

SGR 94/4 - Superannuation guarantee: Ordinary time earnings



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Superannuation Guarantee Ruling

Ordinary time earnings

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

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

What this Ruling is about

1. This Ruling explains what are 'ordinary time earnings' (OTE) as defined in subsection 6(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).
2. Under the SGAA, an employer's liability is based on the employee's notional earnings base. OTE is used as a default earnings base where there are no other acceptable earnings bases relevant to a particular employee.

Previous Rulings

3. This Ruling replaces SGR 93/3 which is withdrawn from the date of this Ruling.
4. This Ruling takes into account any changes to the SGAA up until the date of this Ruling. The proposed measures announced by the Treasurer on 28 June 1994 are not included in this Ruling.

Ruling

5. Subsection 6(1) of the SGAA defines OTE in this way:
' "ordinary time earnings", in relation to an employee, means:
 - (a) the total of:
 - (i) earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of

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any of the following kinds made to the employee on the termination of his or her employment:

- (A) a payment in lieu of unused sick leave;
 - (B) a payment in lieu of unused annual leave within the meaning of subsection 26AC(1) of the *Income Tax Assessment Act 1936* (ITAA);
 - (C) a payment in lieu of unused long service leave within the meaning of subsection 26AD(1) of the ITAA; and
- (ii) earnings consisting of over award payments, shift loading or commission; or
- (b) if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the contribution period - the maximum contribution base'.

6. A '**maximum contribution base**' is a maximum limit on the amount of superannuation support that an employer is expected to provide for the benefit of an employee. This maximum limit is subject to annual indexation; indexed to AWOTE. The maximum limit for each contribution period is \$40,000 in the 1992-93 financial year, \$20,160 (quarterly) in the 1993-94 financial year, and \$20,780 (quarterly) in the 1994-95 financial year.

Ordinary hours of work

7. The ordinary hours of work may be specified in a statute or under an industrial award. If so, the ordinary hours specified are also the ordinary hours of work under the SGAA.

8. If an employee is not covered by an award, but has agreed to work a certain number of hours, those hours are the employee's ordinary hours of work. The hours agreed will be determined in the light of all the circumstances (for example, hours actually worked, the industry norm, or what is contained in any written agreement).

9. If the ordinary hours of work are not specified or agreed, the ordinary hours of work will be the hours actually worked and any hours of paid leave.

10. Ordinary hours of work are not limited to hours between 9am to 5pm, Monday to Friday. They could include night and weekend shifts.

In respect of

11. The term '**in respect of**' means to have some connection with. For the definition of OTE, a payment will be taken to be earnings **in respect of** ordinary hours of work if it is made:

- for attendance, or for work done, in those hours; or
- to satisfy an entitlement that accrued as a result of attending, or working, in those hours.

Entitlements accrued before 1 July 1992

12. A payment made after 30 June 1992 will form part of OTE even though it reflects an entitlement accrued for ordinary hours of work before the SGAA commenced.

Over award payments, shift loadings and commissions

13. Over award payments, shift loadings and commissions are OTE even if they are paid for work done outside ordinary hours of work.

14. An over award payment is the excess by which the actual rate paid to an employee exceeds the award rate.

15. A shift loading is an additional payment for employees who work shifts other than normal day shifts. The payment may be a percentage of the ordinary time rate and is paid as compensation for inconvenient working hours.

16. A commission is any payment made to an employee on the basis of agreed performance criteria (for example, a payment based on a percentage of sales). A commission also includes a fee allocated to an agent for services rendered.

Date of effect

17. This Ruling sets out the current practice of the Australian Taxation Office and is not concerned with a change in interpretation. Consequently, it applies from the time that the legislation commenced to operate.

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Explanations

What is included in ordinary time earnings?

18.

Types of Earnings	Reasons
<i>Directors' fees</i>	Any fees paid for directors are payments for directors' ordinary hours of work.
<i>Remuneration while on annual leave, sick leave or long service leave</i>	Paid for an entitlement accrued on the basis of ordinary hours of work. Therefore, it is paid in respect of ordinary hours of work. It also includes amounts accrued before 1 July 1992 but paid after 30 June 1992.
<i>Allowances (not reimbursement of expenses)</i>	See paragraph 20.
<i>Bonuses calculated by reference to work undertaken/sales made during ordinary hours of work</i>	See paragraphs 24-25.
<i>Casual loading</i>	These are payments for ordinary hours of work to reflect the lack of formal benefits associated with employment such as sick leave, annual leave, etc.
<i>Top-up payments or accident make-up payments when the employee works</i>	These are payments paid by the employer to the employee, for actual hours required to attend or perform work.
<i>Government (wage) subsidies</i>	Governments sometimes provide subsidies to employers who employ particular types of people. Such a subsidy (for example, the Job Start Allowance) reimburses the employer. The employer should not deduct the subsidy to determine ordinary time earnings. The amount the employee receives in respect of ordinary hours of work is not affected by an amount the employer receives as a subsidy.

What is excluded from ordinary time earnings?

19.

