TR 2013/5 - Income tax: when a superannuation income stream commences and ceases

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There is a Compendium for this document: **TR 2013/5EC** .

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Taxation Ruling

Income tax: when a superannuation income stream commences and ceases

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What this Ruling is about

1. This Ruling explains when a superannuation income stream commences and when it ceases, and consequently when a superannuation income stream is payable. These concepts are relevant to determining the income tax consequences for both the superannuation fund and the member[1] in relation to superannuation income stream benefits paid.

2. This Ruling considers the case where a member with an accumulation interest in a taxed complying superannuation fund commences a superannuation income stream on or after 1 July 2007 that meets the conditions of paragraph (a)(ii) of the definition of superannuation income stream in regulation 995-1.01 of the *Income Tax Assessment Regulations 1997* (ITAR 1997). That is, the superannuation income stream is taken to be a pension in accordance with subregulation 1.06(1) of the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994).

3. Although there are various pension types that satisfy subregulation 1.06(1) of the SISR 1994, this Ruling applies to a pension that satisfies subregulation 1.06(1) and paragraph 1.06(9A)(a) of the SISR 1994. In this Ruling a product that satisfies these provisions is referred to as an 'account based pension' or a superannuation income stream.

[1] The term 'member' refers to the person who first commences a superannuation income stream.

4. This Ruling also applies to an account based pension that is a transition to retirement income stream (as defined in paragraph (b) of the definition of transition to retirement income stream in subregulation 6.01(2) of the SISR 1994).

Ruling

What is an 'income stream' and 'superannuation income stream'

5. There is an 'income stream' within the definition of 'superannuation income stream',[2] if a superannuation fund trustee has a liability to pay to a member a series of periodic payments that relate to each other over an identifiable period of time. The payments need not be periodic in the sense that they are always paid at the same, recurring intervals. The payments in a series may also vary in amount. A liability to make a single payment each year for a number of years can satisfy as a liability to pay a member a series of payments. However, a liability to make a single payment for one year will not satisfy as a liability to pay a member a series of payments and thus will not satisfy as an income stream.

6. A series of periodic payments, (including a series of periodic payments made annually), that relate to each other and are made over an identifiable period of time, is a superannuation income stream if the requirements of subregulation 1.06(1) of the SISR 1994 are met.

Superannuation income stream benefits and superannuation lump sums

7. Each periodic payment, in a series of periodic payments, made from a superannuation interest that supports a superannuation income stream is a superannuation income stream benefit unless an election under regulation 995-1.03 of the ITAR 1997 has been made for that payment not to be treated as a superannuation income stream benefit.[3]

[2] Regulation 995-1.01 of the ITAR 1997.
[3] See the definition of superannuation income stream benefit in regulation 995-1.01 of the ITAR 1997 for the 2007-08 to 2011-12 income years and in paragraph 995-1.01(2)(a) of the ITAR 1997 for the 2012-13 and later income years.

8. A superannuation lump sum is a superannuation benefit that is not a superannuation income stream benefit.[4] The following types of payments are superannuation lump sums.[5]

- a payment from a superannuation interest that supports a superannuation income stream if, under regulation 995-1.03 of the ITAR 1997, the member elects[6] before the payment is made for the payment to not be treated as a superannuation income stream benefit;
- a payment made from a superannuation interest that has ceased to support a superannuation income stream.[7]

When a superannuation income stream commences

9. A superannuation income stream can never commence before all the capital which is to support that income stream has been added by way of contribution or rollover to the relevant superannuation interest from which the superannuation income stream is to be paid.[8]

10. Subject to what is said in paragraph 9, a superannuation income stream commences on the first day of the period to which the first payment of the superannuation income stream relates (the commencement day).[9]

11. When the commencement day occurs must be determined by reference to the terms and conditions of the superannuation income stream agreed by the trustee and member, the rules of the superannuation income stream as set out in the governing rules[10] of the superannuation fund and the relevant regulations of the SISR 1994.[11]

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[4] Section 307-65 of the *Income Tax Assessment Act 1997* (ITAA 1997).
[5] The two examples mentioned are not intended to be an exhaustive list of superannuation lump sums that may be made from a superannuation interest that is supporting, or has supported, a superannuation income stream.
[6] For the election to be available to a person the superannuation income stream must meet certain conditions under regulation 995-1.03 of the ITAR 1997.
[7] For certain provisions of the ITAA 1997 a superannuation lump sum paid after the death of a person may be taken to be a superannuation income stream benefit: see paragraph 995-1.01(2)(b) of the ITAR 1997. This applies for the 2012-13 income year and later income years.
[8] For further explanation see paragraphs 83 to 86, and Example 4 paragraphs 36 to 38, of this Ruling.
[9] See the definition of 'commencement day' in subregulation 1.03(1) of the SISR 1994.
[10] The term 'governing rules' in relation to a fund, scheme or trust is defined in subsection 10(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993) as: any rules contained in a trust instrument, other document or legislation, or combination of them; or any unwritten rules; governing the establishment or operation of the fund, scheme or trust.
[11] The commencement day is not affected by clause 4 of Schedule 7 to the SISR 1994. This clause states that if the commencement day of a pension is on or after 1 June in a financial year, no payment is required to be made for that financial

12. The commencement day may occur before the due date of the first payment, depending on the rules which govern the superannuation income stream, but the commencement day cannot precede the date of the member's request or application. Further, the commencement day cannot occur prior to:

- the day established as the commencement day in the terms and conditions agreed between the member and the trustee that will govern the superannuation income stream; or
- in circumstances where a member or dependant beneficiary[12] becomes entitled to the superannuation income stream under the governing rules of the superannuation fund, the time at which the entitlement to start the income stream arises.[13]

13. Once a superannuation income stream commences it is payable (that is, there is an obligation to pay superannuation income stream benefits from that superannuation income stream) until such time as that superannuation income stream ceases. This remains true even if the member dies before any payment is due to be made under the terms of that arrangement.[14]

When a superannuation income stream ceases

14. A superannuation income stream ceases when there is no longer a member who is entitled, or a dependant beneficiary of a member who is automatically entitled, to be paid a superannuation income stream benefit from a superannuation interest that supports a superannuation income stream.

