



PS LA 2008/1 - The Commissioner's discretion to disregard or reallocate concessional and non-concessional contributions for a financial year

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Practice Statement Law Administration

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax Office staff must follow their business line's escalation process.

SUBJECT: **The Commissioner's discretion to disregard or reallocate concessional and non-concessional contributions for a financial year**

PURPOSE: **To guide staff in the exercise of the discretion contained in section 292-465 of the *Income Tax Assessment Act 1997***

Table of contents	Paragraph
STATEMENT	1
EXPLANATION	7
Legislative background	7
Policy context of the excess contributions tax	15
Policy context for the Commissioner's discretion	20
<i>Special circumstances</i>	22
<i>Object of Division 292</i>	27
Exercising the discretion	30
<i>Factors that must be considered</i>	30
<i>Factors that may be considered</i>	32
<i>Circumstances that do not generally amount to special circumstances</i>	35
Effect of making the determination	36
Examples illustrating how the discretion may be exercised	37
<i>Example 1</i>	39
<i>Example 2</i>	41
<i>Example 3</i>	42
<i>Example 4</i>	43
<i>Example 5</i>	44

<i>Example 6</i>	45
<i>Example 7</i>	46
<i>Example 8</i>	49
<i>Example 9</i>	50
<i>Example 10</i>	51
<i>Example 11</i>	52

STATEMENT

1. All legislative references in this practice statement are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. The Commissioner may make a written determination that all or part of an individual's concessional contributions and/or non-concessional contributions for a financial year are to be disregarded or allocated instead to another financial year for the purposes of excess contributions tax.¹ This practice statement provides guidance to Tax Office staff as to whether they should, and how they may, exercise this discretion.
3. The law prescribes that the discretion may only be exercised in cases where the Commissioner considers that:
 - there are special circumstances, and
 - making the determination is consistent with the object of Division 292, which is set out in section 292-5.²

Further the Commissioner may have regard to whether:

 - a contribution made in one financial year would be more appropriately allocated towards a different financial year³
 - it was reasonably foreseeable when the contribution was made that there would be excess concessional or excess non-concessional contributions for the financial year. Where the contribution is made by another person, the terms of any agreement or arrangement covering the amount and timing of the contribution will be relevant. Another relevant consideration is the extent of the individual's control over the making of the contribution,⁴ and
 - there are any other relevant matters.⁵
4. It is not possible to anticipate all the circumstances in which the discretion may or may not be exercised. In each case the decision maker (that is, the Commissioner or a person delegated or authorised to exercise the Commissioner's discretion) must consider the particular circumstances of the case and the relevant individual. However, regard should be had to the principles and examples set out in the Explanation section of this practice statement. In applying those principles to an individual's circumstances, a decision maker

¹ Section 292-465 of the *Income Tax Assessment Act 1997*.

² Subsection 292-465(3).

³ Subsection 292-465(5).

⁴ Subsection 292-465(6).

⁵ Subsection 292-465(4).

should be satisfied that the relevant circumstances are special in the sense that they are unusual or out of the ordinary. In the context of this discretion, for the particular circumstances to have this character, a decision maker must be satisfied that the circumstances make the imposition of the excess contributions tax unjust, unreasonable or otherwise inappropriate. The circumstances will not be special if the imposition of the excess contributions tax in those circumstances is not unjust, unreasonable or otherwise inappropriate compared to the general purpose and context of the imposition of excess contributions tax.

5. In addition, this discretion must be exercised consistently with the object of Division 292 which is to ensure that the amount of concessionally taxed superannuation benefits a person receives results from contributions that have been made gradually over the course of the person's life.⁶ That object must be understood in light of the explanation in the Guide⁷ to the superannuation contributions phase provisions as a whole, explaining that there are limits on contributions that receive favourable tax treatment. Those limits seek to restrict concessional contributions made for a person each financial year and seek to restrict non-concessional contributions made for a person each financial year or over a three-year period.
6. The exercise of the discretion must not be approached in a rigid or inflexible way. In forming an opinion, administrative law principles must be observed. Each case has to be considered on its merits after having proper regard to all the relevant facts. Decision makers must not take into account irrelevant considerations and must exercise their own judgment in making an appropriate and reasoned decision. The decision to exercise the discretion should be made in good faith and without bias and must not be made at the direction of another person.

EXPLANATION

Legislative background

7. Superannuation contributions made for an individual are subject to annual caps. These may be indexed annually.⁸
8. Concessional contributions are generally contributions which are included in the fund's assessable income.⁹ The concessional contributions cap for various financial years is set out in the table below.

Financial year	Amount of cap
2009-10	\$25,000
2008-09	\$50,000
2007-08	\$50,000

For the 2010-11 financial year or a later financial year, the concessional contributions cap is worked out by indexing annually the amount of \$25,000 to

⁶ Section 292-5.

⁷ Section 280-15.

⁸ Subsection 292-20(2), subsection 292-85(2).

⁹ Section 292-25.

average weekly ordinary times earnings (AWOTE) and rounded down to the nearest multiple of \$5,000¹⁰.

