

***MT 2004/D2 - What is the tax treatment of an expense incurred by a superannuation fund that is paid by an employer or eligible person on behalf of a superannuation fund and that is journalised as a superannuation contribution?***

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This document has been finalised by MT 2005/1.



## Draft Miscellaneous Taxation Ruling

What is the tax treatment of an expense incurred by a superannuation fund that is paid by an employer or eligible person on behalf of a superannuation fund and that is journalised as a superannuation contribution?

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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 or section 37 of the **Taxation Administration Act 1953**. It is only final Rulings that represent authoritative statements by the Australian Taxation Office.*

## **What this Ruling is about**

1. This Ruling sets out the Commissioner's views on the tax treatment of expenses incurred by a superannuation fund that are paid by an employer or eligible person<sup>1</sup> on behalf of the superannuation fund.
2. A reference in this Ruling to an employer or eligible person paying an expense on behalf of a superannuation fund is a reference to the employer or eligible person paying money to a third party to extinguish a present liability of the superannuation fund where the payment is recognised in the accounts of the fund as a contribution. This Ruling does not cover the tax treatment of losses or outgoings incurred by an employer that result in an economic benefit to the fund but that are not recognised in the accounts of the fund as contributions. The Tax Office is examining this issue with a view to issuing a separate draft Ruling for industry and professional comment.

### **Class of persons**

3. The class of person to which this Ruling applies is employers and eligible persons who pay expenses on behalf of a superannuation fund and the funds that have incurred the expense.

<sup>1</sup> See the definition of 'eligible person' at paragraph 49 of this Ruling.

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## Date of effect

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4. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). It is also proposed that, when the final Ruling is issued, paragraphs 14 and 39 to 43 will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. (Taxation Rulings TR 92/1, TR 97/16 and Goods and Services Tax Ruling GSTR 1999/1 explain what is a public ruling and when it is binding on the Commissioner).

## Ruling

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### **Deductibility by the employer under section 82AAC, or by the eligible person under section 82AAT**

5. Third party payments made by an employer on behalf of a superannuation fund to meet expenses incurred by the fund are deductible superannuation contributions under section 82AAC of the *Income Tax Assessment Act 1936* (ITAA 1936) provided that the fund recognises the payments as contributions by the employer in its accounts in the same way as it would for any direct cash contribution paid to it.

6. Similarly, payments made by an individual 'eligible person' as defined in subsection 82AAS(2) of the ITAA 1936 (for example a self-employed person making personal superannuation contributions) to a third party on behalf of a superannuation fund to meet expenses incurred by the fund are deductible superannuation contributions under section 82AAT of the ITAA 1936 provided:

- the conditions in section 82AAT are met including the notice requirements specified in subsection 82AAT(1A); and
- the fund recognises the payments as contributions by the person in its accounts in the same way as it would for any direct cash contribution paid to it.

7. The payment to the third party is treated for all tax purposes as though the employer or eligible person had made the payment directly to the fund and the fund had separately paid an equal amount to the third party.

**Taxable contributions in the hands of the superannuation fund**

8. The payments are taxable contributions made to the fund under section 274 of the ITAA 1936 to the same extent that they would be taxable contributions had the payments been made directly to the fund. The taxable contributions must be included in the fund's assessable income under section 281 of the ITAA 1936.

**Deductibility of expense by the superannuation fund**

9. The expense may be deductible by the fund under the ITAA 1936 or *Income Tax Assessment Act 1997* (ITAA 1997) subject to the normal principles governing the tax deductibility of expenditure incurred by superannuation funds.

**Superannuation guarantee**

10. The payments, in the case of employer payments, are superannuation contributions that may reduce the employer's superannuation guarantee shortfall amount for the relevant employees for the quarter under Part 3 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992).

**Superannuation surcharge**

11. The payments are, in the case of employer payments, surchargeable contributions in respect of the relevant employees under section 8 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (SCT(AC) Act). In the case of payments made by an eligible person, the payments are surchargeable contributions under section 8 to the extent the payments are tax deductible to the person under section 82AAT of the ITAA 1936.

