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The 3rd certainty - tinkering with the superannuation

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As the idiom popularised by Benjamin Franklin states "nothing can be said to be certain, except death and taxes".

In 2023, it appears a further certainty is the fascination with government and the revenue alike to change the rules in relation to superannuation.

The first example of the calendar year in this regard being the Tax Office publication QC 45254, namely 'Paying superannuation death benefits', released in February 2023.

QC 45254 particularly focuses on the distinction between member payments and death benefit payments and the so called 'fast death' tax that can be triggered.

Fast death tax

Fast death tax arises where funds that could otherwise be withdrawn tax free by the member of a superannuation fund during their lifetime, remain in the fund at the date of death of the member and are then subject to tax on the distribution from the fund. The tax detriment so branded due to the fact that if a member dies of (say) a heart attack the tax will be triggered, whereas where a terminally ill member is given (say) 4 months to live they will likely have sufficient time to withdraw all benefits. Arguably an unnecessarily capricious piece of superannuation legislation (which itself was introduced by amendments a few years ago - further evidence of the 3rd certainty).

There are generally three potential pathways to manage this form of death tax, namely:

- ensure the funds are withdrawn prior to death, while the member has capacity;

- implement a complementary enduring power of attorney, allowing an attorney to withdraw funds if a member loses capacity, ensuring the withdrawal is completed before the donor's death;
- the member could sign a direction as to future withdrawal, with the effective date defined as being (say) one day prior to their death. In relation to this approach, if a complementary enduring power of attorney is in place, then the attorney could sign such a direction.

The first two approaches appear to be accepted by the Tax Office, subject only to any anti avoidance arguments. This said, given the concessionary tax regime of superannuation is forgone - potentially for an extended period - these approaches are perhaps unlikely to be seen as offensive.

Historically the third approach has also been approved in a number of Private Rulings issued by the Tax Office.

Future withdrawal strategy

The approach was generally centred around a member signing as part of their estate planning arrangements a direction as to future withdrawal, with the effective date of the withdrawal set as being (say) 1 day before the date of the death of the member.

This approach relies primarily on section 307-15 of the Tax Act, which provides as follows:

'This section applies for the purposes of:

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

... A payment is treated as being made to you, or received by you, if it is made:

- for your benefit; or

- to another person or to an entity at your direction or request.'

While generally a death benefit is defined as being a payment made to someone, due to the death of another person, a payment under section 307-15 would seem to create a pathway that allows a payment to be held to have been made to a member, despite the fact that they have died.

A key aspect to supporting an argument along the lines outlined above, based on the Private Rulings issued by the Tax Office, is that the direction signed by the member must be drafted to specifically confirm reliance on section 307-15.

Furthermore, it should be noted that the Private Rulings issued by the Tax Office do not consider whether the anti-avoidance provisions under Part IVA of the Tax Act may be applicable to a direction as to future withdrawal designed to effectively side step the potential triggering of fast death tax.

QC 45254

The robustness of the above summarised approach is also subject to the Tax Office publication 'Paying superannuation death benefits', released in February 2023 as QC 45254.

In this publication the Tax Office states:

- If a member requests an amount to be paid from their fund before they die, but dies before they receive it, it may be a member benefit in some 'limited' cases. The outcome in this regard is said to be 'determined by the facts and circumstances surrounding the payment'.
- The relevant facts and circumstances listed by the Tax Office are set out as including:
    - terms of the request from the member;
    - terms of the trust deed and any other governing rules;
    - knowledge of the trustee at the time the payment is made (including whether the trustee is aware that the member has died);
    - the entity that the payment is being paid to (eg the member's personal account or an account in the name of the member's legal personal representative);

- circumstances and timing of the payment;
- whether the payment is made because of and in line with the request made by the member.

Critically in the examples provided in QC 45254 the Tax Office draws particular distinctions on the following items, apparently making them key factors in determining whether a payment after death is a member benefit or a death benefit; namely whether:

- the trustee was aware that the member was deceased at the time of the payment (with the trustee being unaware supporting a conclusion that the payment is a member benefit);
- the payment was made to an account in the name of the member, or in the name of the member's legal personal representative (with payment to the member's account supporting a conclusion that the payment is a member benefit).

Practical implications

As flagged in the examples, this seems to indicate that the Tax Office believes SMSFs will be unlikely to substantiate payment of a member (as opposed to death) benefit post death (given the trustee is almost certain to be aware that the member has died) as compared to an APRA fund where the trustee may be unaware of the member's death at the date of payment.

Furthermore, unless the purported member benefit payment is supported by the trust deed and implementation documentation and made to the bank account of a member, any payment following a member's death is likely to be treated by the Tax Office as a death benefit.

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