TR 2005/D9 - Income tax: deductibility of personal superannuation contributions

This document has been finalised by TR 2005/24.

Draft Taxation Ruling

Income tax: deductibility of personal superannuation contributions

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

What this Ruling is about

Class of person/arrangement

1. This Ruling applies to a person who makes personal contributions to a complying superannuation fund or a Retirement Savings Account (RSA). It considers the circumstances in which those personal superannuation contributions qualify for an income tax deduction under Subdivision AB of Division 3 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936).

2. The Ruling provides guidelines for determining when a person is an 'eligible person' in terms of subsection 82AAS(2) of the ITAA 1936 and explains how the eligible person test is modified under subsection 82AAS(3) of the ITAA 1936.

3. The Ruling also outlines the notice requirements that need to be satisfied in order to obtain an income tax deduction for personal contributions to a superannuation fund or RSA and outlines the superannuation deduction limits.

4. Unless otherwise stated all legislative references are to the ITAA 1936.

Date of effect

5. It is proposed that when the final Ruling is issued, it will apply from the date of its issue.

Previous Rulings

6. This Ruling replaces TR 96/25. TR 96/25 is withdrawn from the date of issue of this Ruling.

Ruling

Deduction

7. A taxpayer is entitled to a deduction for personal superannuation contributions under section 82AAT if the following conditions are met:

(a) the taxpayer is an 'eligible person' in relation to the year of income;

(b) the taxpayer made the contributions in order to obtain superannuation benefits;

(c) the fund is a complying superannuation fund; and

(d) the taxpayer has given notice under subsection (1A) in respect of the contribution and the trustee of the fund has acknowledged that notice under subsection (1A).

Eligible person test

8. Under subsection 82AAS(2), a taxpayer is an 'eligible person' in respect of a year of income unless it was reasonable to expect that superannuation benefits would be provided for the taxpayer in the event of his or her retirement or to dependants in the event of his or her death (paragraph 82AAS(2)(a)). In addition, to the extent to which those benefits would be attributable to the year of income, the benefits would be wholly or partly attributable to contributions made, or required to be made in relation to the year of income:

- to a superannuation fund of the taxpayer; and
- by someone other than the taxpayer; and
- in connection with the eligible employment of the taxpayer in the year of income; or

the benefits would, in whole or in part, be paid in relation to the year of income:

- out of money (other than contributions made to a superannuation fund) of someone other than the taxpayer; and
- in connection with the eligible employment of the person in the year of income.

9. To come within the definition of 'eligible person' depends on whether or not there were contributions made or required to be made in respect of the eligible employment of the taxpayer (refer to Examples 2, 3, 5, 6 and 7). Subsection 82AAS(3) contains a threshold test known as the ten percent rule, which allows a taxpayer to receive income from eligible employment, be entitled to employer superannuation support, and still be determined an 'eligible person'. As such, the taxpayer would be entitled to deductions for personal superannuation contributions.

Reasonable to expect that superannuation benefits would be provided

10. Ordinarily, if a taxpayer has ceased employment with a former employer or is in receipt of a pension from his or her former employer's superannuation fund, there will be no reasonable likelihood that future superannuation contributions will be made by that employer.

11. However, if the employer has only temporarily ceased contributions, for example, because adequate provision has been made in previous years known as a 'contribution holiday' or, the taxpayer has taken an extended period of leave without pay and receives employer superannuation support in respect of that period, then there will be a reasonable likelihood that the employer will make future superannuation contributions for the benefit of the taxpayer.

12. Ordinarily, a taxpayer will not be an 'eligible person' because it is reasonable to expect that superannuation benefits would be provided for the taxpayer by another person in respect of a year of income if:

- the person's employer actually makes contributions to a superannuation fund for the benefit of the taxpayer in respect of that year of income;
- a person has an obligation to make superannuation contributions on behalf of another person in connection with eligible employment in respect of that year of income;
- the taxpayer is a member of a public sector superannuation scheme constituted by or under a law of the Commonwealth or a State or Territory which provides superannuation benefits to the taxpayer upon his or her retirement or death where those benefits can be expected to take into account the taxpayer's service in that year of income; or
- another person makes deposits for the benefit of the taxpayer into the Superannuation Holding Accounts Special Account (subsection 82AAS(8)) in respect of that year of income.

