



31 January 2025

Ms Bonita Tsang
Australian Taxation Office

By Email: PAGSEO@ato.gov.au

Dear Ms Tsang,

SMSF ASSOCIATION SUBMISSION – TR 2010/1DC2: INCOME TAX: SUPERANNUATION CONTRIBUTIONS

The SMSF Association welcomes the opportunity to provide a submission on Draft Taxation Ruling *TR 2010/1DC2 Income tax: superannuation contributions* (the Ruling).

We recommend that this submission be read in conjunction with our submission on *LCR 2021/2DC Non-arm's length income – expenditure incurred under a non-arm's length arrangement* (the LCR), as the issues are highly interrelated. We have intentionally avoided replication to provide a cohesive analysis; both submissions collectively address the issues arising from the interaction of the contribution and NALI provisions and should not be considered in isolation.

This submission highlights critical concerns related to market valuation requirements, the treatment of insurance proceeds, increases in fund capital, and the removal of the compliance approach previously outlined in Appendix 2 of TR 2010/1.

The Ruling applies retrospectively, requiring updates to address the defunct maximum earnings test. However, the revised Ruling should also modernise examples (e.g. Example 10 references 2012) and provide clarity on the current law regarding deductible contributions, particularly the interaction with the work test and work test exemption.

While we support efforts to refine guidance, the current draft introduces ambiguities that create significant compliance burdens and risks for trustees. Issues such as the interaction between non-arm's length income/expenditure (NALI/NALE) provisions and contribution rules, potential double taxation, and the retrospective application of changes must be addressed to ensure clarity, consistency, fairness and alignment with legislative intent.

Without a pragmatic compliance approach, trustees and members will be exposed to disproportionate penalties and uncertainty, undermining confidence in the superannuation system.

This submission provides practical recommendations to enhance clarity, reduce compliance risks, and promote equitable outcomes for SMSF trustees and members whilst maintaining the integrity of the NALI provisions and contribution caps.



MARKET VALUE REQUIREMENTS

The SMSF Association wishes to take this opportunity to highlight the critical importance of practical and consistent market valuation guidelines, particularly for in-specie contributions. For more detail, please read this submission in conjunction with our submission on LCR 2021/2DC (the LCR), as it further reinforces the need for alignment across related guidance.

Fundamental to the operation of this Ruling is the need for trustees to obtain accurate market valuations for contributions, yet current ATO guidelines are very rigid and create unnecessary complexity by failing to recognise that arm's length market values often fall within a reasonable range.

Neither, the [ATO's Valuation Guidelines for SMSFs](#) (QC 26343) nor the ATO's [Market Valuation for tax purposes](#) guide, address this flexibility, instead seemingly requiring pinpoint valuation accuracy without a clear legislative basis when most valuers in practice provide a range for the value of a particular asset.

The [BPFN and Commissioner of Taxation \[2023\] AATA 2330](#) decision and [Spencer v Commonwealth of Australia \[1907\] HCA 82](#) confirm that valuations inherently involve ranges, reflecting market fluctuations, professional practices, and the realities of buyer and seller behaviour.

Further, paragraph 2.49 from the Explanatory Memorandum, Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019 states:

2.49 *It can be difficult to determine an exact price that is 'non-arm's length'. An 'arm's length' price may be accepted to fall within a range of commercial prices. For example, loans may be available at different interest rates based on a range of factors. Accordingly, an SMSF may be able to apply an acceptable commercial rate of interest to a loan within a band of rates available to it on an arm's length basis*

Recommendation

The ATO should update its valuation guidelines to explicitly acknowledge that arm's length transactions may fall within an acceptable range.

INSURANCE PROCEEDS

The SMSF Association does not support any departure from the established ATO view, and established industry practices, regarding the treatment of insurance proceeds received by SMSFs, unless accompanied by clear legislative amendments.

For nearly 15 years, since the release of TR 2010/1, industry has consistently treated insurance proceeds akin to an investment return of a fund and not as a superannuation contribution. That is, the insurer pays the insurance proceeds not to benefit the member but to fulfill the terms of an insurance contract that it has been entered into with the SMSF trustee.

Edits to paragraph 138 of the Ruling require further clarification. It is unclear what scenarios the inclusion of the following statement intends to capture: *"However, where it is objectively determined that the purpose of the insurance payment is to benefit a member of the fund, the payment may be treated as a contribution"*.



The new language implies that such proceeds could instead be reclassified as contributions when tied directly to a member's benefit. This creates a potential departure from established practice.

Furthermore, the use of the words "*objectively determined*" introduce ambiguity. What evidence or criteria will the ATO require to confirm whether or not insurance proceeds will be treated as contributions?

This is particularly concerning when one considers that SIS Reg 4.09 is an operating standard which requires trustees to consider the need to hold insurance for members, and SIS Reg 4.07D requires all new insurance policies to implicitly benefit a member.

Recommendation

Should the ATO have specific concerns or scenarios it seeks to address with this new language, these need to be clearly articulated within the Ruling. Detailed examples should also be provided to help industry understand the intent and application of the ATO's view, showing the interaction with SIS regulations, contribution caps and the evidence required for an 'objective determination'.

Without such clarity, we recommend removing the statement entirely, as its inclusion introduces new concepts that raise ambiguity and unnecessary confusion and risks disrupting long-established and well-functioning industry practice.

IN-SPECIE CONTRIBUTIONS

The SMSF Association does not agree with the ATO's strict view adopted in paragraph 25C. In our view, a superannuation fund trustee with the consent of a member, can validly agree to treat a transfer of an undervalued asset as an in-specie contribution, to reflect the true market value of the asset.

