

Issue No. 1 March 2007

Superannuation Update

Welcome to the March Update

The year is now well under way and there have not been any surprises such as the major shake-ups of 2006 – although in superannuation (and tax), you generally should not assume anything! In this Update, we review the progress of the amending legislation on its way to actually becoming law, as well as discussing other recent developments.

If you require assistance in relation to any matter set out in this update, or require assistance or advice in relation to any other tax or superannuation matter, please contact either Arthur Athanasiou or James Shattock – contact details appear below.

Progress of Simplified Superannuation Bill 2006 and supporting bills

The following Bills have now been introduced into the House of Representatives, in relation to the proposed changes to superannuation that were announced in May 2006:

1. Tax Laws Amendment (Simplified Superannuation) Bill 2006
2. Superannuation (Excess Concessional Contributions Tax) Bill 2006
3. Superannuation (Excess Non-Concessional Contributions Tax) Bill 2006
4. Superannuation (Excess Untaxed Roll-Over Amounts Tax) Bill 2006
5. Superannuation (Departing Australia Superannuation Payments Tax) Bill 2006
6. Superannuation (Self Managed Superannuation Funds) Supervisory Levy Amendment Bill 2006
7. Superannuation Legislation Amendment (Simplification) Bill 2007
8. Income Tax Amendment Bill 2007
9. Income Tax (Former Complying Superannuation Funds) Amendment Bill 2007
10. Income Tax (Former Non-resident Superannuation Funds) Amendment Bill 2007
11. Income Tax Rates Amendment (Superannuation) Bill 2007



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Progress of Simplified Superannuation Bill 2006 and supporting bills

Continued

All of the above Bills are to implement the Government's simplified superannuation reforms, which we outlined and discussed last year.

Bills 1 to 6 above were introduced into the House of Representatives on 7 December 2006, while Bills 7 to 11 above were introduced into the House of Representatives on 7 February 2007.

On 13 February 2007, the Bills were passed by the House of Representatives without amendment. All the above Bills now proceed to the Senate.

In a press release issued on 14 February 2007, the Minister for Revenue and Assistant Treasurer, Peter Dutton, called on Labor to swiftly pass the Bills through the Senate.

In an earlier press release issued on 7 February 2007, Peter Dutton said that the remaining aspects of Simplified Superannuation will be implemented through regulations that will be made as soon as possible after the Bills receive royal assent.

Mr Dutton also announced additional transitional arrangements for contributions to superannuation by people who were aged 64 or 74 during the three month consultation period on Simplified Superannuation.

More particularly, transitional measures are being introduced to ensure people who may have become subject to the work test applying to superannuation contributions, or become ineligible to contribute to superannuation, between 10 May 2006 and the Government's announcement on 5 September 2006, can still take advantage of the higher contribution limits.

A person who was aged 64 between 10 May 2006 and 5 September 2006 will be able to make non-concessional superannuation contributions up to 30 June 2007 without having to satisfy the work test.

A person aged 74 between those dates will be able to make superannuation contributions up to 30 June 2007 if they had satisfied the work test for the relevant financial year.

Amendments to the relevant regulations to implement these transitional arrangements will be made as soon as possible.

Individuals who were aged at least 65 but less than 75 between 10 May 2006 and 5 September 2006 will continue to have to satisfy the work test in order to be able to contribute to a superannuation fund.

Local government councillors – salary sacrifice arrangements

In **ATO ID 2007/8**, the issue was whether a local government council could enter into an effective salary sacrifice arrangement ("SSA") with its councillors such that contributions to a complying superannuation fund made under the arrangement in lieu of remuneration for the individual are employer contributions for the purposes of the *Superannuation Guarantee (Administration) Act 1992* ("SGAA").

