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Excess Non-Concessional Contributions Tax Assessments for the 2005/2006 and 2006/2007 Years

The Taxation Institute of Australia (**Taxation Institute**) refers to correspondence from the Australian Taxation Office (**ATO**) to a number of taxpayers in March 2009 relating to excess contributions tax. These letters were headed "You may have to pay excess contributions tax: For your information and action". The letters advised the taxpayer that the ATO had contributions information for the above years as specified in an attached schedule. The taxpayer was required to review the information and contact the ATO if they believed the information held by the ATO was incorrect. In the absence of further information from the taxpayer, excess contributions tax assessments would be issued in relation to the amounts shown on the schedule. The Taxation Institute understands such excess contributions tax assessments have started to be issued from May 2009.

The Taxation Institute wishes to express concern regarding some aspects of this procedure and to suggest ways in which the potential adverse outcomes may be mitigated.

Problem areas

The Taxation Institute's members have experienced areas as follows where the ATO's records give rise to potential problems.

Taxpayers with tax-exempt employers

The employer contributions reported by funds for the period included contributions made by tax-exempt entities. These should not be a factor in the calculation of excess non-concessional contributions under s 292-80 of the Income Tax (Transitional Provisions) Act 1997, because they are not deductible to the contributor as required under paragraph 292-80(5)(b). This paragraph is included in transitional provisions related to the calculation of non-concessional contributions during the period 10 May 2006 to 30 June 2007, and the Taxation Institute believes that although these provisions sit fairly within policy design, it would be fair to describe them as complex, obscure and hard to track down.

The reporting requirements for funds for the relevant period did not require separate reporting for contributions from tax exempt entities, hence there was no method whereby the ATO could identify such contributions. However, the letter does not flag this issue and it is not an obvious issue that would be identified by the individuals who received the letter. Taxpayers with contributions made by tax-exempt entities would be numerous and would include hospital employees, university employees and state employed teachers, to name a few categories.

Member undeducted (non-concessional) contributions

The schedule attached to the letters contained a heading "Non-concessional contributions between 10 May 2006 -30 June 2006". The amounts listed under this heading were in fact the full amount of non-concessional contributions reported by the taxpayer's funds for the full year 1 July 2005 to 30 June 2006. This fact is noted next to the fund's name, but is not consistent with the heading, and no prominence is given to the need to contact the fund to obtain information about the date and amount of each non-concessional contribution, either in the schedule or in the covering letter. The Taxation Institute believes that this approach was unhelpful to taxpayers who were already struggling with some very unfamiliar legislation and concepts.

The Taxation Institute's concern is that some taxpayers without the benefit of detailed advice may not be in a position to identify or verify data that may be incomplete in the ATO's records. Hence these taxpayers may have ended up with assessments for excess contributions tax which are incorrect.

Suggested assistance to taxpayers

The Taxation Institute notes that letters of a similar nature were sent to individuals whose transitional termination payments were directed to superannuation during the 2007/08 year. These amounts were originally identified by the ATO as employer contributions. The ATO subsequently became aware of the error and sent letters of apology to the affected taxpayers. The error was also referred to on the ATO's web site.

The Taxation Institute believes it would be of assistance to the taxpayers affected by excess non-concessional contributions tax during the transitional period 10 May 2006 to 30 June 2007 if a follow up letter were sent to highlight the above noted areas of potential error. It would also be helpful if the ATO could post an article about the issues on its web site and highlight it as of interest to practitioners and taxpayers who could be affected.

PS LA 2008/1 and the Commissioner's Discretion under s292-465 ITAA 1997

The Taxation Institute also wishes to raise concerns regarding the limited grounds under which the Commissioner is likely to exercise his discretion to disregard or reallocate a non-concessional contribution to another financial year. The penalty of 46.5% on a non-concessional contribution is very severe and administrative flexibility is required as many taxpayers have overlooked their caps or have become victims of circumstances outside their control, for example stalled settlements on sale of property resulting in them contributing in the wrong financial year.

The excess contributions tax penalty should be reserved for those taxpayers who have deliberately set about to take advantage of getting more into super than the caps intend. However, many people who exceed their caps have done so out of oversight or due to factors outside their control rather than a deliberate attempt to obtain an advantage by contributing excess amounts. We urge the Commissioner to exercise this discretion so that innocent oversights or unavoidably failing to meet strict payment deadlines does not result in severe penalty and diminution of retirement savings. This might be achieved if the Commissioner could accept some fluidity in contributions spanning the June - July period or if some form of averaging over a two year period might be allowed, although this may require legislative amendment.

The Taxation Institute requests that the Commissioner consult industry on the experience to date with excess contributions and why these came about and revise its practice to provide far greater flexibility.

If you require any further information or assistance in respect of our submission, please contact the Taxation Institute's President, Joan Roberts on 03 9611 0178 Senior Tax Counsel, Dr Michael Dirakis, on 02 8223 0011.

Yours sincerely



Joan Roberts