

ATO scrutiny on early release

In light of the financial hardship being experienced by many Australians during the Coronavirus pandemic, the Government has extended early access of superannuation until December 2020.

However, the ATO has expressed concern regarding individuals who may undertake superannuation strategies that circumvent the purpose of COVID-19 relief measures.

COVID-19 early release of super – measure extended

Temporary changes to the law also allow superannuation fund members financially affected by COVID-19 (including SMSF members) to access their superannuation prior to meeting a condition of release.

Citizens and permanent residents of Australia and New Zealand who meet the eligibility conditions for early access can obtain a single lump sum of \$10,000.

Previously, applications were required to be submitted by 24 September 2020. However, the Government has now extended this deadline so that eligible individuals have until 31 December 2020 to submit their application.

TIP– The eligibility conditions require the individual to demonstrate financial hardship from COVID-19 (e.g., they are unemployed, were made redundant).

ATO warns individuals about early release strategies

The ATO has issued a fact sheet outlining its concerns regarding schemes that individuals may enter into in order to access the COVID-19 early release of super.

One area of concern relates to the withdrawal and re-contribution of super for taxation benefits. Accordingly, the ATO has flagged that the following tax avoidance schemes may be subject to penalties:

- Withdrawing and re-contributing super to claim a tax deduction; or
- Contributing an amount to claim a tax deduction and later withdrawing that amount.

If individuals still proceed to re-contribute super withdrawn under the early access provisions as a deductible contribution, the ATO advises of the following tax consequences (plus penalties that may apply):

- Excess contributions tax will apply if the concessional contributions cap is exceeded;
- A 15% tax applies to any re-contributed amounts; and

HIGHLIGHTS

ATO FLAGS CONCERNS WITH COVID-19

The ATO is concerned about tax avoidance with COVID-19 early access to super

RECENT CHANGES FOR SMSFS

The contribution acceptance rules have now been relaxed

PENSION PLANNING

With reduced minimum pension payments again for 2021, we review an important planning issue

- High income earners with income and super contributions over \$250,000 are subject to an additional 15% 'Division 293 tax'.

EXAMPLE– Jess, an airline pilot, is stood down by her employer and applies for a COVID-19 early release of super. However, Jess' financial situation is such that she does not need any additional financial support throughout COVID-19.

In May 2020, Jess applies to access a one-off \$10,000 payment from her superannuation account. Jess wants to re-contribute the \$10,000 amount back into her superannuation fund and claim a personal tax deduction for the contribution.

After re-contributing, Jess notifies her fund that she intends to claim a personal super contribution tax deduction. She submits her tax return claiming a \$10,000 deduction, which reduces her taxable income.

The ATO advises that this is a tax scheme entered into by Jess in order to access a tax benefit. Therefore, Jess would be penalised for this transaction.



"...the following COVID-19 early release of super tax avoidance schemes may be subject to penalties..."

ATO UPDATE

The ATO has recently issued Regulator's Bulletin SMSFRB 2020/1 entitled 'Self-managed superannuation funds and property development'.

The ATO issued the Bulletin because it is seeing an increasing number of SMSFs enter into property development arrangements. It is concerned that the parties involved in these developments are participating in 'joint ventures' or other complex structures that may expose a fund to tax and super risks. Google QC 62407 to see more.

On a separate note, the ATO recently wrote to 25,000 individuals who had claimed personal super deductions. The ATO was concerned that these members had not advised their SMSF of their intent to claim a deduction (nor had they received acknowledgement back from their fund). Google 'QC 62799' to learn more.

Retirees to benefit from new law changes

In a win for retirees, recent Government law changes now make it easier for retirees to contribute super for both themselves and their spouse.

Retirees able to contribute more under work test changes

Traditionally, individuals aged 65 to 74 could only make voluntary superannuation contributions (e.g., non-concessional contributions) to their SMSF if they satisfy the 'work test'.

This test requires an individual to work 40 hours over a 30-day period in the relevant financial year. Note, a limited 'work test exemption' applies from 1 July 2019 if the individual:

- Met the work test in the income year prior to the income year in which they contributed;
- Had a total super balance of less than \$300,000 at 30 June of the prior income year; and
- Has not previously used the work test exemption.

The Government announced in the 2019-20 Federal Budget that it would amend the law in order to align the work test with the eligibility age for the Age Pension (scheduled to reach 67 from 1 July 2023).

Following recent law changes, individuals aged under 67 (at the time of contributing) no longer need to meet the work test in order to make non-concessional contributions. This applies from 1 July 2020.

TIP–The critical age for assessing whether the work test applies is the individual's 67th birthday – contributions before this time are not subject to the work test, whereas contributions after this time are.

