

# Superannuation Update

## Introduction

*While there have been no major developments in superannuation over the last few months to compare with the so-called Instalment Warrant Revolution or the post-1 July 2007 superannuation changes, there have nevertheless recently been many decisions and other developments that those involved in the superannuation industry need to be aware of.*

*In this Update, we discuss some of the more noteworthy decisions and developments in recent months. These include both a ruling and an AAT decision in relation to the superannuation guarantee, as well as the changes to superannuation rates and thresholds that apply for the 2008-2009 year.*

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## Superannuation guarantee: payments made to sportspersons

Draft Superannuation Guarantee Ruling **SGR 2008/D1** explains the Commissioner's view of how the definition of 'employee' and 'employer' contained in subsection 12(8) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) applies to sportspersons and persons providing services in connection with sporting activities. It further discusses whether prize monies and other payments made to sportspersons are 'salary or wages' under paragraph 11(1)(d) of the SGAA and are 'ordinary time earnings' under subsection 6(1) of the SGAA.

This Ruling also considers whether the definition of 'employee' and 'employer' in subsection 12(1) of the SGAA or the extended definition of 'employee' and 'employer' in subsection 12(3) of the SGAA may apply to sportspersons and persons providing services in connection with sporting activities.

These concepts are relevant for the purpose of determining whether the payer has to make the minimum amount of superannuation contributions to a complying fund in order to



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avoid a liability to pay the superannuation guarantee charge (SGC) in respect of a sportsperson.

This Ruling does not specifically deal with artists, musicians or other performers who are also referred to in section 12(8) of the SGAA.

Unless otherwise stated, all legislative references in this Ruling are to the SGAA.

The issues dealt with in this Ruling were previously addressed in Superannuation Guarantee Determination SGD 93/11 which was withdrawn on 5 December 2007.

Section 12 provides a definition of 'employee' and 'employer' for the purposes of the SGAA. Under subsection 12(1), 'employee' and 'employer' are expressed to have their ordinary meaning and an expanded meaning. Where the relationship between the parties to a contract is not a common law employment relationship or there is doubt in respect of the status of a person, the expanded meaning of 'employee' must be taken into account. The expanded meaning of 'employee' is contained in subsections 12(2) to 12(9). Of particular relevance to sportspersons is subsection 12(8) and, to a lesser extent, subsection 12(3).

It is possible that a sportsperson could be a common law employee under subsection 12(1) if their relationship to the payer conforms to the indicators and factors that typify an employment contract. The relevant indicators for a common law employment relationship are comprehensively covered in Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee? If a common law employment relationship does not exist, subsection 12(8) and subsection 12(3) must be considered.

## Payments for participation or performance

Subsection 12(8) applies on a payment by payment basis. In applying paragraph 12(8)(a), the character of the payments received by a sportsperson are determinative of whether that person will be treated as an employee of the payer for the purposes of the SGAA. In determining the character of the relevant payment, reference must be had to the substance of the arrangement, and not merely by reference to what the parties have agreed to label the payment. Each case must be examined on all the facts and circumstances.

In order to fall within the scope of paragraph 12(8)(a), the payment made to the sportsperson must be referable to the person's participation or performance in the sporting or similar activity, regardless of the result achieved from that participation. This causal link is apparent in the requirement that the sportsperson is 'paid to perform'. Further, under the terms of paragraph 12(8)(a), the sportsperson is required to actively participate in the sport and that participation must involve the sportsperson's physical or personal skills.

Therefore, a sportsperson paid 'appearance fees' and similar payments to participate in sporting activity is an employee of the payer under the SGAA. However, a sportsperson paid 'prize money' would not be an employee of the payer because the prize money is not paid for the sportsperson's participation in a sporting activity. Prize money is only payable if a specific result has been achieved.

## Payments for services provided in connection with a sporting activity

In the context in which the term appears, services are provided 'in connection with' a sporting activity if the services are directly referable to the sporting activity such that the services can be said to be 'bound up' or 'involved in' that activity.

The provision will also cover persons providing services required so that the sporting activity can be played. Such services may be provided before, during or after the sporting activity. Hence, paragraph 12(8)(b) will include persons such as umpires, referees and other sporting officials and technicians who are not already under a common law employment relationship with the relevant payer.

The terms of paragraph 12(8)(b) will not be satisfied where services are provided at the same time as the sporting event but are provided for some other purpose, such as for example, advertising. In such circumstances, the direct causal link required by paragraph 12(8)(b) will not exist.