15. It is not the effect of regulation 307-200.05 of the ITAR 1997 to ensure that once an income stream commences it can only cease once the amount in the relevant superannuation interest is exhausted.[15]

16. When a superannuation income stream ceases is determined by reference to the particular superannuation fund's governing rules, the requirements of the SISR 1994 and the facts and circumstances of the payment of the member's, or dependant beneficiary's, benefits.[16]

17. The common circumstances in which a superannuation income stream ceases are outlined below.

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year. Thus, for that clause to apply, it is first necessary to determine when the pension commences.

[12] The term 'dependant beneficiary' refers to a person who, upon a member's death, is entitled to a pension. Subregulation 6.21(2A) of the SISR 1994 sets out who is entitled to receive a pension after a member's death.

[13] For further explanation see paragraphs 73 to 81 and Examples 1 to 3 paragraphs 30 to 35 of this Ruling.

[14] For further explanation see paragraph 129 of this Ruling.

[15] For further explanation see paragraphs 88 to 90 of this Ruling.

[16] For further explanation see paragraphs 91 to 95 of this Ruling.

Failure to comply with pension rules

18. A superannuation income stream ceases for income tax purposes if any of the requirements of the SISR 1994 relating to the payment of the superannuation income stream are not met in a financial year. This is the case even if a member remains entitled to receive a payment from the superannuation fund in relation to the purported superannuation income stream under the governing rules of the superannuation fund, or under general trust law concepts.

19. The trustee is taken *not* to have been paying a superannuation income stream at any time during the income year[17] in which the requirements are not met.

20. If the requirements are again met in the following year this results in the commencement of a new superannuation income stream.[18]

By operation of the payment standards of the SISR 1994

21. A superannuation income stream may cease due to specific requirements in the payment standards in the SISR 1994. For instance, under subregulation 6.21(2B) of the SISR 1994 a superannuation income stream must be cashed as a lump sum if it is being paid to a financially dependent child of the deceased who attains the age of 25 (unless the child has a relevant disability). In this case, the superannuation income stream ceases at the earlier of the time specified, if any, in the governing rules, or on the day the child attains age 25.[19]

Exhaustion of capital

22. A superannuation income stream ceases as no superannuation income stream benefits are payable when the capital supporting the superannuation income stream has been reduced to nil, and the member's right to have any other amounts applied (other than by way of contribution or roll over) to their superannuation interest has been exhausted.

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[17] This assumes the fund's income year corresponds with the financial year.
[18] For further explanation see paragraphs 96 to 101, and Example 6 paragraphs 42 to 44, of this Ruling.
[19] This assumes that paragraph 6.21(2B)(a) of the SISR 1994 does not apply. Paragraph 6.21(2B)(a) requires the benefit to be cashed as a lump sum when the superannuation income stream is commuted, or its term expires (unless it is rolled over to commence a new superannuation income stream) if this is before the day on which the child attains the age of 25.

Commutation

23. A superannuation income stream ceases when a request from a member or a dependant beneficiary to *fully* commute their entitlements to future superannuation income stream benefits for an entitlement to a lump sum takes effect.

24. A request to fully commute a superannuation income stream takes effect as soon as the trustee's liability to pay periodic superannuation income stream benefits to the member or a dependant beneficiary is substituted with a liability to pay that member or dependant beneficiary a superannuation lump sum.

25. As the liability to pay the commutation lump sum arises as a consequence of the full commutation having taken effect, the superannuation income stream ceases before the time the lump sum payment to the member or dependant beneficiary is made.

26. The payment made to the member or dependant beneficiary following a full commutation of a superannuation income stream is a superannuation lump sum for income tax purposes as the superannuation interest no longer supports a superannuation income stream at the time the payment is made.[20]

27. A superannuation income stream does *not* cease when a member or dependant beneficiary applies to partially commute some of their entitlements to future superannuation income stream benefits for an entitlement to a lump sum.

28. When a partial commutation takes effect, the member or a dependant beneficiary may make an election under paragraph 995-1.03(b) of the ITAR 1997 for the payment of the partial commutation not to be treated as a superannuation income stream benefit. The election can only be made if the requirements of subparagraphs 995-1.03(a)(i) to (iv) of the ITAR 1997 are satisfied. The election must also be made before any payment is made. If an election is made the payment resulting from the partial commutation is a superannuation lump sum for income tax purposes. If the election is not made the payment resulting from the partial commutation is a superannuation income stream benefit.[21]

[20] For further explanation see paragraphs 115 to 118 of this Ruling.
[21] For further explanation see paragraphs 119 and 120 of this Ruling.

Death of a member

29. A superannuation income stream ceases as soon as a member in receipt of the superannuation income stream dies, unless a dependant beneficiary of the deceased member is automatically entitled, under the governing rules of the superannuation fund or the rules of the superannuation income stream, to receive an income stream on the death of the member. If a dependant beneficiary of the deceased member is automatically entitled to receive the income stream upon the member's death, the superannuation income stream continues.[22]

Examples

Example 1: when a superannuation income stream commences – application date

30. A member of the XYZ Superannuation Fund applies, using the relevant product disclosure statement application form, to receive a superannuation income stream (an account based pension) from their accumulated savings in the superannuation fund. The application form requires the member to specify the frequency of payments as monthly, quarterly, half-yearly or yearly and to specify the month in which the first payment is to be made. The governing rules of the superannuation fund also provide that the superannuation income stream payable will commence on the date of a member's application. The member applies on 9 July, to receive monthly payments of $2,000 commencing in August, and the superannuation fund receives the application on 10 July.

