TD 2004/D82 - Income tax: will Part IVA of the Income Tax Assessment Act 1936 always apply if a business (including a personal services business) pays superannuation contributions that are considerably in excess of the value of the services provided by the employee?

This document has been finalised by TD 2005/29.

Draft Taxation Determination

Income tax: will Part IVA of the *Income Tax Assessment Act 1936* always apply if a business (including a personal services business) pays superannuation contributions that are considerably in excess of the value of the services provided by the employee?

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 Determinations that represent authoritative statements by the Australian Taxation Office.*

1. No. The application of Part IVA to a particular scheme depends on the particular facts and circumstances of the case. However, in light of the AAT's decision in *Ryan v Commissioner of Taxation* [2004] AATA 753 (*Ryan's case*), the ATO accepts that, absent unusual features (and subject to the qualification that follows), Part IVA will not apply to a case where a company or trust conducting a personal services business (as defined in Division 87 of the *Income Tax Assessment Act 1997*) pays genuine superannuation contributions up to the age-based limits to a complying superannuation fund in respect of the associate of the main service provider. The qualification referred to above is that the provision of personal services through the entity must be commercially justified (for example, because the relevant service acquirers will not contract with individuals but with entities only). (If the use of the entity is not commercially justified, it would be necessary to consider factors such as those considered in *Tupicoff v. Federal Commissioner of Taxation* (1984) 15 ATR 1262; 84 ATC 4851, *Egan v. Federal Commissioner of Taxation* (2001) 47 ATR 1180; 2001 ATC 2185 and *Federal Commissioner of Taxation v. Mochkin* (2003) 52 ATR 198; 2003 ATC 4272.)

2. *Ryan's case* is an example of a situation where a personal services business paid superannuation contributions in excess of the value of the services provided by the employee in circumstances where the AAT held that Part IVA did not apply.

3. The case was an alienation of personal services income (income splitting) case involving the provision of the taxpayer's personal services as a computer consultant through a company that he and his wife controlled. The company conducted a personal services business and therefore was not subject to the alienation of personal services

income measures in Part 2-42 of the *Income Tax Assessment Act 1997*. The company paid the taxpayer's wife a small salary for her secretarial assistance but made large superannuation contributions on her behalf. Those contributions exceeded the value of her work for the company but were within the age-based limits prescribed in subsection 82AAC(2) of the ITAA 1936. The ATO argued that section 177F of the ITAA 1936 allowed the Commissioner to include the amount of the excess contributions in the taxpayer's assessable income.

4. The AAT found for the taxpayer on the grounds that, in the circumstances of the case, it could not reasonably be expected that the amount paid to the superannuation fund in respect of the taxpayer's wife would otherwise have been paid to him personally. Rather, it found that if the company had not made superannuation contributions in respect of his wife it would have made superannuation contributions in respect of him – that is, no additional income would have been paid directly to either of them. The AAT also observed that, even if this were not the case, a consideration of the matters listed in section 177D of the ITAA 1936 did not reveal a dominant purpose of obtaining a tax benefit. In these circumstances Part IVA could not apply.

5. In reaching its conclusion the AAT accepted that the company was necessary to enable the taxpayer to obtain the work and that the salary to his wife was fair and reasonable. It also noted that if the superannuation contributions had been made for him then there would have been only a very small increase in the amount of tax that was actually paid.

6. An example of a case having unusual features of the type referred to in paragraph 1 might include a situation where objectively it is clear that the associate is engaged by the entity solely to allow the diversion of superannuation contributions from the main service provider. Depending on the particular facts such a situation may give rise to different considerations. Cases which have unusual features which remove them from the general guidance provided by this Taxation Determination will need to be considered in light of their own particular facts and circumstances.

7. This Taxation Determination does not address alienation of personal services income other than by way of making contributions to a complying superannuation fund. For example, it does not apply to cases where income of the entity is paid directly to the main service provider and his or her spouse in such a way that the amounts paid to each are disproportionate to their respective contributions to the personal services business. In this regard, the AAT in *Ryan's case* noted that different considerations may have arisen if the case had involved the payment by the company of equal amounts of income to the taxpayer and his wife (rather than contributions to a superannuation fund).

8. The conclusions reached in this Taxation Determination are equally applicable to businesses that are not personal services businesses.

Date of effect

9. When the final Determination is issued, it is proposed to apply 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 21 and 22 of Taxation Ruling TR 92/20).

Your comments

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

Due date: **18 February 2005**

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Commissioner of Taxation
22 December 2004

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1936 82ACC(2)
- ITAA 1936 177D
- ITAA 1936 177F
- ITAA 1997 Part 2-42
- ITAA 1997 Div 87

Case references:

- Egan v. Federal Commissioner of Taxation (2001) 47 ATR 1180; 2001 ATC 2185
- Federal Commissioner of Taxation v. Mochkin (2003) 52 ATR 198; 2003 ATC 4272
- Ryan v Commissioner of Taxation [2004] AATA 753
- Tupicoff v. Federal Commissioner of Taxation (1984) 15 ATR 1262; 84 ATC 4851

ATO references
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