



## Fact sheets

Fact sheets and frequently asked questions information for APRA-regulated funds.

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# Compensation received by super funds from financial institutions and insurance providers

Tax and super consequences for funds that receive compensation.

10 September 2021

A super fund may have a right to seek compensation if it entered into a legal contract or agreement with a financial services provider or insurance provider, paid the fees or premiums from fund assets, allocated the cost to the members, and:

- the financial service or advice was not provided
- the advice was deficient, or
- the insurance premiums for death or disability insurance cover were overcharged.

If a super fund receives such compensation, the trustee of the fund needs to be aware of possible super, income tax and goods and services tax (GST) consequences. The consequences depend on the circumstances in which the compensation amounts are received.

Compensation includes any amount received by the super fund in respect of a right to seek compensation or a cause of action, or any proceeding by the super fund for that right or cause of action.

It does not matter whether there is any admission of guilt or liability by the financial institution or insurance provider in making the payment.

The 'right to seek compensation' is the right of action arising at law or in equity which vests in the trustee of the super fund on the occurrence of any breach of contract or other compensable damage or injury.

The [Super contribution caps factsheet](#) explains the impact on the contribution's caps when an individual's super fund receives an amount of compensation from a financial service provider and it is allocated to their account.

The tax consequences of compensation payments paid to **individuals** are explained in [Compensation paid to individuals for advice from](#)

financial institutions.

**See also:**

- Fees where no service is provided
- Deficient financial advice
- Overcharged insurance premiums
- Interim use of reserves
- Payments where no right to seek compensation

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## **DASP and working holiday maker changes – frequently asked questions**

Questions on changes to taxation of the departing Australia super payment (DASP).

8 December 2017

As part of the Working Holiday Maker Reform package there has been a change in the departing Australia superannuation payment (DASP) tax rate for working holiday makers (WHMs).

From 1 July 2017, super funds will be required to apply a new tax rate of 65% to the taxed and untaxed elements of the taxable component of a DASP which contains amounts attributable to super contributions made while the person was a WHM (referred to as the WHM tax rate). The tax-free component continues to be taxed at 0%.

**Find out about:**

- [When should the new WHM tax rate of 65% be applied to a DASP?](#)
- [Can a former temporary resident have one member account with a fund having held a number of different visas?](#)
- [What tax rate should be applied to the DASP if the applicant has never held a WHM visa?](#)

- [What tax rate should be applied to the DASP if the applicant has held a WHM visa?](#)
- [What if a DASP includes, but is not wholly comprised of, amounts attributable to super contributions made while the person held a WHM visa?](#)
- [If the fund has not applied the correct tax rate, and the ATO holds information to suggest this is the case, how will the ATO react?](#)
- [What changes can funds expect to see in the DASP online application?](#)
- [Is the paper application being updated?](#)
- [Will clients using the paper application need to obtain a Home Affairs certificate, even if the application is for an amount of less than \\$5,000?](#)
- [Is it possible to remove the paper application?](#)
- [If overtaxed, a client would most likely go to the fund rather than the ATO, how should funds action these requests?](#)
- [Is providing the additional visa information compulsory?](#)
- [If an applicant has three accounts in a fund, will the fund pay one DASP to the applicant or one from each account, and how will the payments be taxed?](#)
- [As ATO shares information from Home Affairs, can there be some built-in portal for the funds to do the same with Home Affairs.](#)

## **When should the new WHM tax rate of 65% be applied to a DASP?**

The new WHM tax rate is applied to the taxed and untaxed elements of the taxable component of a DASP paid to a person on or after 1 July 2017. This applies if the DASP includes amounts attributable to super contributions made while the person was a WHM.

If a DASP does not include such amounts, the DASP ordinary tax rates apply. For payments made on or after 1 July 2017, these are 35% for the taxed element of the taxable component and 45% for the untaxed element.

## **Can a former temporary resident have one member account with a fund having held a number of different visas?**

Yes, a former temporary resident (FTR) who is being paid a DASP from a fund may have one member account with a fund but have held more than one type of visa. It is therefore possible that some of the super contributions were made to that account while the person was a WHM, and some contributions were not.

## **What tax rate should be applied to the DASP if the applicant has never held a WHM visa?**

If the applicant has never held a WHM visa, the tax rate to be applied from 1 July 2017 will be:

- 35% for the taxed element
- 45% for the untaxed element of the taxable component of the DASP.

## **What tax rate should be applied to the DASP if the applicant has held a WHM visa?**

If the applicant has held a WHM visa, super funds will need to check whether the DASP include amounts attributable to super contributions made under the WHM visa. If there were, apply the DASP WHM tax rate of 65% to the taxed and untaxed elements. If there were **not**, apply the DASP ordinary tax rates to the taxed and untaxed elements.

In cases where super funds are not able to determine whether the DASP includes amounts attributable to super contributions made under the WHM visa, for example rollovers, the fund can:

- apply the DASP WHM tax rate where the applicant has held WHM visa and no other visas with work rights
- apply the DASP ordinary tax rates where the applicant has held WHM visa and other visas with work rights.

