


***SGD 2017/1 - Superannuation guarantee: is an advance paid under section 28 of the Fair Entitlements Guarantee Act 2012 to a former employee 'salary or wages' paid by the employer to the employee for the purposes of working out a superannuation guarantee charge liability under the Superannuation Guarantee (Administration) Act 1992?***

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# Superannuation Guarantee Determination

Superannuation guarantee: is an advance paid under section 28 of the *Fair Entitlements Guarantee Act 2012* to a former employee 'salary or wages' paid by the employer to the employee for the purposes of working out a superannuation guarantee charge liability under the *Superannuation Guarantee (Administration) Act 1992*?

## Preamble

Superannuation Guarantee Determinations (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this determination indicates, the fact that you acted in accordance with this determination would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regards to the imposition of penalties.

## Ruling

1. Yes. An advance paid under section 28 of the *Fair Entitlements Guarantee Act 2012* (FEG Act), to a former employee is 'salary or wages' paid by the employer to an employee for the purposes of working out a liability for the superannuation guarantee charge.
2. For superannuation guarantee purposes, the employer is the entity with the liability for the superannuation guarantee charge.

## Date of effect

3. This Determination replaces ATO Interpretative Decision ATOID 2015/13 *Superannuation Guarantee: liability of company in liquidation for superannuation guarantee charge in respect of a Fair Entitlements Guarantee advance paid by a third party*, ATOID 2015/14 *Superannuation guarantee: liability of company in liquidation for superannuation guarantee charge in respect of a Fair Entitlements Guarantee advance paid by a liquidator* and ATOID 2015/15 *Superannuation guarantee: liability of liquidator for superannuation guarantee charge in respect of a Fair Entitlements Guarantee advance*. As such, it applies both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached.*

4. Employers are required to provide a minimum level of superannuation support each year to each of their employees. Where no superannuation contributions are made by or on behalf of the employer for the benefit of the employee, the employer becomes liable to pay a superannuation guarantee charge unless one of the exceptions apply.<sup>1</sup>

5. The superannuation guarantee charge is payable by the employer.<sup>2</sup> This does not change under the liquidation process, whether it is paid on behalf of the employer by either the liquidator or a third party.

6. The superannuation guarantee charge is worked out as the difference between the minimum superannuation support required to be made and the amount actually contributed by the employer. The employee's 'salary or wages' is relevant in calculating the superannuation guarantee shortfall.

### **'Salary or wages'**

7. The primary objective of the FEG Act is to provide financial assistance (called an 'advance') to former employees, where the end of their employment is linked to the insolvency or bankruptcy of their employer.<sup>3</sup> An advance is paid in respect of certain unpaid employee entitlements when there are insufficient funds or assets available to the employer to pay those entitlements.

8. An advance that is paid to a former employee of a company in liquidation is 'salary or wages' within the ordinary meaning of those terms because the advance is paid in consideration of the services rendered by the former employee to the company, prior to the company entering into liquidation.

9. A payment that falls within the ordinary meaning of salary or wages will be 'salary or wages' for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).<sup>4</sup>

10. An employer's superannuation guarantee shortfall for the relevant quarter is calculated under Part 3 of the SGAA. Section 15B extends the application of Part 3 to former employees:

This Part applies to salary or wages paid to, and contributions for the benefit of, a former employee as if the former employee were an employee of the person who was the former employee's employer.

11. While the payment of the advance does not extinguish the salary or wages debt owed by the company to the former employee, the advance still constitutes 'salary or wages' within the ordinary meaning of those terms. As stated by Mansfield J in *Deputy Commissioner of Taxation v. Applied Design Development Pty Ltd (in liq.)* [2002] FCA 205 (paragraph 25):

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<sup>1</sup> See sections 27 to 29 of the SGAA.

<sup>2</sup> Section 16 of the SGAA.

<sup>3</sup> See *Outline* section of the Explanatory Memorandum to the Fair Entitlements Guarantee Bill 2012

<sup>4</sup> Section 11 of the SGAA. Superannuation Guarantee Ruling SGR 2009/2 *Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'* provides further guidance on the meaning of 'salary or wages' for the purposes of the SGAA.

A debt comprised of owed wages is ordinarily enforceable pursuant to a personal contractual right in an employee against an employer. However, the right to recover as a debt salary or wages owing is not an essential element of the ordinary meaning of the word 'salary' or the word 'wage'. Whether the debt is enforceable pursuant to a personal contractual right, or whether the eventual payment of the debt is made pursuant to a statutory right to participate in the winding up of the company, the nature of the payment as a payment in respect of services rendered by an individual to an employer may nevertheless be unaltered.

