

REFUND OF EXCESS CONCESSIONAL CONTRIBUTIONS

This article considers the stages leading to the current position regarding the refund of excess concessional contributions.

In the 2011 Federal Budget, the Government announced it would legislate to allow the refund of excess concessional contributions in specific instances. Legislation following the announcement received assent in June 2012. Subsequent legislation in June 2013 removed some of the limitations contained in the 2012 legislation.

2012 Legislation

The 2012 legislation, titled *Tax And Superannuation Laws Amendment (2012 Measures No. 1) Act 2012* provided for the refund by the ATO ('Commissioner') of excess contributions, within limited circumstances. Those limitations were:

- the amount of the excess concessional contributions was \$10,000 or less;
- the individual had no prior excess concessional contributions (after 1 July 2011);
- the individual had lodged an income tax return for that particular financial year, either within 12 months of the end of that year or longer if permitted by the Commissioner; and
- the individual accepted an offer from the Commissioner to have the excess concessional contributions returned.

Some major points to note from the 2012 legislation are:

1. The \$10,000 upper limit

If the amount of excess contributions was \$10,001 or higher, the option to refund the excess contributions, or just \$10,000 of those contributions, was not available.

2. Prior excess concessional contributions

The legislation effectively applied from the 2012/13 financial year. As a line was drawn from 1 July 2011, the 2011/12 year was the first year to be considered in determining whether refundable excess concessional contributions had been made.

As the opportunity to obtain a refund of excess concessional contributions was a 'one-off' opportunity, any excess concessional contributions made between 1 July 2011 and the start of the particular financial year, even if the refund option had not previously been taken, negated the opportunity.

3. Excess concessional contributions over 2 years

There was no option to 'cherry pick' the year in which contributions were to be refunded, if excess

concessional contributions were made in more than one year. This was partly due to the prior year issue referred to in point 2 above, but the legislation also covered the situation whereby excess concessional contributions had been made in a second year, before the excess concessional contributions notice issued for the first year.

For example, if the excess concessional contribution in year 1 was \$100 and then \$9,000 in year 2, there was no option to select the year 2 excess as the amount to be refunded. Only the amount of the 1st year excess concessional contributions was eligible for the one-off refund.

4. Accepting an offer from the Commissioner

If the individual wished to accept the Commissioner's offer to refund the excess concessional contributions, the acceptance was required to be done via an approved form within 28 days of the date of the Commissioner's notice.

5. Non-concessional contributions not included

The opportunity to refund excess contributions extended only to excess concessional contributions, not to excess non-concessional

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contributions. The reason given for excluding the option to refund excess non-concessional contributions was basically that the member has greater control over the timing and amount of non-concessional contributions.

Once the individual accepted the offer to have the excess concessional contributions returned, the Commissioner would:

- provide a 'release authority' to the individual's super fund to pay 85% of the amount of the relevant excess concessional contributions (allowing for the 15% tax already deducted) to the ATO; and
- amend the individual's income tax assessment for that same year to include:
 - the amount of the excess (grossed up); and
 - a tax offset of 15% of the amount of the excess (to compensate for tax of 15% paid by the super fund); and
- provide a credit in the individual's amended income tax assessment for the payment received under the release authority.

The following example illustrates those procedures.

Example

In the 2011/12 financial year, Stuart inadvertently salary sacrificed to super an amount greater (by \$9,000) than his concessional contributions cap. In line with the standard procedures, he accepted the offer from the Commissioner to have the excess concessional contributions returned.

The tables below indicate how Stuart's tax calculations would differ if he accepted the Commissioner's offer (Medicare levy excluded for ease of illustration):

BEFORE ADJUSTMENT	
Taxable income	\$100,000
Tax payable	-\$24,950
PAYG Withheld	\$25,000
Refund paid	\$50

FOLLOWING ADJUSTMENT	
Initial Taxable Income	\$100,000
Add Refunded Contributions	\$9,000
Adjusted Taxable Income	\$109,000
Tax payable	-\$28,280
PAYG Withheld	\$25,000
85% of Refunded Contributions	\$7,650
Tax Offset (15% of \$9,000)	\$1,350
Refund due	\$5,720
Refund paid	-\$50
Remaining refund	\$5,670

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The 'remaining refund' amount would have been paid to Stuart unless he had a debt for another type of tax or to another Commonwealth agency (e.g. Child Support Agency, Centrelink, etc.).

