

Company D -v- Comptroller of Taxes
Pension Transfer
February 2022

For the purpose of anonymisation, the true name of any individual or company mentioned below has been fictionalised.

ISSUE UNDER APPEAL

Company D is appealing the refusal of the Comptroller to approve the transfer of a pension fund from an approved Jersey pension scheme to the Company D superannuation scheme, an approved New Zealand pension scheme. The Parties agreed that the basis on which the Appellant brings the claim is as the licenced Manager of the Company D superannuation scheme and a person aggrieved by the Comptroller's decision. Company D is entitled to appeal according to Article 131A Income Tax (Jersey) Law 1961.

The Appeal is to determine whether, when considering if the Company D superannuation scheme is an 'equivalent scheme', the Comptroller has taken account of factors that are not relevant to the decision the Law requires him to make. The Appeal is also to determine whether the Company D superannuation scheme is equivalent and allow the pension transfer.

The applicable legislative provisions are at Article 131CG(4), (7) & (8) Income Tax (Jersey) Law 1961, with general reference to the whole of Part 19 of the Law.

Article 131CG(4) provides that an approved Jersey scheme may permit a person who is not resident in Jersey to transfer their Jersey pension to an equivalent scheme outside Jersey. The Comptroller must give written permission before any scheme transfer.

- Article 131CG(7) states that the Comptroller may approve if they agree that the overseas scheme is an equivalent scheme.
- Article 131CG(8) states that a scheme established outside of Jersey is an equivalent scheme if, in the Comptroller's opinion, the scheme has characteristics which are consistent with the characteristics of an approved Jersey scheme.
- Company D has provided an undertaking that they will restrict benefits paid to the pension holder to those that an approved Jersey Scheme would pay.

During the hearing, both Parties accepted that the pension holder is resident for tax purposes in New Zealand and has been since 2015.

SUMMARY OF RELEVANT FACTS

A pension holder, formerly resident in Jersey, moved to New Zealand in 2015. A request was made on his behalf by Company D in April 2021 on form TR1 for a transfer of his pension fund from a Jersey Personal Pension Scheme. The proposed transfer was to the Company D superannuation scheme, a scheme form in New Zealand. The proposed transfer was for the full value of the fund.

The Jersey Personal Payment Scheme (JPPS)

The JPPS is an approved Jersey retirement trust scheme under Article 131 CA. As an approved Jersey scheme JPPS may permit a transfer to a fund established outside of Jersey. Such a

transfer is subject to prior written approval of the Comptroller. It is understood that JPPS will permit the transfer if the required written approval is obtained.

Company D Superannuation Scheme

The Company D superannuation scheme is established in New Zealand and is recognised by the New Zealand Authorities. The Company D superannuation scheme would not provide benefits to Individuals before they attain 50 years of age. The Licensed Manager of the Company D scheme, Company D Limited, has made undertakings to JPPS that it will:

- Require the pension holder to nominate benefits from the Scheme before he is aged 75.
- Not permit the pension holder to commute more than 30% of the fund as a tax-free lump sum.
- That at least 70% of the fund's value will be required to pay an income for life.

And that under the trust deed of the Scheme, it has the power to do this. These undertakings were made in a letter dated 28 April 2021 to the Comptroller.

Comptroller's decision

The approval required under Article 131CG was refused.

SUMMARY OF DECISION

In the matter of the Appeal by Company D hearing in February 2022, the Appellant's Appeal is successful on the basis that the provisions of the Company D scheme, together with the undertaking provided by the Appellant, creates a pension scheme that demonstrates equivalence to the Jersey pension scheme from which the transfer is requested.

We find that the Respondent's consideration of broader jurisdictional factors beyond the specific parameters of the pension schemes at issue is not supported by the relevant provisions of the Income Tax Act (Jersey) 1961.

REASONS FOR DECISION

The Commissioners first considered whether the Comptroller can look at general taxation rules or factors outside the specific provisions of the pension schemes to determine equivalence.