## **What if a DASP includes, but is not wholly comprised of, amounts attributable to super contributions made while the person held a WHM visa?**

The law does not allow for apportionment. If the payment includes amounts attributable to super contributions made while the person held a WHM visa, the 65% tax rate applies to the taxed and untaxed elements of the taxable component of the DASP. This is the case if the DASP is not wholly comprised of amounts attributable to those contributions.

## **If the fund has not applied the correct tax rate, and the ATO holds information to suggest this is the case, how will the ATO react?**

If the fund has made a reasonable assessment of the correct tax rate to apply, and withheld an amount from a DASP, based on information they held at the time they processed the payment, there will generally be no action from us.

However, if we conduct a review of fund obligations and find information the fund holds which indicates the higher rate of 65% should have been used, the fund will be required to adjust their withholding calculation as they currently do.

## **What changes can funds expect to see in the DASP online application?**

The DASP online application system will be updated on 9 December 2017 to obtain visa information from the Department of Home Affairs (Home Affairs) where the applicant has held a WHM visa.

On each DASP application, you will see one of the messages listed below:

1. The Home Affairs records show that the applicant has never held a Working Holiday Maker (WHM) visa.

2. The Home Affairs records show that the applicant held the following Working Holiday Maker (WHM) visas and no other visas with working rights during their time in Australia.
3. The Home Affairs records show that the applicant held the following Working Holiday Maker (WHM) visas along with other visas with working rights during their time in Australia.

Details of the WHM visa details will be shown in the DASP application for funds to view.

## **Is the paper application being updated?**

Yes. The paper application has been updated to allow applicants to provide visa information if they have held a WHM visa. Super funds can check their contribution details against the visa details provided by the WHM.

Applicants do not need to provide visa information on the paper application if they have applied for Certification of Immigration Status from Home Affairs as the certificate will include WHM visa information.

## **Will clients using the paper application need to obtain a Home Affairs certificate, even if the application is for an amount of less than \$5,000?**

Under the current law, only withdrawal benefits of \$5,000 or more require a Home Affairs Certificate of Immigration Status. A law change is required to remove the option for applicants to provide visa and immigration evidence to the fund directly for benefits of less than \$5,000.

If the applicant's withdrawal benefit is less than \$5,000, they have the option to either provide evidence of their visa and immigration status or obtain the Home Affairs certificate.

If the applicant chooses to obtain the certificate, they do not need to provide visa information. If they don't obtain a certificate, they will need to provide visa information on their paper application.

Funds may have additional obligations under their trust deed.

## **Is it possible to remove the paper application?**

Paper applications have always been made available as an alternative option for applicants who may not have access to online system.

## **If overtaxed, a client would most likely go to the fund rather than the ATO, how should funds action these requests?**

If the DASP is paid by a fund no formal 'review rights' exist under the income tax law if the recipient is dissatisfied with the tax rate(s) that have been applied to their payment or a decision made by the fund in applying the WHM tax rate.

However, if a fund has made an error with the withholding amount, the recipient may request a refund of the amount withheld in error under section 18-65 of Subdivision 18 B of Schedule 1 to the TAA, or the Commissioner of Taxation under section 18-70 (depending on the timing of the request).

If the fund becomes aware of the error or the recipient of the DASP applies to the fund for a refund before the end of the financial year in which the amount of tax is withheld from the DASP by the fund, the request must be actioned by the fund. After this time, the recipient can apply to the ATO for a refund.

## **Is providing the additional visa information compulsory?**

If the applicant held a WHM visa, applied via paper and did not obtain a Certification of Immigration Status from Home Affairs, they will need to provide visa information in the paper application.

Visa information is required for applicants who have held a WHM visa so funds can determine the appropriate DASP tax rates to apply to the payment.

## **If an applicant has three accounts in a fund, will the fund pay one DASP to the**

## **applicant or one from each account, and how will the payments be taxed?**

This depends on how the fund usually makes DASP payments. If your fund normally makes one payment then the taxed and untaxed elements of that payment will be taxed at 65%. If your fund pays a DASP from each account then only the payment from the account containing amounts attributable to super contributions made while the applicant was a WHM will be taxed at 65%.

## **As ATO shares information from Home Affairs, can there be some built-in portal for the funds to do the same with Home Affairs**

ATO confirmed that due to privacy policy principles, funds cannot access information from Home Affairs.

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## **Deficient financial advice**

When a super fund receives compensation from a financial service provider for deficient financial advice.

19 July 2019

Where a super fund has a right to seek compensation from a financial services provider, the financial service provider may pay to the super fund compensation (in satisfaction of that right) that reflects any of the following:

- an amount corresponding to a loss of value of an investment resulting from deficient advice
- an amount corresponding to a loss of value as a result of a member investing in an inappropriate investment option
- loss of earnings or interest.

In these circumstances, the following income tax, GST and superannuation consequences apply.

## **Income tax**

### **Compensation for loss of value**

If the compensation received relates to a loss of value on an investment in respect of a capital asset that the super fund still owns, the super fund must reduce either its cost base or reduced cost base by the amount of compensation.

