



THE TAX INSTITUTE

THE MARK OF EXPERTISE

21 September 2015

Attention: Ms Alicia Carr
Senior Adviser
Contributions and Accumulation Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: sgcharge@treasury.gov.au

Dear Ms Carr,

Simplifying and Reducing the Harshness of the Superannuation Guarantee Charge

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to the *Superannuation Guarantee Legislation Amendment (Simplification) Bill 2015* exposure draft legislation (**Exposure Draft**).

The Tax Institute supports the Government's proposal to simplify and reduce the harshness of the superannuation guarantee (**SG**) charge with effect from 1 July 2016. We make the following comments with respect to the Exposure Draft and set out further improvements which in our view, should be made to the regime.

Timing

We query why the amendments could not take effect from an earlier time, given that the SG requirements must be met quarterly. We would propose a commencement date for these changes from either 1 January 2016 or 1 April 2016.

Alignment of earnings base

The proposal to simplify the SG charge by aligning the earnings base for calculating the SG charge (currently, total "salary and wages") with the earnings base for calculating SG contributions ("ordinary time earnings" or "OTE") is a sensible change. The change will assist to alleviate to some extent the harshness of the penalty for employers who are subject to the SG charge without disadvantaging employees.

A new definition of OTE is proposed to be inserted under new section 11A (to replace the current definition under section 6(1)) of the *Superannuation Guarantee (Administration) Act 1992 (Cth) (SGAA)*. However, there remains a level of uncertainty around the concept of OTE and whether some employee entitlements fall inside or outside the scope of OTE. In particular, it would be helpful if the Commissioner had discretion to declare certain entitlements to fall outside OTE, in addition to those termination payments expressly mentioned under section 11A(2) (unused sick leave, annual leave and long service leave). At present it is noted that the SG rulings issued by the Commissioner do not bind the Commissioner and it would be helpful to have greater certainty around the earnings base to which SG contributions (and the SG charge) apply. Whilst the Commissioner has formed a view about certain components as set out in SG Ruling 2009/2 and the “checklist” available on the ATO’s website, there are components of remuneration that remain disputed, particularly in relation to allowances and bonuses. Employers need a simple list of what is included and excluded to allow them to comply.

Nominal interest

The proposed changes with respect to the period for which nominal interest is to accrue are fair and sensible. However, we query the appropriate rate at which nominal interest is applied and suggest this is in need of review on the basis that it is significantly higher than earnings that would typically accrue to members’ investments in most funds. We submit that the nominal interest should be aligned with a commercial rate of interest, such as the interest rate that applies in respect of compliant Division 7A loan agreements.

There is also uncertainty as to how the proposed changes apply to the payment of an SG charge by two or more instalments. The Exposure Draft appears to provide for nominal interest to accrue on the full amount of the shortfall for the entire period until it is paid in full – regardless of whether it is paid down by instalments during this period.

Administrative charge

We recommend for simplicity that the administrative charge of \$20.00 per employee be removed as it is an unnecessary complication.

Contractors

Consideration should be given to introducing a defence from penalties for (deemed) employers with respect to persons who are determined be “contractors” under section 12(3) of SGAA, but where the employer has acted on reasonable grounds so as not to treat the person as an “employee” for the purposes of that section. There have been numerous cases before superior courts to determine this issue, with original decisions having been overturned on appeal demonstrating the difficulty for employers in compliance with their SG obligations in this area. One option may be to at least permit these (deemed) employers to claim a tax deduction for any SG charge payable in these circumstances.

Maximum earnings base and lump sum termination payments

It would be useful if the SGAA could be clarified such that it is clear that if, for example, an employee is paid 12 months wages in lieu of notice (or for other compensatory purposes), the quarterly maximum contribution base applies to that single payment and is not required to be extrapolated over the 12 month notice period.

General discretion

In view of the harshness of the SG regime (despite the changes proposed by the Exposure Draft), the Institute asks that further consideration be given to whether further discretionary relief might be made available for cases where there has been an honest oversight by an employer and there is a genuine attempt to rectify the breach. At present, the Commissioner has very limited discretion extending only to remitting the general interest charge and penalties.

Timing of SG charge

We recommend that the provisions regarding the administration of the SG charge are amended to provide that where an employer has a shortfall for a quarter during a financial year, interest at a commercial rate (refer to the submission above regarding interest) accrues on the outstanding amount. However, we submit that an employer would not be liable for the SG charge until 28 days after the end of the relevant financial year (i.e., 28 July). This would provide employers with the opportunity to reconcile SG contributions made during the relevant financial year and pay any shortfall for a relevant quarter (plus interest), without being liable for any additional penalties and non-deductibility merely by overlooking a particular quarter's SG payment. Many SMEs only do a reconciliation at the end of each financial year and the quarterly system occurs at inappropriate times. For example, the December quarter is due on 28 January whereas BAS and IAS are not due until 28 February.

Typographical change

Substitute "to" for "for to" in paragraph 1.15 of the Explanatory Memorandum.

Broader changes to the SG charge

We note that despite the proposed changes the regime remains harsh because:

- employers are not entitled to a tax deduction for the SG charge – see section 26-95 of the *Income Tax Assessment Act 1997*. We see no reason why an employer should not be so entitled given the severity and range of penalties that apply;
- it is often practically difficult for employers to avoid a double-payment of contributions due to late payment – for example, where an employer has corrected an error or has purported to pay SG contributions to an employee's or contractor's fund outside the 28 day period following the end of the relevant quarter only to later be informed that the late payment will not satisfy their SG obligations and an SG

charge is nevertheless payable (potentially resulting in a windfall to the affected employee(s) and one which the employee cannot readily waive);

- the availability of the late contributions offset against SG charge is limited – for example, where there is no ongoing SG obligation for a (former) employee or contractor;
- the ATO can determine the timeframe in which they will seek to recover any shortfall in SG contributions which could exceed the 4 year amendment period. Where an assessment has not been made, for example where SG statements have not been lodged in respect of contractors, the Commissioner is not restricted by the 4 year amendment period in section 37 of the *Superannuation Guarantee (Administration) Act 1992*. This is a risk with contracting relationships, where the engagement can vary over time and creates significant uncertainty. Specified time deadlines should apply similar to those applicable to income tax assessments where adjustments beyond a 4 year period are only available if there is fraud or evasion; and
- directors may also be personally liable for an amount equal to the SG charge under the director penalty notice provisions of *the Taxation Administration Act*.

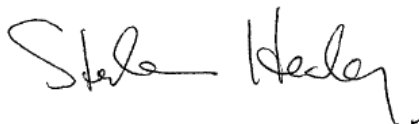
As you will note from the above, the risk of not complying with the SG provisions can result in the winding up of a business. The SG system is seen as an extra cost of doing business. This adds to the difficulty of employing an employee in Australia and to the multiple obligations imposed on many small to medium enterprises.

There is an opportunity with this reform to streamline the SG system more broadly. In many cases, employers are not encouraged to rectify such oversights due the harshness of the penalty system.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours faithfully,



Stephen Healey
President