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Superannuation technical minutes, June 2011



6.2 Excess contributions tax: payments from superannuation funds

Raised

1. Excess contributions tax: is a payment of excess contributions tax from a superannuation fund considered to be the payment of a superannuation benefit for the purposes of:
 - SISR 6.22A - 'Priority in cashing benefits in certain cases - regulated superannuation fund'; and
 - section 307-5 of the ITAA 1997 (necessitating the application of the proportioning rule in s 307-125 of ITAA 1997)?
2. If the payment is considered to be the payment of a superannuation benefit for the purposes of the ITAA 1997, is there a mechanism to ensure that the payment does not also form part of the recipient's assessable income (per division 301)?

Background information

Schedule 1 of the SISR provides the 'Conditions of release of benefits' for regulated superannuation funds. Item 112 of column 1 of this schedule provides the mechanism to allow for payments of excess contributions tax to be made from superannuation balances.

SISR 6.22A provides a cashing order for benefit payments in cases where the cashing restriction in Schedule 1 of the SISR is anything other than a 'nil' restriction (as is the case for excess contributions tax payments). The trustee of the superannuation fund must give priority to benefits in the following order:

- first - to unrestricted non-preserved benefits;
- second - to restricted non-preserved benefits;
- third - to preserved benefits.

Section 307-5 of the ITAA 1997 defines superannuation benefits. Item 1 of column 2 of the table in section 307-5 provides that a superannuation fund payment is a superannuation member benefit if it is a payment to you from a superannuation fund because you are a fund member.

Section 307-10 of the ITAA 1997 outlines payments that a not superannuation benefits.

Section 307-15 of the ITAA 1997 applies for the purposes of:

- a. determining whether a payment is a superannuation benefit; and
- b. determining whether a superannuation benefit is made to you, or received by you.

Section 307-15(2) states that a payment is treated as being made to you, or received by you, if it is made:

- a. for your benefit; or
- b. to another person or entity at your directions or request.

Section 307-120 of the ITAA 1997 provides that the tax free and taxable components of a superannuation benefit must be calculated. Section 307-120(2)(a) states that these components must be worked out under section 307-125 (the 'proportioning' rule).

Industry view / suggested treatment

In our view, the payment of excess contributions tax from a superannuation fund should not constitute a benefit payment for either the purposes of SISR 6.22A or section 307-5 of the ITAA 1997.

Rather, the inclusion of a condition of release in Schedule 1 ('Conditions or release of benefits') of the SISR simply provides a mechanism to enable the excess contributions tax to be released from superannuation without breaching SIS.

Technical reference

SISR - Schedule 1, r 6.22A

ITAA 1997 - section 307-5, section 307-10, section 307-15, section 307-120, section 307-125 , Division 301

Impact on clients

Payments of excess contributions tax are quite common. Clarity is therefore required to ensure consistent treatment amongst all superannuation providers and to ensure that individual's are not disadvantaged.

Priority of issue where ATO view is required

High

ATO initial response

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Question 1(a)

Is a payment of excess contributions tax from a superannuation fund considered to be the payment of a superannuation benefit for the purposes of section 307-5 of the ITAA 1997 (necessitating the application of the proportioning rule in section 307-125 of ITAA 1997)?

Answer

Yes, the payment is a superannuation benefit.

No, it is not necessary to apply the proportioning rule.

Reasons

A superannuation benefit includes a payment made to an individual because that individual is a member of a fund - item 1 of the Table in subsection 307-5(1) of the ITAA 1997.

Subsection 292-410(1) allows the individual to give the release authority to any superannuation provider that holds a superannuation interest for the individual. Subsection 292-415(1) of the ITAA 1997 requires a superannuation provider that has been given a release authority to pay the relevant amount to either the member against whom the ECT is assessed or the Commissioner. As the ECT is assessed in relation to contributions made for the individual and the law authorises the individual to choose the superannuation provider who must pay the amount, the payment made by the relevant provider is considered to be paid because the individual is a member of the fund. That is, the relevant causal connection is satisfied.

It is clear that if the fund pays the released amount directly to the individual, there is a benefit paid to the individual.

If the fund pays the released amount to the Commissioner, the Commissioner will apply the amount to reduce the individual's liability for the ECT. As the payment is clearly applied for the individual's benefit, subsection 307-15(2) of the ITAA 1997 ensures that the payment is treated as being made to, or received by, the individual.

The amount paid pursuant to a release authority is therefore a superannuation benefit as defined in section 307-5 of the ITAA 1997.