## Payments for provision of services in, or in connection with, any television or radio broadcast

A sportsperson who is paid to appear on a television or radio broadcast will be an employee under paragraph 12(8)(c). The terms of paragraph 12(8)(c) do not require that the sportsperson participate or perform in

such a broadcast using their physical or personal skills. The term 'in connection with' is read in similarly narrow way as that under paragraph 12(8)(b) - that is, the payment is made for services that are directly related to the making of a film, tape or disc or of any television or radio broadcast.

## Contracts 'wholly or principally for the labour of a person'

Under subsection 12(3), a person who works under a contract that is wholly or principally for the person's labour is an employee of the other party to the contract. If a sportsperson enters into a contract for the endorsement of a product or a particular brand with a corporate or other sponsor, the operation of subsection 12(3) should be considered.

Generally, in the context of such sponsorship agreements, the contract is not 'wholly or principally' for the 'labour' of the sportsperson, but rather it is a contract for a result. However, each case must be examined on its facts.

## Definition of 'salary or wages'

'Salary or wages' is defined inclusively in section 11. Payments can be salary or wages under the ordinary, or common law, meaning of that term or they can be salary or wages by falling within the extended definition in subsection 11(1).

Paragraph 11(1)(d) expands the meaning of 'salary or wages' in the context of sportspersons by including payments for 'work' referred to in subsection 12(8). Only payments that come within the scope of subsection 12(8) will be taken to be salary or wages under paragraph 11(1)(d).

There is a distinction between the application of the salary or wages provisions to common law employment relationships and the application of subsection 12(8). Once a common law employment relationship is established, the payments take their character from the employment relationship. For example, an amount of 'prize money' paid to a sportsperson by their common law employer is characteristic of an incentive payment or bonus that arises from the course of normal employment. Such a payment would therefore form part of that sportsperson's salary or wages.

By contrast, where subsection 12(8) applies, a person is attributed a status with reference to the payments made to them for particular activities that they engage in. In these situations, the employment relationship is taken to exist, provided the payments made to that

## Superannuation guarantee: payments made to sportspersons Continued

person have a particular character – in the case of a sportsperson, for their performance or participation in a sporting activity. The payment of prize money in such a situation is for a result achieved and is not merely referable to the sportsperson's performance or participation in the sport. Hence, because such payments do not fall within the scope of subsection 12(8), they will also not be salary or wages under paragraph 11(1)(d).

Where relevant, the exclusions from 'salary or wages' contained in section 27 should be considered to determine the amount of an individual superannuation guarantee shortfall and superannuation guarantee charge payable by an employer.

The SGAA will apply to non-resident sportspersons paid to participate in sport in Australia. A certificate of coverage made under a scheduled international social security agreement may have been provided such that the payer is not required to pay

SGC if they do not make superannuation contributions to a complying fund on behalf of the sportsperson. Team officials and non-resident event organisers may also be excluded from the scope of the SGAA if they are a 'prescribed employee' within the terms of subregulation 7(1) of the Superannuation Guarantee (Administration) Regulations 1993 (SGAR 1993).

A sportsperson's ordinary hours of work for the purposes of calculating ordinary time earnings are generally the hours that they actually worked.

A sportsperson's earnings will consist of the amounts paid to the person to perform or participate in the relevant activities listed in subsection 12(8) – that is, the earnings will equal the amount recognised as salary or wages under paragraph 11(1)(d).

Prize money will not form part of ordinary time earnings because the entitlement to the prize

money will only arise on achieving a specific result. That entitlement does not accrue during the sportsperson's participation in the relevant sporting activity.

Various types of payments received by sportspersons (such as fees for public appearances, product promotion, prizes or endorsements) may be considered 'assessable income' under the *Income Tax Assessment Act* 1997. This would not make the entity making these payments liable to make superannuation contributions to a complying superannuation fund in respect of the sportsperson if that person is not an employee of that entity under either subsections 12(1), 12(3) or 12(8) of the SGAA.

How the provisions of the SGAA apply to payments made to a sportsperson must be determined independently from the process of determining whether the relevant payments constitute 'assessable income' for that person.

## Non-cash contributions to superannuation funds

In **Taxpayer Alert TA 2008/12**, the Commissioner of Taxation has expressed concern with arrangements that have features which are designed to allow a member of a superannuation fund to circumvent the new superannuation contributions limits that came into effect from 1 July 2007. The arrangements will mainly involve self-managed superannuation funds, but need not be limited to them.

