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NEWS

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Got a non-geared unit trust? Critical action by 30 June

There is critical action that all SMSFs with non-geared unit trusts must consider by 30 June ... come 1 July it may be too late!

Background

Generally speaking, an SMSF can't invest in a related unit trust. However, a number of exceptions exist. One key exception is:

- upon acquisition — that unit trust meets the criteria set out in reg 13.22C of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) and
- none of the conditions set out in reg 13.22D of the SISR have occurred after acquisition.

The criteria include that the unit trust has no borrowings.

Accordingly, such unit trusts are often referred to as 'non-geared unit trusts' or 'reg 13.22C unit trusts' or 'div 13.3A unit trusts' (because these conditions are contained in div 13.3A).

The typical scenario

Many SMSFs own units in related non-geared unit trusts. These unit trusts typically own real estate.

The SMSF may well want to purchase further units in the unit trust. This could be because the unit trust needs more money to acquire new real estate or improve existing real estate.

Alternatively, it might be because the unit trust has declared distributions to the SMSF and the SMSF wants to offset them rather than receive cash.

Assuming the conditions in div 13.3A are satisfied, the SMSF is typically able to acquire further units.

Legislative change

The Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013 (Cth) proposes to implement a requirement that would mean that any further units acquired in a non-geared unit trust must be acquired at market value *as determined by a qualified independent valuer*.

This change would apply to all units acquired from 1 July 2013. See the proposed s 66A(3)(d)(ii): www.comlaw.gov.au/Details/C2013B00016

Who is a 'qualified independent valuer'?

The logical person to determine the market value is the accountant who prepares the financial statements of the SMSF and the unit trust. That accountant may well be *qualified*.

However, is that accountant also *independent*?

The Bill does not define qualified independent valuer, but the explanatory memorandum states:

> The valuer ... should be impartial, unbiased and not be influenced or appear to be influenced by others.

If the accountant has been remunerated by the SMSF and/or unit trust for many years, it is difficult to say that the accountant *appears* independent.

Does a new accountant need to be engaged each time SMSFs buy units?

Interpreted strictly, the new law may well mean that, from 1 July 2013, each time an SMSF wishes to invest more money in a non-geared unit trust, a new accountant needs to be engaged to determine the market value of the units.

We would hope that a practical approach would be taken in administering the law and the current accountant could determine the market value.

However, even in this situation, performing the full market value determination each time the SMSF wants to acquire further units could give rise to significant accounting costs.

Is there a more practical solution?

We suspect there is a more practical solution, but only for those who act promptly. Firstly, consider the 'mischief' that this law is aimed at, namely the:

> ... risk that related party transfers that occur 'off-market' or outside a formal market may involve transaction date or asset value manipulation to illegally benefit the SMSF or related party, for example, by circumventing the contribution caps and avoiding tax liabilities.

However, where the SMSF owns all the units in the non-geared unit trust, this risk does not arise. Nevertheless, the new law will apply to such SMSFs.

In light of this, consider an SMSF that subscribes for a significant number of units *before* 1 July 2013. The units might only be partially paid.

As the non-geared unit trust needs more money, it might simply call on some or all of the unpaid portion, even if the call occurs after 30 June 2013.

This course of action should be effective because typically an asset is 'acquired' when the contract is signed and/or registered in the acquirer's name, not when full and final payment of the purchase price occurs.

Certainly, this would be consistent with the CGT provisions (see div 109 of the *Income Tax Assessment Act 1997* (Cth)).

Case study

A super fund owns all of the units in a unit trust established in 2006. The unit trust holds real estate.

The fund wishes to reinvest all distributions. Before 1 July 2013 the fund acquires 50,000 units for a market value of $4.10 each, however, the units are partially paid to the extent of $1 each. In 2014, the unit trust needs $45,000 and makes a 90¢ call in respect of all partly paid units.

The fund pays $45,000 (ie, 50,000 x 90¢) and because the fund is not acquiring any new units, no qualified independent valuer is required.

Documenting such an arrangement

Naturally, for such a course of action to be effective, the documentation implementing it must be effective.

New Kit To Help!

DBA Lawyers have just launched the Unit Trust Compliance Kit (see below).

This kit provides template documentation to implement partially issued units along with many other helpful templates for popular unit trust transactions.

Naturally care must be taken to ensure the unit trust deed allows for partially issued units and the situation becomes more involved if the SMSF is not the only unitholder.

Similarly, stamp duty and the quantum of distributions in respect of partially paid units should be carefully considered too.

Many Other Kits Too

DBA Lawyers offers many other kits, ranging from pension kits to wind up kits. For more details visit www.dbalawyers.com.au/strategy-compliance-kits

Unit Trust Compliance Kit

The Unit Trust Compliance Kit contains helpful commentary and template documentation to implement many popular unit trust strategies, such as: • Partially issued units in light of legislative change; • Issuing further units (following the initial subscription); • Cancellation of units; • Transfer of units — change in trusteeship of unitholder; • Transfer of units — death or incapacity of unitholder; • Transfer (including by way of sale) of units to related entities; • Sale of units to third parties; • Distribution of income; • Distribution of capital; • No distribution being made (due to a loss within trust); • Redemption of units; and • Return of paid up capital to unitholders

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'I want to order a Unit Trust Trustee Compliance Kit ($440)'

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Email, post or fax to DBA Lawyers Pty Ltd. Don't send any money. You will be invoiced upon receipt of documentation. Kit can be used an unlimited number of times by the firm ordering for your unit trust clients

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