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OTE & salary or wages - super concepts

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Late last year, the ATO released *Draft Superannuation Guarantee Ruling SGR 2008/D2* to express its views on the meaning of the expressions "ordinary time earnings" (**OTE**) and "salary or wages". Both these expressions are found in sections 6(1) and 11 of the *Superannuation Guarantee (Administration) Act 1992 (SGAA)*. The meaning of the expression OTE is relevant to calculating employees' 9% compulsory superannuation support. Whereas, the meaning of the expression 'salary or wages' is relevant to determining the superannuation guarantee shortfall, if an employer fails to provide the minimum level of superannuation support for an employee. The draft ruling, which is expected to be finalised around July 2009, will replace SGR 94/4 and 94/5.

Meaning of "ordinary time earnings"

The expression "ordinary time earnings" (or "OTE") is defined as the sum of:

- total earnings in respect of ordinary hours of work (other than lump sum payments made upon termination of employment for unused sick, annual or long service leave), and
- earnings consisting of over-award payments, shift-loading and commissions (which do *not* have to be in respect of ordinary hours of work) (section 6(1) of the SGAA).

However, if the above total is greater than the maximum contributions base for the relevant quarter, then OTE will equal the maximum contributions base. Two elements are important in the definition of OTE: 'earnings' and 'in respect of ordinary hours of work'.

For SGAA purposes, OTE is considered a subset of salary and wages.

Meaning of “earnings”

The term “earnings” is not actually defined in the SGAA and thus takes on its ordinary meaning in light of its context in the SGAA.

The English *Oxford Dictionary* defines the term as “what is earned by labour, or invested capital, the fact of deserving what one deserves, gain and profit”.

The ordinary meaning of “earnings” may also be described as money gained as the result of labour, work or services (*Adelaide Fruit & Produce Exchange Co Ltd v DFC of T* [1932] SASR 116). Under this meaning, a person earns whatever he receives by way of remuneration for the services he gives (*Midland Railway Co v Sharpe* [1904] AC 349).

In the ATO’s draft ruling, the expression OTE relates to “remuneration paid to an employee, as a reward for the services of the employee”. In a recent decision, *Prushka Fast Debt Recovery Pty Ltd v FC of T* [2008] AATA 762, the Court held that it was sufficient to have regards to the substance of the payment to determine whether it constitutes ‘earnings’, by examining the facts of each individual case.

Meaning of “in respect of ordinary hours of work”

The ATO’s draft ruling states that “in respect of” implies a “discernible rational link between the two subject matters”.

In both the SGAA and the draft ruling, “ordinary hours of work” is taken to refer to the hours of work which it is usual for an employee to work, and is not limited to the hours between 9-5pm Monday – Friday, but includes nightshift and weekends. Any

occasional overtime work outside normal working hours, however, will not be considered OTE for the purposes of the SGAA.

In general, the specified standard working hours in an award, industrial agreement or workplace agreement will be treated as the 'ordinary hours of work' for an employee whose employment is under such an arrangement. This is the case unless it is manifestly evident from an objective evaluation of the facts and circumstances that the regular working hours of an employee are consistently different to the standard working hours specified in the award or agreement, in which case the regular work hours will be the 'ordinary hours of work'.

If the ordinary hours of work are not specified or agreed, they will be the actual hours worked in addition to any hours of paid leave.

In *Quest Personnel Temping Pty Ltd v FC of T* (2002) 166 FCR 338, the Federal Court considered the meaning of "ordinary hours of work" and held that it should be construed in the context of the SGAA (including normal, regular, customary and usual hours worked by employees) and not the meaning given in industrial awards. By contrast, the High Court in *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, held that in determining what is 'ordinary hours of work', the industrial award meanings must also be taken into account.

Other payments included or excluded from OTE

Allowances, bonuses, piece rates and leave payments paid in respect of ordinary hours of work are considered to be OTE. However, expense allowances, fringe benefit allowances and overtime payments for work performed outside an employee's ordinary hours of work are **not** considered OTE.

Meaning of "salary or wages"

Section 11 of the SGAA defines salary and wages to include:

- commissions
- payment for performance of duties as an executive member for a body corporate
- payments under a labour contract
- remuneration to a member of the legislature
- payments for work in relation to music, play, dance, entertainment, sport, display or promotional activity involving the exercise of intellectual, artistic, musical, physical or other personal skills
- payments for services in connection with the making of any film, tape or disc, television or radio broadcast, and
- remuneration for holding or performing the duties of an appointment, office or position under the Constitution or Australian law.

The above is an inclusive definition, thus, payments are also included within the definition if they satisfy the ordinary or common law meaning of the expression “salary or wages”. Payments do not need to be paid by the employer but may be paid by a third party on behalf of the employer. They can also be payments made in kind to the employee.

However, sections 11(2) and (3) of the SGAA expressly exclude from the definition of “salary or wages”:

- remuneration under a contract for the employment of a person for not more than 30 hours per week for a private or domestic purpose (relating to the employer’s home, household affairs or family organisation)
- fringe benefits, and
- remuneration of a person who holds office as a member of a local government council.

In determining whether a payment meets the definition under common law, each case will need to be considered on its own circumstances. The common law meaning is the remuneration paid to employees as a reward for their services as employees. Thus, there must be an employment relationship.

In *Mutual Acceptance Co Ltd v FC of T* (1944) 69 CLR 389, the High Court interpreted the expression wages and salaries to be ordinary forms of remuneration for work done. According to the Court, as ordinarily understood, the following are considered to be salary or wages:

- allowances
- bonuses
- leave payments
- workers compensation payments
- lump sum payments for unused leave and employment termination
- payments during bankruptcy or liquidation to a former employee who has proved a debt for unpaid salary or wages, and
- unpaid salary or wages recovered by way of settlement of a debt via court order or settlement.

However, the following payments are **not** considered to be salary or wages:

- expense allowances
- reimbursements
- payments for unfair dismissal, and
- bailment arrangements.

Conclusion

Arguably, the mechanisms for determining the meanings of the expressions OTE and salary or wages as used in the SGAA can cause significant problems to employers in determining the amount of the superannuation contributions they need to make for employees. However, it is hoped that the new draft ruling on the meaning of the terms sheds sufficient light on the meaning of the terms, for any ambiguity in the mainstream of cases to have been overcome.

When issued in final form, it is expected the ruling will apply from 1 July 2009.