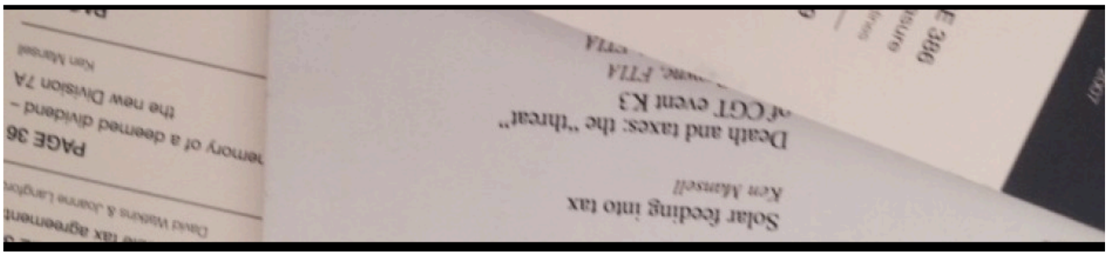

FPA Congress – "Taxing Times"

By Ken Mansell
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1. **Advising non-resident and expat clients**
    - **Who is a non resident?**
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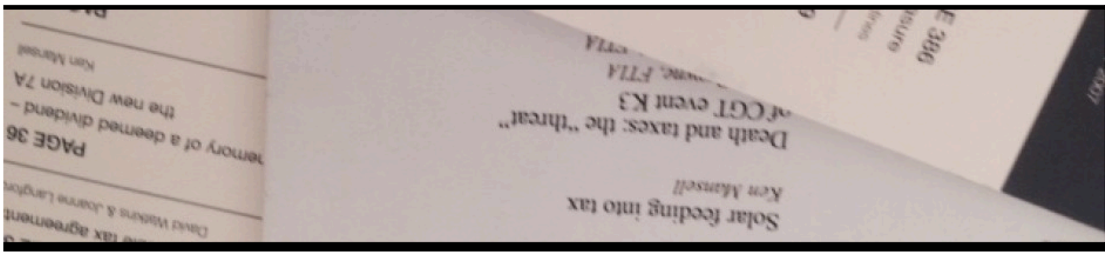


PART 1: Advising non-resident and expat clients

You cannot just use the same advice…

"I think that you should look at negatively gearing an investment property"… Sound advice???

A quote from an email I recently received *"I have recently been asked by a number of clients that hold loss making investment properties overseas whether they can declare the income/loss and claim property depreciation when they are on 457 temporary resident visas – these people are tax residents of Australia."*

And my (edited) response…

"To quote from the Commissioner "As a temporary resident of Australia, any foreign business income you receive or loss you make is disregarded for Australian tax purposes under section 768-910 of the ITAA 1997. Therefore, you are unable to claim the foreign business losses you made against your assessable income." Yes I know it is about business losses but I could not find a rental property decision by the Commissioner… So if they are treated as temporary residents under Subdivision 768-R of the Income Tax Assessment Act 1997 they won't be able to claim the deduction."

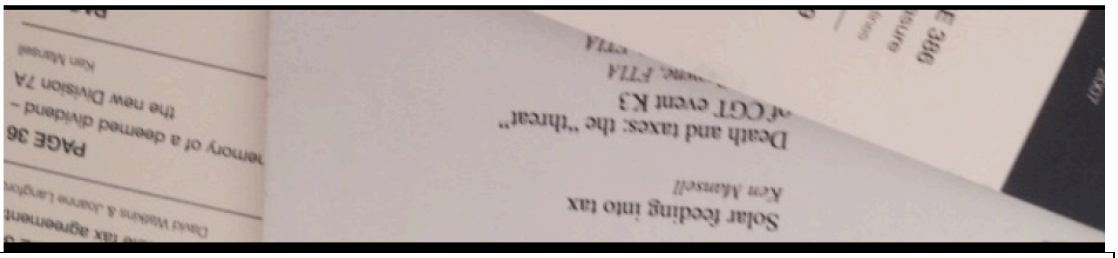
Therefore, they have income in Australia and losses overseas and cannot offset the two

Case study

Ken was born in Australia. At 42 he started to work on a fly in fly out basis in the Solomon Islands. After a year his wife and kids moved over and they stayed for 3 more years.

Peter is in Australia for the same 4 years on a temporary visa class (457) for the first two years and as a citizen for the next two years.

Both Peter and Ken own exactly the same assets (by chance). At the start of the 4 years they both own a rental property portfolio that was worth $1,000,000 at the start of the four years and the value increased $100,000 a year, until in year four where they both sold the portfolio for $2,000,000. The rental portfolio covers Australian and New Zealand properties and are negatively geared.



They both also own Woolworth shares (poor them) that are also worth $1,000,000 at the start of the four years and the value increased $100,000 a year, until in year four where they both sold the portfolio for $2,000,000. They both have an Australian bank account earning $100,000 interest a year.

Ken and his wife have a self managed super fund.

Peter has a foreign pension fund he wants to transfer to a self managed super fund at the end of year 4.

Who is a non resident?

You need to establish if the individual is a resident first.

The Commissioner has a helpful tool on his website but as always the decision depends on the answers you give.

But this is the Ken Mansell rule of thumb… To cease to be an Australian tax resident you need to:

- Intend to live abroad in a settled manner for a minimum period of 2 years

- Your family (spouse and children) have accompanied you

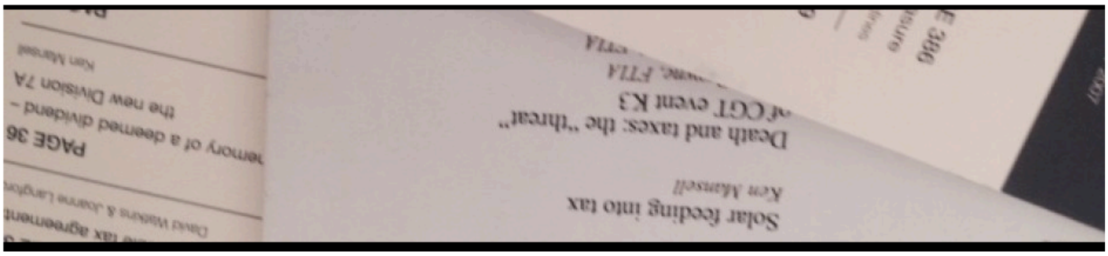
- You have rented, sold or otherwise abandoned your Australian home

The definition of a resident contains a primary test of residency under common law principals and three additional statutory residency tests. Essentially, the four tests are as follows:

1. Residence according to ordinary concepts;
2. The domicile and permanent place of abode test;
3. The 183 day test; and
4. The Commonwealth superannuation fund test.

Tests 1 and 3 apply to inbound and tests 1, 2 and 4 apply to outbound.

The primary test of residency is a determination of whether an individual resides in Australia according to the ordinary meaning of the word. Case law has adopted a broad interpretation of the word “resides”, referring to the dictionary meaning, “to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live, in or at a particular place”.



