PS LA 2008/1 - The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes

This cover sheet is provided for information only. It does not form part of *PS LA 2008/1 - The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes*

This document has changed over time. This version was published on *6 December 2018*

This practice statement was originally published on 31 January 2008. Versions published from 7 October 2009 are available electronically - refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be requested by emailing TCNLawPublishingandPolicy@ato.gov.au .

Generated on: 6 November 2026, 02:56:52 AM

Australian Government
Australian Taxation Office

PS LA 2008/1

The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes

This Law Administration Practice Statement provides guidance to staff in the exercise of the discretion to disregard or reallocate concessional or non-concessional superannuation contributions for excess contributions purposes.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

1. What this Practice statement is about

There are annual caps that limit how much a person can contribute to super without paying extra tax or charges.

A person, who has or will exceed the cap, may apply for a written determination that all or part of their concessional or non-concessional contributions for a financial year are to be disregarded or allocated to another financial year.[1]

The discretion can only be exercised where you consider that there are both special circumstances **and** making the determination is consistent with the object of Divisions 291 or 292.[2]

This Practice statement sets out guidelines on when and how to apply the discretion.

2. General principles to consider when making a determination

When considering relevant factors, you should not consider each factor in isolation when determining whether the discretion should be exercised. You must weigh up all of the relevant factors applicable to the individual's circumstances as a whole when considering whether it is appropriate to exercise the discretion.

You should consider each case on its merits and consider all of the relevant facts that caused the individual to exceed the relevant contributions cap.

3. What are 'special circumstances'?

The expression 'special circumstances' for the purposes of excess contributions has been considered in a number of decisions both in the Federal Court and the Administrative Appeals Tribunal.[3]

It is not possible to lay down precise rules for what constitutes special circumstances. The core idea of special circumstances is that there is something unusual to take the case out of the ordinary course which results in an unfair, unintended or unjust outcome.[4]

The issue to be considered is whether there are special circumstances in relation to all or part of the contributions that have resulted in, or will give rise to, the excess contributions determination or tax assessment. Accordingly, the focus of consideration is whether there are special circumstances that concern the contribution made in the relevant financial year that caused the individual to exceed their contributions cap.

However, circumstances relating to contributions made in earlier financial years may be relevant where those contributions have some relevant relationship with the circumstances relating to the contributions made in the financial year that have resulted in, or will give rise to, the excess contributions determination or tax assessment.[5]

4. Is the determination consistent with the object of the Division?

The object of Divisions 291 and 292 is to ensure that the amount of concessionally taxed super benefits that an individual receives results from contributions that have been made gradually over the course of the individual's life. That is, the contributions which are the subject of the determination represent contributions

[1] Section 291-465 of the *Income Tax Assessment Act 1997* (ITAA 1997) applies to concessional contributions and section 292-465 applies to non-concessional contributions. All legislative references are to the ITAA 1997 unless otherwise indicated.
[2] *Federal Commissioner of Taxation v. Dowling* [2014] FCA 252 at [94]; 2014 ATC 20-447.
[3] Cases are cited in the References section of this practice statement.
[4] *Ward v. Commissioner of Taxation* [2016] FCAFC 132 at [39] to [41]; 2016 ATC 20-583; (2016) 103 ATR 823; (2016) 247 FCR 372.
[5] *Commissioner of Taxation v. Dowling* [2014] FCA 252 at [36] to [37].

that have been made gradually over the course of that person's life.[6]

5. Other factors that may be considered

You may have regard to whether a contribution made in one financial year should be more appropriately allocated towards a different financial year.

You may also consider whether it was reasonably foreseeable, when the contribution was made, that there would be excess contributions.

Where the contribution is made by another person (for example, an employer) you should consider the terms of any agreement or arrangement covering the amount and timing of the contribution.

You should also consider the amount of control the person had over the making of the contribution and any other relevant factors.

6. Factors that do not generally amount to special circumstances

The following factors, in isolation, would not generally amount to special circumstances:

- Financial consequences – the financial (or fiscal) consequences that flow from an excess contribution are not, of themselves special circumstances. Special circumstances need to be found beyond the actual rate imposed and beyond the specific conditions which give rise to that rate being imposed.[7] This means that, for example, the financial consequences from an excess contribution that arose out of acting on a misunderstanding of the law or incorrect advice will not be special circumstances, where that misunderstanding or incorrect advice itself does not amount to special circumstances.[8]
- Not knowing the law – the fact that a person is mistaken or unaware of the consequences does not, on its own, amount to special circumstances.[9]
- Incorrect professional advice – the fact that a third party leads another person into error would not generally amount to special circumstances unless there were other factors leading to the mistake.[10]

7. Examples

The following examples may help you decide when it may be appropriate to exercise the discretion. In particular, they show how imposing additional tax or charges may be unfair or unreasonable because the person had no control over the circumstances.