Concessional contributions in excess of the cap are taxed at a rate of 31.5%.¹¹ This tax is imposed by the *Superannuation (Excess Concessional Contributions Tax) Act 2007* and is levied on the individual.¹²

9. A transitional concessional contributions cap will also apply from 1 July 2007 to 30 June 2012 to individuals aged 50 or over on the last day of the financial year. The transitional concessional contributions cap was \$100,000 per person¹³ for the 2007-08 and 2008-09 financial years. The cap will be \$50 000 for the 2009-10; 2010-11 and 2011-12 financial years. This cap is not indexed.
10. Non-concessional contributions are generally those contributions which are not included in the fund's assessable income, plus the amount of any excess concessional contributions.¹⁴ The non-concessional contributions cap is calculated with reference to the concessional contributions cap amount. For the 2007-08 and 2008-09 financial years the amount was three times the concessional contributions cap. For the 2009-10 and later financial years it is six times the concessional contributions cap. The non-concessional contributions cap for various financial years is set out in the table below.

Financial year	Amount of cap
2009-10	\$150,000
2008-09	\$150,000
2007-08	\$150,000

-

Non-concessional contributions in excess of the cap are taxed at a rate of 46.5%.¹⁵ This tax is imposed by the *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* and is levied on the individual.¹⁶

11. To accommodate larger contributions, individuals under age 65 in a financial year, are able to bring forward future entitlements to two years worth of non-concessional contributions¹⁷. This means that a person under age 65 can contribute non-concessional contributions of up to \$450,000 over three financial years, without exceeding their non-concessional contributions cap.
12. For the period 10 May 2006 to 30 June 2007 an individual could contribute up to \$1,000,000 of non-concessional contributions to their superannuation fund. This limit is referred to as the transitional non-concessional contributions cap.¹⁸
13. A person who has an excess contributions tax¹⁹ liability can apply to the Commissioner in the approved form, for a determination that for the purposes of

¹⁰ Section 960-285.

¹¹ Section 5 of the *Superannuation (Excess Concessional Contributions Tax) Act 2007*.

¹² Section 292-15.

¹³ Section 292-20 of the *Income Tax (Transitional Provisions) Act 1997*.

¹⁴ Section 292-90.

¹⁵ Section 5 of the *Superannuation (Excess Non-concessional Contributions Tax) Act 2007*.

¹⁶ Section 292-80.

¹⁷ Section 292-85.

¹⁸ Section 292-80 of the *Income Tax (Transitional Provisions) Act 1997*.

¹⁹ Defined in subsection 995-1(1) to mean excess concessional contributions tax or excess non-concessional contributions tax.

excess contributions tax, all or part of the person's concessional contributions or non-concessional contributions for a financial year, are to be disregarded or allocated instead to another financial year specified in the determination.²⁰ The application must be made within 60 days of receiving the excess contributions tax assessment or such longer period as the Commissioner allows.²¹

14. Applications are required to be 'in the approved form'.²² To facilitate this, the Tax Office provides a standard application form, *Application - excess contributions tax determination* (NAT 71333-10.2007), which is available on the Tax Office's website. However, the Commissioner does not insist on the use of this standard application form. The application will be in the approved form if it is in writing and contains all the necessary information referred to in that form.

Policy context of the excess contributions tax

15. The Treasury paper, *A Plan to Simplify and Streamline Superannuation*²³ (the Plan), announced the proposal to alter the taxation arrangements for benefits paid from a taxed superannuation fund. Two main elements of the new tax arrangements under the Plan are benefits paid from a taxed source to people over 60 are tax free, and the abolition of the reasonable benefits limit (RBL) rules. In the broader context of the Government's retirement income policy, the Plan explains the policy rationale for the introduction of the excess concessional contributions tax at paragraph 4.2 as follows:

Given the removal of the RBL and tax on benefits, this limit on deductible contributions would play a key role in the fiscal sustainability of the system.

16. Similarly, in setting the policy context for the proposed introduction of the excess non-concessional contributions tax, the Plan states at paragraph 4.5:

Once in the fund, the earnings on all contributions are subject to the concessional 15 per cent earnings tax which represents a significant concession designed to encourage and support retirement savings. The removal of benefits tax and RBLs would increase the concessions provided to superannuation.

These proposed changes, in conjunction with the current tax exempt status of superannuation pension assets, would make superannuation an attractive vehicle in which to retain assets to avoid paying tax. There would also be an incentive for high-wealth individuals to transfer large amounts of assets currently held outside superannuation to the concessional tax superannuation system.

To ensure the concessions are targeted appropriately, a cap of \$150,000 a year (three times the proposed concessional contributions limit) on the amount of post-tax superannuation contributions a person can make would apply.

17. These extracts show that the excess contributions tax regime is critical to ensuring the increased tax concessions provided to superannuation are both fiscally sustainable and targeted appropriately. This policy rationale is reinforced in the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 (EM) which introduced the amendments to the law. The EM notes at paragraphs 1.11 to 1.12:

1.11 The removal of age-based deduction limits, reasonable benefit limits (RBLs) and tax on superannuation benefits from taxed funds for people 60 and

²⁰ Section 292-465.

