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## **Chapter 4**

# ***Sustaining the superannuation contribution concession: calculation and imposition***

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### **Outline of chapter**

4.1 This Chapter explains how Division 293 tax is worked out and imposed under the tax law.

### **Summary of new law**

4.2 Division 293 tax is payable by individuals whose combined income for surcharge purposes (other than reportable superannuation contributions) and concessional tax contributions — low tax contributions—for an income year exceed \$300,000. The amount of tax payable is 15 per cent of the amount of low tax contributions that exceed the \$300,000 threshold.

4.3 Division 293 tax does not apply to:

- non-concessional contributions as they do not receive concessional tax treatment;
- concessional contributions that are subject to excess concessional contributions tax or refunded excess contributions that are disregarded by the Commissioner of Taxation (Commissioner) for the purposes of excess contributions tax;
- State higher level office holders in respect of contributions to constitutionally protected funds (unless the contributions are salary packaged contributions); and
- Commonwealth justices and judges in respect of contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*.

4.4 The Commissioner makes assessments of Division 293 tax. Where Division 293 tax relates to defined benefit interests, payment of the tax is deferred until a superannuation benefit is paid from the interest.

4.5 Former temporary residents who receive a departing Australia superannuation payment to which withholding tax applies are eligible for a refund of the amount of any Division 293 tax paid and release from liability for Division 293 tax, as they effectively do not receive any concessional tax treatment on their contributions to superannuation.

## **Detailed explanation of new law**

4.6 The object of the Division 293 tax is to reduce the concessional tax treatment of superannuation contributions for very high income earners. *[Schedule 3, Part 1, item 1, Subdivision 293-A of the Income Tax Assessment Act 1997 (ITAA 1997)]*

## **Overview**

### ***Imposition of the Division 293 tax and severability***

4.7 For constitutional reasons, a separate Bill imposes liability for Division 293 tax on individuals who have taxable contributions in an income year. *[Item 4 of the Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013 (SSSCCI Bill)]*

4.8 Division 293 tax does not apply if the imposition of the tax on an individual exceeds the legislative power of the Commonwealth. This ensures that the amendments cannot be invalid because they seek to impose Division 293 tax in circumstances which are not within the Commonwealth's legislative power under the Constitution. *[Item 6 of the SSSCCI Bill, and Schedule 3, Part 1, item 1, subsection 293-145(3) and 293-190(3) of the ITAA 1997]*

### ***What is the rate of tax?***

4.9 Division 293 tax applies at a rate of 15 per cent of an individual's taxable contributions (see paragraph 4.21) for an income year. *[Item 5 of the SSSCCI Bill]*

### ***Who is liable for the tax?***

4.10 Individuals are liable to pay the tax if they have taxable contributions for an income year. *[Schedule 3, Part 1, item 1, section 293-15 of the ITAA 1997]*

4.11 The meaning of income year and taxable contributions in the SSSCCI Bill take their meaning from the ITAA 1997. *[Item 3 of the SSSCCI Bill]*

***Working out Division 293 tax***

4.12 Broadly, an individual has a liability for Division 293 tax for an income year if their income for surcharge purposes (less reportable superannuation contributions) and low tax contributions for a corresponding financial year exceed \$300,000 (see Diagram 4.1).

4.13 Income for surcharge purposes is similar to the income test used for determining whether an individual is liable for the Medicare levy surcharge. For an individual whose only superannuation interests are interests that are not defined benefit interests (accumulation interests) and not interests in constitutionally protected funds, low tax contributions are low tax contributed amounts (effectively concessional contributions) less any excess concessional contributions. As accumulation interests are much more common than defined benefit interests (and constitutionally protected funds are uncommon), this method applies in the majority of cases.

4.14 This general method for calculating an amount of low tax contributions is modified by special rules in respect of:

- individuals with defined benefit interests, where the individual's low tax contributions are low tax contributed amounts to any accumulation interests, plus any defined benefit contributions, less any excess concessional contributions (the method of calculating defined benefit contributions is to be set out in regulations);
- certain State higher level office holders, whose low tax contributions are low tax contributed amounts plus defined benefit contributions (except for contributions in respect of constitutionally protected funds that are not made as part of a salary package arrangement), less any excess concessional contributions; and
- certain Commonwealth justices and judges whose low tax contributions are low tax contributed amounts plus defined benefit contributions (except defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*), less any excess concessional contributions.

4.15 Taxable contributions are the lower of:

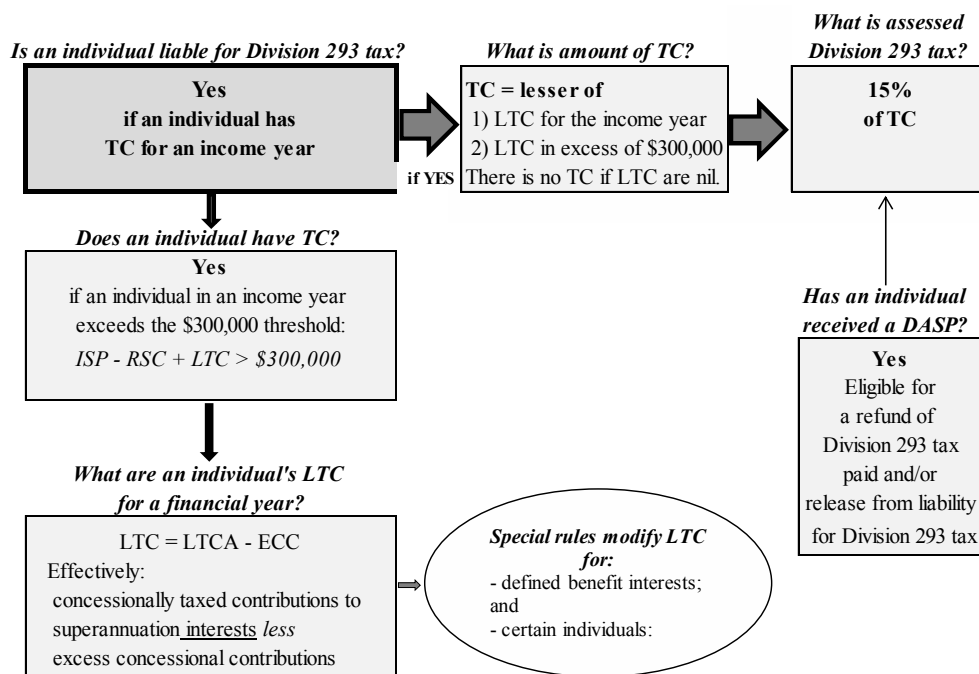
- the amount of low tax contributions; and
- the sum of income for surcharge purposes (less reportable superannuation contributions) and low tax contributions above the \$300,000 threshold.

