

TR 96/25 - Income tax: deductibility of personal superannuation contributions



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Taxation Ruling

Income tax: deductibility of personal superannuation contributions

other Rulings on this topic

TD 93/224; TD 94/37;
TD 96/24

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling applies to a person who makes personal contributions to a complying superannuation fund. It considers the circumstances in which those personal superannuation contributions qualify for an income tax deduction under Subdivision AB of Division 3 of Part III of the *Income Tax Assessment Act 1936* (the Act).
2. The Ruling provides guidelines for determining when a person is an eligible person in terms of subsection 82AAS(2) and explains how the eligible person test is modified under subsection 82AAS(3).
3. The Ruling also outlines the notice requirements that need to be satisfied in order to obtain an income tax deduction for personal contributions to a superannuation fund and outlines the superannuation deduction limits.

Previous Rulings

4. Taxation Ruling IT 19 is now withdrawn.

Date of effect

5. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute

agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling

Eligible person

6. A taxpayer is entitled to a deduction for personal superannuation contributions under section 82AAT if he or she is an eligible person in terms of section 82AAS.

7. Under subsection 82AAS(2), a taxpayer is an eligible person in respect of a year of income unless it was reasonable to expect that superannuation benefits would be provided for the taxpayer in the event of his or her retirement or to dependants in the event of his or her death (paragraph 82AAS(2)(a)). In addition, to the extent that those superannuation benefits relate to a year of income, they must relate wholly or partly to contributions made by another person for the benefit of the taxpayer (subparagraph 82AAS(2)(b)(i)) or must be paid out of moneys that do not represent:

- personal contributions paid by the taxpayer to a superannuation fund or public sector scheme (sub-subparagraphs 82AAS(2)(b)(ii)(A) and 82AAS(2)(b)(ii)(B));
- income or accretions on those personal contributions (sub-subparagraph 82AAS(2)(b)(ii)(C)); or
- income or accretions on contributions made by another person in an earlier year of income where there is no reasonable likelihood that future superannuation contributions will be made in respect of the taxpayer by that other person (sub-subparagraph 82AAS(2)(b)(ii)(D)).

8. Superannuation benefits are usually provided for the taxpayer by his or her employer. If superannuation benefits are provided by an employer for any part of a year of income, subject to the ten percent rule, the taxpayer will not be an eligible person in respect of that year.

9. Generally, if a taxpayer has ceased employment with a former employer or is in receipt of a pension from his former employer's superannuation fund, there will be no reasonable likelihood that future superannuation contributions will be made by that employer.

However, if the employer has only temporarily ceased contributions, for example, because adequate provision has been made in previous years or the taxpayer has taken an extended period of leave without pay and receives employer superannuation support in respect of that period, then there will be a reasonable likelihood that the employer

will make future superannuation contributions for the benefit of the taxpayer.

10. Generally, a taxpayer will not be an eligible person because it is reasonable to expect that superannuation benefits would be provided for the taxpayer by another person in respect of a year of income if:

- another person actually makes contributions to a superannuation fund for the benefit of the taxpayer in respect of that year of income;
- another person has an obligation or has made a commitment to make contributions to a superannuation fund for the benefit of the taxpayer in respect of that year of income;
- the taxpayer is a member of a public sector superannuation scheme constituted by or under a law of the Commonwealth or a State or Territory which provides superannuation benefits to the taxpayer upon his or her retirement or death where those benefits can be expected to take into account the taxpayer's service in that year of income; or
- another person makes deposits for the benefit of the taxpayer into the Superannuation Holding Accounts Reserve (subsection 82AAS(8)) in respect of that year of income.

11. A person will have an obligation to make contributions to a superannuation fund for the benefit of a taxpayer if he or she is required to:

- make contributions to a superannuation fund for the benefit of the taxpayer under any occupational superannuation arrangement or under the terms of a trust deed; or
- make contributions to a superannuation fund for the benefit of the taxpayer under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or pay the Superannuation Guarantee Charge (SGC) in respect of the taxpayer (subsections 82AAS(4), (5), (6) and (10) of the Act).

