

TOPIC 3: SUPERANNUATION CONTRIBUTIONS

Types of Contributions

- There are 2 types of contributions that can be made to a superannuation account:

CONCESSIONAL CONTRIBUTIONS

Concessional contributions are ones that are made by any of the following methods:

- 1. Most common:** employer contributing to employee's super account - up to three types of payments:
 - o **A) SGC** that employers must pay to employee's super accounts - currently 9.5% of employee's salary
 - o **B) Any amount an employer chooses to pay on top** of the 9.5 % SGC, or is obliged to do so (e.g. EA)
 - o **C) Any amount that an employee agrees with their employer to have "salary sacrificed"**
- 2. People who put money into their superannuation accounts which they elect to be a concessional contribution**
 - o **Note:** up until 1 July 2017 only 'self-employed' people could do this
 - o Now available to nearly everyone - need to lodge a form with fund they plan to claim that amount

NON-CONCESSIONAL CONTRIBUTION

- Lacks some of the tax advantages of concessional contributions.
- Non-concessional contributions are usually those that are any of the following:
 - o **Made by the employee or self-employed person** out of their own money
 - E.g. out of their after-tax salary or their capital/savings and they have NOT elected for such contributions to be concessional contributions
 - o **Contributions that a taxpayer makes into their spouse's superannuation account.**

Superannuation Guarantee

- A system of guaranteeing that employees receive a minimum amount of superannuation.
- **How it works:** although no legal obligation to pay 9.5% super - incentive to do so through penalties - employers pay % of workers salary into employees' superannuation
 - o **If they don't** - liable to pay Superannuation Guarantee Charge (SGC) to ATO (+ penalty and interest)
 - Gov will then pay this money into employees' superannuation
 - SGC won't be tax deductible, whereas if employer pays straight into employees' super account, it is tax deductible.

- So, if doesn't pay 9.5% to employee, and instead has to pay to gov – 3 negative consequences:
 - Has to pay penalty
 - Has to pay interest
 - Not tax-deductible meaning employer has a relatively higher income tax liability.
- **Only applicable to 'employees' who have earned at least \$450 per month.**
- **The relevant statutes are:**
 - *Superannuation Guarantee (Administration Act) 1992* ("SGAA")
 - *Superannuation Guarantee Charge Act 1992* ("SGCA") (short legislation, that actually imposes charge)

SPECIFICS OF LEGISLATION

- **S 16 SGAA:** An employer's **superannuation guarantee shortfall** for a quarter is payable by the employer.
- **S 17 SGAA:** superannuation guarantee shortfall is the total of the "**individual superannuation guarantee shortfalls**" + **plus interest + admin penalty**
- **S 19 SGAA:** how to calculate the "Individual superannuation guarantee shortfalls" – basically a % (now 9.5) of "salary or wages" paid to employee
- **HOWEVER - S 23(2):** shortfall is reduced by amount employer has contributed to an employee's super fund
 - If have contributed right amount of super, won't be a shortfall
 - Employee shortfall only if employer does not pay the min amount
- According to these sections only need to give 9.5% on '**ordinary time earnings**' to employee's super to not have a shortfall
 - Includes most salary/wages, does not include leave that paid out upon termination of employment.
 - Also, does not include OT IF the award/industrial agreement stipulates what hours to be worked.
- "**Maximum Superannuation Contribution Base.**" For the 2020/21 tax year, is \$57,090.
 - If earn more than \$57,090 per quarter (x 4 = \$228,360) – only need to pay 9.5% super on max amount
 - E.g. if earn 500K per year, employer will only need to pay 9.5% x \$228,360 super per year.

CONSTITUTIONAL CHALLENGE

- Statutes (SGAA & SGCA) were challenged as being unconstitutional in *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35

S 51(ii) of the Constitution grants taxation power to the Commonwealth

- If employers put super into employees' super accounts (to the required amount) – then no tax imposed
 - HOWEVER otherwise the employer will have to pay the shortfall to the government as a tax.
- Under legislation – gov then takes this shortfall (with interest and penalty) and places it in the super fund of the employee (but doesn't do so for interest and penalty).

Roy Morgan employer who didn't wish to pay super to employees. The relevant power of the Constitution was s 51(ii) which allowed gov the power to make laws in respect of taxation.

