One of the valuable services that Aries Insight offers to members is the Aries Help Desk. Our members can ask us any technical questions they come up against and we will address them, undertaking any research needed.

We then capture our replies in the Aries system as a "technical queries database" so other members can benefit from this research too. (All queries are, of course, suitably anonymised.)

For this Insight, we will look at a smattering of recent enquiries.

A DB scheme member has died aged under 75. The scheme provides a death in service lump sum. During the 'relevant two-year period' for tax-free lump sum death benefits, the amount for the death in service lump sum was passed to the employer in readiness for it to be paid to the beneficiary. However, the two-year period ended before the employer could pay the beneficiary. Does this mean the death in service lump sum is taxable?

The death in service arrangement here provides a defined benefits lump sum death benefit ("DBLSDB"). A lump sum death benefit ("LSDB") in respect of a member who died aged under 75 is paid free from tax if the payment is made within the relevant two-year period.

(If any part of the LSDB exceeds the deceased member's available lump sum and death benefit allowance ("LSDBA"), that part would be subject to income tax, but the responsibility for establishing if that tax charge arises lies with the deceased member's legal personal representative ("LPR") rather than the pension scheme.)

We conclude that the DBLSDB in this case is tax-free (subject to available LSDBA, which is the LPR's responsibility as mentioned). This is on the basis that the payment occurred when the pension scheme passed the amount to the employer, which was within the relevant two-year period.

Although the ultimate beneficiary may not have received their lump sum, the key factor is more about in respect of whom the lump sum is paid than who it is paid to.

Section 160(1) of *The Finance Act 2004* ("FA 2004") says, "The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164" i.e. an 'authorised (member) payment'.

Among the payments specified in Section 164 are "lump sums permitted by the lump sum rule or the lump sum death benefit rule to be paid to or in respect of a member (see sections 166 and 168)" *[Section 164(1)(b) FA 2004]*. A DBLSDB is, of course, one such lump sum.

The lump sum paid by the trustees to the employer is a lump sum paid "in respect of a member" even though it has yet to be passed by the employer to the ultimate beneficiary.

Back in 2006, the 'old' version of the 'relevant two-year period' was introduced, under which an LSDB paid outside of the relevant two-year period was an unauthorised payment. Many pension providers asked HMRC whether the funds could be moved out of the scheme into a 'holding' or 'escrow' account before the two-year period ended, to prevent unauthorised payment charges arising. HMRC's stance was that no unauthorised payment charges would arise provided the funds were moved outside of the tax-privileged environment of the registered pension scheme within the two-year period.

The current tax charges that might be due when an LSDB is paid outside of the relevant two-year period (i.e. marginal rate income tax or the special lump sum death benefits charge) are less penal than when the payment would have been treated as unauthorised. We see no reason why HMRC's view (that the tax will not arise if the sum has left the pension scheme in time) should have changed.

The key thing is the funds are moved outside of the tax-privileged environment of the registered pension scheme within the two-year period: HMRC is happy the LSDB has been 'paid' at that point.

Can a scheme administrator apply a 'subrogation' approach to member overpayment recovery, where the scheme administrator reimburses the pension scheme and the member's debt is transferred to the scheme administrator?

We don't think this is possible.

In our view, an overpayment can only be truly deemed to have been returned if it is the payee (in this case, the member) who returns it.

If the member cannot return the overpaid amount at once, it might be possible for the scheme to allow the member to return it in a series of reasonable instalments. But the scheme would need to avoid adjusting the member's pension rights to reflect full return of the overpaid amounts ***before*** the member has paid their final instalment. If full adjustment is made and then any remaining instalment(s) fall unpaid, the member would have been conferred with an advantage over other members.

Another concern is that, if the scheme administrator was to 'pay back' the overpayments to the trustees, then the amount 'paid back' would appear to be treated by the pension tax rules as a contribution for and on behalf of the member. The pension tax rules are silent on subrogation (and indeed largely silent on error rectification as a whole) and would not be capable of 'looking through' that payment to see the subrogation arrangement underneath it.

However, this is ultimately a matter for the trustees to take a view on, and they may wish to consider legal advice when making their decision.

What provides the basis for a SIPP that is winding up to make a transfer without member consent?

For Personal Pension Schemes ("PPS"), including SIPPs, there is no direct legislative provision for the scheme to transfer benefits without member consent. Instead, it appears that power arises because there is no legislative restriction.

For occupational schemes Section 71 of *The Pension Schemes Act 1993* ("PSA 1993") provides members with the right to have a 'short service benefit' preserved under the scheme, if certain conditions are met.

