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Meaning of superannuation contributions

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The ATO recently released *Draft Taxation Ruling* TR 2009/D3 on the meaning of the expression "superannuation contribution". In particular, the draft ruling explains the ATO's views on the ordinary meaning of the word "contribution" which is of relevance for income tax purposes. It should be noted that while parts of the ruling are also relevant to the meaning of "contribution" for SIS Act purposes, superannuation law has its own definition of "contribution" which actually modifies the ordinary meaning of the expression (TR 2009/D3, paragraph 1).

Issues

In more detail, the issues considered TR 2009/D3 are as follows:

- the ordinary meaning of the word "contribution";
- how a contribution can be made;
- when a contribution is made;
- the requirements for claiming a deduction for an employee superannuation contribution; and
- the requirements for claiming a deduction for a personal superannuation contribution.

Ordinary meaning

To determine whether or not an amount is a superannuation contribution, regard must be given to the character of the amount in the hands of the receiving superannuation provider, who is either the trustee of a superannuation fund, the trustee of an approved deposit fund or the provider of a retirement savings account (section 995-1(1) of the ITAA 1997) (TR 2009/D3, paragraph 4).

An amount received by a superannuation fund will be a superannuation contribution if it increases the capital of the fund (TR 2009/D3, paragraph 5). However, an amount received as income, profit or gain from an investment will not be considered a superannuation contribution (TR 2009/D3, paragraph 5).

How a contribution can be made

There are various ways in which a superannuation contribution can be made. The following are examples of how contributions may be made:

- a contribution of money or money equivalent, including a contribution of cash (Australian or foreign), an electronic funds transfer, a bank cheque, a personal cheque or a similar negotiable instrument;
- a contribution made by increasing the value of an existing asset of the fund;
- shifting the value of interests in the asset held by both a person and the superannuation fund to the interests of the fund;
- a contribution to a superannuation fund by making a payment to a third party to satisfy a liability of the fund on behalf of the fund;
- where the person pays an amount to the superannuation fund under an agreement to reimburse the fund for a liability previously met by the fund;
- a loan entered into by the superannuation fund is forgiven by the lender;
- a guarantor satisfies a loan obligation of the superannuation fund in circumstances where the guarantor has no, or forgoes their right of, redemption against the fund;
- distribution is made by the trustee of a discretionary trust to the trustee of a superannuation fund;
- roll-over of a superannuation benefit to the superannuation fund; and
- transfer of a person’s benefits from an overseas superannuation fund to the superannuation fund (TR 2009/D3, paragraphs 6 to 20).

When is contribution made

Generally speaking, a superannuation contribution is made when it is received by the superannuation fund. An amount cannot increase the capital of the fund until it is received by the fund (TR 2009/D3, paragraph 19).

However, in the case of post-dated cheques or promissory notes, the contribution is made to the fund not when the cheque or note is received, unless it is immediately payable, but when the date of payment is stipulated, unless it is dishonoured (TR 2009/D3, paragraphs 21 & 22).

Contribution of property

A contribution of property will be received when either legal or beneficial ownership to the property passes from the contributor to the fund (TR 2009/D3, paragraph 28).

In instances where the formal registration of the change of legal ownership occurs some time after beneficial ownership to the property passes, the ATO will accept that a contribution of property is made when beneficial ownership to the property is obtained by the fund (TR 2009/D3, paragraph 31).

Debt forgiveness and guarantees

A contribution by way of debt forgiveness will be taken to occur when a lender executes a deed of release that relieves a superannuation fund from the obligation to repay a loan from the lender (TR 2009/D3, paragraph 35).

When a guarantor makes a contribution by paying a debt of the superannuation fund, the timing of the contribution is dependent on the following:

- if the guarantor has no right to be indemnified, the contribution is made upon satisfying the fund's liability; and
- if the guarantor has a right to be indemnified, the contribution is made only when

the guarantor takes formal steps to forgo that right (eg by executing a deed of release) (TR 2009/D3 paragraph 36).

Amount of in specie superannuation contribution

The amount of an in specie contribution is the market value of the asset transferred at the time the contribution is received by the fund (TR 2009/D3 paragraph, 37).

If a person contributes an asset to a fund that provides consideration for the transfer of that asset, the contributed amount is the amount by which the market value of the asset exceeds the consideration paid by the fund (TR 2009/D3, paragraph 38).

Specific rules on deducting contributions

To determine whether a contribution is deductible, regard must be had to the purpose of the contributor. The contributor's purpose must be to provide super benefits for a particular person or class of persons in the fund (TR 2009/D3, paragraph 39).

It should be noted, that whilst providing superannuation benefits must be the person's sole purpose in contributing to the fund for deductions to be made, it does not matter that a person takes account of the incidental consequences of making a contribution such as obtaining a tax deduction (TR 2009/D3, paragraph 41).

Claiming an employer contribution as a deduction

An employer will be entitled to a tax deduction in relation to superannuation contributions that they have paid if all of the following conditions are met:

- the contribution provided is for the benefit of a person who at the time is an employee;
- the employee must be a member of the fund that receives the contribution;
- the contribution will provide superannuation benefits to the employee; and
- the employee must have fully secured rights to the benefit (TR 2009/D3, paragraphs 42 to 45).

A person is treated as an employee where they are a common law employee or are an employee within section 12 of the SGAA 1992 (TR 2009/D3, paragraph 51).

Claiming a personal contribution as a deduction

A person will be entitled to a deduction in relation to superannuation contributions where both of the following conditions are met:

- they do not breach the 10% test. That is, they would be entitled to claim a personal superannuation contribution as a deduction where their employment income is less than 10% of the entire assessable income for the income year in which a contribution is made; and
- they must provide the superannuation fund with a valid notice in the approved form, notifying their intention of claiming such a superannuation contribution as a tax deduction (TR 2009/D3 paragraphs 61 & 66).

Conclusion

In *Draft Taxation Ruling* TR 2009/D3, the ATO seeks to clarify the methods by which a superannuation fund can receive contributions on behalf of its members and when those contributions are taken to have occurred. The ATO goes into further detail in respect of contributions accepted by superannuation funds by way of cheques, promissory notes and other forms of negotiable instruments.

The ATO also clarifies certain conditions which have to be met before deductions can be claimed for superannuation contributions. Superannuation funds which do not comply with the views of the ATO in TR 2009/D3 will need to wait for a final ruling to be issued on the matters detailed in the draft ruling and whether there are any transitional provisions set out in the ruling.