4.16 However, if an individual does not have low tax contributions (that is, if the amount of low tax contributions is zero) then there are no taxable contributions and no liability arises for Division 293 tax.

4.17 The Commissioner makes an assessment of Division 293 tax payable for each income year for an individual equal to 15 per cent of taxable contributions.

4.18 Former temporary residents who receive a departing Australia superannuation payment are entitled to a refund of any Division 293 tax that they have paid and the Commissioner may release these individuals, in whole or part, from any existing or future liability for Division 293 tax.

**Diagram 4.1: Working out Division 293 tax**



**LEGEND:**

TC: taxable contributions

ISP: income for surcharge purposes

RSC: reportable superannuation contributions

LTC: low tax contributions

LTCA: low tax contributed amounts

ECC: excess concessional contributions

DASP: departing Australia  
superannuation payments

## **When does an individual have taxable contributions?**

4.19 Individuals have taxable contributions if their combined income and low tax contributions for an income year exceed \$300,000.

4.20 In particular, an individual has taxable contributions if they have low tax contributions and the sum of:

- the amount of their income, measured as income for surcharge purposes less reportable superannuation contributions for an income year; and
- the amount of low tax contributions for the corresponding financial year;

exceeds \$300,000.

*[Schedule 3, Part 1, item 1, subsection 293-20(1) of the ITAA 1997]*

4.21 The amount of taxable contributions is the lesser of:

- the amount of low tax contributions; and
- the amount of the excess of the sum over the \$300,000 threshold.

*[Schedule 3, Part 1, item 1, subsection 293-20(1) of the ITAA 1997]*

4.22 The calculation ensures that the tax applies to low tax contributions only to the extent that they exceed the \$300,000 threshold when added to income for surcharge purpose (other than reportable superannuation contributions). Accordingly, even if an individual has income exceeding the \$300,000 threshold but does not have low tax contributions, the individual is not liable for Division 293 tax. This reflects that the measure applies to low tax contributions to the extent the \$300,000 threshold is exceeded. *[Schedule 3, Part 1, item 1, subsection 293-20(2) of the ITAA 1997]*

### **Example 4.1: Determining the amount of taxable contributions**

#### *Low tax contributions equal to taxable contributions (Case 1)*

David's income (income for surcharge purposes other than reportable superannuation contributions) is \$315,000 for an income year and his low tax contributions are \$25,000 for the corresponding financial year.

David's combined income and low tax contributions are \$340,000, being \$315,000 (income for surcharge purposes other than reportable superannuation contributions) plus \$25,000 (low tax contributions).

*Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013*  
*Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013*

As the amount of low tax contributions (\$25,000) is lower than the amount of combined income and low tax contributions (\$340,000) that exceed the \$300,000 threshold (that is, the excess is \$40,000), the amount of taxable contributions for the income year is the amount of low tax contributions, that is \$25,000.

For an illustration of David's case see Diagram 4.2 (Case 1).

*Taxable contributions are lower than low tax contributions (Case 2)*

Sabina's income (income for surcharge purposes other than reportable superannuation contributions) is \$285,000 for an income year and her low tax contributions are \$25,000 for the corresponding financial year.

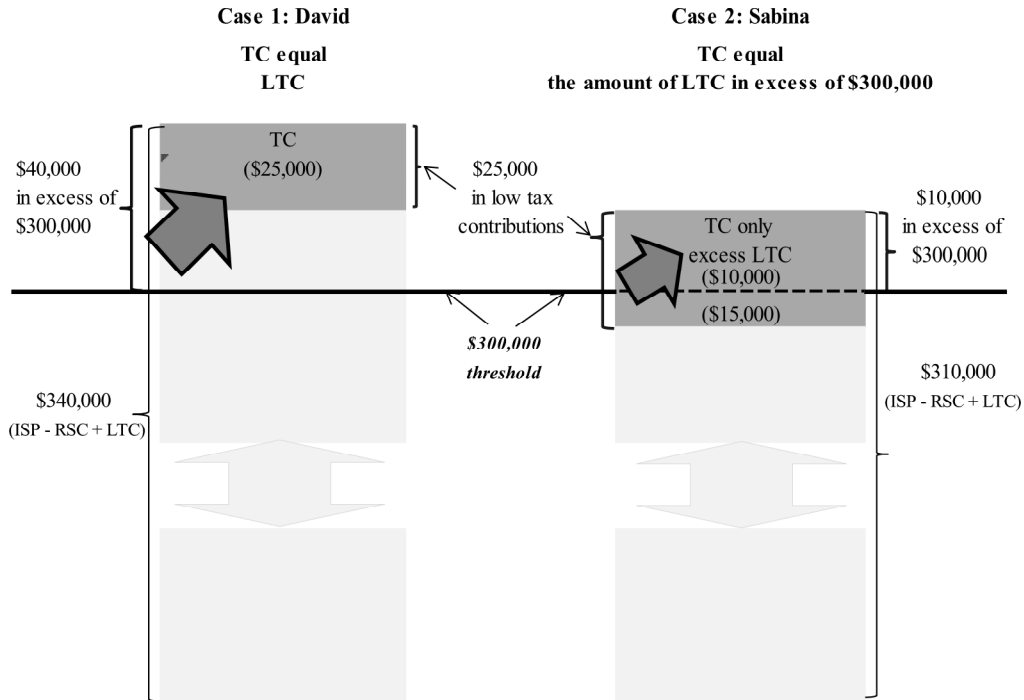
Sabina's combined income and low tax contributions are \$310,000, being \$285,000 (income for surcharge purposes other than reportable superannuation contributions) plus \$25,000 (low tax contributions).

The amount of low tax contributions (\$25,000) is greater than the excess of the amount of combined income and low tax contributions over the \$300,000 threshold. The excess equals \$10,000 (\$310,000 less \$300,000).

Hence, Sabina's taxable contributions are \$10,000.

For an illustration of Sabina's case see Diagram 4.2 (Case 2).

**Diagram 4.2: An illustration of Example 4.1**



**LEGEND:**

TC: taxable contributions  
LTC: low tax contributions

ISP: income for surcharge purposes  
RSC: reportable superannuation contributions

**Working out income**

4.23 The purpose of the \$300,000 threshold is to ensure that Division 293 tax only applies to very high income earners with low tax contributions in an income year. The amendments use a broad based concept of income to ensure that various forms of income are included and to ensure that Division 293 tax cannot be reduced or avoided by manipulating taxable income by, for example, entering into salary packaging arrangements.



