



# Explanatory Memorandum

September 2010

## CURRENCY:

This issue of Client Alert takes into account all developments up to and including 17 August 2010.

## Payment Summaries and Reporting of Incorrect Super Amounts

The ATO says some employers have been incorrectly including compulsory superannuation amounts as reportable employer super contributions on their employees' payment summaries for the 2009-10 income year. The payments being incorrectly included cover things such as super guarantee contributions and industrial agreement (award) super contributions.

ATO Deputy Commissioner Erin Holland says reportable employer super contributions should only include additional super contributions made by an employer, eg super contributions made on behalf of an employee under a salary sacrifice arrangement.

**TIP:** As a result of these errors, tax agents should review payment summaries of their individual clients to identify if they contain compulsory super amounts as reportable employer super contributions. Tax agents should also be vigilant to check their client's pre-filling report payment summary information (especially where the individual client does not salary sacrifice super).

If any of their individual clients have compulsory super amounts incorrectly included on their payment summaries, tax agents should advise them to notify their employer to provide them with an amended payment summary.

If this is not practical, and agents are confident the reportable employer superannuation contribution amount is wrong, the ATO says they may include the correct amount in their clients' returns. The ATO suggests that, if this is done, tax agents should ask their clients to advise their employers to provide them with an amended payment summary for their records. Or the individual client can make a general statutory declaration under Commonwealth law (available from the Attorney-General's Department website at <[www.ag.gov.au/www/agd/agd.nsf/Page/Statutory\\_declaration](http://www.ag.gov.au/www/agd/agd.nsf/Page/Statutory_declaration)>).

The ATO says taxpayers will need to lodge an amendment where they have already lodged their individual income tax returns using the incorrect information and completed any of the income tested items or have any of the obligations listed below:

- dependent tax offset — spouse (without child or student), child-housekeeper, housekeeper, parent, spouse's parent or invalid relative tax offset (label T1 or T10);
- senior Australian or pensioner tax offset (label T2 or T3);
- superannuation contribution on behalf of your spouse tax offset (label T7);
- mature age worker tax offset (label T12);
- entrepreneur's tax offset (label T13);
- deduction for personal superannuation contributions (label D13);
- employee share scheme (Income item 12);
- are liable for Medicare levy surcharge (label M2);
- entitled to superannuation co-contribution;
- have a higher education loan program (HELP) or student financial supplement scheme (SFSS) debt;
- receive benefits from or have to pay amounts to Centrelink or Child Support Agency.

**TIP:** If employers have issued payment summaries to their employees that incorrectly include compulsory super amounts, tax agents should consider contacting them, so they can notify any affected employees about the error and issue them with amended payment summaries. If these employers have already lodged their payment summary annual reports with the ATO, they will need to lodge an amended annual report.

If employers need to issue amended payment summaries on paper, the ATO says it has increased the number of paper payment summaries they can order using the ATO's electronic ordering service <[www.ato.gov.au/corporate/content.asp?doc=/content/34875.htm&mnu=3412&mfp=001](http://www.ato.gov.au/corporate/content.asp?doc=/content/34875.htm&mnu=3412&mfp=001)>. The limit is now 500 per order.

## Further information

Further information is on the ATO website at:

- *Employer guide for reportable employer superannuation contributions (RESC)*  
<[www.ato.gov.au/businesses/content.asp?doc=/content/00189411.htm](http://www.ato.gov.au/businesses/content.asp?doc=/content/00189411.htm)>
- *How to complete the PAYG payment summary — individual non-business form*  
<[www.ato.gov.au/businesses/content.asp?doc=/content/00199564.htm](http://www.ato.gov.au/businesses/content.asp?doc=/content/00199564.htm)>
- *Guide for employee and self-employed — Reportable super contributions — income tests*  
<[www.ato.gov.au/individuals/content.asp?doc=/content/00205990.htm](http://www.ato.gov.au/individuals/content.asp?doc=/content/00205990.htm)>

*Source: Incorrect amounts at reportable employer super contributions on payment summaries — ATO broadcast for tax practitioners*  
<[www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00251454.htm](http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00251454.htm)>

## New SMSF Member Verification Process in the Pipeline

ATO Deputy Commissioner for Superannuation, Neil Olesen has recently provided an update on changes to the SMSF registration process to prevent illegal early access to super funds. Mr Olesen said, later this year, the ATO 'will implement a SMSF member validation process that will provide greater transparency around rollovers from other funds into SMSFs'. The change will mean that funds making a rollover to a SMSF can check that the individual requesting the rollover is actually a member of the SMSF, he said.