In this case, the local government council was seeking to enter into an arrangement with its councillors under which the remuneration the councillors would otherwise expect to receive is paid into a complying superannuation fund. The local government council did not have a unanimous resolution in effect, in accordance with section 446-5 of Schedule 1 to the *Taxation Administration Act 1953* ("TAA"), that the remuneration of members of the council be subject to PAYG withholding.

It was held in this case that a local government council that does not have a unanimous resolution in effect, in accordance

with section 446-5 of Schedule 1 to the TAA, cannot enter into an effective SSA with its councillors. Any contributions to a complying superannuation fund made under the arrangement in lieu of remuneration for the individual are not employer contributions for the purposes of the SGAA but are considered to be a redirection of income that is otherwise assessable to the individual councillors.

The reasons for this decision can be outlined as follows.

A SSA is an arrangement under which an employee agrees to forego part of the total remuneration that he or she would otherwise expect to receive as salary or wages, in return for their employer or the employer's associate providing benefits of a similar value. A SSA is considered to be "effective" if the employee agrees to receive part of his or her total remuneration as benefits before the employee has earned the entitlement to receive that amount as salary or wages.

In order to enter into an effective SSA, either the PAYG withholding provisions in sections 12-35, 12-40 or 12-45 of Schedule 1 to the TAA must apply or there must be an employer/employee relationship between the local government council and its councillors within the meaning of section 12 of the SGAA.

As the local government council does not have a unanimous resolution in effect that the remuneration of the members of the council be subject to PAYG withholding, the PAYG withholding provisions do not apply.

For an employer/employee relationship to exist between the local government council and its councillors for the purposes of the SGAA, the definition of "employer" and "employee" in section 12 of that Act must be satisfied. Under section 12(1) of the SGAA the terms have their ordinary or common law meaning. Subsections 12(2) to 12(11) of the SGAA expand the ordinary meaning of the terms and make particular provision to avoid doubt as to the status of certain persons.

Further info:

Local government councillors – salary sacrifice arrangements Continued



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None of the traditional indicators are applicable to the relationship between local government councillors and the council, therefore local government councillors are not employees at common law.

Subsection 12(9A) of the SGAA provides that a member of a local government council is not an employee of the council unless subsection 12(10) of the SGAA applies. Subsection 12(10) of the SGAA states that a person covered by paragraph 12-45(1)(e) of Schedule 1 to the TAA is an employee of the relevant body. A person will be covered by paragraph 12-45(1)(e) of Schedule 1 to the TAA if the local governing body has a unanimous resolution in effect, in accordance with section 446-5 of Schedule 1 to the TAA, that the remuneration of members of the body be subject to PAYG withholding.

The relevant council does not have a unanimous resolution in effect that it be subject to PAYG withholding, therefore paragraph 12-45(1)(e) of Schedule 1 to the TAA does not apply. Accordingly, subsection 12(10) of the SGAA also does not apply and by virtue of subsection 12(9A) of the SGAA, the councillors will not be employees for the purposes of the SGAA.

As there is no employer/employee relationship within the meaning of the SGAA in existence between the local government council and the councillors, any part of the remuneration paid to the fund under the arrangement cannot constitute employer contributions for the purposes of the SGAA. Rather it is a redirection of income that is otherwise assessable to the councillor. As a result, the local government council cannot enter into an effective SSA with its councillors.

Assessability of superannuation payments to non-residents

There have recently been two separate ATO IDs in relation to the assessability or otherwise of superannuation payments to non-residents, with differing decisions.

In **ATO ID 2007/24**, the issue was whether a Singaporean resident taxpayer was assessable under subsection 6-10(5) of the Income Tax Assessment Act 1997 ("ITAA 1997") on an eligible termination payment ("ETP") received from a complying Australian superannuation fund.

In this case, the taxpayer was a Singaporean resident and was not an Australian resident for income tax purposes.

The taxpayer received an ETP, as defined in paragraph 27A(1) of the ITAA 1936 from a

complying Australian superannuation fund. The ETP consisted of both a concessional component and a post-June 1983 taxed element.