²¹ Subsection 292-465(2).

²² Subsection 292-465(2), section 388-50 of Schedule 1 to the *Taxation Administration Act 1953*.

²³ The Treasury 2006, *A Plan to Simplify and Streamline Superannuation* The Treasury, Canberra.

over will increase the concessions provided to superannuation. These changes, in conjunction with the continuing tax exemption provided for income from superannuation assets supporting a pension, will make superannuation an attractive vehicle for retaining assets to minimise tax. There will be an incentive for people to transfer income producing assets currently held outside superannuation to the concessional tax system.

1.12 To ensure superannuation taxation concessions are targeted appropriately, limits will be placed on the amount of superannuation contributions a person can make that receive concessional treatment.

18. Sections 292-1 and 292-5 are important indicators of the intended purpose of the new excess contributions tax system. Section 292-1 provides the guide to Division 292 as follows:

This Division limits the superannuation contributions made in a financial year for a person that receive concessional tax treatment.

The object clause in section 292-5 states:

The object of this Division is to ensure that the amount of concessional tax superannuation benefits that a person receives results from superannuation contributions that have been made gradually over the course of the person's life.

19. Capping the concessional tax treatment for superannuation contributions for a financial year also, in effect, limits the total amount of concessional tax superannuation benefits a person can accumulate over their lifetime. Capping non-concessional contributions for a financial year or over three years, also effectively limits the amount of earnings that are concessional tax in superannuation funds. These broad policies are reflected in the Guide to the Part of which the Division forms part, at section 280-15. The object of the Division must be understood in the context of the Part as a whole.

Policy context for the Commissioner's discretion

20. The importance of the excess contributions tax regime to the integrity of the new superannuation measures needs to be kept in mind when considering an application to exercise the discretion.
21. There are two preconditions to a determination exercising the discretion under section 292-465:
- the presence of 'special circumstances', and
 - the determination achieving an outcome which is consistent with the object of Division 292.

Special circumstances

22. The meaning of the expression 'special circumstances' has been considered in case law in a variety of legislative contexts. The principles that emerge from the cases are that:
- it is not possible to lay down precise rules for what constitutes special circumstances²⁴

²⁴ *Beadle v. Director-General of Social Security* (1985) 60 ALR 225 (*Beadle*); *Drachnikov and Another v. Centrelink and Another* (2003) 75 ALD 134 (*Drachnikov*) per Hill J (with whom Kiefel and Hely JJ agreed) at paragraph 65.

- the core idea of special circumstances is that there is something unusual to take the case outside the ordinary course,²⁵ and
 - in determining whether there are special circumstances in the context of the exercise of a discretion, a decision maker must bear in mind the purpose for which the discretion is given.²⁶
23. The approach to special circumstances in the context of section 292-465 is confirmed by the EM to the Bill which introduced the amendments. At paragraph 1.117 it says:
- It is clear from the case law that special circumstances are unusual circumstances, or circumstances out of the ordinary. Whether circumstances are special will vary from case to case as the context requires, but in this context they must make it unjust, unreasonable or inappropriate to impose the liability for excess contributions tax.
24. In determining whether there are special circumstances in a given case, a decision maker should consider whether there are circumstances which are outside the ordinary course, and which, in the light of the purpose of the excess contributions tax, make it unjust, unreasonable or inappropriate for a liability for excess contributions tax to be imposed.
25. Because a determination for the purposes of excess contributions tax may relate not only to completely relieving or excusing liability for excess contributions tax for a period, but also to allocating contributions to another year, the effect of allocating contributions to another year or, of not doing so, must also be considered in judging whether an imposition of liability in the circumstances of a particular case is appropriate or whether it is at odds with the object or purpose of the law.
26. The guiding principle stated in the case law about exercising the discretion consistently with the object of the law is expressly required by paragraph 292-465(3)(b).

Object of Division 292

27. To achieve its object Division 292 limits the amount of contributions made to a superannuation provider which are concessional tax each financial year.
28. In general, the Commissioner may consider the object of Division 292 is achieved if, apart from the special circumstances, the relevant cap would not have been breached and the special circumstances have produced the breach unjustly, unreasonably or inappropriately.
29. Where the special circumstances are such that a contribution is more properly referable to a different financial year, the Commissioner may be more likely to determine that an amount should be allocated to another financial year, rather than be disregarded altogether. On the other hand, where the special circumstances relate to the amount of the contribution, the Commissioner may be more likely to determine that an amount should be disregarded rather than reallocated to another year.

²⁵ *Drachnikov* at paragraph 66; *Minister For Community Services and Health and Another v. Chee Keong Thoo* (1980) 78 ALR 307 per Burchett J; *Tefonu Pty Ltd v. Insurance And Superannuation Commissioner* (1993) 30 ALD 455 per Beazley J.

²⁶ *Beadle and Drachnikov*.

