SGD 2006/2 - 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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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

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

[Note: This is a consolidated version of this document. Refer to the Legal Database (ato.gov.au/law) to check its currency and to view the details of all changes.]

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 Subdivision 290-B of the *Income Tax Assessment Act 1997* (which deals with deductions for employer contributions) and would also ensure that the contributions are not considered to be income in the hands of the employee.

2A. However, in working out any superannuation guarantee shortfall for quarters beginning on or after 1 January 2020.[A1]:

- such employer contributions do not reduce an employer's charge percentage under section 23 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA);

[A1] Pursuant to amendments made to the SGAA by Schedule 7 to the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Act 2019*. See also Super Guidance Note GN 2020/1 *Salary sacrifice and super guarantee.*

- the ordinary time earnings base in subsection 23(2) of the SGAA includes the amount of any sacrificed ordinary time earnings; and
- the quarterly salary or wages base (for an employer in respect of an employee for a quarter) in subsection 19(1) of the SGAA includes the amount of any sacrificed salary or wages.

Explanation

Background

3. Subsection 12(3) of the SGAA 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 SGAA 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 SGAA 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 SGAA purposes. The word 'salary' is used in the extended superannuation guarantee sense in this Determination.

5. Taxation Ruling TR 2001/10[1] 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 12(8) of the SGAA ('SG employees').[2] 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[3]) 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[4]) 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[5] to be 'effective'.

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[1] Taxation Ruling TR 2001/10 *Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements*.
[2] See paragraphs 2 and 3 of TR 2001/10.
[3] Please note that paragraphs 27 and 28 of TR 2001/10 have been amended – see TR 2001/10A.
[4] Under subsection 6-5(4) or 6-10(3) of the *Income Tax Assessment Act 1997*.
[5] Including receipt taken to have occurred under subsection 6-5(4) or 6-10(3) of the *Income Tax Assessment Act 1997*.

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 SGAA 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,[6] 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.

11. In particular, paragraph 104 of TR 2001/10 observes that the purpose of the SGAA 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 SGAA 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:

- give rise to a deduction under Subdivision 290-B of the *Income Tax Assessment Act 1997* subject to the usual conditions in that Subdivision; 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.[7]

14. This reasoning does not apply to contractors who are not deemed to be employees under section 12 of the SGAA.

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.

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[6] See paragraphs 101 to 107 of TR 2001/10.

[7] However, such employer contributions do not reduce an employer's charge percentage under section 23 of the SGAA, or have the other consequences outlined at paragraph 2A of this Determination, in working out any superannuation guarantee shortfall for quarters beginning on or after 1 January 2020.

Date of effect

16. This Determination applies to quarters and income years commencing both before and after its date of issue. However, this Determination does 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. Paragraph 2A applies in working out any superannuation guarantee shortfall for quarters beginning on or after 1 January 2020.

Commissioner of Taxation
28 June 2006

Previous draft:

SGD 2006/D1

Related Rulings/Determinations:

TR 2001/10; TR 2001/10A

Subject references:

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

Legislative references:

- ITAA 1997 6-5(4)
- ITAA 1997 6-10(3)
- ITAA 1997 Subdivision 290-B
- SGAA 1992 11
- SGAA 1992 12
- SGAA 1992 12(3)
- SGAA 1992 12(8)
- SGAA 1992 15A
- SGAA 1992 19(1)
- SGAA 1992 23
- SGAA 1992 23(2)
- *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Act 2019 Schedule 7*

Other references:

Guidance Note GN 2020/1: Salary sacrifice and super guarantee

ATO references

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