4.24 Income for surcharge purposes is the concept of income that is similar to the test used for determining whether an individual is liable to pay the Medicare levy surcharge. Income for surcharge purposes is defined in section 995-1 of the ITAA 1997. Broadly:

- it includes:
  - an individual’s taxable income (including the net amount on which family trust distribution tax has been paid);
  - reportable superannuation contributions;
  - reportable fringe benefits; and
  - total net investment loss (includes both net financial investment loss and net rental property loss); but
- it excludes the taxed element of the taxable component of a superannuation lump sum benefit, other than a death benefit, up to the low rate cap amount (\$175,000 in the 2012 -13 income year) for individuals aged 55 to 59.

4.25 Reportable superannuation contributions are defined in section 995-1 of the ITAA 1997. Broadly, reportable superannuation contributions consist of:

- reportable employer superannuation contributions (essentially, contributions that could have been received by an employee as income if they had chosen; for example, salary sacrificed superannuation contributions, annual bonuses paid as superannuation contributions or higher superannuation contributions as a result of individual contracts); and
- personal superannuation contributions made by self-employed and other eligible individuals for which an income tax deduction is claimed.

4.26 For the purposes of the \$300,000 threshold, the amount of income for surcharge purposes is reduced by reportable superannuation contributions because reportable superannuation contributions are already included in low tax contributions. This avoids double counting of those contributions.

## **Working out low tax contributions**

4.27 To determine whether an individual has taxable contributions for an income year, the amount of low tax contributions for the corresponding financial year needs to be determined.

4.28 Low tax contributions are effectively concessional tax contributions generally made for an individual to an interest held by a superannuation provider.

4.29 The amount of an individual's low tax contributions for a financial year is worked out under:

- the general rules that apply to individuals with contributions made or amounts allocated to accumulation interests, which are the majority of cases; and
- the special rules that apply to:
  - individuals with defined benefit interests;
  - certain State higher level office holders; and
  - certain Commonwealth justices and judges.

4.30 The calculation of low tax contributions by the Commissioner for individuals under the general and the special rules is outlined below. This commentary includes examples of situations in which individuals hold only an accumulation interest or interests, hold only a defined benefit interest or interests, and where individuals hold both types of interests. The examples also take into account whether or not the individuals have excess concessional contributions.

### ***General rules — individuals with accumulation interests***

4.31 When individuals have only concessional tax contributions in respect of accumulation interests, the amount of low tax contributions for a financial year is worked out as follows:

- low tax contributed amounts for the financial year;

*less*

- excess concessional contributions for the financial year (if any).

*[Schedule 3, Part 1, item 1, section 293-25 of the ITAA 1997]*

*Low tax contributed amounts*

4.32 Low tax contributed amounts are broadly concessional contributions as defined in section 292-25 of the ITAA 1997, however they:

- also include contributions to tax exempt constitutionally protected funds that would otherwise be concessional contributions; and
- exclude notional taxed contributions for defined benefit interests.

*[Schedule 3, Part 1, item 1, section 293-30 of the ITAA 1997]*

4.33 In effect, in the majority of cases, where individuals only have contributions to accumulation interests (none of which are in constitutionally protected funds), low tax contributed amounts for a financial year equal the amount of concessional contributions for the financial year. They include contributions such as:

- all employer contributions made on behalf of that individual (including compulsory superannuation guarantee contributions and salary sacrificed amounts); and
- personal contributions made by that individual that are tax deductible (generally restricted to eligible self-employed persons).

**Example 4.2: Calculation of low tax contributions — superannuation interest that is an accumulation interest**

Maria's only superannuation interest is an accumulation interest. Concessional contributions made on Maria's behalf to her superannuation interest in the fund are \$21,000 in the 2012-13 financial year.

Maria's low tax contributions are \$21,000 in 2012-13, being her concessional contributions.

No further calculations are required to work out Maria's low tax contributions because:

- Maria has only concessional contributions in respect of a superannuation interest other than a defined benefit interest, which means that her low tax contributed amounts equal her amount of concessional contributions;

- Maria does not have excess concessional contributions as her concessional contributions of \$21,000 are lower than the concessional contributions cap for 2012-13 (which is \$25,000). Therefore no amount of excess concessional contributions needs to be subtracted from her low tax contributed amounts; and
- no special rules for working out low tax contributions apply to Maria.

*Excess concessional contributions*

4.34 Excess concessional contributions are determined under section 292-20 of the ITAA 1997. Broadly, excess concessional contributions are concessional contributions that exceed the individual's concessional contribution cap for the financial year (which is \$25,000 for the 2012-13 financial year).

4.35 In general, excess concessional contributions are subject to excess concessional contributions tax. However, in certain circumstances excess concessional contributions can be refunded, and concessional contributions can be disregarded or allocated to another financial year by the Commissioner exercising a discretion for the purposes of excess contributions tax. Whether or not contributions are subject to excess contributions tax, refunded, disregarded or allocated to another year has implications for whether they are included or excluded from low tax contributions and income for surcharge purposes. That is, it will affect whether they are potentially subject to Division 293 tax and whether they are included in the \$300,000 threshold. The effect of excess concessional contributions on low tax contributions for the purposes of Division 293 tax is summarised in Table 4.1.

4.36 Non-concessional contributions are not concessionally taxed and therefore are generally not included in low tax contributed amounts. However, there are some concessional contributions that are also non-concessional contributions, for example, excess concessional contributions. Any non-concessional contributions that are disregarded or allocated to another financial year by the Commissioner exercising a discretion are neither included in amounts of low tax contributions nor in income for surcharge purposes.

**Table 4.1: Summary of the treatment of excess concessional contributions for the purposes of Division 293 tax<sup>1</sup>**

<i>Types of excess concessional contributions</i>	<i>Is the amount included in low tax contributions?</i>	<i>Is the amount included in the \$300,000 threshold?</i>
Excess concessional contributions subject to excess concessional contributions tax (Subdivision 292-B of the ITAA 1997).	No.  Division 293 tax does not apply to this amount as it is effectively subject to tax at the highest individual marginal tax rate (inclusive of the Medicare levy).	No.  This amount is not included in low tax contributions. It is also not included in income for surcharge purposes.
Excess concessional contributions that are refunded (that is, disregarded for the purposes of excess contributions tax under section 292-467 of the ITAA 1997).	No.  Division 293 tax does not apply to the excess contributions disregarded as that amount forms part of the assessable income of individuals and is subject to income tax at the individual's marginal tax rate.	Yes.  The amount of the excess contributions disregarded is not included in low tax contributions. However, this amount is included in income for surcharge purposes as it forms part of assessable income.  No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions.