Exercising the discretion

Factors that must be considered

30. The Commissioner must consider whether there are special circumstances. As discussed in paragraphs 22 to 26 of this practice statement, special circumstances are factors which are unusual or out of the ordinary and which justify the making of an exception to the general application of the legislation because that operation would be unjust, unreasonable or otherwise inappropriate.
31. The Commissioner must also take into account the object of Division 292, as discussed in paragraphs 27 to 29 of this practice statement.²⁷

Factors that may be considered

32. The Commissioner may have regard to whether a contribution made in one financial year should be more appropriately allocated towards a different financial year.²⁸ The examples set out below illustrate where this may be the case.
33. The Commissioner may consider whether it was reasonably foreseeable when the contribution was made that there would be excess concessional or non-concessional contributions for the financial year.²⁹ Where the contribution is made for the person by someone else, the terms of any agreement or arrangement covering the amount and timing of the contribution will be relevant in forming this opinion.³⁰ The EM notes at paragraph 1.119 that the terms of any agreement or arrangement will include an effective salary sacrifice arrangement, workplace agreement or industrial award. Another factor which may be relevant is the extent to which the person had control over the making of the contributions.³¹
34. The Commissioner may also consider any other relevant matters.³²

Circumstances that do not generally amount to special circumstances

35. It is not possible to identify every factor that might be relevant to considering whether the exercise of the discretion is appropriate or prescribe how one factor should always be considered. Each individual case will present a unique set of circumstances that need to be considered and weighed up in forming an opinion. However, the following factors in isolation would not generally amount to the existence of special circumstances that make the imposition of the tax unjust, unreasonable or inappropriate:
 - Financial hardship – it is common or usual, rather than 'special' for some degree of financial hardship to occur as a result of excess contributions tax being assessed. The imposition of the tax and corresponding liability to pay the amount assessed is an intended consequence of the law designed to discourage excess contributions. The financial hardship may be ameliorated if a person uses the release authority given by the

²⁷ Paragraph 292-465(3)(b).

²⁸ Subsection 292-465(5).

²⁹ Subsection 295-465(6).

³⁰ Paragraph 292-465(6)(a).

³¹ Paragraph 292-465(6)(b).

³² Subsection 292-465(4).

Commissioner to release the amount of the excess contributions tax from the fund to pay the liability. A claim of financial hardship should generally be considered in light of the *ATO Receivables Policy*.

- Ignorance of the law – a claim that a person was ignorant of the law would not, generally speaking, be regarded as 'special circumstances' unless other factors exist which would make the ignorance or misconception reasonable or understandable in the circumstances, such as where incorrect advice was provided to the person by the Tax Office.
- Incorrect professional advice – as with ignorance of the law, this would not generally amount to special circumstances, unless there were other special factors leading to the mistake. For example, if the incorrect professional advice was based on a widely understood view of the law that was ultimately found by a court to be incorrect, the incorrect advice may constitute special circumstances. However, the mere fact that a particular mistake is of a type that is 'not uncommon' or results from an incorrect interpretation of a provision which some may find hard to apply, would not generally make the circumstances sufficiently special to warrant exercise of the Commissioner's discretion.
- Retrospectivity of law or adverse effect of legislative changes – claims such as these would not be considered 'special circumstances'.

Effect of making the determination

36. Where a decision maker makes a determination to disregard or reallocate all or part of a person's contributions, it will be necessary to amend the relevant excess contributions tax assessment. However, the determination has no effect for a purpose other than the excess contributions tax. That is, for example, it does not affect an employer's income tax deduction or an individual's entitlement to a Government co-contribution.

Examples illustrating how the discretion may be exercised

37. The EM contains a number of examples that provide some guidance about how the discretion might be exercised. The following paragraphs expand on those examples and should be considered when deciding whether and how to exercise the discretion. Actual decisions will depend on all the facts of each particular case. These examples are illustrative only and are not a substitute for the exercise of judgment in light of all the facts.
38. The examples indicate that the circumstances that are likely to be considered special are more likely to arise where the person for whom the contribution is made has no control over the timing or amount of the contribution. In those circumstances, it may be possible to argue that imposition of the tax would be unfair or unreasonable.
39. *Example 1*³³
- Barbara is aged 43 and has entered into an effective salary sacrifice arrangement with her employer to sacrifice 20% of her salary into

³³ This example is based on example 1.11 which appears after paragraph 1.121 in the EM.

superannuation. This results in a contribution of \$45,000 for the 2009 financial year. However, during the same year, the Tax Office collects superannuation guarantee charge from Barbara's previous employer for quarters in an earlier financial year and pays a \$20,000 (shortfall component) to her superannuation fund. As these contributions are assessable income of Barbara's fund, the fund reports \$65,000 in concessional contributions for the financial year to the Tax Office. Barbara is issued an excess concessional contributions tax assessment based on excess concessional contributions of \$15,000. Barbara applies to the Commissioner for an exercise of the discretion.

