

## **Private Rulings ('PR')**

Applying to the Commissioner for a PR may be desirable for seeking clarification of the Commissioner's treatment of a proposed transaction. Alternatively, a PR may be seen as a strategic tool to be used in bringing about the jurisdiction of the Administrative Appeals Tribunal ('AAT') to review a decision of the Commissioner or to appeal to the Federal Court ('FC') where an adverse PR may be given.

However, the ability to seek review or to appeal is dependent on the AAT or FC having jurisdiction. Amongst other requirements, this hinges on whether a PR exists against which the taxpayer is 'dissatisfied'. In the case of a PR which relates to a proposed transaction, this means that the transaction must be such that if entered into, would fall within the PR. If the PR relates to a year of income which has passed before the review or appeal has been instituted (or heard) and therefore cannot affect the taxation liability of the taxpayer, the taxpayer will not be a person dissatisfied.

It is therefore important that, when applying for a PR for clients who propose to do something in a future year of income, you plan for the future. An application should be made not only in relation to the current year of income, but also numerous future years of income.

Failing to plan ahead may mean that your client may be left with a PR application in respect of a year of income that has passed if they have not instituted the proposed transaction which will result in them being without any jurisdiction, meaning they will have to recommence the entire PR process again.

## **Negatively gearing overseas rental properties**

If you have overseas investment property tax deductions which are greater than your overseas rental property income, you will have a foreign income loss. Due to the operation of the foreign loss quarantining rules, the foreign rental losses cannot be used to reduce your Australian income. However, you may be able to use your losses to reduce similar foreign income.

However, interest on borrowings to purchase foreign property can still be claimed against your other Australian assessable income, ie, you can negatively gear interest on foreign property without the interest being quarantined by the foreign loss rules. This is not a very well known fact and is even omitted from the ATO's recent booklet *Tax smart investing – Australian residents with overseas real estate*.

## **Franking credits and life tenants**

Presently, income beneficiaries of testamentary trusts created under a Will (such as life tenants) are denied franking credits unless a family trust election ('FTE') is made. This is because they are not deemed to be holding the shares 'at risk' under the holding period rules. This is illustrated by the example below:

*Mary is the life tenant of a share portfolio under her late husband's testamentary trust established under his Will. The trust holds shares in various companies from which franked dividends are received. Mary, as a beneficiary, is entitled to a share of the income of the trust, but she has no entitlement to the corpus of the trust. Due to the operation of the holding period rules, Mary is denied entitlement to the benefits of the franking credits (where the franking credits attached to these dividends exceed the \$5,000 small shareholder exemption).*

However, the law will be amended with effect from 1 July 2002 to overcome this limitation. The change will give life tenants the benefit of the franking credits and there may be some opportunity for FTEs to be revoked.

# Can SMSFs with individual trustees pay ETPs?

A hot topic recently has been the difficulties of SMSFs with individual trustees paying ETPs. This has generated a lot of queries from advisers seeking further information. This article is a brief summary of the current situation.

Where the trustees of an SMSF are individuals, the fund's governing rules must require that the sole or primary purpose of the fund is the provision of old-age pensions. Accordingly, where the trustees are individuals and a member wants to take out an ETP rather than a pension, the member must first request the payment of a pension entitlement. Secondly (usually on the next day), the member must request that that pension entitlement be surrendered or exchanged for an ETP. (In contrast, where an SMSF has a company acting as trustee, it can pay an ETP without first commencing a pension.)

The individual trustees should document this two step process. While this process does not result in any pension ever being commenced or paid or any document being lodged with the ATO reporting the commencement of a pension, the regulatory authorities have generally accepted this approach.

Unless the appropriate documents are in place, significant penalties can arise. A breach of superannuation law can result in the fund losing its status as a complying superannuation fund. Furthermore, if money is accessed from a superannuation fund without a valid condition of release being satisfied, the amount accessed can be taxed as ordinary income rather than attracting concessional tax treatment as an ETP.

The requirement to pay a pension where the fund does not have a company acting as trustee is due to constitutional requirements. In the absence of a company acting as trustee, the fund must have a sole or primary purpose of paying old-age pensions. Given the proposal to reduce the ASIC incorporation fee to \$400 (currently \$800) from 1 July 2006, there will be more acceptance for having a corporate trustee.

The fund's trust deed must also be inspected to ensure it is fully complied with. Where there are individual trustees, the deed must specify that the sole or primary purpose is the provision of old-age pensions. Legal advice should be obtained if the deed needs any amendment.

Note that there is a big difference between the commencement of a pension and its subsequent commutation compared to the surrendering of a pension entitlement. If a pension is commenced, all relevant ATO forms must be completed and lodged and the minimum pension must be paid.

DBA Butler's SMSF Trustee Minute Kit, which provides examples of over 20 trustee resolutions, includes sample resolutions to help individual trustees of SMSFs document the steps involved in paying ETPs.



---

## Order the SMSF Trustee Minute Kit

'Yes, I want an SMSF Trustee Minute Kit for \$150 incl GST'.

Signature \_\_\_\_\_ Name of person ordering \_\_\_\_\_

Name of Firm \_\_\_\_\_

Postal address of firm \_\_\_\_\_ State \_\_\_\_\_ Postcode \_\_\_\_\_

Tel \_\_\_\_\_ Fax \_\_\_\_\_ Email \_\_\_\_\_

Don't send any payment. You will be invoiced upon receipt of the kit.

For further information please contact:

**DBA BUTLER PTY LTD, Lawyers**, 23 Union Street, South Melbourne Vic 3205  
Ph 03 9682 0903 Fax 03 9682 0907 [dba@dbabutler.com.au](mailto:dba@dbabutler.com.au) [www.dbabutler.com.au](http://www.dbabutler.com.au)

DBA News contains general information only and is no substitute for expert advice. Further, DBA is not licensed under the *Corporations Act 2001* (Cth) to give financial product advice. We therefore disclaim all liability howsoever arising from reliance on any information herein unless you are a client of DBA that has specifically requested our advice.

✓ Superannuation ✓ Tax ✓ Succession Planning