The new process adds another plank to efforts by the Tax Office to deter schemes which seek to obtain illegal early access or release of superannuation. The first plank, which has been in operation since January this year, involved upgrading the SMSF registration process so that new SMSFs may not be displayed on the Super Fund Lookup website <<http://superfundlookup.gov.au>> for up to seven days while the Tax Office carries out a risk assessment of the SMSF.

**TIP:** The new SMSF member verification process is expected to make processing member rollovers from superannuation funds to SMSFs more efficient and secure. However, it would be important for the Tax Office to be notified quickly of any SMSF membership changes. For example, it would be prudent to ensure name changes are appropriately dealt with before a rollover is attempted by a member.

**TIP:** The Tax Office Compliance Program for 2010-11 noted that the ATO will continue to focus its attention on illegal access or release of superannuation. Features of early release arrangements which concern the Tax Office are set out in Taxpayer Alert TA 2009/1.

*Sources: Targeting tax crime: a whole-of-government approach (August 2010)*

<[www.ato.gov.au/content/downloads/snc00251208.pdf](http://www.ato.gov.au/content/downloads/snc00251208.pdf)>;

*ATO Compliance Program 2010-11* <[www.ato.gov.au/content/downloads/cor00248103\\_NAT7769.pdf](http://www.ato.gov.au/content/downloads/cor00248103_NAT7769.pdf)>

## ATO Keeps a Close Eye on the Cash Economy

The ATO has reiterated that increased data-matching and benchmarking will be used to identify businesses participating in the cash economy. The ATO says that, this financial year, it will send around 110,000 letters to taxpayers who it believes may be participating in the cash economy. The majority of letters will be sent to businesses reporting outside the small business benchmarks for their industry. The ATO will write to tax agents of business taxpayers identified to advise it has contacted their clients.

The ATO says the letters will inform taxpayers that they have been identified as a result of one of the ATO's cash economy indicators. The ATO says it will encourage taxpayers to review their records to ensure they have correctly reported all income, especially cash transactions. Letters that are sent to taxpayers identified by the ATO as reporting outside the small business benchmarks for their industry provide information about:

- (i) the tax performance of their business;
- (ii) how the ATO uses benchmarks to calculate default assessments; and
- (iii) details of how to correct their mistakes or make voluntary disclosures.

Further information is available on the ATO website at

<[www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00251723.htm](http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00251723.htm)>.

The ATO, however, notes that businesses that fall within the small business performance benchmarks 'should not assume that they are safe from an ATO audit or review.' It said the benchmarks complement the ATO's recently expanded data-matching program, which now includes data from online auction sites eBay and Trading Post.

**TIP:** The Tax Office Compliance Program for 2010-11 noted that the cash economy continues to be a major focus. Specific behaviours that the Tax Office is concerned about include:

- paying cash-in-hand wages;
- skimming some or all of the cash takings;
- running part of normal business activities off the books;
- not reporting the exchange of goods and services for other goods and services (barter); and
- operating underground, avoiding obligations by not registering or not lodging returns.

Source: ATO Compliance Program 2010-11

<[www.ato.gov.au/content/downloads/cor00248103\\_NAT7769.pdf](http://www.ato.gov.au/content/downloads/cor00248103_NAT7769.pdf)>

## Share Investor, Not a Share Trader

The AAT has affirmed that a taxpayer did not carry on a share trading business but rather he was an investor. During the 2007 and 2008 income years, the taxpayer engaged in the buying and selling of shares. The taxpayer lodged his tax returns on the basis that he was a share trader for the relevant income years

In reaching its decisions, the Tribunal considered various factors, including the indicators of whether a business was being carried on as established by case law, and evidence presented by the taxpayer. It noted from the taxpayer's evidence that he did not 'really intend' to be a share trader. Rather, in the Tribunal's view, the evidence suggested that the taxpayer did not represent himself as a share trader until after he lodged his tax returns. It said this decision was perhaps influenced by the 'entrepreneurial approach' at his workplace and the increase to his disposable income.