2013 Legislation

The 2013 legislation, titled *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Act 2013*, which received assent on 29 June 2013, effectively revoked the 2012 legislation with the addition of new provisions. A further relevant piece of legislation, also assented to on 29 June 2013, was the *Superannuation (Excess Concessional Contributions Charge) Act 2013* ('ECCC Act'), which introduced a charge on the excess concessional contributions, detailed below.

Under the 2013 legislation, the 'relief' provisions are similar to the 2012 legislation, but have removed the \$10,000 limit on the amount of excess concessional contributions and also the 'one-off' nature of the provisions.

The situation with excess concessional contributions is now as follows:

- all concessional contributions, regardless of the amount, are taxed in the fund at the rate of 15%;
- the amount of concessional contributions will be measured against the individual's concessional contributions cap and any excess will be included in the personal income tax return of the individual for that relevant year (i.e. will be taxed at the individual's marginal tax rate);
- the individual will receive a tax offset for the amount of the excess concessional contributions included in their income tax return at the rate of 15%, as compensation for the fact that the contributions have already been taxed in the superannuation fund;
- interest, under the name of an 'excess concessional contributions charge' (ECCC), introduced under the ECCC Act, will generally be payable because:
 - the tax on the excess concessional contributions is collected later than it would have been in the event of the contributions not having been paid to the superannuation fund and, instead, included in the salary income of the individual (and paid under the PAYG withholding system); and
 - earnings on that delayed tax would potentially have been received at concessional rates;
- the ECCC is calculated on a daily basis (commencing on 1 July of the year the excess concessional contribution is made) by applying the Reserve Bank monthly average yield of 90 day Bank Accepted Bills, plus 3 percentage points, to the amount of adjusted tax applicable;

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- the individual may elect to release up to 85% of the excess concessional contributions (i.e. 100% of excess concessional contributions less 15% tax paid by super fund) from their superannuation;
- in the election, the individual will notify the ATO of the super fund(s) the released amount is to be paid from and, if electing more than 1 fund, the proportions applying to each fund;
- the Commissioner will issue a release authority to the nominated fund or funds;
- the released amounts will be paid by the superannuation fund to the Commissioner and, as applied under the 2012 legislation, the amount paid will be included as a credit in the individual's income tax return; and
- the grossed up amount of excess concessional contributions released will not be included as part of the measurement under the individual's non-concessional contributions cap.

The major differences to the 2012 legislation are:

- there will no longer be a penalty rate of tax payable by the superannuation fund, regardless of the level of excess concessional contributions; and
- the amount of excess concessional contributions is automatically included in the income tax assessment of the individual, whether or not they elect to have the net amount of

the excess released by the super fund.

Interestingly, the provisions do not take into account the possibility of the recently introduced tax of 30% on contributions for higher income earners (i.e. over \$300,000) applying to the contributions and, therefore, reducing the net amount of the excess contributions from 85% to 70%.

Non-concessional contributions

At this stage, no relief has been provided in regards to the potentially heavy penalties for exceeding the non-concessional contributions cap. The 2013 legislative changes at least provide a mechanism to stop excess concessional contributions causing a flow on effect of adding those excess contributions to the non-concessional contributions when determining whether the non-concessional contributions cap has been exceeded. Previously, such a flow on resulted in penalty tax on contributions of up to 97%, a very significant penalty.

Issues to consider

Although the 2013 legislation provides a good degree of relief from excess concessional contributions tax, clients and advisers need to continue to monitor the level of contributions. Whilst the opportunity of a refund is available, the adjustment to the individual's income tax return could, for example:

- come at a time of higher income and, therefore, a higher marginal tax rate; or

- merely cause the individual to move into a higher marginal tax bracket;

resulting in the undoing of retirement strategy planning.

There may be some argument in purposely breaching the concessional contributions cap, because the tax impact has been reduced to the individual's marginal tax rate, instead of the top rate, and not releasing the contributions. However, if contemplating such action, it is important to consider:

- the impact of the ECCC; and
- the addition of the excess concessional contributions to the non-concessional contributions cap.

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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