



CAVENDISH SUPERANNUATION PTY LTD

SPECIALISTS IN SELF MANAGED SUPERANNUATION

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Accepting Superannuation Contributions

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On 3 June 2009 the ATO released Draft Taxation Ruling TR 2009/D3 regarding superannuation contributions. The primary purpose of this ruling is to provide guidance on what a contribution is and how and when a contribution is made. The ruling is expected to be finalised later this year. This bulletin examines the ruling and how it applies to SMSFs.

TR 2009/D3

The ruling provides the Commissioner's view as to what constitutes a contribution. After establishing a definition the ruling is broken down into two separate parts. Part A considers how and when a contribution can be made and Part B explains the rules associated with claiming a deduction for contributions made to a fund.

Claiming a personal deduction as well as other Contribution Cap issues will be discussed in our next 'Technical Update'.

The first question that needs to be addressed is what is a 'Contribution'?

WHAT IS A CONTRIBUTION

A Contribution is defined by the ATO as an amount that increases the capital or property of a fund to derive real benefits on behalf of members.

Exclusions to this definition are amounts that are received by a fund that are income, profit or gain from investments of the existing capital or realisation of an investment of the existing capital.

The ATO ruling does not concern itself with the question of who the contributions are made for. That is determined by the Trustees and members of a fund.



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ACCEPTING SUPERANNUATION CONTRIBUTIONS

HOW CAN A CONTRIBUTION BE MADE

A contribution can be made by money or money equivalent, transferring an asset (in specie contribution) or other such forms that have monetary value attached to them.

MONEY OR MONEY EQUIVALENT

A money or money equivalent contribution include any of the following:

- Cash (Australian, foreign)
- Money Order
- Electronic Transfer
- Bank or personal cheque
- Similar Negotiable Instrument (Promissory Notes)

TRANSFERRING ASSETS

Section 66(1) of the SIS Act prohibits the Trustees of a Fund from intentionally acquiring an asset from a related party of a Fund. Section 66(2) and 66(2A) provide for certain exemptions to the above prohibition, primarily:

- Listed Securities
- Business Real Property
- In-house Assets (and other exceptions)

Subject to satisfying section 66 a fund can accept the transfer of certain assets as contributions.

OTHER FORMS

Other forms of contribution, equivalent of monies paid into a fund are likely to be as a result of one of the following:

- Satisfying a liability of the fund on behalf of the Trustees
- Forgiveness of debt by a lender
- Personal guarantor satisfying a loan obligation of the Trustees (S67(4A))
- Increasing the value of an asset already owned by the Fund
- Discretionary trust distributions (where the Fund does not have an investment interest in the trust)

Discretionary trust distributions are currently assessed under 'Special Income' provisions. How the Commissioner distinguishes between special income and contributions is expected to be addressed when the ruling is finalised.

In accordance with the Commissioner, contributions are also made when a fund receives a rollover from another fund or a transfer from an overseas superannuation/pension fund. However, rollovers are excluded from the SIS definition of a contribution so there is no age restriction on when a rollover is received.



MONEY EQUIVALENT – PROMISSORY NOTES

The ruling provides clarity on the use of promissory notes and distinguishes between related party promissory notes and non-related promissory notes referred to as investment-related promissory notes.

A fund can accept a related party promissory note as a form of money similar to that of a cheque. Investment-related promissory notes are tradable commodities and as such are not the equivalent of money but rather an asset so are subject to the requirements of Section 66 of the SIS Act. Given that they are unlikely to be listed securities, less likely to be in-house assets and definitely not business real property the ability to transfer an investment-related promissory note to a SMSF is extremely limited.

The ATO have defined an investment-related promissory note as a note issued by a non-related entity to another entity at a discount rate from its face value with the value payable to the payee or bearer at a fixed or determinable future time.

OTHER FORMS – SATISFYING A FUND LIABILITY

It is often the practice in the SMSF industry that an employer or the member pays a liability of a fund. The ATO's preferred position is that a fund meet all its own liabilities however it accepts that a third party can satisfy the liability and then a fund can treat the amount as being a contribution by way of journal entry.

EXAMPLE – INSURANCE PREMIUMS

A member pays an insurance premium from their personal bank account for a policy held in the name of the Trustees of the SMSF. Rather than the SMSF reimburse the member for the premium the Fund simple treats the amount paid as a contribution to the Fund.

OTHER FORMS – FORGIVENESS OF DEBT/GUARANTOR PAYMENTS

If a SMSF enters into a loan agreement, usually by way of a Section 67(4A) borrowing arrangement and the loan is forgiven by the lender then the value of that loan will be treated as a contribution.

Similarly, some banks require personal guarantees when a SMSF enters into a borrowing arrangement under 67(4A). If a fund defaults on its payment and the guarantor satisfies the loan obligation the ATO's position is that this amount be treated as a contribution to the Fund unless the guarantor has some form or right to redemption from the Fund. If the guarantor has a right to redemption then the Fund has not distinguished its loan but rather transferred its liability from the bank to the guarantor.



ACCEPTING SUPERANNUATION CONTRIBUTIONS

OTHER FORMS – INCREASING THE VALUE OF AN ASSET

An asset that increases in value due to a re-investment of dividends/distributions/interest is investment related so is not considered a contribution.

There are two common scenarios where the value of an asset is likely to be increased and will subsequently be deemed a contribution.