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<sup>1</sup> The Government announced on 5 April 2013 that it would reform the treatment of concessional contributions in excess of the annual cap. This change is not reflected in this Bill or explanatory memorandum.

<b><i>Types of excess concessional contributions</i></b>	<b><i>Is the amount included in low tax contributions?</i></b>	<b><i>Is the amount included in the \$300,000 threshold?</i></b>
Concessional contributions disregarded for the purposes of excess contributions tax by the Commissioner's discretion under section 292-465 of the ITAA 1997.	Yes.  This amount is subject to Division 293 tax as it is a low tax contribution that is not subject to excess contributions tax. The disregarded contributions received concessional tax treatment.	Yes.  This is because the amount is included in low tax contributions.  No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions.
Concessional contributions allocated to another year for the purposes of excess contributions tax by the Commissioner's discretion under section 292-465 of the ITAA 1997.	Yes.  This amount is subject to Division 293 tax as it is a low tax contribution that is not subject to excess contributions tax. It is included in low tax contributions in the year the contributions were made.  It is not included in low tax contributions in the year it is allocated to as it received concessional tax treatment in the year the contribution was made.	Yes.  This is because this amount is included in low tax contributions. No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions.  It is not included in the year it is allocated to. This is because it is not included in low tax contributions or income for surcharge purposes.

4.37 Generally, excess concessional contributions are subtracted from low tax contributed amounts in working out low tax contributions to prevent excess concessional contributions from being subject to Division 293 tax. This is because, in general, these contributions are subject to excess concessional contributions tax which effectively removes the concessional tax treatment of the excess concessional contributions by imposing excess concessional contributions tax on them at a rate of 31.5 per cent.

4.38 Similarly, excess concessional contributions are not included in the \$300,000 threshold test. This reflects that excess concessional contributions are not included in low tax contributions or in income for surcharge purposes (after excluding reportable superannuation contributions).

**Example 4.3: Calculation of low tax contributions — accumulation interest and excess concessional contributions**

Mark only has one superannuation interest. It is not a defined benefit interest. Concessional contributions made on Mark's behalf are \$40,000 in the 2012-13 financial year.

Mark has excess concessional contributions of \$15,000 (being \$40,000 less \$25,000) as his concessional contributions cap for the 2012-13 financial year is \$25,000.

His low tax contributions are \$25,000, being effectively his concessional contributions (\$40,000) reduced by his excess concessional contributions (\$15,000).

No further calculations are required to work out Mark's low tax contributions because special rules for calculating his low tax contributions do not apply to Mark.

The \$15,000 of excess concessional contributions is also not included in the \$300,000 threshold to determine whether Mark has taxable contributions. This is because excess concessional contributions are not only excluded from amounts of low tax contributions but also from the income test (income for surcharge purposes less reportable superannuation contributions).

Refunded excess concessional contributions

4.39 When the Commissioner makes a determination under section 292-467 of the ITAA 1997 for the purposes of excess concessional contributions tax, an amount of the excess contributions (reduced by 15 per cent in recognition of the tax paid by the superannuation provider on the contributions) may be released by a superannuation provider. The amount is paid to the Commissioner and the gross amount of the excess contributions is included in the assessable income of the individual. A net amount (if any) is refunded to the individual by the Commissioner after an amended income tax assessment is issued.

4.40 The amount of the excess concessional contributions is disregarded for working out excess concessional contributions subject to excess contributions tax. However, for the purposes of calculating low tax contributions the excess concessional contributions disregarded for the purposes of excess contributions tax continue to be treated as excess concessional contributions and accordingly are deducted from low tax contributed amounts. *[Schedule 3, Part 1, item 1, section 293-35 of the ITAA 1997]*

4.41 This prevents these disregarded excess concessional contributions from being subject to Division 293 tax. This is because the disregarded contributions are included in an individual's assessable

income and are therefore subject to income tax at the individual's marginal tax rate. This removes any concessional tax treatment of those contributions.

4.42 However, the disregarded contributions are included in the \$300,000 threshold. This is because, while the disregarded excess concessional contributions are not included in low tax contributions, they are included in income for surcharge purposes (as they are part of assessable income). This reflects that by disregarding them for excess contributions tax, they are included in the assessable income of the individual.

**Example 4.4: Calculation of low tax contributions — accumulation interests and refunded excess concessional contributions**

Assume the same facts as Example 4.3, except that Mark's concessional contributions (and therefore his low tax contributed amounts) are \$30,000.

Mark has excess concessional contributions of \$5,000.

Mark accepts an offer by the Commissioner to have the excess concessional contributions disregarded for excess contributions tax and instead included in his assessable income. His fund releases 85 per cent of the amount of his excess contributions to the Commissioner and the Commissioner later refunds part of that amount to him.

His low tax contributions are still \$25,000, because his contributed amounts (\$30,000) are reduced by the amount of disregarded excess concessional contributions (\$5,000) as they are treated the same as other excess concessional contributions for the purpose of determining low tax contributions. The fact that the \$5,000 was disregarded as being excess concessional contributions as the Commissioner made a determination and Mark is not liable for excess contributions tax on those contributions is ignored.

However, the \$5,000 is included in Mark's assessable income and thus in income for surcharge purposes, so it is part of the \$300,000 threshold to determine whether Mark has taxable contributions. There is no double counting as the amount is not included in low tax contributions.

**Disregarded and reallocated excess concessional contributions**

4.43 When the Commissioner makes a determination under section 292-465 of the ITAA 1997 for the purposes of excess contributions tax, an amount of concessional contributions for a financial



year can be disregarded for the purposes of excess contributions tax or allocated instead to another year.

4.44 However, the disregarded amounts are not included in excess concessional contributions (or subject to excess concessional contributions tax) and consequently are not subtracted from low tax contributed amounts. This ensures that amounts of concessional contributions that are disregarded for excess contributions tax are included in low tax contributions and makes them potentially subject to Division 293 tax.

4.45 Those disregarded amounts are included in the \$300,000 threshold test.

**Example 4.5: Calculation of low tax contributions — accumulation interests and disregarded concessional contributions**

Assume the same facts as Example 4.3, except that Mark's concessional contributions are \$27,000 in the 2012-13 financial year.

Mark has excess concessional contributions of \$2,000. However, the Commissioner makes a determination to disregard an amount of \$2,000 of concessional contributions for the purposes of excess contributions tax. Mark therefore has no excess concessional contributions as a result of the Commissioner's determination.

