



TapIn Flash

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Superannuation 'Contribution' taxation ruling

The ATO has recently released taxation ruling TR 2010/1. It explains the ordinary meaning of making a "contribution" to a superannuation fund for taxation purposes. This explanation is required because tax legislation does not specifically define what a contribution to a superannuation fund is.

The ruling also outlines:

- How a contribution can be made;
- When a contribution is made; and
- When contributions are tax deductible, including the Notice of Intent (deductibility) requirements.

Preliminary analysis

Generally, the ruling is non-controversial and broadly consistent with the industry's understanding of the relevant law. However, aspects of the ruling will require some further analysis and clarification. The ruling's key points are outlined below:

Ordinary meaning of a contribution

The ordinary meaning of a contribution to a superannuation fund is "anything of value that increases the capital of a superannuation fund provided by a contributor whose purpose is to benefit one or more particular members of the fund or all the members in general."

For example, the capital of a superannuation fund can be increased by directly providing it with cash funds, or where permitted, transferring an existing asset by way of in-specie contribution (e.g. listed securities and business real property).

The capital of a superannuation fund can also be increased by:

- Paying an amount to a third party for the benefit of the superannuation fund;
- Forgiving a debt owed by the superannuation fund; or
- Increasing the value of an existing asset or shifting value to an asset already owned by the superannuation fund.

Importantly, not every increase in the capital of the fund is a superannuation contribution. Increases in the fund's capital due to income, profits and gains arising from the use of the fund's existing capital will not be a contribution. Similarly, the proceeds of an insurance policy received by the superannuation fund when an insured event arises is not a contribution.

When is a contribution made?

As a general rule, contributions will be made when the funds are received by the trustee of the superannuation fund.

Where a contribution is made by way of a transfer of an asset, the contribution will be deemed to have been made when the superannuation fund obtains ownership of the asset from the contributor. For this purpose, a fund obtains ownership when beneficial ownership of the asset is acquired by the fund, which can occur earlier than legal ownership.

For example, a fund may acquire beneficial ownership of listed shares, effected through an off-market share transfer, when the trustee of the fund obtains the properly executed off-market share transfer in registrable form.

In the case of real property a superannuation fund acquires beneficial ownership when its trustee obtains possession of a properly executed transfer that is in registrable form, together with any title deeds or other documents necessary to procure registration of the fund as the legal owner of the land.

Deductibility

Deductibility of superannuation contributions is determined by the purpose of the contributor which must be to provide superannuation benefits for the member or a class of members in the fund.

While providing superannuation benefits must be the contributor's sole purpose, it does not matter that a contributor also takes account of the incidental consequences of making a contribution such as obtaining a tax deduction if all the deductibility rules for employer or personal contributions are also satisfied.

Deductible Employer Contributions

The contributions made by the employer must be made for an "employee" who is either an employee at common law or is treated as an employee under the expanded definition of employee used for Superannuation Guarantee (SG) purposes (e.g. certain individual contractors who supply their labour etc).

In addition, the employee must also satisfy an employment activity condition. For example, a common law employee must be either:

- Engaged in producing the employer's assessable income; or
- An Australian resident who is engaged in the employer's business.

It is important to note that a person who is an employee because of the expanded definition of employee for SG purposes is deemed to automatically satisfy the employment activity condition. This means an employer can claim a deduction for contributions made for a person who is an employee under the expanded SG definition even though that employee may not actually be engaged in producing the employer's assessable income or engaged in the employer's business.

For example, a company's director is an employee of the company for the purposes of the SG legislation if the director is entitled to payment for the performance of duties as a member of the company's executive body. Accordingly, if the company makes a contribution for the director the company will be entitled to a tax deduction even though the director may not be engaged in producing the company's assessable income or engaged in its business.

On the other hand in trust situations involving a corporate trustee of the trust, the ruling indicates that a superannuation contribution for a director of the corporate trustee can only be deducted from the income of the trust if the director is also a common law employee of the trust engaged in producing the assessable income of the trust or engaged in its business.

Deductible Personal Member Contributions

It is well understood that if a member is engaged in an "employment activity" in the income year in which they make a personal contribution, they must satisfy the under 10% rule. For this purpose the person is engaged in employment activity if it results in them being treated as an employee for SG purposes.

Importantly, to be engaged in employment activity does not necessarily mean that the person has to physically be at work carrying out the obligations and duties of the job or work. For example, the ATO regards a common law employee to still be engaged in the employment activity while they remain employed and in receipt of workers compensation even though they are not physically at work.

This means that the workers compensation payments will be included in the under 10% calculations.

