

Technically Speaking: Contribution errors, refunds, and ATO discretion

Written by Fabian Bussoletti, Technical Manager, SMSF Association

Through our recent series of Technically Speaking bulletins we have covered extensive ground on both concessional and non-concessional contributions – identifying strategic opportunities, as well as covering the operation of the respective contribution caps and the penalties for exceeding them.

In the final Technically Speaking bulletin of this series focussed on superannuation contributions, we turn our attention to the limited, albeit important opportunities that may exist to return a contribution to a member, whether that be a concessional or a non-concessional contribution, and when it may be appropriate to lodge a dispute against an excess contribution determination issued by the ATO.

Where there is an ability to return a contribution to a member, this may provide a simple yet practical solution to dealing with excess contributions.

However, it's important to begin by acknowledging that there is nothing in either the superannuation or tax legislation which permits a fund trustee to return a contribution(s) to a member simply because that member would otherwise exceed their contribution cap(s).

Where a contribution is received by a fund trustee, and that contribution causes the member to exceed their cap, there is typically very little that can be done to reverse the situation.

While a fund trustee is typically not permitted to reject or return a member's contribution, there may be an opportunity to do so where that superannuation contribution has been made to a fund in error, or in circumstances where the fund trustee was unable to accept the contribution (e.g. because the member is over age 75).



NOTE

Note: The contribution caps are not intended to prohibit an individual from contributing more than their respective cap(s) into super. Further, the fund capped contribution limits that existed prior to 1 July 2017, which prevented fund trustees accepting certain NCCs above a fund member's NCC cap, no longer apply.

Checking for errors

As an initial step, individuals who receive an excess contributions determination from the ATO should be encouraged to verify that the recorded contributions are indeed accurate and that the information contained in the determination is correct.

Much of this can be simply achieved by cross-referencing data that is readily available via the individual's online MyGov account, with information provided by the fund(s) in question.

Where it is discovered that an error has occurred with respect to, say, the reporting of a contribution, the SMSF trustee(s) is able to correct this error by re-reporting the correct details to the ATO.



However, funds must only report contributions based on the facts, including the:

- date contributions were received, and
- the contributor's intention at the time the contribution was made.

That is, it needs to be emphasised that super fund trustees are only permitted to re-report contributions if the original reporting of that contribution was wrong. That is, they cannot and should not re-report an individual's contributions simply to help them avoid excess contributions.

Restitution for mistake

Depending on the circumstances that surround the making of the contribution, a fund trustee may choose to return a superannuation contribution to a member in accordance with the law of restitution – that is, where the contribution was made to the fund in error.

Importantly, for this to be possible, the error must have arisen in the individual's *intention* to make the contribution. That is, it would need to be demonstrated that the individual did not **intend** to make the superannuation contribution at all.

Where the 'error' simply amounts to the individual regretting making the contribution (e.g. due to the penalties that will be imposed), or as a result of inappropriate or inaccurate professional advice, this will not provide sufficient reason to return the member's contribution.

In the [December 2008 meeting](#) of the ATO's NTLG Superannuation Technical sub-group, the ATO stated that:

"It is the Commissioner's view that a mistake as to the consequences of a contribution will not be sufficient to found a claim for restitution. In this regard, we have considered authorities dealing with the circumstances in which equity will grant rescission or rectification of contracts for mistake. For example, in Baird v. BCE Holdings Pty Ltd (1996) 40 NSWLR 377, the court held that there were no grounds for rescission or rectification where a party to a contract was mistaken as to the tax implications of an agreement. Such mistakes were not considered to go to the making of the agreement itself. Accordingly, the Commissioner does not accept that a contribution made 'in the reasonable belief that the contribution will not exceed the relevant contribution cap' would, in the absence of other factors, be the subject of a claim for restitution."

In [ATO ID 2010/104](#) the ATO considered restitution of a 'mistaken' contribution in the context of excess contributions. The ATO found that **[Emphasis added]**:

*"... in this case the individual formed an **intention** to make a superannuation contribution of a **certain amount** to the fund and **gave effect** to that intention by making a contribution of that amount. The fund was the **intended recipient** of the amount and the individual obtained the expected superannuation benefits. The individual was not mistaken in the sense that he thought he was required to make a contribution. In the circumstances of this case, there was a contribution (as discussed in TR 2010/1), and it would not have been unjust for the trustee of the fund to retain the contribution."*

Therefore, it would seem that refunding a contribution as restitution for a mistake might be possible where an individual mistakenly selects the SMSF bank account when transferring money – resulting



in money being received by the fund as a contribution. In such a scenario, it could be argued that it was never the individual's intention to make a superannuation contribution, and that the contribution was made in error.