13. A person will have an obligation to make contributions to a superannuation fund for the benefit of a taxpayer if he or she is required to:

- make contributions to a superannuation fund for the benefit of the taxpayer under any occupational superannuation arrangement, an award, or under the terms of a trust deed; or
- make contributions to a superannuation fund for the benefit of the taxpayer under the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) or pay the Superannuation Guarantee Charge (SGC) in respect of the taxpayer (subsections 82AAS(4), (5), (6) and (10) of the SGAA 1992).

14. In broad terms the provisions of subsections 82AAS(4), (5), (6) and (10) of the SGAA 1992 operate to require amounts paid in accordance with the provisions of sections 65, 65A, 66, and 67 of the SGAA 1992 to constitute superannuation benefits for the purposes of subsection 82AAS(2).

15. There are only very limited circumstances under the provisions of sections 27 and 28 of the SGAA 1992 where an employer will not be under an obligation to provide superannuation support for the benefit of an employee. Examples include employees who are:

- 70 years of age or older;
- paid less than $450 in a month; or
- working part-time for the whole year and are under 18 years of age.

16. In addition, under subsection 19(4) of the SGAA 1992 a person is able to elect not to receive superannuation guarantee contributions from their employer where the person has reached the reasonable benefit limit. In this situation the person may not receive any employer superannuation (excluding obligations under an award or industrial agreement or Australian workplace agreement) from eligible employment. Even though this means that the person could be viewed as an 'eligible person' they are specifically precluded from deducting personal contributions through the operation of subsection 82AAT(1F). That subsection states that:

> If a person has given his or her employer statements under subsection 19(4) of the *Superannuation Guarantee (Administration) Act 1992*, the person is not entitled to a deduction under this section, in his or her assessment for the year of income, in respect of any contribution made to a complying superannuation fund, or to an RSA, during:
>
> (a) the quarter (within the meaning of the Act) in which the statements are given; or
>
> (b) any later quarter.

17. Further information about 'eligible person' is contained in the Explanation section at paragraphs 35 to 46.

The ten percent rule

18. The reference to superannuation benefits in subsection 82AAS(2) does not include benefits provided for the taxpayer in respect of eligible employment if the taxpayer's income from that eligible employment is less than ten percent of his or her total assessable income and reportable fringe benefits for the year (subsection 82AAS(3)) (refer to Examples 1, 4, 8, 9 and 10).

19. In determining whether a person is an 'eligible person', assessable income, exempt income and reportable fringe benefits are included for the purposes of applying the ten percent rule. Sections 6-5, 6-10 and 6-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) set out the rules for working out what amounts are included in a taxpayer's assessable income. According to those sections, a taxpayer's assessable income includes income in relation to ordinary concepts and statutory income, but does not include exempt income.

20. Assessable income attributable to eligible employment includes salary or wages and the assessable amount of Eligible Termination Payments (ETPs) from the employer. It does not include payments from other sources such as ETPs from superannuation funds (including an employer sponsored fund) or approved deposit funds.

21. However exempt income attributable to eligible employment includes payments of an income nature which are specifically exempt from tax, for example, pay and allowances of part-time members of the defence force reserves are exempt from income tax under section 51-5 of the ITAA 1997. Exempt income does not include the tax free amount of a bona fide redundancy payment, approved early retirement payments, and the post 30 June 1994 invalidity component (section 27CB).

22. A fringe benefit in broad terms is a benefit provided to an employee, but in a different form to salary or wages. According to the Fringe Benefit Tax (FBT) legislation, a fringe benefit is a benefit provided in respect of employment to a current, former, or future 'employee'.

23. Employers subject to FBT are required to record the grossed-up taxable value of fringe benefits on the payment summary of any employee who receives relevant benefits with a total taxable value exceeding $1,000.

24. Any superannuation contribution that is made for the benefit of the person and relates to that eligible employment will not preclude the person from being an 'eligible person', if the person can satisfy the ten percent rule.