This Alert applies to arrangements which have one or more of the following features:

- (a) A person makes an in specie contribution to the fund and the fund does not recognise and record the contribution at the true market value of the asset in its accounts.
- (b) A person (e.g. an employer of members of the fund) pays expenses on behalf of the fund and does not subsequently seek reimbursement from the fund. Alternatively, the fund pays the expense but seeks reimbursement from another person (e.g. an employer of members of the fund).
- (c) A person, usually a member of the fund or their associate, makes improvements

to an asset of the fund to increase the asset's value without seeking reimbursement from the fund. For example, the fund owns real property and a member pays the cost of improvements to that property.

- (d) A person, usually a member of the fund or their associate, together with the trustee of the fund owns all of the units in a non-leveraged unit trust or shares in a company and further units or shares are issued, or the rights attached to the units or shares are altered, so that the value of the units or shares owned by the fund is increased.

The Tax Office considers that arrangements exhibiting one or more of the above features may give rise to taxation and superannuation regulatory issues, including whether:

- the trustee of the fund has properly recognised that the arrangement involves a contribution to the fund that must be allocated to a member and reported for the purposes of the excess contributions taxes under Division 292 of the *Income Tax Assessment Act* 1997 (ITAA 1997) at its market value

- the contributor is subject to the correct amount of tax (whether that is as a result of the application of the ordinary income, trading stock or capital gains tax provisions of ITAA 1997) when an asset is contributed to the fund
- the general value shifting regime in Division 725 of ITAA 1997 applies when rights in respect of particular investments by the fund are varied and value shifting occurs, and
- the exclusion of superannuation contributions from fringe benefits tax properly applies if the contribution is for the benefit of an employee.

Trustees are also reminded that when assets other than cash are transferred to a superannuation fund they must take any steps necessary to ensure the fund's ownership of the assets is recognised. Trustees should also ensure that they have not breached the regulatory provisions of the *Superannuation Industry (Supervision) Act* 1993 (SIS Act), and that some of these arrangements may subsequently lead to the derivation of non-arm's length income under Division 295 of ITAA 1997.

# Changes to superannuation rates and thresholds

The principal changes to superannuation rates and thresholds that apply for the year ending 30 June 2009 can be outlined as follows.

## CGT cap amount

Under the CGT (capital gains tax) cap, you can only exclude up to the CGT cap amount in non-concessional superannuation contributions from the non-concessional contributions cap during your lifetime. The CGT cap applies to all excluded CGT contributions, whether they were made between 10 May 2006 and 30 June 2007 or after 30 June 2007.

For the year ending 30 June 2009, the CGT cap amount is \$1,045,000 (increased from \$1,000,000 for the year ending 30 June 2008).

Note that in accordance with section 960-285 of the ITAA 1997, the CGT cap amount is increased in line with AWOTE (i.e., Average Weekly Ordinary Time Earnings), in increments of \$5,000 (rounded down).

## Low rate cap amount for superannuation benefits

The application of the low rate threshold for superannuation lump sum payments is capped. The low rate cap amount is reduced by any amount previously applied to the low rate threshold.

For the year ending 30 June 2009, the low rate cap amount is \$145,000 (increased from \$140,000 for the year ending 30 June 2008).

Again, in accordance with section 960-285 of the ITAA 1997, the low rate cap amount is indexed in line with AWOTE, in increments of \$5,000 (rounded down).

## Untaxed plan cap amount for superannuation benefits

The untaxed plan cap amount limits the concessional tax treatment of benefits that have not been subject to contributions tax in a superannuation fund. The untaxed plan cap amount applies to each superannuation plan from which a person receives lump sum member benefits.

For the year ending 30 June 2009, the untaxed plan cap amount is \$1,045,000 (increased from \$1,000,000 for the year ending 30 June 2008).

Again, in accordance with section 960-285 of the ITAA 1997, the low rate cap amount is indexed in line with AWOTE, in increments of \$5,000 (rounded down).

## Employment termination payments (ETP) cap amount

An employment termination payment (ETP) is a payment made in consequence of the termination of employment. It can include:

- amounts for unused rostered days off
- amounts in lieu of notice
- a gratuity or "golden handshake"
- an employee's invalidity payment (for permanent disability, other than compensation for personal injury), and
- certain payments after the death of an employee.

Employment termination payments do not include:

- a payment for unused annual leave or unused long service leave, or
- the tax-free part of a genuine redundancy payment or an early retirement scheme payment.

