



Presentation to Pension
lawyers Association

Pension interests on Divorce - a discussion



Presented by Jenny Gordon, Legal Services



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The Divorce Amendment Act of 1989

“ Situation prior to 1989

“In determining patrimonial benefits, the pension interest of a party shall be deemed to be part of his/her assets.

“Applies to marriages after 1 November 1984 (except marriages out of C.O.P -no accrual)

“reduced by previous divorce award

“Pension Interest defined:

“Pension & Provident Funds: withdrawal benefit on divorce

“Retirement Annuity fund: contributions+ 15,5% simple interest

The court granting a divorce may order:

“any part of the pension interest awarded to the other party shall be paid by that fund to that other party when any pension benefit accrues to that member.(section 7(8))

“an endorsement to be made to the records of that fund that that part of the pension interest concerned is so payable to that other party.

“Any law which applies in relation to the reduction, assignment, transfer, cession, pledge, of the pension benefits, shall apply to the other party’s right.

Major problem areas

- “ no growth on allocated portion. Member earns growth
- “ Preservation funds? Withdrawal benefit on resignation - no resignation benefit from a preservation fund
 - “Pension interest+- no resemblance to real value of fund
- “Funds are not served with the summons or incorrectly cited
- “court orders exceed funds powers ito the law. eg Divide end benefit
- “Death of non-member spouse prior to accrual.
- “Preservation fund practice note: Divorce order is first withdrawal. Expected to change
- “Tax position

The tax situation

“Since 1989, SARS interpreted tax liability to member.

Fund pays gross allocated portion to former spouse.

ITC 10404 held: Member's estate had no right to amount awarded to former spouse so no accrual & no tax.

“SARS %stated intention to appeal+. %unds must still tax member+.

“Amended I T Act. Effective 24/11/99

“ Deems the amount to have accrued to the member on the date the pension interest of which it forms part accrues to the member

“Right to recover tax from former spouse.

Section 37 D of the Pension Fund Amendment Act 2007

“ A registered fund may ÷ ..

(d) **deduct from a member’s benefit or minimum individual reserve** , as the case may be, any amount as signed from his or her pension interest to a non-member spouse or any other person in terms of a valid order made by a competent court.

(e) For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) the pension benefit referred to in that section is **deemed to accrue** to the member on the **date of the court order** ÷ ..+

2B. ÷ where a court has made an order that any part of the pension interest of a member of a pension fund, provident fund or retirement annuity fund shall be paid to the former spouse of that member, as provided for in the Divorce Act, 1979 (Act No. 70 of 1979), the amount of **that part is deemed to be an amount that accrues** to that member on the **date** on which the **pension interest**, of which that amount forms part, Accrues to that member ÷;

Provided that ÷ . any amount ÷ . may be recovered by such person from the former spouse to whom ÷ . it becomes payable.

Retrospectivity

Letter to National Treasury and Submissions:

1. rules of interpretation of statutes presume that legislation is not retrospective unless there is an express provision to the effect or that the result is unavoidable in the language used.
2. there is a section of the Amendment Bill which specifically lists a number of sections to have retrospective effect. Section 37D is not listed as one.
3. The legislation makes it effective from date of divorce. It has the nonsensical effect that a non-member's award is deemed to accrue on the date of the court order, which might have been up to eighteen years earlier.
4. Vested rights of the member are clearly affected. Adjudicator overlooked that and concentrated on the non-member's rights only.
5. Practical considerations: if retrospective, all existing divorce orders become immediately payable. IRF submissions were for the award to become payable on claim by non-member spouse. Problem: unclaimed awards where non-member spouses cannot be located.

The Tax Now

"New Divorce Orders

After 13 September 2007

Paragraph 2B. Part accrues to member on the date the pension interest of which it forms part accrues to the member.

Accrual is on exit from the fund eg: retirement

At what rate? Average rate in year of exit

What must funds do? Pay out to non member and note payment

No IT3A as no tax is due

"Existing orders

Same

Draft Revenue Law s Amendment Bill

"Intention is to tax the member at the same time as the non-member's award is paid out

"How do you get the tax as member's benefits have not accrued?

"Can you take it from the amount paid to the non member's spouse?

"Comments being discussed

"Options:

1. Leave tax as is under Para 2B

Problems: Funds have to keep records for long periods; Tax at average rate on exit and may be higher than when non member paid out; makes proposed recovery by member difficult (unlikely)

2. Tax paid at same time as non member is paid out

- Tax deemed to accrue and paid from additional benefits. But tax is part of the benefit which accrues so the tax should also be taxed.

-Tax at average rate at same time award paid. (likely)

3. Pay member's tax at same time as payment to non member spouse and withhold the tax from the non member's portion

Possible solution for new divorce orders. Fair because the pension interest would be taxed if it was withdrawn prior to divorce and the parties would only share the after tax interest. (unlikely . break from previous line)

Examples:

Eg: 1 Pension interest at date of Divorce: R100 000. Average rate 30% amount paid into estate R70 000. Wife gets R35000 Member gets R35000.

Eg: 2 Pension interest R100 000 Divide 50: 50. Non member awarded R50 000. Tax is member's . =(R15000.)

Non member gets R50 000

Member left with R35 000

(Less tax on R15000)

Member resigns and withdraws: tax + R15 000

Member receives: R 20 000

Eg: 3 PI R100 000. Divided 50:50. Average rate =R30% . Tax = R15000.

Non member paid R35000 . Member left with R50 000. Resigns pays R15000.

Member left with R35 000. The same.

New Pension Legislation expected next year

“Clarify that with effect from date of the legislation %Clean break+applies to existing divorce orders

“Alignment of the tax and the pension legislation

“Transfer of non member to new fund . tax position uncertain need clarifying legislation to show it is a contribution.

Wish List

“Amendments to the Divorce Act re Preservation Funds and

“Definition of pension interest re RAç

“Other issues: Maintenance awards . taxation and extent of legislation still uncertain

Thank You !

Questions?