

Aspects of Financial Planning

Superannuation and temporary residents

April 2010

The requirement of employers to pay Superannuation Guarantee contributions on behalf of employees does have exceptions including some temporary residents on certain visas. For temporary residents whose employers are obliged or choose to pay super on their behalf, there are special rules which enable them to access their super savings on leaving Australia.

Background

The Superannuation Guarantee (SG) scheme was introduced in 1992 in order to provide compulsory superannuation support to employees. The SG scheme requires employers to provide a minimum level of superannuation support in each quarter for most employees. The Australian Taxation Office (ATO) administers this scheme including the Superannuation Guarantee Charge (SGC) which is payable by employers who fail to provide the minimum level of superannuation contributions. The current minimum rate of superannuation required is generally 9% of an employee's ordinary time earnings.

The *Superannuation Guarantee (Administration) Act 1992* imposes obligations on employers to contribute on behalf of their full-time, part-time and casual employees except persons who fall into limited exemption categories. The main exemptions are:

- 1) An employee who is aged 70 and over
- 2) Non-resident employees paid for work performed outside Australia
- 3) Senior foreign executives working in Australia temporarily
- 4) Employees receiving salary and wages of less than \$450 per month; and
- 5) Part time employees under 18 years of age.





In December 2008, legislation was introduced which significantly changed the superannuation system for temporary residents. This Aspect will cover the superannuation and taxation implications of benefits accumulated by those who are classified as temporary residents with particular focus on the treatment of their superannuation benefits when temporary residents leave Australia.

Prescribed employees

As outlined above, under the SG legislation there are a limited number of exemptions for employers not having to pay the SG on behalf of employees. One of the exemptions applies to 'prescribed employees'. Senior foreign executives who have entered Australia under certain working visas, who meet prescribed criteria, are known as prescribed employees for the purposes of the legislation. Regulation 7 of the *Superannuation Guarantee (Administration) Regulations 1993* lists the employees who are considered prescribed employees.

The designated work visas that allow a person to be exempt from the superannuation guarantee requirements are:

- Class 413 (executive (overseas)) visa or entry permit granted under the Migration (1993) Regulations; and
- Certain class 456, 457, 956 and 977 visas or entry permits.

For example, an employee who is a holder of a Subclass 457 (Business (Long Stay)) visa and who holds a position as a senior executive of a company operating in Australia and who is employed under certain conditions is considered to be a prescribed employee. If an employee meets the criteria as outlined in the regulations, the employer has no legislative requirement to make superannuation contributions on their behalf. The corresponding regulation, including the list of employment conditions can be found in the Appendix.

This rule does not apply to New Zealand residents working in Australia either temporarily or permanently as they are not required to hold a visa to work in Australia. The salary and wages earned by a NZ resident are therefore included in determining the SG contributions required to be paid on their behalf by their Australian employer.

Voluntary super contributions

In some cases where an employee is deemed a prescribed employee and therefore not required to have compulsory super paid on their behalf, the employer may elect to pay superannuation regardless. This may occur for example where the payment of superannuation contributions is an employment condition under their contract with the employer.





These voluntary contributions, paid to an Australian superannuation fund will be tax deductible for the employer. However, given the higher rates of tax now imposed on the accumulated benefits of temporary residents leaving Australia (see below), employers of non-residents may need to re-think the attractiveness of making voluntary contributions on behalf of their temporary residence staff.

As these contributions fall outside the SG legislation, if these payments are paid after the quarterly SG cut-off dates, they do not attract the SGC and do not need to be paid via the ATO. However, an employer may elect to make an additional contribution to compensate for lost interest on these monies. Further, the employer can offer choice of fund to these employees but are not required to do so.

In all other cases...

The prescribed employee exemption typically applies to senior foreign executives working in Australia temporarily. In all other cases, for example a British backpacker on a working holiday in Australia for twelve months, SG contributions will generally have to be paid to an Australian fund on their behalf.

Taxation of contributions

Employer contributions made to an Australian super fund on behalf of temporary residents are subject to 15% contributions tax (and 15% tax on the earnings of the fund). However, any personal after-tax (non-concessional) contributions made by employees to an Australian super fund will not be subject to tax on entering the fund (though earnings are taxed as above).

International agreements on superannuation contributions

Another situation where SG contributions may not be required in Australia comes as a result of Australia entering into agreements with a number of countries to address the issue of 'double superannuation coverage' for employees. These agreements remove the potential for super contributions (or equivalent) to be paid in two countries when employees are sent to work temporarily in another country and the employer or employee is required to make super contributions under the legislation of both countries for the same work.

