

SMSFR 2009/4A2 - Addendum - Self Managed Superannuation Funds: the meaning of 'asset', 'loan', 'investment in', 'lease' and 'lease arrangement' in the definition of an 'in-house asset' in the Superannuation Industry (Supervision) Act 1993

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Addendum

Self Managed Superannuation Funds Ruling

Self Managed Superannuation Funds: the meaning of ‘asset’, ‘loan’, ‘investment in’, ‘lease’ and ‘lease arrangement’ in the definition of an ‘in-house asset’ in the *Superannuation Industry (Supervision) Act 1993*

This Addendum amends Self Managed Superannuation Funds Ruling SMSFR 2009/4 to take into consideration the repeal of subsection 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993), the introduction of section 67A of the SISA, the introduction of section 62A of the SISA, and the introduction of Superannuation Industry (Supervision) Regulations 1994 regulation 13.18AA, and to correct typographical and other minor errors.

SMSFR 2009/4 is amended as follows:

1. Footnote 3

Omit ‘SMSFR 2009/3’; substitute ‘Self Managed Superannuation Funds Ruling SMSFR 2009/3 *Self Managed Superannuation Funds: application of the Superannuation Industry (Supervision) Act 1993 to unpaid trust distributions payable to a Self Managed Superannuation Fund*’.

2. Paragraph 13

Omit ‘of goods’; substitute ‘for goods’.

3. Paragraph 32

(a) Omit from example 4 of the table ‘artwork’; substitute ‘machinery’

(b) Omit example 5 of the table; substitute:

5.	Use of machinery in a member’s business	120
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- (c) Omit from example 9 of the table '145'; substitute '144'.

4. Footnote 7

Omit the footnote; substitute:

⁷ See Self Managed Superannuation Funds Ruling SMSFR 2008/2 *Self Managed Superannuation Funds: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits.*

5. Paragraph 35

- (a) Omit footnote 8; substitute:

⁸ See Self Managed Superannuation Funds Ruling SMSFR 2008/1 *Self Managed Superannuation Funds: giving financial assistance using the resources of a self managed superannuation fund to a member or relative of a member that is prohibited for the purposes of paragraph 65(1)(b) of the Superannuation Industry (Supervision) Act 1993.*

- (b) At the end of the fourth dot point, insert footnote 8A:

^{8A} See Self Managed Superannuation Funds Ruling SMSFR 2009/2 *Self Managed Superannuation Funds: the meaning of 'borrow money' or 'maintain an existing borrowing of money' for the purposes of section 67 of the Superannuation Industry (Supervision) Act 1993.*

6. Footnote 9

Omit the footnote; substitute

⁹ See Self Managed Superannuation Funds Ruling SMSFR 2010/1 *Self Managed Superannuation Funds: the application of subsection 66(1) of the Superannuation Industry (Supervision) Act 1993 to the acquisition of an asset by a self managed superannuation fund from a related party.*

7. Paragraph 40

Omit 'chooses'; substitute 'choses'.

8. Paragraph 49

Omit 'Australian Oxford English Dictionary'; substitute '*Australian Oxford Dictionary*'.

9. Paragraph 61

Omit 'Consumer Credit Code' substitute 'the Consumer Credit Code'.

10. Paragraph 62

Omit paragraph; substitute:

62. Under the Consumer Credit Code, credit is provided if payment of a debt owed by one person to another is deferred (for example forbearance on a pre-existing debt) or if a person incurs a deferred debt to another person. In this context Bell J discussed the meaning of the term 'debt' at paragraphs 83 to 85:

83 I have expressed the view that this obligation to make a future payment is a present debt for which payment is not yet due (*a debitum in praesenti, solvendum in futuro*) that matures, when the time for payment arrives, into a present debt for which payment is due (*a debitum in praesenti*). These legal categories of debt emerge from the decided cases and, I repeat, are equally applicable when determining whether a terms contract for sale of land is a credit contract under the Code. Of the countless cases on the subject, I will deal with just four.

84 The first is *Webb v Stenton*.¹⁰⁰ The Court of Appeal had to decide whether income from a trust fund was a debt 'owing or accruing' and therefore liable to attachment under the applicable legislation. It held 'owing or accruing' encompassed a debt *debitum in praesenti, solvendum in futuro* ... Lindley LJ was equally explicit:

I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation...