- *Matthews v Chicory Marketing Board (Vic)* – defined a tax: "It is a compulsory exaction of money by a public authority **for public purposes**, enforceable by law, and is not a payment for services rendered."

RM argued that the way the scheme was structured, it was not for "public purposes" and so was not a tax under s 51(ii) Constitution. Since didn't come under s 51(ii), was unconstitutional.

- Referred to *Matthews v Chicory Marketing Board (Vic)* definition of tax
- **Issue:** whether it is for public purposes – not definition of tax
- **Held:** It was constitutional – money here that is taxed due to being a shortfall goes to Consolidated Revenue
 - Because it goes to Consolidated Revenue, it is for a 'public purpose'.
 - True this money is then spent on individual employees' super – but its identity has been lost once goes into Consolidated Revenue. In other words, cannot trace the money.
- **Heydon J:** referred to definition of a tax in *Chicory* – what is argued by the taxpayer is that there is no 'public purpose' so not a tax.
 - Was a public purpose: "public purposes centre on the encouragement of employers to contribute to superannuation funds so as to meet the needs of aged or infirm employees and to reduce the pension burdens which would otherwise have to be funded by the government."
 - Also brought up the issue that the aim of this tax is not to raise revenue but to modify a behaviour – said this does not prevent it from being a tax.

Who is an Employee and so Covered by Superannuation Guarantee?

EMPLOYEE V NON-EMPLOYEE

- Employee (incl. ones in expanded definition) entitled to 9.5% - independent contractor isn't.
- Not an employee:

TOPIC 4: COMPLYING SUPERANNUATION FUNDS

Importance

- The main advantage of superannuation to those with superannuation savings are the tax concessions.
- **Div 295 ITAA:** However, those concessions are only available to a “complying superannuation fund”
 - o So very important to make sure that the superannuation fund is a complying superannuation fund.
 - Can generally assume big super funds are complying funds

Requirements

- **S 45 SISA:** A fund will be a **complying superannuation fund** where for the financial year the trustee has received notice from APRA stating that it is a complying super fund
 - o SMSF – relevant notice will be from the Commissioner of Taxation – not APRA.
- If notice given for previous income year – complying unless received a notice saying it is a non-complying fund
- **S 40 SISA:** Regulator can give a notice that complying superannuation fund **AND** can give notice that non-complying superannuation fund
- **S 42/42A SISA (42A for SMSF):** the fund will be a **complying superannuation fund** where it is:
 - o a **resident regulated superannuation fund (s 10 SISA); AND**
 - o some **other conditions** are fulfilled.

S 10 SISA - RESIDENT REGULATED SUPER FUND

- **S 10 SISA:** resident regulated superannuation fund means a regulated superannuation fund that is an Australian superannuation fund within the meaning of the ITAA – main requirements:
 - o a) Superannuation fund (as defined by s 995-1 ITAA); **and**
 - o b) Regulated fund; **and**
 - o c) Which is Australian (as defined by ITAA 1997) (residency issues)

1. S 10 SISA - Superannuation Fund

- **Defined in s 995-1 ITAA 1997:** meaning given by s 10 of SISA
- **S 10 of SISA:** “superannuation fund” means:
 - o (a) a fund that:
 - (i) is an indefinitely continuing fund; **AND**
 - (ii) is a provident, benefit, superannuation or retirement fund; **OR**
 - o (b) a public sector superannuation scheme.

Indefinitely Continuing Fund

- Must be nothing in the rules of the fund (in trust deed) that seek to terminate the fund after specified period
 - o E.g. if it said “this fund will run till 10 January 2025” then it would not fulfil this requirement

Cameron Brae Pty Limited v FCT [2007] FCAFC 135

- “In these circumstances, we would reserve consideration of the meaning of that phrase, save to say that the ordinary meaning of the word “indefinite” is “without distinct limitation of being or character; indeterminate, vague, undefined; of undetermined extent, amount or number”
- Needs to be an indefinitely continuing fund

Provident, Benefit, Superannuation or Retirement Fund

- *Mahony v FCT (1967)* - basically means that the fund is for provision for retirement, early cessation of employment, possible future event (e.g. unforeseen illness), or a specific purpose (e.g. funeral benefit). *Walstern Pty Ltd v FCT (2003) 54 ATR 423* - approved definition
- **Note:** ‘public sector superannuation scheme’ – defined in s 10 SISA – basically a super scheme established under law/authority of gov.