31. The superannuation income stream will commence on 9 July as the governing rules of the superannuation fund state it will commence on the application date.

Example 2: when a superannuation income stream commences – first day of the period

32. The facts are as per Example 1, but the governing rules of the XYZ Superannuation Fund state that the superannuation income stream commences on the first day of the month after a member's application is received.

33. As the member's application is received on 10 July, the superannuation income stream will commence on 1 August.

[22] For further explanation see paragraphs 121 to 127, and Example 5 paragraphs 39 to 41 of this Ruling.

Example 3: when a superannuation income stream commences – cooling off period

34. The facts are as per Example 1, but the governing rules of the XYZ Superannuation Fund state that the superannuation income stream cannot commence before the end of the statutory cooling off period that is imposed by the *Corporations Act 2001*.[23]

35. The superannuation income stream will commence the day after the cooling off period ends.

Example 4: superannuation income stream cannot commence until all capital is received

36. Fred is a member of the XYZ Superannuation Fund, where his interest is valued at $500,000, and also a member of the DEF Superannuation Fund, where his interest is valued at $1 million. Fred wishes to rollover the amount he has in the DEF Superannuation Fund to the XYZ Superannuation Fund to commence a superannuation income stream based on $1.5 million.

37. Fred completes the application form attached to the XYZ Superannuation Fund's pension product disclosure statement on 10 July. In that form he requests the trustees of the XYZ Superannuation Fund to obtain a rollover of his benefits from the DEF Superannuation Fund.

38. On 15 July the XYZ Superannuation Fund provides the necessary information to the DEF Superannuation Fund and receives the rollover monies on 10 August. Fred's superannuation income stream, which is based on $1.5 million, cannot commence before 10 August. That is, the superannuation income stream cannot commence before all amounts that are to form the capital of the income stream are paid into Fred's superannuation interest with the XYZ Superannuation Fund.

Example 5: payment of a superannuation income stream to a dependant beneficiary – no cessation

39. David is a member of the EFG Superannuation Fund and has been married to Aggie for 20 years. The governing rules of the EFG Superannuation Fund provide that if a member is in receipt of a superannuation income stream when the member dies the income stream will continue to be paid to their spouse, provided that person had been the member's spouse for at least three years prior to the member's death.

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[23] Division 5 of Part 7.9 of the *Corporations Act 2001* provides for a cooling off period in relation to the purchase of a financial product (such as a superannuation income stream). The standard period is 14 days, but can differ in particular circumstances.

40. David commences to receive a superannuation income stream on 1 July 2008. David dies on 1 September 2009. Aggie is automatically entitled to receive (and does receive) superannuation income stream benefits under the governing rules of the superannuation fund. There is, therefore, a continuing liability to make payments under that superannuation income stream.

41. In these circumstances there is no cessation of the superannuation income stream.

Example 6: failure to meet minimum annual payment requirement – cessation of superannuation income stream

42. Bill is a member of the JKL Superannuation Fund (a self managed superannuation fund) and has commenced a superannuation income stream (an account based pension). The minimum annual payments required under clause 1 of Schedule 7 of the SISR 1994 were made to Bill during the 2010-11 and 2011-12 years.[24] At the start of the 2012-13 year the trustee of the JKL Superannuation Fund calculates that the minimum annual payment required to be made under clause 1 of Schedule 7 of the SISR 1994 for that year is $1,000.

43. During the 2012-13 year the trustee of the JKL Superannuation Fund makes a single payment to Bill of $50. As this amount is less than the minimum annual payment required, the superannuation income stream has not met the requirements of the SISR 1994 for the 2012-13 year. The superannuation income stream ceases for income tax purposes at the beginning of this income year, and the $50 payment is a superannuation lump sum.

44. This is the case even if Bill remains entitled to receive a payment from the superannuation fund in relation to the pension under the governing rules of the superannuation fund, or under general trust law concepts, in future years. If the relevant SISR 1994 requirements are again complied with in the 2013-14 year, this results in the commencement of a new pension.

Date of effect

45. This Ruling applies from 1 July 2007.

46. However, the Commissioner understands that there are a range of current practices that derive from views that are different from those expressed in this Ruling. Having regard to the need to allocate compliance resources the Commissioner considers that it is not appropriate for the ATO to take compliance action to apply the views of the law expressed in this Ruling with regards to when a superannuation income stream ceases on the death of a member before the 2012-13 income year.

[24] The SMSF's income year is the same as the financial year.

47. If the Commissioner is asked or required to state his view formally, (for example, giving a private ruling or in a litigation matter), then he will do so consistent with the views expressed in this Ruling.

48. Further, draft Taxation Ruling TR 2011/D3 stated that upon a partial commutation of a superannuation income stream the resulting payment was a superannuation lump sum for income tax purposes as the member, by making the choice to partially commute the income stream was also taken to have made an election under paragraph 995-1.03(b) of the ITAR 1997 for that payment not to be treated as a superannuation income stream benefit (effectively, for the payment to be treated as a superannuation lump sum). However, this Ruling requires the person to actually make the election before a partial commutation payment is made for that payment to be treated as a superannuation lump sum. The requirement to actually make the election under regulation 995-1.03 of the ITAR 1997 applies from the date of issue of this Ruling. For a partial commutation payment made before the date of issue of this Ruling that payment is a superannuation lump sum payment unless the person has treated the payment as a superannuation income stream benefit.

49. The Ruling 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 Ruling (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
31 July 2013

Appendix 1 – Explanation

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

50. This Ruling explains:

- the meaning of 'superannuation income stream' (paragraphs 51 to 65);
- the relevance of when a superannuation income stream commences and ceases (paragraphs 66 to 72);
- when a superannuation income stream commences (paragraphs 73 to 90); and
- when a superannuation income stream ceases (paragraphs 91 to 129).