If the compensation amount relates to a loss of value on an investment in respect of a capital asset that the super fund has disposed of, the payment of compensation to the super fund would constitute additional capital proceeds in respect of the relevant CGT event. The super fund would need to amend its income tax return where the disposal happened in a previous income year.

If the trustee determines that the compensation amount cannot be attributed to any particular asset(s) of the fund, the compensation amount will be capital proceeds for the ending of the right to seek compensation.

The super fund may be eligible to apply the CGT discount if the asset has been held for 12 months or longer.

### **Compensation for loss of earning or interest**

Compensation for earnings and interest will normally be assessable income to the super fund. However, if a compensation amount received by a super fund for loss of earnings or interest is part of the capital proceeds received in relation to a CGT event involving a CGT asset of the fund (including a right to seek compensation), the amount received will reduce the cost base of any underlying investment.

If the investment has been disposed of, the amount is considered to be additional capital proceeds in relation to any relevant CGT event.

If the trustee determines that the amount cannot be attributed to any particular asset(s) of the fund, the compensation amount will be capital proceeds for the ending of the right to seek compensation. The super fund may be eligible to apply the CGT discount if the asset has been held for 12 months or longer.

# GST

If a compensation amount received by a super fund includes a component of interest, or compensation for loss of earnings or loss of value on an investment, this component will not be subject to GST. This is because such a payment is not consideration for a supply.

## Super contributions

The compensation amount received will not be a super contribution for the benefit of a member of the super fund if the trustee of the super fund allocates an amount to the member's super interest in respect of the compensation. This is because the compensation amount does not result in the capital of the super fund being increased – the right to compensation has been satisfied by the compensation amount.

### See also:

- Compensation received by super funds from financial institutions and insurance providers
- Fees where no service provided
- Overcharged insurance premiums
- Interim use of reserves
- Payments where no right to seek compensation

### Find out about:

- Compensation paid to individuals for advice from financial institutions
- Taxation Ruling TR 95/35 – *Income tax: capital gains: treatment of compensation receipts*
- Taxation Ruling TR 2010/1 – *Income tax: superannuation contributions*
- Disposal – CGT event
- Amending an income tax return
- Goods and Services Taxation Ruling GSTR 2001/4 – *GST consequences of court order and out-of-court settlement*

## **Defined benefit superannuation interest value for calculating pre-July 1983 amount at 30 June 2007**

Determine the value of a defined benefit super interest to calculate the crystallised segment of the tax-free component.

25 May 2015

This information applies only to superannuation interests that are:

- defined benefit interests in taxed funds, and
- in the accumulation phase.

### **What is a defined benefit interest?**

A defined benefit interest is generally an interest for which the benefits payable from the interest are defined by reference to a specified amount or matter, commonly the member's salary at a particular time or an average salary for a particular period.

### **What is the pre-July 1983 amount?**

The pre-July 1983 component relates to superannuation entitlements accrued before 1 July 1983. The pre-July 1983 amount forms part of the tax-free component of the interest.

### **When is the pre-July 1983 amount calculated?**

Taxed superannuation funds will calculate the pre-July 1983 component of the crystallised segment for all interests that include a taxable component and are in the accumulation phase as at 30 June 2007.

Taxed superannuation funds will have until 30 June 2008 to calculate the pre-July 1983 components. Superannuation providers that do not ensure this amount is calculated by this date may be subject to a penalty of up to \$850.

## Determining the defined benefit superannuation interest pre-July 1983 amount

The pre-July 1983 amount for a defined benefit interest is calculated using the following steps.

### Step 1

A.	Calculate the value of the retirement benefit that would have been payable at 30 June 2007 if the member had been eligible to retire on that date and had elected to do so.
B.	<p>If the retirement benefit depends on the member's age, service or salary, or on the employer's consent, assume that the:</p> <ul style="list-style-type: none"><li>• member's service was their actual service to 30 June 2007</li><li>• member's age was the greater of the minimum age at which a retirement benefit could be taken without the employer's consent and the member's actual age at 30 June 2007</li><li>• member's salary was their salary for superannuation purposes as at 30 June 2007, and</li><li>• employer has consented to the retirement.</li></ul>
C.	<p>If part or all of the retirement benefit can be paid as a superannuation income stream, it's necessary to work out two amounts.</p> <p>First, the <b>value of the income stream</b> is calculated as:</p> <ul style="list-style-type: none"><li>• the annual rate of the income stream that would have been paid had the maximum proportion of the benefit possible been taken as an income stream</li></ul>

	<p><b>multiplied by</b></p> <ul style="list-style-type: none"> <li>the applicable factor (for applicable factors see Clause 1, Schedule 1B of the Income Tax Assessment Regulations 1997).</li> </ul> <p>Then, the <b>total value of the retirement benefit</b> is calculated as:</p> <ul style="list-style-type: none"> <li>the value of any income stream as calculated above</li> </ul> <p><b>plus</b></p> <ul style="list-style-type: none"> <li>the amount of any lump sum payable under the above assumptions had the member taken the maximum possible proportion of their benefits as an income stream.</li> </ul>
D.	<p>If the superannuation benefit can only be paid as a lump sum then the value of the retirement benefit is the amount of that lump sum.</p>

## Step 2

If a superannuation lump sum benefit, including a rollover superannuation benefit, would have been payable had the member resigned, or withdrawn their benefit on 30 June 2007, calculate the amount of that benefit.