Under these agreements, the employer/employee will be exempt from making super contributions in Australia, if:

- The home country has a bilateral agreement with Australia
- The employee remains covered by compulsory super (or equivalent) contributions in their home country; and
- The home country employer submits the relevant documentation that will enforce the exemption from the double superannuation contribution. (The Australian equivalent is a





'certificate of coverage' which is organised and approved by the Australian Tax Office before the employee assumes the overseas assignment).

Departing Australia superannuation payment

Legislative changes introduced in December 2008 require superannuation funds to pay to the ATO, the superannuation benefits of temporary residents who do not claim their superannuation within six months of departure from Australia. The funds are treated as unclaimed superannuation, held by the ATO indefinitely and are not credited with any interest or earnings.

Temporary residents permanently departing Australia due to the cancellation or expiry of their work visa are eligible to apply to have access to their funds. The payment, known as a 'departing Australia superannuation payment' (DASP) is subject to special taxation and withholding arrangements.

The purpose (according to the Government) of requiring super funds to transfer temporary residents' super benefits to the ATO is to reduce the number of lost accounts and unclaimed money in the superannuation system. The large amount of lost super has partly arisen due to temporary visa holders leaving Australia without taking their superannuation benefits with them.

Eligibility for a DASP

To be eligible for a DASP payment, one must:

- Have entered Australia on a temporary visa
- Have a visa that has expired or been cancelled
- Have left Australia; and
- Not be an Australian citizen, New Zealand citizen or permanent resident at the time of making the application.

Individuals who meet the criteria have two options of applying for a DASP; either online or via a written application to their super fund (within 6 months of departure) or the ATO (outside of 6 months). Both options are detailed below. Please note the process is less onerous for balances less than \$5,000 and each super fund may have different procedures.

1. The member is able to apply online via the ATO website, www.ato.gov.au/super through a section titled 'Temporary residents – departing Australia'. This is a free service and relevant details are confirmed electronically with the Department of Immigration and Citizenship (DIAC). Once the ATO establish this person is eligible, they will send the approval online to the relevant superannuation fund, which will then process the DASP and generate a cheque. The cheque will then be forwarded to the address specified on the application.





The details which are generally required to complete the application are as follows:

- Name, date of birth and other personal details
- E-mail address
- Passport number
- Australian Tax File Number (optional)
- Superannuation account details – including the superannuation provider's Australian Business Number (ABN).

2. The individual is able to complete the necessary paperwork offline. A 'Request for departing Australia superannuation payment temporary resident' form which can be found on the ATO's website would need to be completed, along with a 'Certification of immigration status' form from the DIAC, available from www.immi.gov.au. Both forms need to be sent, along with the application fee (details of this are provided on the request form), to DIAC after leaving Australia. The postal address is:

Department of Immigration and Citizenship
GPO Box 1496
Hobart TAS 7001
Australia

Superannuation funds are required to make the payment within 28 days of receiving the completed forms.

Taxation of DASPs

A DASP is treated differently to other superannuation payments. It is not included in the recipient's assessable income and the tax payable differs to the tax paid on other superannuation benefits.

A DASP is subject to final withholding tax at the rates set out in income tax legislation. From 1 April 2009, the withholding tax rates are:

- Tax free component – nil.
- Taxable component (taxed element) – 35%.

The fund (or the ATO) must withhold tax before making the departing Australia superannuation payment. A payment summary must be provided to the recipient and to the ATO within 14 days of the payment being made.





The higher tax rates imposed on temporary residents withdrawing Australian superannuation benefits is aimed at clawing back tax concessions which were made available on the assumption that the funds would be used for genuine retirement income purposes.

Accessing the accumulated superannuation benefit

Historically, in addition to the DASP condition of release, temporary residents were able to access their superannuation benefits under any condition of release contained in the superannuation legislation where one of these conditions could be met e.g. death, permanent incapacity, retirement over preservation age, attaining age 65. This meant that a former temporary resident nearing retirement could consider leaving their superannuation in Australia and accessing it tax free upon reaching age 60.

However, from 1 April 2009 there are only certain conditions of release that a departed temporary resident (other than a retirement visa holder – subclass 405 or 410), who is not currently an Australian citizen, New Zealand citizen or permanent resident, can satisfy.

In these circumstances the conditions of release are:

- A condition of release that the individual satisfied prior to 1 April 2009; or
- Death
- Terminal medical condition
- Permanent incapacity (TPD)
- Temporary incapacity
- Unclaimed money payment; and
- Departed temporary resident.

