



TD 2021/D6 - Income tax: tax treatment of a superannuation benefit when the Commissioner exercises the discretion in subsection 304-10(4) of the Income Tax Assessment Act 1997

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 For information about the status of this draft determination, see item 3975 on our [Advice under development program](#).



Status: **draft only – for comment**

Draft Taxation Determination

Income tax: tax treatment of a superannuation benefit when the Commissioner exercises the discretion in subsection 304-10(4) of the *Income Tax Assessment Act 1997*

❶ Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Determination is about

1. Superannuation benefits received by members of a superannuation fund are generally taxed at a more concessional rate than ordinary assessable income. Payments from a superannuation fund lose their concessional tax treatment if they are paid in breach of relevant superannuation regulations. The amounts are instead included in the member's assessable income under Division 304 of the *Income Tax Assessment Act 1997* (ITAA 1997)¹ and taxed at the relevant marginal tax rate. This may occur where members access amounts before they meet a condition of release (such as retirement).
2. However, a superannuation benefit is not included in a member's assessable income under Division 304 if the Commissioner is satisfied that this would be unreasonable, having regard to the matters in subsection 304-10(4).

¹ All legislative references in this Determination are to the ITAA 1997, unless otherwise indicated.

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3. This draft Determination² clarifies the income tax treatment of a superannuation benefit where the Commissioner exercises the discretion in subsection 304-10(4). In particular, it considers how Division 304 interacts with Divisions 301, 302 and 303³ which set out the relevant tax rules for amounts paid as superannuation member benefits or superannuation death benefits.

4. The Determination should be read together with Draft Law Administration Practice Statement PS LA 2021/D3 *Superannuation – Commissioner’s discretion where members receive benefits in breach of legislative requirements*, which sets out the principles for considering the exercise of the Commissioner’s discretion.

Ruling

5. A superannuation benefit that you receive from a complying superannuation fund otherwise than in accordance with the payment standards prescribed under subsection 31(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA)⁴ is included in your assessable income under subsection 304-10(1). This treatment applies despite the application of Divisions 301, 302 and 303.⁵

6. However, you do not include an amount in your assessable income under section 304-10 to the extent the Commissioner is satisfied that this would be unreasonable having regard to the matters in subsection 304-10(4). Where the Commissioner is satisfied, the superannuation benefit is subject to the relevant tax treatment set out in Divisions 301, 302 or 303.⁶

7. While this Determination applies to superannuation benefits received from a complying superannuation fund, we would take the same view for other amounts that would be included in a individual’s assessable income under Division 304, but for the Commissioner exercising the discretion in subsection 304-10(4). For example, superannuation benefits received from approved deposit funds.

Example – pension paid from APRA-regulated superannuation fund

8. *Donald is aged 58 and is a member of Muscovy Superannuation Fund. Muscovy Superannuation Fund is a complying superannuation fund regulated by the Australian Prudential Regulation Authority (APRA).*

9. *On 1 July 2020, Donald commenced a transition to a retirement pension which had a maximum amount of \$75,000 that could be paid annually. He asked the superannuation fund to make the maximum pension payment to his bank account in June each year.*

10. *In June 2021, the superannuation fund overpays Donald’s pension by \$10,000 because of a system error.*

² All further references to ‘this Determination’ refer to the Determination as it will be read when finalised. Note that the Determination will not take effect until finalised.

³ Section 304-1.

⁴ The relevant payment standards are set out in Part 6 and Schedule 1 of the *Superannuation Industry (Supervision) Regulations 1994*.

⁵ Section 304-5.

⁶ If a superannuation income stream that commenced on or after 20 September 2007 is payable, but any of the requirements in *Superannuation Industry (Supervision) Regulations 1994* relating to payments from it are not met, the superannuation income stream will be taken to have ceased for income tax purposes at the start of the year. Any payments made in relation to it during the financial year will be superannuation lump sums. See *Taxation Ruling TR 2013/5 Income tax: when a superannuation income stream commences and ceases*.

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11. *Because Donald had passed his preservation age, but not met any of the other conditions of release during the financial year, he was allowed only the cashing of benefits in the form of a transition to retirement income stream. The \$85,000 benefit did not satisfy the cashing restriction contained in table item 110 of Schedule 1 to the Superannuation Industry (Supervision) Regulations 1994. Donald received the payment in breach of the payment standards prescribed under subsection 31(1) of the SISA.*

12. *As a result of this breach, the superannuation benefit is included in Donald's assessable income and not taxed concessional under Division 301, unless the Commissioner exercises the discretion in subsection 304-10(4).*

13. *However, because the benefit was received as the result of an error by a complying APRA-regulated superannuation fund, the Commissioner is satisfied that it would be unreasonable to include the \$85,000 payment in Donald's assessable income under section 304-10. As the benefit was received by Donald due to his membership of the fund, and the conditions in Division 303 did not apply, the superannuation benefit of \$85,000 is taxed under Division 301.*

Date of effect

14. 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 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation15 December 2021

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Appendix 1 – Explanation

❶ ***This Explanation 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.***

15. Generally, a superannuation benefit received by an individual is taxed concessionally under Divisions 301, 302 or 303. The tax treatment will depend on:

- whether the superannuation benefit is a superannuation member benefit or a superannuation death benefit
- the person’s age, and
- whether the superannuation benefit is comprised of a tax-free component, taxable component with a taxable element or a taxable component with an untaxed element.