The meaning of 'superannuation income stream'

51. The meaning of 'superannuation income stream' is directly relevant to the meaning of 'superannuation income stream benefit'. Under Divisions 301 through to 307 of the ITAA 1997, certain income tax consequences apply to a member of a superannuation fund who receives a superannuation income stream benefit. There are also particular income tax consequences that apply to a superannuation fund that is paying a superannuation income stream.

52. A 'superannuation income stream' is defined in subsection 307-70(2) of the ITAA 1997 by reference to regulation 995-1.01 of the ITAR 1997[25] and relevantly to this Ruling as:

> (a) an income stream that is taken to be:
>
> …
>
> (ii) a pension for the purposes of the SIS Act in accordance with subregulation 1.06(1) of the SIS Regulations; or
>
> …

53. It is clear from this definition that the meaning of 'superannuation income stream' is concerned with something that is an 'income stream' within the ordinary meaning of that expression.

[25] This Ruling does not specifically consider pensions that are covered by paragraph (b) of the definition and it has not been reproduced.

54. As the term 'superannuation income stream benefit'[26] is separately defined, the term 'superannuation income stream' refers to the particular arrangement or product with the features as specified by the fund's governing rules, the agreement between the fund and the member and any other relevant documentation that, relevantly for this Ruling, is an account based pension of the kind covered by subregulation 1.06(1) of the SISR 1994. The term 'superannuation income stream' does not refer to each particular payment made from the arrangement or product.

The meaning of 'income stream'

55. The term 'income stream' is not defined for the purposes of the ITAA 1997 and hence takes its ordinary meaning in the context in which it appears.[27]

56. There is no dictionary meaning of the composite term 'income stream'. However, one of several meanings given for 'income' by the *Macquarie Dictionary*[28] is:

> the returns that come in periodically, especially annually, from one's work, property, business, etc; revenue; receipts

57. One of several meanings given for 'stream' is:

> a continuous flow or succession of anything: *a stream of words*

58. In light of the ordinary meanings of these terms, the Commissioner considers the ordinary meaning of the phrase 'income stream' refers to a series of periodic[29] (including a series of annual) payments made from a member's interest in the superannuation fund. The payments that comprise the income stream must relate to each other such that it is possible to identify a series of payments to be made to the member over an identifiable period of time. The payments need not be periodic in the sense that they are always paid at the same, recurring intervals. The payments in a series may also vary in amount. However, a liability to make a single payment for one year will not satisfy as a liability to pay a member a series of payments and thus will not satisfy as an income stream.

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[26] Regulation 995-1.01 of the ITAR 1997.
[27] *CIC Insurance* Ltd *v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.
[28] 4th Edn.
[29] This is consistent with Hill J (paragraph 28) in *Tubemakers of Australia Ltd v. Federal Commissioner of Taxation* [1993] FCA 175 at paragraph 28; (1993) 93 ATC 4207 at 4212; (1993) 25 ATR 183 at 189, stating that it is a necessary characteristic of a pension that it be periodical.

Requirement for an income stream to be a pension

59. An income stream is only a 'superannuation income stream' if, relevantly for this Ruling,[30] it is capable of being taken to be a pension in accordance with subregulation 1.06(1) of the SISR 1994.[31] Subregulation 1.06(1) defines a benefit as a pension if:

> (a) it is provided under rules of a superannuation fund that:
>
> (i) meet the standards of subregulation (9A); and
>
> (ii) do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced; and
>
> (b) in the case of rules to which paragraph (9A)(a) applies – the rules also meet the standards of regulation 1.07D.
>
> …

60. For a superannuation income stream that is an account based pension the relevant requirements in subregulation 1.06(9A) of the SISR 1994 are as follows:

> Rules for the provision of a benefit (the pension) meet the standards of this subregulation if the rules ensure that payment of the pension is made at least annually, and also ensure that:
>
> (a) for a pension in relation to which there is an account balance attributable to the beneficiary - the total of payments in any year (including under a payment split but excluding amounts rolled over) is at least the amount calculated under clause 1 of Schedule 7; and
>
> …
>
> (c) the pension is transferable to another person only on the death of the beneficiary (primary or reversionary, as the case may be); and
>
> (d) the capital value of the pension and the income from it cannot be used as a security for a borrowing.

61. The definition of a 'pension' under paragraph 1.06(9A)(a) of the SISR 1994 includes two fundamental requirements, being that:

- payment should occur *at least* annually, and
- a minimum amount must be paid to the member each year.

62. These requirements reflect the ordinary meaning of an income stream explained at paragraphs 55 to 58, being a series of periodic (including a series of annual) payments from the member's interest in the superannuation fund.

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[30] See paragraphs 3 and 4 as to the scope of the Ruling.
[31] Subparagraph (a)(ii) of the definition of 'superannuation income stream' in regulation 995-1.01 of the ITAR 1997.

63. In summary, if a member is entitled to a series of periodic payments, whether paid annually or more frequently, over an identifiable period of time from their interest in the superannuation fund, and that series of payments meets the requirements of subregulation 1.06(1), which includes subregulation 1.06(9A)(a) of the SISR 1994, it is a superannuation income stream.

Superannuation income stream benefits

64. Each periodic (including annual) payment made as part of a series of periodic payments over an identifiable period of time from a superannuation interest that supports a superannuation income stream is a superannuation income stream benefit. This is the case unless an election under regulation 995-1.03 of the ITAR 1997 has been made for that payment not to be treated as a superannuation income stream benefit.[32]

65. A payment made as a result of a full commutation of a superannuation income stream is a superannuation lump sum. A payment made as a result of a partial commutation of a superannuation income stream is a superannuation lump sum only if before the payment is made the member elects under regulation 995-1.03 of the ITAR 1997 for that payment to not be treated as a superannuation income stream benefit. If the member does not elect, the payment resulting from the partial commutation is a superannuation income stream benefit for income tax purposes.[33]

Relevance of when a superannuation income stream commences and ceases

66. It is necessary to determine when a superannuation income stream commences or ceases as particular consequences flow from its commencement or cessation. Additionally, once the superannuation income stream commences it is payable (that is, there is an obligation to pay superannuation income stream benefits under that superannuation income stream) until such time as that superannuation income stream ceases.