Types of Earnings	Reasons
<i>Overtime payments</i>	These are paid for work performed outside ordinary hours of work. It makes no difference how often the employee works overtime.
<i>'Christmas' bonuses and 'ex gratia payments'</i>	See paragraph 26.
<i>Payments in lieu of notice</i>	These are paid for hours never worked. There is no entitlement that accrues in ordinary hours even if the calculation uses a formula based on length of service.
<i>Redundancy payments</i>	Paid for non-transferable credits and inconvenience and hardship. No entitlement accrues during ordinary hours.
<i>Other payments not covered by paragraph 18 made by employer on termination of employment</i>	These are connected, not with ordinary hours of work, but with the end of ordinary hours of work. They should not be confused with payments for ordinary hours of work accumulated until the termination of employment.
<i>Payments when on maternity or paternity leave</i>	These are payments made in respect of employment and parenthood, not in respect of ordinary hours of work.
<i>Lump sums paid for accrued annual leave, accrued long service leave or accrued sick leave on termination of employment</i>	Excluded by definition. See paragraph 5.
<i>Workers' compensation payments</i>	These are payments made in respect of employment, not ordinary hours of work.
<i>Top-up payments or accident make up payments when the employee does not work</i>	Payments made to employees, who do not attend or perform work, are payments in respect of employment, not ordinary hours of work. See paragraph 23.

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<i>Top up payments, e.g., when serving on jury duty or with reserve forces, etc.</i>	These are payments made either by obligation (e.g., an award) or gratuitously, and are not in respect of ordinary hours of work.
<i>Benefits subject to tax under the Fringe Benefits Tax Assessment Act 1986</i>	All payments that form part of OTE are also part of 'salary or wages'. As these amounts are excluded from 'salary or wages' they cannot form part of OTE.
<i>Payments by way of restraint of trade</i>	These are paid for not exercising rights or freedoms. They are not paid in respect of ordinary hours of work.
<i>Reimbursement of expenses</i>	These are paid to compensate for expenses incurred by an employee rather than for ordinary hours of work. See paragraphs 21-22.
<i>Annual leave loading</i>	This is paid in respect of employment, not ordinary hours of work.

Allowances and reimbursements

20. What is an allowance? An allowance is a payment of a definite predetermined amount to cover an estimated expense. It is paid regardless of whether the employee incurs the expected expense. The employee has the discretion whether or not to expend the allowance.

20A. An expense allowance. An expense allowance is one which is paid with the expectation that the money will be fully expended in deriving income. For example, car allowance paid to real estate agents. This type of expense should not be included in salary or wages for superannuation guarantee purposes and it follows that these allowances do not form part of OTE. **These allowances are NOT included in salary or wages for superannuation guarantee purposes.**

20.B Other allowances e.g. dirt, locality, etc. Other allowances are those which are paid to employees and are not expended in the course of the employee's work. For example, those allowances which are paid because of particular conditions applying to the job, such as height, dust or danger allowances. These do form part of salary or wages and OTE. **These allowances are included in salary or wages and OTE for superannuation guarantee purposes.**

21. What is a reimbursement? A payment is a reimbursement if the employee is compensated exactly for all or an agreed part of an expense already incurred, although not necessarily disbursed. With

reimbursements in general, the employer considers the expense to be its own and the employee incurs the expenditure on behalf of the employer. A requirement that the employee vouch expenses lends weight to a presumption that a payment is a reimbursement rather than an allowance.

Note: The Commissioner will treat a payment at a set rate per kilometre as a reimbursement if the expense amount is calculated on a reasonable basis. For example, calculations made with reference to the statutory formula in the income tax laws would be considered reasonable.

22. An employer may make a payment in advance to an employee to enable the employee to expend an amount of money. Where the employee is required to account for any unspent monies to the employer, the payment is neither an allowance nor a reimbursement. In this situation the employee expends the money as an agent for the employer. The payment is not included in OTE.

Top up payments

23. Top up payments are paid by the employer, either by obligation (e.g. an award) or gratuitously. In general, the payment is made to compensate the employee for a reduced income when the employee serves, for example, on jury duty, or with the reserve forces. The payment is not in connection with work for the employer and is therefore not a payment **in respect of** ordinary hours. The payment is not included in OTE.

Bonuses

24. **A bonus** will form part of an employee's ordinary time earnings where the bonus is paid in respect of ordinary hours of work. The *CCH Macquarie Dictionary of Employment and Industrial Relations* defines a bonus as:

'a payment above the regular basic rate or standard pay, e.g. a payment for overtime or shift work, or attendance, an allowance for work under exceptional conditions, as well as an incentive payment made under a piecework system or incentive scheme or as a production bonus.'

25. All of these payments (excluding payments for overtime) would form part of an employee's ordinary time earnings.

26. A bonus that is an 'ex gratia payment' would not form part of an employee's ordinary time earnings. A discretionary payment made as a free gift and not subject to negotiation (such as a Christmas bonus) is not OTE.

Examples

27.

