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TAXATION INSTITUTE of AUSTRALIA
IT'S ESSENTIAL

26 August 2009

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: cgt_super_rollover@treasury.gov.au

Dear Sir

Tax Laws Amendment (2009 Measures No. 6) Bill 2009: Loss roll-over for merging superannuation funds

The Taxation Institute of Australia (**Taxation Institute**) welcomes the opportunity to comment on the Tax Laws Amendment (2009 Measures No. 6) Bill 2009: Loss roll-over for merging superannuation funds issued on 31 July 2009.

The proposed relief will greatly assist merging funds which would otherwise face the loss of potential benefits from realised and unrealised losses on their investments. The Taxation Institute welcomes the extension of the relief to revenue losses, and to situations where Pooled Superannuation Trusts (**PST**) and life company investments are held by merging funds or their successor funds.

The Taxation Institute would welcome further extension of relief to the following situations which are not encompassed in the proposed provisions.

- Mergers where the transferee fund is a small superannuation fund;
- Mergers where employers wish to make bulk transfers from large funds; and
- Situations where a fund holds all its assets in pooled investments and wishes to change providers.

In addition, the Taxation Institute would like to propose a change to the conditions under which the relief is available, to allow for situations where a fund must continue to maintain members in respect of whom insurance claims are outstanding or other litigation pending.

Small superannuation funds

The Taxation Institute notes that the proposed relief would not extend to situations where the transferee is a small superannuation fund. Given that a small fund can have up to four members, there are many situations where small funds may wish to merge, to achieve efficiencies in the administration of the assets of married partners, different generations and business partners. The Taxation Institute considers that the loss relief should be extended to small funds that merge with other Small APRA Funds (**SAFs**) or Self Managed Superannuation Funds (**SMSFs**).

There is much anecdotal information to suggest that this is a significant and well founded concern in the community.

The Taxation Institute is aware that small superannuation funds have been used as tools by promoters of early release schemes and the Taxation Institute understands the concerns that tax relief for mergers of small funds with other small funds could potentially ease the path for such schemes. However, the Taxation Institute's understanding is that the targets for promoters of these schemes are generally members of larger funds, who do not fully understand superannuation. There is little, if any, experience of existing small fund members/trustees being enticed into these schemes. The Taxation Institute considers it unreasonable that all small funds should be considered likely targets for schemes of this nature.

It is not the small funds that are at fault here, but a small percentage of the population that uses the descriptor SMSF to disguise a very different kind of entity. The Taxation Institute supports the efforts of regulators to prevent this exploitation, but suggests that denying appropriate tax relief for genuine fund mergers is not a necessary or desirable method of achieving this. Educating the public against early release schemes by various measures including the recent Alerts issued by the Australian Taxation Office would be more effective in the long term.

The Taxation Institute notes that, in practice, the relief would be limited to situations where small funds merge with other small funds. Logically no relief would be sought for members transferring from large funds to small funds which is the area perceived as a risk zone.

Bulk transfers from larger funds

The Taxation Institute believes it would be helpful if the relief could be extended to situations where, as a result of employer re-organisation, an employer would wish to transfer members and assets from a master fund or from another large fund. Since the large transferor fund would continue to have members and assets, the current proposals would not assist and may result in inequitable treatment for members who are the subject of the transfer – with the members remaining behind gaining at their expense.

A 'bulk transfer' would be likely to occur in a situation where an employer merges into a larger employer group or where there is a sale of a division of an employer to a new employer. In these circumstances, it is often important for reasons of industrial harmony and efficiency to move the employees from their 'original' fund to a fund used by the new group.

In the modern context it is not always the case that the transferring employer has a stand-alone fund. In many cases the transferring employees' superannuation is likely to be provided for under a master trust or in a large public offer fund – these kinds of 'original' funds would not terminate on transfer. In these situations, it is possible, though not necessary, that a 'sub-fund' may cease to exist following (or shortly following) transfer – but the whole 'original fund' itself will not terminate.

In the interests of equity it is important that in these kinds of situations, merging employers should be able to ensure that the benefit of a share of losses from the 'original fund' (or sub-fund) move with the transferring employees into the new fund.

Change in PST and life company providers

As currently drafted the provisions operate so that where an 'original' fund has invested all (or a large part) of its assets in a PST or life policy, that fund cannot access the roll-over relief when it transfers to a new PST and/or life policy provider – unless, of course, the 'original' fund itself is also terminated as part of that process.

This means that employees/members are likely to be disadvantaged where there is a legitimate transfer of an 'original' fund's entire assets (or a substantial portion of those assets) from one provider to another provider when compared to a similar scenario of employees/members affected by a fund-to-fund transfer.

In view of this situation, the Taxation Institute would welcome further consideration being given to extending the relief to situations where a fund with all (or a substantial portion) of its assets in a PST or life policy investment may wish to move between providers. The extension of relief to such a situation would promote competition with a view to ensuring the best and most efficient investment mechanisms are accessed by funds. Currently, trustees are effectively barred from making such a move as the benefit of losses, for good reason in the current climate, will typically not be fully reflected in the exit unit price. Hence, a move may not benefit employees/members because the unit pricing issues will outweigh other considerations which might favour a move.

Outstanding insurance claims

The proposed legislation requires that the 'original' superannuation fund should have no members at the end of the transfer period and that the transfer period must not straddle income years: proposed paragraphs 310-10(1)(d) and (e), 310-15(1)(d) and (e) and 320(1)(d) and (e).

However, in a merger situation, it may be necessary to maintain some members and assets in the transferor fund because they are the subject of outstanding disablement or death claims for which insurance is recoverable by the transferor fund or there is other actual or potential litigation surrounding the claim. There can be issues with assignment of insurance recoveries and litigation matters to a transferee fund.

Given that mergers typically occur via a 'successor fund transfer' the Taxation Institute would propose that one test of whether a fund has merged should be based around this notion. It is unusual (and unlikely) that a successor fund transfer would be used in circumstances where there are only several members transferring. Alternatively, the Taxation Institute suggests that a similar provision to section 310-10(2) is also required to reflect occasions when "members" are retained in the 'original' fund often due to the need to continue to process an insurance claim for death or disability through the original fund or because there may be a legal claim on foot that relates to a member of the 'original' fund which means that such member retains rights against the trustee of the original fund – in respect of which assets are retained.

The Taxation Institute believes that rationalisation of superannuation arrangements, and cost savings for members and employers could be further promoted by the extension of relief to situations outlined above.

If you require any further information or assistance regarding our submission please contact Joan Roberts on 03 9611 0178 or the Taxation Institute's Senior Tax Counsel, Michael Dirkis on 02 8223 0011

Yours faithfully

Joan Roberts

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