



ATO Interpretative Decision

ATO ID 2009/29

Superannuation

Superannuation Contributions: return of contribution by self managed superannuation fund - after 30 day time limit

FOI status: may be released



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Issue

Does subregulation 7.04(4) of the *Superannuation Industry (Supervision) Regulations 1994* (SISR) impose a requirement for a trustee of a self-managed superannuation fund to return a contribution or part of a contribution if the amount was not returned within 30 days of the trustee becoming aware that the contribution standards in subregulations 7.04(1), 7.04(2) or 7.04(3) of the SISR were not met?

Decision

Yes. The trustee is still required to return the amount of a contribution that has been accepted inconsistent with the contribution standards, even if more than 30 days has expired since the trustee became aware of the inconsistency.

Facts

An individual is a member of a self-managed superannuation fund (ABC Fund). The individual is also a trustee of ABC Fund. During the 2008-09 financial year the member made a contribution to ABC Fund that did not meet one of the contribution standards in subregulations 7.04(1), 7.04(2) or 7.04(3) of the SISR.

At the time the contribution was made, the trustee of ABC Fund became aware that acceptance of the contribution was inconsistent with one of the contribution standards. The trustee did not return the amount of the contribution within 30 days.

The individual, in their capacity as trustee of ABC Fund, has asked whether they are still required to return the contribution, even though they became aware of the inconsistency more than 30 days ago.

Reasons for Decision

Regulation 7.04 of the SISR sets out the conditions for the acceptance of contributions by regulated superannuation funds. This regulation is an operating standard for regulated superannuation funds under section 31 of the *Superannuation Industry (Supervision) Act 1993* (SISA). Subsection 34(1) of the SISA requires a trustee to ensure that the operating standards are complied with at all times.

Subregulation 7.04(1) of the SISR provides that:

A regulated superannuation fund may accept contributions only in accordance with the following table and subregulations (2), (3), (4) and (6).

A trustee of a self-managed superannuation fund should, before accepting a contribution for a member, consider if the contribution will meet the conditions set out in the regulations.

Subregulation 7.04(4) of the SISR provides that:

If a regulated superannuation fund receives an amount that is inconsistent with subregulation (1), (2) or (3):

(a)

the fund must return the amount to the entity or the person that paid the amount within 30 days of becoming aware that the amount was received in a manner that is inconsistent with subregulation (1), (2) or (3), unless...

The provision is constructed so that both the return of the amount and the time requirement must be satisfied.

It has been suggested that the mandatory language (by the use of the word 'must') in subregulation 7.04(4) of the SISR requires strict compliance, and once the 30 days has expired the trustee is not able to act under subregulation 7.04(4) to return the amount.

When interpreting the meaning of legislative provisions, the courts have in the past considered whether the language is mandatory or directory. In general terms a mandatory rule contained in a provision requires strict observance, or the rule will not have been satisfied whereas a directory requirement will not render the act ineffective if the rule is not strictly complied with.

However in more recent cases, the courts have followed *Tasker v. Fullwood* [1978] 1 NSWLR 20, where on appeal, the Court referred to the following propositions:

(1) The problem is to be solved in the process of construing the relevant statute (2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute (4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement (5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations.

The Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2007 (No.1) reveals the scope and object of the statute and the statutory intention of the amendments which changed the contribution standards in SISR. It states in the introduction:

The purpose of the Regulations is to amend the Superannuation Industry (Supervision) Regulations 1994 to:

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prohibit a superannuation fund from accepting member contributions

where a tax file number is not quoted or the amount of the contribution exceeds the non-concessional contributions cap.

And at item 80 of the Explanatory Statement:

Non-personal member contributions (such as spouse contributions) will continue to not be allowed to be accepted into a fund for any person who has reached age 70.

To help prevent a person from inadvertently contributing more than the non-concessional contributions cap, new subregulation 7.04(3) provides that superannuation funds will be required to return an amount of certain member contributions that exceed the cap.

The SISR impose strict conditions on the acceptance of certain contributions, and provide for a compulsory return of an amount where the contribution standards in subregulations 7.04(1), 7.04(2) or 7.04(3) of the SISR have not been met. The objective of subregulation 7.04(4) of the SISR is to prohibit contributions from remaining in the fund where those contributions are inconsistent with the contribution standards.

Accordingly, our view is that the 30 day requirement imposes an obligation for the timely return of a contribution, but that the trustee remains obliged under subregulation 7.04(4) of the SISR to return the inconsistent amount even if more than 30 days have elapsed since the trustee became aware of the inconsistency with the contribution standards.

In this case the trustee is required to return the amount that is inconsistent with one of the contribution standards in subregulation 7.04(1), 7.04(2) and 7.04(3) of the SISR.

Date of decision: 20 February 2009

Year of income: Year ended 30 June 2009

Legislative References:

Superannuation Industry (Supervision) Act 1993

section 31

subsection 34(1)

Superannuation Industry (Supervision) Regulations 1994

subregulation 7.04(1)

subregulation 7.04(2)

subregulation 7.04(3)

subregulation 7.04(4)

Case References:

Tasker v. Fullwood

[1978] 1 NSWLR 20

Related ATO Interpretative Decisions

ATO ID 2007/225

ATO ID 2008/90

Other References

Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2007 (No. 1)

Keywords

Complying superannuation funds

Contributions returned

Contributions standards

Self managed superannuation funds

SMSF trustee

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