## Step 3

The value of the defined benefit superannuation interest for the purpose of calculating the pre-July 1983 amount is:

- the greater of the values worked out using steps 1 and 2, or
- if no value can be determined under step 2, the value of the defined benefit superannuation interest is the value worked out in step 1.

## Example 1

Sebastian, age 54, has a defined benefit interest in a taxed superannuation fund. Sebastian's interest is in the accumulation phase. Both Sebastian and his employer contribute to the superannuation fund. Sebastian will be able to take his retirement benefit on reaching age 60.

On retirement, Sebastian will be entitled to be paid up to 50% of his benefits held in the fund as an indexed lifetime income stream and the remainder of the benefits as a lump sum. If Sebastian had been eligible to retire and had elected to do so at 30 June 2007, the annual rate of the maximum income stream payable would be \$10,000 and his lump sum payable would be \$100,000.

Sebastian would have been entitled to be paid a lump sum benefit of \$200,000 had he actually resigned on 30 June 2007.

Sebastian's fund would determine the value of his interest for the purpose of calculating the pre-July 1983 amount of the crystallised segment of the tax-free component of his interest as follows:

## **Step 1**

Calculate the value of the retirement benefit that would have been payable at 30 June 2007.

As Sebastian would be entitled to take up to 50% of his retirement benefit as an income stream, multiply the annual rate of the maximum income stream by the applicable factor to determine the value of the income stream.

The applicable factor for an indexed lifetime income stream payable to a person aged 60 is 16.513 (see Table 1 of Schedule 1B to the Income Tax Assessment Regulations 1997).

$$\$10,000 \times 16.513 = \$165,130$$

The total value of the retirement benefit is the sum of the value of the income stream (worked out above) and the amount of the lump sum payable on retirement.

$$\$165,130 + \$100,000 = \$265,130$$

## **Step 2**

Sebastian would have been entitled to a lump sum of \$200,000 if he had actually resigned on 30 June 2007.

## **Step 3**

The value of Sebastian's defined benefit superannuation interest for the purpose of calculating the pre-July 1983 amount at 30 June 2007 is the greater of the values worked out using steps 1 and 2.

The value of Sebastian's defined benefit superannuation interest for the purpose of calculating the pre-July 1983 amount of the crystallised segment at 30 June 2007 is \$265,130.

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## Fees where no service is provided

When a super fund receives compensation from a financial services provider for fees when no service is provided.

19 July 2019

Where a super fund has a right to seek compensation from a financial services provider, the financial service provider may pay to the super fund compensation (in satisfaction of that right) that reflects any of the following:

- the adviser fees paid
- an amount corresponding to the loss of value of the investment as a result of paying the fees
- interest.

Where a super fund is paid compensation under these circumstances, the following consequences apply.

## Income tax

### Income tax: amount reflecting adviser fees

If the adviser fees were an allowable deduction to the super fund when originally paid, the compensation amount reflecting the fees will be an assessable recoupment under section 20-20 of the ITAA 1997.

If the fees were **not** an allowable deduction to the super fund when originally paid, the compensation amount reflecting the fees will not be an assessable recoupment. Instead, the amount will reduce the cost base of any underlying investment. If the investment has been disposed of, it will form part of the capital proceeds received in relation to any capital gains tax (CGT) event. If the trustee determines that the

amount cannot be attributed to any particular asset(s) of the fund, the compensation amount will be capital proceeds for the ending of the right to seek compensation. The super fund may be eligible to apply the CGT discount if the asset has been held for 12 months or longer.

## **Income tax: compensation for loss of earnings or interest**

Compensation for earnings and interest will normally be assessable income to the super fund. However, if a compensation amount received by a super fund for loss of earnings or interest is part of the capital proceeds received in relation to a CGT event of the fund (including a right to seek compensation), the amount received will reduce the cost base of any underlying investment.

If the investment has been disposed of, the amount is considered to be additional capital proceeds in relation to any relevant CGT event.

If the trustee determines that the amount cannot be attributed to any particular asset(s) of the fund, the compensation amount will be capital proceeds for the ending of the right to seek compensation. The super fund may be eligible to apply the CGT discount if the asset has been held for 12 months or longer.

## **GST**

As a general comment, the GST consequences for a super fund should typically mirror the GST implications for the financial service provider. You should work with your financial supply provider to ensure the correct GST treatment is adopted by both parties.

### **GST: amount reflecting adviser fees**

A super fund will need to consider whether it is required to repay the GST credits claimed where the super fund receives a compensation amount that reflects a refund of fees paid to a financial service provider and the super fund had previously claimed GST credits or reduced GST credits on the fees.

Depending on the circumstances, the refund of fees may result in:

- a reimbursement of passed-on GST where a supply was never made (under Division 142 of the GST Act), in which case the super fund may need to make an amendment to correct the business

activity statement (BAS) in which it originally claimed the GST credits (subject to time limits), or

- an adjustment to an earlier supply made by the financial service provider, in which case the super fund may need to make an increasing adjustment in its current BAS (when it receives the refund).