Divisions 301 through to 307 of the ITAA 1997

67. Whether there is a superannuation income stream from which superannuation income stream benefits are being paid is relevant to the superannuation benefit taxing rules set out (primarily) in Divisions 301, 302 and 307 of the ITAA 1997.

68. These Divisions provide for different income tax treatment to apply to superannuation income stream benefits in a range of circumstances compared with the treatment that applies to superannuation lump sums.

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[32] See footnote 3 of this Ruling.
[33] For further explanation see paragraphs 115 to 120 of this Ruling.

69. For example, the proportioning rule[34] applies differently depending on whether a superannuation lump sum[35] is paid from a superannuation interest that supports a superannuation income stream or a superannuation lump sum is paid from a superannuation interest that has never supported a superannuation income stream.

70. A further example is the separate interest rule in regulation 307-200.05 of the ITAR 1997. This rule provides that once a superannuation income stream 'commences', an amount that supports the superannuation income stream is always to be treated as a separate superannuation interest.[36]

71. Both these rules are central to the correct identification of the tax free and taxable components of payments made from that superannuation interest.

Exempt current pension income provisions

72. Further context is provided by Subdivision 295-F of the ITAA 1997. Broadly, this Subdivision provides two mechanisms for exempting from the assessable income of a superannuation fund, ordinary or statutory income from fund assets that support the payment of a superannuation income stream(s) by the fund. Thus in determining if the exemption applies, it is necessary to consider whether superannuation income stream benefits[37] are payable, and this in turn requires consideration of whether a superannuation income stream has commenced and not ceased.

When a superannuation income stream commences

73. There is no definition of 'commence' or 'commenced' or 'commencement day' as the terms relate to superannuation income streams in either the ITAA 1997 or the ITAR 1997. However, the term 'commencement day' is defined in the SISR 1994 in relation to a pension or annuity. The 'commencement day'[38] for a pension or annuity is the first day of the period to which the first payment of the pension or annuity relates.

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[34] Section 307-125 of the ITAA 1997. The proportioning rule is discussed further at paragraphs 83 to 86 of this Ruling.
[35] That is, a superannuation lump sum payment in circumstances where before the payment is made an election is made under regulation 995-1.03 of the ITAR 1997 for the payment not to be treated as a superannuation income stream benefit.
[36] Further mention of this regulation is at paragraphs 88 to 90 of this Ruling.
[37] See footnote 7 of this Ruling.
[38] See footnote 9 of this Ruling.

74. As the definition of superannuation income stream relies on there being a pension under subregulation 1.06(1) of the SISR 1994, it is consistent with the legislative framework that the time at which a superannuation income stream commences for income tax purposes is aligned with the 'commencement day' for such a pension under the SISR 1994. The concept of 'commencement day' is used throughout the pension standards set out in regulation 1.06 of the SISR 1994. The concept is also used in regulation 1.07D of the SISR 1994, which places restrictions on the commutation of superannuation pensions, and in Schedule 7 to the SISR 1994, which prescribes the minimum annual payment requirements that must be met for account based pensions.

75. Aligning the approach with that taken for pensions in the SISR 1994, the 'commencement day' for a superannuation income stream is the first day of the period to which the first payment relates.

76. The first day of the period to which the first payment relates must be determined by reference to the governing rules of the superannuation fund, including documentation applying to the relevant superannuation income stream.[39] An example of documentation that is relevant in determining the commencement of a superannuation income stream is the product disclosure statement that may be required to be issued to members by the superannuation fund pursuant to the *Corporations Act 2001*.

77. If the governing rules of a superannuation fund provide that a superannuation income stream becomes immediately payable on the occurrence of a particular event, the commencement day for the superannuation income stream is the day on which that event occurs and not before.

78. The commencement day for a superannuation income stream may occur before the due date of the first payment depending on the terms and conditions upon which the superannuation income stream is payable.

79. However, the commencement day cannot occur prior to the day established as the commencement day in the terms and conditions agreed between the member and the trustee that will govern the superannuation income stream.

80. How the terms and conditions are agreed upon will depend on the particular facts and circumstances and will likely vary as between funds and products (superannuation income streams).

[39] However, see also paragraphs 83 to 86.

81. In some cases a member will apply to commence a pension by completing an application form specifying the frequency and amount of payments, or a default option, as appropriate. In other circumstances the fund may not have a formal application process. However, a member will still be required to request that a superannuation income stream commences, and agree to its terms and conditions with the superannuation fund trustee. The commencement day can not precede the member's request or application.

82. Examples 1 to 3 (paragraphs 30 to 35) illustrate how the commencement day of a superannuation income stream is determined in different circumstances.

Contributions and roll-overs to be made before the superannuation income stream commences

83. The proportioning rule in section 307-125 of the ITAA 1997 first requires the tax free and taxable proportions of a superannuation interest to be determined. These proportions are then required to be applied to any benefit paid from the superannuation interest to ensure that the benefit contains the same proportions of tax free and taxable components as the superannuation interest from which it is paid.

84. Subsection 307-125(3) of the ITAA 1997 refers to the time at which the value of the tax free and taxable components of the superannuation interest must be determined. For a superannuation income stream benefit, or a superannuation benefit arising from the commutation of a superannuation income stream, the value of the tax free and taxable components must be determined at the time when the superannuation income stream commenced.[40] For superannuation lump sums from an interest that has never supported a superannuation income stream, the relevant time is just before the benefit is paid. This timing ensures that all payments from the superannuation income stream have the correct tax free and taxable components. It also assists superannuation funds to report correctly and withhold the correct amount of tax if necessary.

