

Senate Standing Committee on Economics

Re: Simplification of Superannuation

You would be well aware of the stand by DFRDB Superannuants along with some 4000 petitioners (and growing), in the matter of treatment of taxation on Superannuants in the DFRB/DFRDB Schemes and proposed future taxation of same after 01 JUL 07. It is suggested that before the Government blithely departs on proposed Superannuation reforms it looks closely at the legalities of the respective ACTS in relation to DFRB/DFRDB.

Before I get to the matter at hand in respect to taxation of the above schemes, I would like to add further information in the matter of untaxed funds:

As a recipient of payments from an untaxed fund the ATO sees these as a first level of income and hence it levies tax at the appropriate levels for the gross annual sum received. Assuming that a former DFRB/DFRDB superannuant retires at say 55 years and assumes a position in the work force then the salary/wage received will be taxed as a second income and at the top marginal rate. On reaching 60 years and still working that same superannuant will still be paying tax at the top marginal rate on his stipend as well as a rate of tax on his Superannuation payments. Other taxpayers in funded schemes will be able to take their Superannuation tax-free and still keep working.

Now it may be so that the DFRB/DFRDB Superannuant will be able to receive a 10% tax rebate (let us assume \$24,000 per annum Gross, rebate \$2,400) but his total tax grab for the year is the Gross of his Superannuation plus his working salary/wage.

As a result the DFRB/DFRDB, over 60 years of age, Superannuant is going to be far worse off than a Superannuant in a comparable taxed fund. So much for equity and simplification? I believe that The Government has still much to do in researching the facts before the final outcome of this debate and proposed taxation changes.

Now to my second point and I must formally acknowledge the work of Graham MacLeod TPI (OHSa Inspector, ret.), Legal Liaison Officer, Veterans and Pensioners Advocacy, from Western Australia. Mr MacLeod has done considerable work in researching this matter along with his cohorts in various legal firms.

I contend to you that it was illegal to tax DFRB and DFRDB entitlements and as such the Government should be refunding all of the deductions (plus interest), which have previously been unlawfully taken from DFRB and DFRDB entitlements.

Much has been researched on this matter and it behoves the Treasurer, The Hon Peter Costello and the Finance Minister, The Hon Nick Minchin to do the same, before just dismissing this contention.

In making this contention legal advice was sought and received and supports this contention that it is unlawful for the Department of Defence to deduct taxation instalments from the DFRB or DFRDB superannuation scheme entitlements or to forward those taxation deductions to the Commissioner of Taxation. Why is this so?

The Defence Force Retirement Benefits Act 1948 (DFRB) and the Defence Force Retirement

and Death Benefits Act 1973 (DFRDB) contain Sections (with very similar wording) which I contend render it unlawful for taxation deductions to be imposed on the respective pension entitlements of each of those Acts.

The Defence Force Retirement Benefits Act 1948 (DFRB) states:

Assignment of pensions - (Section) 85.

"pensions and other benefits under this Act are not capable of being assigned or charged or of passing by operation of law" etc.

The Defence Force Retirement and Death Benefits Act 1973 contains similar wording which states:

Assignment of pensions (Section) 129.

"no pension benefit or other benefit under this Act is capable of being assigned or charged or of passing by operation of law" etc.

As you can readily see, there are minor variations in the wording in each of those Sections of the two Acts but the legal or legislative 'intention' appears to be identical in each case.

What, then, is the Federal Parliamentary 'intention' behind those Sections and the phrases and words, which appear in them?

In the absence of access to the original Federal Parliamentary 'intention' which caused the inclusion of those Sections and their phrases and words to be included in those two enactments (Acts), we are forced to rely upon the legal definitions of the phrases and words which each of those Sections contain.

What, then, are we looking for?

The essence appears to be that 'pensions', 'pension benefits' and/or 'other benefits' under the provisions of each of those (DFRB and DFRDB) Acts are legislatively not capable of being 'assigned' or 'charged' or of 'passing by operation of law'.

