

TR 2000/D11 - Income tax: special income derived by a complying superannuation fund, a complying ADF or a PST in relation to the year of income

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Draft Taxation Ruling

Income tax: special income derived by a complying superannuation fund, a complying ADF or a PST in relation to the year of income

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Preamble

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. This ruling applies to complying superannuation funds, complying approved deposit funds (ADFs) and pooled superannuation trusts (PSTs). It considers what is special income for these superannuation entities. The ruling covers dividends from private companies, income from non arm's length transactions, income received from trusts in the capacity of beneficiary with no fixed entitlement and income received from trusts in the capacity of beneficiary with a fixed entitlement. The relevant section is section 273 of the *Income Tax Assessment Act 1936* (ITAA 1936).

Background

2. Section 273 identifies income that is being directed to a concessionally taxed superannuation entity. The specified portion of income so identified is the special component of the taxable income of the superannuation entity. By taxing the special component of the taxable income at the highest marginal tax rate that applies to individuals, the taxation benefit of directing income to a concessionally taxed superannuation entity that would otherwise have been derived by a high rate taxpayer is removed.

3. Section 273 does not reverse, unravel or invalidate a transaction so far as other parties are concerned. The income or capital gain consequences to other parties are determined in accordance with the relevant provisions of the ITAA 1936 and the *Income Tax Assessment Act 1997* (ITAA 1997).

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4. Section 273 was inserted by the *Taxation Laws Amendment Act (No 2) 1989*, applicable to assessments for the year of income in which 1 July 1988 occurred and subsequent years. In the form in which the section was originally enacted, special income of a superannuation entity included dividends from private companies and income from non arm's length transactions.

5. The section was significantly amended by the *Superannuation Legislation Amendment Act (No.2) 1999* to include income derived by the entity from trusts in the capacity of beneficiary of a trust estate. The amendments apply to income derived after 2:00pm by standard time in the Australian Capital Territory (ACT) on 25 November 1997.

6. There is a transitional arrangement that applies to superannuation entities that are holders of units in a unit trust. This arrangement applied from 25 November 1997 to the end of 2 July 1998.

Ruling

In house assets and special income

7. Whether income is special income is not determined by the income being derived from an asset that is an in house asset of the entity under the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA).

8. An asset can be an in house asset without the income being special income of the entity. If an asset is an in house asset, it is probable that the parties are not at arm's length with the entity. For income tax purposes, the key issue is whether the income derived from the in house asset is greater than what would have been derived if the parties were dealing with each other at arm's length. This is a question of fact that must be addressed by the Commissioner.

9. That an asset is not counted as an in house asset does not preclude the income from that asset being special income of the entity. If the parties are not dealing at arm's length and the entity is deriving income greater than would be the case if the parties were dealing with each other at arm's length, the Commissioner may conclude that the income is special income.

Dividends paid by a private company

10. Subsection 273(2) is in the same terms as former subsections 23FC(2) - (5) and the earlier provisions of former subsections 23F(16) - (18) of ITAA 1936. Superannuation funds, ADFs and PSTs generally qualified for exemption from income tax

under taxation law as it applied prior to 1 July 1988. They were, however, taxable in full on income of a type that would now be special income because of the operation of subsection 273(2).

11. A number of cases concerning the reasonableness or otherwise of excluding private company dividends under the equivalent provisions of the former subsections 23F(16) - (18) were decided by the Board of Review ("the Board"). As subsection 273(2) is in the same terms as former subsections 23F(16) - (18), the principles to be drawn from those cases remain relevant. (It should be noted, however, that some of the investments that are discussed in the earlier Board cases are no longer permitted investments for superannuation entities.)

12. Subsection 273(2) has the effect that all private company dividends are special income unless the Commissioner forms the opinion that it would be reasonable not to treat the dividends as special income. Subsection 273(2) needs to be read with subsection 273(3) which supports it by ensuring that any private company dividends paid indirectly can also be special income.

