

TR 2009-D3 Income Tax: Superannuation Contributions

ASFA Submission

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Association of Superannuation Funds of Australia

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17 July 2009

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Dear Andrew,

RE: TR 2009/D3 Income tax: superannuation contributions

The Association of Superannuation Funds of Australia (ASFA) would like to provide the following comments on TR 2009/D3 Income tax: superannuation contributions.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

General comments

The Ruling is divided into two topic areas with each topic area covering two sub topics:

Part A

This part deals with general superannuation contribution concepts and looks specifically at what a contribution is and when a contribution is paid. It covers well travelled ground and the positions established are broadly consistent with earlier ATO pronouncements on the tax deductibility of contributions and when a contribution is deemed to have been made for the purpose of the *Superannuation Guarantee (Administration) Act 1994*.

However, the ruling omits discussion of the intention of the contributor. The intent of the payer is fundamental to determining whether a payment is a contribution, a donation, a legal obligation or something else and should be given prominence in the discussion of specific items.

The ruling's treatment of certain events as contributions appears also to ignore the Capital Gains Tax law. Some analysis of the interactions of CGT law and activities such as forgiveness of a loan should be presented.

Part B

This part deals with the specific rules relating to when an employer can claim a tax deduction for a contribution and when an individual can claim a tax deduction for a personal contribution.

ASFA is less certain that these two topics have been adequately dealt with.

Of initial concern is that the commentary on personal tax deductions does not discuss Reportable Employer Superannuation Contributions (RESA), which need to be taken into account for the purpose of the 10% test.

Of further concern is the omission of certain issues. Specifically, ASFA is concerned that the following seven topics have not been addressed:

- Whether or not a particular contribution is taxable in the hands of the superannuation provider;
- Whether a contribution is to be classified in the member's account as a concessional contribution, a non-concessional contribution or neither;
- Excess contributions tax – when it is incurred, how the amount of tax payable it is calculated and what other processes are involved;
- How to determine whether a contribution is a (RESC);
- When a RESC is deemed to have been paid (important because the determination of this is based on different principles to those that apply for determining tax deductibility and SG compliance);
- Whether a fund can or cannot accept a particular contribution, and
- No-TFN contributions – the rules and the tax implications.

Although the ruling is currently rather long at 43 pages, and including the above matters would significantly lengthen the ruling, a complete omission of the topics could lead to a significant misunderstanding by the contributor of implications and ramifications of making a contribution.

Whilst it may not be possible to deal comprehensively with all of the above matters, it is suggested that the complexity of the interactions warrants some kind of 'roadmap' of the inter-related issues and where information on the various issues can be found. This could be achieved by:

- expanding the 'What this Ruling is about' section and
- including specific references at relevant spots in the text (not through footnotes).

Two matters which ASFA suggests should be covered in some detail in this ruling are whether or not a contribution is taxable and the difference in timing for an RESC.

On the first matter, of particular concern is the degree of confusion that may arise from the legislation classifying as a contribution amounts that a 'normal' person would not consider to be a contribution. For example:

- Roll-over benefits are contributions, but they are not taxable and are not concessional or non-concessional contributions.
- A Roll-over of a benefit for a member suffering a terminal medical condition is not a superannuation rollover benefit. Rather It is a (non-concessional) contribution which is taxable and which counts towards the member's non-concessional contribution cap.

On the second matter, an understanding of the difference in the timing of an RESC payment and an employer/SG/voluntary contribution is important because of the impact on government benefit entitlements and contribution cap and SG compliance.

Specific comments

Paragraph 13 (Other forms of contribution)

Should this paragraph also include information as to the evidence required to demonstrate that the bill paid was a liability of the superannuation provider?

Consideration should also be given to discussing/considering the intent of the contributor. For example a corporate sponsor of a superannuation plan may be under a legal obligation (derived from the trust deed) to pay the operating expenses of the fund. It is difficult to comprehend how, under such an arrangement, the payment of a fund expense could be a contribution.

This paragraph should be amended to reflect previous ATO Income Tax and GST rulings on the topic of the appropriate tax treatment of an employer paying the expenses of a superannuation fund.

Paragraph 14 (Other forms of contribution)

Should the situation in paragraph 14 be distinguished from the situation where an SMSF 'inadvertently' pays for personal/company expenses of the member or employer sponsor, the transaction is recorded in the debtors ledger until repaid and a contravention of SIS section 65 is noted?

The comments made regarding paragraph 13 are also applicable to this paragraph.

Paragraph 17 (Other forms of contribution)

The statement that a distribution to a superannuation fund from a discretionary trust is a contribution appears to be a change in the ATO view that such a payment is non-arms length income and taxable at the top marginal rate.

Paragraph 18 (Other forms of contribution)

This paragraph contains two concepts: a roll-over and a transfer.

