. A particular question raised during consultation on the CGT relief provisions concerned the relevance of commencing a pension (including a TRIS) after 9 November 2016 to the availability of CGT relief under the proportionate method. Generally speaking, merely starting a pension during the pre-commencement period would not be of concern to the ATO from a Part IVA perspective. However, a commutation of the pension shortly after its commencement might be scrutinised more closely if the purpose of such action appeared consistent with obtaining a tax benefit.

52. Paragraph 51

Omit point '(ii)'; substitute:

(ii) 'immediately before' 1 July 2017 (the **deemed sale time**), if the fund uses the proportionate method.[38]

53. Paragraph 52

Omit the paragraph and footnote 39.

54. Paragraph 54A

Insert:

54A. In calculating the deemed capital gain or loss, all amounts included in the CGT asset's cost base (or reduced cost base) before the repurchase time are taken into account. This includes, for example, the incidental costs incurred by the fund to originally acquire the asset.

55. Paragraph 55

Omit both points (i) and (ii)'; substitute:

(i) at the cessation time, for an asset that ceased being a segregated current pension asset in the pre-commencement period[40A], or

(ii) 'just after' the deemed sale time, where the fund uses the proportionate method.[41]

[37A] From 1 July 2017, the potential for asset washing practices may be curtailed for some SMSFs and small APRA-funds that will not be able to use the segregated method from that time (refer to paragraphs 25 to 27 of this Guideline).

[38] Paragraph 294-115(3)(b) of the IT(TP)A 1997. For funds using the proportionate method, the deemed sale happens 'just before' 1 July 2017. This is on 30 June 2017. The repurchase occurs 'just after' that time, which is still on 30 June 2017 (and not on 1 July 2017). Refer to the EM to the Bill, at paragraphs 3.344 and 3.345.

[40A] Paragraph 294-110(3(b) of the IT(TP)A 1997.

[41] Paragraphs 294-110(3)(b) and 294-115(3)(b) of the IT(TP)A 1997.

56. Paragraph 56

Omit the words 'purchase to support the reacquisition'; substitute 'repurchase'.

57. Paragraph 57

Omit the paragraph; substitute:

> 57. For the purposes of the CGT regime, the repurchase of the asset is taken to have been at market value.[41A] Any other costs that are incurred subsequently which go to the other elements of the cost base or reduced cost base for that asset are taken into account at the time of a subsequent CGT event.

58. Paragraph 59

Omit the words 'intentional, but' from the second sentence.

59. Paragraph 60

Insert the word 'CGT' before all occurrences of 'relief'.

60. Paragraph 61

Omit the paragraph and footnote 45; substitute:

> 61. Although CGT relief applies to certain CGT assets held by a fund throughout the pre-commencement period, if chosen, CGT relief results in a permanent modification to an asset's cost base/reduced cost base.

61. Paragraph 62

(a) Omit the words 'Choosing the'; insert 'Choosing to apply CGT' in the first sentence.

(b) In the second sentence after the word 'choose'; insert 'CGT'.

62. Paragraph 63

Insert 'CGT' before the word 'relief' in the first sentence.

63. Paragraph 64

Omit the word 'reacquisition'; substitute 'repurchase'.

64. Paragraph 66

Omit the paragraph; substitute:

> 66. Likewise, the deemed sale and repurchase for CGT purposes does not:

[41A] Paragraphs 294-110(3)(b) and 294-115(3)(b) of the IT(TP)A 1997.

- affect a fund's capital allowance or capital works deductions, or the cost of its assets for such purposes, or
- break the continuity of the 45-day or 90-day holding periods (as applicable) that a fund might need to satisfy to claim imputation benefits, if CGT relief is chosen for a share or an interest in a share.[50A]

65. Paragraph 67

Omit the paragraph; substitute:

> 67. The effect that choosing CGT relief has for a fund depends on whether a CGT asset stops being a segregated current pension asset during the pre-commencement period, and whether the fund continues using the proportionate method in the pre-commencement period.

66. Paragraph 68

Omit the second sentence; substitute 'In this situation, the fund may choose the CGT relief that applies for assets that stop being segregated current pension assets.'.

67. Paragraph 69

Omit the Heading and paragraph; substitute:

> ***Asset stops being a segregated current pension asset in the pre-commencement period***
>
> 69. If the conditions in paragraph 21 of this Guideline are satisfied, a fund has two options available for a CGT asset that stops being a segregated current pension asset in the pre-commencement period.

68. Paragraph 71

Insert the word 'CGT' in the first sentence after the words 'sale of the'.

69. Paragraph 73

Omit the words '11.45am Australian Eastern Standard Time on'; substitute '11.45am Australian Eastern Standard Time on'.

70. Paragraphs 74, 75 and 76

Omit the paragraphs, substitute:

> 74. The CGT asset's cost base/reduced cost base is reset to the asset's market value at the deemed repurchase time.

[50A] Subparagraphs 207-145(1)(a) and 207-150(1)(a) of the ITAA 1997, and Division 1A of former Part IIIAA of the ITAA 1936.