The determination of residency under ordinary concepts is a question of fact, based on the circumstances of each individual case. In this respect, according to the Commissioner in TR 98/17, the period of physical presence or length of time in Australia is not, by itself, decisive when determining whether an individual resides here. However, an individual's behaviour over the period of time they have spent in Australia may reflect a degree of continuity, routine or habit that is consistent with them 'residing' in Australia.

There are many factors which are considered relevant to the determination of residence referred to by the courts. The following factors have been specifically identified by the ATO as being *'useful in describing the quality and character of an individual's behaviour*':

- Intention or purpose of presence;
- Family and business/employment ties;
- Maintenance and location of assets; and
- Social and living arrangement.

Under the second test, an individual will be an Australian tax resident where that individual's domicile is in Australia, unless the ATO is satisfied that the person has a permanent place of abode outside of Australia.

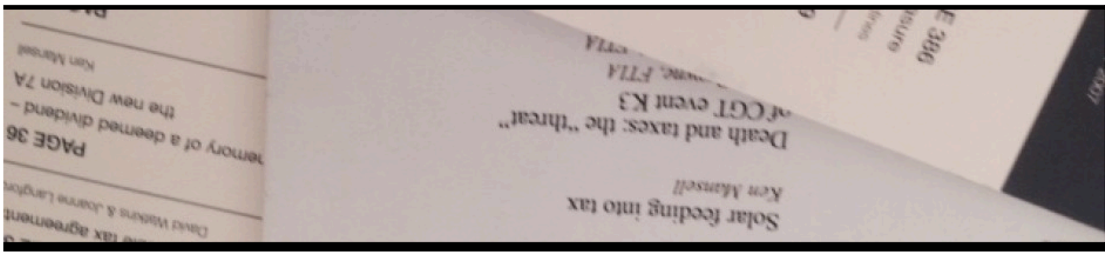
Under the 183 day test, if an individual spends more than half of the income year present in Australia, whether it be continuously or intermittently, constructive residence may be established unless it can be established either:

- The individual's usual place of abode is outside Australia; and/or
- The individual has no intention to take up residence in Australia.

Under the Commonwealth super test, an individual is a tax resident if he or she is either:

- A member of the superannuation scheme established under the Superannuation Act 1990, or
- An eligible employee for the purposes of the Superannuation Act 1976.

Case study issues?



Who is a temporary resident?

A “Temporary Resident” is a person who:

- Holds a temporary visa granted under the Migration Act 1958; and
- Is not an Australian resident within the meaning of the Social Security Act 1991; and
- Whose spouse is not an Australian resident within the meaning of the Social Security Act 1991.

An Australian tax resident that is a temporary resident will benefit from certain tax concessions under the temporary resident rules, which broadly means that:

- Most of the foreign income is not taxed in Australia, except for the income earned from employment performed overseas for short periods when the taxpayer is a temporary resident;

- For CGT events occurring after 12 December 2006, a temporary resident is not liable for capital gains tax unless the asset is ‘taxable Australian property’

Case study issues?

Non residents have different tax rates…

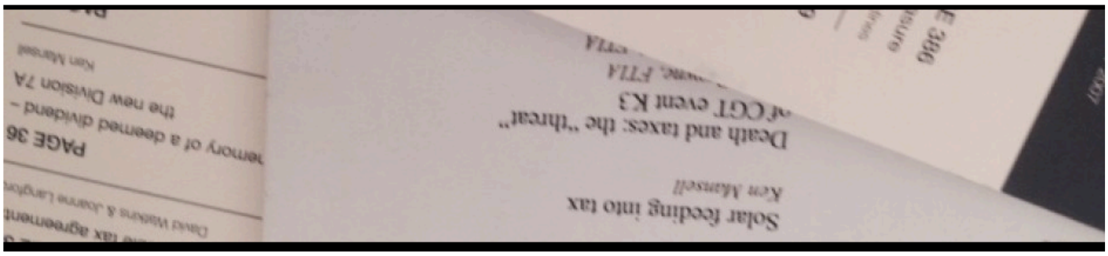
Non resident tax rates are the same as the resident tax rate EXCEPT the 32.5% rate applies to every dollar up to $80,000.

That is right, there is no tax free threshold. So don’t alienate income to non residents thinking the first $18,200 will be tax free.

Non-residents are not required to pay the Medicare levy. But this also means they are not entitled to claim Medicare benefits during this time.

All Australian sourced interest, unfranked dividends and royalties derived after an individual cease to be an Australian resident are subject to withholding tax provisions. These include:

- 10% of any interest earned from your Australian bank accounts or term deposits is withheld for tax



- 30% withholding tax applies to unfranked dividends where Australia does not have a double tax treaty; and
- Royalties will be taxed up to 30% depending on the existence of a double tax treaty.

These are final taxes so no deductions can be claimed against them.

Case study issues?

What are non residents subject to CGT on?

Foreign residents can disregard a capital gain or capital loss if the CGT event happens in relation to a CGT asset that is not taxable Australian property.

A “foreign resident’’ is a person who is not a resident of Australia or is a temporary residents.

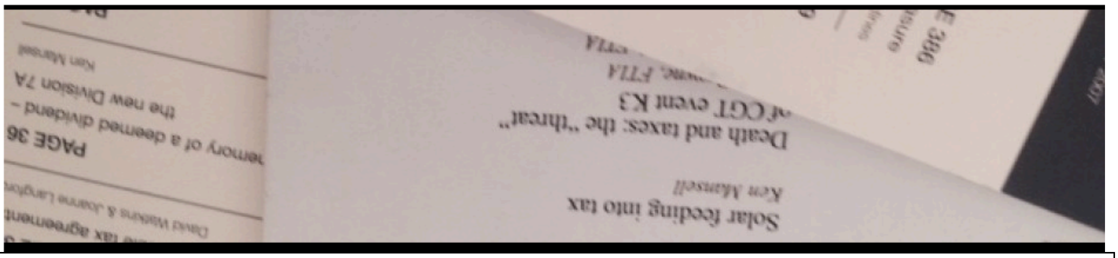
Taxable Australian property is:

- Taxable Australian real property; an indirect interest in Australian real property;
- A business asset of a permanent establishment in Australia;
- An option or right to acquire any of the CGT assets in items 1 to 3; or
- A CGT asset that is deemed to be Australian taxable property where a taxpayer, on ceasing to be an Australian resident, makes an election.

So please don’t apply your CGT “wash” transaction ideas when a non resident sells their Commonwealth bank shares for a profit as there was no CGT payable in the first place!

But this does mean a non resident can invest in Australia, and if they do not buy Taxable Australian Property, there will be no tax in Australia on these amounts (but their may be tax in their resident country).

So if you have a client becoming a non resident for some time, these investments can be worthwhile as they may be tax free.



Case study issues?

Non residents and the CGT discount

The 50% CGT discount does not apply for foreign or temporary residents who dispose of "Taxable Australian Property" or assets they have elected to treat as "Taxable Australian Property" on or after 8 May 2012.

So any calculations you do for a non resident should ensure the discount is not applied.

Case study issues?

Ceasing to be a resident or becoming a resident

When an individual becomes a non-resident, there are capital gains tax issues. There is a deemed disposal of all assets that are not "taxable Australian property".