25. When applying the ten percent rule, the term particular eligible employment, as it applies in subsection 82AAS(3), includes multiple periods of employment by virtue of paragraph 23(b) of the *Acts Interpretation Act 1901*. That paragraph provides that words in the singular number include the plural and vice versa, unless the contrary intention appears. The Tax Office considers that a contrary intention does not appear here.

26. On this basis, under subsection 82AAS(3), income received by the person for the same or a combination of periods of employment from the same or different employers for the year of income is aggregated in the calculation and is not treated separately.

27. Income from eligible employment, where the employer is not required to provide any superannuation support under the SGAA 1992 in the year of income, will not be aggregated with other employment income for subsection 82AAS(3) purposes.

28. If the total of a person's assessable income, exempt income, and the reportable fringe benefits total attributable to eligible employment (adopting the interpretation in paragraphs 26 and 27) is less than ten percent of the person's assessable income and reportable fringe benefits total, then the person is an 'eligible person' for purposes of subsection 82AAS(2). Conversely, if the amount is greater than ten percent, then the person is not an 'eligible person' for purposes of subsection 82AAS(2) and is not entitled to a deduction for personal superannuation contributions made to a complying superannuation fund.

29. Further information about the ten percent rule is contained in the Explanation section at paragraphs 47 to 54.

Notice requirements

30. If a taxpayer is an 'eligible person', he or she must give a written notice to the trustee of each fund to which he or she has made a contribution and receive an acknowledgment of the notice from the trustee in order to obtain a deduction for personal superannuation contributions. The acknowledgment must be given by the trustee to the person without delay (subsection 82AAT(1A)) and before the Commissioner makes an assessment of the person's income for the relevant year (subsection 82AAT(1E)). However, if the person later receives the acknowledgement, the Commissioner may amend the assessment to allow the deduction.

31. The specific information that must be provided by the person for the purposes of subsection 82AAT(1D) concerning the form of the notice is set out in Taxation Determination TD 93/224.

Deductible amount and limits

32. If a taxpayer meets the requirements of subsection 82AAT(1) they are entitled to an income tax deduction which must not exceed the lesser of:

- the sum of the first $5,000 of the personal superannuation contributions made and 75% of the contributions over $5,000 (paragraph 82AAT(2)(a)); or
- the taxpayer's aged-based deduction limit (paragraph 82AAT(2)(b)).

33. The deduction limit is based on the person's age at the time that the last contribution for the income year was made (subsection 82AAT(2A)). These amounts are indexed each year (subsection 82AAT(2B)).

34. A taxpayer is not entitled to an income tax deduction where the taxpayer:

- is aged 70 and over and the contributions were not paid on or before the day that is 28 days after the end of the month in which the taxpayer turned 70 years of age (subsection 26-80(3) of the ITAA 1997);
- under the age of 18 and has not received employer or business income (subsection 26-80(3) of the ITAA 1997); or
- is entitled to a Government co-contribution in respect of the contribution made (subsection 26-80(3) of the ITAA 1997).

Explanation

'Eligible person'

35. A person is an eligible person in relation to a year of income unless:

- it was reasonable to expect that superannuation benefits would be provided for the relevant person or for dependants of the relevant person; and
- those benefits would be attributable to the year of income:
  - (i) from contributions made, or required to be made:
    - (A) to a superannuation fund of the relevant person;
    - (B) by someone other than the relevant person; and

(C) in connection with the eligible employment of the relevant person in the year of income; or

(ii) the benefits would, in whole or in part, be paid in relation to the year of income:

(A) out of money (other than contributions made to a superannuation fund) of someone other than the relevant person; and

(B) in connection with the eligible employment of the person in the year of income.

36. In broad terms, this means that if the person has not received or, is not entitled to receive any employer superannuation support for the year of income they would be an 'eligible person'. An exception applies where the person meets the ten percent rule.

37. Further information about the exception is contained at paragraphs 47 to 54.

Reasonable to expect

38. The meaning of the term reasonable to expect in the context of determining whether a particular person is an 'eligible person' in terms of subsection 82AAS(2) has been decided in a number of cases. Two of these cases were decided prior to the introduction of the SGAA 1992 and the provisions of subsection 82AAS(2) as at 1 July 1992.

