


# ***TA 2010/2 (Withdrawn) - Circumvention of Excess Contributions Tax***

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 This document has changed over time. This version was published on *29 November 2011*



# Taxpayer Alert

**TA 2010/2  
(Withdrawn)**

**!** The Alert is withdrawn. Following a review of these arrangements, the ATO has concluded that some trust deed clauses may prevent a payment to a trustee of a superannuation fund from forming part of the fund and therefore from being a contribution for excess contributions tax and other purposes.

Whether a particular clause has that effect, and whether it applies to all or only some categories of payments, depends on the proper construction of the clause considered in the context of the surrounding provisions of the trust deed and the deed as a whole.

If a clause has the effect of preventing payments from being contributions, the payer is not entitled to the income tax deductions available for superannuation contributions. Such payments are likely to be subject to a separate trust. The beneficiary of the separate trust must account for income tax on the earnings of the trust in accordance with the income tax law. Failure to account for income tax in accordance with the clause and keep proper records may give rise to penalties and interest liabilities.

If the trustee does not take proper care to determine whether payments form part of the superannuation fund and wrongly intermingles payments that do not form part of the fund with assets of the fund, the trustee will breach its duties as trustee. This may be relevant to whether the trustee is a fit and proper person to act as trustee of a self managed superannuation fund.

Further information is available in the fact sheet [‘Fund Rules Intended to Prevent Excess Contributions Tax’](#).

On 29 November 2011, the Government announced that it will ensure the integrity of the annual superannuation contribution caps by ensuring that certain trust deed clauses cannot be used to avoid what would otherwise be excess contributions from being counted against the caps. Further information is available at [Mid-Year Economic and Fiscal Outlook 2011-12 - Appendix A - Revenue Measures - Treasury](#) under *Superannuation — clarifying the operation of certain superannuation trust deed clauses*.

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## FOI status: may be released

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*Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax and superannuation planning issues or arrangements that the Australian Taxation Office (ATO) has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed.*

*Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform tax officers of new and emerging higher risk tax and superannuation planning issues. Not all potential tax and superannuation planning issues that the ATO has under risk assessment will be the subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the ATO. In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.*

*Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which are of concern to the ATO. These issues will generally require more detailed analysis to provide the ATO view to taxpayers.*

*Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert might obtain their own advice or contact the ATO to seek guidance in relation to the tax and superannuation regulatory issues covered in the Taxpayer Alert.*

*This Taxpayer Alert is issued under the authority of the Commissioner.*

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## **TITLE: Circumvention of Excess Contributions Tax**

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This Taxpayer Alert describes an arrangement where a clause or clauses are inserted into a self managed superannuation fund (SMSF) trust deed in an attempt to circumvent the imposition of the excess contributions tax. The clauses are purported to create separate trusts which are intended to exclude from the fund any contributions that cause, or caused, a member to exceed their concessional or non-concessional contributions caps. It is implied that this would prevent the member from being subject to excess contributions tax.

### **Context for the arrangement**

From 1 July 2007 the concessional taxation of superannuation benefits is restricted by placing a limit on the amount of funds that can be contributed in respect of a superannuation fund member. There are two caps in operation. From 1 July 2009, the annual concessional contributions cap is \$25,000 (indexed) for those aged under 50 and \$50,000 for those aged 50 and over for the transition period ending 30 June 2012.

Non-concessional contributions are subject to a cap of \$150,000 per annum. (Individuals under 65 years of age may 'bring forward' two years of future entitlements of non-concessional contributions giving them a cap of \$450,000 over three years.)

Where contributions exceed the caps specified in the legislation, the individual will be liable to excess contributions tax.

### **Description**

This alert applies to arrangements with features that are substantially equivalent to the following:

1. The trust deed of an SMSF is amended to insert specific clauses, or a new SMSF is established with such clauses included in its deed, in the belief that the presence of such clauses prevents a member from ever being subject to the excess contributions tax.
2. A member makes contributions to the SMSF which in total exceed the member's contributions caps. The superannuation law does not generally allow the trustee to return all or part of any one of the contributions made for the member.

An exception allows the trustee of an SMSF to return all or part of a single contribution in very limited circumstances. For example, if a single non-concessional contribution exceeds \$150,000 for a member aged 65 or more on 1 July of the financial year the trustee must return the excess amount. The trustee must also return the part of a single non-concessional contribution that exceeds \$450,000 for a member aged 64 or less on 1 July of the financial year. ([ATOID 2007/225](#) explains how the SIS Regulations apply to a single contribution).