**Fringe benefits tax**

12. Payments of the kind covered by this Ruling made by an employer are not subject to fringe benefits tax because they are excluded from the definition of a 'fringe benefit' under paragraph (j) of the definition in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986).

13. Because these payments are contributions to the superannuation fund, section 26-80 of the ITAA 1997<sup>2</sup> prevents any deduction under section 8-1.

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<sup>2</sup> Refer also to section 82AAR of the ITAA 1936 in the case of employer payments.

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## **Goods and services tax**

14. The employer or eligible person paying the expenses incurred by the fund is not entitled to input tax credits under Division 11 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) in relation to the acquisitions for which the expenses are paid because it has not acquired anything for the payment. The fund is entitled to input tax credits, including reduced input tax credits where applicable, in relation to the acquisitions, but only to the extent that credits would be available if the fund had paid the expense directly.

## **Explanation**

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### **Background**

15. The Tax Office's preferred approach is for all superannuation fund expenses to be paid directly out of the fund itself and for superannuation contributions to be made directly to the fund. This provides clarity because the outgoings of the employer or eligible person and the fund directly match the tax treatment.

16. However, the Tax Office recognises that the practice of an employer or eligible person paying an expense on behalf of a superannuation fund is common. This is usually done for administrative ease, for example, where the fund does not have a cheque account. The practice involves the making of journal entries after the expense is paid that, in the case of the employer or eligible person, re-classifies the expense payment as a superannuation contribution and, in the accounts of the superannuation fund, recognises the making of the contribution and payment of the expense.

### **Deductibility by the employer under section 82AAC, or by the eligible person under section 82AAT**

#### ***Legislation***

17. Subdivisions AA and AB of Division 3 of Part III of the ITAA 1936 (sections 82AAA to 82AAT) deal with the deductibility of contributions to superannuation funds. Section 82AAC allows a tax deduction to employers<sup>3</sup> for contributions for the benefit of employees in certain circumstances. Section 82AAT allows a tax deduction for personal contributions in certain circumstances. Section 26-80 of the ITAA 1997 limits deductibility of superannuation contributions to those claimable under Subdivisions AA and AB.

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<sup>3</sup> A deduction may be allowable to certain associates of the direct employer. See the definition of 'eligible employee' at paragraph 48 of this Ruling.

18. Section 82AAC allows a deduction up to age based limits<sup>4</sup> for superannuation contributions made to a complying superannuation fund<sup>5</sup> in respect of an eligible employee. A deduction is available if 'a taxpayer makes a contribution to a fund for the purpose of making provision for superannuation benefits payable for an eligible employee...'.<sup>6</sup>

19. Section 82AAT allows a deduction by an eligible person up to the deduction limits specified in subsection 82AAT(2), and subject to the notice requirements prescribed, for superannuation contributions made to a complying superannuation fund in order to obtain superannuation benefits for the person, or for dependants of the person in the event of their death.

*Meaning of 'contribution'*

20. The ITAA 1936 does not define the term 'contribution'. Contribution is relevantly defined in the Australian Oxford Dictionary 1999 as '1. the act of contributing 2. something contributed, esp. money'. 'Contribute' is defined as 'give (money, an idea, help, etc.) towards a common purpose'.

21. The meaning of 'contribution' is wider than just a direct cash payment. The Tax Office accepts, for example, that, subject to the restrictions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) on a superannuation fund acquiring assets from a related party, a transfer of an asset to a superannuation fund may be a contribution 'in specie' for the purposes of section 82AAC of the ITAA 1936.<sup>7</sup> Similarly, a payment to a third party extinguishing a liability of the superannuation fund can be a contribution to the fund provided the payment is appropriately treated in the accounts of the fund so that it is clear that the payment represents a contribution to the fund.

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<sup>4</sup> Subsection 82AAC(2A) of the ITAA 1936 and Tax Determination TD 2004/18. See also the further limit in section 26-80 of the ITAA 1997.

<sup>5</sup> Paragraph 82AAC(1)(b) of the ITAA 1936.

