SUBMISSION

Submission to ATO – TR 2013/5DC1 – Income tax: when a superannuation income stream commences and ceases

10 November 2023

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Mr Scott Sargent

Australian Taxation Office

Via email: pagseo@ato.gov.au

10 November 2023

Dear Mr Sargent

TR 2013/5DC1 – Income tax: when a superannuation income stream commences and ceases

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to proposed updates to TR 2013/5 released for consultation on 27 September 2023 as TR 2013/5DC1 (the revised TR).

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $3.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

Summary of ATO proposed view in relation to SFTs

The revised TR provides that, in relation to a successor fund transfer (SFT), the superannuation income stream from the original fund ceases at the time of the transfer to the successor fund, and a new superannuation income stream commences to be paid by the successor fund (see proposed paragraphs 28A to 28C, example 7 and proposed paragraphs 120A to 120E).

Further, the transfer results in an involuntary roll-over superannuation benefit to the successor fund in respect of each member (section 306-12 of the *Income Tax Assessment Act 1997*).

Implications of this ATO view

The ATO view in the revised TR triggers various reporting obligations for both the closing and ongoing superannuation funds under the Member Account Transaction Service (MATS) and Member Account Attribution Service (MAAS). These include reporting of:

- the commutation of the existing income stream by the closing fund; and
- the commencement of the new income stream by the ongoing fund.

Subject to the two funds carefully monitoring the quantum of income streams paid in the period up to the SFT date and after the SFT date, the ATO view may also result in issues in relation to the minimum pension requirements.

ASFA submission

ASFA notes and welcomes the Government's announcement on 26 October 2023, which seeks to address the specific negative consequences that may flow from the ATO view in relation to defined benefit income streams. ASFA looks forward to working with Treasury and the ATO on any practical aspects once proposed legislation for this announcement is released.

ASFA notes that this legislation may have implications for some of the comments in the revised TR. In order to ensure consistency, we suggest that the ATO defers finalisation of the revised TR until the approach adopted in this proposed legislation is known.

More broadly, ASFA submits that the ATO view in the revised TR is difficult to reconcile with the relevant SFT provisions in the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation Industry (Supervision) Regulations 1994* (SIS). Those provisions allow for the transfer of a member's interest in a superannuation fund without the member's consent, but do not allow for the commutation of an income stream being paid to a member without the member's consent.

Two possible interpretations of the operation of the SFT provisions appear open:

- there is no power to transfer an income stream member as part of an SFT, and thus consent would be required from each and every income stream member (to allow the commutation of his or her commutation) as part of the implementation of an SFT; or
- the relevant income streams do not cease and recommence.

ASFA submits that the first of these interpretations would render most large SFTs unworkable. Further, the second interpretation gives rise to significant uncertainty as to the tax treatment of amounts paid by the closing fund to the ongoing fund in an SFT that reflect the value of an income stream member's liabilities.

In light of this, ASFA considers that the ATO view as expressed in the revised TR represents an appropriate compromise. However, ASFA submits that, as part of finalising the revised TR, the ATO should liaise with APRA to provide broader guidance to the industry that better reconciles the SIS provisions and the tax legislation. This guidance could, for example, make clear that APRA considers that the member's income stream in the closing fund can cease (or be commuted) without the member's consent in the context of an SFT.

Based on acceptance of the views expressed in relation to SFTs in the revised TR, ASFA recommends that the ATO provides additional commentary in the revised TR or in other guidance issued at the same time as the revised TR that:

a) Specifically notes the additional reporting and minimum pension implications that arise from the ATO view; and

b) Provides administrative relief (in the SFT protocol or similar) that:

  - relieves the closing fund and ongoing fund from any redundant elements of this reporting (while the reporting of the member's closure of account in the closing fund and opening of account in the ongoing fund is important and valuable to the member, the reporting of the 'commutation value' by the closing fund and the 'commencement value' by the ongoing fund would appear redundant); and

- for retirement phase income streams, ensures that where the combined income stream payments made by the two funds in the year in which the SFT occurs exceeds the minimum pension requirement had the closing fund continued to exist until year-end, both the closing fund and the ongoing fund will be entitled to treat the income streams as retirement phase income streams for the purposes of their respective exempt current pension income calculations for the period up to the SFT date (for the closing fund) and for the period from the SFT date to the ongoing fund's year-end (for the ongoing fund).

ASFA submits that such relief is appropriate, in that it would remove unnecessary compliance costs (and potential income tax liabilities) for funds and fund members.

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If you have any queries or comments in relation to the content of our submission, please contact Julia Stannard, Senior Policy Advisor, on (02 8079 0819 or by email JStannard@superannuation.asn.au.

Yours sincerely

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