Determining which scenario is relevant can depend on a range of factors, including:

- whether the financial service provider made a supply to the super fund
- the terms of the original contract with the financial service provider
- the terms of the settlement or payment deed (including whether the payment may be compensation – see below).

## **GST: compensation for loss of earnings or interest**

If a compensation amount received by a super fund includes a component of interest, or compensation for loss of earnings, this component will not be subject to GST. This is because such a payment is not consideration for a supply.

## **Super contributions**

The compensation amount received will not be a super contribution for the benefit of a member of the super fund if the trustee of the super fund allocates an amount to the member's super interest in respect of the compensation. This is because the compensation amount does not result in the capital of the super fund being increased – the right to compensation has been satisfied by the compensation amount.

### **Example: Fees for no service**

ABC Super Fund has a legal arrangement with DEF Financial Services where the fund pays DEF Financial Services to provide financial advice to ABC Super Fund members. The advice is limited to a member's super interest in the super fund.

ABC Super Fund claimed a deduction for the fees paid for the financial advice and also claimed reduced GST credits.

ABC Super Fund reviewed their members' super interests and determined that advice was not provided to one of their members on joining the fund in 2016, nor subsequently. In 2019, ABC Super Fund enters into a settlement with DEF Financial Services, under which DEF Financial Services makes a payment to ABC Super Fund to compensate the fund for the fees paid where no service was provided (\$5,000) and an additional amount for lost earnings and interest (\$2,500).

ABC Super Fund allocates an amount to the member's super interest for the compensation received.

The total amount of \$7,500 is not a super contribution.

ABC Super Fund includes \$5,000 as assessable income in their tax return for the income year they receive the compensation as an assessable recoupment.

The \$2,500 related to the amount by which earnings from an interest in a managed investment scheme were reduced due to the advice not being provided. As ABC Super Fund still holds that interest in the managed investment scheme, they would reduce the cost base of the interest by \$2,500.

If ABC Super Fund cannot attribute the \$2,500 to an underlying asset, then it can be treated as capital proceeds received on the ending of its right to seek compensation. As the right to seek compensation arose in 2016 and ended with payment of compensation in 2019, the relevant asset would have been held for longer than 12 months. Accordingly, ABC Super Fund can apply the CGT discount to a capital gain resulting from the ending of its right to seek compensation.

ABC Super Fund determines that the repayment from DEF Financial Services includes a reimbursement of passed-on GST under Division 142 of the GST Act, in a situation where in fact there was never a supply made. Accordingly, ABC Super Fund will need to make an amendment to the BAS for the period in which it claimed the reduced GST credits (subject to time limits).

The \$2,500 component representing lost earnings and interest is not consideration for a taxable supply made by ABC Super Fund.

**See also:**

- Compensation received by super funds from financial institutions and insurance providers
- Deficient financial advice
- Overcharged insurance premiums
- Interim use of reserves
- Payments where no right to seek compensation

**Find out about:**

- Compensation paid to individuals for advice from financial institutions
- Taxation Ruling TR 95/35 – *Income tax: capital gains: treatment of compensation receipts*
- Taxation Ruling TR 2010/1 – *Income tax: superannuation contributions*
- Disposal – CGT event
- Amending an income tax return
- Fixing BAS mistakes or making adjustments
- Correcting GST errors

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## **How many superannuation interests does a member of a superannuation fund have in their fund?**

Commissioner's view as to what constitutes a super interest in relation to the different kinds of super fund.

25 May 2015

A 'superannuation interest' is defined, relevantly for present purposes, as 'an interest in a superannuation fund' [\(1\)](#) When read in context, the Commissioner considers that this definition generally refers to the rights of persons who have proprietary interests in trusts, interests under a trust that confer no proprietary interest in the assets of the trust, purely contractual rights (for example to a right to an annuity) and statutory rights to superannuation benefits.

Accordingly, 'interest in' a fund refers to a distinct claim of any kind against a fund, whether it be proprietary in character or not. However, various regulations made under the income tax law modify this general principle by creating special rules for what constitutes a superannuation interest [\(2\)](#)

Against this background, the following sets out the Commissioner's view as to what constitutes a superannuation interest in relation to the different kinds of superannuation fund.

This document deals only with superannuation funds and not with approved deposit funds, retirement savings accounts or superannuation annuities.

## **Self-managed superannuation funds (SMSFs)**

An amount that supports a superannuation income stream that is commenced from an SMSF is treated as a separate interest from immediately after the income stream commences (that is, once its tax free component and taxable component proportions have been determined) [\(3\)](#) In the case of multiple income streams commenced from the same SMSF, each income stream commenced gives rise to a separate interest from the interest to which each other income stream gives rise.

Except for that case, a member of an SMSF always has just one interest in the SMSF [\(4\)](#)

Funds with four or fewer members that are not SMSFs (that is, "small APRA funds") are not in the same category as SMSFs [\(5\)](#) They are covered by the next category.