<sup>6</sup> Paragraph 82AAC(1)(a) of the ITAA 1936.

<sup>7</sup> Refer also to Superannuation Circulars I.A.1 and II.D.3.

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## *Journal entries*

22. No deduction is available for amounts set aside but not actually paid as a contribution. It is well established that the making of a journal entry in the books of an entity does not alone establish a payment.<sup>8</sup> However, an actual payment has been made in the circumstances covered by this Ruling, albeit to a creditor of the superannuation fund rather than to the fund itself. The Tax Office accepts that the actual contribution by way of a third party payment together with the entries in the accounts of both the fund and the employer or eligible person establish a contribution to the fund and payment of the associated expense for tax purposes. The journal entries need not be made immediately, but will need to be made by the earliest time necessary to establish a record of the contribution and fund expense for tax purposes. The exact time will depend on the circumstances. For example, for superannuation guarantee purposes contributions must be made on at least a quarterly basis. That is, the contribution would need to be established in the accounts of the fund by the 14th day of the month following the relevant quarter if the contribution is to reduce the employer superannuation guarantee shortfall for the quarter.

## *Contributions by an employer must be for the purpose of making provision for superannuation benefits for an eligible employee*

23. The requirements regarding the purpose of the contribution and the way it must be dealt with by the fund for a deduction to be allowable under section 82AAC of the ITAA 1936 are the same as for a direct cash contribution to the fund.

24. In particular, to be an allowable deduction under section 82AAC the contribution must be for the purpose of making provision for superannuation benefits payable for an eligible employee (or eligible employee's dependants in the event of the employee's death). These conditions must be satisfied in relation to each payment and in respect of each employee, as set out in AAT Case 5636<sup>9</sup> which relied on *Metropolitan Gas Co. v. Federal Commissioner of Taxation*<sup>10</sup> and *Federal Commissioner of Taxation v. Northern Timber and Hardware Co. Ltd.*<sup>11</sup>

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<sup>8</sup> *Temples Wholesale Flower Supplies Pty Limited v. Federal Commissioner of Taxation* (1991) 29 FCR 93; 21 ATR 1606; 91 ATC 4387; *Brookton Co-operative Society Limited v. Federal Commissioner of Taxation* [1981] HCA 28; (1981) 147 CLR 441; (1981) 55 ALJR 479; (1981) 35 ALR 295; (1981) 81 ATC 4346; (1981) 11 ATR 880.

<sup>9</sup> (1990) 21 ATR 3212.

<sup>10</sup> (1932) 6 ALJ 318; (1932) 39 ALR 60; (1932) 2 ATD 178; (1932) 47 CLR 621.

<sup>11</sup> (1960) 34 ALJR 376; (1960) 12 ATD 257; [1961] ALR 466; (1960) 103 CLR 650.

**Taxable contributions in the hands of the superannuation fund**

25. Under section 274 of the ITAA 1936:

- amounts paid to a complying superannuation fund as contributions made for the purpose of providing superannuation benefits for another person;<sup>12</sup> and
- personal contributions covered by a notice under subsection 82AAT(1A),<sup>13</sup>

are taxable contributions. Section 281 of the ITAA 1936 includes these taxable contributions in the assessable income of the fund.

26. Section 274 uses the expression ‘amounts paid to an eligible entity’<sup>14</sup> but the Tax Office considers that these words extend to expense payments made on behalf of a fund that are contributions of the kind referred to in the paragraphs of subsection 274(1). The reference to ‘contributions’ in the paragraphs of subsection 274(1) indicate that a payment cannot be a deductible contribution under section 82AAC or section 82AAT unless it is also a taxable contribution in the hands of the fund under section 274.

**Deductibility of expense by the superannuation fund**

27. The expense payment incurred by the fund and paid by the employer may be an allowable deduction to the superannuation fund under the normal principles governing the tax deductibility of expenditure incurred by superannuation funds. See Taxation Ruling TR 93/17 for further guidance.

