SGD 2005/D1 - Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house?

This cover sheet is provided for information only. It does not form part of *SGD 2005/D1 - Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house?*

This document has been finalised by SGD 2005/2.

Draft Superannuation Guarantee Determination

Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house?

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 should not be relied on by taxpayers and practitioners. 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.

1. No. A contribution for the benefit of an employee to a superannuation fund or retirement savings account (RSA) that is made through the use of a clearing house is made when the contribution is received by the trustee of the complying superannuation fund or the RSA. A failure by the clearing house to forward the contributions to the superannuation fund or RSA by the required date for the quarter under the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) will result in a failure by the employer to make that contribution by the required date. However, if the clearing house is an agent of the superannuation fund and the contribution is for an employee that is a member of that superannuation fund, the contribution is made when the employer makes the contribution to the clearing house.

2. Subsection 23(6) of the SGAA 1992 allows contributions made within the period of 28 days after the end of a quarter to reduce an employer's liability to the superannuation guarantee charge. However that subsection requires the contributions to be made to a complying superannuation fund or RSA for the benefit of an employee. A payment by an employer to a clearing house is not a contribution made to a complying superannuation fund or RSA for the benefit of an employee.

3. It makes no difference if the clearing house is operated by a superannuation fund. The contribution is still made to the fund when the trustee of the fund receives the contribution. A regulated superannuation fund is only able to accept contributions in accordance with Part 7 of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations 1994). Under Part 7 of the SIS Regulations 1994, a superannuation fund is only able to accept contributions that are made in respect of a member of the fund.

4. A clearing house is a facility provided by an organisation, (often offered by a superannuation fund) that accepts superannuation contributions for employees of a particular employer and distributes those contributions to the particular superannuation funds chosen by the employees. The employer generally pays the clearing house a fee to use the service. Where a clearing house deducts the administration fee from the contributions and sends the reduced balance to the fund, only the remaining balance sent to the fund will reduce the employer's liability to the superannuation guarantee charge.

5. The arrangement between the employer and clearing house is documented under a contract. There is an agency relationship between the employer and the clearing house. For commercial law purposes, an agent is a person who is authorised, either expressly or impliedly, by a principal to act for that principal so as to create or effect legal relations between the principal and third parties (*International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644). Where an employer (the principal) has authorised a clearing house (the agent) to act on the employer's behalf, and the clearing house is acting within the authority conferred on it by the employer, any act done on behalf of the employer by the clearing house is an act of the employer.

6. However, there may be cases where a clearing house has also entered into an agency arrangement with a superannuation fund(s) for the purposes of accepting contributions for members of that superannuation fund(s). Where the clearing house is an agent of a superannuation fund for the purposes of accepting contributions for members of that fund, contributions made in respect of employees that are also members of that superannuation fund will be made when the employer provides the contribution to the clearing house. This also means that the superannuation fund is taken to have received the contribution in respect of its member(s) on the date on which the employer made the contribution to the clearing house for the purposes of complying with the SIS Regulations 1994.

7. If a clearing house forwards the contribution on to a superannuation fund by way of a cheque, Superannuation Guarantee Determination SGD 2003/7 provides information on when the contribution is taken to have been made.

Example 1

8. *Peter pays clearing house PBS Pty Ltd $9,800 on 27 April to cover contributions for the 1 January to 31 March quarter for his employees. PBS Pty Ltd forwards the contributions on behalf of Peter to each of the employee's respective superannuation funds on 29 April. An agency arrangement does not exist between PBS Pty Ltd and the respective superannuation funds. As the contributions have not been received by the trustees of the superannuation funds by 28 April, Peter is liable for the superannuation guarantee charge. Peter's superannuation guarantee charge consists of each of the employee's individual superannuation guarantee shortfall amounts, a nominal interest component and an administration component.*

Example 2

9. *Mitchell Accounts pays a clearing house operated by Handy Superannuation Fund $5,000 on 28 October to cover the July to September quarter. The clearing house has entered into an agreement with Handy Superannuation Fund that enables the clearing house to be an agent of the Handy Superannuation Fund in respect of contributions received for its members. Contributions of $3,000, made by Mitchell Accounts are in respect of employees who are members of Handy Superannuation Fund. Mitchell Accounts is taken to have made the contributions in respect of its employees who are also members of the Handy Superannuation Fund on 28 October. Contributions of $2,000 for two employees, Toni and Danielle, need to be paid to different superannuation funds (the employees' chosen superannuation funds). The clearing house has not entered into agency agreements with either of the employees' chosen superannuation funds and is required to keep these amounts separate from amounts that it holds for the trustee of Handy Superannuation Fund. On 29 October the clearing house forwards $2,000 to Toni and Danielle's chosen superannuation funds on behalf of Mitchell Accounts. Mitchell Accounts has not met the 28 October deadline and has a superannuation guarantee shortfall of $2,000 as the contribution was not made until 29 October. Mitchell Accounts' superannuation guarantee liability would consist of the shortfall amount of $2,000, nominal interest on that shortfall amount and Mitchell Accounts' administration component.*

Example 3

10. *Mathew pays clearing house Haine Pty Ltd $59,800 on 24 April to cover contributions for the January to March quarter for his 10 employees. Haine Pty Ltd charges an administration fee of $5.50 per quarter plus a fee of $1.10 for each employee whose contributions are transferred to a superannuation fund. Haine Pty Ltd subtracts $16.50 from Mathew's contributions and then forwards the contributions on behalf of Mathew to each employee's respective superannuation fund. It is only the remaining balance of $59,783.50 that is sent to the employees' superannuation funds that will reduce Mathew's liability to pay the superannuation guarantee charge. Mathew needs to ensure that he pays Haine Pty Ltd the minimum required superannuation contributions he must make for his employees as well as the full amount of his clearing house's administration fees to avoid liability to the superannuation guarantee charge. The minimum amount of superannuation support Mathew was required to provide for his 10 employees for the quarter starting 1 January was $59,800. Mathew has a superannuation guarantee shortfall which is calculated with reference to the total salary and wages paid by him to his employees. Assuming this amount is the same as his earnings base, Mathew's superannuation guarantee liability would consist of the shortfall amount of $16.50, nominal interest on that shortfall amount and Mathew's administration component.*

Date of Effect

11. It is proposed that when the final Determination is issued, it will apply both before and after its date of issue. However, the 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.

Your comments

12. We invite you to comment on this draft Superannuation Guarantee Determination. Please forward your comments to the contact officer by the due date.

Due date: **29 July 2005**

Contact officer: **Usha Chand**

E-mail address: **Usha.Chand@ato.gov.au**

Telephone: **(02) 6216 2355**

Facsimile: **(02) 6216 2260**

Address: **Australian Taxation Office**
GPO Box 9990
CANBERRA ACT 2600

Commissioner of Taxation
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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

SGD 2003/7

Subject references:

- clearing house
- contribution
- superannuation guarantee
- timing of payments

Legislative references:

- SGAA 1992 23(6)
- SIS Regulations 1994 Pt 7

Case references:

- International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company (1958) 100 CLR 644

ATO references
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