13. While the bare language of subsection 273(2) is the starting point that all private company dividends are special income, this does not remove the need for the Commissioner to consider all relevant facts to determine what opinion should be formed.

14. As part of forming an opinion that it would be reasonable not to treat the private company dividend as special income, regard must be had to the six matters in paragraphs 273(2)(a) – (f). All six matters have equal weight. It is possible for some of the matters to suggest the private company dividend should be treated as special income, other matters to suggest the private company dividend is not special income and yet other matters to be neutral.

15. The Commissioner expects the shares of the private company to be all fully paid or, if not fully paid, partly paid to the same extent. If the shares are paid to a different extent, the Commissioner will expect the dividends paid to reflect the differing extent to which the shares are paid up. If the effective rate of return to the superannuation entity for some or all of the shares it holds in a private company is greater than the effective rate of return other shareholders are obtaining, the Commissioner would draw the conclusion that the entity is obtaining a special benefit. In such circumstances, the Commissioner would treat the dividend as special income.

16. Where the shares in the private company are of different classes, differing rates of return to shareholders may be acceptable. The Commissioner will take into account whether the rate of return on different classes of shares is commensurate with the level of risk or other relevant commercial factors.

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17. Where the market value and the par value of the shares in a private company differ, the Commissioner would expect the superannuation entity to acquire the shares at market value. Where the issued shares do not have a par value, the Commissioner would expect the superannuation entity to acquire the shares at market value.

18. If the shares are acquired for less than market value, an implication that may be drawn is that one of the intentions of the superannuation entity in acquiring the private company shares was to enable the entity to derive dividend income greater than would be the case if all parties were dealing at arm's length. If an entity acquires shares in a private company for an amount less than the market value of those shares, any dividends paid on those shares are likely to be considered special income.

19. If there is no readily ascertainable market value for the shares, alternative valuation methods may be used. Without seeking to limit the taxpayer or the Commissioner, alternative valuation methods include:

- (a) determining the market value of the underlying assets of the company so as to value the share capital of the company;
- (b) comparison with publicly listed companies;
- (c) comparison with the sale of businesses similar to that of the business the company conducts;
- (d) net present value of expected future profits;
- (e) an independent valuation of the company shares by an expert valuer.

20. It is for the trustee to decide what expenditure will be incurred in obtaining the valuation. The Commissioner will place greater weight on a valuation that is supported by an independent expert opinion.

21. It is preferred that the valuation be conducted at or near the time of the acquisition of the shares by the superannuation entity. It is acceptable that the valuation was prepared for someone other than the Commissioner (e.g., a Bank when obtaining bank finance).

22. The Commissioner will not accept that the shares of a private company cannot be valued. The trustees of a superannuation entity have a duty to invest for the benefit of the members. To be able to justify the acquisition of private company shares as an appropriate investment for the superannuation entity, prudent trustees will have found a market value for the private company shares so that they are in a position to compare the option of acquiring shares with other investment options available to the superannuation entity.

23. The higher the rate of dividend expressed as a rate of return on the investment, the more likely it is that the private company dividend will be special income. There cannot be a set formula determining an acceptable level of dividend payable. It may be possible to make a comparison with the rate of dividend paid by public companies in the same industry as the private company. There may be industry benchmarks that can be used. The degree of risk involved will always be relevant. What is a high rate of return will vary over time as the social and economic environments that companies operate in change.

24. Where the profits of the company are largely dependant on the efforts of key personnel who are also members of the superannuation entity and less than market salary is being paid to those key employees, this indicates that what would otherwise be salary of an individual is being converted to dividends payable to the superannuation entity. The Commissioner would consider such private company dividends to be special income.

25. The Commissioner would expect that shareholders holding the same class of share to receive an equal declared dividend rate per share. If the superannuation entity receives a dividend rate greater than that of other shareholders of the same class, this will suggest that the dividend should be considered to be special income.