The following factors are relevant matters to consider in this example:

- Of Barbara's total contributions, \$20,000 is more appropriately allocated to the financial year in which her former employer should have made superannuation contributions.
- Barbara could not control the timing of the contribution to her fund relating to the shortfall component collected by the Tax Office. The timing of the contribution is a direct result of her former employer's failure to contribute in a timely way and action taken by the Tax Office to assess, collect and remit the shortfall component.
- Barbara could not necessarily foresee whether, and if so, when, the Tax Office would collect and pay the shortfall component.
- Had the contributions been made by her former employer at an appropriate time, the contributions for Barbara would have been spread gradually over different financial years, which is consistent with the object of Division 292.

In these circumstances, a decision maker may decide that the contribution of \$20,000 made by the Tax Office should be reallocated to the financial year in which Barbara's employer could reasonably be expected to have made one or more contributions for Barbara. An excess contributions tax liability could be regarded as unjust, unreasonable or inappropriate because it has arisen as a direct consequence of the former employer's failure to make compulsory superannuation contributions in a timely way. Also, reallocating the contribution to the appropriate financial year is consistent with the object of Division 292, to ensure that superannuation contributions are spread over the person's life. If excess contributions tax arises in the year to which the contributions should be allocated, that would have to be considered in its own right, although if the excess contributions tax would be the same or more, then that might provide good reason to think there are no special circumstances requiring any exercise of the discretion.

40. This example illustrates how the payment of a shortfall component under the *Superannuation Guarantee (Administration) Act 1992* might result in the conclusion that a contribution would more appropriately be allocated towards another financial year.

41. *Example 2*

The facts of Example 1 are modified as follows. The Tax Office does not collect and pay any shortfall component to Barbara's superannuation fund. Under the terms of Barbara's contract of employment, she has an entitlement to be considered for the payment of a performance bonus. The terms of her salary sacrifice agreement include the amount of any bonus her employer decides to

pay. Based on bonuses paid in previous years, she expects on the basis of her current year performance to receive a bonus of at least \$50,000. Her employer decides to pay a bonus of \$50,000 of which \$10,000, representing 20% of the bonus, is contributed to superannuation under the salary sacrifice agreement. As these contributions are assessable income of Barbara's fund, the fund reports \$55,000 in concessional contributions for the 2009 financial year to the Tax Office. This amount is made up of the \$45,000 ordinary salary sacrifice contributions plus the \$10,000 from the bonus. Barbara is issued an excess concessional contributions tax assessment based on excess concessional contributions of \$5,000. Barbara applies to the Commissioner for an exercise of the discretion.

The following factors are relevant matters to consider in this example:

- The contributions are appropriately included in the financial year to which they relate.
- Barbara agreed with her employer on the terms of the salary sacrifice agreement which included the payment of a portion of performance bonuses into superannuation.
- Although the exact amount of the bonus was not ascertainable in advance, it was reasonably foreseeable that the bonus would be paid and that the amount of the possible bonus might cause the cap to be exceeded.
- The liability to excess contributions tax is consistent with the object of Division 292.

The facts of this example do not demonstrate special circumstances. In the absence of other circumstances, these circumstances are not sufficiently unusual or out of the ordinary. Nor do the facts suggest that the imposition of the tax is unjust, unreasonable or inappropriate. Although Barbara had no control over the decision to pay the bonus, or the amount of the bonus, she had agreed with her employer to the terms of the salary sacrifice agreement. Based on her previous performance, she had a reasonable expectation of being paid the bonus and that the amount payable could mean the superannuation contributions would exceed the concessional contributions cap.

42. *Example 3*

The facts of Example 2 are modified as follows. Barbara is not entitled to an annual performance bonus. Rather, Barbara's employment agreement provides for her to be paid a bonus if she performs at, or above, a certain standard for five consecutive years.

A bonus of \$50,000 is paid at the end of the fifth year (which is the 2009 financial year in this example), with 20% of the bonus (\$10,000) being contributed to superannuation in accordance with Barbara's salary sacrifice agreement. In addition to other contributions of \$45,000 in that year, this causes Barbara to exceed the concessional contributions cap.

Barbara applies to the Commissioner to exercise his discretion and allocate the bonus payment proportionally over the five years.

This example does not demonstrate 'special circumstances'. These circumstances are not sufficiently unusual or out of the ordinary. It is considered that the bonus is

properly referable to the year in which it is paid. If Barbara had not completed a fifth year of service, or had performed below the required standard in that year, she would not have been eligible for any bonus. Even though Barbara had no control over the decision to pay the bonus or the amount of the bonus, she had agreed with her employer to the terms of the salary sacrifice agreement.

43. *Example 4*³⁴

Jaylee is 63 and makes non-concessional contributions (for which she cannot claim a tax deduction) totalling \$750,000 to two different superannuation funds in the 2010 financial year. After receiving an excess non-concessional contributions tax assessment, Jaylee applies to the Commissioner to exercise his discretion and reallocate the excess contributions to earlier financial years in which she did not make contributions, arguing that the contribution should be counted under the bring forward provisions.

