SMSFD 2007/D1 - Superannuation: when is a dividend or trust distribution 'received' before the end of 30 June 2009 for the purposes of paragraph 71D(d) of the Superannuation Industry (Supervision) Act 1993?

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Draft Self Managed Superannuation Funds Determination

Superannuation: when is a dividend or trust distribution 'received' before the end of 30 June 2009 for the purposes of paragraph 71D(d) of the *Superannuation Industry (Supervision) Act 1993*?

Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the Superannuation Industry (Supervision) Act 1993, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Determinations (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

Ruling

1. A dividend or trust distribution is 'received' before the end of 30 June 2009 for the purposes of paragraph 71D(d) of the *Superannuation Industry (Supervision) Act 1993* (SISA)[1] if the dividend or trust distribution is paid to the self managed superannuation fund (SMSF) by the company or trust respectively on or before 30 June 2009. A dividend or trust distribution is not received by an SMSF if the SMSF is only entitled to the dividend or trust distribution.

2. The time when a dividend or trust distribution amount is paid to the SMSF depends on the payment option that is either chosen by the SMSF, or prescribed by the company or trust respectively.

[1] All legislative references in this draft Determination are to the SISA unless otherwise indicated.

3. If a dividend or trust distribution amount is to be paid by way of direct credit to a nominated account with a financial institution, it is paid and received by the SMSF when the amount is credited to that account. However, if the amount is paid by way of cash or cheque it is received by the SMSF when the cash or cheque is either collected or, if posted, actually received by the SMSF. It is not necessary for the cheque to be presented or cleared.

4. If the dividend or trust distribution amount is to be applied or dealt with in some way on behalf of the SMSF it is received by the SMSF as soon as it has been applied or dealt with as requested.

Date of effect

5. It is proposed that when the final Determination is issued, the Determination will apply to years of income commencing both before and after its date of issue. However, the Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Funds to which this Determination applies

6. This Determination applies to SMSFs[2] and former SMSFs.[3] References in the Determination to SMSFs include former SMSFs unless otherwise indicated.

Commissioner of Taxation
5 September 2007

[2] As defined in section 17A.
[3] A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Background

7. The in-house asset rules are one of the ways in which the SISA regulates the investments of superannuation funds. Broadly, the in-house asset rules limit the extent to which a fund can invest in related parties. These rules were amended with effect from 11 August 1999 to extend the definition of 'in-house assets'. The amendments inserted transitional provisions which excluded specific investment assets of SMSFs from being in-house assets. This Determination is concerned with one of these transitional provisions, section 71D, which excludes certain investments in related entities made before 30 June 2009 from being in-house assets.[4] Investments in related entities made after this date will not be excluded from the in-house assets of an SMSF under the transitional arrangements.

Explanation

8. If an SMSF has made an investment (the original investment) in a company or trust on or prior to 11 August 1999 (the test time),[5] section 71D may exclude from the in-house assets of the SMSF further investments it makes in that entity during the period (the relevant period) beginning 12 August 1999 and ending at the end of 30 June 2009. Paragraph 71D(d) provides for the maximum amount that can be invested in the company or trust that ensures exclusion of the further investment from being treated as an in-house asset.[6]

9. Under paragraph 71D(d), the total amount invested in the company or trust during the relevant period must not exceed the sum of the amounts 'received' by the SMSF as dividends or trust distributions during that period in respect of the original investment or further investments in that entity.

10. Practically speaking, an SMSF satisfies paragraph 71D(d) if it reinvests some or all of the dividends or trust distributions it has received from the company or trust during the relevant period. However, if the SMSF makes additional investments in the company or trust over and above the total of all of the dividends or trust distributions it has received during the relevant period, paragraph 71D(d) is not satisfied in relation to the additional investments. That additional investment is an in-house asset of the SMSF if it otherwise satisfies the definition of in-house asset in subsection 71(1) (that is, it is an investment in a related party or a related trust).

[4] Investments made under these transitional arrangements prior to 30 June 2009 continue to be excluded from being in-house assets of the SMSF after this date.
[5] Defined in section 71F.
[6] The requirements in paragraphs 71D(b) and 71D(c) must also be met for section 71D to apply.

11. It is necessary to apply the threshold test in paragraph 71D(d) whenever a further investment is made by the SMSF in the company or trust during the relevant period. Any further investment is not excluded from being an in-house asset to the extent that it is in excess of the total amounts 'received' by the SMSF as dividends or trust distributions up to the time of investment. However, a further investment to which section 71D does not initially apply may later satisfy the threshold test in paragraph 71D(d) once additional dividends or trust distributions are 'received' from the company or trust during the relevant period.

12. Thus, to determine if paragraph 71D(d) is satisfied in relation to a further investment in a company or a trust during the relevant period, it is necessary to identify when a dividend or trust distribution is 'received' by the SMSF.

13. The term 'received' is not defined. It is the Commissioner's view that for a dividend or trust distribution to be 'received', it must be paid to the SMSF. In contrast, a dividend or trust distribution to which the SMSF is only entitled is not 'received' by the SMSF for the purposes of paragraph 71D(d). This view is supported by the Explanatory Memorandum accompanying the Bill[7] that inserted section 71D into the SISA. The Explanatory Memorandum makes it clear that it was Parliament's intention that 'received' means 'paid to'. It explains that:

> The term received for the purpose of section 71D means paid to the superannuation fund. For the purpose of this section, a fund would not have received dividends and trust distributions to which it is entitled, but which had not been paid to the fund.

14. The time when a dividend or trust distribution amount is received by the SMSF depends on the payment option that is either chosen by the SMSF or prescribed by the company or trust respectively.[8]

15. If the method for payment is by way of direct credit to a nominated account with a financial institution, the dividend or trust distribution amount is received by the SMSF when the amount is credited to that account.