## **Superannuation funds other than SMSFs and Public Sector Superannuation**

## **Schemes (PSSS)**

An amount that supports a superannuation income stream that is commenced from a fund of this kind is treated as a separate interest from immediately after the income stream commences (that is, once its tax free components and taxable component proportions have been determined) <sup>(6)</sup> In the case of multiple income streams commenced from the same fund, each income stream commenced gives rise to a separate interest from the interest to which each other income stream gives rise.

Except for that case, it is a question of fact whether the various amounts, benefits and entitlements that a member has in a fund constitute one interest or several interests in the fund. The principle described in the second paragraph above should be applied in addressing that question.

If a member has separate accounts in a fund, the Commissioner accepts that an account constitutes a separate interest so long as, viewed as an objective matter, the account reflects a claim of the kind described in the second paragraph above that is separate and distinct from other claims of that kind that the member has against the fund. For example, if the member has bought separate 'products' under a separately documented process whereby the member acquires distinct sets of legal rights against the trustee.

By contrast, merely purporting to divide a member's entitlements into separate accounts as a bookkeeping exercise, such as the separate bookkeeping for investments against which a person had a single claim, without any such objective basis does not establish that there are separate interests.

## **Public sector superannuation schemes (including constitutionally protected funds)**

The same principles as in the previous section apply. However, for many public sector superannuation schemes (PSSS) the source of the various rights and obligations of scheme members is the legislation establishing the PSSS rather than a trust deed or a contract. An objective basis for discerning separate interests in the one scheme is likely therefore to be found in the relevant legislation than in any equitable or contractual relationship between trustee and member.

There is one extra rule [\(7\)](#) If a benefit is partly sourced from contributions to the scheme and earnings on those contributions and partly from some other source, the member's interest is separated into two interests: one interest that consists of the contributions to the scheme and the earnings on those contributions; and one interest consisting of the remainder of the interest. (For this purpose the "contributions and earnings" are reduced by the amount specified in any notice given under s307-285 for the benefit.)

## Anti-avoidance

Nothing in this document should be read as precluding the normal operation of the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936*. The creation or manipulation of separate superannuation interests by way of blatant, artificial or contrived arrangements for the sole or dominant purpose of obtaining a tax benefit may attract the operation of Part IVA. This would have consequences for the taxpayer who obtains the tax benefit, being the relevant member in this case [\(8\)](#) Practice Statement PS LA 2005/24 explains how the Commissioner interprets and administers Part IVA.

## References

1. See the definition of 'superannuation interest' in 995-1 of the Income Tax Assessment Act 1997 (ITAA 1997)
2. Division 307 of the Income Tax Assessment Regulations 1997 (ITAR 1997)
3. Regulation 307-200.05 of the ITAR
4. Regulation 307-200.02 of the ITAR
5. Regulation 307-200.02 of the ITAR applies only to SMSFs and not to any other kind of fund
6. See regulation 307-200.05 of the ITAR
7. See regulation 307-200.03 of the ITAR
8. The operation of Part IVA in relation to a scheme of this kind would not have direct consequences for a fund trustee unless the trustee obtained some tax benefit from the scheme. However, a person who markets or otherwise encourages the growth of a tax avoidance scheme in return for consideration may be penalised

separately: see Division 290 of Schedule 1 to the  
Taxation Administration Act 1953

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## Other information

Other information relevant to compensation received by super funds from financial institutions and insurance providers.

19 July 2019

## Interim use of reserves

Where a super fund has a right to seek compensation from a third party, the trustee of the super fund may allocate an amount from an operational risk reserve to a member's super interest in anticipation of the receipt of the compensation from the third party.

An amount allocated from a reserve to a member's super interest, subject to certain exceptions, is a concessional contribution under the *Income Tax Assessment Regulations 1997*. We will not treat an allocation from an operational risk reserve as a concessional contribution in circumstances where **all** of the following factors are present:

- the super fund has a right to seek compensation against a third party which the super fund exercises
- the trustee of the super fund allocates an amount from the operational risk reserve to a member's super interest in anticipation of receiving compensation from the third party
- the third party pays the super fund an amount of compensation
- the trustee of the super fund immediately allocates an amount to the operational risk reserve from the compensation amount received equal to the amount allocated to the member's super interest.

However, allocations from an operational risk reserve to a member's super interest to satisfy a trustee's obligation to reimburse or compensate a member that are not covered by an amount that will be recouped by the trustee from a third party would be considered to be a concessional contribution unless one of the exceptions set out in the regulations applies.

## **Payments where no right to seek compensation**

An individual may hold the right to seek compensation from a third party and direct that the third party make payment of the compensation direct to a super fund. In these circumstances the payment results in the capital of the super fund being increased and is paid for the purpose of benefitting the member of the fund. Accordingly, the payment will be a personal non-concessional contribution paid to the superfund at the direction of the member of the super fund. However, the payment will be a concessional contribution if the member subsequently provides the super fund with a notice of intent to claim a deduction and the super fund provides the individual with a written acknowledgement.

Receiving a payment where neither the fund nor the member has a right to seek compensation is a concessional contribution. This is because the payment increases the capital of the super fund and is made for the purpose of benefiting one or more members of the fund or all the members in general.

