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Creeping acquisitions of property via unit trusts ('UT')

UTs can offer considerable flexibility for SMSFs wanting to acquire property.

Where an SMSF has insufficient funds to purchase property, a UT can instead be used to purchase the property and the SMSF makes creeping acquisitions of units in the UT over time (eg, by acquiring units from unit holders or by the UT issuing fresh units).

However, there are a number of issues that must be considered before an SMSF acquires units in a UT.

In-house asset rules

Where the UT is a related trust of the SMSF, units acquired in the UT will generally be in-house assets ('IHA') and therefore subject to the 5% IHA ceiling. However, provided that the UT remains non-geared (and satisfies further criteria relating to its investments), the SMSF may invest, or continue to invest, in the UT and such investments will not be considered IHAs.

Acquiring assets from a related party

Section 66 of the *Superannuation Industry (Supervision) Act 1993* (Cth) prohibits an SMSF from acquiring assets from a related party of the fund, unless the acquisition falls under an exemption.

Exemptions from section 66 apply to the purchase of business real property ('BRP') and units in a non-geared UT acquired at market value.

Broadly, an acquisition of units at market value from unit holders in the UT (who are, eg, also members of the SMSF), or by the issue of fresh units in the UT to the SMSF, will not be in breach of section 66.

Look-through approach

Even if the above conditions are satisfied, there is a risk that the ATO will deem the acquisition of units to be in breach of section 66 if the property is not BRP. This may be the case where the ATO applies the 'look-through approach' (ie, it looks to the assets underlying the UT, not just the units themselves) in considering the section 66 exemptions.

Capital gains tax ('CGT') and land rich considerations

The CGT and duty implications of the acquisition of units should also be considered. In particular, the relevant land rich provisions may apply if the value of the property in the UT exceeds the land rich threshold in the particular State.

Compulsory super cashing – abolished in law?

2006 budget

The budget proposed to abolish compulsory payment of benefits to members aged over 65 who do not meet the work test (240 hours in the prior fiscal year). That is, there would be no forced payment of superannuation benefits after age 65.

However, this change was proposed to take effect from 1 July 2007. This left many advisers asking what happens to clients who turn 65 between budget night and mid 2007.

APRA declaration

APRA have announced that the requirement for compulsory cashing of benefits is removed, effective 10 May 2006. APRA has done this by releasing a modification declaration that inserts extra provisions into the SISR. This gives effect to a recent press release by the Treasurer stating that compulsory cashing would be removed, effective 10 May 2006.

A word of caution

We are aware of many superannuation commentators who are treating APRA's declaration as having modified the law. However, it is the 'Regulator' who is empowered to make modification declarations. Naturally, the 'Regulator' of SMSFs is the Commissioner of Taxation, not APRA.

We would be surprised if the ATO would administer the law contrary to APRA's declaration and the Treasurer's press release. However, strictly speaking, the compulsory cashing requirements still apply to SMSFs.

We are currently seeking confirmation from the ATO as to how they will administer the law.

Spotlight on tenants-in-common agreements

What is a TIC agreement?

A TIC agreement is a document outlining the conditions relating to ownership of land which is

owned as 'tenants in common'. Where land is owned as tenants in common, one party owns one share of the land and another party owns the other share. TIC agreements typically cover situations such as:

- What happens if one land holder wants to sell their portion of land but the other does not?
- What happens if one land holder wants to sell at one price but the other demands a higher price?

Relevance for super funds

Often super funds want to buy land but do not have enough cash and cannot borrow. Therefore, they buy a portion of the land themselves and another party buys the rest of the land. The other party is often a related party (eg, the members). The land *must* be owned as tenants in common.

The existence of a TIC agreement helps show that the super fund is complying with the arm's length requirements.

Further, without a TIC agreement, the super fund might be required to purchase the other portion of land. If the other party is related, this could breach s 66 of SISA.

TIC agreements also deliver considerable certainty and peace of mind, as well as having other benefits.

For more information about TIC agreements, please visit www.dbabutler.com.au/index.php?p=TIC

Contribution splitting isn't dead

When contribution splitting was introduced, most viewed it as a method of managing excessive RBLs. With the proposed scrapping of RBLs, contribution splitting fell out of favour. However, there are still situations where contribution splitting can be beneficial.

Consider a husband and wife, and the husband is in a higher tax bracket. The wife may well have less money in super and wants to salary sacrifice. Overall, the couple pay less tax if the husband sacrifices and then splits the contributions to his wife.

Contribution splitting can also be useful where a member accesses lump sums before 60. By splitting contribution, the member can keep their taxed component under the tax free low-rate threshold ($135,590 in 2006–07).

In order to engage in contribution splitting, the fund's deed must allow for it. For more information about amending deeds to allow for contribution splitting, see www.dbabutler.com.au/index.php?p=SDV

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