



ATO Interpretative Decision


ATO ID 2012/16

Superannuation

Superannuation Excess Contributions Tax: concessional contributions - allocation of contributions

 This ATO ID has been amended to clarify the Facts and Reasons for Decision.

FOI status: may be released

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Issue

When calculating a person's concessional contributions under section 292-25 of the *Income Tax Assessment Act 1997* (ITAA 1997) is a concessional contribution made to a superannuation fund in one financial year but allocated to the member under the Superannuation Industry (Supervision) Regulations 1994 (SISR) with effect in the subsequent financial year counted as a concessional contribution in the latter year?

Decision

Yes. When a contribution has been received in one financial year and allocated in accordance with SISR to the member with effect in a subsequent financial year it is counted as a concessional contribution in the latter year.

Facts

A member of a self-managed superannuation fund made a personal contribution of \$25,000 to their fund on 4 April 2011. The trustees of the fund immediately allocated this contribution to the member in accordance with subregulation 7.08(2) of the SISR.

The member made a further personal contribution of \$25,000 on 28 June 2011. The trustees applied this amount to an unallocated contributions account that had been established in accordance with the governing rules of the fund. On 4 July 2011, the trustees allocated the amount credited to the unallocated contributions account (that is, the amount of the 28 June contribution) to the member as a contribution for the member with effect from that date (and not from 28 June 2011 when the contribution was received).

The member satisfied all the conditions necessary to deduct both personal contributions made in 2010-11 income year and was allowed a deduction of \$50,000 in his income tax assessment for that year.

The member's concessional contributions cap for the 2010-11 financial year was \$25,000.

Reasons for Decision

Subsection 292-25(2) of the ITAA 1997 provides that a contribution is a concessional contribution if it is made in the financial year to a complying superannuation plan 'in respect of you' and it is included in the assessable income of the superannuation provider. A contribution is made 'in respect of you' when it is made for the purpose of providing superannuation benefits for you. As indicated in paragraph 7 of Taxation Ruling TR 2010/1 Income tax: superannuation contributions this requires an objective determination of the contributor's purpose. Therefore, a contribution does not cease to be made to provide superannuation benefits for a particular person merely because the trustee does not immediately allocate it to the member.

Subsection 292-25(3) of the ITAA 1997 also includes in concessional contributions an amount allocated in accordance with the conditions specified in the regulations.

Subregulation 292-25.01(2) of the Income Tax Assessment Regulations 1997 (ITAR) provides that an amount is allocated in a way covered by subsection 292-25(3) of the ITAA 1997 if the amount has been allocated under Division 7.2 of the SISR and is an assessable contribution.

Division 7.2 of the SISR provides rules for the allocation of contributions to members. Subregulation 7.08(2) of the SISR requires a trustee who receives a contribution in a month in relation to an accumulation interest to allocate the contribution to a member of the fund:

- (a) within 28 days after the end of the month; or
- (b) if it is not reasonably practicable to allocate the contribution to the member of the fund within 28 days after the end of the month - within such longer period as is reasonable in the circumstances.

Subregulation 292-25.01(4) of the ITAR 1997 provides that amounts allocated from reserves are also treated as being allocated in a way covered by subsection 292-25(3) of the ITAA 1997 unless an exclusion in subregulation 292-25.01(4) of the ITAR 1997 applies. However, subregulation 292-25.01(4) of the ITAR 1997 does not apply to an amount that is covered by subregulation 292-25.01(2) of the ITAR 1997.

As the unallocated contributions account maintained by the fund consists only of contributions that were made for a particular member and the amount allocated to the member's account was from contributions made in respect of that member subregulation 292-25.01(2) of the ITAR 1997 is the more specific regulation.

Where a contribution is made to a fund in respect of a particular member and is subsequently allocated to the member under Division 7.2 of the SISR the application of the above provisions appears to result in the contribution being counted as a concessional contribution twice:

- once under subsection 292-25(2) of the ITAA 1997 because a contribution has been made to the fund in respect of the member; and
- a second time under subsection 292-25(3) of the ITAA 1997 because it is an amount allocated to the member covered by subregulation 292-25.01(2) of the ITAR 1997.

The times at which the contribution is counted for the purposes of those subsections could be different (including in different financial years) where, as in this case, the subsequent allocation of the contribution has effect from a date different from when the contribution was made.

Case law provides that unless there is a clear intention to tax an amount twice, an interpretation should be adopted which avoids double taxing: Dixon J in *Executor Trustee and Agency Company of South Australia Ltd v Federal Commissioner of Taxation* (1932) 48 CLR 26.

Further, the Explanatory Statement to Income Tax Assessment Amendment Regulations 2007 (No. 3) which introduced regulation 292-25.01 of the ITAR shows there is a clear intention not to include a contribution in concessional contributions twice.

The Explanatory Statement to Income Tax Assessment Amendment Regulations 2007 (No. 3) states:

This approach will not result in double counting against the concessional contributions cap as contributions that are allocated directly to a reserve when made will only be counted against the contributions cap when allocated to a member.

It is considered the intent declared by this statement demonstrates that the second contribution of \$25,000 is intended to be included in concessional contributions at the time the allocation of the contribution has effect (in this case, on 4 July 2011) and not when the contribution was made (if that is different).

Consequently, the member had concessional contributions of \$25,000 for the 2010-11 financial year. The member also had at least \$25,000 in concessional contributions for the 2011-12 financial year.

Date of decision: 5 March 2012

Year of income: Year ending 30 June 2012

Legislative References:

Income Tax Assessment Act 1997

section 292-25
subsection 292-25(2)
subsection 292-25(3)

Income Tax Assessment Regulation 1997

regulation 292-25.01(2)
regulation 292-25.01(4)

Superannuation Industry (Supervision) Regulations 1994

Division 7.2
subregulation 7.08(2)

Case References:

Executor Trustee and Agency Company of South Australia Ltd v. Federal Commissioner of Taxation
(1932) 48 CLR 26

Related Public Rulings (including Determinations)

Taxation Ruling TR 2010/1

Other References

Explanatory Statement for Income Tax Assessment Amendment Regulations 2007 (No. 3)

Keywords

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