

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

23 – 24 February 2011

Question No: AET 17

Topic: Excess Contributions Tax

Hansard Page: Written

Senator Williams asked: Excess Contributions Tax on superannuation funds occurs when a member contributes a sum in excess of the permitted limits to a superannuation fund. It can happen where a member or his advisor contributes more than the allowable limit by mistake. As at the 31st of October, 2010, the National tax Liaison Group had received 524 applications for the exercise of discretion to not impose excess contributions tax, and 66 had been approved in part or full. The Tax Office has issued a Fact Sheet which indicates that their discretion will only be exercised in extreme cases.

For example, I am told an elderly man who was suffering from a range of medical conditions inadvertently paid more money in than allowed and was forced to pay \$13,000 in Excess Contributions tax.

1. How does the Tax Office determine who should get leniency and who should not?
2. Is there a set penalty for each offence?
3. Should not the penalties be downscaled if it can be proven it was genuine mistake?
4. Are circumstances as outlined above taken into account?
5. Is there an appeal mechanism?

Answer:

1. The Commissioner of Taxation can exercise a discretion to disregard or reallocate superannuation contributions for a financial year. Should this discretion be exercised, this would either reduce the level of contributions below the caps (resulting in no excess contributions tax liability) or reduce the amount of excess contributions tax.

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By law, this discretion may only be exercised where the Commissioner considers there are special circumstances and the decision is consistent with the objectives of the relevant tax laws.

The meaning of the expression 'special circumstances' has been considered in case law in a variety of legislative contexts. The ATO applies the principles arising from these cases to the facts of each request. In summary, special circumstances are circumstances that make a case different from the ordinary or usual case.

Circumstances are special only if the ordinary application of the law would result in an unjust, unfair or otherwise inappropriate outcome. Further guidance on how the ATO applies the law is detailed in *PSLA 2008/1 The Commissioner's discretion to disregard or reallocate concessional and non-concessional contributions for a financial year*.

2. It is not an offence to make contributions that exceed the superannuation contribution caps and no penalties are imposed for doing so. Contributions exceeding the superannuation contributions caps are subject to the imposition of a tax.

Excess concessional contributions are taxed at 31.5% on the amount by which the cap is exceeded. Excess non-concessional contributions are taxed at 46.5% on the amount by which the cap is exceeded.

Excess concessional contributions also count as non-concessional contributions, and individuals may exceed both caps in the same year.

3. There is no penalty for making contributions in excess of the superannuation contributions caps. The ATO must impose the applicable rate of tax where an excess contributions tax assessment is made.

4. Yes. This will occur when an application is made for the Commissioner to exercise his discretion to disregard or reallocate certain contributions. The ATO looks at how such factors affected the contributions made. The ATO has published guidance on its website to help taxpayers understand whether their applications are likely to be successful, although each application for Commissioner's discretion is determined on its own particular facts. The ATO's web material includes scenarios of taxpayers who were ill, under stress or grieving at the time of the relevant contribution. The web content can be found at ato.gov.au by searching *Excess contributions tax – applying to have your contributions disregarded or reallocated*.

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5. Yes. Where taxpayers disagree with an ATO decision to refuse to exercise the discretion, they may lodge an objection to the subsequent assessment of excess contributions tax. They can do so on the grounds that they are dissatisfied with the original discretion decision.

Where they are dissatisfied with the outcome of the objection and the application for the exercise of the discretion was made on or after 17 November 2010, they can request a review of the decision by the Administrative Appeals Tribunal.

Where an application for the exercise of the Commissioner's discretion was made before 17 November 2010, taxpayers will not be able to seek a merits review of the exercise of the discretion by the AAT. They will be limited to a review by the Courts on administrative law grounds.