

## CONCESSIONAL CONTRIBUTIONS - BE CAREFUL WITH THE TIMING

Maximising contributions to superannuation is one of a number of planning strategies implemented throughout a financial year. Care needs to be exercised with the timing of contributions, as potential timing traps can apply. Some of those traps concerning superannuation contributions will be covered in some detail in this paper.

Each financial year, as we move into the new year, consideration is given to setting the amount of salary sacrifice individuals may make for the year, and then, as we approach the end of the year, thoughts turn to ensuring maximum, and no more than the maximum, contributions have been made to superannuation.

We know that employers have until 28 July to pay contributions for the June quarter, and we also know that the ATO has indicated the possibility of reallocating contributions to an earlier (or later) year, as one of the few 'special circumstances' it will consider to relieve an individual from breaching the concessional contributions cap. Yet the ATO's willingness to consider special circumstances may not be as generous as it could be.

The ATO released an Interpretative Decision, ID 2012/16 - Superannuation Excess Contributions Tax: concessional contributions - allocation of contributions, in March 2012. In ID 2012/16, the ATO considers the subject of contributions being made in one year and allocated in the next financial year. In September 2013, the ATO provided some additional guidance, which will be discussed towards the end of this paper

Around the time of the release of ID 2012/16, the Administrative Appeals Tribunal (AAT) decided on 3 separate cases involving appeals against the ATO's assessment of excess concessional contributions tax, with the arguments based on timing issues.

### Detail

Consideration of the 2 quite separate issues, ATO ID 2012/16 and 3 AAT cases, will explain the opportunities available with careful planning, and the penalties which may occur as a result of either a lack of planning or incorrect assumptions.

### ATO ID 2012/16

In ID 2012/16, the ATO advises that a concessional contribution made in one financial year can be allocated by the trustee in the following year, and counted under the member's concessional contributions cap in the year it is allocated. The facts on which the ATO made the determination included:

- the member had a concessional contributions cap of \$25,000;

- personal concessional contributions of \$25,000 were paid to the fund on 4 April 2011;
- those contributions were immediately allocated to the member;
- further personal concessional contributions of \$25,000 were paid to the fund on 28 June 2011;
- those contributions were applied to an unallocated contributions account; and
- on 4 July 2011 (i.e. the following financial year), the contributions in the unallocated contributions account were allocated to the member.

The ATO stated in the ID that the member could claim a deduction for the total amount of \$50,000 in their 2010/11 income tax return, and that the superannuation fund would be liable for tax in the year of receipt (i.e. in the 2010/11 financial year).

Timing of the later contribution was important, as the contribution must be allocated by the 28<sup>th</sup> day of the month after the contribution was received. As the contribution was received in June, it needed to be allocated by 28 July. If, for example, the trustee had received the

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contribution on 31 May, it would need to have been allocated by 28 June, meaning that the contributions to be counted under the concessional contributions cap in that year would have been \$50,000.

In the ID, the ATO specifically referred to the need for the governing rules of the fund (i.e. the trust deed) to permit the holding of the contributions in an 'unallocated contributions account' (the ATO does not consider it to be a 'reserve').

Holding the contributions in an unallocated contributions account effectively provides a 'one-off' benefit as, in the following year, either no contribution can be made or else the contribution will need to be made in June and allocated in the next July. However, there may be reasons why such an option could be beneficial. An example would occur if a self employed individual received a significant capital gain in one year, enabling them to offset the gain in their personal income tax return with a higher deduction (for superannuation contributions) in that year.

Although the ID provides a degree of guidance, there are still some unknown 'what ifs', such as what if:

- there was only 1 member in the fund - does the trustee need a reason not to allocate the contribution?
- the member has turned 65 before the contribution is allocated and is no longer working?
- the contributions were non-concessional - do the same rules apply?

One question which has been answered by the ATO, at a National Taxation Liaison Group meeting, subsequent to the release of ID 2012/16 is 'if there was only one contribution of \$50,000, made in June - could it be split?' with the ATO responding that the one contribution could not be apportioned across separate years.

The ATO's answers to the remaining questions are emerging, as can be seen from the latest release. Careful planning is needed to ensure the opportunities available can be utilised, if needed.

### AAT Cases

Three cases dealt with by the AAT in February and March 2012 concerned the issue of excess concessional contributions caused by the timing of employer contributions. Those cases are:

- AAT Case 129 - Leckie and FCT;
- AAT Case 130 - Naude and FCT; and
- AAT Case 140 - Peaker and FCT.

All 3 cases were very similar in nature, involving the timing of employer contributions, which included salary sacrifice contributions. The applicant lost in each case, meaning that the excess concessional contributions assessments issued by the ATO remained in force.

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To illustrate the decisions, we will use the case of Leckie:

In the year ended 30 June 2009, Mr Leckie was entitled to a concessional contributions cap of \$50,000, and he arranged to top up his superannuation guarantee contributions with salary sacrificed contributions, to a level slightly below his concessional contributions cap. In the 2008/09 financial year, the payment of contributions by Mr Leckie's employer, to 2 separate funds, was as set out in the table below:

	Fund	Contributions
Employer Contributions	Fund # 1	\$29,266.81
	Fund # 2	\$24,408.64
<b>Total Contributions</b>		<b>\$53,675.45</b>
Excess Concessional Contributions	\$3,675.45	
<b>Excess Concessional Contributions Tax (31.5%)</b>	<b>\$1,157.75</b>	

On the information provided so far, it would appear that the excess concessional contributions tax of \$1,157.75 was 'reasonable', in so far as excess concessional contributions tax can be considered to be reasonable.

