

Controversial TA 2010/2 and excess contributions

Controversial Taxpayer Alert 2010/2 was withdrawn on 29 November 2011. This alert questioned the effectiveness of certain SMSF deed clauses that reject excess contributions.

These clauses have historically been used by SMSF trustees to reject contributions that would cause SMSF members to exceed their contributions caps.

In the alert the ATO questioned whether such clauses were effective and further questioned whether amounts rejected under such clauses could nevertheless attract excess contributions tax.

The ATO warned that they were considering whether entities involved in such arrangements could be subject to the promoter penalty provisions (outlined in div 290 of sch 1 to the *Taxation Administration Act 1953* (Cth)).

The withdrawal of TA 2010/2 coincided with the government's announcement on 29 November 2011 that legislation will be introduced that deems SMSF trustees to have:

accepted such contributions, notwithstanding the trust deed clause, if the contributions have not been returned promptly and have in effect been intermingled with assets of the fund.

The specifics of the proposed new legislation have not yet been released. We will keep our clients updated on developments in our regular email news.

DBA's SMSF deed

Prior to TA 2010/2, our SMSF deed had a rejection clause to ensure that members stayed within their contributions caps. The withdrawal of TA 2010/2 means that clients with our SMSF deed drafted before TA 2010/2 do not need to take any further action.

DBA Lawyers views such clauses as legally valid and we consider the withdrawal of TA 2010/2 is confirmation of this view.

Nevertheless, after TA 2010/2 we felt the most practical course of action was to remove the rejection clauses. We did so shortly after TA 2010/2 was released.

Accordingly, clients with deeds issued after TA 2010/2 also do not need to take any further action.

Naturally, before acting on any rejection clause you should obtain expert advice.

Recent excess contributions AAT decision

The recent AAT decision of *Rinaldo and Commissioner of Taxation* [2011] AATA 839 highlighted that member contribution statements ('MCS') cannot be amended in order to achieve a more convenient excess contributions tax position.

Mr Rinaldo had excess contributions of \$150,000 allocated to his member account in his SMSF. He then sought to alter this by re-allocating the excess contributions to his wife (by lodging updated member contribution statements).

The AAT member held that a taxpayer cannot retrospectively organise his affairs to achieve a more convenient outcome. As such, the Commissioner's assessment of \$150,000 excess non-concessional contributions for 2006–07 was affirmed.

The AAT member also noted that the (excess) mistake was not covered by the legal doctrine of restitution for unjust enrichment (ie, broadly allowing a refund) because the payment was intended to be a contribution but unintentionally exceeded his caps. (This is contrasted with a mistake relating to payment, for example, in to an incorrect bank account: see ATO ID 2010/104.)

This is another unfortunate excess contributions tax decision where an oversight has resulted in substantial tax.

SMSF and property development checklist

Using SMSFs as a vehicle to develop property has gained momentum in recent times, particularly due to uncertainty surrounding global equity markets.

Remuneration of trustees

The Tax Laws Amendment (2011 Measure No. 9) Bill 2011 (Cth) was introduced on 23 November 2011. This bill outlines certain restrictions on remuneration for services performed by trustees.

The bill requires that trustees must be appropriately qualified, perform services in the ordinary course of a business and the dealings must be at arm's length.

This may impact SMSFs developing property that seek to employ the trustee as a builder or project manager. For example, an SMSF trustee who is also a builder wants to develop property and be paid. They would need to be a registered or licensed builder with appropriate insurance cover, etc.

Property development checklist — outright investment and development

Where an SMSF invests in and develops property via direct investment, the following should be considered.

Superannuation issues

- Sole purpose test — is the property being used for the members' retirement purposes?
- Related party acquisitions — is the property being purchased from a related party? If there is a related party, eg, builder, are building materials (as compared to services) being acquired from a related party in contravention of s 66 (see SMSFR 2010/1)?
- Borrowing — in SMSFR 2011/D1 the ATO has outlined that borrowing to develop property is not permissible.

- Arm's length — are all of the trustee's dealings at arm's length? Are relevant transactions supported with evidence?
- No charges over fund assets — most building contracts include these and need to be amended accordingly.
- Investment strategy — does this take into account the investment and development?
- Does the trust deed allow for the course of action and is the trustee acting within power?

Commercial issues

- Cash flow — does the SMSF have additional funds to support cost blow outs on the development?
- Trustee remuneration is restricted – see above — and must be benchmarked at arm's length.
- Consider risk minimisation strategies — eg, a sole purpose corporate SMSF trustee and appropriate liability insurance.

We recommend a detailed review be undertaken before any building or development project commences to ensure all items are covered off and appropriately documented.

DBA Network's upcoming events for 2012

Online SMSF Updates — four sessions in 2012

Following a successful first year of Online SMSF Updates, DBA Network is pleased to announce that they will be hosting four sessions throughout 2012. DBA Network's next SMSF Online Update is on Friday 10 February 2012. These timely updates can be accessed anywhere via your computer. Keep right up to date with SMSF changes.

Quarterly SMSF Seminars

DBA Network's next round of Quarterly SMSF Seminars will be held in eight different locations around Australia during March 2012 and will include topics on SMSFs and property development, contraventions of superannuation law and a brief SMSF update.

Newcastle Seminars in 2012

Due to a successful November launch in Newcastle, DBA Network will be presenting two more seminars in Newcastle during 2012 on the 8 March 2012 and 23 August 2012. These seminars will cover the same topics as the March and August Quarterly SMSF Seminars. DBA Network's website will soon be updated for these two seminars.

To register for these events, or for more information, visit <http://www.dbanetwork.com.au>.

For further information please contact:

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