Example – adapted from ATO ID 2010/104:

During the 2022-23 financial year, Leanne intended to transfer \$5,000 to her landlord's real estate agent for rent. Instead, she mistakenly transferred \$5,000 to her SMSF by selecting the incorrect bank account. This 'error' contributed to Leanne exceeding her NCC cap for the year.

In this case, Leanne has made an 'error', and this 'error' has led to an excess determination being issued. From the facts, it appears that it was never Leanne's 'intention' to make a superannuation contribution to her SMSF – rather she made an error with respect to the identity of the payee.

This would likely be a sufficient reason for the fund trustee(s) to refund the contributed amount as restitution for a mistake.

Contributions that are appropriately returned to a member on this basis, will not count towards the individual's contribution cap and the fund will need to amend its reporting to reflect the returned contribution(s).

Contributions incorrectly accepted by a fund

Superannuation funds are only permitted to accept a contribution in accordance with the SIS Regulations.

With the abolishment of the work test for contribution acceptance purposes from 1 July 2023 for those under age 75, there are now even fewer situations in which a fund trustee cannot accept a contribution from a member.

For instance, given the removal of the work test from the contribution acceptance rules, individual's aged 67 to 75, who intend to claim a tax deduction for personal super contributions will need to remain particularly vigilant.

A failure to meet the work test by individuals in this cohort will result in their claim for a tax deduction being denied – as discussed in our [Contribution Standards Tech File](#).

However, this failure to meet the work test will no longer have an impact on the fund's ability to accept the contribution.



Example:

Callum, aged 70, has been retired for several years now.

Due to the sale of several investments, he crystallised a capital gain during the 2022-23 financial year. To counter this, he made a \$357,500 personal superannuation contribution to his SMSF in June 2023 – he had intended to claim \$27,500 of this amount as a tax deduction.

Unfortunately, due to several factors outside of his control, he was unable to meet the work test requirements in the 2022-23 year.



As a result, Callum will not be eligible to claim the \$27,500 as a tax deduction. This means the entire amount contributed will be treated as a Non-concessional contribution – causing him to exceed his NCC cap – refer to [Technically Speaking Issue 79](#) for a more detailed discussion on the NCC cap.

While Callum's failure to meet the work test requirement means he is not eligible to claim a tax deduction for any of his personal contribution, it does not mean he is ineligible to make a superannuation contribution.

In a similar vein, when planning to make contributions intended to unlock the additional contribution cap(s) available under the 'downsizer' or 'Small business CGT cap' provisions, it is extremely important to ensure that the respective eligibility criteria is clearly understood and satisfied. While these contribution types provide an opportunity to make large personal contributions (in addition to an individual's NCC cap), a failure to satisfy the strict eligibility criteria is not a sufficient reason for a contribution to be returned to a member – resulting in the contribution(s) being counted as NCCs and potentially creating a significant excess NCC.



NOTE

It's important to be aware that personal superannuation contributions are, in effect, treated by the ATO as Non-concessional contributions until such time as they are properly claimed as a tax deduction by the taxpayer – at which point they will be counted against a member's concessional contribution cap.

Notwithstanding the above discussion, there may still be circumstances in which a fund trustee erroneously accepts a contribution from one of its members.

Where this occurs, the SIS Regulations require the fund trustee(s) to return the amount previously accepted as a contribution to the member (SIS Regulation 7.04(4)). And, where this occurs, the fund is taken to have never accepted the amount as a contribution and is therefore not required to report it.

Where a contribution has been received by a fund, and the contribution does not meet the contribution acceptance rules, the fund trustee(s) must return the contribution to the member within 30 days of the fund trustee becoming aware that the amount was received incorrectly.



Example:

Patricia, who turned 75 in June 2023, is a member of her SMSF along with her two daughters.