### **See also:**

- Compensation received by super funds from financial institutions and insurance providers
- Fees where no service is provided
- Deficient financial advice
- Overcharged insurance premiums

### **Find out about:**

- Compensation paid to individuals for advice from financial institutions
- Taxation Ruling TR 95/35 – *Income tax: capital gains: treatment of compensation receipts*

- Taxation Ruling TR 2010/1 – *Income tax: superannuation contributions*
- Disposal – CGT event
- Amending an income tax return
- Fixing BAS mistakes or making adjustments
- Goods and Services Taxation Ruling GSTR 2001/4 – *GST consequences of court order and out-of-court settlement*
- Correcting GST errors

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## Overcharged insurance premiums

When a super fund receives compensation from an insurer for overcharged premiums.

19 July 2019

Where a super fund has a right to seek compensation against an insurer, the insurer may pay the super fund compensation (in satisfaction of that right) that reflects any of the following:

- a refund of incorrectly charged premiums
- an amount corresponding to a loss of investment earnings arising from the incorrectly charged premiums
- interest.

In these circumstances, the following income tax, GST and superannuation consequences apply.

## Income tax

### Refund of insurance premiums

An amount of a death or disability insurance premium that is refunded to a super fund, where the super fund was allowed a deduction in

respect of the original premium, will be assessable income of the fund for the year in which the refund is received.

## **Compensation for loss of earnings or interest**

Compensation for earnings and interest will normally be assessable income to the super fund. However, if a compensation amount received by a super fund for loss of earnings or interest is part of the capital proceeds received in relation to a CGT event involving a CGT asset of the fund (including a right to seek compensation), the amount received will reduce the cost base of any underlying investment. If the investment has been disposed of, the amount is considered to be additional capital proceeds in relation to any relevant CGT event.

If the trustee determines that the amount cannot be attributed to any particular asset(s) of the fund, the compensation amount will be capital proceeds for the ending of the right to seek compensation. The super fund may be eligible to apply the CGT discount if the asset has been held for 12 months or longer.

## **GST**

### **Refund of insurance premiums**

The GST treatment of any refund of premiums will depend on the GST treatment of the original insurance. Typically it will be a partial refund of premiums for a group policy that covers multiple fund members.

If the refund relates to an insurance policy that was input-taxed, such as life, total and permanent disability (TPD) or a policy covering life, TPD and income protection issued by a life insurance business, then there will be no GST implications on refund of the premiums.

If the refund relates to a taxable insurance policy, such as income protection (which was not issued as part of a life insurance business), then the super fund will need to make an increasing adjustment and repay reduced GST credits previously claimed in relation to the refunded premiums. The adjustment will need to be reflected in the BAS that covers the period in which the super fund becomes aware of the adjustment (likely to be the period in which the refund is received).

### **Compensation for loss of earnings or interest**

If a compensation amount received by a super fund includes a component of interest, or compensation for loss of earnings, this component will not be subject to GST. This is because such a payment is not consideration for a supply.

## Super contributions

The compensation amount received will not be a super contribution for the benefit of a member of the super fund if the trustee of the super fund allocates an amount to the member's super interest in respect of the compensation. This is because the compensation amount does not result in the capital of the super fund being increased – the right to compensation has been satisfied by the compensation amount.

### Example: Refund of insurance premiums

HIJ Super Fund has a group insurance policy with KLM Insurance to provide income protection cover for its members, including those who opt to have additional insurance cover.

HIJ Super Fund claimed a deduction for the insurance premiums paid to the insurance provider, and also claimed reduced GST credits (as the supply of the insurance policy was a taxable supply to HIJ Super Fund).

HIJ Super Fund reviewed their members' super interests and determined that ten members, whose premiums had been paid, were not entitled to be covered under the insurance policy due to a pre-existing condition that was excluded under the policy. Nine of those members commenced the insurance cover on joining the fund in 2017 or earlier. One member commenced the insurance cover on joining the fund in late 2018.

In early 2019, HIJ Super Fund enters into a settlement with KLM Insurance to refund the premiums for the members who were not entitled to be covered (\$12,000) and pay compensation for lost earnings and interest (\$4,000).

HIJ Super Fund allocates amounts to the affected members' super interests in respect of the compensation payments.

No amount of the \$16,000 is a super contribution.

HIJ Super Fund includes the \$12,000 refund of premiums as assessable income in its income tax return for the income year it receives the refund. It also includes the \$4,000 compensation for loss of earnings and interest as capital proceeds received on the ending of its right to seek compensation.

As the right to seek compensation in relation to nine of the members arose in 2017 or earlier, and ended with payment of compensation in early 2019, the relevant asset was held for longer than 12 months in those cases. Accordingly HIJ Super Fund can apply the CGT discount to a capital gain resulting from the capital proceeds which are referable to the ending of its right to seek compensation in relation to those nine members.

The right to compensation in relation to the tenth member is not an asset that has been held for 12 months. Accordingly, HIJ Super Fund cannot apply the CGT discount to a capital gain resulting from capital proceeds that are referable to the ending of its right to seek compensation in relation to the tenth member.

