



Explanatory Memorandum

March 2011

CURRENCY:

This issue of Client Alert takes into account all developments up to and including 16 February 2011.

Temporary Flood Levy Proposed

On 27 January 2011, the Prime Minister announced that the Government would impose a temporary levy on taxable incomes to help fund flood reconstruction work in Queensland and elsewhere.

On 10 February 2011, the Bills to implement the levy were introduced into the House of Reps. The *Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011* and the *Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011* propose to amend the ITAA 1997, the *Income Tax Rates Act 1986* and the *Income Tax (Transitional Provisions) Act 1997* to implement a one-year progressive flood reconstruction levy in the form of additional income tax on Australian resident and foreign resident individuals in the 2011–2012 financial year only. Under the proposed changes:

- individuals with a taxable income between \$50,001 and \$100,000 will pay a 0.5% levy on that part of taxable income above \$50,000;
- individuals with a taxable income of \$100,001 or more will pay a 0.5% levy on that part of their taxable income between \$50,001 and \$100,000 and a 1% levy on that part of their taxable income above \$100,000; and
- no levy is payable where the taxpayer has a taxable income of \$50,000 or less, or where they fall into an exemption category as specified in a legislative instrument that is made by the Minister.

The calculation of the levy will be as follows:

Flood levy calculation

<i>Taxable income (TI) 2011–2012 financial year (\$)</i>	<i>Flood levy (\$)</i>
0 – 50,000	Nil
50,001 – 100,000	$[TI - 50,000] \times 0.5\%$
100,000 +	$250 + [(TI - 100,000) \times 1\%]$

Under the levy, someone who has a taxable income of \$80,000 will pay \$2.88 extra per week. Someone on average annual adult full-time total earnings of \$68,125 will pay \$1.74 a week.

In calculating an individual's tax liability, the levy will not be included in the taxpayer's basic income tax liability for the purposes of applying any tax offsets against the levy. The levy liability must be calculated in addition to the amount of basic income tax liability set out in s 4-10(3) of the ITAA 1997. The levy cannot be reduced by non-refundable tax offsets.

For those taxpayers whose employer withholds tax throughout the year according to Tax Office withholding schedules, new withholding schedules will be issued by the Commissioner to take account of the levy throughout the year.

For the purposes of the foreign income tax offset rules (s 770-75 of the ITAA 1997), the levy is to be disregarded in determining the foreign income tax offset limit for the 2011–2012 financial year.

The Prime Minister confirmed in her Second Reading Speech to the Bills that recipients of an Australian Government Disaster Recovery Payment will be exempt from the levy. Taxpayers who were affected by a declared disaster and meet at least one of the eligibility criteria for an Australian Government Disaster Recovery Payment, even if they have not received a payment, will also be exempt. In addition, taxpayers who are New Zealand Special Class Visa Holders who were technically ineligible for the Australian Government Disaster Recovery Payments, but have received an ex-gratia natural disaster payment, will also be exempt.

Date of effect

The amendments are proposed to apply to the 2011–2012 financial year only and are proposed to be repealed on 1 July 2016.

Further information

Treasury has released a factsheet and a flood levy estimate calculator available at www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1949.

Source: PM's announcement, 27 January 2011, www.pm.gov.au/press-office/rebuilding-after-floods

Tax Help for Flood Victims

On 21 January 2011, the Government announced that clean-up and recovery grants of up to \$25,000, paid to primary producers and small businesses directly affected by the recent flooding that has occurred since 29 November 2010, will be exempt from tax.

Such grants would normally be treated as assessable income, with taxpayers able to claim deductions for the associated expenditure. However, in light of the extraordinary hardship suffered by those affected by the recent flooding, the Government has decided to make these payments non-assessable, non-exempt income.

The Government has also confirmed that the Disaster Income Recovery Subsidy, which was announced by the Prime Minister on 10 January 2011, to assist employees, small business persons and farmers who have lost their income as a direct consequence of the flooding, will also be tax-exempt.