It is suggested that each concept be dealt with in a separate paragraph and that the information on transfers from overseas be expanded to deal with some of the subtleties.

It is further suggested that such amounts are not contributions. The ordinary meaning of contribution is that new money is entering the system. It is difficult to comprehend, in the absence of a specific legislative statement to the contrary, that the movement of a members benefits between two regulated superannuation funds is a contribution under ordinary concepts or for the purpose of the contribution cap rules.

When a contribution is made

This section would benefit from some explicit commentary on electronic banking as it is an increasingly common method of contribution payment and it does include some complexities surrounding the timing of money leaving the payer's account and arriving in the payee's account

Paragraph 19 (When a contribution is made)

This paragraph needs to be tied in to some commentary on the contribution caps and RESC payments and the need for all parties to understand the rule and the implications for tax deductibility, SG compliance, contribution caps and government benefit entitlements where superannuation contributions are paid near the end of the financial year.

Paragraph 45 (Deducting superannuation contributions for own employees)

This paragraph states that:

The employee must have fully secured rights to the benefit. It is not sufficient that an employee is entitled to their superannuation benefits only through the exercise of a discretion by a superannuation provider.

Clarification of this point is required with respect to:

- Defined benefit funds where there are often discretions exercised by the trustee and paid out of the corpus of the trust.
- Accumulation arrangements which, in some cases, might still have an unvested component.

Deducting personal contributions

Paragraphs 55 to 64

This is a complex area which warrants more detailed commentary and some specific examples. Particularly due to the newly reduced entitlements to contribute, the interactions between the contribution caps, and the penalties imposed for cap breaches.

Paragraph 70 (notice of intention to claim a deduction)

Paragraph 70 states that:

A superannuation provider will no longer hold a contribution if the member has chosen to roll-over a part of the superannuation interest held by the provider and the value of the interest after the roll-over is less than the current year's personal contributions.

This appears more restrictive than the section 290-170(2) requirement.

It is suggested that the requirement for a valid notice should be that there is sufficient non-concessional contributions available to cover the notice. That is, paragraph 70 should perhaps read that in a partial roll-over situation the provider "will not longer hold a contribution... " where "...the value of the non concessional component of the interest is less than the amount in the notice."

Paragraphs 77 to 79 (Example 3 – invalid notice to deduct)

To illustrate the above point, and to support paragraph 79, Example 3 should be followed by an example of a valid notice of intention to deduct where the member has a taxable and a tax free component, makes a non-concessional contribution, requests a partial rollover and then lodges a valid notice for an amount which is less than both the amount contributed in the relevant year and the remaining tax free component of the interest.

Paragraph 141 (Other forms of contributions)

This paragraph states that

An amount payable by an insurance company to a superannuation provider under the terms of an insurance policy is not a superannuation contribution as such an amount is considered to arise by way of income, profit or gain from the use of the fund's existing capital.

The wording of the statement leaves it open to form an opinion that the ATO would consider that the insurance proceeds should therefore be taxed as income, profit or gain in the hands of the superannuation provider.

The more common insurance claim payments are in relation to death, total and permanent disablement, disability income and terminal medical condition payments.

An interpretation that such receipts are taxable would appear to be inconsistent with actual practice and understanding over the 21 years since the introduction of contribution tax.

Other insurance claims similarly affected would include claims proceeds from indemnity insurance and property insurance.

This then leads to the question as to whether payments such as compensation payments made by an administrator to rectify an error would be considered to be a contribution.

Paragraph 172 (Deducting contributions for own employees)

This paragraph states that a contribution is only deductible in respect of a person who is your employee: '... at the time that the contribution is made.'

This paragraph should be expanded to deal with the situation of former employees (as provided for in section 290-85). It is too important a matter to be left to a footnote and its omission from the main text has the potential to seriously mislead the reader.

Other issues

Whilst not a direct subject for the ruling, the ruling highlights the unreasonable and inappropriate legislation and/or interpretations in relation to:

- The loss of tax deductibility for personal contributions where:
 - There has been a successor fund transfer,
 - The amount left in the fund is less than the contribution claimed as a tax deduction, or
 - Where a pension has been commenced (even where there is sufficient remaining contributions to cover the deduction amount.
- The breach of the SG contribution rules, and the timing of deductibility when the contribution is made to a clearing house that fails to pass it on in a timely manner.

Generally, these matters will be taken up in other forums.

However, ASFA considers that the Ruling should specifically address the implications and provide information about what actions may be taken to avoid the impact. It is important the readers of the document who may be impacted are made aware of the issues and what they may need to do to overcome the associated problems.

Should you require further information on any of the above matters please contact either Tony Keir (tkeir@superannuation.asn.au) or Robert Hodge (rhodge@superannuation.asn.au).

Yours sincerely

Melinda Howes
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