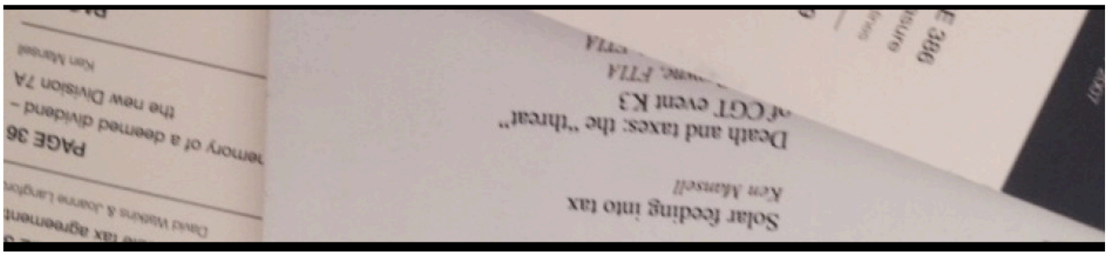
Remember, the definition of taxable Australian property includes real property situated in Australia, some indirect interests in Australian real property and options or rights to acquire an interest in Australian real property. So the family home and the investment property are still in the CGT net.

But what about the other assets? There are two choices, and the choice will be reflected in your tax return (and it applies to all assets, not just a selected few).

Option 1: Deemed sale at market value causing a CGT gain or loss.

Option 2: Elect to not reflect the gain or loss in your return, but keep the assets subject to CGT in Australia, even though you are a non-resident.

Which option is better? If you expect an increase in value, pay the tax liability when you leave, stopping tax in Australia. But you have to find the cash…



Option 2 avoids up front tax but will mean continuing to prepare Australian tax returns and no access to the CGT discount on future gains as you are a non resident.

If you become a resident, your world wide income is now taxed. Further your non Taxable Australian Assets are subject to CGT and given a market value cost base.

Case study issues?

Main residence exemptions for those going overseas

This is not really a non-resident tax issue, but it is very commonly asked by those going overseas. Will my main residence remain free of CGT?

Section 118-145 provides for an extension to the MR exemption period for the dwelling to continue to be the main residence of the taxpayer, even though the taxpayer is not physically living in that dwelling.

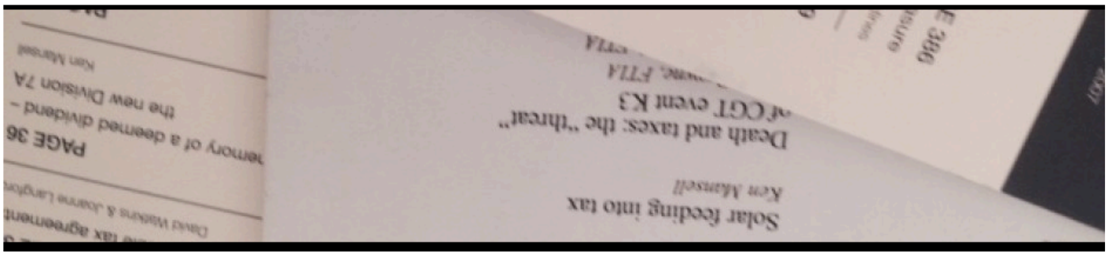
However, this extension to the MR exemption comes at a cost: no other dwelling can be treated as the MR of the taxpayer while this choice is applicable. This applies even if the taxpayer acquires a second dwelling and lives in it during their absence from their original main residence.

A key misconception with the so-called ‘6-year rule’ is its name. It is not just a 6-year rule. The period of time for which the extension to the MR exemption depends on the use of that dwelling while the taxpayer is absent.

- The extension of the MR exemption is indefinite, if the dwelling is not used for the purpose of producing assessable income during the taxpayer’s absence; but,

- The extension of the MR exemption is up to a maximum of 6 years, if the dwelling is used for the purpose of producing assessable income during the taxpayer’s absence.

Also, if a main residence is used to produce assessable income, the taxpayer is not forced to have the full six year extension to the MR exemption during their absence. The taxpayer may choose to have an extension to their MR exemption that is less than six years.



Case study issues?

SMSF issues

There can be major issues for people who operate SMSFs and relocate overseas.

If the fund remain does not remain an ‘Australian Superannuation Fund’ it become a non-complying fund. An SMSF qualifies as an Australian Superannuation Fund if the following three conditions are met:

- The fund was established in Australia
- The central management and control is ordinarily in Australia; and
- At least 50% of the benefits in the fund that relate to active members have been derived from active members that are also residents of Australia.

In order to prevent this from happening, people with SMSFs intending to reside overseas for an extended period of time, should consider winding up the SMSF and rolling their money into a public offer superannuation fund.

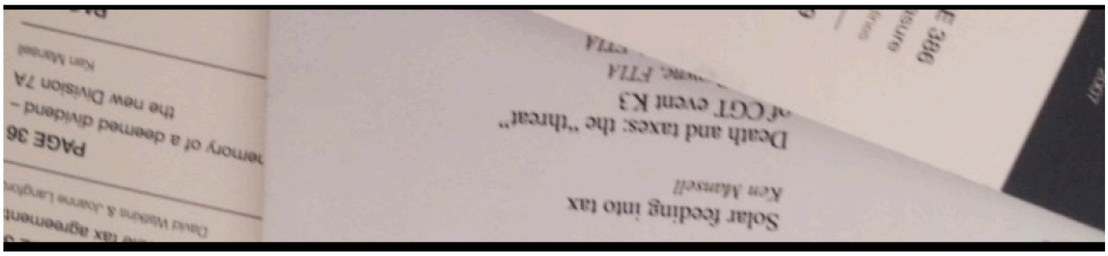
Note: Superannuation contributions will no longer be compulsory if you become a foreign resident and perform employment services outside Australia. However, an Australian employer may voluntarily decide to continue with contributions

Case study issues?

The Federal Treasury has released draft legislation in relation to the proposed 10% withholding for capital gains made by non-residents.

Exposure Draft: Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015: Foreign resident capital gains withholding payments

The Government announced in the 2013/14 Federal Budget that they would introduce, from 1 July 2016, a 10% non-final withholding tax on the disposal of certain taxable Australian property by foreign residents.



This announcement by the previous Government, and confirmed by the current Government, has been widely criticised as it puts the withholding obligation on the purchaser.

And this could lead to very unfortunate circumstances. The draft legislation requires the purchaser to pay 10% of the purchase price to the Commissioner, whether or not the amount was withheld from the payment the purchaser made to the vendor. If the purchaser forgets to withhold the amount, they will still be liable to pay the 10% to the Commissioner.