The fund will also need to make an adjustment and repay reduced GST credits previously claimed with respect to the insurance policy. The \$4,000 component representing lost earnings and interest is not consideration for a taxable supply made by HIJ Super Fund.

**See also:**

- Compensation received by super funds from financial institutions and insurance providers
- Fees where no service provided
- Deficient financial advice
- Interim use of reserves
- Payments where no right to seek compensation

**Find out about:**

- Compensation paid to individuals for advice from financial institutions
- Taxation Ruling TR 95/35 – *Income tax: capital gains: treatment of compensation receipts*

- Taxation Ruling TR 2010/1 – *Income tax: superannuation contributions*
- Disposal – CGT event
- Amending an income tax return
- Fixing BAS mistakes or making adjustments

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## Tax treatment of transfers from foreign super funds

Questions and answers for tax treatment of transfers from foreign super funds to super funds.

28 March 2017

These questions and answers relate to the tax treatment of transfers from foreign super funds to Australian complying super funds.

### Scenario 1 – transfer from a foreign super fund to an Australian super fund

If your fund receives a super lump sum directly from a foreign super fund, your member can choose to have some or all of the assessable part of the lump sum treated as assessable income of your fund.

By doing so, your fund pays tax – on the assessable part of the lump sum – at the concessional fund tax rate of 15%, rather than the member paying tax at their marginal rate.

Your member can make this choice:

- up until the day they lodge their income tax return for the year of transfer or
- the day they would have been required to lodge one if they don't need to lodge a tax return.

This is the case unless the governing rules of your fund provide an earlier time.

If your member makes this choice, they must complete and submit the approved form to you. Once the choice is made, it cannot be revoked or varied.

**Next step:**

- Complete the approved form – **Completing your choice to have your Australian fund pay tax on a foreign super transfer (NAT 11724)**

### Example

A taxpayer has \$100,000 in a foreign super fund which is paid directly to an Australian super fund. Assume that the assessable amount of the payment is \$20,000.

The taxpayer may choose to have the \$20,000 treated as assessable income of the Australian super fund. In this situation, the taxpayer must complete the *Choice to have your Australian fund pay tax on a foreign super transfer* form (NAT 11724) and submit it to their super fund.

The Australian super fund will include the \$20,000 in its assessable income and the amount to be included in the taxpayer's assessable income will be reduced to nil.

## Who should complete the approved form (NAT 11724)?

Your member should complete this form if all of the following apply:

- they are an Australian resident transferring their entire entitlement in a foreign super fund to a complying Australian super fund
- they receive their super entitlement more than six months after becoming an Australian resident or terminating their foreign employment
- the entitlement being transferred includes earnings in the foreign fund, accumulated since your member became an Australia resident, that would have been assessable in their Australian tax return (that is, they would have paid tax on that amount at their marginal tax rate)

- they want to have your fund pay income tax on some or all of these earnings instead (a super fund generally pays 15% tax).

**Next step:**

- Download – Completing your Choice to have your Australian fund pay tax on a foreign super transfer (NAT 11724)

## **How is the assessable amount calculated?**

The assessable amount of a super lump sum from a foreign super fund transferred directly to an Australian super fund is referred to as applicable fund earnings. It is essentially the growth in the foreign super fund between the time your member becomes an Australian resident and when the lump sum is paid.

Applicable fund earnings are calculated differently depending on whether your member was an Australian resident at all times during the period to which the lump sum relates. Your member can apply for a private ruling to determine their applicable fund earnings.

For more information on applicable fund earnings, call the Super information line on **13 10 20**.

A super lump sum from a foreign super fund will generally be tax-free if received within six months of your member becoming an Australian resident or within six months of their foreign employment being terminated.

**See also:**

- Super lump sums from a foreign super fund

## **If the amount on the form is treated as assessable income of the Australian super fund, how is the rest of the payment from the foreign super fund treated?**

In most cases, if your member has chosen for all the assessable amount of the transfer to be assessable income of the Australian super fund, the part of the payment not covered on the form will be tax free.

## **How do you treat the assessable amount of the transfer when you pay it to your member?**

In most cases when you make a payment to your member, the assessable amount of the transfer will be treated as a taxable

component of a super lump sum benefit consisting of an element taxed in the fund.

**See also:**

- Calculating components of a super benefit
- Taxation of super benefits

## **Scenario 2 – transfer from a foreign super fund directly to your member**

### **What happens if the payment is made to your member, either directly or to a third party on their behalf?**

If the lump sum from the foreign super fund is paid directly to your member (or another person on their behalf) there is no impact on your fund. The assessable amount of the payment will be included in your member's assessable income and taxed at their marginal tax rate.

## **Scenario 3 – transfer from one foreign super fund to another foreign super fund**

### **How are payments from one foreign super fund to another foreign super fund treated?**

When a payment is made from one foreign super fund to another foreign super fund, there will be no tax payable by your fund or by your member at the time of that payment. Tax is deferred until the benefit is eventually paid to your member or to an Australian super fund, or otherwise dealt with on your member's behalf (that is, the monies exit the foreign super environment).

## **Where can I get more information?**

To learn more about the tax treatment of transfers from foreign super funds, call our information line on **13 10 20**.

## **Our commitment to you**

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.

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