16. If the method for payment is by way of cash or cheque, the dividend or trust distribution amount is received by the SMSF when the cash or cheque is either collected or, if posted, actually received by the SMSF. It is not necessary for the cheque to be presented or cleared.[9]

17. Alternatively, the SMSF may have requested that the dividend or trust distribution amount be applied or dealt with in some way by the company or trust respectively on its behalf. For example, the SMSF may have opted to have its dividends or trust distributions reinvested through a dividend or distribution reinvestment plan. Although the Explanatory Memorandum explains that received means paid, it is used in contradistinction to a mere entitlement to a dividend or trust distribution. In the Commissioner's view it is not meant to confine received to only those circumstances where the dividend or trust distribution amount is actually paid to the SMSF.

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[7] Superannuation Legislation Amendment Bill (No. 4) 1999 enacted as *Superannuation Legislation Amendment Act (No. 4) 1999.* See Schedule 1 of the Explanatory Memorandum, under the headings 'Transitional Arrangements' and 'Exception – reinvestments (Section 71D)'.

[8] This is consistent with *Case No. B81* 2 TBRD 375. In that case Mr Gibson (Chairman) and Mr Bock (member) held (at 382) that a dividend was paid to the taxpayer 'when the cheque drawn for that purpose was deposited by the company to the credit of the taxpayer's bank account in accordance with its standing arrangement with the taxpayer – the only authority which it had as to the manner of payment of the dividend'.

[9] This is consistent with *Tilley v. Official Receiver in Bankruptcy* (1960) 103 CLR 529 where Dixon CJ and Kitto J considered that payment by way of cheque is conditional payment.

18. It is therefore the Commissioner's view that if an SMSF has requested that a dividend or trust distribution amount be applied or dealt with in some way on its behalf, the SMSF is taken to have received that amount as soon as it has been applied or dealt with as requested. For example, if a dividend or trust distribution amount is to be reinvested in the company or trust respectively, the amount is received by the SMSF when the amount is appropriated for the purchase of additional shares or units, as appropriate. If a dividend or trust distribution amount is to be set-off against a liability owing by the SMSF to the company or trust respectively, the amount is received by the SMSF as soon as the set-off happens.[10]

Example 1

19. *At the end of 11 August 1999 (test time) the P&J SMSF owned fully paid units in P&J Unit Trust (unit trust), a related trust of the SMSF. The SMSF has taken up the payment option to have all trust distributions automatically reinvested in additional units.*

20. *Trust distributions totalling $20,500 have been applied by the unit trust on behalf of the SMSF as payment for the purchase of further units by the SMSF in the unit trust during the period 12 August 1999 to 30 June 2008. These trust distributions represent the total of all distributions made to the SMSF by the unit trust in that period.*

21. *At the end of 30 June 2009 the SMSF is entitled to a trust distribution of $5,000 but the amount has not yet been appropriated on behalf of the SMSF for the purchase of further units in the trust. The distribution is not received by the SMSF at the end of 30 June 2009. Once the $5,000 distribution is applied to acquire further units in the unit trust, those units would be in-house assets of the SMSF under subsection 71(1).*

Example 2

22. *At the end of 11 August 1999 (test time) the G&D SMSF owned fully paid units in G&D Unit Trust (unit trust), a related trust of the SMSF.*

23. *Trust distributions totalling $10,000 have been invested by the SMSF in acquiring units in the unit trust during the period 12 August 1999 to 30 June 2007. These trust distributions represent the total of all distributions made to the SMSF by the unit trust in that period.*

24. *On 30 September 2007 the SMSF decided to invest a further $2,000 in the unit trust although it has received no further distributions. Thus the total amount invested in the unit trust exceeds the trust distributions received by $2,000. The additional investment is not excluded by section 71D and is an in-house asset of the SMSF.*

25. *On 30 June 2008 a trust distribution of $3,000 is paid to the SMSF. The SMSF invests $1,000 of that distribution in acquiring further units in the unit trust. At that time trust distributions total $13,000 and the further investment by the SMSF in the unit trust during the relevant period totals $13,000. Thus the investment of $2,000 may again be excluded as an in-house asset of the SMSF.*

[10] This is consistent with *FC of T v. Steeves Agnew & Co (Vic) Pty Ltd* (1951) 82 CLR 408 and *Re Harmony and Montague Tin & Copper Mining (Spargo's case)* (1873) LR 8 Ch App 407; [1861-73] All ER Rep 261 which establish that an amount set-off constitutes money paid.

Appendix 2 – Your comments

26. We invite you to comment on this draft Determination. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date: **5 October 2007**

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- in-house assets
- self managed superannuation funds
- superannuation
- transitional rules

Legislative references:

- SISA 1993
- SISA 1993 10(4)
- SISA 1993 17A
- SISA 1993 71(1)
- SISA 1993 71D
- SISA 1993 71D(b)
- SISA 1993 71D(c)
- SISA 1993 71D(d)
- SISA 1993 71F
- Superannuation Legislation Amendment Act (No. 4) 1999

Case references:

- Case No. B81 2 TBRD 375
- FC of T v. Steeves Agnew & Co (Vic) Pty Ltd (1951) 82 CLR 408
- Re Harmony and Montague Tin & Copper Mining (Spargo's case) (1873) LR 8 Ch App 407; [1861-73] All ER Rep 261
- Tilley v. Official Receiver in Bankruptcy (1960) 103 CLR 529

Other references:

- Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999
- Superannuation Legislation Amendment Bill (No. 4) 1999

ATO references

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