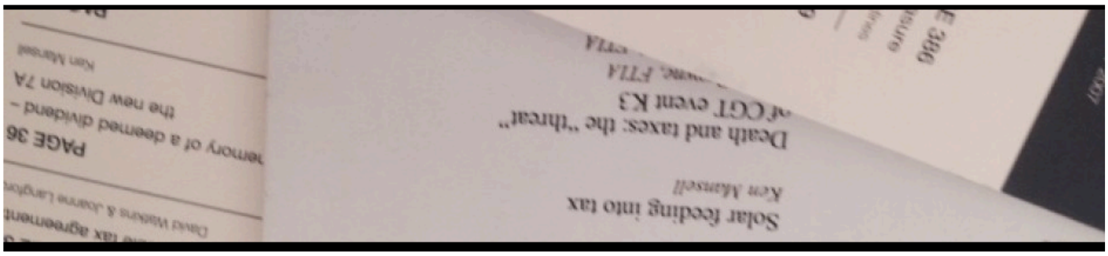
From 1 July 2016, if a non-resident sells to a taxpayer taxable Australian real property, an indirect Australian real property interest, or an option or right to acquire such property or interest then the taxpayer will need to consider if they should withhold 10% of the purchase price.

Transactions that will not be subject to this new withholding include:

- Transactions involving residential property valued less than $2.5 million;
- An arrangement that is conducted through a stock exchange;
- An arrangement that is already subject to an existing withholding obligation;
- An arrangement where the vendor has made a declaration that they are an Australian resident for income tax purposes;
- An arrangement where the vendor has made a declaration that they will be carrying on a business through a permanent establishment located in Australia immediately after the transaction; and
- An arrangement where the vendor has made a declaration that the interest is not an indirect Australian real property interest.

These changes will add a new tax risk for purchasers of certain property from 1 July 2016. Before the start of this new withholding rule it is important that we let our clients know about this risk.

Case study issues?



How to convert foreign currency amounts in relation to the payment of a lump sum from a foreign pension.

In ATOID 2015/7 the Commissioner considers how and when to translate foreign currency into Australian dollars in one specific case. This is where an individual receives a superannuation lump sum from a foreign superannuation fund.

These rules require the individual who receive a transfer more than six month after becoming an Australian tax resident to include in their assessable income the increase in the value of the foreign superannuation fund while they are Australian residents. But this amount is only included when they receive the lump sum.

This requires the individual to work out the value of the foreign fund when they become an Australian resident, and also when they receive the lump sum. The difference is included in the individual’s assessable income.

But how do you translate the growth since residency in the entitlement transferred into Australian dollars?

The ATOID states that applicable fund earnings should be calculated as the difference between the fund balance at the time of transfer and the balance immediately prior to the fund member becoming an Australian resident.

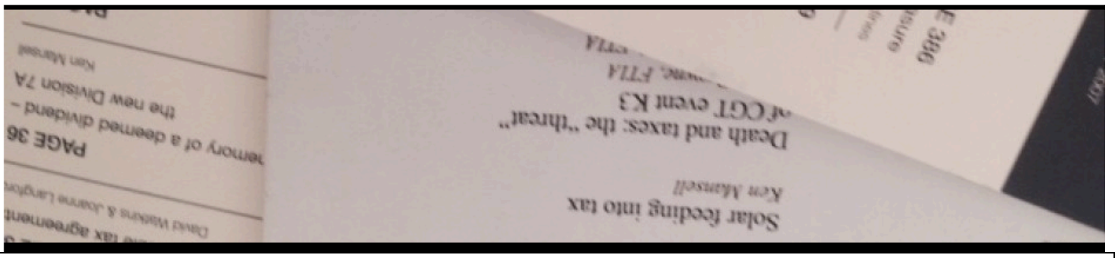
But the ATOID states that these amounts are converted to AUD at the exchange rate applicable on the day the payment is received by the Australian superannuation fund

Previously, in PBRs, the Commissioner had calculated applicable fund earnings using two exchange rates, one immediately prior to the individual becoming an Australian resident and one at the date of transfer.

This means currency issues are totally ignored.

For example, if the value in the value of the foreign super fund increased in the foreign currency by 10%, but the exchange rate saw the AUD drop by 20% relative to the foreign currency, there has been a loss of 10% in real term in AUD. However, under these new rules, as the exchange rate at the time the individual became a resident is ignored, only the 10% gain is reflected.

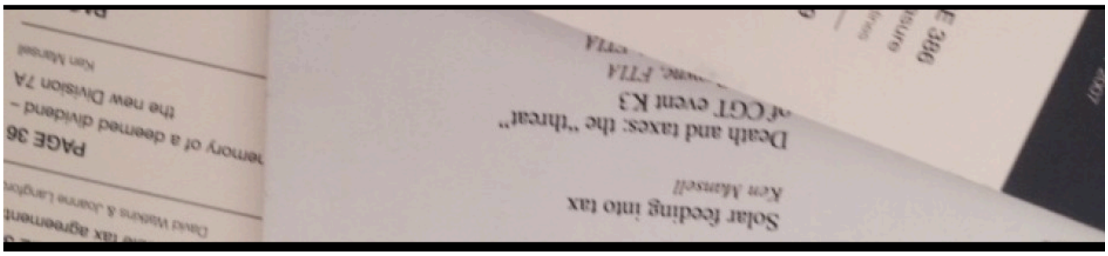
A 10% loss that leads to tax on an imaginary 10% gain… Now when you transfer is a real tax issue!



Case study issues?

Of course everyone wants to know what this all means for transferring UK pensions after the UK government's decision to not allow such transfers from 6 April 2015. There is a list of certain funds that amounts can be rolled into. They include (www.gov.uk/government/publications/list-of-qualifying-recognised-overseas-pension-schemes-qrops/list-of-recognised-overseas-pension-schemes-notifications#australia):

- Commonwealth Superannuation Scheme (CSS)
- Local Government Superannuation Scheme
- Locke Sinclair Retirement Fund
- P Wyns Age 55 Super Fund (SMSF)
- RBCT Superannuation Fund



PART 3: Super Tax Strategies

Yes I know you know all of these so lets just say I included this for “completeness”…

Strategy 1: Optimising tax and super contributions using the small business CGT concessions

When you sell your business, or your clients do, the Small Business CGT concessions allow you to both minimise (and often totally remove) any tax payable. These concessions also allow you to transfer value into super IN EXCESS OF THE CAPS…

I get a lost of questions about these concessions so lets look at a common case study and work out how to make the most of these concessions.

Case Study

Start Engineering is a company owned by two Discretionary Trusts of its founders, Alex and Adam. Alex is 50 and Adam is 56. The company, as the name suggests runs an engineering business.

The two shares in the company both have a cost base of $1.

There are only two assets in the company. The first is the real property that the business is run out of. It is worth $2,000,000 with a $1,000,000 mortgage still on it.

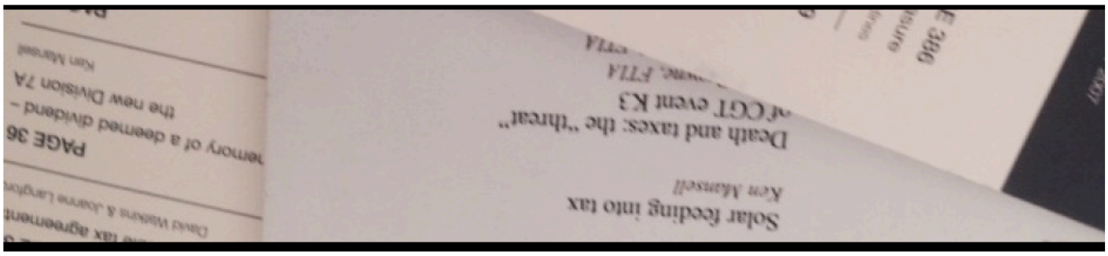
The second asset is the goodwill of the business. This goodwill actually has a cost base as the company bought the goodwill of a smaller firm for $250,000 many years ago to kick start the business 12 years ago when the business started.

