TR 93/17A2 - Addendum - Income tax: income tax deductions available to superannuation funds

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Addendum

Taxation Ruling

Income tax: income tax deductions available to superannuation funds

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 93/17 to ensure the guidance provided in the Ruling is relevant to contemporary industry practices by clarifying the income tax treatment of certain expenses and adding content and examples in relation to the apportionment of those expenses.

TR 93/17 is amended as follows:

1. Preamble

Omit Preamble; substitute:

> ❗ **This publication provides you with the following level of protection:**
>
> This publication (excluding the Explanations section) is a public ruling for the purposes of the *Taxation Administration Act 1953*.
>
> A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.
>
> If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

2. Contents section

Omit 'other Rulings on this topic IT 2672'.

3. Paragraph 1

After the paragraph insert:

> 1A. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise stated.

4. Paragraph 3

Omit comma after the words 'superannuation fund'.

5. Paragraph 4

Omit subparagraphs (a), (b), (d), (f) and (h); substitute:

(a) actuarial costs – except those incurred in complying with, or managing, the fund's income tax affairs and obligations (for example, Subdivision 295-F) which are ordinarily deductible under section 25-5;

(b) accountancy fees – except those incurred in complying with, or managing, the fund's income tax affairs and obligations which are ordinarily deductible under section 25-5;

(d) costs of complying with a 'regulatory provision' as defined in section 38A of the *Superannuation Industry (Supervision) Act 1993* (unless the cost is a capital expense);

(f) costs in connection with the calculation and payment of benefits to members (but not the cost of the benefit itself) for example, interest on money borrowed to secure temporary finance for payment of benefits and medical costs in assessing invalidity benefit claims;

(h) subscriptions for membership paid by a fund to The Association of Superannuation Funds of Australia Limited and other such industry bodies; and

6. Paragraph 5

Omit the subparagraphs; substitute:

(a) the superannuation supervisory levy[1] is deductible under section 25-5 as a tax-related expense (however, any penalty for late payment of the levy is not deductible: section 26-5);

(b) the deductibility of legal expenses is determined under section 8-1 and usually depends on whether the expenses are of a capital or revenue nature;

(c) up-front costs incurred in investing money are of a capital nature and are not deductible under section 8-1;

(d) investment or administration charges levied by a life assurance company or pooled superannuation trust will generally not be deductible to the fund in accordance with subsection 295-100(2); and

(e) the costs of amending trust deeds are allowable as a deduction provided the expenditure is not of a capital nature.

[1] The supervisory levy is imposed on trustees of self managed superannuation funds (SMSFs) by the *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* and on trustees of other funds by the *Superannuation Supervisory Levy Imposition Act 1998.* The levy is payable annually and contributes towards the cost of regulation.

7. Paragraph 6

Omit the paragraph; substitute:

6. Expenditure that is only incurred in gaining or producing non-assessable income[2] is not deductible under section 8-1. Expenditure (for example, general administrative expenses of managing a superannuation fund) which is incurred partly in producing assessable income and partly in gaining non-assessable income must be apportioned to determine the amount that is deductible under section 8-1. The expenditure is deductible only to the extent to which it is incurred in producing assessable income (thereby satisfying the first limb of the section as contained in paragraph 8-1(1)(a)), or has the character of an operating or working expense of a business or is an essential part of the cost of the fund's business operations (thereby satisfying the second limb of the section as contained in paragraph 8-1(1)(b)).

6A. Expenditure that is deductible under section 25-5 does not need to be apportioned to the extent the fund gains or produces non-assessable income.

8. Paragraph 7

Omit the paragraph; substitute:

7. The correct method for apportioning expenditure between assessable income and non-assessable income depends on the particular circumstances of the case. If there is a single outlay in respect of a thing or service, only part of which is used for gaining or producing assessable income, then the following principles apply:

(1) if a distinct and severable part of the thing or service is devoted to gaining or producing assessable income and part is not, the expenditure can be apportioned according to the ratio of those parts; and

(2) if an outlay serves both objects indifferently, another method must be used to apportion the expenditure which gives a fair and reasonable assessment of the extent to which it relates to assessable income.