The facts of this example are not unusual or out of the ordinary. In the absence of other circumstances, they do not constitute special circumstances. Jaylee was able to control both the timing and amount of the contributions and it was reasonably foreseeable that Jaylee would exceed the non-concessional contributions cap.

The imposition of the tax in this case, is not unjust, unreasonable or inappropriate. As page 36 of the EM states in relation to example 1.12:

[T]he contribution caps operate on a 'use it or lose it' basis. That is, non-concessional contributions are subject to annual limits with the ability for those under age 65 to bring forward future entitlements to two years worth of non-concessional contributions. Past year's entitlements can not be carried forward in this manner.

44. *Example 5*

Roslyn is 66 and is still working full time as an employee. Her non-concessional contributions cap is \$150,000 and she is not eligible for the bring forward arrangements because she was not under 65 at any time during the 2009 financial year. She was a beneficiary of her father's deceased estate and received her share of the estate on 25 June 2008. She waits until the proceeds are available and hand delivers her first cheque to her superannuation fund for \$150,000 on 27 June 2008. Roslyn expected the contribution to be counted towards her non-concessional contributions cap for the 2008 financial year. She posts a second cheque for \$150,000 to her fund on 7 July 2008. The fund does not process Roslyn's first cheque until 2 July 2008. It is actually reported by her fund and counted towards her non-concessional contributions cap for the 2009 financial year. The fund receives and processes Roslyn's second cheque on 9 July 2008. This contribution is also reported and counted towards her non-concessional contributions cap for the 2009 financial year. Roslyn receives an excess non-concessional contributions tax assessment for the 2009 financial year. She applies to the Commissioner to exercise his discretion and reallocate \$150,000 of the contributions to the 2008 financial year.

³⁴ This example is based on example 1.12, one of several examples which appear after paragraph 1.121 in the EM.

In these circumstances, a decision maker may consider that special circumstances exist and decide that the contribution of \$150,000 made by Roslyn when she hand delivered the cheque to the fund's office on 27 June 2008 should be reallocated to the 2008 financial year. Roslyn's excess contributions tax liability could be regarded as unjust, unreasonable or inappropriate because it arose as a direct result of the delay by her fund in processing her cheque. Roslyn could have reasonably expected that the fund would have processed her cheque before 1 July 2008. Also, reallocating the contribution to the appropriate financial year is consistent with the object of Division 292, to ensure that superannuation contributions are spread over the person's life.

45. *Example 6*³⁵

Antoni is a member of an employer sponsored superannuation plan. Under the terms of the plan Antoni is required to contribute 5% of his salary (\$5,000) to the fund each year. Each of his contributions is a non-concessional contribution. However, in the 2008 financial year, Antoni also contributes \$450,000 in non-concessional contributions from an inheritance to a public offer fund. Antoni has total non-concessional contributions of \$455,000. The Commissioner issues Antoni with an excess non-concessional contributions tax assessment based on excess non-concessional contributions of \$5,000, as under the bring forward provisions Antoni is able to contribute up to \$450,000 without exceeding the cap. Antoni applies to the Commissioner for an exercise of the discretion.

The facts of this example are not sufficiently unusual or out of the ordinary, nor do they suggest that the imposition of the tax is unjust, unreasonable or inappropriate. In the absence of other circumstances, they do not constitute special circumstances. Antoni was able to control both the timing and the amount of the contribution he made from the inheritance and it was reasonably foreseeable he would exceed the non-concessional contributions cap.

46. *Example 7*³⁶

George is 45 years of age. George's employer contributes \$50,000 each year to his superannuation plan under the terms of an effective salary sacrifice agreement. However, George was unaware that his employer's contribution for the 2008 financial year was made late, on 3 July 2008. The employer's contribution for the 2008-09 financial year was made on time on 29 June 2009. This resulted in George having no concessional contributions in the 2008 financial year but concessional contributions of \$100,000 in the 2009 financial year. George is issued a concessional contributions tax assessment for the 2009 financial year based on excess concessional contributions of \$50,000. George applies to the Commissioner to exercise his discretion and reallocate \$50,000 in contributions to the 2008 financial year.

The following factors are relevant matters to consider in this example:

- Of the total contributions made on George's behalf in the 2009 financial year, \$50,000 is more appropriately allocated to the 2008 financial year.

³⁵ This example is based on example 1.14, one of several examples which appear after paragraph 1.121 in the EM.

³⁶ This example is based on example 1.13, one of several examples which appear after paragraph 1.121 in the EM.

- George could not control the timing of the contribution to his plan. George's employer controlled the timing of the contribution. However, it is clear from his salary sacrifice agreement that George intends to spread his contributions evenly across financial years.
- George could not reasonably foresee that the superannuation contribution made under his salary sacrifice agreement would be made outside the financial year to which the contribution related.
- Had George's employer made the 2008 financial year contribution within that year, George would not have had an excess concessional contributions tax liability for the 2009 year.

