

## Tech Time



### Perpetual's monthly technical guide

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#### Legislation to support introduction of a superannuation clearing house

The Tax Laws Amendment (2010 Measures No.1) Bill was introduced into Parliament on 10 February 2010. The Bill, among other things, provides the legislative framework to support the introduction of a new superannuation 'clearing house'. The legislation amends the Superannuation Guarantee (Administration) (SIS) Act so that an employer who pays a contribution to an approved clearing house is treated as if that contribution had been made to a superannuation fund. The legislation also amends the Superannuation Industry (Supervision) Act and allows employers to meet their obligations to promptly remit superannuation amounts deducted from employees' wages by paying them to the approved clearing house.

Interestingly, Medicare Australia is set to be the only approved clearing house service for small business superannuation contributions.

The clearing house service will be available to eligible small businesses (those with fewer than 20 employees) from July 2010, although businesses will be able to register with Medicare Australia from May 2010.

#### Questions from the recent National Tax Liaison Group meeting

At the recent National Tax Liaison Group (NTLG) meeting held in November 2009, the Australian Taxation Office (ATO) expressed its view on a number of key issues about superannuation.

##### 1. Electing for a payment to be taxed as a lump sum

Can a member with a transition to retirement pension, who has their entire pension made up of preserved money, make an election under ITAR 995-1.03 so that the payment is taxed as a superannuation lump sum rather than a superannuation income stream benefit? Would the payment of the lump sum satisfy the minimum pension requirements for the year?

##### ▶ Example

A member is aged 57, working full time and has never met a condition of release. They have a transition to retirement pension with a balance of \$200,000 on 1 July 2009.

- The minimum payment from this pension in the 2008/09 financial year is \$4,000.
- The maximum payment from this pension in the 2008/09 financial year is \$20,000.
- The member chooses to withdraw \$10,000 during the financial year.
- Prior to taking the payment from the pension the member informs the trustee they would like to elect for the payment to be taxed as a lump sum benefit.

The ATO affirmed the view presented to the December 2008 meeting of the NTLG Superannuation Technical sub-group, that a commutation is necessary for an election to be made under paragraph (b) of regulation 995-1.03 of the ITAA 97. Therefore, where no commutation is allowable under the rules of the pension, no election can be made for the purpose of regulation 995-1.03.

## 2. Excess contributions tax

Would the Commissioner exercise discretion to disregard excess non-concessional contributions in circumstances where a concessional contribution was made to a fund, and due to an unforeseen inability to claim a tax deduction for the contribution, it was ultimately treated as a non-concessional contribution?

### ▶ Example

A sole trader makes a concessional contribution to their superannuation fund with the intention of claiming the full amount as a tax deduction. The contribution is accompanied by a section 290-170 notice. At the same time he makes a non-concessional contribution up to the non-concessional cap.

Following the financial year end it is determined that the sole trader does not have adequate taxable income to claim the full amount of the superannuation contribution as a tax deduction. As a result, the section 290-170 notice is varied and the excess that was unable to be claimed was treated as a non-concessional contribution. The fund cannot refund the contribution and, as the non-concessional cap has already been reached, the sole trader will be issued an assessment for excess contributions tax on the contributions that were unable to be claimed as a tax deduction.

The ATO referred to Law Administration Practice Statement PS LA 2008/1 which provides guidelines for the exercise of the Commissioner's discretion. They also stated that the exercise of the Commissioner's discretion is made based on all the facts and circumstances of each case and is made on a case by case basis.

## What happens to self managed super funds when your clients go offshore?

Increasing globalisation means it is inevitable that at least some of your clients at some point will venture off shore for work purposes. From a superannuation perspective this can require some forethought, particularly where your client has a self managed superannuation fund, as the move can cause their fund to no longer be considered to be an 'Australian superannuation fund'.

To qualify as a complying superannuation fund under the SIS Act and hence be entitled to tax concessions, a prerequisite is that the fund must be an 'Australian superannuation fund' at all times during the year of income [SIS Act Section 42].

A fund can be regarded as an Australian superannuation fund at a particular time if all the following conditions are met:

1. The fund is a provident, benefit superannuation or retirement fund (ie there is provision of benefits for the member and any beneficiaries)
2. Either the fund was established in Australia or any asset of the fund is situated in Australia
3. Central management and control of the fund is ordinarily in Australia
4. Where the fund has at least one active member, at least 50% of:
  - a. the total market value of the fund's assets attributable to superannuation interests held by active members or
  - b. the sum of the amounts that would be payable to or in respect of active members if they voluntarily ceased to be members is attributable to superannuation interests held by active members who are Australian residents.

All four criteria need to be satisfied for the fund to be considered an Australian superannuation fund.



**Tech tip:** Active members are those who contribute, have contributions made on their behalf or receive rollovers into their superannuation funds.



### Satisfying the active member test

The active member test is easily satisfied by ensuring off shore members don't make any contributions or have rollovers made on their behalf while they are offshore. Consideration should be made to making contributions to a 'public offer' fund for the time they are off shore.

Alternatively, consideration may be given to adding resident member's to the fund. However, it is important to ensure they have at least 50% of the market value of the assets of the fund attributable to their member accounts.

### Satisfying the central management and control test

Satisfaction of this test requires evidence that the fund is ordinarily being managed from Australia. While this is easy to satisfy while the trustees are residing in Australia it becomes less clear upon departure, particularly upon permanent departure. It needs to be determined when the test no longer satisfied, at the point of departure, or at the end of a two year period.

It appears that clients who are permanently departing Australia would potentially breach the test immediately upon departure. On the flip side, clients who are only temporarily departing may still satisfy the test after three years. While the two year rule remains, unlike its application pre-1 July 2007, its purpose is now to be used as a guide only.

Where central management and control is deemed to be offshore, a question often raised is whether it is possible to delegate central management and control. TR 2008/9 has identified that this is possible where the person is accountable for more than just the mere duty and is in actual fact performing the high level duties and responsibilities of the fund independently of the trustee.

The alternative option may be to appoint an approved trustee and for the fund to become a small APRA fund. Alternatively, consideration may need to be given to winding up the fund.

Another question raised is whether the test would be satisfied where there are an equal number of trustees both in Australia and overseas who equally participate in the central management and control of the fund. Again TR 2008/9 confirmed that the central management and control test would deem it to be Australian.



**Tech tip:** Where there are three members of a fund, with two offshore, it may be worthwhile adding a fourth member who resides in Australia to ensure they satisfy the central management and control test.

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