39. In *FC of T v. Arklay* 89 ATC 4563; (1989) 20 ATR 276; 85 ALR 368; (1989) 22 FCR 298 (*Arklay's* case), the applicant commenced employment with the Queensland Railways as a temporary porter. As a temporary employee, he was not entitled to become a member of the State Service Superannuation Scheme. However, under the by-laws made by the Queensland Commissioner of Railways, he was entitled to be paid a retiring allowance, if applicable, upon retirement from the Railways. The retiring allowance only became payable after the taxpayer had been employed for a number of years and not before. The taxpayer had previously been employed by a bank for 12 years and took a less demanding job at the railways because of health problems. He was uncertain as to whether he would stay for anything like the number of years required to receive the retiring allowance. He paid an amount of money to a qualifying superannuation fund and claimed a deduction for the amount under section 82AAT. The court accepted that the taxpayer was not a person to whom 'it was reasonable to expect' that a retiring allowance would be provided on his retirement and, accordingly, it found him to be an 'eligible person' under section 82AAS. It decided that the phrase 'by reason of which it was reasonable to expect' as it appears in section 82AAS requires a determination whether or not circumstances exist by reason which the decision-maker is able to expect on reasonable grounds that the superannuation benefits would be provided. The test is an objective one; however in applying the

test, the decision-maker should have regard to any relevant matters concerning the taxpayer personally. The expressed subjective intentions of the taxpayer would be relevant.

40. In *FC of T v. McCabe* 90 ATC 4968; (1990) 21 ATR 992; (1990) 26 FCR 431 (*McCabe's* case), the applicant was employed by a university in a number of positions. The applicant had five appointments from 1978, each being for a term of five years. In 1984, the applicant was employed as a lecturer on a fixed term appointment for five years and for the first time qualified to become a member of the State Superannuation Fund. However, the applicant would not qualify for employer-sponsored superannuation benefits unless she remained employed by the university for 10 years, retired due to ill health, or died. In 1986, the applicant made a minimal contribution to the State fund in addition to a $1,500 contribution to a non-employer sponsored fund, and claimed a deduction under section 82AAT for the $1,500 contribution. The Commissioner disallowed the claim. The taxpayer was successful before the Administrative Appeals Tribunal (AAT) and the Commissioner appealed to the Federal Court. The Federal Court set aside the Tribunal's decision and found that paragraph 82AAS(2)(a) requires there to be an assessment as to the future, as to what it is reasonable to expect will happen. It was unreasonable to conclude, that the only reasonable expectation was that the taxpayer would not serve the university beyond the term of the five-year contract. The evidence did not reasonably admit that conclusion.

41. In *Findlay v. FC of T* (1998) 98 ATC 4623; 39 ATR 266 (*Findlay's* case), the respondent was an employee of a company. The company had an obligation to make superannuation guarantee contributions for him as he was an employee for purposes of the SGAA 1992. An administrator was appointed to the company and in the 1994 year the applicant made personal contributions to a superannuation fund and claimed a deduction for those contributions. Subsequently, the administrator of the company paid the SGC in respect of the employee who was informed by the Commissioner that he was entitled to a superannuation guarantee credit of $981 which could only be paid into a nominated superannuation fund account. The applicant would not nominate a superannuation fund account into which the credit could be paid. Sundberg J. whilst affirming the *Arklay* and *McCabe* cases, also stated: *'a person is ineligible only if conditions (a) and (b) in section 82AAS(2) are both satisfied'*.

42. It was concluded that the applicant was an 'eligible person' because subparagraph 82AAS(2)(b)(i) was not satisfied as:

> no one other than the applicant had contributed to a superannuation fund in relation to him. While the 'benefits' in paragraph (b) are the future benefits contemplated by paragraph (a), the 'contributions' to which paragraph(b)(i) refers are in my view contributions that have in fact been made. Paragraph (b) assumes that these benefits are likely to be provided, and is concerned with attributing benefits to contributions made in the year of income and identifying the contributor.

43. The inclusion of subsection 82AAS(10) into the ITAA 1936 in 1995 now provides that a credit to a superannuation guarantee account is taken to be a contribution by the employer for the purposes of subsection 82AAS(2) and as such the dispute in *Findlay's* case will not arise in the future.