Section 73 of PSA 1993, along with Regulation 12 of **The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991** *(SI 1991/167*, ("the Preservation of Benefit Regs"), enable transfer of members' benefits without consent in certain circumstances.

For stakeholder schemes, Regulation 12(6) of the Preservation of Benefit Regs enables transfer without consent when the stakeholder scheme is winding up.

However, PPS (including SIPPs) have no equivalent of the Preservation of Benefit Regs. A PPS may discharge its liability to provide benefit in accordance with its scheme rules / contract terms. Any provision for a particular PPS to transfer without member consent will be contained in its scheme rules / contract terms.

Hence, a SPP may transfer without member consent if its scheme rules / contract terms enable it.

A member has applied for a transitional tax-free amounts certificate ("TTFAC") even though they have not taken any benefits nor otherwise used up any lifetime allowance ("LTA"). Must the pension scheme comply with this application?

There are effectively three cohorts underpinning this enquiry:

First Cohort
Individuals who used up some/all of their LTA before 6 April 2024 (whether they have a pension that came into payment before 6 April 2006 or not).

Second Cohort
Individuals who did not use up any LTA before 6 April 2024 but have a pension that came into payment before 6 April 2006.

Third Cohort
Individuals who neither used up any LTA before 6 April 2024 nor have a pension that came into payment before 6 April 2006.

The TTFAC and applications for it arise under Paragraphs 125 to 127 of Schedule 9 of *The Finance Act 2024* ("FA 2024").

Importantly, the TTFAC is a feature of transitional provisions for calculating available Lump Sum Allowance ("LSA") and/or LSDBA for the First Cohort (accounting for their pre-6 April 2024 benefit crystallisation events).

The TTFAC is *not* a feature of transitional provisions for calculating available LSA/LSDBA for the Second Cohort.

Naturally, there are no available LSA/LSDBA transitional provisions for the Third Cohort.

Putting this another way, the TTFAC rules (and the TTFAC itself) have no effect or relevance for members who are not in the First Cohort.

Yet nothing in the TTFAC application rules specifically excludes those in the Second or even Third Cohort from applying for one (even though doing so would be a waste of time for both the member and the pension scheme). It appears that, if a pension scheme did receive a valid TTFAC application from a member of either the Second or Third Cohort, the requirement to issue that person with a TTFAC, within three months of their valid application, would still apply.

If a scheme receives an application from a member not in the First Cohort, it could suggest that the member first works through the HMRC online service Check if you can apply for a transitional tax-free amount certificate. The service should return the message, "You do not need to apply for a transitional tax-free amount certificate as it does not give you an additional tax-free amount."

(The questions we receive are not only about HMRC or DWP rules. Let us close with one about FCA rules.)

Must SSAS trustees be FCA regulated for investment purposes?

The short answer here is it depends on the investment choices the trustees intend to make. They might find that for some activities they must be FCA regulated, but not for others.

The functions of the Trustees of an occupational pension scheme are detailed in Sections 32 to 39 of the *Pensions Act 1995* ("the Act").

Section 36 of the Act concerns the Trustees' power to choose investments under the scheme. Subsection (1) requires that the trustees exercise their powers of investment in accordance with both regulations and subsections (3) and (4).

Subsection (3) requires that, before investing in any manner*, the trustees obtain and consider "proper advice" on whether the investment is satisfactory.

**(except if the investment is mentioned in Part I of Schedule 1 to the* Trustee Investments Act 1961*, a highly restricted range of investments that is unlikely to be of relevance for a SSAS)*

The term "proper advice" is defined in subsection (6). If giving the advice is a "regulated activity" for the purposes of the *Financial Services and Markets Act 2000* ("FSMA 2000"), the advice must be given by a person either authorised by the FCA to give that advice (or exempt from that authorisation). Otherwise, the advice simply needs to be given by a person the trustees consider to be competent to provide that advice.

If the Trustees are suitably FCA regulated, then they may be able to advise themselves. (If just one of them is suitably FCA regulated, that individual may provide the required advice to the entire Trustee board.)

It is of note that subsection (4) of Section 36 of the Act imposes a similar requirement to obtain and consider "proper advice" if the trustees are considering retaining an existing investment.

Having said that, all the trustees may need to be FCA regulated if they make regular investment decisions and directly buy or sell assets for the scheme (in a sense, 'trade'), or if they perform their trustee functions "by way of business". This may be an "activity of a specified kind" under section 22 and Paragraph 6 of Schedule 2 of FSMA 2000. To be such an activity, it must be one of those in the somewhat lengthy *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (SI 2001/544).

In summary, trustees would need to consider how they intend to manage their scheme (including selecting, making, or selling investments) so they may determine when and if they must be FCA regulated.

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