In these circumstances, a decision maker may consider that special circumstances exist and decide that the contribution of \$50,000 made by George's employer on 3 July 2008 should be reallocated to the 2008 financial year. An excess contributions tax liability in this case could be regarded as unjust, unreasonable or inappropriate because it has arisen as a direct consequence of the actual timing of the employer's contributions which were meant to be made annually and would have been expected to be made in different years. Also, reallocating the contribution to the appropriate financial year is consistent with the object of Division 292, to ensure that superannuation contributions are spread over the person's life.

47. This example describes the situation where the timing of salary sacrifice contributions made by an employer causes an artificial distortion or bunching of contributions in one financial year but where the contributions relate to different financial years. Exercising the discretion to reallocate the contributions to the appropriate year spreads the contributions and aligns them with the financial year in which the employer's obligation arises. This is consistent with the object of Division 292.
48. The way in which the *Superannuation Guarantee (Administration) Act 1992* (SGAA) operates may also result in timing issues. Contributions made within 28 days after the end of the quarter are taken into account for the purposes for the SGAA as if they had been made in that quarter.³⁷ A contribution made by 28 July for example, will therefore be counted for the purposes of the SGAA as a contribution made for the quarter commencing 1 April of the previous financial year, but for Division 292 purposes it is counted as being made in the next financial year. It is possible that counting the contribution for that later year could produce excess concessional contributions. If excess contributions tax arises, the applicability of the contributions for SGAA purposes to an earlier year might form part of special circumstances and would then be a relevant matter to consider.

³⁷ See subsection 23(6) of the *Superannuation Guarantee (Administration) Act 1992*.

49. *Example 8*

As in Example 7, George's employer contributes \$50,000 each year to his superannuation plan under the terms of an effective salary sacrifice agreement. George and his employer have agreed that this amount will be spread across four contributions of \$12,500 to be made on 28 September, 28 December, 28 March and 28 June. However, George's employer does not make the contribution due on 28 June 2008 until 3 July 2008.

George receives a statement from his superannuation fund in October 2008. He realises that if all his salary sacrifice contributions for the 2008-09 year are made on time he will exceed the concessional contributions cap for that year.

In these circumstances, it is clear that the contribution made on 3 July 2008 is referable to the previous financial year, the year in which it should have been made. The employer's delay must be considered. George is not able to control when the contributions are actually made by his employer. His employer has not strictly adhered to the terms of the agreement. Even though George could foresee that the contributions to be made under his 2009 salary sacrifice agreement may exceed the concessional contributions cap, George should not necessarily be required to alter the terms of his salary sacrifice agreement for 2008-09 because of his employer's failure to fulfil the terms of his 2008 agreement. A decision maker may consider that special circumstances exist in these circumstances and decide that the breach of the cap is essentially due to the employer's failure to make contributions consistently with the salary sacrifice agreement. It would be consistent with the object of Division 292 to reallocate the contributions to the appropriate year.

50. *Example 9*³⁸

Helen is aged 50. She made non-concessional contributions to her Australian superannuation provider in the 2008 financial year of \$300,000, triggering the bring forward provisions. This means that she can make further non-concessional contributions of \$150,000 over the next two financial years without incurring a liability for excess contributions tax. Helen instructs her overseas superannuation provider to pay an amount to her Australian superannuation provider on 15 August 2008. At the time of giving her instructions Helen tried to specify an amount in the foreign currency that would not exceed \$A150,000, taking into account the prevailing exchange rate. However, the amount actually paid on 19 August 2008 was \$152,000, due to the exchange rate having changed more than Helen anticipated between the time she requested the transfer and the time the transfer was processed. Helen received an excess non-concessional contributions tax assessment based on excess non-concessional contributions of \$2,000. Helen applies to the Commissioner for an exercise of the discretion.

In this case, a decision maker may consider exercising the discretion to disregard the excess contributions of \$2,000, as the fluctuations in the exchange rate is a relevant matter to consider. Helen generally could not control nor reasonably foresee by how much the exchange rate would fluctuate. However, further information as to the surrounding facts would be required to make a decision in this particular case. For example, a decision maker may wish to consider how much exchange rate fluctuation Helen allowed for and the extent to which the

³⁸ This example is based on example 1.15, one of several examples which appear after paragraph 1.121 in the EM.

change in the exchange rate was foreseeable. This includes considering whether the change in the exchange rate was excessive compared with recent fluctuations. They might also consider whether Helen could determine the date of the payment. Could she nominate a particular date, or was the timing of the payment determined solely by the fund? That may affect the reasonableness of Helen's expectation as to the exchange rate that would apply. Decision makers may also consider other facts to be relevant.

51. *Example 10*

Helen instructs her overseas superannuation provider to transfer her interest in her overseas superannuation plan to her Australian superannuation providers on 15 August 2007. Helen is unable to transfer only part of her interest and the total value of her interest will exceed \$450,000, her non-concessional contributions cap for the 2008 financial year using the bring forward arrangements. Helen transfers the total value of her interest in the overseas fund to two different Australian superannuation funds. A total amount of \$700,000 is paid to Helen's Australian superannuation providers on 19 September 2007. No part of that amount is included in the assessable income of either of the Australian superannuation plans. Non-concessional contributions totalling \$700,000 are reported to the Tax Office. As a result of receiving an assessment based on \$250,000 excess non-concessional contributions, Helen applies to the Commissioner to exercise his discretion and disregard the excess contributions of \$250,000.