16. However, a superannuation benefit received by an individual from a complying superannuation fund otherwise than in accordance with relevant superannuation regulations is included in their assessable income under subsection 304-10(1). The rules in Division 304 apply, despite Divisions 301, 302 and 303.⁷ The superannuation benefit will be assessed according to the individual’s marginal tax rates and will not be subject to any concessional tax treatment under Divisions 301, 302 or 303.

17. Subsection 304-10(4) provides for a superannuation benefit not to be included in the individual’s assessable income to the extent that the Commissioner is satisfied that this would be unreasonable having regard to:

- the nature of the fund, and
- any other matters considered relevant.

18. The reference to an amount not being included in the individual’s assessable income in subsection 304-10(4) is to be read as not being included in the individual’s assessable income under section 304-10. When considering the statutory context of Division 304, it is apparent that section 304-5 (which refers to Division 304 applying despite Division 301, 302 and 303) ensures that an amount can only be assessed under either Division 304 or under Divisions 301, 302 or 303. Accordingly, the same superannuation benefit cannot be included in an individual’s assessable income under multiple Divisions. Section 304-5 does not preclude amounts that subsection 304-10(4) excludes from Division 304 from being included in the individual’s assessable income under Division 301, 302 or 303, as relevant.

19. This construction is consistent with the drafting techniques used in Divisions 301, 302 and 303, which Division 304 complements. Where a superannuation benefit, or part of a superannuation benefit, is not to be included in an individual’s assessable income, the relevant provisions expressly state that the superannuation benefit is ‘not assessable income and is not exempt income’.⁸ Subsection 304-10(4) does not adopt the same drafting technique, which suggests the superannuation benefit is not intended to be excluded entirely from an individual’s assessable income.

20. An alternative construction is that the superannuation benefit is not included in the individual’s assessable income under any Division of the ITAA 1997. We do not consider

⁷ Section 304-5.

⁸ See sections 301-10, 301-15, 301-30, 302-60, 302-65, 302-70 and 302-140.

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this view to be consistent with the policy intent of subsection 304-10(4), as articulated at paragraph 2.84 of the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006:

The Commissioner of Taxation (Commissioner) retains discretion to provide that an amount may be excluded from a person's assessable income and treated as a superannuation benefit where the Commissioner is satisfied that it would be unreasonable not to do so. The Commissioner may have regard to the nature of the superannuation fund, where relevant, and any other matter that he or she may consider to be relevant.

21. The reference to 'treated as a superannuation benefit' shows a clear intention that the exercise of the discretion under subsection 304-10(4) does not result in the amount having nil tax consequences.

22. While this issue was not specifically considered in *Mason and Commissioner of Taxation*⁹, the Commissioner's view of subsection 304-10(4) is consistent with statements made by the Administrative Appeals Tribunal in their decision:

However, the Commissioner has a discretion to exclude an amount from a person's assessable income, and to have the amount treated as a superannuation benefit (such that it is taxed concessional and not at marginal tax rates), where he is satisfied that it would be unreasonable not to do so having regard to the nature of the superannuation fund and any other relevant matters ...

23. The preferred interpretation of subsection 304-10(4) is also consistent with the operation of former subsection 26AFB(4) of the *Income Tax Assessment Act 1936*, which subsection 304-10(4) replaced. While noting that there are textual differences between the two provisions, the extrinsic materials accompanying the introduction of subsection 304-10(4) do not indicate any intended change in policy in the tax treatment of amounts that have been the subject of the Commissioner's discretion.

⁹ [2012] AATA 133 at [9].

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Appendix 2 – Your comments

24. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

25. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 4 February 2022

Contact officer details have been removed.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936 former 26AFB(4)
- ITAA 1997 Div 301
- ITAA 1997 301-10
- ITAA 1997 301-15
- ITAA 1997 301-30
- ITAA 1997 Div 302
- ITAA 1997 302-60
- ITAA 1997 302-65
- ITAA 1997 302-70
- ITAA 1997 302-140
- ITAA 1997 Div 303
- ITAA 1997 Div 304
- ITAA 1997 304-1

- ITAA 1997 304-5
- ITAA 1997 304-10
- ITAA 1997 304-10(1)
- ITAA 1997 304-10(4)
- TAA 1953
- SISA 1993 31(1)
- SISR 1994 Pt 6
- SISR 1994 Sch 1

Cases relied on:

Mason and Commissioner of Taxation [2012] AATA 133; 2012 ATC 10-237; (2012) 87 ATR 326

Other references:

Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006
PS LA 2021/D3

ATO references

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