Source: Assistant Treasurer's media release No 016, 21 January 2011, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/016.htm&pageID=003&min=brs&Year=&DocType>

ATO announces extra time to lodge

The Commissioner has announced additional time for tax-related lodgments and associated payments for individuals and businesses affected by the recent natural disasters. This includes the lodgment of monthly activity statements since December 2010, if not already lodged, any income tax lodgment and payment obligations since December, quarterly activity statements (but does not apply to large PAYG withholders) and lodgment of superannuation guarantee charge statements for the December 2010 quarter. The Commissioner said:

- All December and January monthly activity statement lodgment will be deferred until 21 March 2011, and all December (Q2) quarterly activity statements lodgment until 28 March 2011. This includes any other lodgments due on 28 February 2011 which will be deferred until 28 March 2011.
- Individuals and businesses in affected postcodes that previously received deferrals for December monthly activity statements to 21 February 2011 will now have these deferred to 21 March 2011, if they are still in the affected postcodes. The list of postcodes for affected areas is available on the ATO website at www.ato.gov.au/corporate/content.asp?doc=/content/00189316.htm.
- The deadline for superannuation guarantee charge statements for the quarter ended 31 December 2010 has been extended from 28 February 2011 to 28 March 2011.

Source: ATO media release No 2011/09, 11 February 2011, www.ato.gov.au/corporate/content.asp?doc=/content/00269769.htm

Disaster declaration for tax purposes

The Treasurer has declared the Victorian floods a disaster for the purposes of establishing Australian disaster relief funds, effective from 15 January 2011. The Treasurer has also declared the NSW floods a disaster for the purposes of establishing Australian disaster relief funds, effective from 10 January 2011. A similar declaration has been made by the Queensland Government in relation to floods in that state.

These declarations (and the declarations by the Queensland Government) ensure that qualifying existing funds established for the relief of people in communities affected by the floods, and new funds, can receive tax deductible donations. Funds still need to apply to the ATO for formal endorsement, and the ATO has established a fast track process for this purpose, Mr Swan said. He said donations to Australian disaster relief funds, established to provide relief in the aftermath of the floods, will be tax deductible for a period of 2 years from the date of the respective declarations [ie to 15 January 2013 for Victoria and 10 January 2013 for NSW].

Source: Treasurer's press release No 004, 19 January 2011, ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/004.htm&pageID=003&min=wms&Year=&DocType

"Bucket" donations are deductible

The Commissioner has announced that the ATO has again approved "bucket donations" for the 2011 Queensland and Northern NSW floods as it did for the large number of donations made after the Victorian bushfires in 2009. The ATO will allow deductions for donations in 2010–2011 tax returns up to \$10 made to "bucket appeals" for the floods without needing to keep a receipt. Mr D'Ascenzo said those making donations through other means, such as a bank or retail outlet, should make sure they receive a receipt in order to claim a deduction.

Café Owners' Tax Bill Reduced after Cash Wages Taken into Account

The AAT has determined that amended assessments issued to husband and wife shareholders of a company that operated cafes were excessive as they failed to take into account deductions for cash wages paid to staff in determining the distributable surplus for Div 7A purposes on which the assessments were based. As result, the distributable surplus was reduced from some \$2.1m to some \$630,000 – together with further reductions for the company's liability for GIC on its unpaid tax and for a loan owed to the husband.

Background

Following an audit of the husband and wife taxpayers and their company through which they operated two city cafes, the Commissioner issued amended assessments to the taxpayers for the income years 1995 to 2006 to increase their taxable income for deemed dividends pursuant to Div 7A of the ITAA 1936. The assessments were based on a second set of handwritten books kept by the husband which the Commissioner claimed properly reflected both the undisclosed sales made by the company in that period and the taxpayers' entitlement to the company's "distributable surplus" in terms of Div 7A. In addition, penalties of between 75% and 90% were imposed on the taxpayers.

The taxpayers argued that in determining the distributable surplus (or profits) for Div 7A purposes for the relevant years, the Commissioner failed to take account of deductions for wages paid in cash to employees over the period of some \$1.5m, as evidenced in the separate handwritten book of accounts. They also claimed that the company's liability for GIC on unpaid tax and its liability to repay a loan made by the husband to the company had not been taken into account. They also claimed that any assessable distribution was only assessable to the husband as it had only been applied for his benefit, and the wife was unaware of the undisclosed income.