12. The gross amount of the advance, including the Pay As You Go tax withheld, constitutes 'salary or wages' for the purposes of the SGAA.

13. The obligation of the employer to pay the superannuation guarantee charge does not change under the liquidation process. There is no provision in the SGAA imposing any personal liability upon a liquidator or other external administrator for payment of the superannuation guarantee charge out of its own funds.

#### **'On behalf of the employer'**

14. Subsection 6(3) of the SGAA states that, for the purposes of the Act:

...a reference to salary or wages paid by an employer to an employee includes a reference to a payment made on behalf of the employer.

15. The phrase 'on behalf of' in subsection 6(3) is not defined in the SGAA. Therefore, it should be given its ordinary and natural meaning taking into account its context in the SGAA. The *Macquarie Dictionary* (Sixth Edition, 2013) defines 'on behalf of' as 'as a representative of' and 'in the interest of; in aid of'.

16. Where the Department of Employment, for example, pays an advance in relation to unpaid employee entitlements, the Department pays as a representative of, or in the interest of, the company in liquidation. Therefore, the payment falls within the scope of subsection 6(3) of the SGAA as being a payment made 'on behalf of' the employer.

17. The advance is still considered to be paid 'on behalf of the employer' by the Department of Employment even though there is no agency relationship between the Department of Employment and the company and even if the advance is ultimately paid to the employee by a third party, such as an accounting firm.

18. Similarly, where the department makes the payment directly to the employee, such payments are still considered to be 'on behalf of' the employer.

#### **Example 1**

19. *Aus Co enters into liquidation in February 2016 and Patrick's employment is terminated. Aus Co owes a debt of unpaid wages to Patrick.*

20. *Patrick applies for and receives an advance from the Department of Employment under the FEG Act, which is paid to him by a third party firm, Accounting Co.*

21. *Aus Co did not make a superannuation guarantee contribution for Patrick in the January to March 2016 quarter.*

22. *The advance that Patrick receives from the Department of Employment is 'salary or wages' for the purposes of the SGAA. As no superannuation guarantee contribution was made, Aus Co is liable for the superannuation guarantee charge for the January to March 2016 quarter.*

## **Example 2**

23. *Assume the same facts as in example one but the advance is paid directly into Patrick's bank account by the Department of Education.*

24. *The advance is salary or wages for the purposes of the SGAA and Aus Co is liable for the superannuation guarantee charge for the January to March 2016 quarter as no superannuation guarantee contribution was made.*

**Note:** *a liability to the superannuation guarantee charge in this case would not have arisen had the required amount of superannuation contributions been made by or on behalf of the employer for the benefit of the former employee to an appropriate destination by the relevant due date.*

*In calculating the required amount of superannuation contributions which would have prevented a superannuation guarantee charge from arising, regard is had to the former employee's 'ordinary time earnings' rather than their 'salary or wages'.*

*To that extent, only an amount of an advance representing unpaid wages would have been relevant for such a calculation, as unpaid annual leave payments and unpaid long service leave payments – when paid on termination of employment – are specifically excluded from the definition of 'ordinary time earnings' by sub-subparagraph (a)(i)(B) of that definition within subsection 6(1) of the SGAA.*

## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; SGR 2009/2

### *Legislative references:*

SGAA 1992  
 SGAA 1992 6(1)  
 SGAA 1992 6(3)  
 SGAA 1992 11  
 SGAA 1992 15B  
 SGAA 1992 16  
 SGAA 1992 27  
 SGAA 1992 28  
 SGAA 1992 29  
 Fair Entitlement Guarantee Act 2012 28

### *Cases relied on:*

Deputy Commissioner of Taxation v. Applied Design Development Pty Ltd (in liq) [2002] FCA 205; (2002) 49 ATR 196; 2002 ATC 4193; (2002) 20 ACLC 463; (2002) 117 FCR 336

### *Other references:*

ATO ID 2008/26  
 ATO ID 2015/13 (withdrawn)  
 ATO ID 2015/14 (withdrawn)  
 ATO ID 2015/15 (withdrawn)  
 Supplementary Explanatory Memorandum to the Superannuation Guarantee (Administration) Bill 1992  
 Explanatory Memorandum to the to the Fair Entitlements Guarantee Bill 2012  
 Macquarie Dictionary, 6th edition 2013

### ATO references

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