85 This decision has been frequently followed. For example, in *Re Australia and New Zealand Savings Bank Ltd; Mellas v. Everandis* ... The judgment of the Full Court was delivered by Pape J, who said: 'a debt 'accruing due' must be a debt based upon a present obligation but which is payable at a definable approachable future date'... So a debt that arose only on the performance of a condition precedent was not an accruing debt, that is, not a *debitum in praesenti, solvendum in futuro*...

11. Paragraph 66

After 'Act'; insert 'and'.

12. Paragraph 70

Omit from the beginning of the first sentence 'The'; substitute 'In the'.

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13. Paragraph 77

Omit 'that, 'loan' also encompasses arrangements where there is no objective purpose of gaining interest, income, profit or gain,'; substitute 'that; 'loan' also encompasses arrangements where there is no objective purpose of gaining interest, income, profit or gain;'

14. Paragraph 101

Omit 'summarise'; substitute 'summarises'.

15. Paragraph 103

Omit from the first sentence 'making'; substitute 'the making'.

16. Paragraph 110

Omit from heading 'artwork'; substitute 'machinery'.

17. Paragraph 111

Omit first sentence; substitute: '*TJ SMSF owns a machine which is leased to TJ Pty Ltd and used in its business.*'

18. Paragraph 112

Omit '*artwork*'; substitute '*machine*'.

19. Paragraph 115

Omit '*The Australian Oxford Dictionary*'; substitute '*the Australian Oxford Dictionary*'.

20. Paragraph 120

(a) Omit the heading; substitute '*Example 5 – Use of machinery in a member's business*'

(b) Omit the second sentence; substitute '*The SMSF owns a machine which is used in Dorien's business.*'

21. Paragraph 122

(a) Omit the first occurrence of '*artwork*'; substitute '*machine*'

(b) Omit the second sentence; substitute '*The machine is physically located in Dorien's business premises, giving him the right to control access to it and he uses it in his business.*'

22. Paragraph 123

- (a) Omit *'artwork'*; substitute *'machine'*.
- (b) Omit *'displayed in Dorien's home'*; substitute *'used in Dorien's business'*.

23. Paragraph 125

- (a) Omit *'3rd'*; substitute *'third'*.
- (b) Omit the third sentence; substitute *'Instead, one of the members of the fund holds the keys and security alarm code to the garage as they use it for the storage of their vintage car.'*
- (c) After *'paid'*; insert *'for the garage'*.

24. Paragraph 129

Omit *'of the in-house asset rules'*.

25. Paragraph 133

- (a) Omit from the first sentence *'to'*.
- (b) Insert a comma in the first sentence after *'loan'*.
- (c) Omit the last sentence; substitute *'A brief explanation of this framework is therefore provided below.'*

26. Paragraph 140

- (a) Omit *'an employer-sponsor'*; substitute *'of a standard employer-sponsor'*.
- (b) Omit from the second sentence *'employer sponsor'*; substitute *'standard employer-sponsor'*.

27. Paragraph 141

- (a) Omit *'the definition of'*; substitute *'whether the entity in question is'*.
- (b) After *'Part 8 associate'*; insert *'of a standard employer-sponsor'*.

28. Paragraph 142

- (a) Omit from the second dot point *'will be a Part 8 associate'*.

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(b) Omit from the fifth dot point 'by the individual, by a Part 8 associate of the individual or by the individual together with Part 8 associates'; substitute 'by, the individual, a Part 8 associate of the individual, or two or more of these entities'.

29. Footnote 53

Omit footnote; substitute:

⁵³ The term 'relative' is defined in section 10.

30. Paragraph 143

Omit 'or has a majority voting interest in'.

31. Paragraph 152

(a) Omit the third dot point; substitute

- Another entity (the controlling entity) where the company is sufficiently influenced by, or a majority voting interest in the company is held by, the controlling entity, a Part 8 associate of the controlling entity or two or more of these entities;

(a) Omit the fifth dot point; substitute

- Another company (the controlled company) which is sufficiently influenced by, or in which a majority voting interest is held by, the company, a Part 8 associate of the company, or two or more of these entities.

32. Paragraph 154

Insert a hyphen between the words '*employer*' and '*sponsor*'.

33. Paragraph 156

(a) Omit the heading - 'Definition of a 'related trust'?'; substitute:

- 'Definition of a 'related trust''

(b) After 'controls'; insert '(within the meaning of section 70E)'.