The amount up to the ETP cap amount will be concessionally taxed. The amount in excess of the ETP cap amount will be taxed at the top marginal rate.

For the year ending 30 June 2009, the ETP cap amount for both life benefit termination payments and for death benefit termination payments is \$145,000 (increased from \$140,000 for the year ending 30 June 2008).

Again, in accordance with section 960-285 of the ITAA 1997, the low rate cap amount is indexed in line with AWOTE, in increments of \$5,000 (rounded down).

## Transitional ETP cap amounts up to 30 June 2012

Transitional arrangements apply if you were entitled, as at 9 May 2006, to a payment made on the termination of employment under:

- a written contract
- an Australian or foreign law (or an instrument under such a law), or
- a workplace agreement under the *Workplace Relations Act 1996*.

Employment termination payments made after 1 July 2007 (other than those made under the transitional arrangements) won't be able to be contributed or rolled over into superannuation.

The taxable component of a transitional termination payment will be taxed at no more than 15% up to the lower cap amount and no more than 30% on the amount which exceeds the lower cap amount but does not exceed the upper cap amount. Amounts in excess of the upper cap amount will be taxed at the top marginal rate.

For the year ending 30 June 2009, the lower cap amount for transitional termination payments is \$145,000 (increased from \$140,000 for the year ending 30 June 2008), while the upper cap amount remains the same at \$1,000,000.

Transitional arrangements in relation to termination payments will cease to apply on or after 1 July 2012.

## Tax free part of genuine redundancy payments and early retirement scheme payments

The table at the end of this article (on page 5) shows the limit set for genuine redundancy and early retirement scheme payments.

In accordance with section 960-275 of the ITAA 1997, the base limit and service amount is indexed in line with AWOTE each income year.

## Superannuation guarantee

The superannuation guarantee ("SG") requires employers to provide sufficient superannuation support for their employees. Employers are obliged to contribute a minimum of 9% of an eligible employee's earning base to a complying superannuation fund or retirement savings account. Employers need to make these contributions at least every quarter (that is, every three months).

The SG charge percentage is set out in the law. For 2002-03 and subsequent years, the rate is 9% of each employee's earnings base.

The maximum superannuation contribution base is used to determine the maximum limit on any individual employee's earnings base for each quarter of any financial year. Employers do not have to provide the minimum support for the part of earnings above this limit.

For the year ending 30 June 2009, the maximum superannuation contribution base is \$38,180 (increased from \$36,470 for the year ending 30 June 2008).

In accordance with section 9 of the *Superannuation Guarantee (Administration) Act 1992*, the maximum superannuation contributions base is indexed in line with AWOTE each income year.

## Changes to superannuation rates and thresholds

Continued

### Superannuation co-contribution

The Super Co-contribution is a helping hand from the Australian Government to assist eligible individuals to save for their retirement. If you are eligible and make personal superannuation contributions, the government will match your contribution with a co-contribution up to certain limits.

For 2004-05 and later years, eligible personal superannuation contributions of qualifying low income earners are matched at the rate of up to 150%. For a contribution of \$1,000, the maximum amount of government co-contribution is \$1,500.

For the year ending 30 June 2009, the maximum co-contribution applies where the contributor's income is \$30,342 or less, phasing out at the rate of five cents for each additional dollar of income. It is phased out completely when income reaches \$60,342. (For the year ending 30 June 2008, the upper and lower income thresholds were respectively \$28,980 and \$58,980.)

In accordance with section 10A of the Superannuation (Government Co-contributions for Low Income Earners) Act 2003, the lower income threshold is indexed in line with AWOTE each income year.

### Other superannuation contributions

The annual limits for other superannuation contributions remain unchanged. More particularly, the amount of undeducted (i.e., after tax) contributions that an individual may make remains at \$150,000 per year (and it is still the case that people under age 65 will be able to bring forward two years of contributions and make a larger contribution of \$450,000).

Also, the annual limit of \$50,000 on concessional deductible (as compared to undeducted) contributions still applies per person per year, and it is still the case (until 30 June 2012) that up to \$100,000 of concessional deductible contributions may be made by or on behalf of people aged 50 and over. These limits apply per person, irrespective of the number of employers contributing on behalf of the person.

## Bonus payments OTE for SGC purposes

In *Prushka Fast Debt Recovery Pty Ltd and Commissioner of Taxation* [2008] AATA 762, the Administrative Appeals Tribunal (per Fice M) held on 28 August 2008 that bonus payments paid by an employer to its employees related to the employee's ordinary hours of work and therefore comprised part of the employee's ordinary time earnings for the purposes of the *Superannuation Guarantee (Administration) Act 1992*.