Mark's low tax contributions are \$27,000. This is because the \$2,000 disregarded concessional contributions for the purposes of excess contributions tax are still part of low tax contributed amounts (for Mark, effectively concessional contributions) as they still receive concessional tax treatment. As Mark has no excess concessional contributions his low tax contributions are equal to his low tax contributed amounts.

As the \$2,000 disregarded concessional contributions are included in low tax contributions, they are also included in the \$300,000 threshold to determine whether Mark has taxable contributions.

4.46 Where the Commissioner makes a determination to reallocate concessional contributions from one financial year to another financial year for the purposes of excess contributions tax, those contributions are:

- included in low tax contributed amounts in the year that they are made in determining low tax contributions;
- not included in excess concessional contributions in the year that they are made and consequently are not subtracted

from low tax contributed amounts for determining low tax contributions for that year; and

- not included in low tax contributed amounts for determining low tax contributions for the year they are reallocated to.

4.47 However, the reallocated contributions are included in concessional contributions in the year they are reallocated to for the purposes of excess contributions tax.

4.48 This ensures that contributions reallocated for the purposes of excess contributions tax are potentially subject to Division 293 tax in the year that they are made and that they are not subject to Division 293 tax in the year to which they were reallocated (thus avoiding any double taxation).

4.49 This also ensures that the contributions reallocated for the purposes of excess contributions tax are included in the \$300,000 threshold in the year they were made and not included in the \$300,000 threshold in the year to which they were reallocated (thus avoiding double counting).

**Example 4.6: Calculation of low tax contributions: accumulation interests and reallocated concessional contributions**

Richard has concessional contributions of \$30,000 in the 2012-13 financial year.

Richard has excess concessional contributions of \$5,000. However, the Commissioner makes a determination to reallocate \$5,000 concessional contributions from the 2012-13 financial year to the 2013-14 financial year for the purposes of excess contributions tax.

*2012-13 financial year*

Richard's low tax contributions for the 2012-13 financial year equal the amount of concessional contributions; that is \$30,000.

This is because concessional contributions reallocated to the 2013-14 financial year due to the Commissioner's determination made for the purposes of excess contributions tax are not included in excess concessional contributions in 2012-13 (that is, in the year that they were made) and consequently are not subtracted from low tax contributed amounts for determining low tax contributions in that year.

The Commissioner's determination made for the purposes of excess contributions tax does not have the effect of reallocating the contributions for the purposes of low tax contributions.

*Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013*  
*Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013*

As the \$5,000 in reallocated concessional contributions are included in low tax contributions for the 2012-13 financial year, they are also included in the \$300,000 threshold test to determine whether Richard has taxable contributions for Division 293 tax in 2012-13.

*2013-14 financial year*

Richard's concessional contributions of \$5,000 that were reallocated from the 2012-13 financial year and instead allocated to the 2013-14 financial year due to the Commissioner's determination made for the purposes of excess contributions tax count towards his concessional contributions cap of \$25,000 for the 2013-14 financial year for the purposes of excess contributions tax.

Concessional contributions actually made on Richard's behalf amount to \$23,000 in the 2013-14 financial year.

However, for excess contributions tax purposes concessional contributions for the 2013-14 financial year also include the \$5,000 reallocated by the Commissioner from the 2012-13 financial year. His total concessional contributions for the purposes of excess contributions tax are therefore \$28,000.

Richard therefore has excess concessional contributions of \$3,000 in the 2013-14 financial year. This amount is subject to excess concessional contributions tax, thus it is subtracted as excess contributions from low tax contributed amounts for the purposes of calculation of the low tax contributions.

Accordingly, Richard's low tax contributions amount to \$20,000 in the 2013-14 financial year which is \$23,000 in low tax contributed amounts (effectively Richard's concessional contributions made in the 2013-14 financial year) less \$3,000 in excess concessional contributions.

As the \$5,000 reallocated concessional contributions are not included in low tax contributions for the 2013-14 financial year, they are also not included in the \$300,000 threshold test to determine whether Richard has taxable contributions for Division 293 tax in 2013-14.

***Special rules — defined benefit interests***

4.50 Where individuals have a defined benefit interest or interests, the amount of low tax contributions is calculated under special rules for defined benefit interests. These special rules modify the general calculation of low tax contributions discussed at paragraph 4.31.

4.51 A note is inserted to alert taxpayers to the special rules for calculating low tax contributions for defined benefit interests. [*Schedule 3, Part 1, item 1, paragraph 293-25(b) of the ITAA 1997*]

4.52 The special rules for defined benefit interests provide that low tax contributions for a financial year are worked out as follows:

- include low tax contributed amounts as calculated under the general rules but only to the extent that they relate to accumulation interests (*Step 1*);
- *subtract* excess concessional contributions (*Step 2*); and
- *add* defined benefit contributions (*Step 3*).

If a negative amount results from the calculation under this method, then low tax contributions are nil and therefore there is no Division 293 tax. [*Schedule 3, Part 1, item 1, section 293-105 of the ITAA 1997*]

4.53 A negative amount only arises where excess concessional contributions exceed the total of low tax contributed amounts plus defined benefit contributions.

4.54 Broadly:

- Step 1 and Step 2 (see paragraph 4.52) are effectively the same as calculations made under the general rules for individuals with accumulation interests as outlined previously;
- the result of Step 2 is negative if excess concessional contributions are greater than the amount of the low tax contributed amounts for accumulation interests with the result that any remaining amount of excess concessional contributions reduces the defined benefit contributions; and
- Step 3 then includes notional employer contributions for defined benefit interests (referred to as defined benefit contributions) to calculate the amount of low tax contributions.

4.55 If low tax contributions are nil then no taxable contributions arise and there is no Division 293 tax.

4.56 Set out below is further information on the steps for calculating low tax contributions for individuals with defined benefit interests. This is followed by examples involving the calculation of low tax contributions for individuals with defined benefit interests in different circumstances.

*Include low tax contributed amounts that do not relate to a defined benefit interest (Step 1)*

4.57 This ensures that low tax contributed amounts for accumulation interests are included in the amount of low tax contributions for individuals who have both types of interests in the same financial year.

*Subtract excess concessional contributions (Step 2)*

4.58 As discussed under the general rules, excess concessional contributions are subtracted from the amount of low tax contributed amounts as they are subject to excess concessional contributions tax which removes any concessional tax treatment on those contributions.

