Superannuation and the ‘fast death tax’

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Where a person has superannuation entitlements and no tax dependants, the consequences of the so-called ‘fast death tax’ need to be considered. The ‘fast death tax’ arises where funds that could otherwise be withdrawn tax free by the member during their lifetime remain in the fund at the date of death of the member and are then subject to tax on the distribution from the fund.

In broad terms, the tax treatment of lump sum payments from superannuation is summarised in the table below:

LUMP SUMS	AGE OR DEPENDANT STATUS	TAX TREATMENT (TAX RATE %)	
		TAX FREE COMPONENT	TAXABLE COMPONENT
Lump sum withdrawn pre-death	N/A	0%	0%
Death benefit	Death benefit dependant	0%	0%
	Non-death benefit dependant	0%	15% or 30% on certain insured benefits

Importantly, there is a distinction between a ‘dependant’ eligible to receive a death benefit under the *Superannuation Industry (Supervision) Act* (**SIS Act**) and a ‘death benefit dependant’ eligible to receive death benefits tax free.

A ‘dependant’ under the SIS Act includes a spouse, child or any person in an ‘interdependency’ relationship with the member of the fund.

By contrast, a ‘death benefit dependant’ is limited to a spouse, child aged under 18, or a person who is financially dependent or in an interdependency relationship with the member.

In particular, this means that while adult children will qualify as a ‘dependant’ and eligible to receive death benefit entitlements under the SIS Act, they will not as a ‘death benefit dependant’ for tax purposes. This means they will be taxed on the proceeds as outlined in the table above at a minimum of 15% and possibly 30% (plus other additional ‘levies’, for example Medicare).

If a member has no tax dependants, the ‘fast death tax’ creates a clear incentive to ensure all entitlements are withdrawn prior to death.

The main disadvantage of withdrawing a lump sum from superannuation prior to death is that any income generated on investment of the funds will be taxed at the recipient’s marginal tax rate, rather than benefitting from the concessional rates which apply to superannuation funds.

Practically it is important to note that there are conflicting views about whether the Australian Taxation Office (**ATO**) requires a ‘physical’ withdrawal of funds from superannuation prior to death in order to ensure no tax is payable. Conservatively it should be assumed that the ATO will reject the validity of approaches such as pre-signed member withdrawal authorities, particularly given its publicly released guidance in February 2023.

This said, a carefully crafted member withdrawal direction may create at least a reasonably arguable position to avoid the impost of ‘fast death tax’.

An alternative approach that is generally accepted as ensuring legitimate avoidance of ‘fast death tax’ is ensuring a member’s enduring power of attorney includes an authority for the attorneys to act on the principal’s behalf in relation to their superannuation entitlements.

This may include the ability to urgently withdraw superannuation entitlements before death, subject to any requirements or limitations which may be imposed by the trustee of the fund.

Indeed we are aware of situations where terminally ill members have had intense additional medical support provided in order to allow their attorneys sufficient time to withdraw all benefits. In one instance the ‘fast death tax’ was legitimately avoided with less than a day to spare.

If you would like any additional information, please contact us at solutions@viewlegal.com.au.