The Commissioner, on the other hand, accepted that the company made cash payment for the wages but contended that its undisclosed sales was greater than the amount recorded in the separate books of account (as evidenced by such matters as the accumulation of wealth by the taxpayers over the period, the reported annual gross sales of one of the cafes for the purposes of its sale and the husband's testimony that the second set of books showed that wages paid were clear of takings). Alternatively, the Commissioner claimed that if the distributable surplus was something less than that originally assessed to the taxpayers, then the full amounts were otherwise assessable as ordinary dividends under s 44(1) of the ITAA 1936 or ordinary income under s 6-1 of the ITAA 1997.

Decision

In finding that the amended assessments issued to the husband and wife were excessive, the AAT agreed that account should have been taken of deductions for cash wages paid to employees over the period as evidenced in the separate hand-written books kept by the husband, even though these records were incomplete. Nevertheless, the AAT accepted evidence from the taxpayers' accountant in which the records of the wages paid was reconstructed and extrapolated from the incomplete records on an average basis. In this regard, the AAT pointed out that even though the husband had credibility issues as a witness, the documentary evidence could be relied on.

At the same time, in accordance with the decision in *FCT v H* [2010] FCAFC 128, the AAT determined that the distributable surplus was to be further reduced by the company's liability for GIC imposed on its unpaid primary tax. It also accepted evidence that the husband had made a loan to the company which was a liability that also had to be taken into account in calculating its distributable surplus. However, the AAT agreed that the Commissioner had correctly added back undisclosed cash sales of the company for the purpose of determining the company's net assets under s 109Y(2) of the ITAA 1936 and, therefore, its distributable surplus.

In relation to the Commissioner's argument that the company's undisclosed sales was greater than the amount recorded in the handwritten sales books seized, the AAT found that there were other legitimate explanations for taxpayers' accretion in wealth over the period (including evidence of rental income from properties and the receipt of an inheritance). The AAT also found that the sales figures for one of the cafes had been exaggerated by an agent appointed for its sale. Moreover, it found that there was no evidence from the husband that the second set of books showed that wages paid were clear of takings, or that these records understated the company's income.

The AAT also dismissed the Commissioner's alternative arguments that the original amounts assessed to the taxpayers were otherwise ordinary dividends under s 44(1) of the ITAA 1936 or ordinary income under s 6-1 of the ITAA 1997. It did so on the basis that the taxpayers would be prejudiced by such a claim as they were new grounds raised by the Commissioner after the hearing had commenced and that, in any event, the grounds had not been made out by the Commissioner, especially as the facts of the case were not undisputed. In this regard, however, the AAT dismissed the taxpayers' claim that if in fact it had found that the amounts were assessable as ordinary income there would be double taxation. Instead, the AAT stated that there was no bar to assessing two different taxpayers in respect of the same income (in this case, the company and the husband and wife), but only a bar on "double recovery" – and in this case there was no evidence of any recovery of the tax debt from the company (which was now in liquidation).

The AAT also dismissed the taxpayers' argument that any deemed dividend was only assessable to the husband. Instead, it found that it was appropriate for the deemed dividend to be assessed equally between the husband and wife as they had managed their affairs "collectively" during the relevant period, despite the fact that the wife did not know about the undisclosed sales of the company. It was also relevant that funds were paid into joint accounts or towards joint assets.

Finally, the AAT maintained the penalties imposed on the husband for "intentional disregard" of the law, despite the argument that he did not have full appreciation of the seriousness of his actions because of his bipolar disorder. The AAT found that people with bipolar disorder had the capacity to act with "intentional disregard" and that in fact the taxpayer had done so. However, the AAT remitted penalties imposed on the wife to the extent that they were imposed over and above the 25% rate for "failing to take reasonable care".

Re Kocic and FCT [2011] AATA 47, Tamberlin DP, Redfern SM, 1 February 2011

Same Trust, so Capital Gain Can Be Offset by Earlier Losses

The Full Federal Court has, by majority, dismissed the Commissioner's appeal and held that the net capital gain arising out of a disposal of properties by a trust could be reduced by previously unapplied net capital losses.