4.59 The treatment of excess concessional contributions for the purposes of low tax contributions is the same as outlined under the general rules. This includes the treatment of disregarded (and potentially refunded) excess concessional contributions under the Commissioner's determination for the purposes of excess contributions tax (as provided by section 292-467 of the ITAA 1997). Accordingly, such contributions are included in excess concessional contributions that are subtracted from the low tax contributed amounts in respect of accumulation interests; however, they continue to be included in calculating the \$300,000 threshold. *[Schedule 3, Part 1, item 1, section 293-110 of the ITAA 1997]*

*Add defined benefit contributions (Step 3)*

4.60 Amounts of defined benefit contributions are added to ensure that (along with low tax contributed amounts for accumulation interests) concessional tax contributions for defined benefit interests are also included in low tax contributions and thus are potentially subject to Division 293 tax.

4.61 Both the scope of defined benefit contributions and the method of determining the amounts of defined benefit contributions are to be prescribed by regulations (defined benefit contributions regulations). *[Schedule 3, Part 1, item 1, section 293-115 of the ITAA 1997]*

4.62 The regulations may take the following into account in determining the scope of defined benefit contributions:

- the individual who has the superannuation interest that includes the defined benefit interest;
- the superannuation plan in which superannuation interest exists;

- the superannuation provider in relation to the superannuation plan; and
- any other matters.

*[Schedule 3, Part 1, item 1, subsection 293-115(3) of the ITAA 1997]*

4.63 The regulations may also specify circumstances in which the amount of defined benefit contributions for a financial year is nil.

*[Schedule 3, Part 1, item 1, subsection 293-115(4) of the ITAA 1997]*

4.64 The list of matters that may be taken into account by the regulations in setting out what constitutes defined benefit contributions do not restrict the scope of the regulation making power to only take account of these matters. *[Schedule 3, item 1, Part 1, subsection 293-115(5) of the ITAA 1997]*

4.65 As the measure applies from 1 July 2012, the amendments expressly allow the defined benefit contribution regulations to apply from 1 July 2012, despite subsection 12(2) of the *Legislative Instruments Act 2003* which provides that legislative instruments will only apply on a prospective basis unless the principal legislation specifically provides to the contrary. *[Schedule 3, item 1, Part 1, subsection 293-115(6) of the ITAA 1997]*

4.66 Without retrospective regulations, there would be no definition or method for calculating defined benefit contributions for the 2012-13 financial year and these amendments could not operate. Allowing for the regulations to apply retrospectively from the day from which these amendments apply ensures that individuals with defined benefit interests are treated consistently with individuals with accumulation interests.

4.67 It is intended that the inclusion of defined benefit contributions in low tax contributions will ensure that individuals with defined benefit interests are treated in a similar way to those individuals with accumulation interests for the purposes of Division 293 tax. This will be achieved in the regulations by estimating for defined benefit interests (including interests held in funded, unfunded and partially unfunded superannuation schemes) the amount of employer contributions that would be made if contributions were made annually in respect of the interest. Defined benefit contributions will also include employer contributions made under a salary sacrifice arrangement made in respect of the individual to defined benefit interests. Unlike the amount of notional taxed contributions (used for determining an individual's concessional contributions for the purposes of excess contributions tax) there will be no limit on the amount of defined benefit contributions

because no grandfathering of the amount of defined benefit contributions applies.

*Examples of calculation of low tax contributions*

4.68 The following examples include calculations of low tax contributions under the special rules for individuals with a defined benefit interest or interests. They provide examples of calculations of low tax contributions for individuals with only a defined benefit interest and for individuals with both an accumulation interest and a defined benefit interest. There are also examples for individuals that have notional taxed contributions determined for the purposes of excess contributions tax under the special rules for grandfathering and also where those grandfathering rules do not apply.

4.69 There are other special rules that apply to certain individuals that are discussed at paragraphs 4.70 to 4.87. Examples 4.7 to 4.10 do not apply to those individuals subject to the other special rules.

**Example 4.7: Calculation of low tax contributions — defined benefit interest only**

Victor has one superannuation interest which is a defined benefit interest. Victor's defined benefit contributions for the purposes of Division 293 tax are \$24,000 for the 2012-13 financial year. Victor's notional taxed contributions for the purposes of excess contributions tax are also \$24,000.

Victor's low tax contributions are therefore \$24,000 in the 2012-13 financial year. This is the amount of his defined benefit contributions under Step 3 in the special rules for defined benefit interests.

No further calculations are required because Victor does not have:

- any accumulation interests (Step 1); and
- excess concessional contributions (Step 2).

**Example 4.8: Calculation of low tax contributions — defined benefit interest and excess concessional contributions**

Assume the same facts as in Examples 4.7, except that Victor's defined benefit contributions for the purposes of Division 293 tax are \$40,000 for the 2012-13 financial year.

*Case 1: Excess contributions tax grandfathering does not apply*

Victor's notional taxed contributions for the purposes of excess contributions tax also equal \$40,000 for the 2012-13 financial year.

Victor commenced to hold the defined benefit interest after 12 May 2009 so the special rules for grandfathering for excess contributions tax for defined benefit interests do not apply and therefore his notional taxed contributions are not equal to his concessional contributions cap of \$25,000. Accordingly, Victor's excess concessional contributions are \$15,000 ( $\$40,000 - \$25,000$  (his concessional contributions cap)).

Accordingly, Victor's low tax contributions are \$25,000, calculated as follows:

- start with low tax contributed amounts that do not relate to the defined benefit interest (nil);
- *deduct* the amount of his excess concessional contributions (\$15,000) under Step 2 as those excess concessional contributions are subject to excess concessional contributions tax ( $0 - \$15,000 - \$15,000$ ); and
- *add* the amount of his defined benefit contributions (\$40,000) under Step 3 ( $-\$15,000 + \$40,000 = \$25,000$ ).

*Case 2: Excess contributions tax grandfathering applies*

If Victor held the defined benefit interest before 12 May 2009 and meets all of the other conditions for eligibility for the grandfathering rules for excess concessional contributions tax, his notional taxed contributions for the purposes of excess concessional contributions tax will be equal to his concessional contributions cap of \$25,000. This results in no excess concessional contributions tax liability for Victor.

Accordingly, Victor's low tax contributions are \$40,000, being the full amount of his defined benefit contributions in Step 3.

**Example 4.9: Calculation of low tax contributions — both a defined benefit interest and an accumulation interest**

Steve holds an accumulation interest in a superannuation fund. Low tax contributed amounts made on his behalf to that interest amounted to \$15,000 in the 2013-14 financial year. Steve's concessional contributions for excess contributions tax are the same as the low tax contributed amounts. Steve also holds a defined benefit interest in a superannuation fund and his defined benefit contributions for that interest are \$10,000 for the 2013-14 financial year. Steve's notional taxed contributions for the purposes of excess contributions tax are the same as his defined benefit contributions.



