

## Contribution Reserving Strategy

[dbalawyers.com.au/contributions/contribution-reserving-strategy](http://dbalawyers.com.au/contributions/contribution-reserving-strategy)

Daniel Butler

**Joseph Cheung** ([jcheung@dbalawyers.com.au](mailto:jcheung@dbalawyers.com.au)), Lawyer and **Daniel Butler** ([dbutler@dbalawyers.com.au](mailto:dbutler@dbalawyers.com.au)), Director, DBA Lawyers

This article highlights some reasons why a contribution reserving strategy may be used by an SMSF, and also briefly discusses the risks and some of the associated compliance issues.

### Reasons for engaging in contribution reserving

There are a range of reasons why SMSF trustees engage in contribution reserving. For instance, contributions are received from time to time from members and other persons where the SMSF trustee does not have sufficient information to allow ready allocation of those amounts directly to the member's account. In certain cases:



It is not always clear whether a contribution is from the member directly (as it may be a member contribution paid on their behalf by a trustee of a discretionary trust or contributed by an employer but is set off against the employee's loan account in that trust or company). In these instances, further investigation may be needed to confirm the status of the contribution.

The contribution may be paid from a joint bank account on behalf of a couple but there is no information provided at that time regarding whether the contributed amount is for one or both members or the split between the couple.

The 'notice of intent to claim or vary a deduction for a personal super contribution' (NAT 71121) is not provided and the components of that contribution are not available at that time (this notice is generally not due until the lodgment of the member's tax return).

The trustee may, for administrative ease or other reasons, prefer to reserve the contribution until the trustee has obtained further information or advice regarding how best to deal with the amount in accordance with applicable law and practice. In

particular, the contribution cap rules, in addition to the total superannuation balance ('TSB') limits, place more responsibility on trustees and members to remain informed to minimize any excess contributions.

Broadly, contribution reserving has provided a practical method of receiving a contribution and dealing with the special rules and administrative practices that relate to allocating it to a member's account at a later time.

### **Management of div 293 tax**

A contribution reserving strategy can assist in managing contribution caps and other contribution thresholds such as the \$250,000 div 293 tax threshold. We illustrate this by way of example.

### **EXAMPLE**

Jim is a farmer who has an SMSF.

Jim's earnings fluctuate quite significantly due to the seasonal nature of his work. Jim has a bumper year in FY2018 and earns assessable income of approximately \$270,000. However, Jim believes that he will be lucky to earn more than \$200,000 in the following FY.

Jim makes two separate personal deductible contributions of \$25,000 each to his SMSF: one on 2 June 2018 and the second on 20 June 2018. The SMSF trustee allocates the first \$25,000 in FY2018 and allocates the second \$25,000 on 14 July 2018.

Therefore, in FY2018 Jim's taxable income is \$220,000 and \$25,000 of the first concessional contribution ('CC') is added to determine his income for div 293 adjusted income. Accordingly, he does not exceed the div 293 \$250,000 threshold for FY2018.

Note the above outcome is based on the view of the Australian Taxation Office ('ATO') reached in ATO ID 2012/16 and TD 2013/22 to overcome a potential double taxation. However, note that these ATO's materials do not specifically cover div 293 but are based on a similar issue. Thus, taxpayers seeking to rely on this view should consider obtaining expert advice or seeking a private binding ruling.

### **General compliance considerations**

The allocation of contributions over two FYs may raise suspicion from the ATO that the trustees are trying to circumvent the excess contributions tax provisions, minimise div 293 tax or manipulate their TSB to be in a position to make further contributions to superannuation.

There is also a disparity between what is reported to the ATO in relation to the FY in which the contribution is included in the assessable income of the SMSF (or a deduction is claimed by the member) compared to the FY in which the ('reserved') contribution counts towards the relevant member's contribution caps. This may result in the ATO seeking further clarification in respect of this discrepancy. This may result in an excess contribution assessment being issued where a member exceeds their CCs cap.

The ATO has indicated that it would expect to see an SMSF deed that authorised reserving, that a trustee resolution implemented the reserve, and that a trustee resolution allocated the contribution. Since the taxpayer bears the burden of proof, in the event that the ATO raises an assessment the taxpayer must prove his or her case on the balance of probabilities, typically at a significant cost. The ATO may also request further documentation and information and may check that this information does not disclose any irregularity or backdating, etc. The ATO may also seek to apply the anti-avoidance provisions and penalties if it is not happy with what unfolds.