**Superannuation guarantee**

28. The SGAA 1992 provides that employers are required to make contributions to an eligible superannuation fund for their employees, in accordance with minimum prescribed levels, in order to avoid paying the superannuation guarantee charge.

29. Section 16 of the SGAA 1992 provides that the superannuation guarantee charge is imposed on an employer’s superannuation guarantee shortfall and is payable by the employer. Sections 22 and 23 of the SGAA 1992 state that where an employer makes contributions to a complying superannuation fund for the relevant quarter, the superannuation guarantee shortfall amount is reduced.

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<sup>12</sup> Subsection 274(1).

<sup>13</sup> Subsection 274(2).

<sup>14</sup> Including an eligible superannuation fund.

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30. If:

- an expense of the superannuation fund is paid by an employer; and
- the expense payment is subsequently appropriately journalised by the fund as a contribution for eligible employees within the time required for the making of contributions for the relevant quarter,

the payment will reduce the employer's liability to pay the superannuation guarantee shortfall amount for those employees for the period relevant to the date on which the expense payment was made. In the case of payments by cheque, the contribution is taken to be made when the creditor receives the cheque unless the cheque is subsequently dishonoured. This is the same, in effect, as the time when a contribution is taken to have been made had there been a payment directly to the fund. See Superannuation Guarantee Determination SGD 2003/7.

## **Superannuation surcharge**

31. A surchargeable contribution is defined within section 8 of the SCT(AC) Act. A surchargeable contribution includes:

- taxable contributions under subparagraph 274(1)(a)(i) of the ITAA 1936, being contributions made for the purpose of making provision for superannuation benefits of another person; and
- personal contributions allowed as deductions to the member under section 82AAT of the ITAA 1936.

32. In the circumstances covered by this Ruling where an expense payment is treated as a taxable contribution under subparagraph 274(1)(a)(i) (employer contributions), or a taxable contribution under subparagraph 274(1)(b)(i) (personal contributions deductible to the member), it is also a surchargeable contribution for the purposes of the SCT(AC) Act.

## **Fringe benefits tax**

33. A payment by an employer of a fund's expense which is treated as a contribution to the fund for the benefit of an employee for the purposes of section 82AAC in accordance with this Ruling is not a fringe benefit, in relation to the employer and employee, under the FBTAA 1986.

34. The payment is a 'benefit' either of the employee as beneficiary of the fund or of the trustee as an associate of the employee.<sup>15</sup> The scheme of the FBTAA 1986 also incorporates expense payments.<sup>16</sup> In the case of expense payment fringe benefits a payment directly to a creditor of a person is treated the same as a payment reimbursing the person for the expense.<sup>17</sup> However, a benefit is not a fringe benefit if it is a benefit constituted by 'the making of a payment of money to a superannuation fund ... that the person making the payment had reasonable grounds for believing was a complying superannuation fund...' under paragraph (j) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA 1986.

35. The Explanatory Memorandum to the Fringe Benefits Tax Assessment Bill 1986 contained this statement:<sup>18</sup>

Consistent with the intended application of the Act – which is to apply, broadly, to non-cash fringe benefits provided to employees – the definition of fringe benefit excludes from the scope of the Act ... contributions to superannuation funds...

36. This suggests that it accords with the intention of the FBTAA for payments of money covered by this Ruling to gain the benefit of paragraph (j) of the definition of 'fringe benefit' in subsection 136(1). There is no payment of money directly to a fund, but a payment of money is made in satisfaction of a liability of the fund which is recognised in the accounts of the fund as a contribution. This is consistent with the scheme of the FBT law regarding expense payment fringe benefits where a payment directly to a creditor of a person is treated in the same way as reimbursing the person for the expense. The Tax Office therefore accepts that the payments covered by this ruling are excluded from the definition of 'fringe benefit' by paragraph (j) of the definition.

### **Payment not an allowable deduction to the employer or eligible person under section 8-1 of the ITAA 1997**

37. An amount paid that is a contribution to a complying superannuation fund or retirement saving account can only be deducted under sections 82AAC or 82AAT of the ITAA 1936 and not any other provision. The availability of those deductions is subject to the specified age and deduction limits in sections 82AAC and 82AAT of the ITAA 1936 and section 26-80 of the ITAA 1997.