It was held in this case that the taxpayer was assessable under subsection 6-10(5) of the ITAA 1997 on an ETP received from a complying Australian superannuation fund.

The reasons for this decision can be outlined as follows.

Paragraph 27B(1)(a) and subsection 27C(2) of the ITAA 1936 include the post-June 1983 taxed element and the concessional component respectively in the assessable income of a taxpayer.

The assessable income of a non-resident, however, only includes the statutory income from Australian sources – refer subsection 6-10(5) of the ITAA 1997. A non-resident's assessable income will therefore only include the post-June 1983 taxed element and the concessional component where the ETP has an Australian source.

The ETP was paid by a superannuation fund that was established and controlled in Australia and so has an Australian source (paragraph 45 of Taxation Ruling IT 2168). It will form part of the non-resident's assessable income.

In determining liability to tax on Australian source income received by a non-resident, it is

Assessability of superannuation payments to non-residents Continued

necessary to also consider any applicable tax treaty contained in the *International Tax Agreements Act 1953* ("Agreements Act").

The taxpayer is a resident of Singapore, a country with which Australia has entered into a tax treaty. Therefore, the tax treaty between Australia and Singapore (the "Singapore Agreement") and the protocols to that treaty contained in Schedule 5 and 5A of the Agreements Act respectively must be considered in determining whether the ETP paid to the taxpayer is taxable in Australia.

Section 7 of the *Agreements Act* gives the Singapore Agreement the force of law in Australia. Section 4 of the *Agreements Act* incorporates that Act with the ITAA 1936 and the ITAA 1997 so that those Acts are read as one.

Article 11 of the Singapore Agreement deals with remuneration in respect of personal services. It does not apply to amounts paid by a complying superannuation fund that constitute an ETP under paragraph 27A(1)(b) of the ITAA 1936 because such amounts are not remuneration paid in respect of personal services.

Article 13 of the Singapore Agreement deals with pensions and annuities. It does not apply because an ETP is not a periodic payment that attracts the application of Article 13.

Article 16A of the Singapore Agreement provides that items of income which are not expressly mentioned in the foregoing Articles of the Singapore Agreement shall be taxable in accordance with the laws of the Contracting State. As the ETP is not dealt with by the other Articles of the tax treaty, Article 16A provides that the amount is taxable in Australia in accordance with Australian law.

Accordingly, the ETP will be assessable in Australia.

This is to be contrasted with the decision in **ATO ID 2007/22**. In that case, the facts were similar – the taxpayer was a Sri Lankan resident and was not an Australian resident, and the taxpayer received an allocated pension from an Australian superannuation fund. However, in this case it was held that an allocated pension paid by an Australian superannuation fund to a Sri Lankan resident is not assessable under subsection 6-10(5) of the ITAA 1997.

It was again stated in this case that in determining liability to tax on Australian sourced income received by a non-resident, it is necessary to consider any applicable tax treaty contained in the *International Tax Agreements Act 1953* ("Agreements Act").

It was also again stated that section 4 of the *Agreements Act* incorporates that Act with the ITAA 1936 and the ITAA 1997 so that those Acts are read as one. Schedule 31 to the Agreements Act contains the double tax agreement between Australia and Sri Lanka ("the Sri Lankan Agreement").

Article 18 of the Sri Lankan Agreement deals with pensions and annuities. Article 18(1) of the Sri Lankan Agreement provides that pensions paid to a Sri Lankan resident are taxable only in Sri Lanka.

Since the taxpayer is a resident of Sri Lanka and is not an Australian resident, the allocated pension received from an Australian superannuation fund is taxable only in Sri Lanka.

The above two ATO IDs demonstrate that there may be different outcomes in relation to the assessability or otherwise of superannuation payments received by non-residents, depending on the effect of any applicable tax treaty with the other country in question, and also depending on the form in which the superannuation payment is received.

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