

TA 2009/16 - Circumvention of in-house asset rules by self-managed superannuation funds using related party agreements

⚠ This cover sheet is provided for information only. It does not form part of *TA 2009/16 - Circumvention of in-house asset rules by self-managed superannuation funds using related party agreements*

⚠ The Taxation Office view on this arrangement is set out in Self Managed Superannuation Funds Ruling [SMSFR 2009/4](#)

⚠ This document has changed over time. This version was published on *10 June 2009*



Taxpayer Alert

TA 2009/16

FOI status: may be released

Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax planning issues or arrangements that the Australian Taxation Office has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed.

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 tax officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the Tax Office 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 Tax Office. In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.

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 are of concern to the Tax Office. These issues will generally require more detailed analysis to provide the Tax Office view to taxpayers.

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert might obtain their own advice or contact the Tax Office to seek guidance in relation to the income tax and superannuation regulatory issues covered in the Taxpayer Alert.

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

TITLE: Circumvention of in-house asset rules by self-managed superannuation funds using related party agreements

This Taxpayer Alert describes an arrangement where a self-managed superannuation fund (SMSF) enters into an agreement (sometimes referred to as a joint venture agreement) with a related trust to acquire assets such as rental property in order to obtain certain taxation and superannuation benefits. The Tax Office is concerned that such an arrangement may breach the superannuation in-house asset rules.

Context for the arrangement

Subject to limited exceptions, an investment in or loan to a related party by an SMSF is an in-house asset. SMSF trustees are prohibited from acquiring an in-house asset if, after the acquisition, the market value of the SMSF's in-house assets exceeds 5% of the total market value of the fund's assets. SMSFs are also prohibited from maintaining a level of in-house assets in excess of the 5% limit. Where in-house assets for an SMSF exceed the 5% limit, the trustee needs to rectify the breach, usually within 12 months.

The contravention of these provisions may result in the SMSF becoming a non-complying superannuation fund for tax purposes, i.e. subject to 45% tax rates on its income (and assets other than undeducted

contributions in the year that the fund becomes non-complying). In certain circumstances, the fund's trustee may also be liable to civil or criminal consequences.

Description

This alert applies to arrangements with features that are substantially equivalent to the following:

1. A trustee of an SMSF ('the trustee') pays a fee to an organiser ('the organiser') to set up an agreement, possibly referred to as a 'joint venture agreement' ('the agreement'), between the SMSF and a related trust ('the trust').
2. The trust may be a hybrid trust of the type described in [Taxpayer Alert TA 2008/3 Uncommercial use of certain trusts](#) and [Taxpayer Alert TA 2008/4 Self-managed superannuation funds deriving income from certain uncommercial trusts](#).
3. The organiser claims that the purpose of setting the agreement is to buy investments to provide mutual financial rewards to the SMSF and the trust.
4. Under the agreement, the SMSF contributes capital to fund the acquisition and possible development of an asset ('the asset'), typically real property, which is acquired by the trust.
5. Typically the agreement would state that the SMSF acquires no legal, equitable or other interest in the asset.
6. In exchange for the capital contribution, the agreement provides the SMSF with rights to a proportionate share of the profits from the commercial usage of the asset from the trust. Therefore, the return on the investment, and the investment risk, is dependent on the trust.
7. The trust uses the funds from the SMSF (e.g. 15%) and a borrowed amount (e.g. 85%) to purchase and potentially develop the asset.
8. The borrowed amount the trust puts towards the investment in the asset (e.g. 85%) may come from the following source(s):
 - the trust borrows an amount from a financial institution; and/or
 - an individual borrows an amount from a financial institution and subscribes units in the trust.