SCENARIO 1 – ASSET ACQUIRED BELOW MARKET RATE

The first situation is where a fund pays for an investment at a value determined to be lower than “Market Rate” for that investment. The ATO has deemed that the difference between the amount paid and the Market Value is to be treated as a contribution.

EXAMPLE

A client does an off-market transfer and pays \$100,000 @ \$1 each obtaining 100,000 shares in a company. If the Market Value of the shares on the day of the transfer are \$1.50 each then the contribution will be the equivalent of 50 cents per share which equals \$50,000. **NOTE:** This should not occur in a SMSF as the Trustees must undertake all activities on a commercial basis particularly when acquiring assets from a related party.

SCENARIO 2 – CAPITAL IMPROVEMENTS

The Trustees/members make capital improvements to an asset such as property and finance the improvements personally.

EXAMPLE

Fund owns an investment property. The Trustees want to renovate the property to make it more attractive to prospective investors. If the Trustees finance the renovations personally then the costs associated with the renovations will be treated as a contribution to the Fund.

WHEN IS A CONTRIBUTION MADE – MONEY/MONEY EQUIVALENT

Money or money equivalent contributions are made when the money is received by the Fund which is usually the date as indicated on the bank statement. The ATO will accept printed receipts that show transfers that occur over a weekend if the receipts indicate that the money has been deposited in the Fund account. This may be the case if the member and Fund bank with the same institution and can do immediate transfers electronically.

Contributions via cheques and promissory notes are made when the cheque (or note) is received, not necessarily banked, by the Trustee of the Fund unless they are subsequently dishonoured. The ATO will apply this rule as long as the cheque is promptly presented for payment within a few business days having regard to reasonable commercial practice.

If the payment is not sought promptly the ATO will treat the contribution as occurring when cash or its electronic equivalent is received.



ACCEPTING SUPERANNUATION CONTRIBUTIONS

WHEN IS A CONTRIBUTION MADE – ASSETS TRANSFERRED

Property (assets other than money or money equivalent) is received when either the legal or beneficial ownership passes from the contributor to the Trustees.

If there is no formal registration process to evidence ownership, the ownership passes to the Trustee when they physically take possession of the asset. The ATO will also accept the date of the contribution as the date a Deed of Transfer is executed.

Where there is a formal registration process the ATO's view is that ownership and therefore the contribution is made when the Fund Trustees are registered as the owner of the property. As legal ownership can often occur sometime after beneficial ownership of property passes, the ATO accept that the contribution is made when beneficial ownership is obtained.

REAL PROPERTY

For real property beneficial ownership is obtained when the Trustees are in receipt of the requisite transfer forms and there is no legal impediment stopping the Fund from affecting the transfer.

EXAMPLE

The members of a SMSF wish to transfer business real property held in their personal names into their SMSF. To satisfy all requirements of Section 66 of the SIS Act the members obtain an independent valuation of the property. Once they have obtained the valuation and determined that there is no other legal impediment (in particular there is no debt on the property) the members complete the necessary land titles forms to transfer the property.

A fully completed land titles transfer will be sufficient to determine the date of the contribution. The Trustees are therefore not required to wait until the Land Titles Registry in the appropriate State has registered the transfer.

LISTED SECURITIES

If listed securities are transferred to a fund, Section 1072F of the Corporations Act 2001 states that a person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.

The ATO provides slightly different interpretations for shares transferred via an off-market transfer. An in-specie contribution of listed securities is made when the Trustee of a fund obtains a properly completed off-market share transfer form. Properly completed requires the form to be fully completed, dated and signed by all parties concerned. If the form is incomplete then the transfer will occur when the form is completed.

The amount of the contribution will be the MARKET VALUE of the shares at the time the form is completed.



WHEN IS A CONTRIBUTION MADE – ASSETS TRANSFERRED (cont)**EXAMPLE**

A member holds 5,000 BHP shares personally and wishes to transfer the shares to their SMSF. At the time they completed the off-market transfer the market value for BHP was \$30 per share. If the form was completed by the seller and buyer that day the member can transfer the shares into the Fund and the contribution will be \$150,000.

Assuming the member completes the “seller information” on the day the shares are \$30 but does not get all Trustees of the Fund to complete and sign the “buyer information” until a later date when the shares are valued at \$37, the transfer value and contribution will be \$185,000.

This may trigger the “bring forward provision” if the member was under 65 or may create an excess contribution for a member over 65. For a member over 65 the Fund could not execute the entire transfer unless the member was entitled to a personal deduction and provided a notice of intent to claim that deduction.

Obviously it is important when a member is trying to make a contribution prior to 30 June that the form is completed prior to that date to ensure the contribution does not fall into the following year.

CONCLUSION

The ruling, albeit a draft, provides greater clarity on a number of issues that have caused great debate within the SMSF industry.

For funds considering gearing, it confirms that personal guarantees are possible but there is a risk that if called upon the amount may count not only as a contribution but against contribution cap.

In addition it clarifies the process for off-market share transfers. The release of this ruling and recent audit activity clears up an old industry myth: **THERE IS NO RULE THAT PROVIDES A THREE (3) MONTH WINDOW OF OPPORTUNITY TO SELECT THE “BEST PRICE” TO TRANSFER SHARES!**

Once the Trustees accept when and how a contribution can be made they need to identify who the contributions are for and the taxation treatment that applies. This will be explored in our next bulletin.

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