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General Manager
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: superamendments@treasury.gov.au

Dear Sir/Madam,

TAX CERTAINTY FOR DECEASED ESTATES

Thank you for the opportunity to comment on the exposure draft of the *Income Tax Assessment Amendment Regulation* that will give effect to the Government's announced measure to allow the income tax exemption in respect of earnings on assets that were supporting a pension to continue for a limited period following the death of the pensioner.

The Association of Superannuation Funds of Australia (ASFA) is supportive of the Government's efforts to remove the uncertainty over the eligibility for the exemption following the death of the pensioner. Our comments are confined to two specific matters:

- Periods prior to the 2012-13 tax year
- Multiple payments, and

We would also like to take the opportunity to draw to your attention the following area of uncertainty which we consider should be addressed as part of this measure:

- Applicability to benefits tax

ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds (SMSFs) and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

GENERAL COMMENTS

ASFA notes that the regulations, once made, will give effect to the Government's measure, announced in the 2012-13 MYEFO, to provide tax certainty to the beneficiaries of deceased estates.

Investment earnings derived by superannuation funds from assets supporting pensions are exempt from tax. Upon the death of the pensioner, the standard practice in the superannuation industry has been to treat the pension as being 'on foot' until the final distribution of benefits to dependents or the pensioner's estate. Since the release by the Australian Taxation Office (ATO) in 2011 of a draft ruling which, in part, aimed to clarify when, for fund taxation purposes, a pension was considered to have ceased, there has been uncertainty over eligibility for this exemption following the death of a pensioner member.

Whilst strongly supporting the Government's MYEFO announcement, and pleased with the rapid progress being made in implementing the measure, we note that the law will only be amended with respect to the 2012-13 and later income years. We have addressed this issue, and some others, below.

SPECIFIC COMMENTS

Periods prior to the 2012-13 tax year

As drafted, the provisions will apply to the 2012-13 and later years of income. This leaves uncertainty with respect to early tax years. Most superannuation funds have interpreted the legislation on the basis that a pension is not considered to have been terminated until the final pension payment is made and the residual benefit paid out and, as such, the tax exemption continues until this time.

ASFA requests that either the commencement date for the amendment be adjusted such that it covers the four year tax assessment review period or the ATO make a statement that it will not revisit income tax assessments for earlier periods. That is, the basis on which funds have self assessed their tax liability for earlier periods will remain undisturbed.

Recommendation:

That the commencement date be changed to cover the four year tax assessment review period; or

That the ATO indicate it is not going to deny tax exemptions claimed for periods prior to 1 July 2012 in situations where the benefits were paid as soon as practicable.

Multiple payments

The use of the singular 'payment' may cause some confusion to some readers of the law. ASFA's view is that the *Acts Interpretation Act* provides grounds for a view that the exemption applies irrespective of whether the final distribution is made by way of a single or multiple payments.

If our view is correct then ASFA requests that the Explanatory Statement be amended to address this issue. This could be done by specifically addressing a broad range of situations such as where:

- There is more than one beneficiary
- A single beneficiary receives both a lump sum and a pension
- A single beneficiary receives two lump sums (such as an interim death benefit and a final (residual) payment)

Should our view not be correct then ASFA requests the draft regulations be amended to cover situations where the death benefits are paid by way of multiple payments.

Recommendation:

ASFA recommends that either:

- the Explanatory Material be expanded to include examples of multiple payment which would result in the exemption continuing until the final payment in respect of the pension has been made (provided the payments were made as soon as practical), or

- the draft regulations be amended to cover situations where the death benefits are paid by way of multiple payments

ADDITIONAL MATTER

Applicability to benefit tax

The draft amending regulations only apply to the application of tax payable by the superannuation fund. This raises the question of the tax treatment of benefits paid to the beneficiaries. Specifically, is the tax free component of a death benefit paid to a beneficiary to be based on the tax free proportion of the original pension or is the tax free component to be crystallised as at the date of death? If it is to be crystallised as at the date of death this would result in the need for significant changes to existing administration systems.

Recommendation:

ASFA recommends that, if necessary, the amending regulations be extended to make clear that the tax free component of the death benefit is to be based on the pension's tax free component at inception or, if otherwise, clarity be provided by way of a note in the explanatory material.

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If you have any queries or comments regarding the contents of our submission, please contact Robert Hodge on (02) 8079 0806 or via e-mail rhodge@superannuation.asn.au.

Yours sincerely
Fiona Galbraith



Director Policy