NTAA ADVICE

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No 'special circumstances' for breach of concessional contributions cap

In a recent decision, the AAT confirmed the ATO's decision not to exercise its discretion to set aside or defer concessional contributions that gave rise to excess contributions tax.

The taxpayer had a superannuation account with UniSuper in which she had both a defined benefit interest and an accumulation interest. The taxpayer made contributions to another superannuation fund of $150,000 in the 2010/11 income year and $450,000 in the 2011/12 income year. The taxpayer's employer also made contributions to UniSuper on her behalf in the 2009/10 and 2010/11 income years, including both contributions to the taxpayer's accumulation interest, and contributions to the taxpayer's defined benefit interest in the fund.

The employer's contributions resulted in the taxpayer exceeding the (then) $50,000 concessional cap in each of the 2009/10 and 2010/11 income years. These excess amounts were then included in calculating the taxpayer's non-concessional contributions (NCCs) for the relevant income years, activating the 'bring-forward' rule for the 2010/11 income year and the two years following. Consequently, the NCC of $450,000 in the 2011/12 income year resulted in the taxpayer exceeding the NCC cap.

The taxpayer requested the ATO to exercise its discretion to disregard the excess NCC or to allocate it to another income year, but the ATO would not do so on the basis that the required 'special circumstances' did not occur.

On appeal to the AAT, the taxpayer submitted that the contributions to her defined benefit interest in UniSuper had been incorrectly characterised as concessional contributions, so that the concessional contributions caps (and consequently, the NCC cap) would not have been exceeded in the years in question.

The AAT however held that both the contributions to the accumulation interest in UniSuper and increases in the defined benefit interest in that fund were correctly characterised as concessional contributions, resulting in breaches of the concessional contributions cap.

The AAT also found that the complexity of her superannuation arrangements and her reliance on erroneous spreadsheets prepared by her husband to keep track of her superannuation contributions did not constitute the 'special circumstances' required to enable the ATO to exercise its discretion.

Refer Moore v FC of T [2017] AATA 998, 29 June 2017.

Work done outside Australia for superannuation guarantee purposes

A previous ATO Interpretative Decision (ATO ID 2015/24) considered what is 'work done outside Australia' for superannuation guarantee (SG) purposes.

Section 27(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) provides that salary or wages paid to an employee for **work done outside Australia** are generally not to be included in calculating the employer's liability to make superannuation contributions if either the employee or the employer (or both) is not a resident of Australia.

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In this case, the employee was not a resident of Australia, and he was employed by a company which was not a resident of Australia. The employee's work was done at sea more than 12 nautical miles from the territorial sea baseline of Australia, although still within the limits of Australia's continental shelf.

The relevant legislation provides that 'Australia', when used in a geographical sense, includes the following:

(a) the following external Territories:

 (i) Norfolk Island;

 (ii) the Coral Sea Islands Territory;

 (iii) the Territory of Ashmore and Cartier Islands;

 (iv) the Territory of Christmas Island;

 (v) the Territory of Cocos (Keeling) Islands; and

 (vi) the Territory of Heard Island and the McDonald Islands;

(b) an offshore area for the purpose of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, and the Joint Petroleum Development Area (within the meaning of the *Petroleum (Timor Sea Treaty) Act 2003*); and

(c) the 'coastal sea' of Australia, which generally means the territorial sea within 12 nautical miles of the coastline of Australia or of its external territories.

Note that (b) and (c) above includes all things located in those areas, including all installations and structures such as oil and gas rigs.

It was held in this ATO ID that in the phrase 'work done outside Australia' as used in subsection 27(1) of the SGAA, 'Australia' is used in a geographical sense and extends to all of the areas set out above. Work done outside those areas is 'work done outside of Australia' for SG purposes.

As a result, the salary or wages paid to the employee in this case was for 'work done outside of Australia' and so it was not taken into account for SG purposes.

When a member of an SMSF dies

While professional advice should be sought following the death of an SMSF member, the following is a general summary of some of the legal issues that need to be considered.

The trustee/member rules that apply to SMSFs generally require (apart from sole member SMSFs) that each member of the SMSF must also be a trustee (or director of the corporate trustee) of the SMSF, and vice versa.

However, S.17A(3)(a) of the Superannuation Industry (Supervision) Act 1993 (SIS Act) provides as follows:

> *"A superannuation fund does not fail to satisfy [the SMSF trustee/member rules] by reason only that……a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:*
>
> *(i) beginning when the member of the fund died; and*
>
> *(ii) ending when death benefits commence to be payable in respect of the member of the fund."*

It is also important to note the following:

(a) the legal personal representative (LPR) of the deceased member does not automatically become trustee/director of the SMSF, and their appointment as trustee/director must be properly documented;

(b) the above section only allows the LPR to be trustee/director from the death of the member until the deceased member's benefits 'commence to be payable';

(c) whether it is necessary or appropriate for the LPR of a deceased member to become trustee/director depends on all the circumstances of the particular SMSF;

(d) the superannuation legislation requires the benefits of a deceased member to actually be paid out of the fund 'as soon as practicable' after the member dies;

(e) where a member has died, there is a six-month period under which the trustee/member rules may be satisfied under S.17A(4); and

(f) the benefits in an SMSF of a deceased member generally do not form part of the deceased member's estate (to be disposed of by their Will), unless the surviving trustee(s) determine that those benefits are to be paid to the deceased member's estate.

First home superannuation saver scheme

On 21 July 2017, Treasury released draft legislation to implement the 2017/18 Federal Budget superannuation measure (First Home Super Saver Scheme) aimed at improving housing affordability.

The First Home Super Saver Scheme (FHSSS) will allow future voluntary superannuation contributions to be made **from 1 July 2017**, to be later withdrawn for a first home deposit.

The proposed scheme provides for up to $15,000 per year (and $30,000 in total) to be contributed to superannuation, subject to the existing concessional and non-concessional contribution caps.

Eligible FHSSS amounts (and associated earnings) may be withdrawn for a first home deposit **from 1 July 2018 onwards**. The maximum amount of contributions that may be released is 85% of concessional contributions (CCs); or 100% of any non-concessional contributions (NCCs).

CCs and associated earnings that are released under the FHSSS will be included in the individual's assessable income, subject to a 30% tax offset. For released amounts of NCCs, only the associated earnings are included in assessable income (with a 30% tax offset).

An individual must apply to the ATO and declare eligibility to purchase or construct residential premises in order to receive the FHSSS released amounts. The ATO will withhold an amount of tax (reflecting its estimate of the individual's tax payable) before releasing the FHSSS amount to the individual.

A person must be at least 18 years, have not used the FHSSS before and never owned real property in Australia, in order to be eligible to use the FHSSS.

Within 12 months of the FHSSS amount being released, the person must sign a contract to purchase or construct residential premises, and the ATO may extend this period by up to 12 months. The premises must then be occupied as soon as practicable, and for at least 6 of the first 12 months after it is practicable to do so. The person must notify the ATO in the approved form within 28 days after they enter into a contract to purchase or construct residential premises.

However, the FHSSS is not yet law and is subject to the passage of further legislation.