85. It necessarily follows that to ensure the tax free and taxable proportions are correctly determined for a superannuation income stream, the superannuation fund and the member must ensure that all contributions (including roll-over amounts) which are intended to form part of the capital supporting the superannuation income stream have been made before the superannuation income stream commences. A contribution is typically made when the amount is received, or ownership of an asset is obtained, or the fund otherwise obtains the benefit of an amount. It is not enough for there to be an agreement to make a contribution at a future time.[41]

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[40] The actual calculation of the tax free and taxable components can be done at any time before the first payment from the superannuation income stream is made.

[41] See further paragraphs 10 to 38 and 181 to 210 of Taxation Ruling TR 2010/1 *Income Tax: superannuation contributions*. This Ruling sets out the

86. Ensuring all contributions are received before the superannuation income stream commences is consistent with the explicit requirement in subparagraph 1.06(1)(a)(ii) of the SISR 1994,[42] which states that the rules of a superannuation fund must not permit the capital supporting a pension to be added to by way of contribution or rollover after the pension has commenced.

87. Example 4 (paragraphs 36 to 38) illustrates that the commencement day cannot be before all amounts that are to form the capital of the income stream are paid into the superannuation interest.

Effect of treating the amount supporting the superannuation income stream as a separate interest

88. Regulation 307-200.05 of the ITAR 1997 states that if a superannuation income stream commences, an amount that supports the superannuation income stream is always to be treated as a separate superannuation interest. Regulation 307-200.05 applies for the purposes of the proportioning rule to ensure all payments made from the superannuation interest that supports the superannuation income stream have the same proportions of tax free component and taxable component.

89. It has, however, been suggested that the effect of regulation 307-200.05 of the ITAR 1997 is that once a superannuation income stream commences, it only ceases once the amount in the relevant superannuation interest is exhausted. However, this interpretation does not give due regard to the terms of regulation 307-200.05 of the ITAR 1997 as they appear in the legislation.

90. The operation of regulation 307-200.05 of the ITAR 1997 is directed at ensuring that a separate superannuation interest is identified at the time a superannuation income stream commences. It does not by its terms deem the amount supporting the superannuation income stream to be the superannuation income stream. Nor does it deem all payments from the superannuation interest, including those made after the superannuation income stream ceases, to be superannuation income stream benefits.

When a superannuation income stream ceases

91. Neither the ITAA 1997 nor the ITAR 1997 sets out when a superannuation income stream ceases for income tax purposes.

Commissioner's view on when a contribution is taken to have been made to a superannuation fund.

[42] Reproduced at paragraph 59 of this Ruling.

92. As outlined at paragraph 52, a superannuation income stream, as relevant to this Ruling, must meet the requirements of a pension in subregulation 1.06(1) of the SISR 1994. The pension standards contained in the SISR 1994 also do not explicitly prescribe when a pension ceases for regulatory purposes.

93. Whether a superannuation income stream has ceased must be determined by reference to the superannuation fund's governing rules, the relevant requirements of the SISR 1994 and the particular facts and circumstances of the payment of the member's, or dependant beneficiary's, benefits.

94. A superannuation income stream ceases when there is no longer a member who is entitled, or a dependant beneficiary of a member who is automatically entitled, to be paid a superannuation income stream benefit from a superannuation interest that supports a superannuation income stream.

95. Further explanation[43] is provided below in relation to:

- failure to comply with the pension rules (paragraphs 96 to 102);
- commutation (paragraphs 103 to 120); and
- death of a member (paragraphs 121 to 129).

Failure to comply with pension rules

96. A superannuation income stream must meet the requirements of subregulation 1.06(1) of the SISR 1994, and thus the requirements of subregulation 1.06(9A) of the SISR 1994, and the commutation standards in regulations 1.07D of SISR 1994.[44] If these requirements, as relevant to the circumstance, are not met there is not a superannuation income stream.

97. The requirements of subregulation 1.06(1) of the SISR 1994 state that for a benefit to be a pension it must be provided under the rules of a superannuation fund that meet various requirements, including the standards of subregulation 1.06(9A). If these standards are not met, the requirements of subregulation 1.06(1) will not be met.

98. Subregulation 1.06(9A)[45] of the SISR 1994 provides that the rules of the superannuation fund meet the relevant standards if the rules 'ensure' that the payment is made at least annually and 'ensure' that the other requirements as outlined in that subregulation are met.

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[43] See paragraphs 21 (By operation of the payment standards of the SISR 1994) and 22 (Exhaustion of capital) of the Ruling for further circumstances in which a superannuation income stream ceases.
[44] See paragraphs 59 and 60 of this Ruling.
[45] As do subregulations 1.06(2) to (8) of the SISR 1994.

99. The word 'ensure' is given the meaning in the *Macquarie Dictionary* as 'to make sure or certain to come, occur, etc'. As the rules of the superannuation fund must 'ensure' that the standards are met it is not enough for the rules of the superannuation fund to simply include a reference to, or reproduce the terms of, those standards. Rather, the rules (standards) must be met, or given effect to, in practice.

100. If a purported superannuation income stream fails to meet these requirements in a financial year, the superannuation income stream will be taken to have ceased at the start of that income year[46] for income tax purposes. Therefore, from the start of that income year the superannuation interest is no longer supporting a superannuation income stream and the payments made from that superannuation interest are not superannuation income stream benefits. Therefore, any payments made during that income year are superannuation lump sums.

101. If in the following year the relevant rules are again complied with this in effect results in the commencement of a new superannuation income stream and the proportioning rule[47] must be applied to that new superannuation income stream when it commences.

102. Example 6 (paragraphs 42 to 44) illustrates the effect of a superannuation income stream not meeting the minimum annual payment requirement.

Commutation

103. A member may choose to commute their entitlements to future superannuation income stream benefits.

The meaning of commutation

104. 'Commutation' is an integral concept of the tax and superannuation regulatory regimes that affects the payment of benefits from a superannuation interest that supports a superannuation income stream. As 'commutation' is not defined in either the ITAA 1997, the ITAR 1997 or the SISR 1994 it takes its ordinary meaning in the context in which it appears.

