

Tech Time



Perpetual's monthly technical guide

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Acquisition of assets from super members

A superannuation fund is not permitted to acquire an asset from a member or related party unless a specific exception applies. The main exceptions are:

- listed securities acquired for market value
- business real property, where the fund has fewer than five members
- widely held unit trusts
- in-house assets (provided the fund does not exceed its in-house assets limit).

Listed securities

These include shares, units, bonds, debentures, rights and options. The securities must be listed on a licensed market, approved stock exchange or exempt market. Approved stock exchanges include the ASX as well as a number of international stock exchanges.

Options or rights

An option or right to acquire a listed security cannot be acquired from a member or related party unless the option or right itself is listed. For example, rights to acquire shares under an employee share scheme are not listed on a stock exchange; accordingly, these could not be acquired by the employee's superannuation fund. However, the fund could acquire the shares received by the member after exercising the rights.

Business real property

This includes freehold or leasehold interests in real property which is used wholly and exclusively in one or more businesses. The businesses may be carried on by members, related parties or unrelated parties.

No private use

Wholly and exclusively means that there can be no private or non-business use of the property. An exception may apply to rural properties where it may be possible to have a private residence on the property with up to two hectares of land, provided the private residence was not the predominant purpose of the property.



Widely held unit trusts

The widely held unit trusts exemption allows superannuation funds to acquire investments in managed funds which are not listed on a stock exchange. A widely held unit trust is a trust which has fixed entitlements to capital and income and where 20 or more (unrelated) unit holders are entitled to at least 75% of the income, or capital of the trust.

In-house assets

In-house assets include loans to, or investments in related parties, investments in related trusts and assets which are subject to a lease or lease arrangement between the fund and a related party.

A fund is permitted to acquire in-house assets from members and related parties, provided it does not result in the fund breaching the in-house assets limit, which is 5% of the fund's total assets.

Arm's length provisions

When a fund acquires an asset from a member or related party, the trustee must ensure that the purchase price does not exceed the purchase price that would be payable to an arm's length seller.

Anti-avoidance provisions

Anti-avoidance provisions may apply to transactions designed to circumvent the prohibition against acquisition of assets from members and related parties. For example, the provisions could apply to a transaction where ownership passed through one or more interposed parties.

Other issues – acquisition of non-business real estate

While a superannuation fund may acquire non-business real estate, it may only acquire this from a non-related party. An issue arises where a member enters into a contract to purchase non-business real estate but wants his or her superannuation fund to complete the transaction to acquire the property. As the initial contract was not made by the trustee of the superannuation fund, assigning the contract to the fund would breach the prohibition against acquisition of assets from members.

A solution in this situation would be to rescind the original contract between the member and the vendor and enter into a new contract between the trustee and the vendor, assuming the vendor was willing to accommodate the request.

Personal deductible super contributions

An individual may be eligible to claim a tax deduction for personal superannuation contributions if:

- he or she is not an employee for Superannuation Guarantee (SG) purposes
- his or her total income from employment for SG purposes is less than 10% of his or her total income (the 10% rule).

Employee for Superannuation Guarantee purposes

SG legislation uses an extended definition of employee. In addition to the 'regular' definition of employee, persons who may be considered to be employees for SG purposes also include:

- persons working under a contract that is wholly or principally for labour
- members of boards of directors
- members of Parliament
- artists, musicians and sports persons.

Expatriate employees

An individual is not an employee for SG purposes if he or she is:

- a non-resident of Australia for income tax purposes and is being paid for work performed outside Australia
- a resident of Australia for income tax purposes and is being paid by a non-resident employer for work performed outside Australia.


Expatriates who are not regarded as employees for SG purposes may be eligible to claim a tax deduction for personal superannuation contributions against Australian sourced income.



Example: An expatriate who rents out his or her family home while working overseas may be able to claim a tax deduction for personal superannuation contributions against the rental income. If he or she is a non-resident for income tax purposes, there is no tax free threshold and the lowest marginal tax rate applicable to the rental income is 29%.

10% rule

An individual is eligible to claim a tax deduction for personal superannuation contributions if his or her total income from employment for SG purposes is less than 10% of his or her total income. Total income consists of assessable income, reportable fringe benefits and reportable superannuation contributions (which include salary sacrifice contributions).

 **Example:** George is a self employed architect who also lectures part time at TAFE. He elected to salary sacrifice 100% of his TAFE salary to superannuation. His total income for the 2010/11 financial year was as follows:

Assessable income from architecture practice	\$100,000
Salary sacrifice superannuation TAFE	\$15,000
Total income	\$115,000

% of income from employment for SG purposes
 $\$15,000/\$115,000 = 13.04\%$

Accordingly, George is not eligible to claim a deduction for personal superannuation contributions.

Section 290-170 notice

Before a deduction may be claimed, the member must:

- give the Trustee a notice stating that he or she intends to claim a deduction for all or part of the contribution
- receive acknowledgement from the fund that the notice was valid.

This must occur before the member lodges his or her tax return for that financial year (or by the following 30 June).

In addition, the notice must be given before:


- rolling a benefit over to another fund
- splitting part of the contribution to a spouse's account
- starting an income stream.

The member may subsequently choose to reduce the amount of a deduction claimed (including to nil), however, he or she may not increase the deduction.

Planning points


Deduction cannot exceed other taxable income

The deduction for a personal contribution cannot exceed the member's other taxable income for the year, ie it cannot result in a loss.

 **Example:** Elaine, aged 50, made a personal superannuation contribution of \$50,000 on 30 June 2011. Her other taxable income for the 2010/11 financial year was \$45,000. The maximum deduction she may claim for a personal superannuation contribution is \$45,000.


Don't reduce taxable income below \$37,000

In general, superannuation fund members should not use a deduction for personal contributions to reduce taxable income below \$37,000, the threshold for the 15% marginal tax rate. Personal deductible contributions are concessional contributions, which are subject to contributions tax of 15%. There is little to be gained by claiming a deduction which reduces taxable income below \$37,000. On the one hand there is a tax saving of 16.5% (including Medicare levy) but this is offset by the 15% contributions tax.

 **Example:** In the previous example Elaine had other taxable income of \$45,000. The normal recommendation would be for Elaine to limit the deduction for her personal contribution to \$8,000 to reduce her taxable income to \$37,000.

Retirees

A person who has retired from gainful employment is not an employee for SG purposes and thus eligible to claim a deduction for personal contributions provided he or she is still eligible to contribute. (No work test applies to contributions made by those aged 64 and under.) Thus for retirees between 55 and 64, personal deductible contributions may provide a tax effective method for transferring non-superannuation assets to superannuation as the deduction may be used to offset any CGT liability which may arise as a result of the transfer.

 **Tech tip:** A member may not know or be certain whether he or she meets the 10% rule until after the end of the financial year. Where a member 'fails' the 10% rule, the contribution will count against the member's non-concessional contribution cap, which may cause problems where the member also made large non-concessional contributions. Thus it may be advisable to delay making contributions until close to year end when the member should have a good idea as to whether he or she will meet the 10% rule.

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