While further clarification will be required, the ATO is suggesting that similar treatment may also apply where the person is in receipt of salary continuance/income protection benefits, especially where the illness/injury is employment related. A case by case analysis will be required.

Example from the ruling: Under 10% rule – Worker’s compensation

Brian was employed by Blackwood Pty Ltd and was injured at work in November 2008. From November 2008 to 30 June 2010 Brian received worker’s compensation payments. Brian resigned from Blackwood Pty Ltd on 10 July 2009. On 17 July 2009 Brian received \$21,000 from Blackwood Pty Ltd for unused long service leave and annual leave.

Brian made a personal superannuation contribution of \$21,000 to a complying superannuation fund in the 2009-10 income year.

As Brian was still employed by Blackwood Pty Ltd in the 2009-10 income year he is considered to be engaged in an employment activity in that income year. Brian is required to meet the under 10% rule to claim a deduction for personal superannuation contributions made in the 2009-10 income year.

The income attributable to Brian’s employment activities in the 2009-10 income year includes the worker’s compensation payments and the unused long service leave and annual leave payments from Blackwood Pty Ltd to the extent that they are assessable in the 2009-10 income year.

Personal Member Contributions – Notice of intention (deductibility) to claim a deduction

A person who intends to deduct their personal super contributions must give to their fund a valid notice in the approved form before lodging their income tax return for the year (or within 12 months of the end of the income year if they have not lodged their return by that time). The trustee must also acknowledge receipt of the notice.

A notice will not be valid in several circumstances (refer to TapIn Bulletin Edition 92). For example, a notice will not be valid if the superannuation provider no longer holds the contribution when the notice is given. A notice will also be invalid if the superannuation provider has begun to pay a superannuation income stream based in whole or in part on the contribution.

An example of when a contribution will no longer be held by the superannuation provider is where the member has made a full or partial withdrawal or rollover which includes the contribution covered in the notice.

The ruling confirms, once again, that any superannuation benefit paid from a superannuation account may affect the validity of a notice of intent to deduct a contribution.

Furthermore, the ruling provides more detailed examples involving part roll-over cases and commencing pensions. The examples below are taken from the ruling:

Example: Valid notice of intention to deduct – Partial withdrawal

Rachel, who is 54, has a superannuation interest valued at \$50,000. This interest includes a tax-free segment due to previous non-deductible contributions of \$10,000.

She makes a \$100,000 personal contribution in March 2009. The fund records this contribution against the tax-free segment for Rachel’s superannuation interest which means that amount would be counted against the tax free component of any superannuation benefit paid to Rachel. The value of her superannuation interest is \$150,000.

In June 2009, Rachel rolls over \$60,000 leaving her with an interest of \$90,000. The \$60,000 roll-over is comprised of a \$44,000 tax free component and a \$16,000 taxable component. The tax free component of the roll-over is worked out as follows:

	x		<u>Tax free component of interest before roll-over</u>		<u>Value of the superannuation interest before roll-over</u>
=		\$60,000	x		$\frac{\$110,000}{\$150,000}$
=		\$44,000			

The tax free component of the remaining superannuation interest is \$66,000.

Rachel then lodges a notice in September 2009 advising that she intends to claim a deduction for the \$100,000 contribution made in the 2008-09 income year.

That notice is not valid. Rachel's superannuation fund no longer holds the entire \$100,000 contribution. However, Rachel could give a valid deduction notice for an amount up to \$60,000. That amount is worked out as follows:

	x		<u>Contribution</u>		<u>Tax free component of interest before roll-over</u>
=		\$66,000	x		$\frac{\$100,000}{\$110,000}$
=		\$60,000			

Example: Invalid notice of intention to deduct-starting a super pension

Libby has a superannuation interest valued at \$150,000. Libby makes a \$50,000 personal contribution in March 2008 so that her interest is valued at \$200,000.

If, before lodging a notice, she were to commence a pension using \$180,000 of her \$200,000 interest, her fund will have commenced to pay a superannuation income stream based in whole or part on the contribution. A notice Libby purports to give her fund to deduct the contribution will be invalid.

Further, the outcome will be same even if, after making her personal contribution, Libby were to commence a pension of only \$140,000 leaving the value of her interest in excess of the amount she intended to deduct.

Date of effect

The ruling broadly has effect from 1 July 2007 with the commencement of the Simpler Super System.

If the superannuation provider's procedures used to calculate the remaining eligible contributions differs from the two examples above, the procedures will need to be rectified to comply by 1 July 2010.

This aspect of the ruling will also require clarification from the ATO and a more detailed TapIn Bulletin will be provided once this is received.

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