7A. Where possible a superannuation fund should apportion its expenditure by way of the distinct and severable method outlined at subparagraph 7(1).

9. Paragraphs 8 to 9

Omit the paragraphs; substitute:

8. In situations where the outlay serves both objects indifferently, it is not possible to prescribe a single method for apportioning expenditure of a superannuation fund so as to give a fair and reasonable assessment of the extent to which the outlay relates to assessable income since each case depends on its own facts. The following methods of apportionment as shown in subparagraphs

[2] For the purposes of this Ruling, the term 'non-assessable income' refers to an amount that section 6-15 provides is not assessable income.

8(1) and 8(2) below are two approaches which are generally accepted as fair and reasonable methods for apportioning the part of a superannuation fund's expenditure which is not divisible into two distinct and severable parts, one devoted to gaining assessable income and one devoted to producing non-assessable income. However, it must be emphasised that these are not the only methods of apportionment which can be used (see, for example, paragraphs 8A and 8B). Other methods are acceptable provided it can be demonstrated that they give a fair and reasonable assessment of the extent to which the outlay relates to assessable income. The two generally accepted methods of apportionment are:

(1) non-capital expenditure incurred in gaining or producing investment income only (for example, investment manager fees) can generally be apportioned according to the formula:

$$\text{Expenditure} \times \frac{\text{Assessable investment income}}{\text{Total investment income}}$$

where **Assessable investment income** for apportionment purposes includes ordinary and statutory income (other than exempt current pension income) received from investments, such as:

- net capital gains (section 102-5); and
- imputation credits (section 207-5);

and also income from the following investments, which is ordinarily non-assessable income of complying superannuation funds:

- units in a pooled superannuation trust
- life insurance policies issued by a life insurance company
- an interest in a trust whose assets consist only of life insurance policies issued by a life insurance company

and **Total investment income** means assessable investment income (as above) plus non-assessable investment income[3], and

(2) general administrative expenses relevant to the operation of the fund as a whole can generally be apportioned according to the formula:

$$\text{General administrative expenses} \times \frac{\text{Assessable income}}{\text{Total income}}$$

where **Assessable income** for apportionment purposes includes (but is not limited to):

- all contributions to the fund, including, for superannuation funds to which section 295-95 applies, those contributions that are not included in the fund's assessable income under Subdivision 295-C (see subsection 295-95(1)), and
- assessable investment income (as discussed above).

[3] For the purposes of this Ruling, the term 'non-assessable investment income' refers to an amount of investment income which is either exempt income or non-assessable non-exempt income.

and **Total income** means assessable income plus exempt income and non-assessable non-exempt income.

8A. Under section 295-390, a superannuation fund with current pension liabilities that does not segregate its assets will usually be required to obtain an actuary's certificate to determine the proportion of its income that is exempt from income tax (subject to certain exceptions). In these circumstances, it may be fair and reasonable for the fund to use the exempt income percentage from the actuary's certificate as an alternative method to the methods outlined in subparagraphs 8(1) and 8(2) to determine the deductible portion of expenses that cannot be divided into distinct and severable parts.

8B. The deductible portion of the fund's expenses using the actuary's certificate is calculated as follows:

Expenses x 'assessable income %'

where 'assessable income %' is:

100% – exempt income % (as certified on actuary's certificate).

8C. Where, in respect of a particular type of expenditure, a superannuation fund elects to use a particular method of apportionment, it would be expected that such method would be used consistently over time for that type of expenditure unless there were specific reasons for departure in a given year, and that any decision to change to another method would be applied consistently into the future. Where the method of apportionment for a particular type of expenditure is changed several times over a small number of years, it may bring into question the appropriateness of the methodology being used in each of those years.

9. Superannuation funds to which section 295-95 applies can claim a deduction for expenses incurred in obtaining contributions whether or not the full amount of those contributions is included in the superannuation fund's assessable income under Subdivision 295-C. No apportionment is necessary for non-capital expenditure incurred solely in gaining contributions made to the fund.

9A. A roll-over superannuation benefit (other than an amount transferred from one superannuation interest in a superannuation plan to another superannuation interest in the same plan) is, for the purposes of subsection 295-95(1), a contribution made to the complying superannuation plan to which that benefit is paid.