2. S 19 SISA - Regulated Super Fund

- To be a regulated super fund:

- o S 19(1) Need a trustee
- o S 19(2) & (3) That trustee should be a corporation OR an individual trustee, where the governing rules provide that the sole/primary purposes of the is the provision of old age pensions
- o S 19(4) Approved form filled in and signed

(1)A regulated superannuation fund is a super fund in respect of which subsec (2) – (4) have been complied with

(2)The superannuation fund must have a trustee.

(3)Either of the following must apply:

(a) trustee must be a **constitutional corporation** pursuant to a requirement contained in the governing rules; **OR**

(b) the governing rules must provide that sole or primary purpose of the fund is **provision of old-age pensions**

- o Trustee should be a corporation **OR** an individual trustee, which the governing rules provide that the sole/primary purposes of the is the provision of old age pensions

- Members in super fund have their account in accumulation mode – put money into super
- When they retire etc. – can withdraw it as a lump sum or take it as income stream
 - If they take it as an income stream, then the account is in pension mode.
- If a superannuation trustee has a human trustee/s, the fund must, in its governing rules, state that its main benefit is to pay its members, once they retire, their benefits as a pension (income stream).
- **However** – fund may allow members, if they wish, to take benefit as lump sum as substitute pension
 - However, cannot allow benefit to only be in the form of a lump sum.
- If fund is offering income stream benefits, could either have the fund provide the income stream by itself (i.e. pay an income stream to the beneficiary when they have retired), or fund could use money to buy an income stream from a third party (such as life insurance company).
- In practice, such a decision will be an issue for SMSF.

(4) The trustee or trustees must have given to APRA, or such other body or person as is specified in the regulations, a written notice that is:

- (a) in the approved form; **AND**
- (b) signed by the trustee or each trustee;

electing that this Act is to apply in relation to the fund

- This election is irrevocable

3. **S 295-95(2) ITAA - Australian Super Fund (Residency Issue)**

S 295-95(2) ITAA: A fund is an Australian Superannuation Fund if:

- (a) the fund was **established in Australia, or any asset of the fund is situated in Australia** at that time; and
- (b) at that time, the **central management and control** of the fund is ordinarily in Australia; and
- (c) at that time either the fund had **no member covered by subsection (3) (an active member) or at least 50% of:**
 - i. total * market value of the fund's assets attributable to * superannuation interests held by active members; **OR**
 - ii. the sum of the amounts that would be payable to or in respect of active members if they voluntarily ceased to be members;

is attributable to superannuation interests held by active members who are Australian residents.

A) FUND ESTABLISHED IN AU OR ANY ASSET OF THE FUND IS SITUATED IN AU AT THAT TIME

- *'established in Australia'* - A "once and for all" condition - only have to fulfil it when establish the super fund.

Fund Established in Australia

- No case law, but Tax Ruling 2008/9 (para 13) comments on this.
 - o TR: statement of the law by the ATO - enforceable - so if abide by it - binds ATO (S 357-60, Sch 1, Taxation Administration Act (1953))
- **Super fund brought into existence when**
 - o Trust deed is signed & executed **AND**
 - No need for deed to be signed and executed in Australia. (paras 13 - 14 of TR 2008/9)
 - o Initial money/property is transferred to trustee to hold on trust as initial contribution.
 - Initial contribution needs to be paid and accepted in Au by trustee

Any Asset of the Fund is Situated in Australia at the Relevant Time

- o If don't fulfil requirement that fund set up in Au - need for one of its assets to be situated in Australia
- o What is the location of an asset? Depends on the asset:
 - **Real estate** - where it is located
 - **Publicly listed shares** - the share registry they are on - so Australian listed shares reside in Au
 - **Chattels** - where they are located at any point in time

B) AT THAT TIME - THE CENTRAL MANAGEMENT AND CONTROL OF THE FUND IS ORDINARILY IN AUSTRALIA

- **CMC:** Strategic and high-level decision making - e.g. (para 20 - 21 of TR 2008/9):
 - o Formulating fund's investment strategy
 - o Reviewing, varying fund's investment strategy
 - o Determining how fund assets are to be used to fund member benefits.
- CMC of the fund **does not include** administrative and day to day activities such as:
 - o Acceptance of contributions
 - o Investment of fund's assets
 - o Payment of fund's assets
- **Who makes the CMC decisions?** Trustees, or if corporate trustee, then directors of corporate trustee.

