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The NTAA's Financial Advice Newsletter Edition No. 39

Which non-concessional contributions cap applies?

Under recently enacted legislation, the annual non-concessional contributions (NCC) cap is to be reduced from $180,000 to $100,000 as from 1 July 2017.

This means that the NCC cap that applies over three years under the "bring forward" rule is reduced from $540,000 to $300,000 (i.e., three times $100,000).

If the NCCs made in the 2015/16 and/or the 2016/17 income years totalled at least $540,000, then the NCC cap is $540,000.

However, if the NCCs made in each of the 2015/16 and the 2016/17 income years did not exceed $180,000, then the three year bring forward NCC cap for the 2017/18 and later income years is just $300,000.

Transitional rules apply if the total NCCs made in the 2015/16 and 2016/17 income years exceeded $180,000 but were less than $540,000, as illustrated by the following examples.

Suppose Mary made NCCs of $200,000 in the 2015/16 income year (triggering the "bring forward" rule), and made further NCCs of $190,000 in the 2016/17 income year.

The applicable NCC cap for Mary is **$460,000** for the 2015/16, 2016/17 and 2017/18 income years (i.e., $180,000 + $180,000 + $100,000).

As Mary has already made NCCs totalling **$390,000** for the 2015/16 and 2016/17 income years, then she will only be able to make additional NCCs of **$70,000** in the 2017/18 income year, without breaching the applicable NCC cap.

Now suppose Mary made NCCs of $150,000 in the 2015/16 income year, and made further NCCs of **$230,000** in the 2016/17 income year (so the "bring forward rule is only triggered in the 2016/17 income year).

The applicable NCC cap for Mary is **$380,000** for the 2016/17, 2017/18 and 2018/19 income years (i.e., $180,000 + $100,000 + $100,000). This means that Mary will only be able to make total NCCs of **$150,000** for the 2017/18 and 2018/19 income years, without breaching the applicable NCC cap.

Note that:

(a) members must be aged under 65 at relevant times for the three year 'bring forward' rule to apply;

(b) if the NCC cap is exceeded, then the excess NCC tax rules apply;

(c) as from 1 July 2017, a new eligibility condition is imposed that any person who holds a superannuation balance of more than $1.6 million cannot make any further NCCs.

ATO guidance regarding SMSF annual return and contribution reserves

The ATO has recently updated its SMSF annual return instructions to provide additional guidance for where a SMSF has used a superannuation contribution reserve strategy.

More particularly, the ATO requires contributions paid into a SMSF reserve to be reported to the ATO (via the SMSF annual return) for the financial year in which they were 'received' by the fund (not in the subsequent year they were later 'allocated' from the reserve to the member's account in accordance with TD 2013/22).

The ATO says it is necessary to complete a Request to adjust concessional contributions form (NAT 74851), in order for a superannuation contribution strategy to work effectively. This is on the basis that the SMSF annual return (NAT 71226) only allows for reporting of contributions that are both ‘received’ by the SMSF and ‘allocated’ in the same financial year, and does not otherwise make provision for contribution reserve strategies.

The Request form referred to above should be lodged by the taxpayer before, or at the same time as, both the SMSF annual return and the individual’s income tax return are lodged. If this is not done, the ATO will issue an incorrect assessment based on the contributions reported in the SMSF annual return. It would then be necessary for affected taxpayers to object to any incorrect assessment that has included excess concessional contributions in their assessable income.

The ATO says that it is important to review Example 1 (regarding personal contributions) and Example 2 (regarding employer contributions) set out in the instructions when completing the request form, and follow the SMSF annual return 2016 instructions, in order to ensure correct reporting.

The ATO also recommends that approved SMSF auditors check the updated instructions and make sure clients have correctly completed their SMSF annual return. Written trustee resolutions should also be retained in order to confirm that a contribution was accepted into a reserve in one financial year, and then allocated to a member in the next financial year, in accordance with the SMSF’s trust deed.

Super death benefit to bankrupt spouse protected in bankruptcy

In a recent decision, the Federal Court ruled that a superannuation death benefit paid to a bankrupt spouse was protected in bankruptcy from her creditors.

By way of background, the respondent became bankrupt in August 2013, shortly after the death of her husband. She received superannuation lump sum death benefit

payments from her late husband’s superannuation funds after becoming bankrupt. The trustees of the superannuation funds had exercised their discretion under the relevant trust deeds to pay the death benefits to the respondent as a dependant of the deceased member, as he had not made a death benefit nomination.

The trustees in bankruptcy argued that the payments were received after the date of bankruptcy and therefore they vested in the bankruptcy trustee.

The Federal Court however held that the superannuation death benefits were an interest of the bankrupt spouse in a regulated superannuation fund, and therefore they fell within specified exemptions under the Bankruptcy Act.

The Court did not accept the bankruptcy trustees’ submission that the exemptions under the Bankruptcy Act made no express reference to an interest of a spouse or de facto partner of the bankrupt. The Court considered that an interest in the superannuation funds was created upon the favourable exercise of the discretion to pay the death benefits to the respondent, notwithstanding that she did not have an interest in either of the superannuation funds. The Court also noted that ‘beneficiary’ as defined in the superannuation legislation is not limited to a person who is a member of a fund.

The Court accordingly ruled that the superannuation lump sum death benefit payments were ‘interests of the bankrupt’ in a regulated superannuation fund as defined in the Bankruptcy Act and were therefore protected in bankruptcy. The Court held that the exemption in relation to a ‘payment to the bankrupt’ from a regulated superannuation fund extends to those who are members of the fund, as well as their spouses and dependants.

Note however that, under the Bankruptcy Act, the payment of a pension (as opposed to a lump sum) from a superannuation fund is not protected in bankruptcy.

Refer Trustees of the Property of Morris (Bankrupt) v Morris (Bankrupt) [2016] FCA 846

Superannuation death benefits and children

It is often the case that a member's superannuation benefits are paid to their children after the member's death. However, there are special rules that govern the payment of superannuation death benefits to children that people may not be aware of.

First of all, it is **generally** the case that a child may only receive superannuation death benefits **tax free** if the child is under 18 at the time of the member's death. This is on the basis that the taxable component of superannuation death benefits are only received tax free if the recipient is a 'death benefits dependant' of the deceased member.

A 'death benefits dependant' is defined in the applicable legislation to include the deceased person's **child aged under 18** (in addition to the deceased's spouse or any other person who was financially dependent on, or with whom the deceased person had an 'interdependency relationship' just before they died).

Therefore, a deceased member's superannuation benefits may be received **tax free** by their child that is aged 18 or over **provided that** the child was financially dependent on, or in an interdependency relationship with, the member just before the member died.

It is also important to note that a deceased member's superannuation benefits generally cannot be paid directly as a pension to an adult child.

The superannuation regulations provide that a deceased member's superannuation benefits can only be paid directly as a pension (rather than a lump sum) to their child if (a) the child is under 18, or (b) the child (aged 18 or over) is financially dependent on the member and less than 25, or the child has a disability as prescribed in the regulations.

Therefore, if the child is aged 25 or over and does not have a prescribed disability, the deceased member's benefits cannot be paid directly to the child as a pension even if the child was financially dependent on, or in an interdependency relationship with, the deceased member.

Incidentally, where superannuation death benefits are paid as a pension (e.g., to a spouse), they will still be subject to tax where both the deceased member when they died and the recipient are aged under 60.

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