12. The provisions under subsections 82AAS(4), (5), (6) and (10) will only operate when the Superannuation Guarantee shortfall is actually paid or credited to a fund, the taxpayer or the taxpayer's legal personal representative. Until these provisions operate, the taxpayer remains an eligible person and a deduction may be allowed for any personal superannuation contributions that have been made. Once the

Superannuation Guarantee Charge has been paid, the Commissioner may issue an amended assessment for the relevant year to disallow his or her personal superannuation contributions.

13. There are only very limited circumstances under the provisions of sections 27 and 28 of the SGAA where an employer will not be under an obligation to provide superannuation support for the benefit of an employee. Examples include employees who are:

- 65 years of age or older;
- paid less than \$450 in a month; or
- working part-time for the whole year and are under 18 years of age.

14. In addition, if it is not reasonable to expect that the Superannuation Guarantee Charge will be paid (e.g., because the employer is bankrupt or has been wound up and it has been established that there are no funds available to pay the Superannuation Guarantee Charge), then the employee may be an eligible person under subsection 82AAS(2).

15. Further information about eligible persons is contained in the Explanation section at paragraphs 30 to 41.

The 'ten percent rule'

16. The reference to superannuation benefits in subsection 82AAS(2) does not include benefits provided for the taxpayer in respect of eligible employment if the taxpayer's income from that eligible employment is less than ten percent of his or her total assessable income for the year (subsection 82AAS(3)).

17. In determining whether a person is **an eligible person**, both assessable and exempt income are included for the purposes of applying the 'ten percent rule'. According to subsection 25(1), assessable income is gross income of a resident taxpayer that is derived directly or indirectly from all sources in and out of Australia which is not exempt income.

18. Income from eligible employment includes salary or wages and the assessable amount of Eligible Termination Payments (ETP) from the employer. They do not include payments from other sources such as ETP from superannuation funds (including an employer sponsored fund) or approved deposit funds.

19. Exempt income from eligible employment includes payments of an income nature which is specifically exempt from tax, e.g., payments to certain defence force personnel (sections 23AB, 23AC and 23AD). Exempt income does not include the tax free amount of a

bona fide redundancy payment, approved early retirement payments and the post 30 June 1994 invalidity component (section 27CB).

20. Any superannuation contribution that is made for the benefit of the person and relates to that eligible employment will not preclude the person from being an eligible person, if the person can satisfy the 'ten percent rule'.

21. When applying the 'ten percent rule', the term 'particular eligible employment', as it applies in subsection 82AAS(3), includes multiple periods of employment by virtue of paragraph 23(b) of the *Acts Interpretation Act 1901*. That paragraph provides that words in the singular number include the plural and vice versa, unless the contrary intention appears. This Office considers that a contrary intention does not appear here.

22. On this basis, under subsection 82AAS(3), income received by the person for the same or a combination of periods of employment from identical or different employers for the year of income is aggregated in the calculation and is not treated separately. This amount is then compared to the person's total assessable income for the year. If the result is less than ten percent of the person's total assessable income, then the person is an eligible person for purposes of subsection 82AAS(2).

23. Also, income from eligible employment, where the employer is not required to provide superannuation support under the SGAA, will not be aggregated with other employment income for subsection 82AAS(3) purposes.

24. Further information about the 'ten percent rule' is contained in the Explanation section at paragraphs 42 to 44.

Notice requirements

25. If a taxpayer is an eligible person, he or she must give a written notice to the trustee of each fund to which he or she has made a contribution and receive an acknowledgment of the notice from the trustee in order to obtain a deduction for personal superannuation contributions. The acknowledgment must be given by the trustee to the person without delay (subsection 82AAT(1A)) and before the Commissioner makes an assessment of the person's income for the relevant year (subsection 82AAT(1E)).

26. The specific information that must be provided by the person for the purposes of subsection 82AAT(1D) is set out in Taxation Determination TD 93/224.

27. Further information about Notice requirements is contained in the **Alternative views** section at paragraphs 45 and 46.

