

What is the status of contribution reserving in light of SMSFRB 2018/1?

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Earlier this month, the ATO released Self Managed Superannuation Fund Regulator's Bulletin SMSFRB 2018/1. It contains some of the most important information available on the use of reserves for SMSFs. However, there is a vital question regarding contribution reserving that SMSFRB 2018/1 gives rise to. The question is not expressly answered; however, in this article I provide what I believe the best answer is.

(Note: for more information regarding SMSF reserves, a recorded version of a recent webinar on the topic is available at



<http://www.dbanetwork.com.au/dbalawyers/seminars3/7846/SMSF-Reserves-Webinar.html>)

Background

In SMSFRB 2018/1 the ATO detail that they are less than keen on SMSFs maintaining certain types of reserves. For example, the ATO describe:

- an administration reserve as 'unnecessary for an SMSF';
- an investment reserve as 'unnecessary in SMSFs'; and
- an operational risk reserve as 'not necessary in SMSFs'.

However, a reserve to hold unallocated contributions (ie, contribution reserving) still appears to be permissible. That being said, the ATO does not consider such an account to be a reserve for superannuation law purposes. Accordingly, the ATO in SMSFR 2018/1 state:

... contributions 'reserve' is often used to describe the accounts used to record contributions pending allocation to members. In such cases, these accounts are not reserves for the purposes of the SISA and SISR.

In this article, however, I will use the term 'contribution reserving.'

How contribution reserving works

Consider the following example from Taxation Determination TD 2013/22. (For completeness, I note that I have updated the financial year to make it more relevant — apart from that, I have quoted TD 2013/22 largely verbatim.)

Harry's concessional contributions cap for the 2017-18 financial year is \$25,000 ... Harry makes a personal contribution of \$25,000 which is received by his fund on 30 June 2018. The Trustees apply this amount to [a contributions reserve] established in accordance with the governing rules of the fund. On 2 July 2018, the trustees allocate the amount of \$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 concessional contributions for the 2018-19 financial year ...

The ATO appear to still accept this. See paragraph 45 of SMSFRB 2018/1.

Accordingly, a contributions reserve appears to allow someone to claim two lots of deductions in financial year 1 (eg, \$25,000 x 2 = \$50,000), but spread the concessional contributions over two years (and thus there are no excess concessional contributions).

Where the key question arises

The ATO are concerned about uses of reserves that produce positive tax implications under the new laws that commenced from 1 July 2017 (eg, 'the intentional use of a reserve to reduce a member's total superannuation balance to enable them to make non-concessional contributions without breaching their non-concessional contributions' cap').

To continue the example above, assume that:

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

To put it differently, due to the use of contributions reserving, Harry may be viewed to have a total superannuation balance that is less than the general transfer balance cap for the 2018-19 financial year. Recall that since 1 July 2017, s 292-85 of the *Income Tax Assessment Act 1997* (Cth) provides:

Your ***non-concessional contributions cap*** for a financial year is:

(a) unless paragraph (b) applies—[\$100,000]; or

(b) if, immediately before the start of the year, your total superannuation balance equals or exceeds [\$1,600,000]—nil.

The implications of this are that, due to the use of a contributions reserve, Harry might have a \$100,000 non-concessional contributions cap in the 2018-19 financial year. If a contributions reserve were not used, Harry might have had a nil concessional contributions cap in the 2018-19 financial year.

So is a contributions reserve allowed?

In SMSFRB 2018/1 the ATO state that:

We will not apply compliance resources to review arrangements entered into by SMSFs as described in this Bulletin before 1 July 2017 provided that ... the facts and circumstances do not indicate that the use of the reserve by the trustee was a means of circumventing the restrictions imposed by the Government's Superannuation Reform measures announced in the 2016-17 Budget

In light of this, without providing an analysis of the law on point, in a practical sense my view is as follows.

A contribution reserve can be admissible. However, if it provides a benefit in respect of the new laws that took effect from 1 July 2017, either:

- do not engage in the contributions reserve; or
- first seek prospective ATO input (eg, private binding ruling and/or an SMSF specific advice).

This is a complex area of law. The above is not law and should not be relied upon. Expert advice should be obtained. 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) need to be appropriately managed to ensure any advice provided is within the bounds of the law.

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