Practically, this means that the majority of temporary residents will qualify for either the unclaimed money payment or departed temporary resident condition of release. The implication being that their benefit will ultimately be paid and taxed as a DASP and be subject to withholding tax at the prevailing rates (see above).

Former temporary residents who qualify for one of the other conditions of release will be granted the same concessional tax treatment as Australian residents e.g. qualification under the terminal medical condition of release allows for a tax free superannuation payment.





Returning to Australia permanently

Some former temporary residents may choose to return to Australia at a later date and become a permanent resident. Consistent with the principle that tax concessions are designed to support the retirement of Australian citizens and permanent residents, the Government has agreed that:

- For any temporary resident who has their super account transferred to the ATO after they depart Australia and after 30 June 2007, and
- Who later returns to Australia as a permanent resident, the account will attract interest at the long-term bond rate less tax while held by the ATO; and
- Upon their return to Australia, such people will be able to have their balance with interest accrued to the age of 65, transferred to a super fund or paid as a retirement or death benefit after an application fee is paid.

Conclusion

Not all employees are entitled by law to receive superannuation guarantee contributions, however some employment contracts make a provision for voluntary employer contributions to be made into superannuation. Consequently it is essential to examine both the law as it relates to employer contributions as well as the employment contract to determine eligibility for superannuation guarantee.

When seeking advice or discussing employment arrangements with a prospective Australian employer, temporary residents should consider the implications of receiving superannuation contributions in Australia. It is important to discuss a temporary resident's eligibility to access their contributions when they leave Australia and the consequential taxation treatment of their benefit.





Centric Wealth Advisers Ltd may be able to be of assistance

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Appendix 1

Superannuation Guarantee (Administration) Regulations 1993

Regulation 7 Certain employees and payments excluded

7(1) [Prescribed employee: s 27(1)(d)]

For the purposes of paragraph 27(1)(d) of the Act, each of the following employees is a prescribed employee:

(a) an employee who is the holder of an executive (overseas) visa or entry permit (code number 413) granted under the Migration Regulations as in force in the period from the beginning of 19 December 1989 to the end of 31 January 1993;

(b) an employee who is the holder of a Class 413 (executive (overseas)) visa or entry permit granted under the Migration (1993) Regulations;

(c) an employee who has been appointed by a company operating in Australia to be the national managing executive or deputy national managing executive or a state manager and who is the holder of:

(i) a Subclass 456 (Business (Short Stay)) visa; or

(ii) a Subclass 956 (Electronic Travel Authority) (Business Entrant — Long Validity) visa; or

(iii) a Subclass 977 (Electronic Travel Authority) (Business Entrant — Short Validity) visa;

(d) an employee who is the holder of a visa referred to in paragraph (c) if:

(i) the employee:

(A) holds a position as a senior executive of a company operating in Australia; or

(B) is establishing a business activity in Australia on behalf of the employer; and

(ii) the employee's position carries substantial executive responsibility; and

(iii) the employee's qualifications for the position are appropriate; and

(iv) the employee's position is a full-time position;

(e) an employee who is the holder of a Subclass 457 (Business (Long Stay)) visa if:





(i) the employee has been appointed by a company operating in Australia to be the national managing executive or deputy national managing executive or a state manager; and

(ii) the employee was nominated as mentioned in paragraph 457.223(2)(c), (4)(d) or (5)(d) of Schedule 2 to the *Migration Regulations 1994* or identified as mentioned in subparagraph 457.223(3)(b)(i) of that Schedule;

(f) an employee who is the holder of a Subclass 457 (Business (Long Stay)) visa if:

(i) the employee holds a position as a senior executive of a company operating in Australia; and

(ii) the employee was nominated as mentioned in paragraph 457.223(2)(c), (4)(d) or (5)(d) of Schedule 2 to the *Migration Regulations 1994* or identified as mentioned in subparagraph 457.223(3)(b)(i) of that Schedule; and

(iii) the employee's position carries substantial executive responsibility; and

(iv) the employee's qualifications for the position are appropriate; and

(v) the employee's position is a full-time position;

(g) an employee who is the holder of a Subclass 457 (Business (Long Stay)) visa if:

(i) the employee is establishing a business activity in Australia on behalf of the employer; and

(ii) the employee's position carries substantial executive responsibility; and

(iii) the employee's qualifications for the position are appropriate; and

(iv) the employee's position is a full-time position.

