



Decision impact statement

Came and Commissioner of Taxation [2023] AATA 3951

❗ Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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Venue: Administrative Appeals Tribunal
Venue reference No: 2022/7426
Judgment date: 28 November 2023

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case, which concerns when a taxpayer is able to make a choice to have applicable fund earnings (AFE) with respect to a payment from a foreign superannuation fund assessed to an Australian complying superannuation fund rather than themselves.
2. All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1997*.
3. All decision references in this Decision impact statement are to the decision in the Administrative Appeals Tribunal (Tribunal) for *Came and Commissioner of Taxation* [2023] AATA 3951.

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Overview of facts

4. The Applicant lived and worked in South Africa, accumulating amounts in South African retirement funds.
5. The Applicant became a resident of Australia on 7 July 2004.
6. The Applicant transferred amounts in their South African retirement funds to Australia in the 2019–20 income year.
7. Due to the application of certain foreign currency exchange regulation restrictions in South African law, such amounts were required to be firstly paid into an Emigrant Capital Account (ECA).
8. The Applicant instructed their South African retirement funds to make lump sum payments to the ECA. The amounts remained in the ECA for a brief period before they were paid to the Applicant's complying superannuation fund in Australia.
9. The Applicant prepared a choice under subsection 305-80(2) to have an amount of AFE in relation to the lump sum amounts included in the assessable income of their complying superannuation fund in Australia. Consistent with that choice, the Applicant did not include such AFE as assessable income in their lodged 2019–20 income year individual tax return.
10. We undertook an audit of the Applicant and issued an Amended Notice of Assessment for the 2019–20 income year, increasing the Applicant's assessable income in relation to AFE. We decided that the Applicant was not entitled to make the choice under subsection 305-80(2). We also disagreed with the approach to foreign currency translation used by the Applicant to calculate the amount of AFE.
11. The Applicant objected to their Amended Notice of Assessment. Their objection was disallowed.
12. The Applicant filed an application for review with the Tribunal.

Issues decided

13. The issues before the Tribunal were the:
 - Applicant's eligibility to make a choice under subsection 305-80(2), and
 - proper foreign currency translation to be used to calculate the AFE reflected in the Applicant's Amended Notice of Assessment.

Choice requirements under section 305-80

14. The Tribunal decided that the Applicant was eligible to make a choice under subsection 305-80(2) to have an amount of AFE included in the assessable income of their complying superannuation fund in Australia in relation to the lump sum amounts that it received.
15. The Tribunal considered that the payment of the superannuation lump sums into the ECA satisfied the requirement in paragraph 305-80(1)(b) that the Applicant must be taken to have received the lump sum under section 307-15.¹ That is, this requirement was satisfied in the particular factual circumstances under consideration where the Applicant received the lump sums into the ECA in a personal capacity.

¹ At [57–58].

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16. The Tribunal was satisfied that all of the lump sum was paid into a complying superannuation fund, as required by paragraph 305-80(1)(c). In doing so, the Tribunal factually resolved that these lump sum amounts were kept intact and whole, with no interim use of the funds, before the transferring of the entirety of each lump sum promptly to the Applicant's complying superannuation fund in Australia.²

17. The Tribunal decided that the Applicant ceased to have an interest in the foreign superannuation fund immediately after the lump sum was paid into a complying superannuation fund in Australia, as required by paragraph 305-80(1)(d).³

18. Accordingly, the Tribunal decided the first issue in favour of the Applicant⁴, and they were eligible to make a choice under subsection 305-80(2).

Calculating applicable fund earnings and translating foreign currency amounts

19. As the Tribunal decided the first issue in favour of the Applicant, the Tribunal decided that it did not need to consider the foreign currency translation issue. This was because no amount of AFE in respect of the lump sum amounts should be included in the Applicant's assessable income for the 2019–20 income year.⁵

ATO view of this decision

20. We consider that, based on the Tribunal's factual findings, the conclusions drawn were reasonably available.

21. We accept that the requirement in paragraph 305-80(1)(b) for the Applicant to be taken to have received a lump sum was satisfied in the particular factual circumstances found by the Tribunal.

22. Having found that the lump sum remained whole and intact, with no interim use of the funds, from the limited time of its payment from the foreign superannuation fund, to the ECA, and then to the complying superannuation fund, it was reasonably open for the Tribunal to conclude that the requirement in paragraph 305-80(1)(c) that all of the lump sum is paid into a complying superannuation fund was satisfied. Whether that can be demonstrated is a question of fact, to be determined on a case-by-case basis.

23. While contrary to the position advanced by us at hearing, we accept that the requirement in paragraph 305-80(1)(d), that 'immediately after the payment into the complying superannuation fund, you [the taxpayer] no longer have a superannuation interest in the foreign superannuation fund', was satisfied on the facts of this case. As noted by the Tribunal⁶:

... paragraph (d) does not impose a positive requirement that the taxpayer still have an interest in the foreign superannuation fund until the lump sum is paid into the complying superannuation fund.

24. However, further considerations arise where the requirements in subsection 305-80(1) are satisfied but there has been a time delay between when an individual received the superannuation lump sum from their foreign superannuation fund and its subsequent payment into the complying superannuation fund in Australia. We consider that the choice under subsection 305-80(2) is only available in these circumstances if the payment of the superannuation lump sum from the foreign fund is received by the taxpayer and paid into

² At [18].

³ At [45–46].

⁴ At [59].

⁵ At [59].

⁶ At [46].

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their complying superannuation fund in Australia in the same income year. This is because:

- A choice under subsection 305-80(2) can only be made if all the requirements in subsection 305-80(1) are met. Accordingly, a choice cannot occur before the lump sum is paid to the complying superannuation fund as required by paragraph 305-80(1)(c).
- Subsection 305-70(2) requires a taxpayer to include in their assessable income for a year so much of the lump sum they receive as equals their AFE less any amount covered by the choice under section 305-80. Where the choice cannot be made for a particular income year because all of the requirements of subsection 305-80(1) have not been met in that income year, the taxpayer must include the AFE relating to the lump sum in their own assessable income.

25. As the Tribunal did not determine the second issue, we consider that when calculating AFE, all amounts denoted in foreign currency are translated at the exchange rate applicable at the time of receipt of the relevant superannuation lump sum. That approach is broadly outlined in ATO Interpretative Decision ATO ID 2015/7 *Foreign currency translation rules in working out 'applicable fund earnings' under section 305-75 of the ITAA 1997*.

Comments

26. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Due date: 7 February 2025

Contact officer details have been removed as the comments period has ended.

Commissioner of Taxation
4 December 2024

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References

Legislative references:

- ITAA 1997 305-70(2)
- ITAA 1997 305-75
- ITAA 1997 305-80
- ITAA 1997 305-80(1)
- ITAA 1997 305-80(1)(b)
- ITAA 1997 305-80(1)(c)
- ITAA 1997 305-80(1)(d)

- ITAA 1997 305-80(2)

- ITAA 1997 307-15

Other references:

- ATO ID 2015/7

ATO references

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