Background

Since 24 June 1993, Clark Enterprises Pty Ltd (CEPL) had been trustee of the Carringbush Unit Trust (the CU Trust), which had been established in 1984. In the income year ended 30 June 2001, the taxpayers were beneficiaries in respect of income derived by CEPL as trustee. The Court said CEPL was effectively controlled by Mr Clark. In the 2001 year, CEPL derived capital gains totalling \$1.9m from the sale of properties in Gladstone (which had been acquired in 1997). The taxpayers asserted that, in calculating the CU Trust's net income pursuant to s 95 of the ITAA 1936, the capital gain should be reduced to nil by the application of capital losses allegedly incurred between 1991 and 1993 when the trustee was Carringbush Pty Ltd.

Before the primary judge (Greenwood J in *Clark v FCT* [2009] FCA 1401), the Commissioner contended that, even if the taxpayers discharged the onus of establishing that the trustee of the CU Trust had incurred the 3 capital losses, the trust estate which incurred the losses was not the same trust estate which had made the capital gain in the 2001 year of income. The Commissioner pointed to a series of events that occurred in June 1993:

- changing the trustee of the CU Trust;
- altering the ownership of the units of that trust;
- extinguishing liabilities of the trust;
- extinguishing the former trustee's right of indemnity out of trust assets;
- altering the corpus of the trust; and
- changing the activity of the trust from being dormant to a vehicle used by Mr Clark to take advantage of accumulated losses in the CU Trust.

The Commissioner contended that all those events established a lack of continuity required by the ITAA 1936 and the ITAA 1997 in the trust estate that made the capital gain in the 2001 income year and the trust estate that incurred the unapplied capital losses in the 1991, 1992 and 1993 income years. It followed, according to the Commissioner, that the net capital losses could not be applied so as to reduce the net capital gain made in the 2001 income year and in consequence, reduce the net income of the CU Trust in the 2001 income year. [The majority of the Full Federal Court considered it significant that the Commissioner "never contended, either before the primary judge or on the appeals, that there was a cessation in the continuum of trust property such as to leave it open to find that the trust estate as originally constituted had come to an end".]

After considering the decision of the Full Federal Court in *FCT v Commercial Nominees of Australia Ltd* (1999) 43 ATR 42, the Federal Court said that if "some degree of continuity of trust property is made out and continuity in the regime of trust obligations is established, there will be sufficient identity of taxpayer in the sense that the hypothetical representative trustee taxpayer on behalf of the trust estate that incurred the loss is the hypothetical taxpayer of the trust estate that made the net capital gain". The Court also considered the 3 indicia of continuity framed by the High Court in *FCT v Commercial Nominees of Australia Ltd* (2001) 47 ATR 220, albeit the case concerned a superannuation fund. The Court believed the 3 indicia could equally apply to trust estates for the purposes of Div 5 of Pt III of the ITAA 1936 and the ITAA 1997. The 3 indicia are the constitution of the trust, the trust property and the membership.

The Commissioner did not accept that the claimed losses were incurred or that, if they were, that they could be applied in reduction of the CU Trust's capital gain. The Commissioner submitted that the events of 1993 brought about a break in the continuity of:

- (i) the trust fund;
- (ii) (ii) the trustee's interest in the trust estate; and
- (iii) (iii) the interests of the beneficiaries in the trust fund.

He assessed the taxpayers accordingly and dismissed their objections. They appealed to the Federal Court and were successful at first instance (in *Clark v FCT* [2009] FCA 1401). The Commissioner then appealed against those decisions.

Decision

The Full Federal Court said the principal issue was the Commissioner's contention that the trust estate (the trustee of which made the capital gain in question) was not the same trust estate, the trustee of which incurred the net capital losses in the 1991, 1992 and 1993 years. This would mean the net capital losses could not be applied against the capital gain on the sale of the properties.