Deduction limits

28. The total deduction that may be claimed by a person must not exceed the **lesser** of:

- the first \$3,000 contributed by the person plus 75% of the total amount contributed in excess of \$3,000; and
- the person's deduction limits (subsection 82AAT(2)).

29. The deduction limit is based on the person's age at the time that the last contribution for the income year was made (subsection 82AAT(2A)). These amounts are indexed each year (subsection 82AAT(2B)).

Explanations

Eligible person

30. The meaning of the term 'reasonable to expect' in the context of determining whether a particular person was an eligible person in terms of subsection 82AAS(2) was decided in a number of cases. Two of these cases were decided prior to the introduction of the SGAA and the current provisions of subsection 82AAS(2) which commenced on 1 July 1992.

31. In *FC of T v. Arklay* 89 ATC 4563; (1989) 20 ATR 276; 85 ALR 368; (1989) 22 FCR 298 (*Arklay's case*), the applicant commenced employment with the Queensland Railways as a temporary porter. As a temporary employee, he was not entitled to become a member of the State Service Superannuation Scheme. However, under the by-laws made by the Queensland Commissioner of Railways, he was entitled to be paid a Retiring Allowance, if applicable, upon retirement from the Railway Department. The Retiring Allowance only became payable after the taxpayer had been employed for a number of years' service and not before.

32. In *FC of T v. McCabe* 90 ATC 4968; (1990) 21 ATR 992; (1990) 26 FCR 431 (*McCabe's case*), the applicant was employed by a university in a number of positions. The applicant had five appointments from 1978, each being for a term of five years. In 1984 the applicant was employed as a lecturer on a fixed term appointment for five years and for the first time qualified to become a member of the State Superannuation Fund. However, the applicant would not qualify for employer-sponsored superannuation benefits unless she remained employed by the university for 10 years, retired due to ill health or died.

33. In *Arklay's* case, the Full Federal Court said (ATC at 4567; ATR at 279; ALR at 372; FCR at 302-303):

'We are of the opinion that the phrase with which we are concerned in the context of sec. 82AAS of the Act requires a determination whether or not circumstances exist by reason of which the decision-maker is able to expect on reasonable grounds that superannuation benefits would be provided as stipulated in the section. That test is an objective one. However, in applying the test the decision-maker, in considering the circumstances, should have regard to any relevant matters concerning the taxpayer personally. Put another way our understanding of the meaning of the expression is one which involves the application of an objective test, but, as one of the concomitant elements of that test, the subjective intentions of the taxpayer may be relevant.'

34. In *McCabe's* case, the Federal Court said (ATC at 4971-4972; ATR at 995-996; FCR at 436):

'The words "reasonable to expect" are not ambiguous and it is undesirable to paraphrase them or to use other words. In particular, they are words appropriate to the task of making an assessment as to the future. It is not useful to adopt other words. The adoption of words such as "probability" or "balance of probabilities" tend to introduce a concept or to have a connotation of proof, which may detract from the application of the section by an administrative decision-maker.'

35. In the above cases, the Courts placed emphasis on the subjective intentions of the taxpayers involved. It was decided that it was not reasonable to expect that the respective person would remain employed in that employment until retirement and receive superannuation benefits at that time.

36. It is accepted that *Arklay's* case and *McCabe's* case were correctly decided on their facts. However, amendments made to paragraph 82AAS(2)(a) by *Taxation Laws Amendment (Superannuation) Act 1992* changed the reasonable expectation test to ensure that a taxpayer would not be an eligible person if superannuation benefits would have been provided to dependants of the taxpayer in the event of the taxpayer's death during the year.

37. The test is an objective one which does not require an estimation of the likelihood that death or retirement would occur during the year. If the Courts had applied an objective test in *Arklay's* case and *McCabe's* case, a different outcome may have been reached. In any event, given the advent of the Superannuation Guarantee scheme, it is

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unlikely that factual situations like those in *Arklay's* case and *McCabe's* case will arise in the future.