44. Also, amendments to subparagraph 82AAS(2)(b)(i) in 2003 as to whether a person is excluded from being an 'eligible person' is now concerned with whether the person had received or should have received superannuation contributions in connection with eligible employment. Essentially, this means even though a taxpayer may not have received employer contributions in connection with eligible employment, but should have, they will be precluded from being an 'eligible person'. These amendments reduce the impact of *Findlay's* case. Hence, it is necessary to determine if there is an employer obligation or requirement to make superannuation contributions on behalf of the taxpayer, regardless of whether those superannuation contributions are in fact made to the fund.

45. It is accepted that *Arklay's* case and *McCabe's* case were correctly decided on their facts. However, amendments made to paragraph 82AAS(2)(a) by *Taxation Laws Amendment (Superannuation) Act 1992* changed the reasonable expectation test to ensure that a taxpayer would not be an 'eligible person' if superannuation benefits would have been provided to dependants of the taxpayer in the event of the taxpayer's death during the year.

46. The test is an objective one which does not require an estimation of the likelihood that death or retirement would occur during the year. If the Courts had applied an objective test in *Arklay's* case and *McCabe's* case, a different outcome may have been reached. In any event, given the advent of the Superannuation Guarantee scheme, it is unlikely that factual situations like those in *Arklay's* case and *McCabe's* case will arise in the future.

The ten percent rule

47. Subsection 82AAS(3) provides that, where a taxpayer is engaged in eligible employment, the reference to superannuation benefits in subsection 82AAS(2) does not include benefits provided for the taxpayer in respect of that eligible employment if the taxpayer's income (assessable and exempt) and the reportable fringe benefits total from that eligible employment is less than ten percent of his or her total assessable income and reportable fringe benefits total for the income year. This is referred to as the ten percent rule.

48. The application of the ten percent rule has been considered in cases before the AAT. In *Re Edmonds – Wilson v. Commissioner of Taxation (Cth)* (1998) 98 ATC 2276; (1998) 40 ATR 1071 (*Re Edmonds – Wilson* case), the employer of a casual employee provided superannuation support for four months of a particular year of income. The salary of the casual employee in the remaining months was less than $450 and as such superannuation support was

not required. If the salary in respect of those months where superannuation support was provided was taken into account, the casual employee, on the basis of the ten percent rule would not be excluded from being an 'eligible person'. The AAT held that, in applying the ten percent rule, all the casual employee's employment income must be brought into account in the arithmetic testing and that this was the only interpretation available under the legislation. As such, the casual employee was not an eligible person.

49. In *Norris v. FC of T* (2002) ATC 2091; 50 ATR 1250 (*Norris* case), the taxpayer derived income of $1,686 from two days work and several days paid annual leave. He argued that he was an 'eligible person' because that amount was less than ten percent of his total assessable income. The Commissioner counted the amounts paid to the taxpayer in respect of long service leave and annual leave even though superannuation support was not provided in respect of those amounts. The Tribunal held that as the meaning of the term assessable income was not defined in subsection 82AAS(3) it should be construed according to its legislative purpose as set out in the Explanatory Memorandum to the Taxation Laws Amendment (Superannuation) Bill 1992. As such, it was preferable to adopt a narrower interpretation of assessable income so that it only included amounts attracting employer superannuation support.

50. With respect to the Tribunal we do not agree that the ordinary meaning conveyed by the text of subsection 82AAS(3) taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable. The extract from the Explanatory Memorandum cited in the *Norris* case as giving support for the proposition that income from 'eligible employment' should be read narrowly is set out below:

> to expand the concept of a substantially self-employed person so that people who are substantially self-employed do not lose access to tax deductions for their personal superannuation contributions because they perform small amounts of paid employment through which they receive employment superannuation support.

