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Super guarantee: are you ready for the ATO crackdown?

The ATO is increasing its efforts to crack down on employers who fail to make quarterly superannuation guarantee (SG) contributions of 9.5% on behalf of their employees. If you are an employer, regardless of whether you run a small or large business, now might be a good time to review your SG obligations before the ATO comes knocking. If a shortfall is discovered, simply rushing to make extra super contributions will not always be the best course of action. In fact, it can result in a double liability, so careful planning is required for dealing with any identified problems.

It is estimated that the shortfall – or gap – in SG payments could be around 5.2%, equivalent to $2.85 billion in missing super contributions (based on estimated figures for 2014–15). This gap is the difference between the theoretical amount due by employers to be fully compliant with their SG obligations and the actual contributions received by super funds. The Minister for Revenue said the failure of some employers to meet their SG obligations to employees has been a problem ever since SG was introduced in 1992.

ATO Deputy Commissioner, James O'Halloran reported recently: "While this analysis shows that 95% of the estimated superannuation guarantee is paid to employees, the gap exists because some employers appear not to be meeting their super guarantee obligations either by not paying enough or not paying it at all". This follows recent pressure from a Senate Committee calling for the ATO to adopt stronger compliance activities, rather than its previous reactive approach.

In addition to following up all reports of unpaid SG, the ATO says it is increasing its proactive SG case work by a third this financial year. Mr O'Halloran added:

"We have improved our analysis of data to detect patterns in non-payment, and are working more closely with other government agencies to exchange information."

Package of reforms

As if the Commissioner doesn't have enough powers already, the Government has announced a package of reforms to give the ATO real-time visibility over SG compliance by employers. One of these involves additional ATO funding for a Superannuation Guarantee Taskforce to crack down on non-compliant employers.

Other key recommendations include the following.

Monthly contribution reporting

Superannuation funds will be required to report to the ATO on contributions received more frequently, at least monthly. The Government says this will enable the ATO to identify non-compliance and take prompt action. It has been noted that this move to more regular SG reporting will place a greater cost burden on super funds, especially smaller ones.

Single Touch Payroll (STP) roll out

Employers with 20 or more employees will transition to STP from 1 July 2018, while smaller employers (ie, those with 19 or less employees) will move to STP from 1 July 2019. Rather than being a check on businesses, this new system is designed to reduce the regulatory burden and transform compliance.

Director penalty notices

The issue of director penalty notices and the use of security bonds for high-risk employers are measures set to improve the effectiveness of the ATO's recovery powers, to ensure that unpaid superannuation is collected and paid to employees' super accounts.

Penalties by court order

The ATO will have the ability to seek court-ordered penalties in the most serious cases of non-payment, including those employers who are repeatedly caught but still fail to pay SG liabilities.

Super contribution due dates

Quarter ending	Employer contribution due date	Late contributions, SGC statement and payment due date
30 September	28 October	28 November
31 December	28 January	28 February
31 March	28 April	28 May
30 June	28 July	28 August

Employers are required to make quarterly super contributions of at least 9.5% of an employee's ordinary time earnings. If the super fund receives the SG contributions by the quarterly due dates (see table) the contribution is tax-deductible for the employer, whereas a late payment is not tax-deductible.

Where an employer does not make sufficient quarterly super contributions by the due date, the employer becomes liable for the superannuation guarantee charge (SGC). The SGC is payable to the ATO and automatically arises as soon as the contributions are not made by the due date. This means that if an employer discovers a shortfall in SG contributions after the due date, making a contribution to the employee's super fund to cover the shortfall isn't always the best course of action as it may not reduce the SGC liability. Generally, an employer can only use late contributions to offset a portion of the SGC that relates to the relevant employee. However, a late contribution cannot be used to offset the SGC in respect of a person who is no longer an employee.

Fixing a SG problem

If you are expecting leniency from the ATO for a first offence, think again. The Commissioner does not have any discretion at law to remit the SGC itself. The best a non-compliant employer can hope for is that the ATO may remit the 200% additional SGC penalty that applies for the late lodgment of a SGC statement.

Employers can also request the ATO to defer the due date for lodgment of a SGC statement. However, a deferral of time to lodge the statement does not defer the time for payment. The ATO will generally only extend the due date for payment where there are circumstances beyond the employer's control (eg, a natural disaster or illness) and the payment can be made in full at a later time (or by instalments).