Court's response to Commissioner's arguments

Before the Court, the Commissioner argued there was a "substantial discontinuity" with respect to each of the 3 main indicia identified by the High Court in *Commercial Nominees* in the following way:

- Constitution of the trusts – the Commissioner claimed there were 2 significant changes:
 - The trustee waived its right of indemnity – the Commissioner's view was that the effect of this waiver was the creation of a new trust. Court's view: The majority of the Full Federal Court (Edmonds and Gordon JJ) said this waiver "no more created a new trust estate than it terminated an existing one". At the very most, the Court said it may have extinguished a "beneficial interest" in the trust assets which the trustee had by virtue of that right. The Court said there was no alteration to the terms of the trusts embodied in the Deed of Trust and no exclusion of the right of indemnity under that document by way of amendment.
 - By reason of a deed between the Clark and Denoon interests, the Commissioner contended that the rights to income of the trust ceased to be completely governed by the terms of the trust deed. Certain arrangements were put in place in June 1993 in relation to the implementation of a joint venture arrangement between entities associated with a Mr Denoon and entities associated with Mr Clark to undertake property development projects through the CU Trust and thus take advantage of income and capital losses accumulated in that trust. Court's view: The majority said this contention was "misconceived". According to the Court, the rights under the Deed of Trust were not affected. It said it "was the exercise of those rights which were the subject of the arrangements between the Clark and Denoon interests pending the matching contribution of \$1.8m by Denoon interests. These arrangements did not vary the trusts of the CU Trust let alone terminate them or bring a new trust estate into existence".
- Trust property – the Commissioner claimed there was a substantial change. Prior to the relevant transactions, he said the trustee's liabilities exceeded the trust assets by \$3.9m. In that sense, the Commissioner said there was no trust property because there were no assets to which beneficiaries could be entitled once the trustee's liabilities had been discharged and its indemnity satisfied. After the relevant transactions, the trust had the settlement sum of \$10 and \$1.8m in cash provided by the Clark interests, both of which were free of the former trustee's right of indemnity. As a result, the Commissioner claimed there was now trust property. Court's view: The majority said the trust property would constantly change as subscriptions for units are made and redemption of units occur, and particularly noted that the Deed of Trust pursuant to which the CU Trust was established expressly provide for the creation and application for units and the redemption of units respectively.

- Membership – the Commissioner claimed there was a completely different set of unit holders in place in the 2001 year when the capital losses were said to be set-off against the capital gain from the sale of the Gladstone properties in 2001, from that which was in place just before the events of June 1993. Court's view: The Court said the identity of the persons entitled to benefit under the CU Trust would be likely to change over time as new units are issued and existing units are transferred or redeemed.

The majority of the Full Federal Court said that, in *Commercial Nominees*, the High Court referred to the fact that the original trust deed as constituted in 1988 was varied by the exercise in 1993 of a power of amendment. In the majority's view, that was "an express endorsement of what the Full [Federal] Court said in [56] of its reasons" (the Full Federal Court decision was *FCT v Commercial Nominees of Australia Ltd* (1999) 43 ATR 42). Paragraph [56] says:

"[56] So long as any amendment of the trust obligations relating to such trust property is made in accordance with any power conferred by the instrument creating the obligations, and continuity of the property that is the subject of trust obligation is established, there will be identity of the "taxpayer" for the purposes of s 278 and ss 79E(3) and 80(2), notwithstanding any amendment of the trust obligation and any change in the property itself."

The majority of the Full Federal Court said the Commissioner referred to the High Court's references to no alterations in trust property at the time the amendments took effect and to common identity of some membership before and after the amendments as indicating "such changes could break the continuum necessary to maintain the existence of the eligible entity or trust estate". The majority disagreed, and said that, in its view, "it was no more than the High Court illustrating that there could be no doubt as to the continuity of the trust property and membership indicia in the case before it because the identity of the trust property had not even altered at the time of the amendments and there was even common identity of some membership either side of the amendments".

In short, the majority did not accept the Commissioner's contentions. It said that when the High Court in *FCT v Commercial Nominees of Australia Ltd* (2001) 47 ATR 220 spoke of trust property and membership as providing 2 of the indicia for the continued existence of the eligible entity or trust estate, "the Court was not suggesting that there had to be a strict or even partial identity of property It was speaking more generally: that there had to be a continuum of property and membership, which could be identified at any time, even if different from time to time; and without severance of one or both leading to the termination of the trust in question. In the present case, the Commissioner never contended, nor on the evidence could he, that there was a severance in the continuum of trust property and objects of the CU Trust. Their identity changed from time to time, but not their continuum".

