

## Excess contributions tax

### Prevention is better than cure

The trap of excess contributions tax ('ECT') may await those who have put in place pre-set measures to contribute, without regard to the now reduced caps for 2012–13 and 2013–14 financial years.

Of course, if you were 50 years old or over, your annual concessional contributions cap for the 2009–10, 2010–11 and 2011–12 financial years was \$50,000.

For the 2012–13 and 2013–14 financial years it is \$25,000. Care should be taken so that pre-set salary sacrifice or similar arrangements do not inadvertently cause a contributions cap breach.

### When is a contribution made?

Numerous Administrative Appeals Tribunal ('AAT') decisions show that contributions are generally 'made' when they are *received* by the fund's account. This was the approach taken in *Peaker and FCT*, *Chantrell and FCT* and *Rawson and FCT*. These decisions show the difficulties of mounting an argument based on electronic funds transfers or BPAY transfers very late in the financial year, where the money was received by the fund in the new financial year.

### Commissioner's discretion

The ATO can disregard or reallocate the contributions where there are special circumstances.

### AAT — reasonable foreseeability

'Special circumstances' typically include a consideration of whether — when the contribution was made — it was reasonably foreseeable that there would be excess concessional or excess non-concessional contributions.

In *Longcake and FCT*, Mr Longcake was assessed for ECT, despite a specific agreement between Mr Longcake and his employer that required his employer to finish making payments to the fund by the end of June 2009. The tribunal found that Mr Longcake had 'expected his employer to comply with the terms as had been agreed' and as a result, it was not reasonably foreseeable that Mr Longcake would exceed the cap. The taxpayer was successful.

## ATO practice statement — special circumstances

The ATO has issued materials such as the Practice Statement Law Administration 2008/1 on the exercise of the discretion. It confirms that circumstances should be outside the ordinary course in order to constitute special circumstances. It states it is relevant whether the imposition of the ECT would be 'unjust, unreasonable or otherwise inappropriate'. Financial hardship, incorrect professional advice and ignorance of the law do not generally amount to special circumstances.

### AAT decisions — special circumstances

Special circumstances have been construed quite narrowly. In *Tran and FCT* it was stated that 'circumstances will not be special unless they are out of the ordinary ... an innocent mistake or ignorance of the law does not, in itself, constitute special circumstances.'

In *Bornstein and FCT*, Mr Bornstein was the sole director and shareholder of a company. Broadly, his company paid amounts into his fund near the start of a new financial year, when Mr Bornstein was under the impression the amounts could be backdated to the prior financial year. The following, together, were held to be a 'perfect storm' of special circumstances:

- The taxpayer sought advice from his accountant. It was relevant that he was conscious that he had obligations and was being 'diligent in attempting to comply with them'.
- There was apparent ambiguity on the ATO website (there was no requirement, however, that the ATO had to be 'at fault').
- The Commissioner did not alert him to the true position before the further payment that exceeded the cap was made. Also, the behaviour of the taxpayer's fund did not give him any reason to question what he had done.

### \$10,000 limit

The Government has introduced a concession from the strict application of the ECT system for individuals who, for the first time, exceed their concessional contributions cap by \$10,000 or less on or after 1 July 2011. People who satisfy these criteria can request their excess concessional contributions be withdrawn from their fund and (indirectly) refunded to them with the excess amount taxed at their marginal tax rate.

## De minimis test

In March 2012, the ATO Superannuation Consultative Committee discussed the issue of small breaches of the concessional contribution cap causing excess non-concessional contributions, in turn leading to large ECT liability. In such circumstances, the ATO will be taking a practical approach. They will apply a *de minimis* threshold so that such circumstances will not lead to a large ECT liability. The ATO stated that this applies to all cases of this nature, including past cases. However, no threshold criteria have been made publicly available.

## SMSF corporate trustees

### Lower ASIC fees and ease in asset protection

Companies set up to act solely as a trustee of a regulated superannuation fund can enjoy the benefit of reduced annual ASIC fees (\$43 compared to \$230) *but only if they also have specific provisions in their constitutions.*

Further, a sole purpose corporate trustee provides greater asset protection as it can avoid situations where creditors of a company sue the company which acts in multiple capacities. Hence it avoids the company needing to prove that certain assets are SMSF assets rather than company assets.

### Special provisions required

However, we find that many SMSF trustee companies do not have a constitution with the provisions required by the *Corporations (Review Fees) Regulations 2003* (Cth) in order to obtain the fee reduction. As such, the company are liable for the

full annual review fee and back payments for past underpaid fees.

## Flexibility also regarded

Even if a constitution contains the special provisions, it may be inflexible in other ways. Many constitutions are 'all-purpose' and pay little regard to SMSF aspects. There are numerous planning issues that should also be included, such as the ability to include 'guardian' shareholders where there is a need for a guardian to step in, and allowing for successor directors for smooth succession planning.

## The DBA constitution

Some of the features of DBA's constitution that may not be available from other suppliers are as follows:

- Provisions allowing a director to nominate a successor director who can take their place on death or loss of capacity.
- The ability to issue 'SMSF shares' that reflects the 'sole purpose company' requirements.
- Numerous provisions to help protect SMSFs to comply with the raft of rules that are often overlooked in many other constitutions. We include a handy 'SMSF Guide' that points to the relevant provisions in the constitution that specifically apply to SMSF trustees.
- Flexibility to use the company for other purposes (eg, as a trustee of family trust). Also, there is no need to prepare extensive corporate documents for the company to take on another role as required under most other constitutions.

Many constitutions, unfortunately, do not address these issues.

## DBA Company Packages

<b>New company</b>	\$800 (+\$50 for hardcopy)
<b>Constitution upgrade</b>	\$500 (+\$50 for hardcopy)
<b>Successor director appointment</b>	\$400 (+ \$300 for each additional director)
<b>New SMSF + new company</b>	\$1,100 (+\$100 for hardcopy)

For more information, please visit [www.dbalawyers.com.au](http://www.dbalawyers.com.au)

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