The Tribunal also noted the taxpayer held his shares for periods longer than a share trader generally would, participated in dividend reinvestment plans and received dividends. It also examined the number of transactions in the taxpayer's share portfolio, which it noted was 'heavily weighted' towards entities of his employer. Furthermore, the Tribunal noted the restrictions in trading imposed on the taxpayer by his employer, including having to seek permission from his employer to trade, and the timing of when he could buy and sell shares in entities of his employer. Therefore, the Tribunal was satisfied the taxpayer's activities did not have the repetition and regularity of a business. The Tribunal was also satisfied the activities did not have a profit making motive.

While the Tribunal found that the taxpayer did not maintain a separate office and worked full-time, it did not put much weight on those indicators. Rather, it was concerned that the taxpayer was unable to indicate the amount of time he spent on his share trading activities. Juxtaposing the taxpayer's activities against the indicators of whether a business exists, the Tribunal concluded that the taxpayer was not in the business of share trading.

In the alternative, the taxpayer argued that he was carrying on a business of dealing in revenue assets. Therefore, the profits and losses from the sale of the shares would be ordinary income (under s 6-5 of the ITAA 1997) and deductions would be available under s 8-1. However, the Tribunal rejected this alternative submission. It said the taxpayer's disposals of the shares were 'a mere realisation or change of investment'. This was because it had concluded that the taxpayer was not carrying on a business, and based on the High Court's decision in *London Australia Investment Company Limited v FCT* (1976) 138 CLR 106; (1977) 7 ATR 757.

**TIP:** Shareholders should be aware that the Tax Office has its sights set on share disposals as part of its Compliance Program for 2010-11. It had also issued an alert mid last year warning taxpayers against claiming losses on revenue account when they had previously claimed gains on capital account; see Taxpayer Alert TA 2009/12.

*Re Smith and FCT* [2010] AATA 576.

Source: ATO Compliance Program 2010-11

<[www.ato.gov.au/content/downloads/cor00248103\\_NAT7769.pdf](http://www.ato.gov.au/content/downloads/cor00248103_NAT7769.pdf)>

## Excess Super Contributions Assessments Upheld

In a lengthy judgment, the AAT has held that it did not have the jurisdiction to review a decision of the Commissioner refusing to make a determination under s 292-465 of the ITAA 1997 to disregard (or to reallocate) excess non-concessional superannuation contributions made by two taxpayers: *Re McMennemin and FCT* [2010] AATA 573 .

## Background

Two retired taxpayers (the husband was a retired accountant and his wife a retired clerical worker) established a self-managed super fund in 1997. In December 2006, each of the taxpayers contributed \$138,484 to the fund, in respect of which they claimed a personal superannuation deduction in their tax returns. The amount claimed by each taxpayer was \$105,113, based on the maximum age-based deduction. The contributions were treated as concessional contributions under Div 292 of the ITAA 1997. In June 2007, each contributed another \$1m which resulted in them exceeding the \$1m transitional non-concessional contributions cap for the income year ended 30 June 2007 under s 292-80 of the *Income Tax (Transitional Provisions) Act 1997*. This was because, under the transitional provisions, the balance (\$33,371) of each of the taxpayer's contributions made in December 2006 was taken into account in determining whether they had exceeded their non-concessional contributions cap.

The AAT said the information on which Mr McMennemin relied to make the contributions and claim the deductions was that in TaxPack 2007, the *A Plan to Simplify and Streamline Superannuation* paper (PSSS paper) released by the Government in the 2006-07 Federal Budget on 9 May 2006 and a September 2006 article in the Herald Sun (see below). The Tribunal considered that the PSSS paper should have "put him on notice that the propositions it put forward were intended for discussion and comment".

