

***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?***

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# Self Managed Superannuation Funds Determination

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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*?

## **Preamble**

*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)<sup>1</sup> 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.
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.

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<sup>1</sup> All legislative references in this Determination are to the SISA unless otherwise indicated.

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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.

## **Funds to which this Determination applies**

5. This Determination applies to SMSFs<sup>2</sup> and former SMSFs.<sup>3</sup> References in the Determination to SMSFs include former SMSFs unless otherwise indicated.

## **Date of effect**

6. This Determination applies 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.

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**Commissioner of Taxation**

19 December 2007

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<sup>2</sup> As defined in section 17A.

<sup>3</sup> A former SMSF is a fund that has ceased being an SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

## Appendix 1 – Examples

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

### Example 1 – automatic reinvestment of trust distributions to acquire further units

7. *At the end of 11 August 1999 (test time) the P&J SMSF owned fully paid units in the P&J Unit Trust (unit trust), a related trust of the SMSF. The SMSF has taken up the option to have all trust distributions automatically reinvested in additional units.*
8. *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.*
9. *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. If this \$5,000 distribution is applied to acquire further units in the unit trust, the units will be in-house assets of the SMSF under subsection 71(1).<sup>4</sup>*

### Example 2 – acquisition of further units in anticipation of a trust distribution

10. *At the end of 11 August 1999 (test time) the G&D SMSF owned fully paid units in the G&D Unit Trust (unit trust), a related trust of the SMSF.*
11. *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.*
12. *On 30 September 2007 the SMSF invested a further \$2,000 in the unit trust. Although the SMSF expects to receive a trust distribution in excess of this amount in the near future, at the time of making the further investment it has not received any further distributions. Therefore the total amount invested in the unit trust exceeds the trust distributions received by \$2,000. The additional investment is not excluded as an in-house asset by section 71D and therefore, is an in-house asset of the SMSF.*
13. *On 30 November 2007 a trust distribution of \$3,000 is paid by way of direct credit to the SMSF's nominated bank account. 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 made on 30 September 2007 is excluded from being an in-house asset of the SMSF when the \$3,000 is paid into its bank account.<sup>5</sup> The \$1,000 invested from the 30 November 2007 distribution is also excluded from being an in-house asset of the SMSF at that time.*

<sup>4</sup> See paragraphs 24 and 25 of this Determination.

<sup>5</sup> See paragraph 18 of this Determination.

## Appendix 2 – Explanation

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

### Background

14. The in-house asset rules are one of the ways in which the SISA regulates the investments of superannuation funds. The in-house asset rules limit the extent to which a fund can invest in related parties. These rules were amended to extend the definition of 'in-house assets'.<sup>6</sup> However, as a transitional measure certain assets that would otherwise be included under the extended definition of in-house asset are excluded. This Determination concerns section 71D, a transitional provision which excludes certain investments in related entities made on or before 30 June 2009 from being in-house assets. Investments excluded under section 71D at the end of 30 June 2009 continue to be excluded from being in-house assets of the SMSF after that date. Investments in related entities made after 30 June 2009 are not excluded from the in-house assets of an SMSF under section 71D.

### Explanation

15. 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),<sup>7</sup> 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.<sup>8</sup>

16. 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.

17. 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).<sup>9</sup>

<sup>6</sup> The amendments took effect from 23 December 1999. For the application of the amendments see item 47 of Schedule 1 to the *Superannuation Legislation Amendment Act (No. 4) 1999* (SLAA (No. 4) 1999).

<sup>7</sup> Defined in section 71F.

<sup>8</sup> The requirements in paragraphs 71D(b) and 71D(c) must also be met for section 71D to apply.

<sup>9</sup> A market value ratio threshold of 5% applies to limit the in-house assets held by an SMSF – sections 82 and 83.

18. 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.

19. 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.

20. The term 'received' is not defined in the SISA. 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<sup>10</sup> that inserted section 71D into the SISA. The Explanatory Memorandum (EM) makes it clear that it was Parliament's intention that 'received' means 'paid to'. The EM 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.<sup>11</sup>

21. 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.<sup>12</sup>

22. 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.

23. 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.<sup>13</sup>

24. 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 EM explains that 'received' means paid, it is used in contradistinction to an 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.

<sup>10</sup> Superannuation Legislation Amendment Bill (No. 4) 1999 enacted as SLAA (No. 4) 1999.

<sup>11</sup> See Schedule 1 of the Explanatory Memorandum, under the headings 'Transitional Arrangements' and 'Exception – reinvestments (Section 71D)'.

<sup>12</sup> 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'.

<sup>13</sup> 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.

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25. 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.<sup>14</sup>

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<sup>14</sup> 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.

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## References

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*Previous draft:*

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*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
- SISA 1993 82
- SISA 1993 83

- Superannuation Legislation Amendment Act (No. 4) 1999
- Superannuation Legislation Amendment Act (No. 4) 1999 Sch 1

*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 (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

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*ATO references*

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