Where a fund records the difference between an undervalued sale as an in-specie contribution for a member, the fund effectively receives full consideration for the asset. The arrangement is not intended to be mischievous or circumvent legislative requirements.

Revising or softening the ATO's view in paragraph 25C would ensure that compliance is maintained without penalising funds for practices that align with legislative intent and have operated effectively over many years. This includes the acquisition of shares under an employee share scheme.

Indeed, we do not see any material difference between a fund purchasing say a \$100,000 allotment of real estate where one-half is purchased at \$50,000 and the other half is contributed as an in-specie contribution compared to the same fund purchasing the same block of land at 50% of its market value at \$50,000 with the other half of the land's market value of \$50,000 being undertaken by an in-specie contribution.

These two different methods result in exactly the same outcome and should be treated consistently as not constituting NALI/E.

Recommendation

The SMSF Association recommends that the ATO review its position on the interaction between the Ruing and LCR with respect to in-specie asset transfers. We urge the ATO to acknowledge and preserve long-established industry practices and provide more examples that reflect real transactions.



We request that the ATO provide clearer guidance between what is a contribution compared to what is NALI/E with more examples to illustrate the difference.

INCREASING THE CAPITAL OF THE FUND

Paragraphs 29 - 32B of the Ruling retain the ATO's view that a contribution arises where there is a direct increase in the value of an existing SMSF asset from an improvement undertaken on a non-arm's length basis.

However, paragraphs 33 – 38 which address indirect increases to a SMSF's capital, fail to provide clarity on the interaction with the NALE provisions. Industry seeks clarity on scenarios where a member pays or extinguishes an SMSF's liability for less than arm's length consideration or without reimbursement from the SMSF.

The ambiguity in these provisions creates uncertainty about whether such transactions trigger NALE, the contribution rules, or both, potentially leading to double taxation.

Recommendation

The SMSF Association welcomes the retention of paragraphs 172 – 174, which acknowledge long standing industry practices.

It is crucial for the ATO to clarify the interaction of the NALE and contribution rules. For instance, Examples 1, 2 and 3 should be updated to acknowledge distinctions in the treatment of accounting, advisory and audit services in line with the LCR. These examples should also reflect concepts outlined in the LCR, particularly the delineation between trustee and non-trustee duties, which significantly impact on how expenses are treated.

ATO COMPLIANCE APPROACH

The Ruling has removed the compliance approach proposed in Appendix 2 of TR 2010/1. Without explicit guidance, uncertainty is created about whether the ATO will now apply both the NALI and contribution provisions concurrently, increasing the risk of double taxation.

Without clear guidance and a compliance approach to supplement such guidance, a non-arm's length arrangement could be taxed as NALI under s295-550 and also be treated as a contribution. This could result in significant tax and a double financial detriment to a member's retirement savings.

For example, a specific non-arm's length capital expense could result in all future income and capital gains from the associated asset being subject to a 45% tax rate under the NALI provisions. If the same capital improvement is treated as a non-concessional contribution (NCC), it could also trigger the excess NCC regime, incurring more tax and requiring the member to release the excess NCC (and associated earnings) from the fund to avoid excess contributions tax at 47%. This reduction in capital, combined with the ongoing increased tax liability on tainted income and gains, has a compounding negative effect on a member's superannuation savings.

Recommendation

Industry needs a clear framework to navigate all situations which may trigger both NALI and contributions to avoid double taxation and a compounding negative effect on members' retirement savings.



We request that the Commissioner reconsider a pragmatic compliance approach that aligns with the principles of fairness and proportionality. Any compliance approach needs to consider the operation of the contribution rules and NALI, with respect to general and specific NALE.

DATE OF EFFECT

When finalised, it is proposed that Part A of the Ruling, which deals with general superannuation contribution concepts, will apply both before and after its date of issue.

The retrospective application of NALE provisions (effective from 1 July 2018) could require years of NCC caps to be recalculated, exposing members to associated earnings penalties backdated to 1 July of the year the contribution was made.

This is a punitive outcome that is very disproportionate. We strongly believe this outcome is unfair, unintended and unjust.

Recommendation

We strongly believe that there are special circumstances which warrant the Commissioner exercising his discretion in accordance with [*PS LA 2008/1: The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes.*](#)

While the GYBW case provides valuable insight into the treatment of contributions, we believe its application should be limited to a go-forward basis to ensure fairness and avoid penalising individuals for past transactions that were undertaken without the benefit of clear guidance.

Furthermore, because of the removal of the Commissioner's compliance approach in Appendix 2, these powers should not be limited to post 28 July 2021 arrangements. The Commissioner should consider exercising his powers for arrangements that have occurred between 1 July 2018 and the date of issue of this Ruling.

PS LA 2008/1 should also be updated to align with the ATO's views in the Ruling and the LCR, providing clear guidelines for staff to exercise the discretion, reducing the need for trustees to write to the Commissioner, thereby avoiding wasting resources and unnecessary compliance costs.

CONCLUSION

The SMSF Association strongly urges the ATO to reconsider the above aspects of the Ruling to ensure it aligns with established principles of fairness, consistency, proportionality, and legislative intent.

Specifically, we recommend updates to valuation guidelines, clear treatment of insurance proceeds and capital improvements, and the reinstatement of a compliance approach to mitigate the risk of double taxation under both NALI and contribution rules.

We also emphasise the retrospective application of the Ruling needs to be accompanied by appropriate administrative relief.

We welcome the opportunity to work collaboratively with the ATO to refine these important provisions and ensure that SMSF trustees can operate with confidence and compliance certainty.



If you have any questions about our submission, please do not hesitate to contact us. We thank you again for the opportunity to provide this submission.

Yours sincerely,

Peter Burgess
Chief Executive Officer

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.