



WEEKLY TAX BULLETIN

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When is too late to beat fast death tax

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The evolving interpretation of the rules in relation to so-called 'fast death tax' has continued with a further Tax Office private binding ruling.

Background

Historically, one possible approach was for a member to sign 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:

- (a) determining whether a payment is a superannuation benefit; and
- (b) 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:

- (a) for your benefit; or
- (b) 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:



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1. 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'.

2. The relevant facts and circumstances listed by the Tax Office are set out as including:

- (a) terms of the request from the member;
- (b) terms of the trust deed and any other governing rules;
- (c) knowledge of the trustee at the time the payment is made (including whether the trustee is aware that the member has died);
- (d) 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);
- (e) circumstances and timing of the payment;
- (f) 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:

(A) 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);

(B) 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).

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 or retail 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.

Private binding rulings

These conclusions are arguably confirmed by subsequent Tax Office private binding rulings (PBRs). For example in two separate PBRs where requests for withdrawal to retail funds were submitted on the day of, but before the, death of the relevant member the Tax Office reached following conclusions:

A. 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 1052091672127); and



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B. in the second factual matrix, 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 (wet signed requests being 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 1052097327812).

Similarly, in PBR 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, 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 SMSF's financial advisor, were aware of the member's death.

The Tax Office concluded that the payment was a superannuation death benefit and that the 28 week delay indicated that 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 Tax Office 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.

The Tax Office approach appears to reinforce its view that SMSFs will never be able to rely on a withdrawal request made, but not completed, before death. This said, based on the reasoning in the above PBRs, it may in fact be the case that a payment after the death of a member by an SMSF could be a member benefit where the SMSF is administered by an external adviser (eg an accountant or SMSF administrator).

Latest PBR

PBR 1052162946778 provides further context as to the approach the Tax Office is taking in this area.

While it is unclear under the PBR whether the fund was an SMSF, the key elements of the factual matrix were as follows:

1. The relevant member lacked legal capacity and as there was no enduring attorney document, the member's niece and niece's husband were appointed by a state tribunal as Administrators.
2. 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.
3. 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 Tax Office concluded the payment was a member benefit, based specifically on the following:

- a. An assumption that the benefits were paid in accordance with the trust deed and other governing rules.



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- b. 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, and therefore the trustee made the payment with the expectation that the member would be alive to receive it.

- c. The timeframe between the trustee becoming aware of the member's death shortly after it occurred and the payment being made one day after the member's death, indicated the payment was made because of - and consistent with - the member's request (via their Administrator) as a member benefit payment.

