

Rulings on death tax coming ‘thick and fast’: lawyer

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

A new private binding ruling from the ATO has highlighted the evolving nature of the rules around the “fast death tax”, says a leading legal specialist.

Matthew Burgess, director of View Legal, said the most recent private ruling suggests that payment after the death of a member by an SMSF could be a member benefit where the fund is administered by an external adviser such as an accountant or administrator.

In the most recent PBR (tel:1052162946778) the trustee of a member's superannuation fund paid the final withdrawal benefit from the member's pension phase account into the member's personal bank account one day after the date of death.

The ATO ruled that in this case “it is reasonable to treat the total superannuation lump sum benefit as a superannuation member benefit”, therefore the tax treatment in Division 301 of the ITAA 1997 should apply to the benefit.

The facts of the case were that the relevant member lacked legal capacity and as there was no enduring attorney document, the member's niece and her husband were appointed by a state tribunal as administrators.

The administrators completed a withdrawal and account closure form for the member's account-based pension and submitted it to the fund before the member's death.

Payment of the benefit into the member's personal bank account was made one day after their death.

“Applying reasoning similar to that summarised above, the ATO concluded the payment was a member benefit,” Mr Burgess said.

He added the reason for doing this included an assumption that the benefits were paid per the trust deed and other governing rules.

“The lump sum was paid into the member's personal bank account, the trustee was unaware of the member's death and payment of the lump sum was paid one day after death,” he noted.

“Therefore the trustee made the payment with the expectation that the member would be alive to receive it.”

He added that the time frame between the trustee becoming aware of the member's death shortly after it occurred and the payment being made indicated the payment was made because of – and consistent with – the member's request via their administrator as a member benefit payment.

Private binding rulings

Mr Burgess said there have been two previous PBRs where requests for withdrawal to retail funds were submitted on the day of, but before the death, of the relevant member where the ATO reached differing conclusions.

“With the first situation, the payment was treated as a member benefit, primarily on the basis that the trustee of the superannuation fund was not aware of the member's death before it paid the lump sum benefit (PBR tel:1052091672127),” he said.

“In the second, the payment was treated as a death benefit, as the original request was held to be invalid on the basis that it was an electronic as opposed to wet-signed request.”

He continued that wet-signed requests were a requirement for valid instructions under the rules for the fund, and the subsequent wet-signed request was sent after the date of death at a time when the trustee was aware the member had died (PBR <tel:1052097327812>).

“Similarly, in PBR tel:1052123084697, an SMSF fund member requested, via their statutorily appointed attorney as they had lost capacity, a full commutation of their pension phase account shortly before death,” he said.

“However it was not paid until around 28 weeks after the death at a point in time when the trustee of the SMSF, and the fund's financial advisor, were aware of the member's death.”

In this instance, the ATO concluded the payment was a superannuation death benefit and that the 28-week delay indicated the payment was not made because of, and consistent with, the member's request, but rather as a consequence of winding up the member's estate.

“The ATO did, however, specifically acknowledge that an amount that a member requests to be paid from their superannuation fund before their death, but is paid after their death, may be classified as a member benefit instead of a death benefit, depending on the facts and circumstances of the payment,” he said.

The ATO updated its guidance on paying superannuation death benefits in February this year to explain when a benefit is a death benefit or a member benefit. The guidance emphasised the importance of factors including whether the trustee was aware the member had died and whether the money was paid to the account of the member or their legal personal representative.

SMSF Alliance principal David Busoli told SMSF Adviser at that time that the updates to QC 45254 did nothing to enhance certainty or provide a basis for practical outcomes.

“This determination is not fit for purpose and needs replacing,” he said.