



### Perpetual's monthly technical guide

In this edition:

- ▶ **Super contributions made in error**
- ▶ **Collectables held by SMSFs**

#### Super contributions made in error

In ATOID 2010/104 the ATO considered whether a superannuation fund could refund a contribution that had been made in error.

##### Facts

A member made the following non-concessional during the period 10 May 2006 to 30 June 2007. The non-concessional contributions cap for this period was \$1,000,000.

1 August 2006	\$200,000
21 January 2007	\$500,000
10 June 2007	<u>\$500,000</u>
Total	\$1,200,000

In October 2008, the member requested the trustees return \$200,000 of the \$500,000 contribution made on 10 June 2007 on the basis that the contribution was made in error. The member argued that he was not aware that the \$200,000 contribution made on 1 August 2006 counted towards the \$1,000,000 limit and that, had he been aware, he would have contributed only \$300,000 not \$500,000 on 10 June 2007.

##### Decision

The ATO held that the member's total concessional contributions for the period were \$1,200,000; in spite of the fact \$200,000 was subsequently refunded.

##### Reasons for the ATO's decision

In making the decision, the ATO noted that the member intended to make the contribution at the time it was made. The fact that the member later became aware that the contribution was excessive was not sufficient grounds to argue that part of the contribution was made in error.

The ATO distinguished this case from other cases where contributions were found to have been made in error.



One case considered a company that made contributions to meet Superannuation Guarantee obligations. It was subsequently found that certain individuals were not employees for Superannuation Guarantee purposes, meaning the company had no obligation to make the contributions. This can be distinguished from the current case where the non-concessional contributions were made voluntarily.

In another case, a member paid an amount into his superannuation fund's bank account instead of paying it into his landlord's bank account, ie there was no intention to make a superannuation contribution. This can be distinguished from the current case where the member intended to make a non-concessional contribution but later changed his mind.

### Historical background

It is helpful to understand the historical background to the ATO's decision. Prior to the 2006/7 financial year there were no caps on non-concessional contributions (then known as undeducted contributions). The May 2006 Budget proposed that the current caps on non-concessional contributions (\$150,000 or \$450,000 using the bring forward rule) would apply from 10 May 2006.

In September 2006, the Treasurer announced that a transitional non-concessional contribution cap of \$1 million would apply to the period 10 May 2006 to 30 June 2007. Members were also given an opportunity to obtain a refund of excess non-concessional contributions made between 10 May and 6 December 2006, as it was acknowledged that there had been confusion regarding which amounts counted towards the \$1 million cap.

This is one of a number of cases where members exceeded the \$1 million transitional cap. The ATO has generally rejected applications to disregard or reallocate contributions which exceeded the \$1 million cap on the basis that non-concessional contributions are made voluntarily and it is the member's responsibility to monitor contributions before they are made. No doubt the fact that members were given an opportunity to obtain a refund of excess contributions has been a factor in the ATO's decisions.

### When can a contribution be refunded?

ATOID 2010/104 is one of several decisions relating to excess contributions which reinforce the need to seek advice before making a contribution. Situations where members may seek a refund of a contribution or request the Commissioner's discretion to disregard or reallocate excess contributions are rare.

The main situation in which it would be possible to obtain a refund of superannuation contributions would be where the member did not intend to make the contribution in the first place, eg money was paid into the wrong bank account or a share transfer was processed incorrectly.

---

## Collectables held by SMSFs

The Assistant Treasurer has released exposure draft regulations relating to investments in collectables and personal use assets by SMSFs. Treasury will accept submissions on the draft regulations until 14 June 2011.

It is proposed that the regulations will apply to collectables and personal use assets acquired by SMSFs on or after 1 July 2011. Existing collectables and personal use assets would become subject to the regulations from 1 July 2016.

### Trustee requirements

The draft regulations set out a number of requirements which the trustees will be required to meet when a SMSF holds collectables or personal use assets. A monetary penalty would apply to a breach of the regulations.

### Strict liability for breach

The trustees will be subject to strict liability for a breach of the regulations. The fact that a breach was accidental or unintentional will not be a defence.

### Sole purpose test

Although there will be specific regulations dealing with collectables or personal use assets held in SMSFs, the investment must still comply with the sole purpose test, ie the trustees must be able to demonstrate that the investment was made for the purpose of providing for retirement or another approved purpose. While compliance with the regulations will assist in meeting the requirements of the sole purpose test, it will not necessarily ensure that the investment meets all of the requirements of the test.

### Definition of collectables and personal use assets

Under the draft regulations, the following items will be collectables or personal use assets:

- Artwork, which is defined by the Income Tax Assessment Act 1997 to be: a painting, sculpture, drawing, engraving or photograph; a reproduction of such a thing; or property of a similar description or use
- Jewellery
- Antiques
- Artefacts
- Coins or medallions
- Postage stamps or first day covers
- Rare folios, manuscripts or books
- Memorabilia
- Wine
- Cars
- Recreational boats
- Memberships of sporting or social clubs.

## Specific requirements

### Leases

Trustees will not be permitted to enter into a lease or lease arrangement with a related party. This provision covers both formal and informal agreements with related parties and includes situations where no rent is payable.

For example, a member could not lease an artwork held by his or her SMSF for display in either his or her home or office.

### Storage

Collectables and personal use assets may not be stored in the private residence of a related party, however, it would be possible to store them in non-residential premises owned or leased by a related party. Where assets were stored in non-residential premises, care would need to be taken to ensure that this was not found to be a lease or lease arrangement.

For example, it may be permissible for a SMSF to store an artwork in a warehouse owned by a related party, however 'storage' of an artwork on a member's office wall is likely to constitute a lease or lease arrangement.

Trustees are also required to document the reason for storing an asset in a particular location and must keep a record for at least 10 years after the decision is made.

### Insurance

Trustees must ensure that collectables and personal use assets are insured in the fund's name within 7 days of acquisition. This requirement does not apply to memberships of social and sporting clubs as these aren't insurable.

### Personal use prohibited

Related parties are not permitted to use jewellery, cars, recreational boats or sporting or social club memberships owned by a SMSF. Interestingly, the draft regulations do not mention consumption of wine, presumably because this would be considered to be the payment of a benefit in specie, which would be covered by the preservation rules.

---

This analysis has been prepared by Perpetual Investment Management Limited (PIML) ABN 18 000 866 535, AFSL 234426 Perpetual Superannuation Limited (PSL) ABN 84 008 416 831 AFSL 225246 RSE L0003315 for the use of financial advisers only. It is general information and is not intended to provide you with financial advice. The technical interpretations expressed in the article are the opinions of the author at the time of writing and do not constitute a recommendation to act. Any information referenced in the article is believed to be accurate at the time of compilation and is provided by Perpetual in good faith. To the extent permitted by law, no liability is accepted for any loss or damage as a result of any reliance on this information.

---



### Further information

**Adviser Services** 1800 062 725

**Investor Services** 1800 022 033

**Email** [investments@perpetual.com.au](mailto:investments@perpetual.com.au)

**www.perpetual.com.au**