The Tribunal said that on 7 September 2006, an article published in the Herald Sun stated:

*Treasurer Peter Costello has made some major concessions in his tune-up of the new superannuation blueprint he laid down at this year's Federal Budget.*

*One of those is that subject to any applicable work test, people will be able to make up to \$1 million capital contributions to super up until July 1, 2007.....*

The Tribunal said the article in the Herald Sun 'was accurate as far as it went. It did not suggest that no regard was to be paid to earlier contributions in the financial year when it told its readers that '... people will be able to make up to \$1 million capital contributions up until 1 July, 2007'.' The Tribunal went on:

*TaxPack for 2007 certainly made no reference to it but the absence of a reference should have put a taxpayer who is used to do his own paper taxation returns on notice to make further enquiries. The Commissioner's commitment is very specific. Implicit in that commitment is an understanding that a taxpayer may rely on what is said in the TaxPack 2007 but should not make assumptions on the basis of what it does not say.*

The Tribunal observed that the advice in TaxPack was:

*not designed to assist a taxpayer make a decision on the way in which to structure his or her financial affairs in the future, however imminent that future might be. In the case of Mr and Mrs McMennemin, it was very imminent for there would have been little time between Mr McMennemin's reading TaxPack 2007 and 30 June 2007 when he made the \$1 million non-concessional contributions.*

The Commissioner issued excess contributions tax assessments (ECT assessments) to the taxpayers who then applied to the Commissioner under s 292-465 that he either disregard the excess non-concessional contributions or allocate them for the purposes of another financial year. The Commissioner decided that the circumstances were not special circumstances within the meaning of s 292-465(3)(a) and that making the determination would not be consistent with the object of Div 292 as required by s 292-465(3)(b). He therefore refused to make the determination. The taxpayers objected to the ECT assessments, the Commissioner disallowed their objections, and they subsequently applied to the Tribunal for review of the Commissioner's objection decision.

## Decision

Although the taxpayers and the Commissioner had submitted that the Tribunal had jurisdiction to review the Commissioner's refusal to make a determination under s 292-465, the Tribunal decided that it did not have that jurisdiction. In the Tribunal's view, the discretion of the Commissioner to make a determination to disregard super contributions for an income year was not part of an excess contributions tax (ECT) assessment process. It noted a taxpayer could only apply for the determination after the assessment was issued. Rather, the Tribunal said the determination was a matter preceding the making of the ECT assessments.

The Tribunal said that as it was only the assessment that could be the subject of its review when it reviews the Commissioner's objection decision, the Tribunal could not review the Commissioner's decision not to make a determination. Forgie DP said she 'would have come to the same conclusion even if the Commissioner had made a determination and Mr and Mrs McMennemin had not been satisfied with it'.

In any event, the Tribunal ruled that no 'special circumstances' existed to enable the Commissioner to make a determination under s 292-465. While the Tribunal accepted the taxpayers did not intentionally exceed the contributions cap, it did not accept that the circumstances leading to the breach were special circumstances.

The Tribunal noted that while the taxpayers were aware of the pending changes to superannuation, they did not take steps to ascertain whether those changes had been enacted other than to read TaxPack 2007 and another publication of the Tax Office. The Tribunal also noted that neither of the taxpayers read the Act which introduced the changes nor were aware that that Act had been passed. However, the Tribunal considered that persons in the position of the taxpayers would have 'reasonably foreseen' that they would have excess non-concessional contributions when the second contribution was made.

**TIP:** Super investors who have contributed above their concessional or non-concessional contributions caps can apply to the Commissioner to disregard or reallocate excess contributions for a financial year: s 292-465. However, an application must be made on the approved form within 60 days of receiving an ECT assessment (or a longer period allowed by the Commissioner). Further, the Commissioner's discretion is limited to special circumstances that are usually outside the control of the investor: see ATO Practice Statement PS LA 2008/1 which provides ATO staff guidance on exercising the Commissioner's discretion under s 292-465.

The Superannuation Legislation Amendment Bill 2010 proposes to amend s 292-465 to allow the Commissioner to make a determination to disregard (or reallocate) contributions without first issuing an ECT assessment. That Bill, however, lapsed when the Federal Election was called.