75. CGT relief may have been chosen because the CGT asset was allocated to the fund's segregated non-current asset pool during the pre-commencement period. When a CGT event subsequently happens to such an asset, only the capital gain or loss accrued on the asset from the cessation time to the event time is recognised at Step 1 of the method statement in section 102-5 of the ITAA 1997 (method statement) (assuming the asset is also a segregated non-current asset at the event time). Any net capital gain remaining at Step 5 will be assessable income for the CGT event year, and a net capital loss is carried forward.

76. Alternatively, CGT relief may have been chosen because the fund started having to use the proportionate method in the pre-commencement period. When a CGT event subsequently happens to the asset, the capital gain or loss accrued on the asset from the cessation time to the event time is also recognised at Step 1 of the method statement (assuming the proportionate method is also used for the CGT event year). But, if there is a net capital gain remaining at Step 5, that amount is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997[53] for the CGT event year, to determine the assessable amount for that year. There is no provision in the law for a net capital loss of a fund using the proportionate method at Step 5 to be proportioned before it is carried forward.

71. Paragraph 77

Omit the paragraph, substitute:

77. The fund may choose not to apply the CGT relief provisions when the CGT asset stops being a segregated current pension asset. This option also applies if no valid choice is made for an asset.[53A]

72. Paragraph 78

Omit the words 'reacquisition of the asset'; substitute 'repurchase of the CGT asset'.

73. Paragraphs 80, 81, 82, 83, 84, 85 and 86

Omit the paragraphs; substitute:

80. If the fund starts having to use the proportionate method in the pre-commencement period, the only difference from paragraph 79 of this Guideline is that the Step 5 amount is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the CGT event year, to determine the assessable amount for that year. Any net capital loss is not proportioned at Step 5 before it is carried forward.

Fund continues using the proportionate method in the pre-commencement period

81 A fund that continues using the proportionate method throughout the pre-commencement period has three options available when choosing to apply

[53] The exempt proportion under this provision for an income year is the: average value of a fund's current pension liabilities for the year, divided by the average value of its superannuation liabilities for the year.
[53A] Refer to paragraphs 13 to 16 of this Guideline.

CGT relief. To qualify, the fund must satisfy the conditions in paragraph 38 of this Guideline.

Option one: fund chooses to apply CGT relief, but chooses not to defer any capital gain[54]

82. A fund could choose to apply CGT relief to a CGT asset and to recognise any capital gain or loss in the 2016-17 income year.

83. The asset is deemed to be sold 'immediately before' 1 July 2017 (the deemed sale time) for its market value. This is on 30 June 2017, and CGT event A1 happens at that time. Any capital gain or loss is recognised at Step 1 of the method statement for the 2016-17 income year. If there is a net capital gain remaining at Step 5, that amount is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the 2016-17 income year, to determine the assessable amount. Any net capital loss at Step 5 is not proportioned before it is carried forward.

84. The fund is deemed to have repurchased the CGT asset 'just after' the deemed sale time on 30 June 2017, but still on that day. This means that the acquisition date of the asset, and hence the start of the CGT discount period, is reset to 30 June 2017. Another effect of resetting the acquisition date is that the indexation method is no longer available when calculating capital gains on assets originally acquired before 11.45am Australian Eastern Standard Time on 21 September 1999.

85. The CGT asset's cost base/reduced cost base is reset and is equal to the asset's market value as at 30 June 2017.

86. When a CGT event subsequently happens to the asset, the capital gain or loss accrued on the asset from the repurchase time on 30 June 2017 to the event time is also recognised at Step 1 of the method statement (assuming the proportionate method is also used for the CGT event year). Any net capital gain remaining at Step 5 is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the CGT event year, to determine the assessable amount for that year. Any net capital loss at Step 5 is not proportioned before it is carried forward.

74. Paragraph 87

After the words 'CGT relief' insert 'to a CGT asset'.

75. Paragraph 90

Omit the second sentence; substitute 'The amount that is deferred is discussed in paragraphs 92 to 98 of this Guideline.'.

76. Paragraph 91

Omit the paragraph; substitute:

[54] Refer to Example 3.61 in the EM to the Bill for additional practical guidance.

91. Similar to option one, the fund is deemed to have repurchased the CGT asset 'just after' the deemed sale on 30 June 2017 for its market value. The asset's acquisition date and the CGT discount period are reset to 30 June 2017. The asset's cost base is also reset to its market value on 30 June 2017. The indexation method will no longer be available for assets originally acquired before 11.45am Australian Eastern Standard Time on 21 September 1999.

77. Paragraph 92

Before the word 'asset' in the second sentence' insert 'CGT'.

78. Paragraph 97

Omit the paragraph; substitute:

97. The fund reduces the net capital gain remaining at Step 5 of the method statement, for the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the 2016-17 income year.