26. The declaration of a dividend rate that reflects the extent to which the shares are paid up would not, by itself, suggest that the dividend is special income. The declaration of differing dividend rates for different classes of shares will be acceptable to the Commissioner where the different rates reflect differing underlying commercial risk.

27. The issue of new shares in the private company to the superannuation entity is by itself a neutral matter. If the new shares are being issued as a means by which the superannuation entity can increase its equity in the company and entitlement to dividends, this will raise concerns for the Commissioner.

28. There may be other relevant matters that should be considered. What is relevant will differ between funds. Some possible relevant matters include:

- (a) the number of arm's length members in the entity;
- (b) changes in dividend paying behaviour;
- (c) the source of funds used by the entity to acquire the shares in the company.

29. The more members that a superannuation entity has who are at arm's length to the private company, the more likely it is that the Commissioner will conclude that it is reasonable to treat the dividends from the private company as not being special income. The

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Commissioner will consider the extent to which it is likely that members of the superannuation entity who are at arm's length to the private company will benefit from any dividends paid to the superannuation entity. If the arm's length members have small account balances with the superannuation entity while the members associated with the private company have large account balances, the Commissioner is more likely to consider that the private company dividends paid are special income.

30. Any unexplained changes in the dividend paying practice of the private company will impact on the opinion of the Commissioner. If a company has made profits but not paid dividends for many years begins to pay dividends when the superannuation entity becomes a shareholder, this would point towards the dividends being special income.

31. The person who is preparing the tax return of the superannuation entity and the taxation officer who is reviewing the private company dividend must consider all relevant matters and weigh them up to form an opinion. The matters can be considered separately or jointly.

32. If a dividend is special income, it cannot be apportioned between an amount the Commissioner would have considered reasonable as not being special income and the excess. The whole amount is special income.

Income from non- arm's length transaction

33. Subsection 273(4) applies to non arm's length transactions. The types of transactions that the subsection can apply to include interest on loans, rent from property, profit on sale of assets, etc.

34. The subsection does not apply to private company dividends paid at any time or income received by the superannuation entity as the beneficiary of a trust after 2:00 pm by standard time on 25 November 1997 in the ACT. Income received by the superannuation entity as the beneficiary of a trust before that time may be special income of the entity.

35. There are three requirements before subsection 273(4) can apply:

- (a) there must be a transaction other than payment of a private company dividend or derivation by the entity of income in the capacity of beneficiary of a trust estate;
- (b) the parties to the transaction must not have been dealing with each other at arm's length;

- (c) the income derived from the transaction must be greater than that might have been expected if the parties were dealing with each other at arm's length.

36. All three requirements are questions of fact. If it is established that all three requirements have been met, the income from the transaction is special income. There is no discretion for the Commissioner to exercise.

37. The parties to the transaction can be unrelated but not dealing at arm's length. The Commissioner will consider the whole relationship between the parties when determining whether they are dealing at arm's length.

38. When considering whether the quantum of income derived from a non arm's length transaction is greater than might have been expected to have been derived if the parties were dealing at arm's length, the Commissioner will take into account all relevant matters. The commercial risk that the superannuation entity is exposed to will be a relevant matter.

39. If the income derived from the non arm's length transaction is greater than might have been expected if the parties had been dealing at arm's length, the superannuation entity will need to establish unusual circumstances exist. Depending on the nature of the unusual circumstances, the Commissioner may accept that it is reasonable to accept that the income is not special income (refer Example 5).

40. If the income is special income, it cannot be apportioned between an amount that would have been derived if the parties were dealing at arm's length and the excess. The entire amount of income from the transaction is special income.

Trust Distributions

41. The amendments to section 273 ensure that income derived by a superannuation entity from trusts in the capacity of a beneficiary of the trust can be special income of the entity. The amendments apply to income derived after 2:00 pm by standard time on 25 November 1997 in the ACT. Whether income derived by a superannuation entity prior to that time is special income needs to be considered under the former subsection 273(4) regarding income from a transaction where the parties are not at arm's length.

