

## Article published on: 12-11-2019

The ATO has released a [fact sheet](#) explaining:

- its approach to exercising discretion to disregard or reallocate contributions when an employer makes remedial super guarantee (SG) contributions that result in an employee exceeding their concessional contribution (CC) cap,
- and information employers need to provide employees to help them apply for a determination.

### The issue

Remedial SG contributions arise *when an employer has not paid enough SG on time for current or former employees*. This usually occurs when there is:

- An underpayment of contributions for a quarter resulting in an SG shortfall for an employee, or
- A back payment of wages leading to an employer making larger than normal SG contributions during the income year.
- 

These contributions are treated as CCs in the year they are made to the employee's chosen super fund, even where they relate to an earlier time period. This may result in the employing exceeding their CC cap and having to pay additional tax, as well as an excess CC charge.

### Applying for Commissioner's discretion

Employees may apply for a determination to have these remedial SG contributions disregarded or allocated to another year and not counted towards their CC cap in the year they are made. Before applying, employees should check that:

- the remedial SG contributions have been made to their super fund/s, and
- they will exceed their CC cap in the income year the remedial SG contributions are made.

When applying for a determination, employees will need to send to the ATO:

- a completed [Application – excess contributions determination form](#), and
- all relevant supporting information outlined in the form checklist.

## Key factors ATO will consider

When assessing applications, the ATO has stated it will consider whether:

- making the remedial SG contributions results in unfair or unintended outcomes
- the employee had control over the circumstances that led to the remedial SG contributions
- it was reasonably predictable that the remedial SG contributions would result in the employee exceeding their CC cap.
- the contributions would be more appropriately allocated to another financial year, and
- any other relevant factors help in understanding the circumstances surrounding the remedial SG contributions.

Law Administration Practice Statement [PS LA 2008/1](#) contains more details on what the ATO considers when deciding whether to exercise discretion to disregard or allocate super contributions to another period for excess contributions purposes.

Unlike excess contributions, the ATO does not have discretion to disregard or reallocate CCs to another income year in the calculation of Division 293 tax.

## How employers can help

Employers can help employees by providing a letter outlining:

- the remedial SG contribution amounts
- the quarters of the relevant income year the contributions relate to if the amounts were contributed directly to a super fund, and
- any further information that explains why the remedial SG contributions were made.

Employers cannot apply for ATO discretion on an employee's behalf.