Adam is married and Alex has been divorced for many years but has a partner he has been living with for a few years now.

The owners have been offered $3,000,000 for the business (not the shares in the company). The business real property will not be sold as a part of the transaction.

Neither Adam or Alex need the cash as the new owners will be bringing both of them on as well paid employees if they want.

Do we have an Active Asset?



In order for any of the amazing CGT Small Business Concessions to apply the asset that is being sold (or assets), need to be an active asset.

To be an active assets it must be a CGT asset that is used, or ready for use, in a business being carried on by you, your affiliate or an entity connected with you.

Obviously this does not include passive assets like assets producing passive income, interest, annuities, rent and royalties.

A CGT asset will be an active asset if the asset is an intangible asset that is inherently connected with a business carried on by the people indicated above. The following are examples of intangible assets:

- The goodwill of a business;
- The benefit of a restrictive covenant; and
- Intellectual property rights.

But the asset does not always have to be an active asset… A CGT asset satisfies the active asset test if:

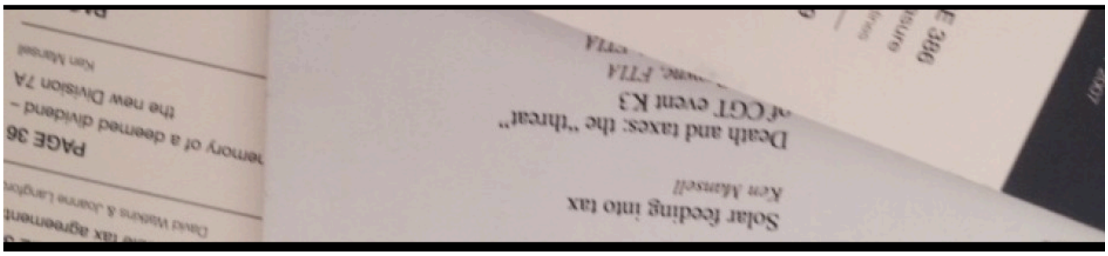
- You have owned the asset for 15 years or less and the asset was an active asset of yours for a total of at least half of the period; or
- You have owned the asset for more than 15 years and the asset was an active asset of yours for a total of at least 7 ½ years during that period.

A share in an Australian resident company or interest in an Australian resident trust will qualify as an active asset if the total of:

- The market values of the active assets of the company or trust; and
- The market value of any financial instruments of the company or trust that are inherently connected with a business that the company or trust carries on; and
- Any cash of the company or trust that is inherently connected with such a business;

is 80% or more of the market value of all of the assets of the company or trust.

Case study question 1
So do we have active assets in the sale of this business (especially the goodwill)?



Do we have the right ownership?

There are a couple of times we need to consider if we have the right "ownership"?

<u>The first is if the CGT asset is a share in a company or an interest in a trust</u>. If this is the case, one of the following additional basic conditions must be satisfied just before the CGT event:

- The taxpayer is a CGT concession stakeholder in the object company or trust; or
- CGT concession stakeholders in the company or trust together have a small business participation percentage in the taxpayer of at least 90%.

So what is a CGT concession stakeholder? An individual is a CGT concession stakeholder of a company or trust if:

- They are a significant individual in the company or trust; or
- They have some participation percentage in the company or trust and they are the spouse of a significant individual in the company or trust.

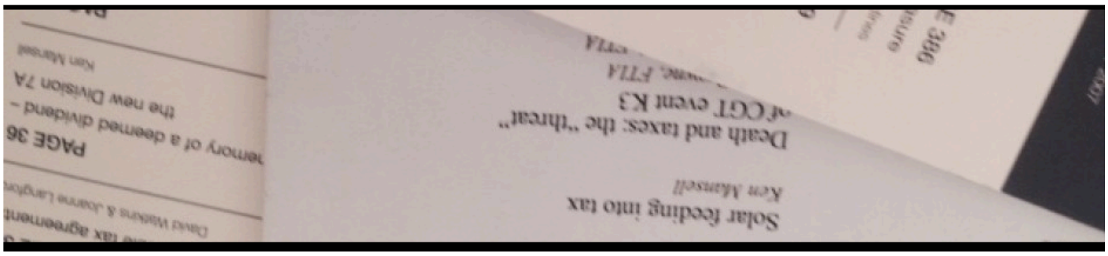
So what is a significant individual? An individual is a significant individual in relation to a company or trust if they have a 'small business participation percentage' of at least 20%.

An individual's small business participation percentage is their total direct and indirect interest in the income and capital of the relevant entity (including voting power for a company). If each of these interests are different for an individual (25% of the income and 5% of the voting) the lowest is the percentage (5%).

For a non-fixed trust, it is the lesser of the individual's entitlements to:

- Any distributions of trust income made in the year of the CGT event; or
- Any distributions of trust capital made in the year of the CGT event.

Indirect participation percentages are calculated by reference to the direct interests of an interposed entity in the subject entity. For example, if Peter owns 40% of Tealy Co, and Tealy Co owns 50% of Mansell Co, then Peter's indirect participation percentage in Mansell Co is 40% x 50% = 20%.



The second time when there needs to be the right ownership is when the taxpayer selling the asset is a company or a trust. There has to be a significant individual of the company of the trust or company just before the CGT event.

NOTE: Where a partnership disposes of an ‘active asset’, the significant individual test does not apply as each partner will be disposing of their interests in the partnership CGT assets i.e. you apply the small business concessions to the partners (not the partnership).

NOTE: As the significant individual test need only be satisfied just before the CGT event, it is possible to undertake some tax planning before the asset is disposed of to ensure the significant individual test will be satisfied.

NOTE: Therefore, it is possible for a company or trust to have up to 8 CGT concession stakeholders at any time - 4 individuals with at least a 20% participation percentage and their 4 spouses with at least some participation percentage.

The third and fourth time we need the right ownership is when we attempt to apply the 15 year exemption and the $500,000 life time exemption… but we will discuss these later.

Case study question 2

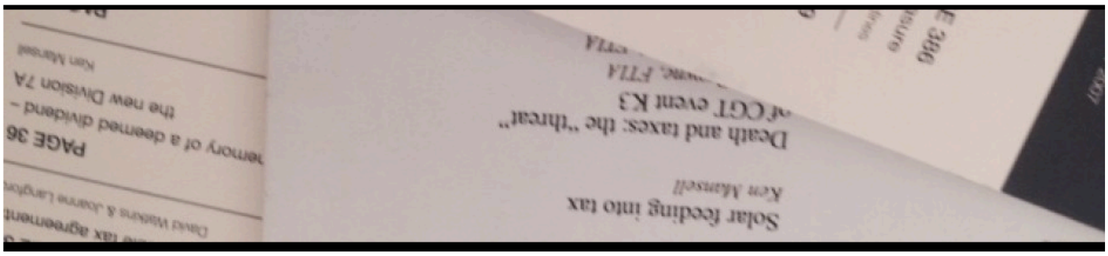
Do we have the right ownership to claim these concessions? Is there anything we could do to get more significant individuals or concession stakeholders?