However, subsection 292-415(5) of the ITAA 1997 states that section 307-125 (the proportioning rule) does not apply to the payment made under section 292-415.

ATO ID 2008/11 Superannuation interest: proportioning rule - release authority explains the implications of subsection 292-415(5) of the ITAA 1997. It states that the superannuation provider is not required to calculate either the tax free component or the taxable component of the superannuation benefit when the amount is released. Further, the superannuation provider does not reduce either the tax free component or the taxable component of the superannuation interest at that time. (This is contrary to the usual case. In the usual case, the note to section 307-210 states that when a superannuation benefit is paid from a superannuation interest, the amount of the tax free component of the interest will be reduced by the tax free component of the superannuation benefit.)

ATO ID 2008/11 also states that as the amount of the contributions segment and the crystallised segment are unchanged by the release of the amount of money under section 292-415 of the ITAA 1997, the tax free component of the superannuation interest remains the same immediately after the payment in respect of the release authority. However the taxable component of the superannuation interest is necessarily reduced as the total value of the superannuation interest is reduced by the payment.

Question 1(b)

Is a payment of excess contributions tax from a superannuation fund considered to be the payment of a benefit for the purposes of SISR 6.22A - 'Priority in cashing benefits in certain cases - regulated superannuation fund'?

Answer

Yes

Reasons

There are a number of aspects of the SIS Regulations that make it clear that an amount paid pursuant to a release authority is a benefit for the purposes of the SIS Regulations.

A member's benefits in a fund may be paid by being cashed in accordance with Division 6.3 of the SIS Regulations - subregulation 6.17(2) of the SIS Regulations.

Division 6.3 contains a number of separate provisions stating when a member's benefits may be cashed. For example, subregulation 6.18(1) of the SIS Regulations states that a member's preserved benefits may be cashed on or after the satisfaction by a member of a condition of release. A similar rule applies to a member's restricted non-preserved benefits - subregulation 6.19(1) of the SIS Regulations. By contrast, a member's unrestricted non-preserved benefits may be cashed at any time - subregulation 6.20(1) of the SIS Regulations.

'Condition of release' is defined in subregulation 6.01(2) of the SIS Regulations to mean a condition of release specified in Column 2 of Schedule 1 to the SIS Regulations. It further states that a member is taken to have satisfied a condition of release if the event specified in that condition has occurred in relation to the member.

Schedule 1 to the SIS Regulations contains Item 112 which is the condition of release that applies when a person gives a release authority to a superannuation provider. Item 112 also specifies cashing restrictions in relation to the condition of release.

The priority in cashing benefits rules in regulation 6.22A of the SIS Regulations apply if a member of a fund satisfies a condition of release in respect of which there is a cashing restriction - subregulation 6.22A(1). Consequently, it is necessary to give priority to benefits in the following order:

- first - to unrestricted non-preserved benefits;
- second - to restricted non-preserved benefits;
- third - to preserved benefits.

Normally, an individual's benefits in a fund must be cashed only in favour of that individual - subregulation 6.22(1) of SIS Regulations. However, a trustee who has received a release authority does not exceed the amount of the excess contributions tax stated in the authority.

However, if the amount of the superannuation benefit paid from a fund (or two or more funds) under the release authority does exceed the amount stated in the authority, the excess is assessable income.

Question 2

If the payment is considered to be the payment of a superannuation benefit for the purposes of the ITAA 1997, is there a mechanism to ensure that the payment does not also form part of the recipient's assessable income (per Division 301)?

Answer

Yes

Reasons

Although the amount paid by a superannuation provider under a release authority is a superannuation benefit it does not fall to be assessed under Division 301 of the ITAA 1997.

Instead, section 304-15 of the ITAA 1997 applies to a superannuation benefit that an individual receives, paid in relation to a release authority given under section 292-410 of the ITAA 1997.

Together, subsections 304-15(2) and (3) ensure the superannuation benefit is not assessable income and not exempt income provided that the total of all the amounts released from any superannuation fund using the release authority does not exceed the amount of the excess contributions tax stated in the authority.

However, if the amount of the superannuation benefit paid from a fund (or two or more funds) under the release authority does exceed the amount stated in the authority, the excess is assessable income.

Meeting discussion

No comments were received.

Sections within 6. Technical questions raised by members

- [6.1 Property owned by SMSF and another party as tenants in common: using a share of the property as security for debt](#)
- 6.2 Excess contributions tax: payments from superannuation funds
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Last Modified: Thursday, 4 August 2011

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