Superannuation guarantee

Special circumstances may occur where an employee has had no control or foreseeability over when any superannuation guarantee (SG) shortfall is paid to their superannuation fund by the ATO. For example, when the timing is directly related to an employer's failure to make contributions for an employee in order to avoid an SG charge and our action to assess, collect and pay the shortfall amount to the employee's superannuation fund.

Applying the discretion to allocate the contributions to the financial year in which the SG shortfall occurred is consistent with the object of the relevant Division to ensure that super contributions are spread over the person's life.

However, it is less likely to establish special circumstances where the individual is the sole director of the company or had any control over the timing and the amount of the payment.

Salary sacrifice

It may be appropriate to exercise the discretion in cases where the person has entered into a salary sacrifice agreement with their employer that specifies:

- the date the amount is to be paid to the superannuation fund
- the total number of payments in a financial year, and

[6] *Federal Commissioner of Taxation v. Dowling* [2014] FCA 252 at [114] to [116]; 2014 ATC 20-447 and *Ward v. Commissioner of Taxation* [2016] FCAFC 132 at [47]; 2016 ATC 20-583; (2016) 103 ATR 823; (2016) 247 FCR 372.

[7] *Mills and FC of T* [2017] AATA 362 at [50]; 2017 ATC 10-451; (2017) 105 ATR 216 (*Mills*) and *Re Verschuer and Federal Commissioner of Taxation* [2013] AATA 12 at [61]; (2013) 88 ATR 991 (*Verschuer*).

[8] The Administrative Appeals Tribunal in *Ward and Commissioner of Taxation* [2018] AATA 1519 considered the financial consequences of the excess contributions tax assessment to be particularly relevant on the facts of that case. However, this approach does differ from *Mills* and *Verschuer* . The approach outlined in this Practice statement is consistent with the approach taken in *Mills* and *Verschuer.*

[9] *Liwszyc v. Federal Commissioner of Taxation* [2014] FCA 112 at [77]; (2014) 218 FCR 334; 2014 ATC 20-441; (2014) 94 ATR 16. See also *Peaker v. Commissioner of Taxation* 2012 ATC 10-238 at [20]; [2012] AATA 140; (2012) 87 ATR 578 and *Verschuer and Federal Commissioner of Taxation* [2013] AATA 12; (2013) 88 ATR 991.

[10] *Federal Commissioner of Taxation v. Dowling* 2014 ATC 20-447 at [108]; [2014] FCA 252.

- the amount to be transferred with each payment,

and the employer breaches the written agreement. In these types of cases there is an absence of control and the amount or timing is directly related to the employer's failure to adhere to the agreement.[11]

Allocating the contribution to the appropriate financial year is consistent with the object of the relevant Division.

However if the salary sacrifice agreement is verbal or fails to set out the particular terms, consideration should be given to the employer's contribution pattern in prior years to determine the level of foreseeability.[12]

Employees are expected to be aware of the payment patterns of their employers and factor this into decisions to alter or amend concessional contributions made on their behalf.

Timing of contributions

A contribution counts in the financial year a superfund actually receives the money, not when the contributor pays the amount or when employer contributions are due to be made.[13]

The fact a contribution accrued or was paid in one financial year but was made in another financial year is not of itself a 'special circumstance'. A short delay in timing between the employer actually making the payment and the amount being received by the super fund is also to be expected.[14]

What is relevant to consider is whether it was unusual or out of the ordinary for a third party to make the contribution when they did and what amount of control and foreseeability the relevant person had over the contribution.

The discretion would generally not be exercised where an individual made an additional concessional contribution during a financial year, assuming that their employer would make contributions on their behalf during that financial year where there is an absence of a regular pattern of the employer making payments on a specific date and the super fund receiving the payment on a specific date. However, the discretion may be allowed where the individual can show that they relied on their employer making payments on a specific date and the super fund receiving the payment on a specific date.

Re-contribution strategy

The fact that a person has entered into a re-contribution strategy (that is, where a member is paid superannuation benefits and subsequently makes contributions to a superannuation fund) would not, on its own, amount to special circumstances. Re-contribution strategies are frequently carried out for a specific purpose.