However, if adjustments were made for the timing of the payments by Mr Leckie's employer, a different result may emerge. The 'timing issue' payments were:

- \$16,154.06 in respect of the 2007/08 financial year, but paid on 16 July 2008; and

- \$11,270.95 in respect of the 2008/09 financial year, but paid on 8 July 2009.

Mr Leckie requested that the ATO reallocate those contributions to their 'correct' year. If so, the contributions for the 2008/09 financial year would have been:

	Contributions
Total Contributions from prior table	\$53,675.45
Less Contributions from 2007/08	-\$16,154.06
Plus Contributions from 2009/10	\$11,270.95
<b>Total Adjusted Concessional Contributions 2008/09</b>	<b>\$48,792.34</b>

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This is how Mr Leckie apparently assumed his contributions would be assessed under the relevant cap. However, the ATO would not reallocate the contributions, and the AAT confirmed the decision of the ATO in Mr Leckie's case and each of the other 2 cases mentioned. The AAT suggested that:

- the circumstances were not 'special circumstances';
- it was 'unremarkable' that the employer paid the June contributions in July; and
- the timing of salary sacrifice contributions "is determined in accordance with the arrangements between the taxpayers and their employers".

The moral to be taken from the AAT cases is that there is no leeway provided if the excess concessional contributions included an amount of salary sacrifice, as the employee is in control and could have made adjustments mid-year.

### Timing is of the essence

Although there appears to be very little in the way of common threads between the ATO ID and the AAT cases, other than the fact that they relate to concessional contributions, one aspect which does resonate throughout is that the efficient management of timing of contributions can potentially:

- enhance deductions when required; and/or
- reduce the occurrence of excess concessional contributions tax.

### A degree of relief

In various pieces of legislation since the introduction of contributions caps following the May 2006 Budget, the Government has attempted to reduce the significant penalty arising from excess concessional contributions:

- firstly through the introduction of a one-off opportunity to withdraw the amount of excess contributions so long as:
  - the occurrence of the excess was the 1<sup>st</sup> such occurrence after 1 July 2011; and
  - the total amount of excess concessional contributions was no greater than \$10,000; and
- secondly, through further legislation permitting all excess concessional contributions to be refunded.

The latter was contained in the *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Act 2013* which was assented to on 29 June 2013.

Basically, the June 2013 amendment changed the tax on excess concessional contributions from 30% plus Medicare levy (the maximum rate of 45% less 15% already taxed in the super fund) to the applicable marginal tax rate of the member (plus Medicare levy).

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Effectively, with one exception, the tax will be applied:

- as if the excess concessional contributions were not paid to the fund, but were instead included in the 'take-home pay' of the member; or
- for members making personal concessional contributions, as if there were no such contributions.

In other words, the amount of excess concessional contributions will either be added to the individual's taxable income (salaried employees) or applied to reduce a deduction for contributions (self employed).

The one exception referred to above relates to the fact that the SMSF will have paid tax at the rate of 15% on those contributions. Therefore, compensation in the form of a 15% offset applies in respect of the additional tax payable because of inclusion of the excess concessional contributions in the income tax return of the individual members.

Because of a timing delay between when the PAYG tax would have been paid by the member's employer and when the individual will pay tax on the excess concessional contributions, an amount of interest (referred to as an Excess Contributions Cap Charge or ECCC) will apply to compensate for the delay.

As a result, the contribution timing issues referred to previously may appear to be less of a consequence, given that there is effectively no penalty for exceeding the concessional contributions cap. However, that may not always be the case.

For example, an individual may have sacrificed additional salary to superannuation because of the expectation of a significant amount of income (e.g. a bonus or sale of an asset and the realisation of capital gain) in a particular financial year.

Having the salary sacrifice reversed, at least to some extent, because of certain timing issues in the payment of contributions, can be counter-productive to the initial planning. Further compounding that, tax payable on those excess contributions may be at the top marginal tax rate, because of the 'extraordinary' income, when the individual would ordinarily pay tax at a lower rate.

### Further ATO guidance

The ATO has provided a degree of guidance in respect to the issue of paying an amount to a superannuation fund in one year, with the amount being held over as a contribution in the following year. In the form of an administratively binding advice (Authorisation Number: 1012478585541 On the Register of Private Binding Rulings) the ATO has dealt with the issue of contributions made in one financial year but categorised as a contribution for the member in the following financial year.

In effect, the ATO has stated that the amount contributed, in the particular circumstances, will not be counted towards the concessional contributions cap in the later year.

The binding advice raises issues in regards to one of the outstanding questions referred to previously, concerning single member funds. In this instance, the member had notified the trustee at the time of

contribution of the intention to claim a deduction for a contribution - in other words, the trustee was in no doubt as to the intent behind the payment to the SMSF.

As the member had intended to offset assessable capital gains with the deduction for the contributions, their plans were scuttled as a result of the private binding advice from the ATO.

Despite the easing of the penalties for excess concessional contributions, care still needs to be taken to enable maximum use of the taxation concessions available within superannuation.

### More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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