51. The interpretation adopted by the Commissioner concerning the parameters of the term 'assessable income from eligible employment' does not prevent the objects set out in the extract from the Explanatory Memorandum from being achieved. The term 'assessable income' is used many times throughout the legislation. For that matter both 'exempt income' and 'reportable fringe benefits' are defined and given their common meaning throughout the ITAA 1936, and if the statutory meaning of these terms was intended to be modified it is considered that the wording of the provisions would have done so. We consider that the wording of the legislation is clear, and the terms used in this provision according to the statute is unambiguous. To the extent that assessable income is attributable to 'eligible employment' it should be taken into account in the arithmetic calculation set out in subsection 82AAS(3). Therefore respectfully in our view it is difficult to support the conclusions in *Norris* as the provision does not state that only assessable income which receives

employer support should be included under the ten percent rule. Hence, it would be difficult to conclude that a differentiation should be made between the diverse forms of income that receive and do not receive employer support. Only income from that employment that is never entitled to receive employer superannuation support is excluded for the purposes of applying the ten percent rule (see paragraph 27 of this Ruling).

52. In interpreting the parameters of income from eligible employment for the purposes of the ten percent rule, the Commissioner considers that the decision in the *Re Edmonds – Wilson* case provides the most appropriate interpretation of the wording of the provisions.

53. 'Eligible employment' is defined in subsection 82AAS(1) and means, in relation to a person:

(a) the holding of any office or appointment;

(b) the performing of any functions or duties;

(c) the engaging in of any work; or

(d) the doing of any acts or things,

that result in the person being treated as an employee for the purposes of the SGAA 1992.

54. The effect of the ten percent rule is that any superannuation contribution which is made, or required to be made, for the benefit of a person and relates to his or her eligible employment will not preclude the person from being an 'eligible person', if the income derived from that eligible employment does not exceed ten percent of the total of the person's assessable income and the reportable fringe benefits total (if any).

Alternative views

55. It has been suggested that a taxpayer's eligible employment income from different employers during different periods of the income year should not be aggregated but treated separately when applying the ten percent rule.

56. Specifically, this alternative view is based on the wording within paragraph 82AAS(3)(a) as it refers to 'particular eligible employment' and sub-subparagraph 82AAS(3)(b)(i)(A) refers to 'that eligible employment'. It has been argued that the use of the terms 'particular' and 'that' in subsection 82AAS(3) indicates that income received by a person from different employers during the year of income can be treated separately when applying the ten percent rule. That is, the rule should be applied to each eligible employment income separately. If any one of those eligible employment periods resulted in that income being greater than ten percent of the individual's total assessable income and reportable fringe benefits for year, the individual would not be an eligible person for the whole income year.

57. The Commissioner does not agree with this interpretation of subsection 82AAS(3). The Commissioner believes that the provision should be read in conjunction with the policy intent which can be discerned from the history of the provision. The intention of the provision is to ensure that all eligible employment income from any particular employment that could attract superannuation support should be aggregated for the purposes of determining the ten percent rule.

58. The Commissioner considers that reference to 'particular' and 'that employment' has been included in the provision to ensure that all employment capable of attracting superannuation support would be included when applying the ten percent rule. Reference to 'particular employment' and 'that eligible employment' was included within the provision not as reference to a particular employer, but rather a reference to all employment that could attract superannuation support.

59. Consequently, where an individual works for an employer that has no legal obligation to make superannuation contributions (for example, the employee earns less than $450 a month), the term 'particular employment' and 'that eligible employment' means that income from this employment would not be taken into account and aggregated for the purposes of applying the ten percent rule.

60. Another alternative view involving the application of the ten percent rule concerns ETPs. It is argued that, where an ETP is paid as a result of a person's engagement in eligible employment, only that part of the assessable component of the ETP which is attributable to the year of income in which it is received should be used to determine whether the ten percent income threshold is exceeded.

61. However, sub-subparagraph 82AAS(3)(b)(i)(A) states that a person's assessable income from eligible employment engaged in during that year of income is the relevant amount to be considered. It is, therefore, the Commissioner's view that there is no legislative basis for apportioning the assessable component of an ETP.

62. Consequently, the amount of the ETP that is included in the person's assessable income in the year of receipt must be used for the purposes of the ten percent rule.

Examples

63. The following examples display the operation of various provisions of sections 82AAS and 82AAT.

Example 1 (ten percent rule)

64. Louise, a self-employed person, works part-time and her employer makes contributions to a superannuation fund for her. The assessable income from her part-time employment is less than ten percent of her assessable income earned during the year of income. Louise is eligible to claim a deduction for her personal superannuation contributions.

