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Mr Rory Tait
Senior Policy Advisor
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Dear Rory,

Commutations of overseas pensions

Thank you for the opportunity to comment on the consultation on **Commutations of overseas pensions**.

CPA Australia represents the diverse interests of more than 175,000 members, including over 3,300 members in New Zealand, working in over a 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

We make the following comments for your consideration:

In case law, the characteristic of periodicity or regularity is one of the most often mentioned characteristics of a pension. It can be an important indicator that a payment or series of payments is in the nature of a pension. Periodicity as a characteristic of a pension was emphasized in In *Re Lauder (Deceased), Public Trustee v CIR* [1963] NZLR 845. That case concerned the commutation of part of a pension to the widow of the deceased and whether the lump sum was a "pension" within the definition in section 2 of the Estate and Gift Duties Act 1959. The definition of a "pension" in that Act was as follows:

> ... includes any annuity, retiring allowance, or other periodical payment, by whatever name it is called.

In the light of this definition, the Supreme Court considered that a pension was a periodic payment. In relation to the commutation of the pension, Hutchison J said that because the payment was a lump sum in form, it was not a pension. However, it should be noted that the Supreme Court decision was decided in relation to a statute which defined a pension as a periodical payment, unlike the ITA 2007, which does not define "pension".

However, periodicity will not in itself always be determinative of the existence of a pension. It is possible for a lump sum amount to be paid in several instalments without those payments being a pension.

It appears that the Commissioner identified that some foreign jurisdictions, e.g. the United Kingdom, individuals can commutate a portion of an individual's pension to a cash sum on reaching retiring age as that option has a tax advantage under foreign rules. Under New Zealand rules, the pension scheme continues to exist after the lump sum commutation payment is made.

This is not different to US schemes where a person must make commutation payments and minimum annual withdrawal which might not be continuous or regular.

We are of the view that both payment patents need to be clarified within CF 3 to clearly distinguish or to include these to the termination of a foreign superannuation scheme and the receipt of a termination payment where the foreign scheme does not **continue to exist**.

We need to emphasise that most of our members have correctly returned commutation payments as well as payments which are periodic and regular as pension payments in the past. Therefore, the clients have paid tax on the correct 100% methodology.

The consultation paper indicates that the Commissioner has identified significant non-compliance with the pension rules in New Zealand. It is worth noting that these rules were not changed on enactment of the foreign superannuation lump sum rules in 2014. The proposed change of the law should be supported with targeted compliance action to ensure the integrity of the system.

We also observe that these proposals do little to strengthen the voluntary compliance model. In particular, the suggested changes to the foreign investment fund rules and the uplift of the residential investment threshold appear to be an unusual policy approach.

If you have any queries about this submission, please contact me on jenny.wong@cpaaustralia.com.au or Bill Leung, Tax Technical Advisor on bill.leung@cpaaustralia.com.au.

Yours sincerely,

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- Mr Jeffrey Owens FCPA (Aust.), Tax Committee – New Zealand
- Mr Darshana Elwela – Tax Committee – New Zealand
- Mr Richard Ashby CPA (Aust.), Tax Committee – New Zealand
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