9B. However, an expense that is incurred partly in obtaining contributions (including those that would not be assessable income under Subdivision 295-C) and/or gaining or producing assessable income and partly in gaining other non-assessable income (including exempt income) will need to be apportioned.

Example 1 – an acceptable method of apportionment

9C. *A public offer superannuation fund that is a complying superannuation fund receives or derives the following amounts in an income year:*

Assessable contributions	$120 million
Non-assessable contributions	$ 20 million

Assessable investment income	$140 million
Exempt current pension income	$ 70 million
Total	$350 million

9D. *The fund incurs wages expenses for administrative staff engaged in processing contributions and roll-over superannuation benefits for new and existing members, processing benefit payments and pension payments, and processing switching requests. The total of those expenses in the income year is $10 million.*

9E. *There is no distinct or severable part of the wages expense that is devoted to either gaining or producing the fund's assessable income (including the obtaining of contributions) or gaining or producing the fund's non-assessable income. The expense serves both of those objects indifferently.*

9F. *The trustees of the fund have chosen to use the formula at subparagraph 8(2) to make an assessment of the extent to which the $10 million wages expenses relate to gaining or producing the fund's assessable income, as follows:*

$$\$10 \text{ million} \times \frac{\$280 \text{ million}}{\$350 \text{ million}}$$

9G. *The fund includes the $20 million of non-assessable contributions in the 'assessable income' numerator in the formula (as well as in the 'total income' denominator). This is because the wages expenses were incurred to an extent in obtaining contributions made to the fund. By operation of subsection 295-95(1), the fund includes the non-assessable contributions in the formula as if they were assessable income for the purposes of determining the proportion of wages expenses allowable as an income tax deduction.*

9H. *The resulting apportionment of the $10 million, where $8 million (80%) is calculated to be deductible, is, in the circumstances, a fair and reasonable assessment.*

Example 2 – not an acceptable method of apportionment

9I. *In the next income year there is a merger that involves $6 billion in roll-over superannuation benefits being transferred into the fund. The fund also received or derived the following amounts in that next income year:*

Assessable contributions	$360 million
Non-assessable contributions	$ 50 million
Assessable investment income	$180 million
Exempt current pension income	$ 90 million
Total	$680 million

9J. *As a result of the merger the fund received or derived a total of $6.68 billion ($6 billion roll-over superannuation benefits plus $680 million contributions and income) in that income year.*

9K. *Because of the merger, the fund employed some additional administrative staff during the year and the relevant wages expenses increased to $15 million (from the $10 million as per Example 1). No information is available to indicate what particular activities led to the increase in expenditure of $5 million. In this example, should the fund choose to employ the formula at subparagraph 8(2) again and include the amount of roll-over superannuation benefits received as a result of the merger in the formula, this would result in an apportionment of the $15 million wages expenses as $14.8 million, or 98.65% (as compared to 80% in the previous year), incurred in gaining or producing the fund's assessable income.*

9L. *The addition into the formula of the significant and extraordinary amounts gained by the fund as a result of the merger distorts the assessment of the deductible amount – because the recurring wages expenses ($10 million) were not applied to any significantly greater extent in obtaining contributions as a consequence of the merger when compared to the prior year. The resulting apportionment would not adequately represent how the total relevant wages expenses would be applied in practical terms within the fund, and would effectively suggest only 1.35% of such expenses bear a relationship to current pension liabilities. On balance, this is not considered a fair and reasonable result.*

9M. *The concept of what is fair and reasonable is not one which can be narrowed down to one specific equation. Instead, a number of factors may need to be taken into account and the result must give a balanced view which appropriately reflects the application of the underlying expense being incurred.*

9N. *If the roll-over superannuation benefits received by the fund from the merging fund during the relevant income year were excluded from the numerator and denominator, use of the formula at subparagraph 8(2) (as modified) would in the Commissioner's opinion, yield a fair and reasonable assessment of the extent to which the relevant wages expenses relate to gaining or producing the fund's assessable income. That is:*

$$\$15 \text{ million} \quad \times \quad \frac{\$590 \text{ million}}{\$680 \text{ million}}$$

would result in an apportionment of the $15 million of the wages expenses where, $13 million (approximately 86.76%) is allowable as an income tax deduction.[4]