You will need to consider all of the circumstances around the making of the contribution giving rise to the excess to determine whether the person was able to, or could reasonably have been expected to, have control over the amount and timing of the payment, and whether it was reasonably foreseeable when the contribution was made that they would exceed the contributions cap.

You must also consider whether the re-contributed amount consists solely of contributions made over the course of the person's life or if the re-contribution included any amounts from other sources to establish if exercising the discretion would be within the object of the relevant Division.[15]

Personal super contributions deduction

Special circumstances would not generally occur if the person exceeded their contributions cap solely because they did not meet any of the requirements to be eligible to claim an income tax deduction.[16]

Foreign transfer

If a person has exceeded their contributions cap due to a transfer from a foreign super fund to an Australian super fund, you should give consideration to the amount of control the person had over the amount and timing of the contribution.

The fact that a person may not have been aware that the amount would count towards their contributions cap or did not know the exact day the amount was transferred may not be considered special

---

[11] *Longcake and FC of T* [2012] AATA 576; 2012 ATC 10-270; (2012) 90 ATR 436.

[12] *Kuyper and FC of T* [2012] AATA 282; (2012) 88 ATR 603 *Davenport and FC of T* [2012] AATA 0760.

[13] Taxation Ruling TR 2010/1 *Income tax: superannuation contributions*.

[14] *Liwszyc v. Federal Commissioner of Taxation* [2014] FCA 112 at [76]; 218 FCR 334; 2014 ATC 20-441; (2014) 94 ATR 16. See also [80] to [81] with respect to the timing of payments in the context of the determination being consistent with the object of Division 292. See also *Re Verschuer and Commissioner of Taxation* [2013] AATA 12 at [55]; 88 ATR 991.

[15] *McLennan and Commissioner of Taxation* [2013] AATA 311; 2013 ATC 10-313; (2013) 93 ATR 957; *KFBC and Federal Commissioner of Taxation* [2013] AATA 577; 2013 ATC 1-056; (2013) 95 ATR 451; *Thompson and Federal Commissioner of Taxation* [2014] AATA 339; 2014 ATC 10-362; (2014) 98 ATR 661; *Pitts v. Federal Commissioner of Taxation* [2017] AATA 685 2017 ATC 10-458.

[16] *Confidential and FC of T* [2013] AATA 110; (2013) 92 ATR 430; *Confidential and FC of T* [2013] AATA 111.

circumstances.[17] However there may be additional factors that are sufficiently unusual or out of the ordinary which may result in special circumstances, such as excessive fluctuations in the exchange rates that may not have been foreseen.

8. More information

For more information and further examples see:

- Super contributions – too much can mean extra tax
- Explanatory Memorandum to Tax Laws Amendment (Simplified Superannuation) Bill 2006
- Super contributions limits
- Application – excess contributions determination
- Excess contributions tax learner guide

Date issued 31 January 2008
Date of effect 1 July 2007

[17] *Mills and FC of T* [2017] AATA 362 at [49]; 2017 ATC 10-451; (2017) 105 ATR 216.

Amendment history

Date of amendment	Part	Comment
6 December 2018	All	Updated to the new LAPS format and style and concurrently.
	Paragraph 6	Amended to reflect the decision of *Ward v. Commissioner of Taxation* [2018] AATA 1519.
	Examples	Changes to examples
8 February 2012	Various	Updated references to financial years.
	References	Link to ATO Receivables Policy removed due to release of PS LA 2011/27 Debt Relief.
	Examples 5,7 and 8.	Changes made to improve technical content and readability.
15 May 2011	Paragraph 14	Added new paragraph to include changes that received Royal assent on 16 November 2010 allowing the Commissioner to apply discretion to disregard or allocate to another financial year all or part of a person's contributions for the purposes of excess contributions tax before an assessment is issued. Also that all of the contributions sought to be disregarded or reallocated must already have been made, and table to outline when contributions have been 'made'.
	Paragraph 15	Updated NAT number for Application - excess contributions tax determination.
	Paragraph 39	Added paragraph to reflect new subsections 292-465(8) and (9).
11 October 2010	Paragraph 4	Minor revisions to refer leaders to information available on ato.gov and to clarify the paragraph.
	Paragraph 8	Concessional contributions cap for 2010-11 financial year added.
	Paragraph 10	Non-concessional contributions cap for 2010-11 financial year added.
	Paragraph 24	Clarification of when the discretion applies.
	Paragraph 28	Clarification re the object of Division 292.
	Paragraph 35	Clarification of what constitutes 'special circumstances'.
	Paragraph 36	Added to include that each individual case requires consideration.
	Paragraph 38	Minor revision to refer readers to information available on ato.gov.au.
	Contact details	Updated.
7 October 2009	Various	Changes to reflect changes in concessional and non-concessional contributions cap limits.
	Contact details	Updated.
11 September 2008	Paragraph 35	References to PS LA 2006/11 removed.
	References	PS LA 2006/11 removed and link to the ATO Receivables Policy added.