Discretionary Trust Distributions

42. If a superannuation entity derives income in the capacity of beneficiary of a trust estate, other than by virtue of holding a fixed entitlement to the income, that income is special income.

43. In practice, if the trustee of the trust distributes income to a superannuation entity by exercising a discretion, subsection 273(6) will ensure that the income distributed is special income.

44. Surrounding circumstances are not relevant. Any commercial justification for the trustee's discretion is not relevant. There is no discretion available to the Commissioner to treat income derived by the superannuation entity in the capacity of beneficiary of a trust estate, other than by virtue of holding a fixed entitlement to the income, as anything other than special income.

Trust Distributions arising from a Fixed Entitlement

45. Subsection 273(7) requires two conditions to be met before income derived by an entity in the capacity of beneficiary of a trust estate by virtue of holding a fixed entitlement to the income is special income of the entity.

46. The first condition has two parts. The entity must have acquired the fixed entitlement under an arrangement or the income must have been derived under an arrangement. The definition of arrangement in subsection 273(8) is very broad. This is qualified in subsection 273(7) by the requirement that some or all of the parties were not dealing with each other at arm's length in relation to the arrangement.

47. The second condition is that the amount of income is greater than might have been expected if the parties had been dealing with each other at arm's length in relation to the arrangement.

48. To acquire a fixed entitlement to the income of a trust will invariably involve an arrangement. Similarly, to derive income from a trust will invariably amount to deriving that income under an arrangement.

49. Notwithstanding the existence of an arrangement, some or all of the parties must not have been dealing with each other at arm's length if subsection 273(7) is to operate to deem the income to be special income.

50. There is no requirement that all persons who have entitlements, including contingent entitlements under the trust deed of the superannuation entity, were party to the dealings not at arm's length. There is no requirement that all members of the superannuation entity benefit from the arrangement.

51. Where there is an arrangement and some or all of the parties are not dealing with each other at arm's length, the amount of income must be greater than might have been expected to have been derived by the entity if those parties had been dealing at arm's length. This will be a question of fact that must be examined for all superannuation

entities that are deriving income in the capacity of beneficiary of a trust by virtue of holding a fixed entitlement to the income.

52. Certain arrangements will be accepted as being at arm's length. Units held in publicly listed unit trusts that are sold to the general public on an Australian or foreign stock exchange will be accepted as having been acquired from the vendor at arm's length where the acquisition occurred on that exchange in the ordinary course of trade. Provided the trustees or persons associated with the trustees of the superannuation entity do not control the publicly listed unit trust the Commissioner accepts that the parties are dealing with each other at arm's length where the fixed entitlement arises.

53. When considering whether the income derived is greater than might have been expected if the parties were dealing at arm's length, the Commissioner will adopt an approach similar to that set out in paragraphs 36-39 of this ruling.

Transitional Arrangements

54. The Treasurer's Press Release on 25 November 1997 referred to assessable income derived by a superannuation entity in the capacity of holder of a unit in a unit trust. To ensure that superannuation entities that relied on the details contained in the press release are not disadvantaged, a transitional arrangement applied from 2:00 pm by standard time in the ACT to the end of 2 July 1998.

55. A fixed entitlement is a wider concept than that of holder of a unit in a unit trust. A fixed entitlement could exist in circumstances where the beneficiary does not own any units in the trust but under the terms of the trust deed is entitled to a fixed proportion of the capital and/or income of the trust.

56. For the period of the transitional arrangement, a superannuation entity that derives income as the holder of a unit in a trust estate must return that income as special income if:

- there was an arrangement in relation to which some or all of the parties were not dealing with each other at arm's length; and
- this arrangement relates either to the acquisition of the unit, or to derivation of the income; and
- the amount on the income is higher than might have been expected to have been derived by the entity if those parties had been dealing with each other at arm's length in relation to the arrangement.

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57. There are not expected to be many situations in which the transitional arrangements will bring about a different tax treatment to that which would apply after the transitional period is completed.