What concessions are generally used?

There are two concessions that are broadly used in the sale of business like this case study. Of course we cannot forget:

- The general 50% discount;
- The additional and option 50% discount that can be applied under the small business CGT concessions; and
- The Small business CGT rollover

But none of these give use concessional access to super. So lets just focus on the two concessions that give us this access. These concessions are:



- The 15 year exemption; and
- The $500,000 lifetime exemption.

The 15 year exemption

The 15 year exemption means:

- The entire capital gain is disregarded;

- Current and carried forward capital losses are not affected. They may be offset against other capital gains or carried forward to future years;

- If a company or trust obtains the 15 year exemption the exempt capital gain can be paid by the company or trust to its shareholders, unitholders or beneficiaries tax free.;

- If the 15 year exemption applies, the full proceeds from the relevant CGT event can be paid into super (subject to the cap discussed below). This differs from the $500,000 lifetime concession as only the gain sheltered by the retirement concession can be paid into super.

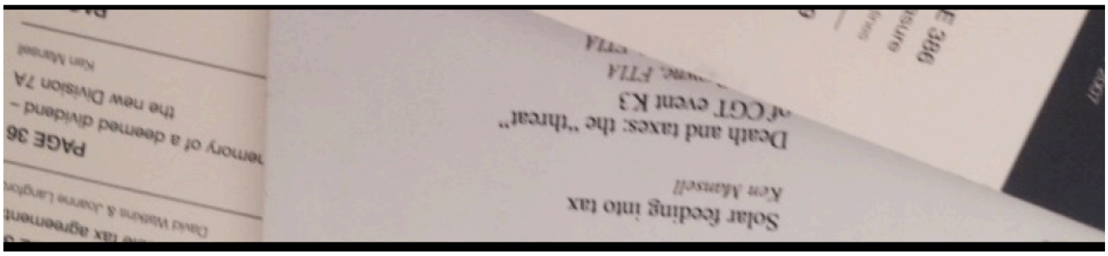
The conditions for the 15 year exemption to apply include:

- The taxpayer continuously owed the CGT asset for the 15 year period ending just before the CGT event (or significant individual existed for 15 years if the taxpayer is a company or a trust – remember that for a discretionary trust, the trust is taken to have a significant individual in the years where no distributions of income or capital are made);

- The taxpayer (if it is an individual), or a significant individual (if the taxpayer is a company or a trust) must be 55 or over at the time of the CGT event and the event happens in connection with the taxpayer's (or significant individual's) retirement or permanently incapacitated

NOTE: There are exceptions to the 15 year continuous ownership condition if the CGT asset has been acquired as a result of rollover relief due to the compulsory acquisition, loss or destruction of another asset or marriage breakdown.

Where the 15 year exemption applies to a company or a trust, that company or trust can pay the exempt amount directly to a shareholder or beneficiary in a tax free manner. For this to happen:



- The payment is made to an individual who was a CGT concession stakeholder of the company or trust just before the event;

- The payment is made within two years after the CGT event (you can ask the Commissioner to extend this);

- The total payments made to each CGT concession stakeholder must not exceed an amount determined by multiplying the CGT concession stakeholder's control percentage by the exempt amount.

NOTE: It is worth applying the 15 year exemption to pre CGT assets held in a company as this gives you a way to pay out the amount without having to pay an unfranked dividend.

The $500,000 lifetime concession

The $500,000 lifetime concession allows certain CGT gains to be reduced by an individual over their lifetime, up to $500,000. Other than passing the normal tests (active asset and either $2M turnover or $6M assets) the requirements for this concession are:

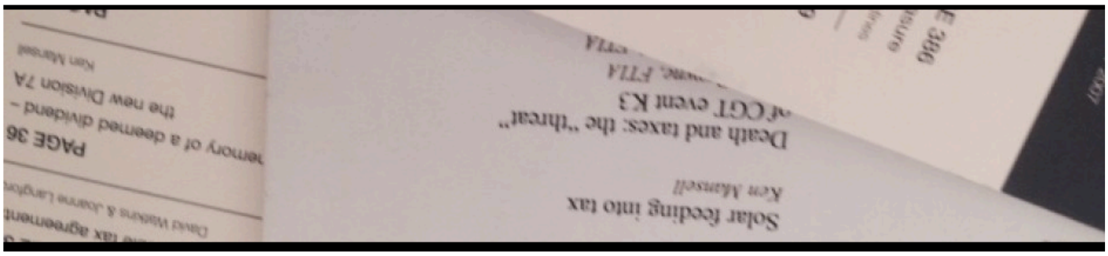
- The taxpayer must choose in writing the amount of the capital gain to be disregarded under this "retirement exemption" as it is known in the legislation. This choice must be made by the time the taxpayer lodges their tax return (even though nothing is sent to the Commissioner);

- The amount must be less than what is left of the taxpayer's lifetime $500,000 CGT retirement exemption limit;

- If the taxpayer is under 55 years of age at the time they make the written choice to apply the retirement exemption they must contribute an amount equal to the CGT exempt amount to a complying superannuation fund;

- The contribution must be made at the later of when the taxpayer makes the choice and when the taxpayer receives the capital proceeds from the CGT event;

- The contribution of the CGT exempt amount to a complying superannuation fund is neither deductible to the taxpayer nor assessable to the superannuation fund.



- The contribution of the CGT exempt amount to a complying superannuation fund does not count towards the concessional contributions cap or the non-concessional contributions cap.

This exemption can apply to a company or trust. For this to happen, the company or trust must satisfy the significant individual test at the time of the CGT event. And each significant individual or CGT concession stakeholder can receive up to the unused part of their $500,000 lifetime concession.

But remember the company or trust must choose in writing how much of the capital gain is to be disregarded by the day the company or trust lodges its tax return. Also, if the company or trust has more than one CGT concession stakeholder it must specify in writing the percentage of the CGT amount that it attributed to each of those stakeholders.

The timing for a company or trust is that they must make the payments to its CGT concession stakeholders by the later of:

- 7 days after it makes the written choice; and

- 7 days after it receives an amount of capital proceeds from the CGT event.

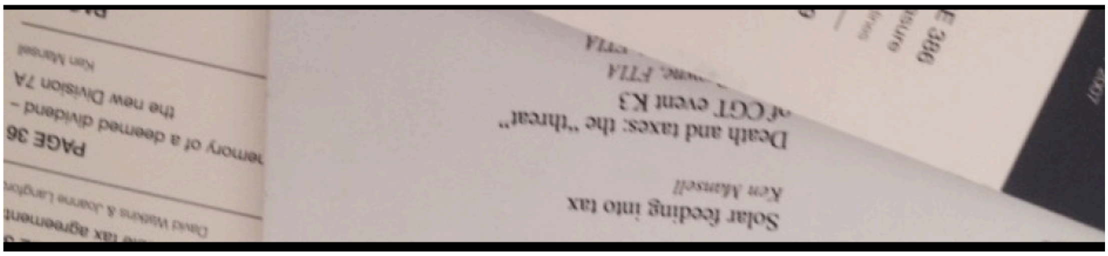
But also remember, if a CGT concession stakeholder is under 55 at the time the company or trust makes a payment in relation to them, the company must contribute the amount to a complying superannuation

Case study question 3

What of these concessions should we consider using, and when?