The bonuses should therefore have been taken into account when calculating the employer's superannuation guarantee contribution. As the bonuses were not taken into account by the employer, there was a superannuation guarantee shortfall, and the Commissioner was correct in imposing a charge on that shortfall under the *Superannuation Guarantee Charge Act 1992*.

The bonus payments were also "salary and wages" for the purposes of calculating the employer's superannuation guarantee shortfall.

### Limit set for genuine redundancy and early retirement scheme payments

Income year	Base limit	For each completed year of service
2007-08	\$7,020	\$3,511
2008-09	\$7,350	\$3,676

# Crystallised segment of a superannuation interest

In ATO Interpretative Decision **ATO ID 2008/100**, the issue was whether a complying superannuation fund was required to recalculate the crystallised segment of a superannuation interest when an eligible person subsequently gives a notice under subsection 82AAT(1A) of the *Income Tax Assessment Act 1936* (ITAA 1936) which is acknowledged by the trustee of that fund.

The facts in this case were as follows. A member of a superannuation fund was self-employed for the whole of the 2006-07 income year. This member made a contribution to their superannuation fund (a complying superannuation fund) during that year. The member was an eligible person for the 2006-07 income year as defined in subsection 82AAS(2) of ITAA 1936. The superannuation fund was an accumulation fund.

Soon after 1 July 2007, the fund calculated the crystallised segment (as defined in section 307-225 of the *Income Tax Assessment Act 1997* (ITAA 1997)). Later in the 2007-08 income year, the member gave a notice under subsection 82AAT(1A) of the ITAA 1936 (82AAT(1A) notice) to the trustee of the fund claiming the maximum allowable deduction in respect of the contributions that were made in the 2006-07 income year.

The trustee of the fund acknowledged receipt of the member's 82AAT(1A) notice. The trustee included the amount being claimed as a deduction in the fund's assessable income in the 2007-08 income year. A superannuation income stream is not paid to the member by the superannuation fund.

It was decided here that the answer is yes; that is, a complying superannuation fund is required to recalculate the crystallised segment of a superannuation interest when an eligible person subsequently gives a notice

under subsection 82AAT(1A) of ITAA 1936 which is acknowledged by the trustee of the fund.

The reasons for this decision can be set out as follows. Under section 307-210 of ITAA 1997, the tax free component of a superannuation interest includes the crystallised segment of that interest.

Section 307-225 of ITAA 1997 explains how to work out the crystallised segment of a superannuation interest. This is done by assuming that an eligible termination payment (ETP) was made just before 1 July 2007 and that the amount of this 'notional ETP' is equal to the value of the superannuation interest at that time.

The crystallised segment is so much of the value of the interest as consists of the total of the components specified in subsection 307-225(2) of ITAA 1997. One of these components is the undeducted contributions of the notional ETP.

As provided by subsection 307-225(4) of ITAA 1997, the terms 'eligible termination payment' and 'undeducted contributions' have the same meaning as in subsection 27A(1) of ITAA 1936 as in force just before 1 July 2007.

Undeducted contributions include member contributions made to the superannuation fund after 30 June 1983 for which no income tax deductions were allowable or were allowed to the member.

After the receipt of the 82AAT(1A) notice (and its acknowledgment by the trustee), the amount of undeducted contributions reflected in the original calculation of the crystallised segment will need to be adjusted as some of the member contributions in the 2006-07 income year have been claimed as an income tax deduction. The original calculation of the

undeducted contributions by the trustee does not correctly reflect the actual amount of undeducted contributions in the notional ETP for the purposes of working out the crystallised segment.

Item 1 in the table in subsection 295-190(1) of ITAA 1997 also requires that the amount which the member claims as an income tax deduction that is set out in an 82AAT(1A) notice must be included in the superannuation fund's assessable income. Subsection 295-190(1) of the *Income Tax (Transitional Provisions) Act 1997* provides that an 82AAT(1A) notice in relation to the 2006-07 income year or an earlier year has effect, after 1 July 2007, as if it were a notice under section 290-170 of ITAA 1997.

*Note 1: a change in the undeducted contributions component may also affect the pre-July 1983 component because of the calculation performed under section 27AA of ITAA 1936 which determines the pre-July 1983 amount under subsection 307-225(2) of ITAA 1997.*

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