

# ***TR 2010/1A2 - Addendum - Income tax: superannuation contributions***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *22 August 2012*

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## Addendum

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### Taxation Ruling

#### Income tax: superannuation contributions

This Addendum amends Taxation Ruling TR 2010/1 to reflect the following amendments made to the *Income Tax Assessment Act 1997* (ITAA 1997) by the *Superannuation Legislation Amendment Act 2010*:

- the repeal of paragraph 290-85(1)(c) of the ITAA 1997, applicable in relation to contributions made on or after 17 November 2010;
- the replacement of subsection 290-170(5) of the ITAA 1997, applicable to notices given to a successor fund on or after 17 November 2010;
- the insertion of subsection 290-85(1AA) of the ITAA 1997, applicable in relation to contributions made on or after 17 November 2010;
- the amendment of section 290-85(1A) of the ITAA 1997 applicable to contributions made on or after 17 November 2010; and
- the insertion of a definition of 'successor fund' in subsection 995-1(1) of the ITAA 1997, applicable to notices given on or after 17 November 2010.

Broadly, the changes made by the *Superannuation Legislation Amendment Act 2010* as covered by this Addendum relate to:

- deducting superannuation contributions for former employees; and
- giving a valid notice of intention to deduct a superannuation contribution to a successor fund if the contribution was made to the original fund.

This Addendum also amends TR 2010/1 to reflect subsection 290-170(5) of the ITAA 1997 as inserted by the *Tax Laws Amendment (2009 Measures No. 6) Act 2010* and before its replacement by the amendment in the *Superannuation Legislation Amendment Act 2010*. When referring to subsection 290-170(5) of the ITAA 1997 as it applied to a valid notice of intention to deduct a superannuation contribution that could be given on or after 25 March 2010 but before 17 November 2010 reference is made to 'former subsection 290-170(5)' of the ITAA 1997.<sup>1</sup> Former

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<sup>1</sup> Item 19, Schedule 2 of the *Tax Laws Amendment (2009 Measures No. 6) Act 2010* that was to repeal former subsection 290-170(5) (effective from 1 July 2013) was

subsection 290-170(5) is relevant to the giving of a valid notice of intention to deduct a superannuation contribution to the trustee of a continuing fund after a choice is made under Subdivision 310-B of the ITAA 1997 in relation to the merger of two superannuation funds.

This Addendum also makes a minor edit to paragraph 190 of TR 2010/1.

## **TR 2010/1 is amended as follows:**

### **1. Paragraph 45**

Omit the paragraph; substitute:

45. A contribution you make to a superannuation provider for a former employee is deductible if you can treat the former employee as an employee when the contribution is made and the conditions for deductibility are met. You can treat the former employee as an employee in several different situations covered by section 290-85 (but not all of those situations are explained in this Ruling).

*Contribution is made on or after 17 November 2010 and within four months after the person stops being your employee*

45A. You can treat a former employee as an employee when a contribution is made if:

- the contribution is made on or after 17 November 2010;
- the contribution relates to a period of service during which the person was your employee;
- you make the contribution within 4 months after the person stops being your employee; and
- you would have been entitled to a deduction for the contribution if you had made it when the person was your employee.<sup>9A</sup>

### **2. Paragraph 46**

Above the paragraph; insert:

*Contribution is made on or after 17 November 2010 and more than four months after the person stops being your employee; or contribution is made before 17 November 2010*

**3. Paragraph 47**

Omit the paragraph; substitute:

47. You can also treat a former employee as an employee when a contribution is made if the contribution is in lieu of salary or wages that relate to the former employee's period of service.<sup>11</sup> The contribution must be a one-off payment made following termination of employment pursuant to an effective salary sacrifice agreement<sup>12</sup> and should reflect the normal contributions to superannuation for the employee just before they ceased employment. Alternatively, more than one contribution can be made before 17 November 2010 pursuant to the salary sacrifice agreement, if the contributions are made within 2 months after termination of employment.<sup>13</sup>

**4. Paragraph 48**

Omit the paragraph; substitute:

48. You can claim a deduction for a superannuation contribution for another person who, when the contribution is made, is an employee of a company in which you have a controlling interest.<sup>14</sup> You can also claim a deduction for a superannuation contribution for a former employee of a company in which you have a controlling interest if you can treat the former employee as an employee of the company at the time the contribution is made.<sup>14A</sup> You can treat the former employee of the company as the employee of the company in several different situations covered by section 290-85. The term 'controlling interest' is not defined and will take its common law meaning.

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<sup>11</sup> Paragraph 290-85(1)(b).

<sup>12</sup> See *Taxation Ruling TR 2001/10 Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements*.

<sup>13</sup> Former paragraph 290-85(1)(c).

<sup>14</sup> Section 290-60 and paragraph 290-90(1)(a).

<sup>14A</sup> Subsection 290-85(1A).

## 5. Paragraph 70

Omit the paragraph; substitute:

70. A superannuation provider will no longer hold a contribution if a member's interest in the fund has been transferred to a successor fund.<sup>24AA</sup> However, under subsection 290-170(5) a valid notice can be given to the trustee or RSA provider of a successor fund on or after 17 November 2010 if all of the member's interest to which the notice relates has been transferred to the successor fund. The member must not have previously given a valid notice to any superannuation provider in relation to the contribution.

70A. A valid notice could also be given (under former subsection 290-170(5)) on or after 25 March 2010 but before 17 November 2010 to a trustee of a fund (the continuing fund) that obtained the member's interest as a result of a merger with the superannuation fund that accepted the member's contribution. The trustee of the fund that accepted the member's contribution must have made a choice under Subdivision 310-B<sup>24AB</sup> in relation to the merger. The member must not have previously given a valid notice to any superannuation provider in relation to the contribution.

