NTAA

ADVICE

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Changes to concessional contributions cap

It is important to be aware of the recent legislative changes that apply in relation to the **concessional contributions** that can be made to an SMSF (as well as the changes to non-concessional contributions that were outlined in a recent article).

Concessional (or pre-tax) contributions include employer contributions and any amounts that are salary sacrificed into a superannuation fund, as well as personal contributions that are claimed as a deduction.

Some of these changes are negative, including:

- As from 1 July 2017, the annual concessional contributions (CC) cap has been reduced to $25,000 for everyone regardless of age; and
- As from 1 July 2017, the income level at which high-income earners must pay an additional 15% tax on CCs has been lowered from $300,000 to $250,000.

However, other changes are positive and will assist fund members to make CCs they may not have previously been able to make.

In particular, from the 2019 income year onwards, fund members will be able to carry forward unused CC cap amounts, for use in later income years.

More particularly, if a member has a 'total superannuation balance' of less than $500,000 at the end of the previous income year, then as from 1 July 2018, they can start to carry forward their unused CCs cap, on a rolling basis for five years.

For example, suppose that for the 2018/19 income year, Kate's employer makes a total of $10,000 in CCs on her behalf, and Kate does not make any additional personal CCs (and Kate's total superannuation balance on 30 June 2019 is less than $500,000). This leaves an unused amount of the CC cap of $15,000, which Kate can carry forward for up to five years to increase her CC cap. Therefore, for the 2019/20 income year, Kate's total CC cap is $40,000 (i.e., her normal CC cap of $25,000, plus $15,000 carried forward).

Another positive change in relation to CCs is the removal of the requirement that an individual must be self-employed (or substantially self-employed) to claim a deduction for personal CCs. That is, as from 1 July 2017, all persons (not just the self-employed) may claim a deduction for personal CCs that they make.

Total superannuation balance – LCG 2016/12

The ATO has recently (on 20 March 2017) released Law Companion Guideline LCG 2016/12. This law companion guideline provides guidance on how an individual's 'total superannuation balance' is calculated from 30 June 2017.

The 'total superannuation balance' is relevant in determining:

(a) eligibility for unused concessional contributions cap carry forward;

(b) eligibility for the non-concessional contributions cap and 'three year bring forward' cap;

(c) eligibility for Government co-contribution;

(d) eligibility for the tax offset for spouse contributions; and

(e) eligibility to use the segregated assets method to determine exempt current pension income.

In relation to (a) above, individuals with a total superannuation balance less than $500,000 as at 30 June for the previous year can carry forward any unused concessional cap amounts from the previous 5 years (starting from 1 July 2018).

In relation to (b) and (e) above, the relevant threshold is $1.6 million (not $500,000). That is, as from 1 July 2017, only individuals with a total superannuation balance of less than $1.6 million can make non-concessional contributions, be eligible for Government co-contributions, etc.

The components of an individual's total superannuation balance are:

- accumulation phase value of an individual's superannuation interests that are not in retirement phase, plus;
- transfer balance (or modified transfer balance), plus;
- any rollover superannuation benefit not already captured; less
- any structured settlement contributions.

The accumulation phase value of an individual's superannuation interest not in retirement phase is generally the total amount of superannuation benefits that would be payable if they voluntarily caused the interest to cease at that time. Superannuation interests include transition to retirement income streams, non-commutable allocated annuities, non-commutable allocated pensions, and deferred superannuation income streams that are not yet payable and have not met a condition of release.

LCG 2016/9 provides guidance on the calculation of the separate 'transfer balance' that also applies from 1 July 2017. However, as set out in LCG 2016/12, for the purposes of calculating the **total superannuation balance** an individual's **transfer balance** is modified if they have an account-based income stream in retirement phase and/or they have made a structured settlement contribution.

No 'special circumstances' for roll-over recipient

In a recent decision, the AAT has upheld the ATO's decision not to exercise his discretion to disregard or reallocate the non-concessional contributions (NCCs) of a taxpayer on the basis that there were no 'special circumstances'.

The taxpayer was a member of a superannuation fund in Australia. The taxpayer moved to London in 2005 and established a UK pension fund. The taxpayer returned to Australia in January 2009, and in June 2009, he decided to transfer the UK pension fund to another superannuation fund in Australia. However, the funds (including NCCs of almost $150,000) were not actually transferred to the superannuation fund in Australia until 15 September 2009.

The taxpayer made other superannuation contributions for the 2009/10 and 2010/11 income years. In August 2011, the taxpayer sought advice on how much he could contribute in the 2011/12 income year without exceeding the NCC cap. The advice he received disregarded the transfer of the UK pension fund assets, and acting on that advice the taxpayer made a contribution of $181,410 for the 20011/12 income year, making total NCCs of $513,526.77 for the three years from 2009/10 to 2011/12.

The taxpayer exceeded the NCC cap for the 2011/12 income year by approximately $64,000, and was assessed with excess contributions tax in the amount of $29,539.90. The taxpayer applied to the ATO for a written determination that all or part of his NCCs for the 2011/12 income year be disregarded or reallocated to another year.

The AAT noted that under the applicable legislation, the ATO could exercise the discretion to disregard or reallocate an NCC only if it considers that there are 'special circumstances'.

While the AAT accepted that the taxpayer had intended to make the transfer from the UK pension fund in the 2008/09 income year, it noted that an intention to make a contribution in a different income year does not itself constitute 'special circumstances'. The taxpayer's ignorance of the application of the law regarding the status of the transfer from the UK pension fund was also not a 'special circumstance', as the taxpayer should have sought specific advice about this.

Refer Mills v FC of T, AAT ref: **[2017] AATA 362**, 23 March 2017

Can a superannuation death benefit pension be paid to a child?

The superannuation legislation specifically provides that the superannuation benefits of a deceased member can be paid either to a spouse or a child of that member (among others).

If the superannuation death benefits are being paid to a spouse, then the benefits can be paid either as a lump sum or as a pension (or both).

However, it is important to note that if superannuation death benefits are being paid to a child (including an adopted child or a stepchild) of the deceased member, they generally must be paid as a lump sum, rather than as a pension.

More particularly, regulation 6.21(2A)(b) of the Superannuation Industry (Supervision) Regulations 1994 provides that, where a deceased member's superannuation benefits are being paid to a child of the member, those benefits can only be paid as a pension (rather than a lump sum) if:

(a) The child is less than 18 years of age; or

(b) The child is over 18 but under 25 years of age, and was financially dependent on the member; or

(c) The child is over 18 years of age and has a disability as described in this regulation.

The above regulation also provides that, in the event that a deceased member's benefits are being paid as a pension to a child as permitted above, then this pension must be cashed as a lump sum (and paid to the child as a lump sum) as soon as the child attains the age of 25 years, **unless** the child has a disability as described in this regulation.

Therefore, a deceased member's benefits cannot in any event be paid directly to the member's child **as a pension** where the child is aged over 25 and is not disabled.

However, members of superannuation funds can nevertheless arrange for their benefits to be paid on their death **indirectly** to their child as a pension, by arranging (e.g., by a binding death benefit nomination) for their superannuation benefits to be paid to their estate to be disposed of by their Will, and also drafting their Will accordingly.