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<sup>15</sup> See the definition of 'fringe benefit' and of 'associate' in subsection 136(1) of the FBTAA and subsection 26AAB of the ITAA 1936.

<sup>16</sup> See section 20 of the FBTAA.

<sup>17</sup> Section 20 of the FBTAA.

<sup>18</sup> In the introductory note: General scheme of the Bill in determining a liability to fringe benefits tax.

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38. Section 26-80 of the ITAA 1997 sets out conditions for deductibility under sections 82AAC and 82AAT. Subsection 26-80(1) provides:

You cannot deduct under this Act an amount you pay as a contribution to a complying superannuation fund or RSA except as provided by this section.

That is, a payment characterised as a contribution to a fund for the purpose of providing superannuation benefits for eligible employees is only allowable as a deduction under section 82AAC of the ITAA 1936, if at all. A payment characterised as a personal contribution is only allowable as a deduction under section 82AAT of the ITAA 1936, if at all.

## **Goods and services tax**

39. Under the GST Act, registered entities are entitled to claim input tax credits for the GST paid on their creditable acquisitions.

40. Under section 11-5 of the GST Act you make a creditable acquisition if:

- (a) you acquire anything solely or partly for a creditable purpose; and
- (b) the supply of the thing to you is a taxable supply; and
- (c) you provide, or are liable to provide, consideration for the supply; and
- (d) you are registered, or required to be registered.

41. Section 11-15 prescribes the meaning of 'creditable purpose':

- (1) You acquire a thing for a creditable purpose to the extent that you acquire it in carrying on your enterprise.
- (2) However, you do not acquire a thing for a creditable purpose to the extent that:
  - (a) the acquisition relates to making supplies that would be input taxed; or
  - (b) the acquisition is of a private or domestic nature.

42. It is the view of the Tax Office that the employer or eligible person is not entitled to input tax credits in respect of acquisitions of a superannuation fund, the costs of which are being borne by the employer or eligible person. This is because section 11-5 of the GST Act has not been satisfied in circumstances where an employer sponsor or eligible person pays expenses incurred by a superannuation fund, because the payer has not acquired anything for the payment.

*Superannuation funds*

43. In the case of the superannuation fund, the supply of an interest in or under a superannuation fund is an input taxed supply under section 40-5 of the GST Act. Where an entity makes an acquisition in the course of an enterprise of supplying interests in a superannuation fund, to the extent its acquisitions relate to making input taxed supplies, they are not for a creditable purpose. The entity is not entitled to input tax credits for those acquisitions.

Superannuation funds can, however, claim reduced input tax credits under Division 70 of the GST Act for certain acquisitions, such as in relation to administration expenses.<sup>19</sup> The superannuation fund may claim input tax credits in relation to the journalised expense payment to exactly the same extent applicable had the fund paid the expense directly.

## Alternative views

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44. That expenses incurred by a superannuation fund that provides superannuation benefits for employees, but which are paid by the related employer, are allowable deductions of the employer under the second limb of section 8-1 unless otherwise excluded (for example, if the loss or outgoing is of a capital nature).

45. Such expenses paid by an employer are not contributions of the kind referred to in sections 82AAC and 82AAT of the ITAA 1936 and are not taxable contributions in the hands of the superannuation fund. Similarly, such expenses paid by the employer are not contributions for the purposes of the superannuation guarantee or superannuation surcharge legislation.

46. These expense payments by the employer do not fall under the exemption contained in paragraph (j) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA 1986 and are subject to fringe benefits tax.

47. For the reasons given in the explanatory section of this Ruling, the alternative views are not supported by the Tax Office.

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<sup>19</sup> See Goods and Services Tax Ruling GSTR 2004/1 which provides guidance on which acquisitions are reduced credit acquisitions that entitle an entity to a reduced input tax credit under Division 70 of the GST Act.