Do you think you could have a problem with your SG obligations? Speak to us about your options before the ATO is on your doorstep.

Want to manage your own super? Setting up an SMSF

A self-managed super fund (SMSF) is a way to prepare for retirement that gives you more control and freedom of choice over your investments than other types, such as retail or industry super funds.

As an SMSF trustee, you can invest in almost any type of valuable asset, from property to shares or even items like artwork.

Taking this much control of your super usually means devoting a significant amount of time and effort towards managing the fund. For this reason, already-experienced investors who hope to achieve higher returns than professionally managed funds often choose SMSFs.

Here's a rundown of what you need to consider before setting up your own SMSF, and the key steps involved.

Is an SMSF right for you?

Your first step should be to assess whether an SMSF is the best option for you. You'll need to be confident you can match or outperform the professional investors who manage retail and industry super funds. You'll also need to have time and recordkeeping skills – as well as being responsible for choosing and managing your SMSF investments, you'll have the job of maintaining accurate records of fund returns for tax and auditing purposes.

There are also the costs of an SMSF to consider. A 2013 Rice Warner/ASIC study found that the cost of setting up an SMSF is typically in the $1,000 to $2,000 range, while annual compliance costs can be anywhere from $1,500 to $3,000. So it's generally recommended that you go in with a starting balance of at least $100,000.

If you're not quite ready to take full control of your super, many professionally managed funds offer DIY investment options that give you choice over the types of assets going into your super fund.

Setting up an SMSF

Your SMSF needs to be set up so that it's eligible for tax concessions, can receive contributions and is simple to administer. Here are the basic steps to setting up an SMSF.

Choose your investments

People often choose an SMSF because it allows them to invest in a broader range of assets than other types of funds. As well as shares and property, you can also invest in collectibles such as artwork, jewellery, antiques or wine.

A highly diversified fund has the benefit of spreading investment risk across more items. On the other hand, it may also mean having to pay out higher investing, accounting and auditing costs. For more complex investments, consider securing the services of a fund manager who is an expert in that specific area.

Add members and trustees

When you set up your SMSF, the position of fund trustee can be assigned either to individuals or to a registered corporation. In both cases, the fund may have up to four members. Key differences include:

- *membership*: a single-member fund must have a minimum of two individual trustees, but if the fund is managed by a corporate trustee, you can act as both the only fund member and its sole company director;
- *fees*: for a corporate trustee, the Australian Securities and Investment Commission (ASIC) charges the fund a fee to register the company, as

well as an annual review fee; these fees don’t apply to individual trustees;

- *ownership changes*: it’s simpler and less costly to change the ownership of assets in a fund for a corporate trustee compared to individual trustees; and
- *separation of assets*: having a corporate trustee provides better separation between your personal assets and the fund’s assets, and better legal protections if the trustee is sued for damages.

Also, make sure you give each fund member the option to purchase life and/or total and permanent disability (TPD) insurance.

Register the SMSF

The next step is to register the SMSF with the ATO so that it can start receiving contributions and rollovers. This requires applying for a Tax File Number (TFN) and and Australian Business Number (ABN), and in some cases registering the fund for Goods and Services Tax (GST). You can also choose whether to make your fund an ATO-regulated SMSF. This will make it eligible to receive tax concessions, and allow fund members to claim deductions for their contributions.

When you open a bank account for the fund, it’s important to keep it separate from trustees’ individual accounts. Multiple members can share the same account, but their entitlements will need to be recorded separately.

Preparing for change

If your SMSF has more than one member, it’s crucial to plan ahead for unexpected events such as ill health, death or relationship breakdown, and how they will affect the fund’s structure and payouts. You should also plan for the possibility that age-related cognitive impairment may make you unable to manage the fund properly in the future. Your contingency plan could involve transferring SMSF assets to a managed fund, or nominating a person to take over your trustee responsibilities.

While an SMSF is more complex to manage than other types of super funds, it can be a good option for the smart investor who wants more control over their super savings. These steps can help to ensure that your fund is both profitable and compliant.

Contact us today if you’d like to discuss your super strategy.