## 6. Paragraph 190

Omit 'cheque or note received'; substitute 'cheque or note is received'.

## 7. Paragraph 223

Omit the paragraph; substitute:

223. A contribution you make to a superannuation provider for a former employee is deductible if the law allows you to treat the former employee as an employee when the contribution is made and the conditions for deductibility are met.<sup>66</sup> You can treat the former employee as an employee in several different situations covered by section 290-85. However, this Ruling does not explain all of those situations.

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<sup>24AA</sup> As defined in subsection 995-1(1). This definition applies for notices given under section 290-170 to a superannuation provider on or after 17 November 2010. Prior to this definition applying, the term 'successor fund' is used in this Ruling to describe a fund that received all of another fund's members' interests. This occurred for example, when there was an amalgamation of funds.

<sup>24AB</sup> Subdivision 310-B allows the transfer of losses for certain merging superannuation funds in particular circumstances.

<sup>66</sup> Sections 290-60 and 290-85.

*Contribution is made on or after 17 November 2010 and within four months after the person stops being your employee*

223A. You can treat a former employee as an employee when a contribution is made if:

- the contribution is made on or after 17 November 2010;
- the contribution relates to a period of service during which the person was your employee;
- you make the contribution within 4 months after the person stops being your employee; and
- you would have been entitled to a deduction for the contribution if you had made it when the person was your employee.<sup>66A</sup>

#### **8. Paragraph 224**

Above the paragraph; insert:

*Contribution is made on or after 17 November 2010 and more than four months after the person stops being your employee; or contribution is made before 17 November 2010*

#### **9. Paragraph 228**

Omit the paragraph; substitute:

228. Where you are required to make more than one contribution in lieu of salary and wages, you can treat the former employee as an employee at the time each contribution is made provided the contribution is made before 17 November 2010 and is made within 2 months after termination of employment.<sup>69</sup> Like the one-off contribution, the contributions covered by former paragraph 290-85(1)(c) must also be pursuant to an effective salary sacrifice agreement that was in place before the termination of employment and reflect the normal contributions made to superannuation for the employee just before they ceased employment.

#### **10. Paragraph 229**

Omit the paragraph; substitute:

229. You can claim a deduction for a superannuation contribution for another person who, at that time, is an employee of a company in which you have a controlling interest.<sup>70</sup> You can also claim a deduction for a

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<sup>66A</sup> Subsection 290-85(1AA).

<sup>69</sup> Former paragraph 290-85(1)(c).

<sup>70</sup> Section 290-60 and paragraph 290-90(1)(a).

superannuation contribution for a former employee of a company in which you have a controlling interest if you can treat the former employee as an employee of the company at the time the contribution is made.<sup>70A</sup> You can treat the former employee of the company as the employee of the company in several different situations covered by section 290-85. The term 'controlling interest' is not defined and will take its common law meaning. There are several decisions, particularly in the United Kingdom, in which the expression 'controlling interest' has been considered.

## 11. Paragraph 276

Omit the paragraph; substitute:

276. A superannuation provider will no longer hold a contribution if a member's interest in the fund has been transferred to a successor fund.<sup>94</sup> The member cannot give a notice of intention to deduct to the trustee of the fund that accepted the member's contribution after the person's interest has been transferred from that fund. However, a valid notice can be given to the trustee or RSA provider of a successor fund on or after 17 November 2010 if all of the member's interest to which the notice relates has been transferred to the successor fund and the member has not previously given a valid notice to any superannuation provider in relation to the contribution.<sup>95</sup>

276A. A valid notice could also be given on or after 25 March 2010 but before 17 November 2010 to a trustee of a fund that obtained the member's superannuation interest as a result of a merger with the superannuation fund that accepted the member's contribution.<sup>96</sup> The trustee of the fund that accepted the member's contribution must have made a choice under Subdivision 310-B in relation to the merger. Subdivision 310-B allows the transfer of losses for certain merging superannuation funds in particular circumstances. The member must not have previously given a valid notice to any superannuation provider in relation to the contribution. Before 25 March 2010 the member could not give a valid notice to the trustee of the successor fund.

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<sup>70A</sup> Subsection 290-85(1A).

<sup>94</sup> As defined in subsection 995-1(1). This definition applies for notices given under section 290-170 to a superannuation provider on or after 17 November 2010. Prior to this definition applying, the term 'successor fund' is used in this Ruling to describe a fund that received all of another fund's members' interests. This occurred for example, when there was an amalgamation of funds.

<sup>95</sup> Subsection 290-170(5).

<sup>96</sup> Former subsection 290-170(5).

**12. Detailed contents list.**

Insert:

<i>Contribution is made on or after 17 November 2010 and within four months after the person stops being your employee</i>	45A
<i>Contribution is made on or after 17 November 2010 and more than four months after the person stops being your employee; or contribution is made before 17 November 2010</i>	47
<i>Contribution is made on or after 17 November 2010 and within four months after the person stops being your employee</i>	223A
<i>Contribution is made on or after 17 November 2010 and more than four months after the person stops being your employee; or contribution is made before 17 November 2010</i>	225

**13. Legislative References**

Insert:

- ITAA 1997 290-85(1AA)
- ITAA 1997 290-85(1A)
- ITAA 1997 290-170(5)
- ITAA 1997 Subdiv 310-B

This Addendum applies both before and after its date of issue.

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**Commissioner of Taxation**

22 August 2012

ATO references

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