Example 2 (eligible person)

65. Tania is accruing benefits in a superannuation fund as a result of contributions made by a former employer that related to a previous year of income. Tania is now self-employed and is entitled to claim any personal superannuation contributions as a deduction in the current year of income.

Example 3 (eligible person)

66. Julia, a self-employed person, is paid an additional $400 per month from casual employment. As Julia is paid less than $450 per month from her casual employment, that employer is not required to provide superannuation support under the SGAA 1992. Therefore, Julia can claim a deduction for any personal superannuation contributions.

67. However, Julia would be precluded from receiving a tax deduction if her employer did provide employer support. This would apply notwithstanding that the employer is not bound to contribute for purposes of the SGAA 1992. However, Julia may be entitled to a deduction for personal superannuation contributions if she qualified under the ten percent rule.

Example 4 (ten percent rule)

68. Mike, who is now a self-employed person, worked full-time for an employer during the first three months of the year. Mike's employer provided superannuation support during the period of his employment. On termination, Mike received an ETP from his employer and a payment for unused annual leave. The sum of these payments and Mike's wages was $10,000. Business income for the year amounted to $30,000.

69. Mike is not an 'eligible person' under subsection 82AAS(2) as superannuation benefits were provided. Also, Mike's income from eligible employment is greater than ten percent of his assessable income (subsection 82AAS(3)). Mike is not entitled to a deduction for any personal superannuation contributions made in respect of that year.

Example 5 (eligible person)

70. Alcoe Pty Ltd did not provide superannuation support for the benefit of their employees during the year of income. John, an employee of Alcoe Pty Ltd, was making personal superannuation contributions into a complying superannuation fund. John is not entitled to claim a deduction for his personal superannuation contributions as Alcoe Pty Ltd has a liability for the SGC.

71. A review was made by the Tax Office to determine the company's liability to pay the SGC. During this review, it was discovered that the company had been wound up. Also, there were no funds to pay the SGC. Notwithstanding this, employer superannuation contributions were required to be made in relation to the year of income. Accordingly, John is not entitled to a deduction for any personal superannuation contributions made to a complying superannuation fund or RSA.

Example 6 (eligible person)

72. Matt, a self-employed plumber, received an ETP to the value of $50,000 from his former employer on 1 July 2004. Matt's other income for the year ending 30 June 2005 consisted of $5,000 in interest and $10,000 from his business. No employer superannuation contributions were made on Matt's behalf during the year ending 30 June 2005.

73. Under subsection 82AAS(2), the ETP received does not constitute the provision of superannuation benefits. Therefore, Matt is considered to be an 'eligible person' and may be entitled to a deduction for any personal superannuation contributions that he has made to a complying superannuation fund or RSA.

Example 7 (eligible person)

74. John's only income for the year ended 30 June 2005 is an employer sponsored superannuation pension and investment income. John has not been in eligible employment for eighteen months. For the year ended 30 June 2005, John made contributions to a complying superannuation fund.

75. John is considered to be an 'eligible person' under subsection 82AAS(2) as no superannuation benefits had been provided in respect of the whole or part of that year of income ended 30 June 2005. Therefore, John is entitled to a deduction for his personal superannuation contributions.

Example 8 (ten percent rule)

76. Bronte took leave without pay to work overseas. Upon her return to Australia she was employed with the same employer for one week before resigning. Upon resignation from Bronte's employer she received payment of her annual and long service leave which did not attract any employer superannuation support. During the same year of income she commenced her business and made personal contributions to her complying superannuation fund.

77. For Bronte to be able to claim a deduction for personal contributions, she needs to pass the ten percent test. In this case her assessable income attributable to eligible employment includes the amounts paid by her employer for annual and long service leave.

Example 9 (ten percent rule)

78. Kylie, a self-employed dressmaker, works on a casual basis as a waitress to supplement her income. She has two 'regular' casual employers, A & B, that is, two separate employment relationships. Depending on the number of hours worked, she earns from A between $500-$550 per month and from B between $250-$300.