The asset may be used as security for the above borrowing(s).
9. Legal title in the asset lies with the trust and not the SMSF.
10. In some cases, the asset may be leased to a member or members either at market rate or below market rate.
11. The benefits arising from the investment i.e. rents and profits from the sale of the asset are split in proportion to the risk capital invested by the SMSF and the trust based on gross proceeds (e.g. 15% to the SMSF and 85% to the trust). The trust pays all expenses.
12. The SMSF can make further capital contributions to the arrangement via variation/amendment to the agreement to increase its financial risk.
13. The organiser may allege that the arrangement falls outside previous negative Tax Office view (such as ATOID 2006/335) on similar arrangements without any qualification regarding materially different facts.
14. The organiser charges a fee for establishing this arrangement, based upon the perceived commercial advantages of the promoted superannuation regulatory and taxation benefits.

Features which concern us

The Tax Office considers that arrangements of this type give rise to the following issues:

Superannuation regulatory issues

The Tax Office considers that arrangements of this type give rise to the following issues relevant to the application of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and Regulations, being whether:

- a. the in-house asset provisions may not be met as there has been an investment by the SMSF in a related party which is over the 5% limit;
- b. section 85 of the SIS Act, which prohibits a fund from entering into any scheme to avoid the application of the in-house asset rules, may have been breached;
- c. the restriction on SMSFs intentionally acquiring assets from a related party under section 66 of the SIS Act may have been breached; and
- d. the sole purpose test under section 62 of the SIS Act may have been breached e.g. where a purpose of the fund investment is to obtain a present day benefit for fund members or a related party, rather than for the purpose of providing retirement benefits for the members.

Taxation issues

The Tax Office considers that arrangements of this type give rise to the following issues relevant to taxation laws, being whether:

- e. income derived by the SMSF under the agreement may be 'non-arm's length income' for the purposes of section 295-550 of the *Income Tax Assessment Act 1997* (ITAA 1997) and therefore is subject to a higher rate of tax;
- f. the borrowing expense incurred by the individual taxpayer or the trust may be deductible under section 8-1 or section 25-25 of ITAA 1997, and the extent to which it is deductible;
- g. any capital gains tax consequences may arise e.g. when trust interests are redeemed, new interests are issued or upon the disposal of the property;
- h. any fee or commission paid should not be allowable as a deduction by the SMSF for that income year;
- i. the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) may apply to the arrangement;
- j. any fee or commission received by the organiser/s of this arrangement should be included as assessable income for the relevant income year; and
- k. any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

The Tax Office is currently examining these arrangements.

The Tax Office issued Draft Self Managed Superannuation Funds Ruling SMSFR 2008/D5 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 which outlines when a transaction between the SMSF and a related party will be regarded as an investment in that related party

(refer paragraph 17 of the draft ruling)

Note 1: Base penalties of up to 75% of the tax avoided can apply where someone makes a false or misleading statement to the Commissioner. Reductions in base penalty will be available if the taxpayer makes a voluntary disclosure to the Tax Office. If you have any information about the current arrangement, phone us on **13 10 20**. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this alert should call the tax practitioner integrity service on **1800 639 745**.

Note 2: Penalties of up to 5,000 penalty units for individuals, 25,000 penalty units for bodies corporate or up to twice the amount of consideration received or receivable may apply to promoters of tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953. The Commissioner can also apply to the Federal Court of Australia for restraining and performance injunctions against promoters where prohibited conduct has occurred, is occurring or is proposed.

Note 3: Where appropriate, section 167 of the ITAA 1936 may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, [PSLA 2007/7](#) and [PSLA 2007/24](#).

Subject References:

Self-managed superannuation fund
Joint venture agreement
Related party
Related trust
Discretionary trust
In-house assets
Sole purpose test
Non-arm's length income

Legislative References:

Superannuation Industry (Supervision) Act 1993
62
66
85
Income Tax Assessment Act 1997
8-1
25-25
295-550
Income Tax Assessment Act 1936
167
Part IVA
Taxation Administration Act 1953
Division 290 of Schedule 1

Related Rulings:

SMSFR 2008/D5

Related Taxpayer Alerts:

Taxpayer Alert 2008/3
Taxpayer Alert 2008/4

Related Practice Statements:

PS LA 2007/7
PS LA 2007/24

Other References:

ATO ID 2006/335

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