Edmonds and Gordon JJ said that, in *Commercial Nominees*, both the Full Federal Court and the High Court pointed out there was nothing in Pt IX, nor in the ITAA 1936 generally, that imposed "some statutory requirement of continuity for determining when there is a sufficient identity of the trusts involved". They said the same applied in the case of Div 6 of Pt III of the ITAA 1936.

Partially dissenting judgment

While Dowsett J essentially agreed with the other judges about the existence of the prior year losses, he held that the trustee was not entitled to set off the Trust's capital losses incurred prior to 18 June 1993 against its capital gain in 2001. In his view, the losses were incurred by the trustee in connection with a different trust estate from that which derived the capital gain in the 2001 year.

FCT v Clark [2011] FCAFC 5, Full Federal Court, Dowsett, Edmonds and Gordon JJ, 21 January 2011

Superannuation Excess Contributions Tax Bill for Breach of Cap

The AAT has upheld a superannuation excess contributions tax assessment against a taxpayer for breaching the \$1m non-concessional contributions cap during the transitional period to 30 June 2007.

Background

The Commissioner issued the taxpayer with an excess non-concessional contributions tax assessment of \$86,867 for the 2007 income year in respect of non-concessional contributions totalling \$1,186,811.

The taxpayer objected against the assessment claiming that a payment of \$355,000 from her personal superannuation fund was received by her in a capacity as trustee (and not beneficially in her personal capacity) before being on-paid to the iAccess Superannuation Fund (IPAC Fund). The taxpayer originally intended that the \$355,000 amount would be paid directly from her personal superannuation fund to the IPAC Fund. However, she allegedly received independent professional advice to implement the transaction by drawing a cheque from her personal superannuation fund in her favour (deposited to her account), followed by a bank cheque drawn by her in favour of the IPAC Fund.

The taxpayer argued that, as she received the \$355,000 amount as a bare trustee, it was a "roll-over superannuation benefit" and not an eligible termination payment (ETP) under former s 27A of the ITAA 1936.

The Commissioner considered that the taxpayer intended the \$355,000 to be an ETP (rather than a roll-over) as part of a re-contribution strategy which inadvertently breached the transitional \$1m non-concessional contributions cap under s 292-80 of the *Income Tax (Transitional Provisions) Act 1997*. The Commissioner also noted that the taxpayer's personal superannuation fund, of which she was the sole director of the corporate trustee, had reported the \$355,000 amount as a benefit. The taxpayer had also included the ETP in her personal tax return.

Decision

In upholding the assessment, the AAT said there was no doubt that the \$355,000 amount was in fact received by the taxpayer from her personal superannuation fund and treated by her as an ETP before being on-paid to the IPAC Fund as a non-concessional contribution.

The AAT dismissed the taxpayer's argument that the payment from her personal superannuation fund was received by her in a capacity as trustee (and not beneficially in her personal capacity). The AAT said there was no basis upon which the taxpayer could now seek to contend that the amount was not derived by her legally and beneficially before being on-paid to the IPAC Fund as a non-concessional contribution.

As the taxpayer had treated the payment to her as an ETP and accounted for it in this manner, the AAT held that the amount paid to the IPAC Fund could not be treated as a "roll-over superannuation benefit" under s 306-10 of the ITAA 1997. The AAT said the difficulty which confronted the taxpayer in this case was that the payment was not made by a complying superannuation plan to another complying superannuation plan. For this reason s 306-10 was not complied with and the relevant transaction cannot be treated as a roll-over, the AAT said.

Player v FCT [2011] AATA 35, Block DP, 28 January 2010

TIP: Different annual contribution caps apply depending on the age of the member and whether contributions are classified as "concessional" or "non-concessional". Contributions above the annual contributions caps are subject to excess contributions tax levied on the individual.

Penalty for Late Superannuation Deduction Notice "Harsh"

The AAT has remitted in full a 25% administrative penalty imposed on a taxpayer who failed to provide a notice of intent to claim a deduction for a personal superannuation contribution.

