SGD 2006/D1 - Superannuation guarantee: can an entity that is an employer of an individual for superannuation guarantee purposes only because of subsection 12(3) or 12(8) of the Superannuation Guarantee (Administration) Act 1992 enter into an effective 'salary' sacrifice arrangement with the individual such that the contributions to a complying superannuation fund or Retirement Savings Account made under the arrangement in lieu of 'salary' for the individual are employer contributions?

This cover sheet is provided for information only. It does not form part of *SGD 2006/D1 - Superannuation guarantee: can an entity that is an employer of an individual for superannuation guarantee purposes only because of subsection 12(3) or 12(8) of the Superannuation Guarantee (Administration) Act 1992 enter into an effective 'salary' sacrifice arrangement with the individual such that the contributions to a complying superannuation fund or Retirement Savings Account made under the arrangement in lieu of 'salary' for the individual are employer contributions?*

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Draft Superannuation Guarantee Determination

Superannuation guarantee: can an entity that is an employer of an individual for superannuation guarantee purposes only because of subsection 12(3) or 12(8) of the *Superannuation Guarantee (Administration) Act 1992* enter into an effective 'salary' sacrifice arrangement with the individual such that the contributions to a complying superannuation fund or Retirement Savings Account made under the arrangement in lieu of 'salary' for the individual are employer contributions?

Preamble

This document is a draft for public comment. As such, it represents the preliminary, though considered, views of the Australian Taxation Office. This draft should not be relied on by taxpayers and practitioners.

1. Yes.

2. If the 'salary' sacrifice arrangement is effective, the contributions are properly considered to be made by the employer for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (SG(A)A). This conclusion would extend to sections 82AAC to 82AAF of the *Income Tax Assessment Act 1936* (ITAA 1936) (which deal with deductions for employer contributions) and would also ensure that the contributions are not considered to be income in the hands of the employee.

Explanation

Background

3. Subsection 12(3) of the SG(A)A deems a person working under a contract that is wholly or principally for labour to be an employee for the purposes of that Act. Subsection 12(8) of the SG(A)A deems certain people working in the fields of entertainment, art and sports to be employees for the purposes of that Act.

4. Section 11 of the SG(A)A deems payments made under a relevant contract or for relevant work to a person covered by subsection 12(3) or 12(8) to be 'salary or wages' of the person for SG(A)A purposes. The word 'salary' is used in the extended superannuation guarantee sense in this Determination.

5. Taxation Ruling TR 2001/10 sets out the Commissioner's view on the tax consequences for employees (within the ordinary, common law meaning of the expression) who enter into effective salary sacrifice arrangements. In essence, a salary sacrifice arrangement involves the parties agreeing in advance that the employee will receive at least part of his or her remuneration in a form other than salary or wages. The main assumption made by the parties to a salary sacrifice arrangement is that the employee is then taxed under the income tax laws only on the reduced payment amount.

6. By its terms, TR 2001/10 does not extend to employees within the extended definition of that expression in subsections 12(3) and (8) of the SG(A)A ('SG employees').[1] The question arises whether the reasoning in TR 2001/10 that supports the income tax consequences of effective salary sacrifice arrangements for common law employees in relation to superannuation contributions would also apply to similar arrangements entered into between SG employees and their employers.

Effective salary sacrifice arrangements

7. The Commissioner considers that the distinction drawn in TR 2001/10 between 'effective' and 'ineffective' salary sacrifice arrangements (see paragraphs 21 to 22 and 27 to 31 of that Ruling[2]) applies for the same reasons as set out in those paragraphs to arrangements that are the subject of this Determination.

8. Occasionally an SG employee may receive an amount of remuneration (or be taken to have received it when it is applied or dealt with for him or her[3]) before he or she has earned the entitlement to receive it. In such cases, the Commissioner considers that the sacrifice arrangement would need to have been made before the time of receipt[4] to be 'effective'.

9. The Commissioner considers that it would be most uncommon for a common law employee or an SG employee covered by subsection 12(3) of the SG(A)A to receive remuneration before he or she has earned the entitlement to receive it, but that it may be less uncommon for this to occur for an SG employee covered by subsection 12(8).

Employer superannuation contributions

10. As stated in TR 2001/10,[5] the Commissioner considers that the scheme of superannuation and taxation law relies on the view that superannuation contributions made by an employer under an effective salary sacrifice arrangement are the employer's contributions and are:

- not the income of the employee; and
- not employee contributions.

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[1] See paragraphs 2 and 3 of TR 2001/10.
[2] Please note that paragraphs 27 and 28 of 2001/10 have been amended – see TR 2001/10A.
[3] Under subsection 6-5(4) or 6-10(3) of the *Income Tax Assessment Act 1997*.
[4] Including receipt taken to have occurred under subsection 6-5(4) or 6-10(3) of the *Income Tax Assessment Act 1997*.
[5] See paragraphs 101 to 107 of TR 2001/10.

11. In particular, paragraph 104 of TR 2001/10 observes that the purpose of the SG(A)A would be frustrated if superannuation contributions made by an employer were regarded as income of the employee that the employee is in reality contributing.

12. The purpose of the SG(A)A would be equally frustrated, so far as SG employees are concerned, if a view contrary to that set out in paragraph 10 of this Determination were applied to SG employees. The reasoning in paragraphs 105 and 106 of TR 2001/10 applies with the same force to the case of the SG employees.

13. In the Commissioner's view, it follows that those contributions to a complying superannuation fund or a Retirement Savings Account made on behalf of a SG employee by their employer:

- reduce the employer's charge percentage under the SG(A)A in respect of the employee for the quarter concerned;
- give rise to a deduction under sections 82AAC to 82AAF of the ITAA 1936 subject to the usual conditions in those provisions; and
- are not assessable income of the employee under the income tax laws,

if they are made under an effective salary sacrifice arrangement (within the meaning of TR 2001/10) between the employer and the employee.

14. This reasoning does not apply to contractors who are not deemed to be employees under section 12 of the SG(A)A.

Other kinds of benefits

15. An effective salary sacrifice arrangement for an SG employee may give rise to non-salary benefits other than employer superannuation contributions. The income tax treatment of such benefits in the hands of the employee is beyond the scope of this Determination.

Date of effect

16. It is proposed that, when the final Determination is issued, it will apply to quarters and income years commencing both before and after its date of issue. However, the final Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

17. We invite you to comment on this draft Superannuation Guarantee Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

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Commissioner of Taxation
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Related Rulings/Determinations:

TR 92/20; TR 2001/10

Subject references:

- assessable income
- employee
- employer
- salary sacrifice
- superannuation guarantee

Legislative references:

- ITAA 1936 82AAC
- ITAA 1936 82AAD
- ITAA 1936 82AADA
- ITAA 1936 82AAE
- ITAA 1936 82AAF
- ITAA 1997 6-5(4)
- ITAA 1997 6-10(3)
- SGAA 1992 11
- SGAA 1992 12(3)
- SGAA 1992 12(8)

ATO references
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