Getting the amounts into super?

Regarding the 15 year exemption, a distribution of an exempt amount under the small business 15 year exemptions is not limited by the superannuation rules, unlike the retirement exemption. There is, however, a concession in the superannuation contribution rules that allows up to $1.395 million for 2015-16 year of a capital gain that has been subject to the 15 year exemption to be paid into a super fund for the



benefit of a CGT concession stakeholder. This cap is separate from the yearly concessional and non-concessional contribution limits for an individual. Given the recent changes to super contribution limits, this is an opportunity that should always be considered.

In relation to the $500,000 lifetime concession, if the relevant individual is under 55 years of age at the time of the choice, that part of the capital gain to which the retirement exemption applies must be rolled over into a superannuation fund and preserved until a condition of release is met.

The contribution must be made at the later of when the taxpayer makes the choice to apply the $500,000 lifetime concession and when the taxpayer receives the capital proceeds from the CGT event.

The contribution of the CGT exempt amount to the superannuation fund is neither deductible to the taxpayer nor assessable to the superannuation fund. It does not count towards the concessional contributions cap or the non-concessional contributions cap. However, it goes towards the $1.395 million for 2015-16 year CGT cap amount in section 292-100 as discussed above.

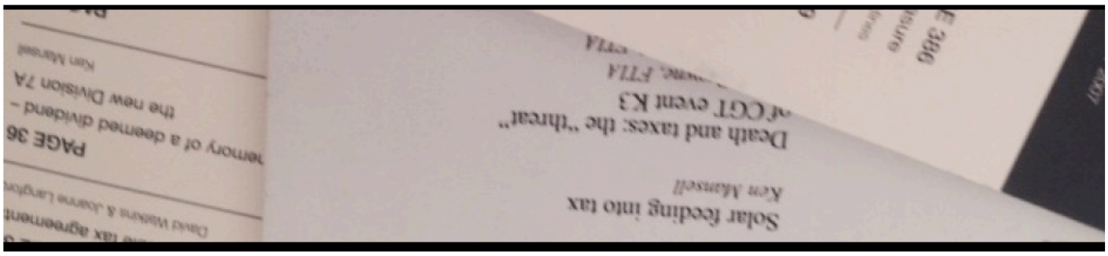
<u>Timing for making super contributions under the 15 year exemption and the $500,000 lifetime concession can be tricky.</u>

For the 15 year concession the rule is generally the individual receiving the amount has 30 days to transfer the amount into super. However, if it is the individual who is claiming the 15 year exemption, this can be delayed until the individual lodges the return in which they claim the exemption. And if it is a trust or a company claiming the concession, remember from earlier the trust or company must pay the amount to the CGT concession stakeholder within two years of the CGT event. So after the CGT Concession stakeholder receives the amount they have 30 days to put it into super.

Regarding the $500,000 lifetime concession:

- If an individual made the capital gain and they are under 55 when the choice is made, they must make the payment to the fund by the later of the receipt of the amounts or when the return is lodged.

- If a company or trust made the capital gain and the CGT concession stakeholder they are going to send the exempt amount to are under 55 when the choice is made, the company or trust must pay the amount to the super fund of the CGT concession stakeholder by the later of 7 days after receipt or



7 days after the trust or company return is lodged.

- If an individual or the CGT concession stakeholder of a company or trust is 55+ when the choice is made, they must make the OPTIONAL payment to the fund by the later of 30 days after the receipt of the amounts or when the return is lodged if they are claiming the concession in their return. But remember these amounts do not have to go to super!

NOTE: You can transfer property in-specie to a SMSF and taking advantage of the Small Business CGT concessions.

For example, a company owned 100% by John (40 years old) has two CGT assets, both worth $250,000 with no cost base. The company sells one making a $250,000 capital gain which it applies the $500,000 lifetime concession to. Therefore, the company must transfer $250,000 to John's superfund by 7 days after lodging the company's tax return. It can either transfer the $250,000 in cash the company now has OR it could do an in-specie transfer of the asset it did not sell with a market value of $250,000. But make sure transferring the asset is not caught by related party rules.

In ATOID 2010/217, an individual used the cash from the CGT event that was exempt under the $500,000 lifetime exemption to pay off the mortgage on business real property and then transfer the business real property to a super fund.

But can an individual transfer at market value the first asset to super, causing a CGT event, claim the $500,000 lifetime exemption on the gain, and use that transfer as the amount that needs to be transferred to super? The Commissioner has stated in non binding comments he does not think you can do this.

Case study question 4

Do we want to get this amount into super? If so what is the process to make this happen?

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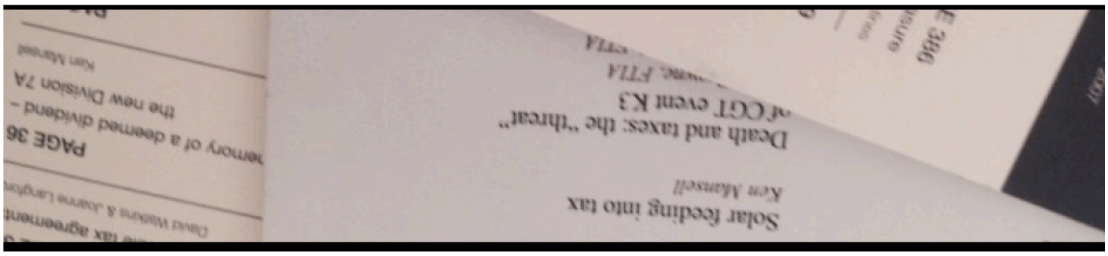


Strategy 2: Reserves to get accelerated deductions

“Request to adjust concessional contributions”, Commissioner of Taxation, www.ato.gov.au, 31 July 2015

Many members of funds use reserve strategies that allow a member to contribute more than the concessional cap in a year, but have the amount above the concessional cap counted towards the cap in the following year.

This strategy involves making concessional contributions in one financial year but having a self-managed superannuation fund allocate some of the contributions to the member in the next financial year by having some of the contribution held in a reserve.

Typically, members undertake this strategy so they can claim the tax deduction for the contribution in Year 1 but have some of the amount counted towards their concessional contributions cap in Year 2.