## Definitions

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### Eligible employee

48. An eligible employee is defined in subsection 82AAA(1) of the ITAA 1936 as:

**‘eligible employee’**, in relation to a taxpayer, means a person other than the taxpayer who is:

- (a) in the case of a taxpayer whether a company or a person other than a company:
  - (i) an employee of the taxpayer;
  - (ii) an employee of a company in which the taxpayer has a controlling interest; or
  - (iii) an employee of a company in which the taxpayer is the beneficial owner of shares but in which the taxpayer does not have a controlling interest (not being an employee who is associated with the taxpayer or who, or a relative of whom, has set apart or paid, or entered into a contract, agreement or arrangement under which he is, or will or may be, required to set apart or pay, amounts as or to a fund for the purpose of providing superannuation benefits for, or for a relative of, the taxpayer); and
- (b) in the case of a taxpayer being a company:
  - (i) an employee of a person that has a controlling interest in the taxpayer; or
  - (ii) an employee of a company in which a controlling interest is held by a person who also has a controlling interest in the taxpayer.

### Eligible person

49. An eligible person is defined in subsection 82AAS(2) of the ITAA 1936 as:

A person (in this subsection referred to as the **‘relevant person’**) is an eligible person in relation to a year of income for the purposes of this Subdivision unless:

- (a) during the whole or a part of the year of income circumstances existed by reason of which it was reasonable to expect that superannuation benefits would be provided for the relevant

- person in the event of the retirement of the relevant person or for dependants of the relevant person in the event of the death of the relevant person (whether or not any condition other than the retirement or death of the relevant person would be required to be satisfied in order that those benefits be provided); and
- (b) to the extent to which those benefits would be attributable to the year of income:
- (i) the benefits would be wholly or partly attributable to contributions made, or required to be made, in relation to the year of income:
- (A) to a superannuation fund of the relevant person; and
- (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.

### **Complying superannuation fund**

50. Section 267 of the ITAA 1936 states that a 'complying superannuation fund' has the meaning given by section 45 of the SIS Act 1993. Section 45 of the SIS Act 1993 provides that a superannuation fund is a complying superannuation fund if it has a current compliance notice from the Regulator. Such a notice will be issued if the entity is a regulated superannuation fund and satisfies the regulatory provisions (section 42 of the SIS Act 1993).

51. Section 19 of the SIS Act 1993 defines a regulated superannuation fund as a superannuation fund that has a trustee, is either a constitutional corporation or has the sole purpose of providing old-age pensions, and the trustee must give notice to APRA that it elects for the SIS Act 1993 to apply to the fund. A superannuation fund is defined in subsection 10(1) of the SIS Act 1993 as a fund that

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is an indefinitely continuing fund and a provident, benefit, superannuation or retirement fund, or a public sector superannuation scheme. To be 'indefinitely continuing' means that the fund must not be one which will terminate or be wound up after a specified period.

## Your comments

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52. We invite you to comment on this draft Miscellaneous Taxation Ruling. Please forward your comments to the contact officer by the due date.

**Due date:** 8 October 2004  
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## Detailed contents list

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**Commissioner of Taxation**

25 August 2004

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|--|------------------------------------|
| <i>Previous draft:</i>                 | - ITAA 1936 82AAA                  |
| Not released in draft form             | - ITAA 1936 82AAA(1)               |
|  | - ITAA 1936 82AAC                  |
| <i>Related Rulings/Determinations:</i> | - ITAA 1936 82AAC(1)(a)            |
| TR 92/1; TR 92/20; TR 93/17;           | - ITAA 1936 82AAC(1)(b)            |
| TR 97/16; TD 2004/18;                  | - ITAA 1936 82AAC(2A)              |
| SGD 2003/7; GSTR 1999/1;               | - ITAA 1936 82AAR                  |
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|  | - ITAA 1936 82AAS(2)               |
|  | - ITAA 1936 82AAT                  |
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| - ITAA 1936 26AAB                      | - ITAA 1936 82AAT(2)               |
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- ITAA 1936 274
- ITAA 1936 274(1)
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