The taxpayer sold an investment property in 2007 and sought to use the sale proceeds to make personal superannuation contributions over several years. However, he was denied a deduction due to his failure to give the trustee of his superannuation fund a notice of his intention to claim the deduction within the strict time limit under s 290-170 of the ITAA 1997. The taxpayer did not lodge the notice for the 2008 income year until July 2010 after the ATO queried his deduction claims.

The AAT determined that the 25% administrative penalty was properly imposed by the Commissioner under ss 284-75 and 284-90 in Sch 1 to the *Taxation Administration Act 1953* (TAA) due to a failure of the taxpayer's tax agent to take reasonable care. However, the AAT remitted in full the administrative penalty under s 298-20 in Sch 1 to the TAA after finding that it would be "harsh" for the taxpayer to pay a penalty of \$10,000 on top of the \$40,000 increase in his tax bill due to a shortcoming in the paperwork.

The AAT also noted that the requirement to provide a notice of intent to claim a deduction "is not particularly well highlighted in the public material dealing with the tax treatment of superannuation contributions". As a result, it found that the invalid deduction claim was not attributable to a failure on the taxpayer's part to take reasonable care. Unfortunately, the AAT said that the same could not be said for the taxpayer's tax agent. According to the AAT, reasonable care on the part of the tax agent for such a significant deduction should have triggered an enquiry to confirm from the taxpayer that the administrative requirements to support the claim had been complied with.

Johnston v FCT [2011] AATA 20, Frost SM, 20 January 2011

TIP: To be eligible for a deduction for a personal superannuation contribution, the individual must:

- (a) give a notice to the fund trustee stating his or her intention to claim a deduction; and
- (b) receive an acknowledgment of receipt of the notice.

The notice must be given by the time the person lodges his or her income tax return for the year in which the contribution is made or, if no return has been lodged by the end of the following income year, by the end of that following year.

Superannuation Benefit and Payment by Cheque

Self Managed Superannuation Funds Determination SMSFD 2011/1, released on 19 January 2011, states that a superannuation benefit payable with a cheque or promissory note is "cashed" at the time the cheque or note is "received" by the member or beneficiary.

Note that the final Determination has been revised in several respects from the previously issued Draft Determination SMSFD 2010/D1.

Payment of superannuation benefits

The ATO says it is necessary to characterise the objective purpose of what has been provided to the member or beneficiary in order to determine whether a benefit has been "cashed" for the purposes of the payment standard in reg 6.17(2)(a)(i) of the SIS Regulations.

Payment by cheque or promissory note

Where the cheque or promissory note is ultimately honoured, the ATO says the benefit will be cashed at the time it is "received" by the member or beneficiary, provided the trustee's objective intention is to immediately transfer funds from the SMSF to the member or beneficiary. However, this will only be the case where the money is payable immediately (ie not post-dated, interest bearing or discounted) and available for payment when the instrument is received. The SMSF trustee must also have taken all reasonable steps to ensure that the money is paid promptly (generally within a few business days).

Nevertheless, the ATO accepts that an objective intention to immediately transfer funds to the member may be found to exist where prompt payment was prevented by the independent actions of a third party outside the trustee's control (eg a failure in the bank's systems). In contrast, a person holding the office of trustee is considered to have control over his or her own actions in other capacities. Accordingly, a person will fail to cash a benefit in his or her capacity as trustee where they fail to promptly present a cheque or note for payment in their capacity as a member.

The ATO says benefits cannot be cashed with a cheque or note that is not honoured with an actual payment of money, since in such a case no payment occurs, and no benefits leave the fund. The final Determination also clarifies that no cashing occurs where a cheque or note issued by the trustee is merely endorsed back to the trustee as a purported contribution. In such cases, the ATO says there is no actual payment of benefits from the fund to the member or beneficiary.

Date of effect

This Determination applies to years of income commencing both before and after its date of issue.

Source: Self Managed Superannuation Funds Determination SMSFD 2011/1
<http://law.ato.gov.au/pdf/pbr/smsfd2011-001.pdf>