38. In *Case 31/96* 96 ATC 352; *AAT Case 10858* (1996) 32 ATR 1249 during the year of income the taxpayer was a director of a research corporation which paid him director's fees totalling \$13,075. Those fees exceeded ten percent of his assessable income. In the same year of income, the corporation contributed \$746.84 to a superannuation fund for the benefit of the taxpayer. That contribution was applied to provide death benefits in accordance with the trust deed of the superannuation fund's plan. The plan provided that in the event of the taxpayer's death, the benefits attributable to the corporation's contributions were payable only to the taxpayer's legal personal representative. During the same year of income, the taxpayer contributed \$36,920 to another superannuation fund.

39. The Tribunal said in relation to the word 'provide' (ATC at 358; ATR at 1255):

'In the context of paragraph 82AAS(2)(a) there seems to us to be no reason why we should not adopt the ordinary meaning of the word. Therefore, in this case, we are concerned with whether it was reasonable to expect that superannuation benefits would be supplied to, or furnished for the use of, the applicant's dependants in the event of death.

We will consider that question in the light of the principles set out in *Arklay's* case which we have set out in paragraph 29 above and to the comments of Davies J ... in *McCabe's* case ...' (see paragraph 33 of this Ruling).

40. The Tribunal decided that superannuation benefits were not provided to the taxpayer in the year of income and a deduction was allowed in respect of the taxpayer's personal contributions.

41. In respect of the decision made in the above case, if the Commissioner or a judicial body determines that a taxpayer's employer had not made superannuation contributions for the benefit of the taxpayer under the SGAA, the employer will be liable to pay the Superannuation Guarantee Charge. Once the Superannuation Guarantee Charge has been paid, the taxpayer's assessment may be amended to disallow his or her personal superannuation contributions (see paragraph 12).

The 'ten percent rule'

42. Subsection 82AAS(3) provides that, where a taxpayer is engaged in eligible employment, the reference to superannuation benefits in subsection 82AAS(2) does not include benefits provided for the

taxpayer in respect of that eligible employment if the taxpayer's income from that eligible employment is less than ten percent of his or her total assessable income for the year. This is referred to as the 'ten percent rule'.

43. **Eligible employment** is defined in subsection 82AAS(1) and means in relation to a person:

- '(a) the holding of any office or appointment; or
- (b) the performing of any functions or duties; or
- (c) the engaging in of any work; or
- (d) the doing of any acts or things;

that result in the person being treated as an employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992*...

44. The effect of the 'ten percent rule' is that any superannuation contribution which is made for the benefit of a person and relates to his/her eligible employment will not preclude the person from being an eligible person, if the income derived from that eligible employment does not exceed ten percent of the person's assessable income.

Alternative views

45. It has been suggested that a taxpayer can claim a deduction for personal superannuation contributions where they have given the trustee an appropriate notice but at the time of lodging their return they have not received an acknowledgment of the notice from the trustee.

46. However, it is clear from the words of subsection 82AAT(1E) that a person is not entitled to a deduction unless the person receives the acknowledgment from the trustee before the assessment is made. Where the person later receives an acknowledgment the assessment may be amended to allow the deduction.

47. With respect to the 'ten percent rule', it has been suggested that, where an ETP is paid as a result of a person's engagement in eligible employment, only that part of the assessable component of the ETP which is attributable to the year of income in which it is received should be used to determine whether the ten percent income threshold is exceeded.

48. However, sub-subparagraph 82AAS(3)(b)(i)(A) clearly states that a person's assessable income from eligible employment engaged in during that year of income is the relevant value to be considered. It

is, therefore, the Commissioner's view that there is no legislative basis for apportioning the assessable component of an ETP.

49. Consequently, the amount of the ETP that is included in the person's assessable income in the year of receipt must be used for the purposes of the 'ten percent rule'.

Examples

50. The following examples display the operation of various provisions of sections 82AAS and 82AAT of the Act.

Example 1

51. Louise, a self-employed person, works part-time and her employer makes contributions to a superannuation fund for her. The assessable income from her part-time employment is less than ten percent of her assessable income earned during the year of income. Louise is eligible to claim a deduction for her personal superannuation contributions.

Example 2

52. Tania is accruing benefits in a superannuation fund as a result of contributions made by a former employer that related to a previous year of income. Tania is now self-employed and is entitled to claim any personal superannuation contributions as a deduction in the current year of income.

