

# ***TA 2002/3 - Access to Preserved Superannuation***

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! The Tax Office has made the following announcements, providing our view on these arrangements:

Tax Office Media Release Nat 02/61, 'Improper early access to super attracts further penalties.'

Tax Office Media Release Nat 04/06, 'Warning against illegal schemes offering early access to super benefits.'

Tax Office website article, 'Illegal arrangements to withdraw your superannuation.'

Tax Office website article, 'Beware of promoters offering early access to superannuation.'

For more information please also see ASIC Media and information release 02/138, 'Court stops early release of super.'

! This document has changed over time. This version was published on *28 February 2002*



# Taxpayer Alert

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**FOI status: may be released**

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*Taxpayer Alerts are intended to be an "early warning" of significant new and emerging tax planning issues or arrangements that the ATO has under risk assessment.*

*Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform ATO officers of new and emerging tax planning issues. Not all potential tax planning issues that the ATO has under risk assessment will be the subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the ATO.*

*Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which the ATO considers give rise to taxation issues. These issues will generally require more detailed analysis to provide an ATO view to taxpayers.*

*The developers and marketers of an arrangement which is the subject of a Taxpayer Alert should provide the full facts of the arrangement to the ATO to enable the ATO to finalise its view.*

*Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert can seek written advice from the ATO and/or contact the ATO officer named in the Alert.*

*This Taxpayer Alert is issued under the authority of the Commissioner.*

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**TITLE:            Access to Preserved Superannuation**

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This Taxpayer Alert describes arrangements offering taxpayers early access to their preserved superannuation prior to retirement for private use.

## DESCRIPTION

The alert applies to arrangements having the following features:

1. A promoter advertises that they can arrange for early access to an individual's superannuation prior to retirement for personal uses (eg: a new car or home, holiday).
2. The arrangement could take a number of forms including:
  - providing the promoter with details of your superannuation fund with the promoter promising to arrange for your superannuation to be paid to you;
  - the promoter assisting you to establish your own self managed superannuation fund, having your existing superannuation rolled over into this fund, and then:
    - having your superannuation paid directly to you from the fund; or
    - arranging for the fund to invest in another (perhaps offshore) entity associated with the promoter, with the promise that all or part of the fund's investment will then be returned to the individual in the form of an interest free or low interest loan and the money can then be used for personal purposes by the individual.
3. The promoter normally charges a fee for their services.

## FEATURES WHICH THE ATO CONSIDERS GIVE RISE TO TAXATION ISSUES

Arrangements of this nature could contravene a number of provisions of the *Superannuation Industry (Supervision) Act 1993*.

- (a) Superannuation funds are required to preserve the benefits in the fund until retirement. If benefits are paid out of the fund to the members prior to retirement this can breach the preservation rules.
- (b) Superannuation funds are required by legislation to have as their purpose the provision of superannuation benefits on retirement. Where instead a fund makes investments in order that some form of current day benefits are provided to the member themselves this can breach the sole purpose test.
- (c) A superannuation fund must not lend money of the fund to a member or their relatives, or give any other financial assistance using the resources of the fund to the member or relatives. An investment by the fund which is designed to provide a current day financial benefit to the member can breach these rules.
- (d) Superannuation funds are generally restricted from investing more than 5% of fund assets in related parties - these are the 'in house asset' rules. An anti avoidance provision applies in respect of these rules. This provides that where a fund invests in an unrelated entity with the understanding that as a result that entity will then provide a loan to a related party of the fund (such as a member of the fund) then the investment by the fund in the entity is an in house asset.

- (e) An individual's benefit in a superannuation fund must not be assigned to another person, and the individual's benefit and fund's assets must not in any way be subject to a charge. Any arrangement which provides for the individual's benefit to be paid to another party or places a charge over the fund's assets may breach these rules.

**Notes: 1. Superannuation is designed for use in retirement.** Accordingly there are legislative rules restricting when superannuation can be accessed prior to retirement. These rules take the form of direct restrictions on access to superannuation prior to retirement as well as rules restricting the investment activities of superannuation funds. The latter have the aim of ensuring superannuation is properly invested for retirement purposes, rather than in a way designed to provide current day benefits to individuals.

**2. When early release is allowed.** Access to superannuation prior to retirement is only allowed in very limited circumstances where the individual is considered to be in severe financial hardship or there are strong compassionate grounds for allowing release. Individuals do not need the assistance of an adviser to access superannuation on these grounds. Rather they should contact their superannuation fund directly or the Australian Prudential Regulation Authority.

**3. Other Taxation Implications.** Payments made by a Superannuation Fund to a person under these arrangements are subject to tax. It appears that in some of these arrangements the individual is not paying the appropriate tax.

**4. Potential Penalties.** A breach of the in house asset, sole purpose test or financial assistance rules can result in penalties of up to \$220,000 and/or jail terms of up to five years. The fund involved could also lose its taxation status as a complying fund resulting in higher taxation applying to the fund.

A breach of the preservation, assignment and charging rules can result in penalties of up to \$11,000. The fund involved could also lose its taxation status as a complying fund resulting in higher taxation applying to the fund.

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*subject references:*

*legislative references:* Sections 62, 65, 71(2), 85 and Part 8 of the Superannuation Industry (Supervision) Act 1993. Regulations 13.12, 13.13, 13.14 and Part 5 of the SIS Regulations.

*related taxpayer alerts:*

*related practice statements:* PS 2001/15 – Taxpayer Alerts

*related media releases:*

*file references:*

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