



Australian Government  
Australian Taxation Office

Financial Strategies (SA) Pty Ltd  
Attention: Theo Marinis  
67 Kensington Road  
NORWOOD SA 5067

Reply to: PO Box 3100  
PENRITH NSW 2740  
Contact officer: Jane Russell  
Phone: 13 28 69  
Fax: 1300 669 846

29 March 2011

**Excess contributions tax  
For your information**

Dear Mr Marinis

You wrote to us on 1 March 2011 requesting confirmation that the Australian Taxation Office (ATO) does not charge excess contributions tax (ECT) if a person can nominate special circumstances outside their control and what percentage of request for relief are met.

We provide the following information which is available on our website [www.ato.gov.au](http://www.ato.gov.au) to assist you with your enquiry.

This guidance is general in nature and is not binding on the Commissioner.

**Disregarding or reallocating contributions**

We can disregard contributions or reallocate contributions to another financial year but we can only do this if there are special circumstances.

If we decide to disregard an amount of concessional or non-concessional contributions, the amount will not be counted towards the relevant contributions cap for any financial year. If we decide to allocate an amount to another financial year, the amount will be counted towards the relevant contributions cap for the financial year to which we allocate it.

As part of the process we write to let taxpayers' know our decision and, where required, we will amend the ECT assessment to reflect our decision.

It is not necessary for a super fund to re-report contributions if we decide to disregard or reallocate an amount. Our decision will not alter eligibility for a super co-contribution or to claim a deduction for personal contribution.

- Any amount is disregarded or reallocated **only** for the purposes of ECT and not for any other purpose.

We can only disregard or reallocate an amount of concessional or non-concessional contributions where:

- there are special circumstances, and
- doing so is in line with the object of ECT.

## **What are special circumstances?**

Australia's courts have stated 'special circumstances' are circumstances that make a case different from the ordinary or usual case. Circumstances are special only if the ordinary application of the law would result in an unjust, unfair or otherwise inappropriate outcome. We must apply this view when we make our decisions.

Our courts have also warned that it is not possible to give precise rules about what constitutes special circumstances, and each case must be considered on its facts.

It is not enough that the circumstances were unusual for the taxpayer. We will look at all of the taxpayer circumstances to determine if they are out of the ordinary or unusual. When we consider whether the taxpayer being liable for the tax is unfair or unjust, we will take into account how the law is meant to apply in the ordinary case.

Sometimes a particular factor will not amount to special circumstances, but when combined with others, it may take a case out of the ordinary and make applying the law unjust, unfair or inappropriate.

Simply having to pay ECT is not unjust, unfair or otherwise inappropriate. Paying ECT is an intended outcome of the law if contributions to super exceed a contributions cap. Nor does unintentionally exceeding a contributions cap, misunderstanding the law or facts, or being given incorrect or incomplete advice amount to special circumstances on their own.

We can only disregard or reallocate excess contributions if it is consistent with the object of ECT to do so. Otherwise, it would give an advantage to those who do not make sufficient effort to understand the law, or who chose advisers who do not understand the law, over those who understood the law and worked within its limits.

## **Application of discretion**

Practice Statement Law Administration (PS LA) 2008/1 is a guide in the exercise of the discretion contained in section 294-465 of the *Income Tax Assessment Act 1997* and can be accessed via our website.

## **Commissioner speech**

Please find below web information in relation to the Commissioner's key speech on super for the 2010 year. In this speech one of the key topics highlighted was ECT, and outlines the percentages in relation to assessments issued and the applications received for discretions.

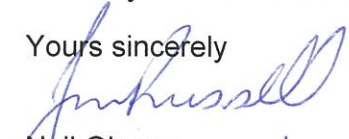
<http://ato.gov.au/corporate/content.asp?doc=/content/00270847.htm>

**More information**

If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Jane Russell on **(03) 6221 0361**.

When you phone us, please have the reference number **1011750926721** ready so we can quickly access your case details.

Yours sincerely



Neil Olesen  
Deputy Commissioner of Taxation

Per  
(Jane Russell)