


***TD 2006/D4 - Income tax: is a non-member spouse who is under 55 years of age entitled to a rebate under section 159SM or section 159SU of the Income Tax Assessment Act 1936 when a superannuation pension or 'eligible annuity' is split pursuant to an agreement or court order on marriage breakdown on a specified percentage basis?***

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This document has been finalised by [TD 2006/35](#).



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## Draft Taxation Determination

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Income tax: is a non-member spouse who is under 55 years of age entitled to a rebate under section 159SM or section 159SU of the *Income Tax Assessment Act 1936* when a superannuation pension or ‘eligible annuity’ is split pursuant to an agreement or court order on marriage breakdown on a specified percentage basis?

**ⓘ This Ruling provides you with the following level of protection:**

This publication is a draft for industry and professional comment. It represents the Commissioner's preliminary view about the way in which a taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendices) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you under-pay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the under-payment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided we are not prevented from doing so by a time limit imposed by the law.

### Ruling

1. No. A non-member spouse (NMS) who is under 55 years of age is not entitled to the rebate under section 159SM or section 159SU of the *Income Tax Assessment Act 1936* (ITAA 1936).
2. An arrangement to which this Determination applies will have the following features:
  - A superannuation agreement or court order is made on marriage breakdown in accordance with Part VIIIIB of the *Family Law Act 1975*.

# TD 2006/D4

- Pursuant to that superannuation agreement or Court order a superannuation pension or annuity that has commenced to be paid to a 'member spouse' (MS) is to be split on a specified percentage basis in accordance with the *Family Law Act 1975*. Superannuation pension and eligible annuity have the meaning<sup>1</sup> which applies to those terms in section 140M of the ITAA 1936.
- Before the split the MS was entitled to a rebate under section 159SM of the ITAA 1936 if a pension was being paid or section 159SU of the ITAA 1936 if an eligible annuity was being paid.
- The annuity or pension being paid to the member spouse is not a death or disability annuity/pension as defined in section 159SJ of the ITAA 1936.

## Date of effect

3. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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**Commissioner of Taxation**

18 January 2006

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<sup>1</sup> 'Superannuation pension' is defined in section 140C of the ITAA 1936 and 'eligible annuity' is defined in section 90MD of the *Family Law Act 1975*.

## Appendix 1 – Explanation

**①** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Explanation

4. Paragraph 140M(1A)(e) of the ITAA 1936 provides that where a ‘non-member spouse’ (NMS) receives a payment of superannuation pension or annuity income under a payment split, the payer of the pension or annuity is taken to have commenced to pay a superannuation pension or annuity to the NMS for the purposes of the ITAA 1936. Paragraph 140M(1C)(g) of the ITAA 1936 also provides that the payer is taken to have commenced to make payments of another superannuation pension or annuity to the MS.

5. As the NMS receives, for income tax purposes, a pension or annuity that is separate from the pension or annuity paid to the MS, any entitlement to a rebate under section 159SM or section 159SU of the ITAA 1936 is based on the circumstances of the NMS.

6. Section 159SM of the ITAA 1936 provides for a rebate of tax in respect of any rebatable superannuation pension, for an amount that is included in a taxpayer’s assessable income under section 27H of the ITAA 1936. The rebate is calculated using the formula in subsection 159SM(1):

$$\text{Reduced 27H amount} \times \text{Rebatable proportion of pension} \times 15\%$$

7. The ‘reduced 27H amount’ is the ‘rebatable 27H amount’ reduced by the total of the amounts specified in notices under section 159SS of the ITAA 1936 given in relation to payments of the pension during the income year (but not including payments made before the taxpayer’s 55th birthday).

8. Section 159SU of the ITAA 1936 provides for a rebate of tax in respect of a ‘rebatable ETP annuity’ for an amount include in assessable income under section 27H of the ITAA 1936. A ‘rebatable ETP annuity’ is defined in subsection 159SJ(1) of the ITAA 1936. As an eligible annuity has a purchase price that consists wholly of a rolled-over amount or rolled-over amounts it is considered a ‘rebatable ETP annuity’.

9. The rebate for a ‘rebatable ETP annuity’ is calculated using the formula in subsection 159SU(1) of the ITAA 1936:

$$\text{Rebatable 27H amount} \times \text{Rebatable proportion of annuity} \times 15\%$$

10. Therefore to be eligible for a rebate under either section 159SM or section 159SU of the ITAA 1936 there must be a ‘rebatable 27H amount’.

11. ‘Rebatable 27H amount’ is defined in subsection 159SJ(1) of the ITAA 1936 in relation to an income year. It means:

- (a) if:
    - (i) the 55th birthday of the recipient of the annuity or pension occurred before the year of income; or
    - (ii) the annuity or pension is a death or disability annuity/pension for the recipient;
- an amount included in assessable income under section 27H in respect of the annuity or pension; or

# TD 2006/D4

- (b) in any other case – so much (if any) of an amount included in assessable income under section 27H in respect of the annuity or pension as is attributable to a payment of the annuity or pension made on or after the recipient's 55th birthday.

12. In relation to the arrangement covered by this Determination, for a NMS who is less than 55 years of age for the entire income year, there can be no rebatable 27H amount. Therefore, they are not entitled to either the section 159SM of the ITAA 1936 rebate in respect of any assessable pension income, or the section 159SU of the ITAA 1936 rebate in respect of any assessable annuity income received in the income year.

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## **Appendix 3 – Your comments**

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13. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

**Due date:** 17 February 2006

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 92/20

*Subject references:*

- eligible annuity
- family law
- marriage breakdown
- rebatable ETP annuity
- rebatable superannuation pension
- superannuation fund
- superannuation pension income
- superannuation pension rebates
- year of income

*Legislative references:*

- ITAA 1936 27H
- ITAA 1936 140C
- ITAA 1936 140M
- ITAA 1936 140M(1A)(e)
- ITAA 1936 140M(1C)(g)
- ITAA 1936 159SJ
- ITAA 1936 159SJ(1)
- ITAA 1936 159SM
- ITAA 1936 159SM(1)
- ITAA 1936 159SS
- ITAA 1936 159SU
- ITAA 1936 159SU(1)
- Family Law Act 1975 Pt VIII B
- Family Law Act 1975 90MD

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ATO references

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