3. The contributions are intermingled with the assets of the SMSF.
4. The trustee becomes aware that the member has made contributions in excess of a contributions cap. This may occur for example as a result of correspondence from the ATO to the member about administration of the excess contributions tax.
5. The trustee asserts that any amount of excess contributions is held in a separate trust even though all the contributions are intermingled with the SMSF's other assets.

6. The trustee relies on clauses of the SMSF trust deed which are intended to operate as follows:
  - a. to prevent the trustee from accepting contributions above the member's contributions caps;
  - b. if the trustee does receive contributions that causes the member to exceed his/her contribution caps the excess amount is said to be held in a trust separate from the SMSF; and
  - c. the trustee is then obliged to repay the excess amount along with any earnings to the relevant member.
7. The member asserts that the amount that is, or the amounts that are, the subject of the purported separate trusts cannot be counted as a contribution(s) for the purposes of excess contributions tax.
8. The trustee may have returned the amount to the member, in reliance upon such clauses.

## Features which concern us

### Taxation issues

9. The ATO considers that arrangements of this type give rise to the following issues relevant to taxation laws, being whether:
  - a. the clauses are effective in creating separate trusts, in particular whether the subject matter of the relevant trusts can be identified with certainty;
  - b. the contributions, and any income arising from their investment, is correctly assessed to either the trustee of the SMSF or the member;
  - c. the insertion of such clauses in the SMSF deed actually has the effect of avoiding excess contributions tax;
  - d. the funds received by the SMSF are in fact contributions; and
  - e. any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

### Superannuation regulatory issues

10. The ATO considers that arrangements of this type give rise to the following issues relevant to the application of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and its Regulations, being whether:
  - a. the return of the amount of the excess contributions to the member is contrary to the contributions, preservation and cashing operating standards in the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations); and
  - b. the intermingling of the excess amount that is purported to be held under a separate trust with the assets of the SMSF has implications for whether the trustee has complied with the sole purpose test set out in section 62 of the SIS Act.

### The Message of this Taxpayer Alert

The SIS Act and SIS Regulations set out a comprehensive regime dealing with acceptance of superannuation contributions and preservation and payment of superannuation benefits. The *Income Tax Assessment Act 1997* (ITAA 1997) contains an assessment regime dealing with excess contributions.

The ATO has reviewed these arrangements and considers that they are ineffective. Any excess amounts are contributions for the purposes of both the SIS Act and ITAA 1997. Our view about what is a contribution is contained in [Taxation Ruling TR 2010/1 Income tax: superannuation contributions](#). If the trustee administers in accordance with such clauses the trustee may also breach the sole purpose test. Our view

on the operation of the sole purpose test for SMSFs is set out in [Self Managed Superannuation Funds Ruling SMSFR 2008/2](#).

**Note 1:**

*An administrative penalty of 20 penalty units may apply to a trustee who makes a false or misleading statement to the Commissioner. If you have any information about the current arrangement, phone us on 13 10 20. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this alert should also call us on 13 10 20.*

**Note 2:**

*Penalties of up to 5,000 penalty units for individuals, 25,000 penalty units for bodies corporate or up to twice the amount of consideration received or receivable may apply to promoters of tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953. The Commissioner can also apply to the Federal Court of Australia for restraining and performance injunctions against promoters where prohibited conduct has occurred, is occurring or is proposed.*

**Note 3:**

*Where appropriate, section 167 of the Income Tax Assessment Act 1936 may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, PS LA 2007/7 and PS LA 2007/24.*

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**Subject References:**

Self managed superannuation fund  
Trust deed  
Sole purpose test  
Contributions caps  
Excess contributions tax  
Contribution  
Concessional contributions  
Non-concessional contributions

**Legislative References:**

*Superannuation Industry (Supervision) Act 1993  
Superannuation Industry (Supervision) Regulations 1994  
Income Tax Assessment Act 1936  
Income Tax Assessment Act 1997  
Taxation Administration Act 1953*

**Other References:**

[Taxation Ruling TR 2010/1](#)  
[SMSFR 2008/2](#)  
[ATOID 2007/225](#)

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