




ATO Interpretative Decision

ATO ID 2012/79

Superannuation

Superannuation contributions: the operation of subregulation 7.04(3) of the Superannuation Industry (Supervision) Regulations 1994 in the context of in-specie contributions of listed shares

FOI status: may be released

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Issue

Does subregulation 7.04(3) of the Superannuation Industry (Supervision) Regulations 1994 (SISR) prevent the trustees of a self managed superannuation fund (SMSF) from accepting the transfer of three parcels of shares in three different listed companies (with each parcel consisting of shares of the same class) from a member of the fund, as a personal undeducted contribution, if the combined value of all the shares transferred exceeds the member's non-concessional contributions cap for the financial year in which the transfer occurs?

Decision

No. For the purposes of applying subregulation 7.04(3) of the SISR, the transfer of each individual parcel of shares is a contribution that satisfies the definition of 'fund-capped contributions' in subregulation 7.04(7) of those Regulations. It is not possible to regard the three parcels as a whole as a fund-capped contribution.

Facts

An individual is a member of an SMSF.

The individual was aged 65 at the commencement of the 2011-12 financial year.

The individual was gainfully employed within the meaning of subregulation 7.01(3) of the SISR for that financial year and was eligible to contribute to the SMSF.

The individual had a non-concessional contributions cap of \$150,000 for the 2011-12 financial year for the purposes of both subsection 292-85(2) of the *Income Tax Assessment Act 1997* (ITAA 1997) and the definition of 'fund-capped contributions' in subregulation 7.04(7) of the SISR.

On 8 February 2012, the member contributed the following parcels of shares in three different listed companies to the SMSF:

- 2000 shares in ABC Ltd - total market value \$42,000
- 5500 shares in DEF Ltd - total market value \$78,000
- 3200 shares in XYZ Ltd - total market value \$35,000

The trustees of the SMSF wish to know whether they are prevented from accepting any part of the above contributions by subregulation 7.04(3) of the SISR.

Reasons for Decision

Subregulation 7.04(3) of the SISR provides that:

In addition to subregulation (1), the regulated superannuation fund must not accept any fund-capped contributions in a financial year in respect of a member that exceed:

- (a) if the member is 64 or less on 1 July of the financial year- three times the amount of the non-concessional contributions cap; or
- (b) if the member is 65 but less than 75 on 1 July of the financial year- the non-concessional contributions cap.

Subregulation 7.04(4) of the SISR provides that:

If a regulated superannuation fund receives an amount that is inconsistent with subregulation ... (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...(3), unless:
 - (i) ...
 - (ii) for an amount received in a manner that is inconsistent with subregulation (3) - a valid notice under section 290-170 of the *Income Tax Assessment Act 1997* is received by the trustee of the fund within 30 days of this amount being received by the trustee of the fund: and...

A trustee of an SMSF should, before accepting a contribution for a member, consider if any contribution is 'fund-capped contributions'. Fund-capped contributions are "contributions by, or on behalf of, the member to the fund", but do "not include employer contributions in respect of the member" (see subregulation 5.01(1) of the SISR) or contributions that fall within the ambit of the exceptions to the definition of 'fund-capped contributions' listed in subregulation 7.04(7) of SISR.

In the 2011-12 financial year, a trustee was unable to accept any 'fund-capped contributions' by or on behalf of a member who was 65 years of age at 1 July 2011 that exceeded \$150,000.

ATO Interpretative Decision ATO ID 2007/225 *Superannuation contributions : acceptance of fund capped contributions by a self managed superannuation fund* provides the ATO view that subregulation 7.04(3) of the SISR applies on a 'contribution by contribution' basis. This principle applies irrespective of the form in which the contribution is made, whether this is cash or property contributed in-specie. This includes the transfer of listed shares.

A share is a type of claim in contract against a company. Section 1070A of the *Corporations Act 2001* states that a share is 'personal property' in nature. It is generally accepted that a share is 'personal property', being intangible property that is a 'chose in action'.

Torkington v. Magee [1902] 2 KB 427 describes a 'chose in action' in the following terms:

'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.

In the NSW Supreme Court decision of Campbell J in *White v. Shortall* [2006] NSWSC 1379 (affirmed on appeal), it was considered that a parcel of shares in the same company (where such shares are of the same class with identical rights attached) are fungible and are appropriately regarded as a homogenous collective, giving rise to a single chose in action or right: see paragraphs 199 and 209.

Shares in different companies, or shares in a single company that are of a different class, are attended by disparate legal and/or beneficial rights and therefore cannot be interchanged or substituted. Accordingly, such shares are not fungible and cannot be regarded as a homogenous collective, as per the principles articulated by Campbell J in *White v. Shortall*. It follows from the above that shares in different companies, or shares in a single company that are of a different class cannot be regarded as constituting a single chose in action or right.

In this case, it is considered each of the three parcels of shares constitutes a separate contribution for the purposes of subregulation 7.04(3) of the SISR. Therefore, the member made three separate contributions to their SMSF of \$78,000, \$42,000 and \$35,000 on 8 February 2012.

As none of these three contributions exceeded \$150,000, subregulation 7.04(3) of the SISR did not apply to prevent the trustee of the SMSF from accepting these contributions. In this case the member will have excess non-concessional contributions for the 2011-12 financial year and will receive a non-concessional contributions tax assessment.

Date of decision: 14 September 2012

Legislative References:

Corporations Act 2001
section 1070A

Superannuation Industry (Supervision) Regulations 1994

subregulation 5.01(1)
subregulation 7.01(3)
subregulation 7.04(3)
subregulation 7.04(4)
subregulation 7.04(7)

Case References:

Torkington v. Magee
[1902] 2 KB 427

White v. Shortall
[2006] NSWSC 1379

Related ATO Interpretative Decisions

ATO ID 2007/225

Keywords

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