Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Rick Ward
Small Business/Self-Employed
Program Manager
SBSE:PSP:INTL

from: M. Grace Fleeman
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subject: Notice of Withdrawal of Ruling Request PLR-147119-05

In accordance with section 7.07(2)(b) of Rev. Proc. 2005-1, 2005-1 I.R.B. 1, we are providing you with notification of a taxpayer withdrawal of a letter ruling request. On October 3, 2005, Taxpayer's representative withdrew its request for a private letter ruling after this office advised Taxpayer's representative of its tentative adverse position. Following is a brief discussion of the issue, facts, applicable law, and the reason for this office's tentative adverse position. A copy of Taxpayer's request is attached. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

<u>LEGEND</u>

Taxpayer	=	
		SSN:
Decedent	=	
Fund	=	
Date 1	=	
Date 2	=	
Date 3	=	
Amount	=	
Year 1	=	

ISSUES

Is the payment to Taxpayer from an Australian superannuation fund subject to U.S. tax under the Convention Between the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Sydney on August 6, 1982, as amended by the Protocol signed at Canberra on September 27, 2001 ("the Treaty")?

CONCLUSIONS

Under the Treaty, the payment to Taxpayer from an Australian superannuation fund is subject to U.S. tax.

FACTS

Taxpayer and Decedent were dual citizens of the United States and Australia at the time of Decedent's Death on Date 1. Taxpayer was a citizen of the United States at all times relevant for purposes of the present discussion. In her request for a ruling, Taxpayer represents that she was a resident of Australia within the meaning of Article 4 of the Treaty at all times relevant for purposes of this discussion.

Decedent was a Member of the Fund, an Australian superannuation fund formed on Date 2 and governed by a written deed dated Date 3 ("the Deed"). Under Australian law, superannuation funds are trust funds subject to special tax rules that are established to provide benefits to members or their dependents upon the sickness, death, or retirement of the member. Taxpayer represents that the Fund is similar to an employer-funded pension plan.

The Deed generally defines the term "Member" as an employee whose employer is making contributions to the fund on the employee's behalf at the relevant time. The "Member's Benefit" is (in simple terms) the amount standing to a Member's credit in accounts accumulating the contributions of the employer and the Member, which include the profits or losses of the Fund's investments allocated to such accounts pursuant to the terms of the Deed. The Deed generally provides that the Member's Benefit will be paid to the Member upon retirement. We assume for purposes of this discussion that the Member's Benefit would have been includible in computing the Decedent's taxable income for U.S. tax purposes had the Decedent received the Member's Benefit during his life.

The Deed provides that when a Member dies before retirement, the Member's Benefit will be paid in a lump sum to one or more of the Member's Dependants[1] at the discretion of the trustees of the Fund. Following Decedent's death and pursuant to the

[1] "Dependant" is defined by the Deed to include "the spouse (including de facto spouse), widow, widower or children of a Member or any other person who in the opinion of the Trustees was dependant on the Member at the relevant date or whom the Member had a legal or moral obligation to support at the relevant date."

terms of the Deed, Taxpayer received Decedent's Member's Benefit, in the amount of Amount, in Year 1.

LAW AND ANALYSIS

Section 61(a) of the Code provides that "gross income means all income from whatever source derived, including (but not limited to) … Pensions."

Section 691(a)(1) provides that the amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period (including the amount of all items of gross income in respect of a prior decedent, if the right to receive such amount was acquired by reason of the death of the prior decedent or by bequest, devise, or inheritance from the prior decedent) shall be included in the gross income, for the taxable year when received, of: (A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent; (B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or (C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

Section 1.691(a)-1(b) of the Income Tax Regulations provides that the term "income in respect of a decedent" refers to those amounts to which a decedent was entitled as gross income, but which were not properly includible in computing the decedent's taxable income for the taxable year ending with the date of the decedent's death or for a previous taxable year under the method of accounting employed by the decedent.

Section 691(a)(3) provides that the right to receive an amount of income in respect of a decedent shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction in which the right to receive the income was originally derived and the amount includible in gross income shall be considered, in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such income.

Section 894(a)(1) of the Code provides that the provisions of the Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer."

Article 18 of the Treaty provides, in relevant part, as follows:

(1) Subject to the provisions of Article 19 (Governmental Remuneration), pensions and other similar remuneration paid to an individual who is a resident of one of

the Contracting States in consideration of past employment shall be taxable only in that State.

* * *

(4) The term “pensions and other similar remuneration”, as used in this Article, means periodic payments made by reason of retirement or death, in consideration for services rendered, or by way of compensation paid after retirement for injuries received in connection with past employment.

* * *

However, Article 1 of the Treaty provides, in relevant part, as follows:

(3) Notwithstanding any provision of this Convention, except paragraph (4) of this Article, a Contracting State may tax its residents (as determined under Article 4 (Residence)) and individuals electing under its domestic Law to be taxed as residents of that State, and by reason of citizenship may tax its citizens, as if this Convention had not entered into force….

(4) The provisions of paragraph (3) shall not affect:

(a) the benefits conferred by a Contracting State under paragraph (2) of Article 9 (Associated Enterprises), paragraph (2) or (6) of Article 18 (Pensions, Annuities, Alimony and Child Support), Article 22 (Relief from Double Taxation), 23 (Non-Discrimination), 24 (Mutual Agreement Procedure), or paragraph (1) of Article 27 (Miscellaneous); …

* * *

Thus, the United States may tax pensions and other similar remuneration paid to a U.S. citizen who is a resident of Australia as if the Treaty had not entered into force.

Based on the information submitted and the representations made, we conclude that Taxpayer is subject to U.S. income tax on Decedent’s Member Benefit as if the Treaty had not entered into force.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3880 if you have any further questions.

By: ______________________________

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