



# Superannuation Contributions

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## Overview

On the 25th of February 2010, Taxation Ruling 2010/1 was released in respect to Contributions to Superannuation Funds. TR 2010/1 is extensive and clarifies a range of issues that relate to superannuation Contributions.

In particular unless a contribution to an SMSF is correctly made there is potential for unintended consequences that could amount to an excess benefit tax.

What follows is an overview of the Superannuation Contributions as outlined in the TR 2010/1.

## What is a Contribution

The Australia Taxation Office (ATO) considers a contribution to be *"anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members of the fund in general"*.

The ATO relies on an example of what is not a contribution. For example a tenant that improves a landlord's premises would generally be doing it for their own purposes, rather than providing for someone's superannuation benefits. An investment return from a fund's interest in a company or trust would generally not be a superannuation contribution as it is a return on its invested moneys. However, a distribution

from a discretionary trust could be considered a concessional superannuation contribution. Such an amount is not income, profit or gain from an investment. The ATO would consider this to be for the purpose of providing benefits for the fund's members. Nevertheless a distribution from a discretionary trust to a self managed superannuation fund ('SMSF') could be potentially subject to the excess contributions tax regime that can potentially result in a 93% tax rate with a further tax penalty being the non-arm's length income (that is special income) provisions that could apply at a 45% tax rate.

## Sole Purpose in Making the Contribution

The ATO has also confirmed that the provision of superannuation benefits must be the sole purpose in making a contribution for the contribution to be tax deductible. However, incidental consequences such as obtaining a tax deduction will not matter. TR2010/1 contains many other items of interest and useful examples.

There would be a various number of situations where non-concessional contributions made on behalf of a member have been treated as concessional contributions by the ATO. These situations could involve a family trust or company making a contribution directly to the fund and reflecting the amount



as a loan to the member by way of journal entry.

### **Constructive Receipt of Payments**

While the ATO acknowledges in TR 2010/1 that a constructive receipt can occur where a payment is made to a third party (for example, an insurer), on behalf of a SMSF in satisfaction of the SMSF's liability, the ATO appears to be applying a strict test in administering the superannuation contribution rules. That is to say the ATO appears to be requiring contributions to be made directly by the member or it will simply treat the contribution as a concessional contribution. This results in the contribution being subject to tax in the SMSF and could result in excess contributions tax.

In order to satisfy a constructive receipt or payment, there typically has to be a liability that is offset, eg where a beneficiary has a credit loan account from a family trust and directs the trustee to pay a contribution on their behalf with a consequent reduction to their loan account balance.

The above risks are highlighted in the decision of The Jendahl

Investments Pty Ltd v FCT [2009] AATA 881. The tribunal held that Mr Jensen had made concessional contributions as he was not able to provide evidence such as bank statements to prove the contributions were personal. The ATO's assessments of around \$356,000 on the amounts transferred directly from his family trust into his SMSF succeeded even though the ATO only provided hypothetical alternative scenarios.

There are many people who may retain a substantial part of their savings or share portfolio in their family trust who similarly wish to make personal or non-concessional contributions to their superannuation funds. However, given the above the prudent course is to make sure the cash or shares are transferred directly to the beneficiary who in turn then transfers the amount directly to the SMSF.

In particular, greater care should be exercised in managing contributions if it is sourced from a family trust or company. For more information about how ili can assist you to adopt skills and implementation tools relating to SMSFs please visit our website [www.ili.com.au](http://www.ili.com.au)

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