

Superannuation Guarantee Determinations do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Determinations and Rulings.

Superannuation Guarantee Determination

Can the allocation of surpluses in accumulation funds count as employer contributions?

1. Yes, in limited circumstances the transfer of money from an accumulation fund's reserve account, or surplus, to the account of a member will be an employer contribution for the purposes of section 23 of the *Superannuation Guarantee (Administration) Act 1992*.
2. Because there is not an actual payment by the employer, there will only be an employer contribution if the employer can demonstrate an offsetting entitlement to be paid an equivalent amount by the trustee (*East Finchley Pty Ltd v. FC* 89 ATC 5280 at 5290-5291, (1989) 20 ATR 1623 at 1634-1635; *FC of T v. P. Iori & Sons Pty Ltd* 87 ATC 4775 at 4780, 4788-4789, (1987) 19 ATR at 206-207, 216). Therefore, it is not sufficient that the deed merely makes provision for the use of the surplus for the benefit of members - the employer must legally be entitled to withdraw those funds from the reserve account *for its own benefit*. This entitlement must be current. A past entitlement which has lapsed is not sufficient, nor is an entitlement which is not yet current because certain formalities or prerequisites must be satisfied first. All the requirements of the fund's trust deed and any relevant law necessary to allow the employer to withdraw those surplus funds immediately must be satisfied.
3. If these circumstances are met, the Commissioner will treat a transfer, from the reserve account to a member's account, at the direction of the employer as a contribution by that employer for superannuation guarantee purposes.
4. For income tax purposes, the Commissioner will treat the transfer as if the money had been paid to the employer by the trustee and then recontributed for the benefit of the employee. Therefore, the payment will be deductible to the trustee under section 279C of the *Income Tax Assessment Act 1936* (ITAA), although this will no longer be the case after 1 July 1995. The payment will be assessable in the employer's hands under section 82AAQ of the ITAA and the amount recontributed will be an allowable deduction to the employer under section 82AAC of the ITAA if the conditions set out in that section are satisfied. The amount would also be assessable to the trustee under section 274 of the ITAA. Therefore, until 1 July 1995, the net income tax position of the employer and the trustee will be neutral if the conditions set out in section 82AAC are satisfied.

5. For superannuation guarantee purposes, money in a fund's reserve account can count towards reducing an employer's charge percentage, without the requirements of paragraph 2 being satisfied, *if the fund is a defined benefit fund, or is an accumulation fund which has elected under section 6B SGAA to be treated as a defined benefit fund.* The fact that the fund is a defined benefit fund, or elects to be treated as such, will not affect the income tax treatment of the money in the reserve account.

Commissioner of Taxation

16/6/94

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Related Determinations:

Related Rulings:

Subject Ref: contribution; surplus; accumulation fund; reserve account

Legislative Ref: SGAA 6B; SGAA 23; ITAA 82AAC; ITAA 82AAQ; ITAA 274; ITAA 279C

Case Ref: FC of T v. P. Iori & Sons Pty Ltd 87 ATC 4775, (1987) 19 ATR 201; East Finchley Pty Ltd v. FC of T 89 ATC 5280, (1989) 20 ATR 1623

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