The DBA Lawyers SMSF deed provides express power and DBA Lawyers also offers a contribution reserving kit which includes suggested template resolutions and detailed guidance. For further information about these documents, please refer to the following links:

- <https://www.dbalawyers.com.au/summary-smsf-documents-strategy-kits/contribution-reserving-kit/>
- <https://www.dbalawyers.com.au/new-smsf/>
- <https://www.dbalawyers.com.au/smsf-deed-update/>

### **Contribution reserving and the ATO SMSFRB 2018/1**

In SMSFRB 2018/1, the ATO considers that the definition of ‘reserve’ under superannuation law may differ from the definition of ‘reserve’ under tax law. In particular, the ATO expresses its view that it does not consider a ‘contribution reserve’ to be a reserve for the purposes of the *Superannuation Industry (Supervision) Act 1993* (Cth), but acknowledges that it could fall within the definition of ‘reserve’ under tax law. Despite these comments, the ATO in SMSFRB 2018/1 confirms that ‘contribution reserving’ can still be used.

The ATO also expressed its concern in SMSFRB 2018/1 about using reserves to produce positive tax outcomes after the mid-2017 super reforms (eg, ‘the intentional use of a reserve to reduce a member’s TSB to enable them to make non-concessional contributions (‘NCCs’) without breaching their NCC cap’). Consider the following example.

#### **EXAMPLE**

Harry’s CC cap for FY2018 is \$25,000. Harry makes a personal contribution of \$25,000 which is received by his fund on 30 June 2018. The trustee applies this amount to a contributions reserve established in accordance with the governing rules of the fund. On 2 July 2018, the trustee allocates \$25,000 to Harry’s member account in the fund with effect from 2 July 2018. The \$25,000 contribution is included in the amount of Harry’s CCs for FY2019.

The ATO appears to accept this approach. However, let’s assume that:

- if the 30 June 2018 contribution is ignored, Harry would have a TSB of \$1,590,000 as at just before 1 July 2018; however;
- if the 30 June 2018 contribution is counted, Harry would have a TSB of \$1,615,000 as at just before 1 July 2018.

In other words, due to the use of contributions reserving, Harry may be viewed to have a

TSB that is less than the general transfer balance cap for FY2019. In these circumstances, it is arguable that a positive tax implication has been produced since Harry might not have had the ability to make further non-concessional contributions in FY2019 if not for the contribution reserving strategy.

For more information about the interaction between contribution reserving and SMSFRB 2018/1, please refer to the following link:

<https://www.dbalawyers.com.au/ato/what-is-the-status-of-contribution-reserving-in-light-of-smsfrb-2018-1/>.

## Conclusion

Contribution reserving is a strategy accepted by the ATO and there are still a number of reasons supporting its legitimate use. However, the law is complex and further considerations should be taken into account before using this strategy especially if it has the potential to circumvent the recent super reforms.

Naturally, for advisers, the Australian Financial Services Licence under the *Corporations Act 2001* (Cth) and tax advice obligations under the *Tax Agent Services Act 2009* (Cth) must be appropriately managed to ensure advice is provided within applicable legal limits of the law.

Note: DBA Lawyers hold SMSF CPD training at venues all around. For more details or to register, visit [www.dbanetwork.com.au](http://www.dbanetwork.com.au) or call 03 9092 9400.

For more information regarding how DBA Lawyers can assist in your SMSF practice, visit [www.dbalawyers.com.au](http://www.dbalawyers.com.au).

29 June 2018

---

Download date: 03/07/2018 Copyright © DBA Lawyers Pty Ltd.

Any information provided on this website (including any blog posts) are mere summaries and general information provided for educational purposes only. This is no substitute for expert advice. Anyone seeking to rely on this content should obtain expert advice to confirm particular issues especially as the law is subject to ongoing changes and substantial penalties can be imposed.

As a law firm DBA Lawyers Pty Ltd is not licensed to give financial product advice under the *Corporations Act 2001* (Cth).