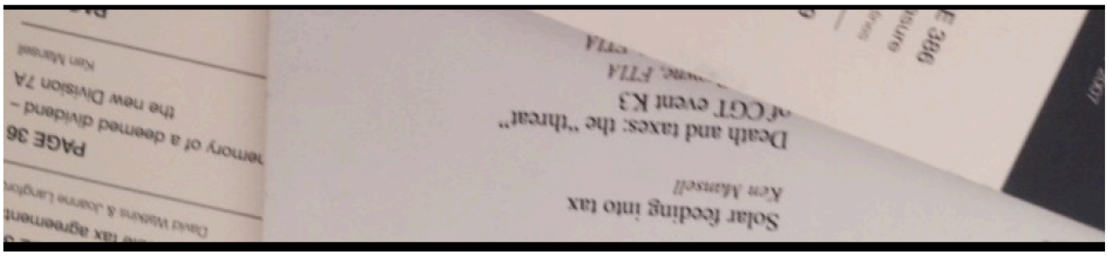
The Commissioner has previously confirmed this is a valid strategy in Taxation Determination TD 2013/22. But remember, this strategy can only be used if the SMSF’s trust deed allows for contribution reserves.

The Commissioner has released a form to assist members identify when they have done this so they are not incorrectly penalised. In this new form, titled “Request to adjust concessional contributions”, members can inform the Commissioner that they have made concessional contributions in one financial year but their self-managed superannuation fund did not allocate the contributions to the member until the next financial year.

The Commissioner needs this form, as the SMSF annual return does not otherwise make provision for this information. With the information provided in the form the Commissioner can adjust the contributions information provided in the SMSF annual return in order to correctly apply the concessional contributions.

If you are using this strategy for your clients, this form will become a necessity.

Benefit: If you bring forward a $30,000 deduction by 12 months the saving will be $30,000 x your tax rate x cost of funds. So if you are on the highest marginal tax rate and your borrowing rate is 10% then the saving is $1,470.



Strategy 3: Recontributions

A recontribution strategy is where a member withdraw an amount from their SMSF and recontributes it back – just as the name suggests.

Bur before considering this, ensure the member satisfies one of the following conditions of release:

- reached your preservation age (55 to 60 years) and retired from your employment
- reached age 65 (working or not)
- ceased work temporarily as a result of physical and/or mental illness
- ceased work as a result of permanent incapacity
- experienced a terminal medical condition (remember 24 months now!!!)
- accessed money under the transition to retirement arrangements.

But why do this?

- Reduce the tax payable on the members superannuation pension if they are under the age of 60
- Lower the tax payable on benefits paid to the members beneficiaries in the event of death.

The funds in the SMSF are comprised of two components. One component is the tax-free component which is made up of non-concessional contributions. The other component is the taxable component - made up of concessional contributions and earnings from SMSF investments.

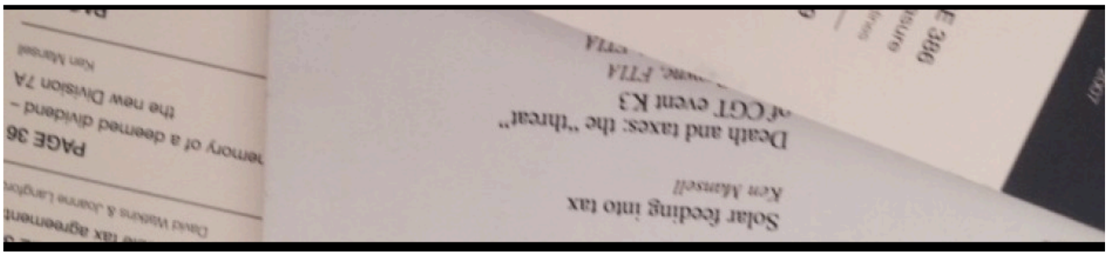
Superannuation benefits, whether pensions and lump sums, are subject to a proportion rule which requires the benefit to be paid in the same proportion as the tax-free and taxable components.

A recontribution strategy involves withdrawing amounts that have both taxable and tax-fee components and recontributing it back as a non-concessional contribution.

Remember:

- The taxable component of a pension benefit received by a person under the age of 60 is taxed at the person's marginal tax rate less a 15% tax offset.

- On death, beneficiaries who are over the age of 18 or are non-dependant pay tax on taxable components.



Warning - don’t exceed your non-concessional contributions cap.

Benefit: The tax saved will generally be 15% of the taxable component that will be paid to a non dependent.

Strategy 4: Salary sacrifice or transfer into super – even after Div 293

The “glass half empty” people say that we need to rethink super tax savings given the effective 30% tax rate on contributions that Division 293 can cause… Not me

If you have the extra cash and want to save tax how can you go past salary sacrificing up to the concessional caps. The amount of contributions will be taxed at 15% or 30% for high income earners within super fund, rather than marginal tax rates which are up to 49%. That’s a minimum 19% tax saving!

An of course earnings are taxed concessionally as well.

So, if you hold direct shares or wholesale managed funds in your own name, why not transfer them to super.

This will reduce tax on the earnings and reduce any CGT the accumulation phase. Better still, capital gains and earnings are tax-free in the pension phase of super.

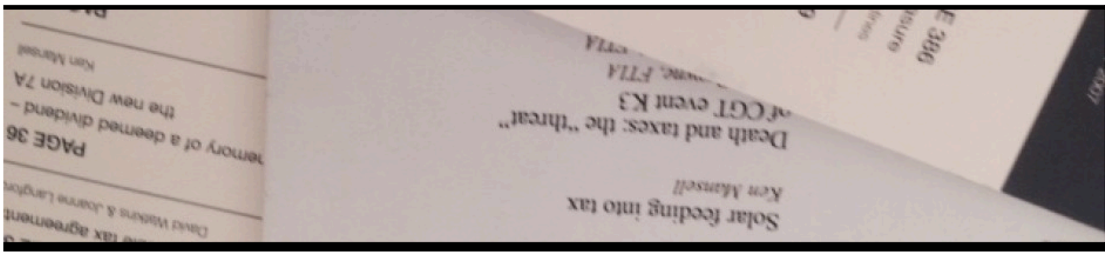
And don’t forget, excess imputation credits will be refunded.

Strategy 5: Self employed to wipe out CGT after discount

Certain self-employed individuals, which may also include retirees or homemakers, can make a personal deductible contribution

This gives them the opportunity to offset part or all of any capital gains tax that may be payable.

Benefit: I am a home maker and make a $100,000 capital gain on shares my late father gifted to me under a will. After the 50% discount I have assessable income of $50,000. If I make a $30,000 concessional contribution my taxable income is now $20,000. Given that the tax free threshold is $18,200, any tax payable will be very small.



Strategy 6: Transition to Retirement Strategy

If an individual is over age 55 and still working, they can set up a transition to retirement pension of up to 10% of the pension account balance.

This additional income allows them to increase their concessional contributions by salary sacrificing or making personal deductible contributions, without effecting to money they have in the bank to maintain their lifestyle.

As the pension income and super contributions and earning are concessionally tax, they end up with more in super and have not affected their lifestyle.

But please ask first if they can just package the difference between their SG contributions and the concessional cap as this is a better outcome than a TTR.

Strategy 7: End of year planning - Capital Gains Timing

This is not a “super” tax planning idea, but just a generally planning idea that can apply to super.

You get a deduction a year earlier if it happens on 30 June rather than 1 July. So employers should PAY their super on 30 June. Individuals should make deductible contributions on 30 June. Shares that are in losses and you no longer want should be sold on 30 June if there are any capital gains they can be offset against. Bad debts should be properly written off on 30 June.

Don’t wait till 1 July!