EXAMPLE–Angie turns 67 on 31 March 2021 and she wishes to make a non-concessional contribution of \$50,000 to her SMSF. She does not need to meet the work test if she contributes before 1 April 2021 (i.e., on or before her 67th birthday). However, the contribution will be subject to the work test if she contributes after then.

More flexibility for spouse contributions

Subject to an upper age cap, the super laws allow an individual to make after-tax contributions for their spouse.

Some financial advantages in contributing for a spouse are:

- **Tax offset for spouse contributions** – individuals making after-tax contributions for their spouse may be eligible for a tax offset of up to \$540 where the spouse's income does not exceed \$40,000 and their total super balance is < \$1.6m; and
- **Low super balance** – spouse contributions may help build up low account balances.

However, the cut-off age for super funds to accept contributions for a spouse has been at age 70 for some time (i.e., meaning that spouse contributions cannot be accepted by a fund for members aged 70+).

In a welcome change to the law, individuals can now contribute superannuation on behalf of a spouse aged under 75 (i.e., instead of 70). This change applies from 1 July 2020.

Note that individuals aged over age 66 who receive a spouse contribution need to be mindful of meeting the work test. In this regard, the operation of the work test for spouse contributions can be summarised as follows:

- **Spouse aged 67 or less** – the work test does not need to be met by the recipient spouse; or
- **Spouse aged 67 to 74** – the work test must be satisfied by the recipient spouse, unless they meet the 'work test exemption' (i.e., as discussed above).

EXAMPLE–Jane, aged 72, makes a non-concessional contribution of \$30,000 for her spouse Henry in the 2021 income year. Henry is also aged 72. In order to receive the contribution, Henry must therefore satisfy:

- The work test in the 2021 income year; or
- The 'work test' exemption.

Planning with your pension payments

As stated in our Autumn 2020 newsletter, the Government has halved the minimum pension payment obligation for the 2020 and 2021 income years.

This lower pension payment obligation makes it more likely that individuals will draw down pension capital above the minimum (e.g., to cover additional living costs).

Individuals expecting to draw down over the mandated minimum should be aware that it is generally better to take the excess as a lump sum (and not a pension), for reasons discussed below.

By way of background, SMSFs paying a pension (e.g., an account-based pension) need to ensure that the fund makes at least one pension payment to the member each year. Note that the minimum pension payment is based on the recipient's age and pension account balance as at 1 July each year (or at the date of commencement).

Age at 1 July (or pension start date)	Default drawdown rates	Reduced rates for the 2021 income year
Under 65	4%	2%
65 – 74	5%	2.5%
75 – 79	6%	3%
80 – 84	7%	3.5%
85 – 89	9%	4.5%
90 – 94	11%	5.5%
95 +	14%	7%

Individuals in the retirement phase are subject to the transfer balance cap (which limits the amount of super that can support a 'retirement phase' income stream). Retirees drawing down over the minimum pension payment can generally treat the excess in two different ways:

- **As a pension payment** – in which case, no debit to the transfer balance account arises for the pension payment made; or

- **As a lump sum payment ('partial commutation')** – whereby a debit to the transfer balance account arises.

Hence, drawing down the excess as a lump sum (instead of as a pension payment) frees up more space in the transfer balance account. Therefore, once the minimum pension has been drawn, it is generally more preferable to draw the excess as a lump sum.

Note that from 1 July 2017, a partial commutation payment cannot count towards the minimum annual pension payment. Accordingly, individuals need to ensure that sufficient pension payments are drawn each year in order to meet the minimum requirements.

TIP—Individuals with an accumulation phase account can draw down any additional capital from this account, instead of from their pension (i.e., in order to maximise the tax-free earnings from pension assets).

Key dates and reminders

1 July 2020

This is the commencement date for the following superannuation measures (i.e., as discussed above):

- Allowing people aged under 67 to make voluntary super contributions without meeting the 'work test'; and
- Increasing the maximum age at which spouse contributions can be made from 69 to 74.

31 October 2020

This is the due date for the 2020 SMSF tax return where prior year income tax returns are outstanding (unless all outstanding returns are lodged by 31 October 2020).

Revised start dates for super measures

The Government has announced revised start dates for certain measures in light of the COVID-19 crisis:

- Increasing the maximum number of SMSF members from four to six – this change will now apply from when the law receives 'Royal Assent'; and
- Adjusting the actuarial certificate requirements for funds that are paying a 'retirement phase' pension – this change will now apply from 1 July 2021.

No start date has been announced for the proposed changes to the 'bring-forward' rule, which would allow individuals aged 65 and 66 to make up to three years of non-concessional contributions (where set requirements are met).

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