105. The *Macquarie Dictionary* gives the meaning of 'commute' as 'to change (one kind of payment) into or for another, as by substitution'.

106. The concept of commuting a pension entitlement was considered by Deputy President Forgie in *Re Hammerton and Comcare Australia*[48] (*Re Hammerton)*. This case considered the character of a payment received on the partial commutation of a pension. That is, whether it retained its character as a pension

[46] This assumes the fund's income year corresponds with the financial year.
[47] Paragraph 307-125(3)(a) of the ITAA 1997.

payment, or became a lump sum payment. It was held by Deputy President Forgie (at paragraphs 47 and 48) that:

> It is implicit in this case that the commutation has had the effect of changing the essential nature of periodical pension payments into something else. That seems to me to accord with what happens when a single payment takes the place of an on-going periodic payment of pension. It also accords with the normal meaning of 'commute' i.e. 'to exchange for another or something else … interchange 2. to change (one kind of payment) into or for another as by substitution … to make a collective payment, esp. of a reduced amount, as an equivalent for a number of payments…' (Macquarie Dictionary).
>
> It follows that Mr Hammerton has received a lump sum benefit under a superannuation scheme as well as being in receipt of ongoing pension payments.

107. The concept of commuting a pension entitlement was also considered by Member Allen in *Cooper and Commissioner of Taxation*[49] *(Cooper)*. This case considered whether a lump sum payment of arrears of an invalidity pension, payable under the *Defence Force Retirement and Death Benefits Act 1973,* constituted a commutation of the pension. The question of whether the payment was a commutation of a superannuation pension was relevant in determining whether that lump sum payment was an 'eligible termination payment' for the purposes of former paragraph 27A(1)(d) of the *Income Tax Assessment Act 1936* (ITAA 1936). It was held by Member Allen (at paragraph 26) that the relevant payment was not in substitution or exchange for any right Mr Cooper had:

> I agree with those submissions and would add that any commutation must be in accordance with the provisions of the superannuation scheme in question. In my opinion a commutation of a superannuation pension requires a beneficiary to make a conscious decision to exchange future entitlements, or a mixture of past and future entitlements, for some other form of benefit (usually a lump sum) as permitted by the scheme. Mr Cooper made no such decision. Once the Authority had determined that he would be treated as having been retired on invalidity or incapacity grounds he became entitled to receive his arrears from the date of retirement and a future pension. The arrears could only be calculated and paid as a lump sum in the way that it was by the Authority. I have no reason to doubt Mr Barton's evidence of the calculations that he made or the appropriateness of his assumptions. I do not, however, believe that his evidence established that there was a commutation of a pension. ….On the evidence I consider that Mr Cooper received his full entitlement as to arrears and that receipt of arrears did not alter in any way the right to receive the pension in future in the same amount and on the same terms. There was no exchange or substitution of anything. There was no commutation of future pension entitlements and the payment of the arrears by a lump sum was not a commutation of past pension entitlements.

[48] [1995] AATA 63; (1995) 21 AAR 204.
[49] [2003] AATA 296; 2003 ATC 2123; (2003) 52 ATR 1199.

108. In each case consideration was given to whether there had been an exchange of entitlements to one thing (periodical payments) for another (a lump sum). Further, in *Cooper* Member Allen considered it necessary for the beneficiary to have made a conscious decision to exchange future entitlements for another form of benefit.

109. Although *Re Hammerton* concerned a pension comprised of periodical payments in the context of the *Safety Rehabilitation and Compensation Act 1988,* and *Cooper* considered a benefit that was accepted as satisfying the requirements for a pension under an earlier version of regulation 1.06 of the SISR 1994, they provide guidance in the current context as for a superannuation income stream to exist there must be a series of periodic payments and these in turn can be exchanged for a lump sum payment.

110. Consistent with the ordinary meaning of commutation and the approach in these cases, a member or a dependant beneficiary commutes their 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. For the trustee of the fund, the liability to pay that member or dependant beneficiary periodic superannuation income stream benefits is substituted with a liability to pay a lump sum.

Determining if there has been a commutation

111. A request to commute is valid if it is consistent with the governing rules of the superannuation fund, the agreement between the member and trustee under which the superannuation income stream is provided and the relevant requirements of the SISR 1994.[50] If a request to commute is not valid, a commutation does not happen.[51]

112. Whether and at what time a valid commutation takes effect is a question of fact to be determined from the particular circumstances. It must be clear that some or all of the member's right, or dependant beneficiary's right, to receive future superannuation income stream benefits has been exchanged for a right to receive a lump sum instead.

[50] See for instance regulation 1.07D of the SISR 1994.
[51] A request to commute may be subject to certain conditions being satisfied, such as requiring the minimum pension payment to be made before commutation occurs. This would not prevent a commutation from occurring, or from being valid, but it may affect the time when the commutation occurs.

113. A member or dependant beneficiary may, subject to the governing rules and the SISR 1994 requirements, alter the amount of and/or the number of payments they wish to receive from their fund in any given year but any such alteration does not of itself evidence a commutation having been made. Only where the alteration results in an exchange of at least some of the member's or dependant beneficiary's right to receive future superannuation income stream benefits for a right to receive a lump sum will a commutation have been made.

114. If the alteration does not result in an exchange of the member's entitlements to receive periodic superannuation income stream benefits for an entitlement to receive a lump sum, (that is, there is no commutation), the additional amounts and/or payments will be superannuation income stream benefits.[52]

Consequences upon a full commutation

115. When a *full* commutation takes effect, a superannuation fund trustee no longer has a liability to provide any superannuation income stream benefits as this liability has been substituted with a liability to make a lump sum payment instead. The superannuation income stream therefore ceases at this time.