- If investment decisions outsourced to a fund manager – fund manager NOT considered to be exercising CMC when they undertake day to day investment decisions – (para 25 TR 2008/9).
- High level decisions that are made by trustees/directors – must ordinarily be made in Australia – **so issue is strictly with where the decisions are made** – rather than where the trustee/s reside.

‘CMC decisions’ – E.g. (based on TR 2008/9 example 4)

J & I are trustees of a new super fund. Want to draft an investment policy. Seek professional advice. Meet with financial adviser, and tell him when they would like to retire, their ability to make contributions in future years, retirement goals. Consequently, investment adviser tells them what investment return they will need. Adviser suggests different asset strategies depending on different retirement date can be and contributions. J & I separately finalise their investment strategy after taking into account what adviser said.

- J & I are exercising CMC – not financial adviser – take advice but are ultimately the ones making the decision

‘Ordinarily in Australia’

- Clearly if super fund trustees are in Australia and making decisions – fulfilled
- If outside Au for a few weeks and make decisions while outside Au – still ordinarily exercised in Au – fulfilled
- **Ordinarily Exercising CMC outside Australia v temporary absence**
 - Because “ordinarily in Australia”, fine if CMC decisions are occasionally made outside Au
 - **Issue:** whether CMC is “regularly, usually or customarily exercised in Au” (para 28, TR 2008/9)
 - Temporary absences are acceptable – temporary absence can last years in some cases.
- **S 295-95(4) ITAA:** CMC of a super fund is ordinarily in Australia at a time even if that CMC is temporarily outside Australia for a **period of not more than 2 years**.
 - **BUT – TR 2008/9 Paras 30 & 31** – under 2-year absence not definitive rule
 - Sometimes less not CMC and sometimes more is still CMC
 - Sometimes more than 2 years outside Au – CMC can still be “ordinarily in Australia” if Australian absence is regarded as temporary.
 - Sometimes less than 2 years outside Australia, CMC can still not be “ordinarily in Australia” if not regarded as temporarily outside Australia (**paras 31 & 32 TR 2008/9**).

E.g.1. Greater than 2 years but CMC ordinarily in Australia (from TR 2008/9, example 7a)

J & M trustees and members of SMSF. J&M Super Fund established in Australia in August 2006. J & M exercise CMC in their home in Sydney. J seconded to London office of his employer for a 2-year period. J & M intended only to be 2 years and then return to Australia. Unexpectedly, for work reasons, turned out that was there for 3 years.

- While in England:
 - They rented out their Australian family home
 - Lived in employer provided apartment in England
 - J & M continued to maintain bank accounts and health insurance in Australia
 - They returned to Aust for Christmas on one occasion.

In England, J & M exercised CMC of their super fund at their apartment in England. In other words, they would review fund's investment strategy, and other high-level function decision making.

- **TR 2008/9:** CMC of the fund was ordinarily exercised in Australia even while they were in England
 - **Intention** was to return to Au within 2 years – although extended stay, did not abandon intention
 - They were in England for a specific reason
 - Did not establish a home outside Australia
 - J & M continued to maintain home, insurance, and other affairs in Australia

E.g.2 More than 2 years out of Au, CMC not regarded as ordinarily in Au (based on TR 2008/9 example 7(b))

- Same facts as E.g.1 **EXCEPT:**
 - Although seconded for 2 years – at end of 2 years changed intention and J intended to stay and work for employer in England indefinitely
 - However, 3 months after the end of 2 years, returned to Australia due to family in Australia being ill
- **TR 2008/9 example 7(b):**
 - For first 2 years – could CMC ordinarily in Au – same reasons mentioned in e.g.1
 - For 3 months after – could not say CMC ordinarily in Australia – because at this stage their absence is no longer temporary as their intention changed

E.g.3 Greater than 2 years but CMC NOT ordinarily in Australia (based on TR 2008/9 example 8(a))

L & O married couple, members and trustees of SMSF. Go overseas on working holiday. No expected return date – but intend to return to Au at some point. Rent in Au, when go overseas, don't renew lease. Before leave, sell some items (E.g. large furniture), and give others to parents. Sell cars. No assets left in Au apart from SMSF and bank accounts. Live in