TA 2008/12 - Non-cash contributions to superannuation funds

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Australian Government
Australian Taxation Office

Taxpayer Alert

TA 2008/12

Note: *The Taxation Office view on the arrangement is set out in Taxation Ruling TR 2010/1*

FOI status: may be released

Taxpayer Alerts are intended to be an "early warning" of significant new and emerging tax planning issues or arrangements that the ATO has under risk assessment.

Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform ATO officers of new and emerging tax planning issues. Not all potential tax planning issues that the ATO has under risk assessment will be the subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the ATO.

Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which the ATO considers give rise to taxation and superannuation regulatory issues. These issues will generally require more detailed analysis to provide an ATO view to taxpayers.

The developers and marketers of an arrangement which is the subject of a Taxpayer Alert should provide the full facts of the arrangement to the ATO to enable the ATO to finalise its view.

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert might obtain their own advice or contact the ATO to seek guidance in relation to the superannuation regulatory issues covered in the Alert.

This Taxpayer Alert is issued under the authority of the Commissioner.

TITLE: Non-cash contributions to superannuation funds

This Taxpayer Alert is concerned with arrangements that have features which are designed to allow a member of a superannuation fund to circumvent the new superannuation contributions limits that came into effect from 1 July 2007. The arrangements will mainly involve self-managed superannuation funds, but need not be limited to them.

DESCRIPTION

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

1. A person makes an in specie contribution to the fund and the fund does not recognise and record the contribution at the true market value of the asset in its accounts.

2. A person (e.g. an employer of members of the fund) pays expenses on behalf of the fund and does not subsequently seek reimbursement from the fund. Alternatively, the fund

pays the expense but seeks reimbursement from another person (e.g. an employer of members of the fund).

3. A person, usually a member of the fund or their associate, makes improvements to an asset of the fund to increase the asset's value without seeking reimbursement from the fund. For example, the fund owns real property and a member pays the cost of improvements to that property.

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

FEATURES WHICH CONCERN US

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

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

2. the contributor is subject to the correct amount of tax (whether that is as a result of the application of the ordinary income, trading stock or capital gains tax provisions of the ITAA 1997) when an asset is contributed to the fund;

3. the general value shifting regime in Division 725 of the ITAA 1997 applies when rights in respect of particular investments by the fund are varied and value shifting occurs; and

4. the exclusion of superannuation contributions from fringe benefits tax properly applies if the contribution is for the benefit of an employee.

Trustees are also reminded that when assets other than cash are transferred to a superannuation fund they must take any steps necessary to ensure the fund's ownership of the assets is recognised. Trustees should also ensure that they have not breached the regulatory provisions of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

Trustees should also note that some of these arrangements may subsequently lead to the derivation of non-arm's length income under Division 295 of the ITAA 1997.

The Tax Office is examining these arrangements and will issue further guidance about the above issues. The Tax Office will also work with auditors of self-managed superannuation funds to determine the circumstances when these arrangements may result in breaches of the regulatory provisions of the SIS Act that must be reported to the Tax Office.

Subject References:
self-managed superannuation fund
superannuation contribution
in specie contribution
capital gains tax
fringe benefits tax
general value shifting regime
non-arm's length income

Legislative References:
Income Tax Assessment Act 1997
Superannuation Industry (Supervision) Act 1993

Related Taxpayer Alerts:

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