On 1 August 2023, Patricia made a NCC of \$110,000. As she was over 75 at the time the contribution was made, and more than 28 days had elapsed following the end of the month in which she turned 75, the fund trustee is unable to accept this contribution.

Upon noticing that the contribution has been made in a manner contrary to the SIS contribution acceptance rules, the fund trustee(s) have 30 days within which to return the contributed amount to Patricia.

The returned contribution will not need to be included in the fund's 2023-24 Annual Return and will therefore not be counted toward Patricia's NCC cap.



Special circumstances – Applying for ATO discretion

If an individual exceeds their contribution cap due to circumstances outside of their control, it's worth noting that the ATO has some limited discretion to disregard certain contributions or have them reallocated to another year.

However, the ATO is only able to do so where:

- there are 'special circumstances', and
- doing so is consistent with the objective of the legislation.

When assessing an application for the ATO to exercise this discretion, the ATO will consider:

- whether the contribution(s) would be more appropriately allocated to another financial year,
- whether it was reasonably foreseeable that the individual would have excess contributions at the time the contribution was made,
- the extent to which the individual had control over the contribution being made, and
- any other relevant factors.

'Special circumstances' are unusual or out of the ordinary factors that lead to an unjust, unreasonable or otherwise inappropriate outcome – and will need to be determined on a case-by-case basis.

However, situations that will not generally be considered 'special circumstances' include:

- financial hardship arising from having to pay extra tax,
- thinking the assessment or determination is unfair,
- not meaning to exceed a cap,
- not knowing about or misunderstanding the law or facts, or
- receiving incorrect or incomplete professional advice.

The ATO has also issued Practice Statement [PS LA 2008/1](#): *'The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes'* which provides some insights into how the Commissioner will apply this discretion and some useful examples.

An application to have contributions disregarded or re-allocated can be made to the ATO using the form [Application – excess contributions determination](#).

An individual is not required to wait until they receive an excess contributions determination to lodge an application for this discretion to be applied. However, the application must only be lodged once all the contributions that are to be disregarded or reallocated have been made, and it must be lodged within 60 days of receiving a determination.



Example – adapted from PS LA 2008/1:

Following the sale of an investment property, Teaghan, aged 70, made a \$27,500 personal contribution during the 2022-23 financial year – which she intended to claim as a tax deduction. She also made a \$330,000 NCC in the same year.

Teaghan failed to meet the work test during the 2022-23 year meaning she is not eligible to claim a tax deduction for the \$27,500 personal contribution. As a result, this personal contribution is measured against her NCC cap – causing her to have an Excess NCC of \$27,500.

Unfortunately for Teaghan, PS LA 2008/1 states that *“special circumstances would not generally occur if the person exceeded their contributions cap solely because they did not meet any of the requirements to be eligible to claim an income tax deduction”*.

Lodging an objection

Finally, if an individual feels that the ATO has applied the law incorrectly when:

- issuing a determination / assessment, or
- making a decision not to disregard or reallocate a contribution,

the individual may consider lodging an objection.

Further information regarding the lodgement of objections is available via the [ATO website](#).

Importantly, where an individual decides to lodge an objection, they will still be required to pay any tax liability that has been raised.

If the objection is subsequently allowed, amounts paid to the ATO will either be refunded to them or offset against any tax or other Australian Government debts they may owe.

CPD quiz

Please click here to access the CPD quiz.

If you have difficulties accessing the quiz via the above link, please copy and paste this URL into a new browser: <https://web.smsfassociation.com/smsfassociationcom-ah3t2/pages/02a1572d5157ee11be6f00224898a934.html?PageId=02a1572d5157ee11be6f00224898a934>

Disclaimer: Technical Papers contain factual information only and are prepared without considering particular objectives, financial circumstances and needs. The information provided is not a substitute for legal, tax and financial product advice. The information contained in this document does not constitute advice given by the SMSF Association to you. If you rely on this information yourself or to provide advice to other persons, then you do so at your own risk. The SMSF Association is not licensed to provide financial product advice, legal advice or taxation advice. We recommend that you seek appropriate professional advice before relying upon the information in this technical paper. While the SMSF Association believes that the information provided is accurate, no warranty is given as to its accuracy and persons who rely on this information do so at their own risk. The information provided in this paper is not considered financial advice for the purposes of the Corporations Act 2001. © SMSF Association