Company D Limited submitted that the Comptroller may only consider the characteristics of the overseas scheme to that of an approved Jersey scheme, such as the rules on contributions or benefits, and not the taxation system of the jurisdiction where the overseas scheme is located.

The Comptroller submitted that the review required is wider and must look at the surrounding rule, especially the impacting legislative framework and particularly, but not only, tax legislation. The Respondence referenced a consultation process and Hansard debates that took place when Article 131CG was being introduced. The expectation of those processes was that there would need to be an examination of the legislative framework, to be able to conclude the transfer was to an equivalent scheme.

Despite this, Article 131CG, as enacted, does not reference a wider legislative framework review in determining whether a foreign scheme is an equivalent scheme.

Our view is that there is no scope within Article 131CG for the Comptroller to consider jurisdictional factors outside the specific parameters of the particular scheme when determining its equivalence to a Jersey scheme.

The Commissioners then considered whether the Company D superannuation scheme is equivalent to the Jersey scheme under Article 131CG. Article 131CG does not set out what conditions are required for a scheme to be an equivalent scheme. Pension holders wishing to transfer a pension must receive written approval from the Comptroller before any transfer pursuant to Article 131CG(4). Revenue Jersey requires Form TR1 to be submitted to the Comptroller as a formal request for the transfer to be considered.

Form TR1 indicates:

To demonstrate the proposed receiving scheme is an equivalent scheme tick the following boxes that apply. If any of the boxes cannot be ticked, you must confirm any alternative arrangements in the destination scheme.

Form TR1 was completed by Company D and submitted in April 2021 on behalf of the pension holder. A number of the boxes on the form were not ticked, as the New Zealand scheme as structured initially does not include the same requirements as an approved Jersey pension scheme. In order to ascertain equivalence, it is necessary to look at the alternative arrangements put into place by Company D.

Company D provided an undertaking to restrict the conditions under which the pension holder could withdraw funds from the scheme. Assessing the effect of that undertaking is integral to determining equivalence to a Jersey scheme in this Appeal.

The Company D undertaking indicated that the following conditions would be adhered to as the alternative arrangements:

1. Receive the funds from the JPPS
2. Apply them to investments within the Company D Superannuation Scheme per the Scheme rules, which do not permit the provision of benefits to individuals before they attain 50 years of age.
3. Require the pension holder to commence benefits from this scheme before the age of 75.
4. Not permit the pension holder to commute more than 30% of the fund value to a tax-free lump sum
5. Require that at least 70% of the fund value be used to pay an income for life, calculated as the "Payment Amount" indicated on the Company D website calculator at <https://www.CompanyA.co.nz/calculator> based on the relevant factors for the pension year in question being:
 - a. The pension holder's gender
 - b. Age
 - c. Fund size

The undertaking was given in accordance with:

- Clause 3.14.16 of the Trust Deed of the Company D Superannuation Scheme (Trust Deed) under which the Manager has the power "to give any undertaking binding the Manager", and
- Clause 27.14 of the Trust Deed whereby the Manager "may upon such terms and conditions as the Manager in its discretion prescribes or agrees with the transferor scheme accept from any other superannuation or pension scheme ... manner or assets in respect of a Member's interest in that superannuation or pension scheme", and

- Clause 29.4 of the Trust Deed whereby any request for benefits (i.e. withdrawals) “shall be in such form as the ... Manager may prescribe or agreed to from time to time”.

The effect of these three Clauses gives the Manager the right to provide an undertaking, thereby amending the provisions of the Trust Deed as if they were changing the original Trust Deed. Therefore, the terms of the Trust Deed and the scheme are deemed to include the conditions noted in the undertaking above.

In our view, the undertaking amends the Trust Deed sufficiently to meet the requirements of a Jersey approved scheme, thereby making it an equivalent scheme.

Therefore, we find the appeal to be successful and direct the Comptroller to approve the transfer of the pension holder’s pension from the JPPS to Company D as requested.