34. Paragraph 157

(a) Omit the first instance of 'a group'.

(b) Insert at the beginning of the first dot point 'a group in relation to the entity'.

(c) Omit from the second dot point 'has a relationship with the trustee(s) such that the trustee or a majority of the trustees is

accustomed, obligated'; substitute 'the trustee of the trust, or a majority of the trustees of the trust, is accustomed or under an obligation'.

- (d) Omit from the second dot point 'group or in'; substitute 'group in'.

35. Paragraph 158

Omit the paragraph; substitute:

158 A 'group' in relation to an entity is defined in subsection 70E(3) to mean the entity acting alone, a Part 8 associate of the entity acting alone, the entity and one or more of its Part 8 associates acting together, or 2 or more of the entity's Part 8 associates acting together.

36. Paragraph 159

After 'are'; insert 'the'.

37. Paragraph 163

- (a) Omit 'section' wherever occurring; substitute 'subsection'.

- (b) Insert in item (f), after 'Regulator' footnote 54A:

^{54A} The meaning of the term 'Regulator' is given in subsection 10(1).

- (c) Omit from item (j) 'Regulations'; substitute 'regulations'.

- (d) Omit footnote 55; substitute:

⁵⁵ See Self Managed Superannuation Funds Ruling SMSFR 2009/1 *Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993* for further explanation.

38. Paragraph 164

- (a) Omit the heading; substitute: '**Investment in a widely held unit trust**'.

- (b) In the first sentence, omit 'Widely held trust'; substitute 'Widely held unit trust'.

39. Paragraph 165

Omit 'widely held trust'; substitute 'widely held unit trust'.

40. Footnote 56

Insert a comma after the first instance of 'commenced'.

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41. Paragraph 171

Omit paragraph; substitute:

171. Section 67A and former subsection 67(4A) provide exemptions to the general prohibition on borrowing by trustees of SMSFs. The exemption applies to certain limited recourse borrowing under an arrangement where the borrowed money is applied to the acquisition of an asset that is held in a holding trust pending the making of payments by the trustee.

42. Paragraph 172

Omit paragraph; substitute:

172. Subsection 71(8) ensures that the SMSF trustee's interest in the holding trust under a borrowing arrangement covered by subsection 67A(1) or former subsection 67(4A) is not an in-house asset of the SMSF at a time provided that:

- the only property of the holding trust at that time is the asset the acquisition of which is the subject of the borrowing arrangement; and
- that asset would not be an in-house asset if held directly in the fund at that time.

43. Paragraph 174

Omit 'exclude'; substitute 'allow'.

44. Paragraph 177

- (a) After 'party'; insert 'where the lease was in place'.
- (b) After '1999'; insert 'and has remained in place since'.

45. Paragraph 179

Omit 'of each lease'; substitute 'covered by each lease'.

46. Footnote 57

Omit the footnote; substitute:

⁵⁷ Self Managed Superannuation Funds Determination SMSFD 2007/1 *Self Managed Superannuation Funds: 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?* considers when a trust distribution or dividend is received by the SMSF for the purposes of this section.

47. Paragraph 192

Omit '71(2A)'; substitute '71(2B)'.

48. Paragraph 194

Omit:

Example 4 – Lease of artwork to an employer 110

Example 5 – Display of artwork at a member's home 120

Substitute:

Example 4 – Lease of machinery to an employer 110

Example 5 – Use of machinery in a member's business 120

Omit:

Example 6 - Asset subject to lease 125

Substitute:

Example 6 - Part of an asset subject to lease 125

Omit:

Definition of a 'related trust'? 156

Substitute:

Definition of a 'related trust' 156

Omit:

Investment in a widely held trust 164

Substitute:

Investment in a widely held unit trust 164

49. Related Rulings/Determinations

Insert 'SMSFR 2009/2; '

50. Legislative references

(a) Omit:

- SISA 1993 70E(4)

- SISA 1993 71(2A)

(b) Insert:

- SISA 1993 62A

- SISA 1993 67A

- SISA 1993 67A(1)

- SISA 1993 70E(3)

- SISA 1993 71(2B)

- SISR 1994 13.18AA

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51. Other references

Omit 'The' from 'The Encyclopaedic Australian Legal Dictionary (LexisNexis)'

This Addendum applies on and from 13 June 2012.

Commissioner of Taxation

13 June 2012

ATO references

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