9O. *Alternatively, the fund may choose another method of apportionment, (such as one that incorporates into the above formula a portion of the roll over superannuation benefits it received), provided that such a method gives a fair and reasonable assessment in the circumstances. For example, the fund may choose to further analyse the extent to which the additional $5 million in wages expenses was incurred in obtaining and processing the rollover contributions and whether it is fair and reasonable to make further adjustments to the formula to take this into account.*

[4] Adjusting the formula in this way is not restricted to the facts in this example but may also be appropriate in other situations where a superannuation fund gains significant and extraordinary income amounts that distort the deductible portion of a particular expense (e.g. some MySuper or Accrued Default Amount transfers).

Example 3 – acceptable method of apportionment involving a service provider

9P. *A large complying superannuation fund outsources all of its administrative functions to a related third party service provider dealing on an arm's length commercial basis. Under the agreement between the parties, the service provider charges a specified annual fee for providing those services. The service provider accordingly bears the risk of any operating loss incurred where the cost of providing the service is more than the specified annual fee received from the fund.*

9Q. *In determining the deductibility of the fee, regard must always be had to the substance of the agreement between the fund and the service provider. In this case, the agreement between the fund and the service provider indicates that the fee to be paid by the fund is an undifferentiated sum that is not calculated according to the costs of each particular service provided. It is therefore not possible for the fee to be divided into any distinct and severable parts that are wholly, of themselves, devoted to gaining either assessable or non-assessable income.*

9R. *Therefore, the fund may choose a method of apportioning the fee that provides a fair and reasonable assessment of the extent to which the fee relates to the assessable and non-assessable income of the fund. The fund could use the method of apportionment outlined at subparagraph 8(2) of this Ruling provided it was fair and reasonable in the particular circumstances.*

Example 4 – expense of a capital nature (creating a new in-house reporting system)

9S. *A large superannuation fund outsources its administration to an external party on an arm's length commercial basis and for a set and undifferentiated fee of $100,000 per annum. As a result of a change in legislation, the fund identifies the need to have a completely new reporting system in order to provide information to the Regulator in the form required.*

9T. *The fund approaches the external party and for a fee of $350,000 the external party undertakes to build a new reporting system for the fund. The fund will own the completed system.*

9U. *In this instance the fund will be able to treat the $100,000 fee as an administration expense and claim an income tax deduction to the extent it relates to the fund's assessable income. The fund may apportion the fee using a fair and reasonable method, including the method outlined at subparagraph 8(2) of this Ruling.*

9V. *Conversely, the expenditure of $350,000 is made in order to acquire a new reporting system. Although the expense arises as a result of a change in legislation, it also creates a new asset (that is, the new system) and is capital in nature. As such, the $350,000 is not tax deductible to the fund under section 8-1.*

9W. *Depending on the circumstances, the new reporting system may be a depreciating asset and the fund may be entitled to a deduction over a period of years under Division 40.*

Example 5 – expense of a revenue nature (enhancing an existing in-house reporting system)

9X. *A superannuation fund offering transition to retirement income streams has its own in-house administration system. As a result of a change in legislation relating to the calculation of exempt current pension income, the fund identifies the need to update its system in order for it to be able to perform new calculations.*

9Y. *For a fee of $10,000 an external service provider undertakes to update the fund's current administration system with new programming.*

9Z. *In this instance the expenditure of the $10,000 is incurred to enhance an existing system to be used by the fund as a means of adapting to a legislative change. In this case, no new asset or capital advantage has been created, and the fund can claim an income tax deduction to the extent the $10,000 fee relates to the fund's assessable income. The fund may apportion the fee using a fair and reasonable method including the method outlined at subparagraph 8(2) of this Ruling.*

Example 6 – expense of a revenue nature (additional services received from external provider)

9ZA. *A superannuation fund outsources its administration to an external party on an arm's length commercial basis for a set and undifferentiated fee of $100,000 per annum. The fund decides to expand the range of its product offerings, and approaches the external party about the systems necessary to support the new range.*