Example 3

53. Kylie, a self-employed person, earns an additional \$400 per month from casual employment. As Kylie is paid less than \$450 per month from her casual employment, that employer is not required to provide superannuation support under the SGAA. Therefore, Kylie can claim a deduction for any personal superannuation contributions.

54. However, Kylie would be precluded from receiving a tax deduction if her employer did provide employer support. This would apply notwithstanding that the employer is not bound to contribute for purposes of the SGAA. However, Kylie may be entitled to a deduction for contributions if she qualified under the 'ten percent rule'.

Example 4

55. Mike, who is now a self-employed person, worked full-time for an employer during the first three months of the year. Mike's employer provided superannuation support during the period of his employment. On termination, Mike received an ETP from his employer and a payment for unused annual leave. The sum of these payments and Mike's wages was \$10,000. Business income for the year amounted to \$30,000.

56. Mike is not an eligible person under subsection 82AAS(2) as superannuation benefits were provided. Also, Mike's income from eligible employment is greater than ten percent of his assessable income (subsection 82AAS(3)). Mike is not entitled to a deduction for any personal superannuation contributions made in respect of that year.

Example 5

57. Alcoe Pty Ltd did not provide superannuation support for the benefit of their employees during the year of income. John, an employee of Alcoe Pty Ltd, was making personal superannuation contributions into a complying superannuation fund. Based on the facts, John should not be entitled to claim a deduction for his personal superannuation contributions as Alcoe Pty Ltd has a liability for a Superannuation Guarantee Charge.

58. A review was made by the ATO to determine the company's liability to pay the Superannuation Guarantee Charge. During this review, it was discovered that the company had been wound up. Also, there are no funds to pay the Superannuation Guarantee Charge. Where this is the case, John is entitled to a deduction for any personal superannuation contributions made to a complying superannuation fund.

Example 6

59. Matt, a self-employed plumber, received an ETP to the value of \$50,000 from his former employer on 1 July 1995. Matt's other income for the year ending 30 June 1996 consisted of \$5,000 in interest and \$10,000 from his business. No employer superannuation contributions were made on Matt's behalf during the year ending 30 June 1996.

60. Under subsection 82AAS(2), the ETP received does not constitute the provision of superannuation benefits. Therefore, Matt is considered to be an eligible person and may be entitled to a deduction for any personal superannuation contributions that he has made.

TR 96/25**Example 7**

61. John's only income for the year ended 30 June 1996 is an employer sponsored superannuation pension and investment income. John has not been in eligible employment for eighteen months. For the year ended 30 June 1996, John made contributions to a complying superannuation fund.

62. John is considered to be an eligible person under subsection 82AAS(2) as no superannuation benefits had been provided in respect of the whole or part of that year of income. Therefore, John is entitled to a deduction for his personal superannuation contributions.

Example 8

63. Helen is on extended leave without pay from her employer and during the year receives dividend and interest income from her investments. She contributes to a personal superannuation fund. Helen did not receive any employer superannuation support in respect of the period that she was on leave without pay from her employer. Helen will be entitled to claim a deduction for her superannuation contributions as she is considered to be an eligible person in terms of subsection 82AAS(2).

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- ITAA 25(1)
- ITAA 23AB
- ITAA 23AC
- ITAA 23AD
- ITAA 27CB
- ITAA Pt III Div 3 Subdiv AB
- ITAA 82AAS
- ITAA 82 AAS(1)
- ITAA 82 AAS(2)
- ITAA 82 AAS(2)(a)
- ITAA 82 AAS(2)(b)(i)
- ITAA 82 AAS(2)(b)(ii)(A)
- ITAA 82 AAS(2)(b)(ii)(B)

- ITAA 82 AAS(2)(b)(ii)(C)
- ITAA 82 AAS(2)(b)(ii)(D)
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- ITAA 82 AAS(4)
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- ITAA 82AAT(2)
- ITAA 82AAT(2A)
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- SGAA 27
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(1989) 20 ATR 276; 85 ALR 368;
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