58. To be within the time period of the transitional arrangement, the superannuation entity must have become beneficially entitled to the fixed entitlement at any time from 2:00 pm by standard time on 25 November 1997 in the ACT to the end of 2 July 1998. Where the beneficiary does not become presently entitled to the fixed entitlement until the trustee makes a resolution in accordance with the terms of the trust deed, the trustee must have made the resolution within the transitional time period. It would be unusual for a trustee to make a resolution in the first two days of a financial year in respect of the trust income of those two days.

Definitions

59. A dividend paid by a private company includes any amount that is a dividend by operation of any section of ITAA 1936 or ITAA 1997. Any taxation credit entitlements attached to the dividend that are required by any provision of the ITAA 1936 or ITAA 1997 to be grossed up or otherwise included as assessable income, will for the purposes of section 273, take the character of the dividend that they are attached to. It is not the purpose or intent of this ruling to determine what constitutes a dividend.

60. Income from a trust estate in the capacity of beneficiary of a trust includes any amount that by the operation of any provision of the ITAA 1936 and ITAA 1997 is the income of the recipient in the capacity of beneficiary of a trust. Income includes any taxation credit entitlements that are associated with the distribution of trust income.

61. The special component of the taxable income of a complying superannuation fund, a complying ADF fund or a PST is the amount (if any) remaining after deducting from the special income:

- a) Any allowable deduction that relates exclusively to the special income; and
- b) So much of any other allowable deduction as, in the opinion of the Commissioner, may appropriately relate to the special income.

62. Sections 26, 27 and 28 respectively of the *Income Tax Rates Act 1986* apply the tax rate of 47% in respect of the special component of taxable income.

Date of effect

63. This ruling sets out the current practice of the Australian Taxation Office and is not concerned with a change in interpretation.
64. In respect of private company dividends, the ruling applies to all private company dividends paid since the commencement of section 273 on 1 July 1988.
65. In respect of non arm's length transactions, the ruling applies to all transactions entered into from 1 July 1988. A non arm's length transaction has never included the payment of a private company dividend and since 2:00pm by standard time in the ACT on 25 November 1997 does not include income derived from a trust in the capacity of a beneficiary.
66. In respect of trust distributions, the ruling applies to all trust distributions made after 2:00pm by standard time in the ACT on 25 November 1997.

Examples

Example 1

67. A private company has 40 000 \$1.00 full paid shares on issue. The shares are beneficially owned by the members of one family. The market value of the shares is \$1.50 per share. A further 10 000 shares are issued fully paid for a price of \$1.10 per share to the superannuation entity. Two members of that family are the only members of the superannuation entity. The next year the private company pays a dividend at the same rate to all shareholders.

Taking into account that the shares were issued at less than market value to the superannuation entity and the relationship between the entity and the other shareholders, the Commissioner would consider the dividends to be special income of the entity.

Example 2

68. A husband and wife who are partners in a professional practice sell the business real property of that professional practice to their self managed superannuation fund. At the time of sale, an independent market valuation is obtained and the business real property is sold to the fund at that value. The husband and wife as partners in a professional practice enter into a long term lease agreement with their SMSF. The payments required under the lease are set at a level that independent experts in the lease of commercial property advise is appropriate for that type of property in that market. The lease

payments are reviewed on a regular basis to ensure that they remain at market level.

As the property was acquired at market value and the lease payments are set at a market rate, the Commissioner would accept that the income derived by the SMSF is not greater than would be expected if the parties were dealing with each other at arm's length.

Example 3

69. A superannuation entity is issued 50% of the shares in a private company of which the directors are the only members of the entity. The nature of the business that the company conducts is such that the physical assets of the company have very little value.