116. When this change in the nature of the trustee's liability occurs must be determined with reference to the governing rules of the superannuation fund and the terms of the superannuation income stream as they may prescribe a process to be followed in applying for a commutation. For example, the governing rules of a superannuation fund may state that a commutation will take effect once the commutation request has been accepted by the trustee.

117. However, irrespective of that process a liability to pay the lump sum resulting from the commutation arises as a consequence of the full commutation taking effect and therefore the superannuation income stream ceases before the time the lump sum payment to the member of a dependant beneficiary is made.

118. As the payment resulting from the full commutation is made after the cessation of the superannuation income stream, it is a superannuation lump sum for income tax purposes.

[52] This assumes an election is not made under regulation 995-1.03 of the ITAR 1997.

Consequences upon a partial commutation

119. In contrast with a full commutation, a partial commutation occurs when a member or a dependant beneficiary consciously exercises their right to exchange something less than their full entitlement to receive future, periodic (including annual) superannuation income stream benefits for an entitlement to be paid a lump sum. As there is still an obligation to continue to pay superannuation income stream benefits, a partial commutation does not result in the cessation of the superannuation income stream.

120. If a partial commutation occurs the resulting payment is a superannuation income stream benefit for income tax purposes unless, before the payment is made, an election[53] is made under paragraph 995-1.03(b) of the ITAR 1997 to not treat the payment as a superannuation income stream benefit. If an election is made the payment is a superannuation lump sum for income tax purposes.

Death of a member

121. When a member dies they no longer have an entitlement to receive superannuation income stream benefits. The member's remaining entitlements must be paid out of the superannuation fund under the relevant regulations of the SISR 1994. The form of any benefit paid, and who it is paid to, depends on the governing rules of the superannuation fund, and the relevant requirements of the SISR 1994.

122. The superannuation fund's governing rules must ensure that an account based pension is transferrable to another person only on the death of the member.[54] Additionally, the superannuation fund's governing rules will not meet the standard if the pension is transferred or paid to a person who is not a dependant beneficiary.[55] If a superannuation fund's governing rules do not comply with these requirements the relevant pension standard is not met and the product is not a pension for the purposes of the SISR 1994 and thus is not a superannuation income stream for income tax purposes.

123. The rules for the cashing of benefits on death in Division 6.3 of the SISR 1994 are consistent with this. Benefits for a dependant beneficiary can be cashed as a pension or annuity product[56] or a lump sum. Benefits paid to a person who is not a dependant beneficiary can only be paid as a lump sum.[57]

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[53] See footnote 6 of this Ruling.
[54] Paragraph 1.06(9A)(c) of the SISR 1994.
[55] Subregulation 1.06(9B) of the SISR 1994. As to who is a dependant beneficiary see footnote 12 of this Ruling.
[56] Paragraph 6.21(2)(b) of the SISR 1994.
[57] Paragraph 6.21(2)(a) of the SISR 1994. The lump sum may be a single lump sum or an interim lump sum followed by a final lump sum.

Payment of a superannuation income stream to a dependant beneficiary

124. Although superannuation entitlements are personal and not normally transferable to another person, the relevant provisions of the SISA 1993 and the SISR 1994, as discussed, recognise that a member's superannuation benefits can be paid to certain other persons on the member's death. Thus a superannuation income stream (that is a pension under subregulation 1.06(1) of the SISR 1994) can be transferred to certain dependant beneficiaries on the death of the member.

125. If the entitlement to a superannuation income stream automatically transfers to a dependant beneficiary on the death of a member, the superannuation income stream does not cease. There is a continuing liability to make the payments under that superannuation income stream albeit the recipient of those payments has changed.

126. A superannuation income stream automatically transfers to a dependant beneficiary on the death of a member if the governing rules of the superannuation fund, or other rules governing the superannuation income stream, specify that this will occur. The rules must specify both the person to whom the benefit will become payable and that it will be paid in the form of a superannuation income stream. The rules may also specify a class of person (for example, spouse) to whom the benefit will become payable. It is not sufficient that a superannuation income stream becomes payable to a beneficiary of a deceased member only because of a discretion (or power) granted to the trustee by the governing rules of the superannuation fund. The discretion (or power) may relate to determining either who will receive the deceased member's benefits, or the form in which the benefits will be payable.

127. If a superannuation income stream does not automatically transfer to a dependant beneficiary on the death of a member, for example, if the trustee has the discretion to pay either a superannuation lump sum or a superannuation income stream to a dependant beneficiary, the superannuation income stream ceases on the member's death. If the trustee ultimately decides to pay the relevant dependant beneficiary a superannuation income stream from the remaining amount of the deceased's superannuation interest then at that time a new superannuation income stream commences.

128. Example 5 (at paragraphs 39 to 41 of this Ruling) illustrates a situation where a superannuation income stream automatically transfers to a dependant beneficiary.

A superannuation income stream may be payable if no superannuation income stream benefits are actually paid

129. As it is the member's entitlement to a series of periodic (including a series of annual) payments made over an identifiable period of time that must be established for a superannuation income stream to be payable, a superannuation income stream may be payable for a period of time even if the member dies before any payment is due to be made under the terms of that arrangement. That is, based on the member's entitlement to a series of related payments over an identifiable period of time there is a superannuation income stream in existence up to the time of the member's death.[58]

[58] This assumes that there is no dependant beneficiary who is automatically entitled to that income stream as discussed at paragraphs 124 to 127 of this Ruling.

Appendix 2 – Detailed contents list

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Related Rulings/Determinations:

TR 2010/1; TR 2006/10

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- annuities & superannuation pensions
- components of superannuation benefits
- death benefits – superannuation benefits
- exempt income of superannuation funds
- income stream – superannuation benefits
- lump sum – superannuation benefits
- proportionate rule for superannuation benefits
- superannuation
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- superannuation fund income
- superannuation pensions
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- taxable component of superannuation benefits
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