- (a) David is an employee of JJ Investment Pty Ltd. Apart from his usual salary, David is paid \$300 per month to cover expenses he is expected to incur while visiting clients. The payment is an allowance because David is paid regardless of whether he spends the \$300. Therefore, the payment is OTE.
- (b) Bernie works for an oil company and is living on an offshore oil rig. Bernie is paid a living away from home allowance to compensate him for having to live away from his usual place of residence. This payment is a fringe benefit and not treated as salary or wages in the employee's hands. Therefore, it is not OTE.
- (c) Suzie is an employee of Wakup Pty Ltd. At the end of the year the company gives her \$2,500 as a Christmas gift. This is a Christmas bonus paid to Suzie as an expression of the company's goodwill. It is not a payment made in respect of Suzie's ordinary hours of work, and so it is not OTE.

If the bonus had been paid to Suzie on the basis of agreed performance criteria it would be OTE.
- (d) Mary's employer requests her to purchase some office supplies and gives her \$100. Mary is required to obtain a receipt and to return the change to her employer. This payment is neither a reimbursement nor an allowance and is not included in OTE. Mary expends the money as agent of her employer.
- (e) Jon is rostered to work shift work which includes weekend work. In addition to his normal pay and shift loading, he is paid a weekend penalty rate. At the end of one shift, Jon's employer asks him to work two hours paid overtime. The weekend penalty rate forms part of OTE as it is paid for ordinary hours of work. The shift loading is included in OTE, by definition. However, the overtime payment is not included in OTE as it is paid for work performed outside ordinary hours of work.
- (f) Don travels by car on behalf of his employer and pays for the petrol used on the trip. On his return he provides receipts to his employer for \$150, the cost of the petrol. When the employer reimburses Don, the \$150 payment is a reimbursement and does not form part of OTE.

- (g) Tom uses his own car to travel 100 kilometres on behalf of his employer. Tom pays for any expenses such as petrol and incurs wear and tear on his vehicle. On his return Tom submits a claim for \$46.50 to his employer for travel costs. Tom has calculated the amount by applying a set travel rate of 46.5 cents per kilometre travelled. When the employer pays Tom, the \$46.50 is a reimbursement and does not form part of OTE. This is because Tom has calculated the amount using the 1993-94 statutory formula in the income tax laws (46.5 cents per kilometre for a 1600cc motor).
- (h) Claire serves five days on jury duty and is paid \$300 by the court. Because Claire's OTE is normally \$400 for five days work, her employer has decided to top up the jury payment by \$100. The employer's top-up payment of \$100 is not in connection with Claire's work for the employer and is therefore not in respect of ordinary hours of work. Neither the jury duty payment nor the top up payment form part of OTE.

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Attachment A

CHECKLIST - OTE & SALARY/WAGES

Payment Type	OTE?	Salary or Wages?
Allowances paid (other than a reimbursement of expenses)	Yes	Yes
Reimbursement of expenses (e.g., travel costs)	No	No
Bonuses that do not relate to specific performance criteria (e.g., Christmas bonuses)	No	Yes
Other bonuses	Yes	Yes
Commission	Yes	Yes
Over award payments	Yes	Yes
Shift loading	Yes	Yes
Overtime	No	Yes
Casual loading	Yes	Yes
Benefits subject fringe benefits tax	No	No
Workers compensation payments, including top up payments, where no work is performed	No	No
Workers compensation payments, including top up payments, paid by the employer, where work is performed	Yes	Yes
Top up payments, e.g., when serving on jury duty or with reserve forces, etc.	No	Yes
Payments when on maternity or paternity leave	No	Yes
Pay for annual holiday leave taken	Yes	Yes
Government (wage) subsidies, e.g., Job Start Allowance	Yes	Yes

Payment Type	OTE?	Salary or Wages?
Annual leave loading	No	Yes
Pay for sick leave taken	Yes	Yes
Pay for long service leave taken	Yes	Yes
Accrued annual leave, long service leave and sick leave paid as a lump sum on termination	No	Yes
Payments in lieu of notice	No	Yes
Redundancy payments	No	Yes
Other payments made by an employer on termination of employment	No	Yes
Director's fees	Yes	Yes
Payments for performance in, or provision of services relating to, entertainment, sport, promotions, films, discs, tapes, TV or radio	Yes	Yes
Payments to a contractor who is an employee under the SGAA (labour portion only)	Yes	Yes
Dividends	No	No
Partnership and trust distributions	No	No
Payments for entering into a restraint of trade agreement	No	No
Payments for domestic or private work under 30 hours per week	No	No

Commissioner of Taxation

15 September 1994

ISSN 1038 - 7463

Not previously released to the public in draft form

ATO references

NO 93/5191-4

Price \$1.20

BO

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FOI index detail

reference number

I 1016263

subject references

- allowance
- bonuses
- commission
- maximum contribution base
- ordinary hours of work
- ordinary time earnings
- over award payments
- reimbursement
- shift loading

legislative references

- SGAA 6(1)
- ITAA 26AC(1)
- ITAA 26AD(1)