Steve's low tax contributions are \$25,000 in the 2013-14 financial year. This is calculated as follows:

- \$15,000 low tax contributed amounts in respect of his accumulation interest (Step 1);
- *plus* \$10,000 in defined benefit contributions in respect of his defined benefit interest (Step 3).

No further calculation is required because Steve does not have excess concessional contributions (Step 2).

**Example 4.10: Calculation of low tax contributions — both a defined benefit interest and an accumulation interest — excess concessional contributions**

Sonia holds both a defined benefit interest and an accumulation interest.

Her contributions for the 2013-14 financial year are:

- for her accumulation interest;
  - concessional contributions of \$40,000 (her low tax contributed amounts are the same amount); and
- for her defined benefit interest (ignoring the special grandfathering rules for excess contributions tax);
  - notional taxed contributions of \$30,000 for the purposes of excess contributions tax; and
  - defined benefit contributions of \$30,000 for the purposes of Division 293 tax.

*Case 1: Excess contributions tax grandfathering does not apply*

Sonia's notional taxed contributions in respect of her defined benefit interest are not eligible for the special arrangements which apply for excess contributions tax to limit the notional taxed contributions to her concessional contributions cap.

Sonia has \$45,000 in excess concessional contributions for excess contributions tax purposes. That is, \$40,000 of concessional contributions for her accumulation interest *plus* \$30,000 (being notional taxed contributions) for her defined benefit interest *less* her concessional contributions cap of \$25,000.

Accordingly, Sonia's low tax contributions are \$25,000 for the 2013-14 financial year. This is calculated as follows:

- \$40,000 in low tax contributed amounts to her accumulation interest (Step 1);
- *less* \$45,000 in excess contributions for the purposes of excess concessional contributions tax (Step 2); and
- *plus* \$30,000 in defined benefit contributions in respect of her defined benefit interest (Step 3).

*Case 2: Excess concessional contributions tax grandfathering applies*

In this case Sonia held the defined benefit interest before 12 May 2009 and meets all of the other conditions for eligibility for the grandfathering rules for excess concessional contributions tax. Therefore her notional taxed contributions in respect of the defined benefit interest for the purposes of excess concessional contributions tax will be equal to her concessional contributions cap of \$25,000.

Sonia has \$40,000 of excess concessional contributions that are subject to excess concessional contributions tax. That is \$40,000 of concessional contributions for her accumulation interest plus \$25,000 for her defined benefit interest *less* her concessional contributions cap of \$25,000.

Sonia's low tax contributions are \$30,000 for the 2013-14 financial year. This is calculated as follows:

- \$40,000 in low tax contributed amounts to her accumulation interest (Step 1);
- *less* \$40,000 of excess concessional contributions for the purposes of excess concessional contributions tax (Step 2); and
- *plus* \$30,000 in defined benefit contributions in respect of her defined benefit interest (Step 3).

***Special rules — certain individuals***

4.70 The Constitution prevents the Commonwealth from imposing tax on certain superannuation contributions in respect of certain individuals.

4.71 Accordingly, these amendments contain special rules for calculating low tax contributions for certain Commonwealth justices and judges and certain State higher level office holders. These special rules ensure that Division 293 tax applies to all high income earners regardless

of their positions and roles but generally only to the extent that the legislative power of the Commonwealth permits.

4.72 Notes are inserted to alert taxpayers to the special rules for calculating low tax contributions and defined benefit contributions for certain Commonwealth justices and judges and certain State higher level office holders. *[Schedule 3, Part 1, item 1, paragraph 293-25(b) and subsection 293-115(1) of the ITAA 1997]*

*Commonwealth justices and judges*

4.73 Section 72(iii) of the Constitution provides that the remuneration of justices of the High Court, and justices and judges of other courts created by the Parliament shall be fixed by the Parliament and this remuneration shall not be diminished whilst they are in office.

4.74 The imposition of Division 293 tax may in effect in some cases constitute a diminution of judicial remuneration where certain defined benefit pension entitlements form part of their remuneration.

4.75 As part of the changes to address these limitations, defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968* are not included in low tax contributions and therefore are not subject to Division 293 tax. This is achieved by treating the amount of such contributions as nil. These special rules only apply to justices and judges that have a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*. *[Schedule 3, Part 1, item 1, subsection 293-190(1) and section 293-195 of the ITAA 1997]*

4.76 However, while there may in some cases be constitutional restrictions on taxing defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*, no such limitations apply to other contributions made to benefit Commonwealth justices and judges. Accordingly, contributions made by other employers after a justice or a judge leaves office are potentially included in low tax contributions.

4.77 To reflect the actual position of Commonwealth justices and judges in determining the Division 293 tax on these contributions, all low tax contributions, including these protected amounts, are included when determining if low tax contributions exceed the \$300,000 threshold at which Division 293 tax applies. Thus, while no Division 293 tax will be assessed on defined benefit contributions for a superannuation interest in a superannuation fund established under the *Judges' Pensions Act 1968*, these contributions affect whether Division 293 tax may be payable on

other low tax contributions. *[Schedule 3, Part 1, item 1, section 293-200 of the ITAA 1997]*

*State higher level office holders*

4.78 In *Austin v Commonwealth* (2003) 215 CLR 185 and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, the High Court found that the Commonwealth could not impose the superannuation contributions tax (surcharge), under legislation enacted in 1997, on contributions or notional contributions made by State Government bodies to constitutionally protected funds on behalf of State office holders at the higher levels of government. In accordance with the High Court finding, Division 293 tax is not imposed on low tax contributions in respect of constitutionally protected funds for these higher level office holders.