79. As she earns less than $450 per month from B, her employer is not required to provide superannuation support under the SGAA 1992. It is assumed that there is no superannuation industrial award for that industry. However, Employer A will be required to provide superannuation support at the going rate on the basis of the income earned by Kylie.

80. For the purposes of determining whether Kylie satisfied the ten percent rule, the Commissioner takes the view that only the income from Employer A which is subject to superannuation support, will be taken into account. The total income earned from B will not be aggregated with the income earned from A in calculating the relevant percentage.

81. The situation would not be different if in some months of the year Kylie had earned less than $450 from A. Her total income from A would still be taken into account in determining whether she satisfied the ten per cent test because she has received some superannuation benefits from A in the other months.

Example 10 (ten percent rule)

82. Sandy, a casual administrative assistant works for two employers during a year of income, as well as being self-employed. Her income details are as follows:

Employer 1	She earns $440 per month for the months July to Oct and then earns $500 per month for the months November till June (total income of $5,760).

Employer 2	She earns $750 per month (total income of $9,000 in the income year).
Other income	She earns $25,000 from her business.

83. Employers 1 and 2 both provide superannuation support for Sandy for the months in which she earned at least $450.

84. For the purposes of determining whether Sandy satisfied the 10 percent rule, the total eligible income from both employers are aggregated. Sandy's eligible employment income for the year of income is $14,760. Consequently, Sandy is not an eligible person for the purposes of section 82AAS(3) as she does not meet the ten percent rule.

Your comments

85. We invite you to comment on this draft Taxation Ruling. Please forward your comments to either of the contact officers by the due date.

Due date:	**6 July 2005**
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Detailed contents list

86. Below is a detailed contents list for this draft Taxation Ruling:

Commissioner of Taxation
25 May 2005

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
TD 93/224; TD 96/24

Previous Rulings/Determinations:
TR 96/25

Subject references:
- complying superannuation fund
- deductible amounts
- eligible employment

- eligible person
- reasonable to expect
- superannuation benefits
- superannuation contributions
- superannuation guarantee
- ten percent rule

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1936 27CB
- ITAA 1936 Pt III Div 3 Subdiv AB
- ITAA 1936 82AAS(1)
- ITAA 1936 82AAS(2)
- ITAA 1936 82AAS(2)(a)
- ITAA 1936 82AAS(2)(b)
- ITAA 1936 82AAS(2)(b)(i)
- ITAA 1936 82AAS(3)
- ITAA 1936 82AAS(3)(a)
- ITAA 1936 82AAS(3)(b)(i)(A)
- ITAA 1936 82AAS(4)
- ITAA 1936 82AAS(5)
- ITAA 1936 82AAS(6)
- ITAA 1936 82AAS(8)
- ITAA 1936 82AAS(10)
- ITAA 1936 82AAT
- ITAA 1936 82AAT(1)
- ITAA 1936 82AAT(1A)
- ITAA 1936 82AAT(1D)
- ITAA 1936 82AAT(1E)
- ITAA 1936 82AAT(1F)
- ITAA 1936 82AAT(2A)
- ITAA 1936 82AAT(2B)
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 6-15
- ITAA 1997 26-80(3)
- ITAA 1997 51-5
- SGAA 1992 19(4)
- SGAA 1992 27
- SGAA 1992 28
- SGAA 1992 65
- SGAA 1992 65A
- SGAA 1992 66
- SGAA 1992 67
- AIA 1901 23(b)
- Taxation Laws Amendment (Superannuation) Act 1992

Case references:

- FC of T v. Arklay 89 ATC 4563; (1989) 20 ATR 276; 85 ALR 368; (1989) 22 FCR 298
- FC of T v. McCabe 90 ATC 4968; (1990) 21 ATR 992; (1990) 26 FCR 431
- Findlay v. FC of T (1998) 98 ATC 4623; 39 ATR 266
- Norris v. FC of T (2002) ATC 2091; 50 ATR 1250
- RE Edmonds – Wilson v. Commissioner of Taxation (Cth) (1998) 98 ATC 2276; (1998) 40 ATR 1071

Other references:

- Explanatory Memorandum to the Taxation Laws Amendment (Superannuation) Bill 1992

ATO references

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