SUPERCENTRAL

Superannuation member benefit vs superannuation death benefit

When there is no tax dependent to receive a member's superannuation death benefits tax-free, a potential tax saving strategy is to withdraw their entire super benefits prior to their death. The money then becomes their 'personal asset' which can be distributed tax-free to any non-tax-dependants such as the member's independent adult children.

The strategy may be of interest to elderly or critically ill members with no tax-dependent beneficiaries but will have no real benefits in cases of sudden accidental deaths.

In other cases though, a member (or their enduring attorney) could be afforded the opportunity to request a withdrawal.

Getting the timing of withdrawal right is critical and generally a member would prefer to withdraw their benefits just prior to their death however it is inherently a very difficult task as no one really knows when their time will be up.

If they are too late in withdrawing and the benefits retain the legal character of 'superannuation' as at the time of their death, the taxable portion of the benefits will be subject to 17% (taxed element) or 32% (untaxed element) tax in the hands of the non-tax dependant beneficiary.

On the other hand if the withdrawal is too early, there is opportunity cost of not having the sum invested in the concessional tax environment of super for as long as possible.

Some could be tempted to postpone the withdrawal to the very last minute. What would happen if the member makes the withdrawal request and then passes away before the payment has been received in his personal bank account? Is the payment still a payment of superannuation member benefit or is it a payment of superannuation death benefit?

The definition of 'superannuation benefit' in subsection 307-5 of the *Income Tax Assessment Act 1997* (Cth) suggests that the legal character of whether a payment is member benefit or death benefit depends on both the 'timing of' and 'reason for' the payment.

The term "member benefit" is defined as "*a payment to a person from a super fund because the person is a fund member*" whereas "death benefit" is defined as *"a payment from a super fund after a person's death because the person was a fund member"*.

On the face of it, the payment in our example is made 'after' the member's death so seems to fit the definition of the death benefit. However, the ATO's view in their published private ruling 1051754180223 suggests otherwise and states that the payment is a "member benefit" even if paid after the member's death provided the following conditions are met:

(a) it was made by a fund to the deceased's nominated account as requested by the deceased immediately prior to their death; and

(b) the fund trustee processed the request in accordance with the applicable *Superannuation Industry (Supervision) Regulations 1994* (Cth) requirements for voluntary cashing of unrestricted non-preserved benefits (i.e. regulations 6.20 and 6.22).

While this is only a private ruling and is not a legal authority to confirm the current legal position, we agree with the ATO's reasoning in that ruling that when determining the proper legal character of the payment more weight should be given to the reason for the payment (i.e. because the member requested the voluntary cashing of their super before death) rather than the mere timing of the cash payment being completed after their death.

Despite the ruling above however, we do not recommend members leave this decision to the very last minute to mitigate the risk of ATO taking a different stance in future. The timing should allow the fund trustee sufficient time to complete the payment prior to the member's death.

Consideration should be given to any illiquid assets and the likely time that would be required to either sell that asset or transfer it in-specie to the member.

A number of checks could be done in advance to facilitate smooth withdrawal without unexpected delay when required.

1. If the member's plan involves an enduring attorney making the withdrawal request on their behalf, check if the governing rules permit members' enduring attorneys to do so.
2. The governing rules of the fund should also be checked for any applicable conditions, procedures, and forms. Where relevant, this information should be shared with the attorney.
3. The withdrawal request when made should be in strict compliance with the procedural and formal requirements to avoid any delays in processing time.
4. The trustee's resolution authorising the payment should clearly document that the reason for the payment is to process the member's request for voluntary cashing of unrestricted non-preserved benefits in accordance with regulation 6.20 of the SISR.

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