9ZB. *The external party undertakes to build a new system at its own expense, estimated to be $700,000. The external party will administer the new system on behalf of the fund as part of its ongoing administration service.*

9ZC. *Because it is now providing additional recurring services to the fund, the external party negotiates an increased fee of $115,000 per annum. The external party owns the new system and the intellectual property associated with it.*

9ZD. *In this instance the $115,000 is an undifferentiated sum for administrative services that is not calculated according to the costs of each particular service provided. Hence the fund can claim an income tax deduction to the extent the $115,000 fee relates to the fund's assessable income. The fund may apportion the fee using a fair and reasonable method including the method outlined at subparagraph 8(2) of this Ruling.*

10. Paragraph 10

Omit the paragraph; substitute:

10. This Ruling applies to years commencing both before and after its date of issue.

10A. However, the Commissioner understands that there are current practices in relation to the treatment of administrative expenses incurred as a result of a merger that derive from views that are different from those expressed in new paragraphs of this Ruling. The Commissioner does not propose to allocate compliance resources to examine the treatment of administrative expenses incurred as a result of a

merger that took place prior to or during the financial year ended 30 June 2016 (or equivalent substituted accounting period)**.**

10B. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

11. Paragraph 11

Omit the last sentence; substitute 'However, the subsection disallows expenditure of capital or of a capital, private or domestic nature or expenditure incurred in gaining or producing exempt or non-assessable non-exempt income.'

12. Paragraph 13

Omit the paragraph; substitute:

13. A superannuation fund has as its sole purpose the provision of benefits to members on retirement or attainment of a certain age, or the provision of benefits to dependants on the death of a member (commonly referred to as the 'sole purpose test'). Therefore, superannuation funds that, for example, undertake speculative activities or carry on an active business such as operating a retail shop, motel or primary production business may be in breach of the sole purpose test or other regulatory provisions[5]. The regular activities of a superannuation fund in holding shares and other investments and from time to time realising them may, in some cases, amount to the carrying on of a business (cf. *FC of T v. Radnor Pty Ltd* 91 ATC 4689; (1991) 22 ATR 344).

13. Paragraphs 15 and 17

Omit 'subsection'; substitute 'section'.

14. Paragraph 16

After the words 'such a business may' insert 'also'.

15. Paragraph 20

(a) Omit the first sentence; substitute 'In the *Ronpibon Tin* case, the High Court said (78 CLR at 56; 8 ATD at 435):'.

(b) After the paragraph; insert:

20A. Expenses connected with establishing, enlarging or replacing the income yielding structure of an entity are generally not deductible under section 8-1 (*Sun*

[5] The regulatory rules that govern SMSFs do not directly prohibit them from carrying on a business. If an SMSF is considering carrying on a business it must first ensure that such activities are allowed under its trust deed and do not contravene any of the regulatory provisions, and that the fund's operation is for the sole purpose of providing retirement (or death) benefits for its members. Where appropriate, trustees should seek advice on this issue.

Newspapers Ltd v. FC of T (1938) 61 CLR 337; 5 ATD 87).[6] These expenses do not come within the positive limbs of section 8-1 (as contained in subsection 8-1(1)) because they lack the necessary connection with, and relevance to, producing income to bear the character of operating, working or business expenses or to have the character of income-producing expenses. The expenses are, in any event, excluded by subsection 8-1(2) because they are capital expenses or expenses of a capital nature.[7]

20B. On the other hand, expenses incurred in carrying out the income-earning operations of an entity, including making changes to the internal organisation or day to day running of an entity, are not considered to be capital in nature provided such changes do not result in an advantage of a lasting character (*Sun Newspapers*, (1938) 61 CLR at 359; *Foley Brothers Pty Ltd v. FC of T* (1965) 13 ATD 562 at 563; *Commissioners of Inland Revenue v. Carron Company* (1968) 45 TC 18).

16. Paragraph 21

After 'see also *Ronpibon Tin*'; insert '78 CLR at 58'.