4.79 This constitutional protection, however, does not extend to contributions to constitutionally protected funds on behalf of such individuals made by an employer (or associate) as part of a salary package arrangement. Accordingly, these amendments ensure that constitutionally protected State higher level office holders do not pay Division 293 tax in respect of low tax contributions for constitutionally protected funds, unless the contributions are made as part of a salary package arrangement. *[Schedule 3, Part 1, item 1, Subdivision 293-E of the ITAA 1997]*

4.80 These amendments achieve this result by providing special rules for calculating low tax contributions for constitutionally protected State higher level office holders with contributions to constitutionally protected funds. *[Schedule 3, item 1, section 293-150 of the ITAA 1997]*

4.81 The exclusion of some low tax contributions for constitutionally protected funds applies to the class of individuals declared by regulations. As the High Court decisions have not provided a comprehensive list of which individuals are State higher level office holders and it is subject to future court decisions, this approach provides flexibility and ensures any changes that may arise in the future can be readily addressed in the regulations. *[Schedule 3, Part 1, item 1, subsection 293-145(1) of the ITAA 1997]*

4.82 Consistent with the regulation making power for defined benefit contributions in these amendments, the regulation making power to prescribe individuals who are constitutionally protected State higher level office holders allows regulations to apply from 1 July 2012. Without retrospective application of the regulation for constitutionally protected State higher level office holders, Division 293 tax would apply to these office holders in the 2012-13 income year. This would be inconsistent with the legislative power of the Commonwealth to impose tax under the Constitution. The retrospective regulation making power benefits

constitutionally protected State higher level office holders by ensuring that explicit special rules in these amendments apply from the date of its application. *[Schedule 3, Part 1, item 1, subsection 293-145(2) of the ITAA 1997]*

4.83 For these individuals, contributions to constitutionally protected funds are only included in low tax contributed amounts (under the general rules) and defined benefit contributions (under the special rules) if they are made as part of a salary package arrangement for the purpose of calculating low tax contributions. This ensures that amounts of low tax contributions in respect of constitutionally protected funds for such individuals only include contributions made as part of a salary package arrangement (and not other contributions to constitutionally protected funds) thus making only such salary packaged contributions potentially subject to Division 293 tax. *[Schedule 3, Part 1, item 1, section 293-150 of the ITAA 1997]*

4.84 Notes are inserted to alert taxpayers to the special rules for calculating low tax contributed amounts and defined benefit contributions for constitutionally protected State higher level office holders. *[Schedule 3, Part 1, item 1, subsections 293-30(1) and 293-115(1) of the ITAA 1997]*

4.85 However, for the purposes of determining whether such constitutionally protected individuals have taxable contributions for an income year, that is, whether the \$300,000 threshold is met, all low tax contributed amounts and all defined benefit contributions are included in the calculation of low tax contributions. *[Schedule 3, Part 1, item 1, section 293-155 of the ITAA 1997]*

4.86 For the purpose of these rules, a salary packaged contribution is a contribution in respect of an individual to whom these provisions apply that is made because they agreed with an entity (or its associate) for the contribution to be made in return for a reduction in their remuneration. *[Schedule 3, Part 1, item 1, subsection 293-160(1) of the ITAA 1997]*

4.87 The reduction in the remuneration needs to be made by the employer reducing one of a number of types of payments covered by the Pay-As-You-Go Withholding regime in Part 2-5 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The relevant types of payments include:

- payments to employees (see section 12-35 in Schedule 1 to the TAA 1953);
- payments to company directors (see section 12-40 in Schedule 1 to the TAA 1953);

- payments to office holders (see section 12-45 in Schedule 1 to the TAA 1953);
- voluntary agreements to withhold (see section 12-55 in Schedule 1 to the TAA 1953); and
- payments under labour hire agreement, or specified by regulation (see section 12-60 in the Schedule 1 to the TAA 1953).

*[Schedule 3, Part 1, item 1, subsection 293-160(2) of the ITAA 1997]*

### **Temporary residents departing Australia: refunds and release from liability for Division 293 tax**

4.88 Departing temporary residents who receive a departing Australia superannuation payment are entitled to a refund of Division 293 tax that they have paid. This treatment reflects that any concessional tax treatment of their superannuation contributions is removed by a final withholding tax on departing Australia superannuation payments (effectively on a payment of a superannuation benefit) imposed under the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007*.

4.89 Individuals are entitled to a refund of Division 293 tax if they:

- made a payment of any of the following:
  - assessed Division 293 tax;
  - a voluntary payment to reduce the amount by which a debt account is in debit; or
  - the debt account discharge liability; and
- received a departing Australia superannuation payment; and
- applied to the Commissioner in the approved form for the refund.

*[Schedule 3, Part 1, item 1, section 293-230 of the ITAA 1997]*

4.90 Broadly, under section 301-170 of the ITAA 1997 and section 12-305 in Schedule 1 to the TAA 1953, a departing Australia superannuation payment is payable to an individual who held a temporary visa, has a superannuation interest with a superannuation provider, and at least six months have passed since the individual ceased to hold the visa and left Australia. A refund is not available for assessed Division 293 tax

for a period when an individual is an Australian resident (but not a temporary resident) of Australia. *[Schedule 3, Part 1, item 1, subsection 293-235(3) of the ITAA 1997]*

4.91 The amount of the refund is the sum of the following payments that an individual has made:

- assessed Division 293 tax;
- a voluntary payment to reduce the amount by which a debt account is in debit; and
- the debt account discharge liability.

*[Schedule 3, Part 1, item 1, subsection 293-235(1) of the ITAA 1997]*

4.92 An individual is not entitled to a refund of the amounts of the above payments to the extent the individual has already received the refund in respect of those payments for an income year. Accordingly, the amount of refund is reduced by the amount that has already been paid by the Commissioner. *[Schedule 3, Part 1, item 1, subsection 293-235(2) of the ITAA 1997]*

4.93 Entitlement to a refund allows the Commissioner to release an individual from all current and future Division 293 tax liabilities (other than a liability in respect of a period when the individual is not a temporary resident). In particular, the Commissioner may extinguish any unpaid Division 293 tax that is due and payable, and also the amount by which a debt account is in debit. *[Schedule 3, Part 1, item 1, paragraph 293-240(1)(a) of the ITAA 1997]*

4.94 A departing temporary resident who receives a departing Australia superannuation payment who has not paid any Division 293 tax but has a liability for Division 293 tax (including defined benefit tax deferred to a debt account) may also be released from all current and future Division 293 tax liabilities where they would have been entitled to a refund had they made a payment. There is no requirement for taxpayers in this situation to apply to the Commissioner using an approved form in order to be released from liability for Division 293 tax. *[Schedule 3, Part 1, item 1, paragraph 293-240(1)(b) of the ITAA 1997]*

4.95 However, the liability will not be released to the extent that the Division 293 tax liability is attributable to a period when an individual is an Australian resident (but not a temporary resident) of Australia. *[Schedule 3, Part 1, item 1, paragraph 293-240(1)(b) and subsection 293-235(3) of the ITAA 1997]*

4.96 The Commissioner may take such action as is necessary to give effect to the decision to release an individual from Division 293 tax liabilities, including notifying the individual of the decision. *[Schedule 3, Part 1, item 1, subsection 293-240(2) of the ITAA 1997]*