The facts of this example are not sufficiently unusual or out of the ordinary. In the absence of other circumstances, they do not constitute special circumstances. It was reasonably foreseeable that the non-concessional contributions cap would be exceeded if Helen's entire interest in her overseas superannuation plan was transferred. Furthermore, it is clear that Parliament intended that contributions from an overseas superannuation plan count as non-concessional contributions. Submissions suggesting a carve-out for such payments were not adopted.

52. *Example 11*

Hue is 58. He made a non-concessional contribution of \$450,000 in the 2008 financial year and therefore cannot make any further non-concessional contributions in the 2009 or 2010 years without breaching the non-concessional contributions cap.

During the 2009 financial year, Hue's current employer made an employer superannuation contribution of \$100,000 on behalf of Hue and the Tax Office also collected a shortfall component of \$20,000 from Hue's past employer. In February 2010 Hue was issued with an excess concessional contributions tax assessment and a release authority for \$6,300.

To enable him to pay the excess contributions tax, Hue gave his release authority to his superannuation fund and the \$6,300 was paid to him in March 2010 as a non-assessable, non-exempt benefit. He subsequently read in a newspaper article about the Commissioner's discretion and applied to the Commissioner to reallocate the \$20,000 contribution to the earlier financial year/s in which his past employer could reasonably be expected to have made the contribution/s. In April 2010 the Commissioner exercised his discretion to reallocate the amount

and issued an amended excess concessional contributions tax assessment for 2009 of nil.

Hue recontributed the \$6,300 to his fund in April 2010. As he made the contribution personally, it was included in his non-concessional contributions for the 2010 financial year. He received an assessment for excess non-concessional contributions tax in February 2011. Hue applied to the Commissioner to exercise his discretion and disregard the contribution of \$6,300.

A decision maker may consider that special circumstances exist and disregard the retribution of the \$6,300. An excess contributions tax liability on this amount could be regarded as unjust, unreasonable or inappropriate because the practical need to withdraw the amount was based on an assessment which the Commissioner subsequently amended.

Disregarding the \$6,300 contribution puts Hue back to the position he would have been in if the original excess concessional contributions tax assessment for the 2009 financial year had not been made. It was not due to an error on Hue's part, nor within his control that the original assessment issued for that amount of excess contributions tax.

Subject references	amending excess contributions tax assessments Commissioner's determination – reallocate or disregard superannuation contributions Commissioner's discretion concessional contributions concessional contributions cap excess concessional contributions excess contributions tax assessments excess non-concessional contributions excess transitional non-concessional contributions non-concessional contributions non-concessional contributions cap special circumstances superannuation superannuation contributions superannuation excess contributions tax transitional non-concessional contributions transitional non-concessional contributions cap
Legislative references	ITAA 1997 ITAA 1997 280-15 ITAA 1997 Div 292 ITAA 1997 292-1 ITAA 1997 292-5 ITAA 1997 292-15 ITAA 1997 292-20 ITAA 1997 292-20(2) ITAA 1997 292-25 ITAA 1997 292-80 ITAA 1997 292-85 ITAA 1997 292-85(2) ITAA 1997 292-85(3) ITAA 1997 292-85(4) ITAA 1997 292-90 ITAA 1997 292-465 ITAA 1997 292-465(2) ITAA 1997 292-465(3) ITAA 1997 292-465(3)(b) ITAA 1997 292-465(4) ITAA 1997 292-465(5) ITAA 1997 292-465(6) ITAA 1997 292-465(6)(a) ITAA 1997 292-465(6)(b) ITAA 1997 995-1(1) IT(TP)A 1997 292-20 IT(TP)A 1997 292-80 Superannuation (Excess Concessional Contributions Tax) Act 2007 Superannuation (Excess Concessional Contributions Tax) Act 2007 5 Superannuation (Excess Non-concessional Contributions Tax) Act 2007 Superannuation (Excess Non-concessional Contributions Tax) Act 2007 5 Superannuation Guarantee (Administration) Act 1992 Superannuation Guarantee (Administration) Act 1992 23(6) Taxation Administration Act 1953 Sch 1 388-50

Related public rulings	
Related practice statements	
Case references	<p>Beadle v. Director-General of Social Security (1985) 60 ALR 225</p> <p>Drachnikov and Another v. Centrelink and Another (2003) 75 ALD 134</p> <p>Minister For Community Services and Health and Another v. Chee Keong Thoo (1988) 78 ALR 307</p> <p>Tefonu Pty Ltd v. Insurance and Superannuation Commissioner (1993) 30 ALD 455</p>
Other references	<p>A Plan to Simplify and Streamline Superannuation Tax Laws Amendment (Simplified Superannuation) Act 2007</p> <p><i>Application - excess contributions tax determination</i> (NAT 71333-10.2007)</p> <p>ATO Receivables Policy</p>
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