I think that we all understand what the words 'pensions', 'pension benefits' and/or 'other benefits' mean in the context of these two enactments of legislation.

They mean ANY entitlement to which an ex soldier/sailor or airman becomes entitled under the provisions of either the Defence Forces Retirement Benefits Act 1948 or the Defence Forces Retirement and Death Benefits Act 1973. I must contend that the Department of Defence, The Treasurer and the Minister for Finance fully comprehend the meaning of the words, 'not capable' (of being...) etc, in simple terms they mean that the intended action cannot lawfully be transacted.

If we now look at the legal definition and the practical legal effect of the meaning of the remaining words and phrase, 'assigned', charged and the phrase, 'passing by operation of law'

‘Assigned’ - Black's Law Dictionary Special Deluxe Fifth Edition legally defines the word 'Assign' as meaning... "To *transfer*, make over, or set over *to another*" (a 'third party' person or organisation).

Under this legal definition, The Commissioner of Taxation and the Australian Taxation Department are a 'third party' person and/or organisation to which the DFRB and DFRDB taxation deductions are currently being unlawfully 'assigned'.

Both the DFRB and the DFRDB Acts clearly state that cannot lawfully be done to entitlements which accrue to any entitled person under the provisions of either of those Acts!

‘Charged’ - Black's Law Dictionary Special Deluxe Fifth Edition legally defines the word 'Charge' as a verb meaning... "To impose a burden, duty, obligation or lien; to create a claim against property; to assess; to demand; to accuse; to instruct a jury on matters of law. To impose a tax, duty, or trust? Note here that one of the legal definitions of the words, ‘charged’ or ‘charge’, is 'To impose a tax'.

Both the DFRB and the DFRDB Acts clearly state that this cannot lawfully be done to entitlements which accrue to any entitled person under the provisions of either of those Acts.

‘Passing by operation of law’ - In this phrase there are two aspects which need examining - the word 'passing' and the phrase 'by operation of law'.

‘Passing’ - One of the many legal definitions of the word 'passing' is to 'transfer' (in this case, from a legislatively entitled person to another [third party] non-entitled person or organisation such as the Commissioner of Taxation and the Australian Taxation Department).

Another of the many legal definitions shown in Black's Law Dictionary Special Deluxe Fifth Edition for the word 'Pass' (or 'Passing') is "Also *to proceed*; to be *rendered* or *given*" (to another party).

Both the DFRB and the DFRDB Acts clearly state that this cannot lawfully be done to entitlements which accrue to any entitled person under the provisions of either of those Acts.

‘By operation of law’ - Black's Law Dictionary Special Deluxe Fifth Edition defines the legal meaning of this phrase as:

"This term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself."

Other meanings of the phrase "by operation of law", also include the content of other existing legislation and the consideration, decision and subsequent ruling by (Australian) courts of law.

Both the DFRB and DFRDB Acts clearly state that this cannot lawfully be done to entitlements which accrue to any entitled person under the provisions of either of those Acts.

In summary then I conclude that DFRB and DFRDB entitlements CANNOT LAWFULLY BE TAXED by the Australian Taxation Department and that it is legislatively

UNLAWFUL for the Department of Defence to deduct taxation instalments from DFRB or DFRDB entitlements and to transfer those deductions to the Commissioner of Taxation or the Australian Taxation Department.

Therefore before considering the “Simplification of Superannuation” the Government needs to look at the legal intentions of the two ACTS, as they applied to contributors, the Government, The Department of Defence and The Australian Taxation Office.

Along with any simplification is the need to look closely at the ACT and refund, with interest, that taxation paid by contributors up to and including 1988 for all Defence Force personnel .

I would ask that you represent this to The Treasurer and Minister For Finance, preferably prior to any debate on the impending legislation.

Persevere

Bernie McGurgan (Major-Retired)