If rolling a pension from one fund to another, must the pension first be commuted?

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Bryce Figot

Common sense has a very simple answer: no, where rolling a pension from one fund to another, the pension does not need to be commuted. But does common sense prevail?

Consider Bob. Bob is in receipt of an account-based pension from SMSF 1. He simply wants to move that pension from SMSF 1 to SMSF 2. He figures that since he wants the same pension before and after there is no need to commute it.

However, is this how the law works?

There is no express answer.

However, one can read in between the lines.

At this point, it is important to consider the meaning of the word commute. The superannuation legislation does not define the term and there is scant case law on point. Accordingly, it is appropriate to look at dictionaries. The Oxford English Dictionary defines the word 'commute' as meaning '[t]o give (one thing) in exchange for another, to change'. Similarly, the Macquarie Encyclopedic Dictionary defines it as meaning 'to exchange for another or something else'. Finally, the Butterworths Australian Legal Dictionary defines commutation as '[t]he act of substituting one thing for another'.

Therefore, when a pension is commuted, it is really just exchanged for something else. This raises the question of what a pension can be exchanged (ie, 'commuted') for.

There are parts of the superannuation legislation regarding pensions that provide things like '… the superannuation lump sum resulting from the commutation is transferred directly to the purchase of another benefit…' (See, for example, regs 1.05 and 1.06.) Accordingly, this suggests that where a pension is commuted, the thing that it is exchanged for is a lump sum.

But must the pension be exchanged for a lump sum and then the lump sum be transferred to another fund only to then have that lump sum used to start a new pension in that new fund?

Again, there is no express answer.

However, one can read in between the lines.

There are parts of the superannuation legislation regarding pensions that provide things like '... if ... [the pension] ... was purchased with a rollover superannuation benefit that resulted from the commutation of: ... a pension ...'

In light of the above, the legislation certainly sets up a scheme where it is possible to commute a pension and — with the resulting lump sum — roll over to a new fund and then start a new pension. (Naturally, before doing so there might be certain criteria that must be first met, such as paying pro-rated relevant minimums.)

However, is this the *only way*? Again, recall Bob. He might be angrily saying at this stage that he merely wants the same pension before and after. He does not want the time and hassle of commuting.

The conservative answer is that commuting is the only way. The legislation does not envisage another method of moving a pension from one fund to another.

Naturally, of course, one can make counter arguments to say the silence of the legislation (ie, the absence of a ban) means that funds can roll pensions from one fund to another without a commutation. I don't think that that is the better view. Rather, I am of the view that the best reading of the legislation is that the pension first be commuted.

Sorry Bob.

However, a relevant question is always: what does the regulator — that is, the Commissioner of Taxation — think?

His key ruling on starting and commuting pensions is Taxation Ruling TR 2013/5. However, the ruling does not consider this question. That being said, the compendium that is associated with the draft version of that ruling reveals interesting insights. Namely, it reveals that the following question was put to the Commissioner:

> Does a commutation occur when an amount is rolled over
> The Ruling does not consider the effect of a member requesting a rollover payment, whether to a new fund or back to accumulation phase in their current fund. The Ruling should clarify whether a commutation occurs, and whether the superannuation income stream ceases.
>
> It could also be clarified that a superannuation lump sum arises in these circumstances. This is important for the application of the proportioning rule to the notional lump sum, and to any subsequent pension which commences.

The response from the Commissioner was as follows:

> The Ruling provides principles which can be used to determine if a commutation has occurred. ***Only a lump sum amount can be rolled over.*** The Ruling does not look, however, at what happens after the commutation occurs, for instance whether it is paid to the member or rolled over to either a new fund or to a new account in the existing fund.
> This question therefore goes into a level of detail not contemplated by the Ruling and is out of

scope.

Further, advice can however be sought from the ATO in relation to particular circumstances if required. [Emphasis added]

Accordingly, the Commissioner has stated, albeit in a non-binding fashion, that only a lump sum amount can be rolled over.

Therefore, the Commissioner and I are in agreement: the short answer to this question is yes, where rolling a pension from one fund to another, the pension must first be commuted.

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