References

Legislative references	ITAA 1997 ITAA 1997 Div 291 ITAA 1997 291-1 ITAA 1997 291-5 ITAA 1997 291-465 ITAA 1997 Div 292 ITAA 1997 292-1 ITAA 1997 292-5 ITAA 1997 292-465
Related public rulings	TR 2010/1 Income tax: superannuation contributions TD 2013/22 Income tax: 'concessional contributions' - allocation of a superannuation contribution with effect from a day in the financial year after the financial year in which the contribution was made
Related practice statements	
Case references	Azer and Federal Commissioner of Taxation [2016] AATA 472; 2016 ATC 10-429 Bornstein and Federal Commissioner of Taxation[2012] AATA 424; 2012 ATC 10-257; (2012) 88 ATR 316 Boscolo v. Secretary, Department of Social Security (1999) 90 FCR 531 Federal Commissioner of Taxation v. Dowling 2014 ATC 20-447; [2014] FCA 252 Confidential and Federal Commissioner of Taxation [2013] AATA 110; (2013) 92 ATR 430 Confidential and Federal Commissioner of Taxation [2013] AATA 111 Davenport and Federal Commissioner of Taxation [2012] AATA 760; (2012) 91 ATR 198 Dickinson and Federal Commissioner of Taxation [2012] AATA 762; (2012) 87 ATR 695 Fischer v. Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (2010) 185 FCR 52; [2010] FCA 441 Hamad and Federal Commissioner of Taxation [2012] AATA 530; 2012 ATC 10-280; (2012) 88 ATR 683 Hope and Federal Commissioner of Taxation [2014] AATA 877; (2014) 99 ATR 959 KFBC and Federal Commissioner of Taxation [2013] AATA 577; 2013 ATC 1-056; (2013) 95 ATR 451 Kuyper and Federal Commissioner of Taxation [2012] AATA 282; (2012) 88 ATR 603 Liwszyc v. Federal Commissioner of Taxation (2014) 218 FCR 334; [2014] FCA 112; 2014 ATC 20-441; (2014) 94 ATR 16 Longcake and Federal Commissioner of Taxation [2012] AATA 576; 2012 ATC 10-270; (2012) 90 ATR 436 McLennan and Federal Commissioner of Taxation [2013] AATA 311; 2013 ATC 10-313; (2013) 93 ATR 957 McMennemin and Federal Commissioner of Taxation [2010] AATA 573; 2010 ATC 10-145; (2010) 79 ATR 898 Mills and Federal Commissioner of Taxation [2017] AATA 362; 2017 ATC 10-451; (2017) 105 ATR 216 Peaker and Federal Commissioner of Taxation 2012 ATC 10-238; [2012] AATA 140; (2012) 87 ATR 578 Pitts and Federal Commissioner of Taxation [2017] AATA 685; 2017 ATC 10-458 Rawson and Commissioner of Taxation [2012] AATA 322; 2012 ATC 10-250; (2012) 88 ATR 612 Thompson and Federal Commissioner of Taxation [2014] AATA 339; 2014 ATC 10-362; (2014) 98 ATR 661 Verschuer and Federal Commissioner of Taxation [2013] AATA 12; (2013) 88 ATR 991

	Ward v. Federal Commissioner of Taxation [2016] FCAFC 132; 2016 ATC 20-583(2016) 103 ATR 823; (2016) 247 FCR 372 Ward and Federal Commissioner of Taxation [2018] AATA 1519; 2018 ATC 10-476
Other references	Explanatory Memorandum to the Superannuation Legislation Amendment Bill 2010 Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006
File references	1-DLJHLCC
Date issued	31 January 2008
Date of effect	1 July 2007
Business Line	Superannuation

ATO references

ISSN	2651-9526
File	1-DLJHLCC
ATOlaw topic	Superannuation ~~Excess contributions ~~Concessional ~~Discretion - financial outcomes Superannuation ~~Excess contributions ~~Non-concessional ~~Discretion - financial outcomes

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).