79. Paragraphs 101, 102, 103, 104, 105 and 106

Omit the paragraphs; substitute:

101. The capital gain or loss accrued on the asset from the repurchase time on 30 June 2017 until the realisation event time is recognised at Step 1 of the method statement for the realisation year (assuming the proportionate method is also used for that year). This capital gain may be a discount capital gain and reduced at Step 3, provided the asset is realised on or after 30 June 2018 (noting that the asset is deemed to have been repurchased by the fund on 30 June 2017).

102. The fund should add the deferred capital gain on assets from the 2016-17 year at Step 1 for the realisation year, but that amount is not a discount capital gain when applying the method statement for the realisation year.[58]

103. The fund reduces the net capital gain remaining at Step 5 of the method statement, for the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the realisation year. However, the fund cannot reduce the Step 5 net capital gain to the extent that a net capital gain is increased, or is created, because the deferred capital gain was recognised for the year.[59]

Option three: fund chooses not to apply CGT relief[60]

104. A fund using the proportionate method may choose not to apply the CGT relief provisions for a qualifying CGT asset it has held throughout the pre-commencement period. This option also applies if no valid choice is made for an asset.[61]

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[58] Subparagraph 294-120(5)(c) of the IT(TP)A 1997.
[59] Subsection 294-120(6) of the IT(TP)A 1997.
[60] Refer to Example 3.65 in the EM to the Bill for additional practical guidance.
[61] Refer to paragraphs 13 to 16 of this Guideline.

105. In this case, there is no deemed sale and repurchase of the asset. The CGT asset's original cost base and acquisition time are preserved. Any capital gain or capital loss is determined under existing rules when a CGT event subsequently happens to the asset.

106. When the CGT asset is eventually realised, the entire capital gain or capital loss accrued on the asset from when it was originally acquired to the CGT event time is recognised at Step 1 of the method statement for the CGT event year. Any net capital gain remaining at Step 5 will be reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 in the event year to determine the assessable amount for that year. Any net capital loss at Step 5 is not proportioned before it is carried forward.

80. Paragraph 106

After the paragraph; omit:

Commissioner of Taxation
24 November 20116

Substitute:

Commissioner of Taxation
8 March 2017

81. Your comments

Omit the heading and paragraph.

82. References

Omit Legislative references; substitute:

ITAA 1997
ITAA 1936 Part 3-1
ITAA 1997 102-5
ITAA 1997 102-10
ITAA 1997 102-15
ITAA 1997 104-5
ITAA 1997 104-10
ITAA 1997 109-5(1)
ITAA 1997 109-5(2)
ITAA 1997 115-25
ITAA 1997 118-320
ITAA 1936 Part 3-3
ITAA 1997 121-20
ITAA 1997 121-25
ITAA 1997 295-390
ITAA 1997 295-385
ITAA 1997 295-385(3)
ITAA 1997 295-385(4)
ITAA 1997 295-385(6)
ITAA 1997 295-385(7)
ITAA 1997 295-387
ITAA 1997 295-390(3)
ITAA 1997 295-390(4)
ITAA 1997 295-390(7)
ITAA 1997 295-395
ITAA 1997 295-395(2)
ITAA 1997 Div 320
ITAA 1997 307-75
ITAA 1997 307-80(3)(a)
ITAA 1997 960-405
ITAA 1936
ITAA 1936 Part IVA
ITAA 1936 177D
ITAA 1936 177C(1)(a)
ITAA 1936 177C(2)(a)
ITTPA 1997
ITTPA 1997 294-100
ITTPA 1997 294-105
ITTPA 1997 294-110
ITTPA 1997 294-110(1)
ITTPA 1997 294-110(1)(c)

ITTPA 1997 294-110(1)(e)
ITTPA 1997 294-110(2)
ITTPA 1997 294-110(2)(c)
ITTPA 1997 294-110(3)
ITTPA 1997 294-110(3)(a)
ITTPA 1997 294-110(3)(b)
ITTPA 1997 294-115(1)
ITTPA 1997 294-115(1)(c)
ITTPA 1997 294-115(1)(d)
ITTPA 1997 294-115(1)(e)
ITTPA 1997 294-115(2)
ITTPA 1997 294-115(2)(c)
ITTPA 1997 294-115(3)
ITTPA 1997 294-115(3)(a)
ITTPA 1997 294-115(3)(b)
ITTPA 1997 294-120
ITTPA 1997 294-120(1)(c)
ITTPA 1997 294-120(2)
ITTPA 1997 294-120(2)(c)
ITTPA 1997 294-120(4)
ITTPA 1997 294-120(5)
ITTPA 1997 294-120(5)(c)
ITTPA 1997 294-120(6)
ITTPA 1997 294-120(7)
ITTPA 1997 Subdiv 295-F
TAA 1953
TAA 1953 388-50(1)(b)
TAA 1953 388-75
AIA 1901
AIA 1901 15AA
Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016

83. Other references

Insert 'PS LA 2011/15'.

This Addendum applies on and from 8 March 2017.

Commissioner of Taxation
8 March 2017

ATO references
ATOlaw topic: Superannuation ~~ Income tax - individuals (superannuation) ~~ Other

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