17. Paragraph 23

Omit the paragraph; substitute:

23. In relation to other types of expenses of a superannuation fund:

(a) section 25-5 enables a deduction for an expense to the extent that it is for managing your tax affairs or complying with an obligation imposed on you by a Commonwealth law, insofar as that obligation relates to the tax affairs of an entity. Section 25-5 is a specific deduction provision as defined in section 8-5. If an expense is deductible under a specific deduction provision, then the wording of that provision will determine the rules for deducting the particular expense. Unlike section 8-1, section 25-5 does not require a connection between the expense and the gaining or producing of an entity's assessable income. Therefore, an expense that is deductible under section 25-5 does not need to be apportioned on account of the fund gaining or producing non-assessable income

(b) [Deleted]

(c) up-front fees incurred in investing money are of a capital nature and therefore not deductible under section 8-1 (see Taxation Ruling IT 5);

(d) non-capital expenditure incurred by a complying superannuation fund in investing in:

[6] Although the case considered paragraph 23(1)(a) of the *Income Tax Assessment Act 1922*, section 8-1 expresses the relevant concept.

[7] Deductions may be allowable to a superannuation fund under section 40-880 in respect of business related capital expenditure if the operations of the fund amount to carrying on a business. Refer to Taxation Ruling TR 2011/6 *Income tax: business related capital expenditure - section 40-880 of the Income Tax Assessment Act 1997 core issues*.

- units in a pooled superannuation trust;
- life insurance policies issued by a life insurance company; and
- an interest in a trust whose assets consist only of life insurance policies issued by a life insurance company;

are, subject to the exceptions outlined below, deductible under section 8-1 (subsection 295-100(1));

(da) however, a complying superannuation fund cannot deduct (otherwise than under section 295-465, dealing with deductions for insurance premiums) an amount for fees or charges incurred for complying superannuation life insurance policies[8], exempt life insurance policies or units in a pooled superannuation trust that are segregated current pension assets of the fund (subsection 295-100(2));

(e) the costs incurred by a trustee of a superannuation fund in:

- establishing a trust (*Sun Newspapers*); or
- executing a new deed for an existing fund (*Fanmac Ltd v. FC of T* 91 ATC 4703 at 4709); or
- amending the fund's trust deed to enlarge or significantly alter the structure or function of the fund (*Sun Newspapers*; *Foley Brothers*);

are, as a general rule, not deductible because they are expenses of a capital nature.[9];

(ea) however, costs associated with amending trust deeds will be deductible if the amendments simply make the administration of the fund more efficient and do not amount to a restructuring of the fund. That is, amendments of a trust deed which:

- facilitate day to day operations of a fund; and/or
- improve its ability to compete in the superannuation fund market;

are not of a capital nature where no new tangible or intangible asset is acquired or no new branch of the fund's existing operations is created (*Commissioners of Inland Revenue v. Carron Company* (1968) 45 TC 18; *FC of T v. Consolidated Fertilisers Ltd* 91 ATC 4677; (1991) 22 ATR 281).

(eb) these indicators of whether trust deed expenditure is capital or revenue in nature also apply to trust deed amendments that are in response to law changes relating to regulatory provisions. The fact that a trust deed is amended to reflect a change in regulatory law is

[8] Prior to 1 July 2015, the exclusion in paragraph 295-100(2)(a) referred to 'complying superannuation/FHSA life insurance policies', where 'FHSA' related to first home saver accounts.

[9] Deductions may be allowable to a superannuation fund under section 40-880 in respect of business related capital expenditure if the operations of the fund amount to carrying on a business. Refer to Taxation Ruling TR 2011/6 Income tax: *business related capital expenditure - section 40-880 of the Income Tax Assessment Act 1997 core issues*

a relevant factor that counts towards an assessment that the change is on revenue account. However, an amendment that is made in response to a regulatory law change which results in enduring changes to the superannuation fund's structure or function or creates a new asset, whether tangible or intangible, is capital in nature and the costs associated with the amendment are not deductible under section 8-1.