The balance sheet of the company before the shares were issued showed \$10 000 of plant & equipment at written down value and \$200 000 cash on deposit which reflects undistributed profits of earlier years. The company earns its business income primarily because of the skills and knowledge of the directors who are being paid less than the market value in salary for their services. The directors have other income such that they are on the highest marginal tax rate. After paying the company \$210 000 cash for the newly issued shares, the balance sheet of the company shows \$10 000 plant & equipment and \$410 000 cash. The company immediately paid a dividend of \$100 000 to the fund (\$200 000 in total).

There is no apparent business need for the further capital by the company. Dividends which would but for the issue of further shares have been paid to a high tax rate taxpayer are now to be paid to the superannuation fund. The Commissioner would conclude that it is reasonable to treat the dividend as special income.

Example 4

70. A company has issued 1 000 class A shares (held by husband/wife directors) and 1 000 class B shares (held by a fund of which the directors are the only members). In the event of the wind up of the company, the class B shares are entitled to a return of capital in precedence to the class A shares. Examination of the company's balance sheet indicates that the increase in market value of the real estate that the company owns is so substantial that it is extremely unlikely that the company would be wound up or that any shareholder would not receive a full return of capital. The directors of the company resolve to pay a dividend of 10 cents per share to the class A shares and \$10.00 per share for the class B shares.

As there is no apparent commercial justification for the declaration of different dividends for the two classes of shares that withstands scrutiny, the dividend paid to the fund is special income.

Example 5

71. A self managed superannuation fund owns one asset which is a commercial property that is rented to a company wholly owned by members of the fund. The nature of the business conducted by the company on the commercial property is such that there is a real risk that the land will become contaminated and require an expensive clean up if it is ever to be sold to another party. The rent charged is higher than that paid by tenants of other comparable commercial properties so as to cover the potential clean up costs. There is community pressure to amend environmental laws so as to prevent the type of business being conducted by the company being conducted by any company in Australia. Very few arm's length landlords are willing to accept a company conducting such a business as a tenant.

The fund has an investment strategy that permits the holding of the commercial property. The trustees of the fund had taken into account the investment risk, the rate of return offered and the membership profile of the fund members before making their decision that the commercial property was an appropriate investment for the fund.

The higher rent may be acceptable to the Commissioner in view of the risk involved in allowing the business to be conducted on the premises.

Example 6

72. A self managed superannuation fund owns all the units in a unit trust. The trust purchased the trading stock of a company controlled by the members of the fund at a cost less than market value. The company was then placed into liquidation. The trading stock is then on sold to an arm's length party for a substantial profit and the trust pays a trust distribution to the fund.

The purchase and subsequent sale of trading stock is an arrangement. The parties are not dealing at arm's length. The entire distribution to the fund is special income of the fund.

Detailed contents list

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Your comments

74. If you wish to comment on this draft Ruling, please send your comments promptly by **30 August 2000** to:

Contact Officer: Tony Trumble
E-Mail address: Tony.Trumble@ato.gov.au
Telephone: (02) 62168218
Facsimile: (02) 62168452

Address: **PO Box 900,
Civic Square ACT 2608**

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Subject references:

- special income
- complying superannuation fund
- complying ADF
- complying PST
- private company dividends
- non-arms length transaction

Legislative references:

- ITAA 1936 273
- ITAA 1936 273(2)
- ITAA 1936 273(3)
- ITAA 1936 273(4)
- ITAA 1936 273(6)
- ITAA 1936 273(7)
- ITAA 1936 273(8)
- Superannuation Industry
(Supervision) Act 1993

Case references:

- Superannuation Legislation
Amendment (No 2) Act 1999
- Taxation Laws Amendment (No 2)
Act 1989
- ITRA 1986 26
- ITRA 1986 27
- ITRA 1986 28
- Case A15, 69 ATC 89
- Case A38, 69 ATC 225
- Case A 39, 69 ATC 227
- Case A40, 69 ATC 229
- Case A41, 69 ATC 233
- Case A77, 69 ATC 420
- Case B15, 70 ATC 61
- Case B40, 70 ATC 202
- Case E56, 73 ATC 442
- Case M63, 80 ATC 440

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