## Soldier's Motor Vehicle Travel Expense Claim Denied

The AAT has determined that motor vehicle travel expenses of \$22,000 incurred by a soldier in the Australian Defence Forces (ADF) in transporting his 'deployment priority 1' kit (DP1) from home to barracks were not deductible as they did not have the essential character of a business expense, nor were they incurred in gaining or producing assessable income. Instead, the AAT found that the 'essential character' of the expenses were of a private or domestic nature in the circumstances.

In arriving at this decision, the AAT relied on Taxation Ruling TR 95/17 (employee work-related deductions of employees of the ADF) which provided that a deduction for the transport of equipment from home to work by ADF members would be allowable if the equipment was 'bulky', if there was no secure area for the storage of the equipment at work and if, as a result, the expenses could be said to be attributable to the transportation of the bulky equipment, rather than to private transport between home and work.

However, while the AAT found the DP1 was 'bulky' (as it contained a field pack, combination webbing, weapons, wet weather gear, laptop, different uniforms, etc, weighing some 60 kilograms), it found there was secure storage at both sets of barracks he was required to attend (as assisted by the Tribunal Member's own site inspection of the barracks, and notwithstanding the taxpayer's evidence of the theft of some of his equipment from this storage).

The AAT also found there was no evidence that the taxpayer transported his DP1 to barracks on a daily basis or that daily DP1 inspections were held or required to be held by soldiers in his unit. In relation to the taxpayer's claim that the kit was required as part of his 'readiness' requirement, the AAT said 'this was not at the heart of his income-earning operations'. The AAT also noted there was no directive that required any soldier to transport their DP1 to and from work, and that the taxpayer had made a personal choice to store his DP1 at home (rather than having a compelling employment-related reason for doing so).

Accordingly, the AAT found that the travel expenses were not attributable to the transportation of his bulky DP1 equipment, but rather were attributable to private transport between home and work. As a result, the AAT concluded there was no connection between any transport by the taxpayer of his DP1 and the earning of his income.

**TIP:** The Tax Office has increased its compliance focus on work-related expenses, especially in relation to travel expenses incurred between home and work. The following are noted by the Tax Office as common mistakes made by taxpayers when claiming work-related travel expenses:

- incorrectly claiming motor vehicle expenses on the basis the taxpayer's vehicle is carrying bulky equipment;
- keeping insufficient documentation to support motor vehicle and travel expenses;
- incorrectly claiming travel or motor vehicle expenses when the taxpayer is required to travel from home to work more than once a day.

**TIP:** Taxpayers can claim motor vehicle expenses on the basis that they are carrying bulky equipment, but only if they can qualify that it is a necessary part of their job: see *FCT v Vogt* (1975) 1 NSWLR 194; 5 ATR 274 and Taxation Ruling IT 112.

*Re Brandon and FCT [2010] AATA 530.*

*Source: ATO Compliance Program 2010-11*

*<[www.ato.gov.au/content/downloads/cor00248103\\_NAT7769.pdf](http://www.ato.gov.au/content/downloads/cor00248103_NAT7769.pdf)>*

## Superannuation Benefits — Timing of Payment by Cheque

Draft Self Managed Superannuation Funds Determination SMSFD 2010/D1

<<http://law.ato.gov.au/pdf/pbr/smsfd2010-d001.pdf>>, released on 28 July 2010, states that a superannuation benefit can be considered to be 'cashed' at the time a cheque or promissory note is issued to the member or beneficiary.

### Payment of superannuation benefits

The Tax Office 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 Tax Office says a self-managed superannuation fund (SMSF) is considered to have cashed a benefit at the time of issuing the instrument. However, the money must be payable immediately (ie not post-dated) and the SMSF trustee must have taken all reasonable steps to ensure that the money is paid promptly (generally within a few business days).

Accordingly, the Tax Office says no cashing will occur where a cheque or note issued by the trustee is not honoured by the actual prompt payment of money to the member or beneficiary. Likewise, no cashing will occur at the time of issuing a cheque or note if a person acting as trustee causes or allows a significant delay in the transfer of funds from the SMSF to the member or beneficiary. In this respect, the Tax Office says a person holding the office of trustee may be considered to have control over their own actions in other capacities as a member of the SMSF.