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taxation and commercial

Estate planning considerations

in the SMSF context

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Important Factors

- Constituent documents
- Superannuation Industry (Supervision) Act
- Income Tax Assessment Acts
- Trustee obligations / powers
  [equity / legislation – e.g. Trustee Act]
- Family provision legislation

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Death benefit payments

- Payment of death benefits determined by governing rules and not will: *McFadden v Public Trustee for Victoria*

- Prima facie a trustee discretion (subject to trust deed and legislation) [*Katz*]

- In SMSF context – deed may allow members to make death benefit nominations.

Death benefit payments

- Limited to ‘dependants’:
  - Spouse (legal or de facto)
  - Child of the member
  - Person whom member has ‘interdependency relationship’
    - Close personal relationship
    - Living together
    - One or both provide financial support
    - One or both provide domestic support and personal care
  - Dependant (common law)
- Estate or LPR (subject to trust deed)

Types of DBN

(1) Nominated beneficiary

(2) Binding death benefit nominations
[binding if to dependent]

(3) Reversionary beneficiary
(income phase only)
[binding if to dependent]

(4) Beneficiary specified in trust deed

Binding death benefit nominations

SMSF Determination 2008/3:

- Reg 16.7A SIS Regs not apply
- 3 year rule not apply (subject to deed)

Implications for SMSF's:

- Terms of deed essential
- Consider whether Reg 16.7A provided for or implied
- Deed should allow for indefinite BDBN
- BDBN should be drafted with requisite capacity and intention

Treatment of death benefits

- Three step approach:

1. **Who is the beneficiary**
   (death benefit or non-death benefit)

2. **Determine method of payment**
   (income stream or lump sum)

3. **Determine tax implications**

Taxation of superannuation death benefits

Lump sum vs income stream

Lump sum:

- Death benefit dependent - tax free
- Non-death benefit dependant

Component	Tax treatment
Tax-free	Nil
Taxable (taxed)	15% (plus Medicare levy)
Taxable (untaxed)	30% (plus Medicare levy)

[all paid proportionally]

Taxation of superannuation death benefits

Income Stream

Only payable to dependants

Pensions can be paid to:

- Spouse
- Person who is dependant at date of death
- Person in interdependancy relationship prior to death
- Child under 18
- Child aged 18 – 25 and financially dependent on member
- Child 18 or over who is permanently disabled

Taxation of superannuation death benefits

Income stream

Taxation of pensions from a taxed fund:

Age of original owner at death	Age of beneficiary upon reversion	Taxation (taxed scheme)
Any age	60 or older	Tax-free
60 or older	Under 60	Tax-free
Under 60	Under 60	Tax-free component is tax free and taxable component beneficiary's MTR (with 15% tax offset). Tax-free when beneficiary reaches 60

Taxation of superannuation death benefits

Income stream

- If income stream payable due to death and beneficiary commutes income stream within the later of 6 months from death or 3 months from grant of probate or letters of administration, the commutation is treated as a **superannuation death benefit**.
- If commuted outside the later of 6 months from death or 3 months from grant of probate or letters of administration, then treated as a **superannuation member benefit** and taxed as a **superannuation benefit**.

Retaining funds in superannuation

- Strategy 1: receive the income as an income stream (either from the accumulation phase or continuation of income stream paid to member). If income not required, the income stream can be commuted later than 6 months from death or 3 months from probate / administration to receive superannuation benefit [not for children under 18 or 18-25]
- Strategy 2: Roll superannuation into a deferred annuity which allows nomination of a reversionary beneficiary. Therefore beneficiary can retain benefit in superannuation until member would have turned 65. A deferred annuity is one which has not yet commenced to be paid – so commutation of income within /outside 3/6 month rule applies.

Superannuation proceeds trusts

- Trust established to only accept superannuation death benefits
- If there is no testamentary trust in a will
- Benefit paid directly from a fund to a trust
- Beneficiaries restricted – spouse and dependent children
- Income – all beneficiaries
- Capital – only dependent children

Wills and payment to the estate

- BDBN - member may nominate a death benefit to be paid to LPR
- No BDBN - trustee may use discretion to pay to deceased estate

IF SO:

will should make provision for such payments

Section 35 of the Succession Act

- Unintended tax consequence

- If beneficiary does not survive deceased by 30 days, then the beneficiary is deemed to have pre-deceased the deceased
- Subject to contrary intention

Section 35 of the Succession Act

- Example - I die, then my wife dies within 30 days of my death – my wife deemed to have pre-deceased
- Effect – if no other ‘dependants’ – death benefit payments subject to tax
- **Ensure that BDBN and will specifically provides that section 35 does not apply to death benefit payments.**

Binding death benefit nominations

Constituent documents essential

Trust deed to provide:

1. What benefits can be paid?
2. To whom can benefits be paid?
3. The procedure for nominating death benefits?

Complaints procedure?

- Should your deed have a dispute resolution / complains procedure?
- SCT – not applicable to SMSF’s
- Create a dispute resolution mechanism. If don’t comply – breach?
- If give reasons- reviewable decision for the Courts?

Estate planning

- Estate planning – more than retirement and death
- Should also deal with incapacity
- Consider delegation of trustee powers

Family provision legislation

- *Succession Act 2006* (NSW)
- 1 March 2009
- ‘Eligible person’
- Claims made:
  – from estate; or
  – if estate inadequate – ‘notional estate’
- ‘relevant property transaction’ includes property passing from a superannuation fund

Family provision legislation

- ‘Eligible persons’:
  - Spouse / former spouse;
  - De facto
  - Children (not step-children)
  - Person wholly / partially dependant on deceased
  - Grandchild (wholly / partally dependant)
  - Member of household (wholly/partially dependant)
  - Deceased living in a close personal relationship

Family provision legislation

- Notional estate claw-backs:
  - Transaction takes effect on or after death;
  - Transaction 1 year before death – when deceased had a ‘moral obligation; and
  - Transaction 3 years before death – intention to deny or limit provision to eligible person

- Note – transaction can be act or omission
- e.g. making or not making a BDBN

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