18. Paragraph 24

Omit the paragraph; substitute:

24. The assessable income of a superannuation fund to which subsection 295-95(1) applies is taken to include, for the purpose of determining the deductions allowable from the assessable income, all contributions made to the fund including those contributions that are not actually included in the assessable income of the fund under Subdivision 295-C (subsection 295-95(1)).

24A. The purpose of subsection 295-95(1) is to ensure that the receipt of non-assessable contributions does not reduce the extent to which a superannuation fund can deduct an expense incurred in obtaining contributions[10] (including a single contribution that has both an assessable and non-assessable portion).

24B. The term 'contribution' is not defined in the ITAA 1997. It has its ordinary meaning, having regard to the context and purpose of the provision in which it appears.

24C. Among other things, Taxation Ruling TR 2010/1 *Income tax: superannuation contributions* sets out the Commissioner's view on the ordinary meaning of the word 'contribution' in so far as it is used in relation to a superannuation fund, approved deposit fund or retirement savings account in the ITAA 1997. Paragraph 4 of the Ruling relevantly provides:

> In the superannuation context, a contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

24D. TR 2010/1 goes on to conclude at paragraph 17 that a roll-over superannuation benefit (other than an amount transferred from one superannuation interest in a superannuation plan to another superannuation interest in the same plan) is a contribution as 'it increases the capital of the fund in the same way as any other transfer of funds or assets and is made to obtain superannuation benefits for a particular individual'.

19. Paragraph 25

Omit the paragraph; substitute:

25. On the other hand, income from assets which, when the income is derived, are segregated current pension assets (section 295-385) is exempt from tax. An

[10] See note 1 to subsection 295-95(1) and paragraphs 3.40 and 3.85 of the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006.

exemption is also provided for complying superannuation funds calculated by reference to unsegregated current pension liabilities (section 295-390).

20. Paragraph 26

Omit the word ‘exempt’; substitute ‘non-assessable’.

21. Paragraph 27

Omit the paragraph; substitute:

27. Each of the amounts referred to in paragraph 25 is therefore non-assessable income for the purpose of apportionment, and so such amounts are not included in the numerator but are included in the denominator in the formulae at subparagraphs 8(1) and 8(2).

22. Paragraph 28

After the paragraph; insert:

29. Example 3 beginning at paragraph 9P illustrates how an apportionment method may be available in a situation of a service provider which deals with a fund on an arm’s length commercial basis, including bearing the risk of any loss resulting from such an arrangement.

30. In determining whether or not a service provider bears the risk of loss, regard may be had to the type of fee structure and its consistency from year to year. For example, where a service provider charges a steady annual fee based on 1.5% of funds under management, it would seem to support a view that the service provider bears the risk of the service arrangement.

31. In contrast, such a conclusion would not be drawn as readily from a situation in which a service provider charges a fee of 1.5% of funds under management in one year, 2.5% in the following year and 2% in the next, as such fluctuations may be due to the service provider recouping identifiable costs from the current or earlier years. In such circumstances, further examination may be necessary to ascertain the nature of the fee structure and whether it is truly an undifferentiated sum.

32. Example 3 is not intended to provide a blanket approach to the treatment of administrative expenses by a fund when it outsources its administration.

33. A fund is not required to ‘look through’ the fee charged in situations similar to those in Example 3. That is, where a fund’s fee structure is consistent and undifferentiated and the service provider operates at arm’s length, a fund could apportion such a fee using the formula at subparagraph 8(2), provided it is fair and reasonable in the particular circumstances.

34. However, a fund would be required to ‘look through’ an increased fee or separate charge that is directly attributable to and designed to recoup particular expenditure. Such an expense is considered to be distinct and severable, and the fund must determine whether (and to what extent) that separate fee or component is deductible.

35. Consideration also needs to be given to what the fund gains from paying the increased fee or separate charge rather than what the service provider gained from incurring the particular expense, provided that the arrangement is on an arm's length commercial basis. If an expense was capital in the hands of the service provider, it does not necessarily follow that in all cases the fee charged to the fund to contribute towards recouping that expense is also capital in the hands of the fund.

36. The extent to which an increased fee or separate charge is incurred in gaining or producing the fund's income and meets the overall general deduction requirements will depend on the facts of each case.

