



THE TAX INSTITUTE

10 November 2020

Law Design Office
The Treasury
Langton Crescent
PARKES ACT 2600

By email: miscamendments@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2020

The Tax Institute welcomes the opportunity to make a submission to The Treasury in relation to the exposure draft of the *Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2020*¹ (**Draft Regs**).

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to Appendix A for more about The Tax Institute.

Summary

Our submission below addresses our main concerns in relation to the Draft Regs. In particular, item 67 of the Draft Regs propose to insert new regulation 8.02AA into the *Superannuation Industry (Supervision) Regulations 1994* to require accounts and statements for self-managed superannuation funds (**SMSFs**) to be prepared, in accordance with section 35B of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), at least 45 days before the annual return is required to be lodged (**lodgment date**). The draft Explanatory Statement notes that this is the same day by which an approved SMSF auditor must be appointed under s 35C(1) of the SIS Act.

Section 35B of the SIS Act does not currently prescribe a time by which accounts must be prepared, so the penalty under item 2 of the table in s 166 of the SIS Act is currently not able to be imposed by the ATO on SMSF trustees.

Discussion

The proposed change to the SIS Regs was not previously announced and will place a significant compliance burden on SMSFs and their accountants to ensure that the accounts are prepared at least 45 days before the annual return is due.

¹ Available [here](#).

Most SMSFs are required to lodge their annual return by 15 May, so this would require SMSFs to have their accounts prepared by the end of March each year. Some funds have an earlier lodgment date (i.e. 31 October), which would require the preparation of the accounts by mid-September. This is unrealistic. Further, many of the managed funds do not publish their tax reports until late September or October, so it would not be possible for a fund that is due 31 October to prepare correct accounts by mid-September.

Accountants spread their workload across the year, which is one of the primary benefits why taxpayers use a tax agent. 99% of SMSFs use a tax agent to lodge their annual return, and tax agents cannot afford to lose 45 days out of their schedule to prepare SMSF accounts earlier in order to meet the proposed requirement.

The proposed amendment will achieve nothing beyond forcing the preparation of SMSF accounts into a tighter timeframe which will place additional pressure on accountants and those assisting SMSFs in the preparation of their accounts. Failing to prepare accounts by the lodgment date inevitably results in the late lodgment of the annual return for which there are already adequate penalties.

Various levers are currently available to the ATO to encourage timely lodgment. The range of penalties and sanctions that can be imposed by the ATO on SMSF trustees for late lodgment of their annual return includes:

- monetary penalties;
- removing the SMSF from the Super Fund Lookup register which can affect the fund's ability to accept contributions; and
- bringing forward the lodgment day for the following year's annual return.

The proposed change seems to be motivated by the inability of the ATO to impose an administrative penalty under item 2 of the table in s 166 of the SIS Act. The penalty for not preparing accounts and statements within the 45-day period will be significant at \$2,220 per individual trustee or \$2,220 per corporate trustee shared jointly and severally between the directors.

The 45-day rule would substantially increase the ATO's administration as many trustees will be subject to these substantial penalties and would then seek remission. The ATO's Practice Statement [PS LA 2020/3](#) provides guidelines for the administration of the penalties imposed under s 166(1) of the SIS Act for contraventions in relation to SMSFs. This amendment will likely result in the ATO allocating resources to large numbers of trustees who would be expected to object and dispute these penalties. Moreover, this type of penalty does not align with the late lodgment penalties applying to other notices and forms under tax legislation.

It is difficult to identify the mischief where an annual return is lodged on time but the accounts were prepared, say, 30 days, even five days, before the lodgment date. If the annual return is otherwise lodged on time, it seems unreasonable to impose a penalty on an SMSF trustee for non-compliance of \$2,220 because the accounts were prepared less than 45 days before the lodgment date. The reality is that SMSF accounts are not necessarily prepared by the time the auditor is engaged, and nor should it be a requirement to do so.

We cannot point to any other provision in the tax or superannuation laws which imposes a penalty for failing to do something before a lodgment date. Provided the taxpayer's lodgment obligations are met — and there are sufficient penalties for those that do not comply — it should not matter whether the accounts were prepared two months or 10 days before the lodgment day. While the amendment would align the requirement to prepare accounts with the latest date an auditor can be appointed, auditors can determine whether sufficient time has been allowed by the SMSF trustee to undertake the audit without the annual return being lodged late.

The proposed amendment fails to target the integrity of the system or improve the revenue collection from SMSFs. It also fails to provide any benefit to the ATO (other than monetary), and there is no-trade off for SMSFs. This measure imposes another compliance burden on SMSF trustees without offering any tangible benefit.

The Draft Regs offer no explanation of the meaning of 'prepared' but presumably this takes its ordinary meaning and refers to a completed set of accounts. Demonstrating that the 45-day rule is met also raises interesting evidentiary issues. More record keeping and increased compliance burden to evidence that the account were prepared by the required date will be something else the auditor needs to check.

There has never been a requirement for SMSF trustees to prepare accounts by a prescribed date in the past and we believe there is no need to introduce a point in time requirement now.

Submission

The Tax Institute seeks that the proposed amendment not proceed, or in the alternative, if the measure does proceed, that the prescribed time of 'at least 45 days before the day by which s 35D of the SIS Act requires a return to be lodged' be changed to simply 'before the lodgment day'.

If you would like to discuss any of the above, please contact either myself or our Senior Advocate, Robyn Jacobson, on (03) 9603 2008.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Peter Godber', with a long horizontal flourish extending to the right.

Peter Godber

President

APPENDIX A

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of almost 12,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.