23. Paragraph 36:

After the paragraph, omit the NOTE; substitute:

NOTE 1: Sections 6-20, 8-1 and 25-5, to which this Ruling refers, express the same ideas as subsection 6(1) (in relation to 'exempt income'), former subsection 51(1) and former section 69, respectively, of the *Income Tax Assessment Act 1936.*

NOTE 2: From 1 July 2017, the application of sections 295-385 and 295-390 will no longer be tested in relation to all types of superannuation income stream benefits, but instead such consideration will be limited to 'retirement phase superannuation income stream benefits' (as defined in section 307-75).

Consequently, depending on all relevant circumstances, there may be changes to the taxation treatment of income derived from certain assets – and the apportionment and deductibility of associated expenses – including those assets which support transition to retirement income streams and pensions, and those which support 'deferred superannuation income streams' (as defined in the *Superannuation Industry (Supervision) Regulations 1994*) [refer subsection 307-80].

On a similar point, from 1 July 2017, section 295-385 will not apply to income from 'disregarded small fund assets' (as defined in section 295-387) [refer subsection 295-385(7)].

24. Reference section

Omit the section; substitute:

ISSN 1039 – 0731

ATO references

NO 90/9759-7

Previously released in draft form as EDR 77

FOI index detail

Reference number:

- I 1013750

Related rulings/determinations

- IT 5; TR 2006/10; TR 2010/1; TR 2011/6

Legislative references:

- ITAA 1922 23(1)(a)
- ITAA 1936 6(1)
- ITAA 1936 51(1)
- ITAA 1936 69
- ITAA 1997 6-15
- ITAA 1997 6-20
- ITAA 1997 8-1
- ITAA 1997 8-1(1)
- ITAA 1997 8-1(1)(a)
- ITAA 1997 8-1(1)(b)
- ITAA 1997 8-1(2)
- ITAA 1997 8-5

- ITAA 1997 25-5
- ITAA 1997 26-5
- ITAA 1997 40-880
- ITAA 1997 102-5
- ITAA 1997 207-5
- ITAA 1997 295-95
- ITAA 1997 295-95(1)
- ITAA 1997 295-95(1) Note 1
- ITAA 1997 295-100
- ITAA 1997 295-100(1)
- ITAA 1997 295-100(2)
- ITAA 1997 295-100(2)(a)
- ITAA 1997 Subdiv 295-C
- ITAA 1997 Subdiv 295-F
- ITAA 1997 295-385
- ITAA 1997 295-385(7)
- ITAA 1997 295-387
- ITAA 1997 295-390
- ITAA 1997 295-465
- ITAA 1997 307-75
- ITAA 1997 307-80
- SISA 1993 38A
- SISR 1994
- TAA 1953

Case references:

- Charles v. FC of T (1954) 90 CLR 598; 6 AITR 85
- Commissioners of Inland Revenue v. Carron Company (1968) 45 TC 18
- Fanmac Ltd v. FC of T 91 ATC 4703
- FC of T v. Consolidated Fertilisers Ltd 91 ATC 4677; (1991) 22 ATR 281
- FC of T v. Green (1950) 81 CLR 313; 4 AITR 471
- Fletcher & Ors v. FC of T 91 ATC 4950; (1991) 22 ATR 613
- FC of T v. Radnor Pty Ltd 91 ATC 4689; (1991) 22 ATR 344
- Foley Brothers Pty Ltd v. FC of T (1965) 13 ATD 562
- Kirkman v. Booth (1848) 11 Beav 273; 50 ER 821
- London Australia Investment Co Ltd v. FC of T (1977) 138 CLR 106; 77 ATC 4398; 7 ATR 757
- Ronpibon Tin NL & Tongkah Compound NL v. FC of T (1949) 78 CLR 47; 4 AITR 236; 8 ATD 431
- Sun Newspapers Ltd v. FC of T (1938) 61 CLR 337; 5 ATD 87

Other references

- Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 – paragraphs 3.40 and 3.85

This Addendum applies to years commencing both before and after its date of issue.

Commissioner of Taxation
17 May 2017

ATO references
NO: 1-A9OUCYA
ISSN: 2205-6211
BSL: TCN

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