DBA Butler Pty Ltd Lawyers

NEWS

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Pension Regulations Finalised

Pension regulations have been finalised clarifying the way the new account-based pensions ('ABP') will operate from 1 July 2007. ABPs require a minimum annual payment amount to be paid to the pensioner each financial year and no maximum applies.

The minimum annual payment amount is based on the pensioner's super account balance on 1 July each financial year multiplied by the percentage factor which is based on the pensioner's age. In the first year, the pension payment is based the account balance and age of pensioner on the commencement date and the factor is pro-rated for the number of days the pension is in place for that financial year.

One issue for some people is: do I start an allocated pension ('AP') now or an ABP after 1 July 2007? In brief there appears to be no material difference between the two pensions. The key differences appear as follows:

	AP	ABP
Can be commenced	prior to 20/9/07	from 1/7/07
Pension Payment	between min & max	above min only (see above)

Naturally, the decision to take an AP or ABP prior to or after 30 June 2007 will depend on a person's overall circumstances including income and estate planning needs.

For example, by splitting undeducted and post-June 1983 components and commencing two APs prior to 1 July 2007 a person can provide the undeducted AP to an adult child on their death as a lump sum almost tax free. Whereas with an ABP the person cannot direct components and hence extra tax on death may arise when a death benefit is paid to an adult child. Accordingly, some may wish to commence an AP prior to 1 July.

A potential strategy to minimise the impact of the new proportioning rule is to establish another fund account (eg, in another public offer fund or a second SMSF) prior to making a large undeducted contribution. This will allow this superannuation interest to be dealt with separately on death. However, this must have regard to administration and related costs and while it may provide extra flexibility may add some complexity.

DBA has extensive superannuation and estate planning expertise to provide sound legal advice.

Business Real Property

There have recently been substantial transfers of business real property ('BRP') into super as members seek to utilise the pre-1 July 2007 $1 million cap on undeducted contributions. This strategy may also be useful after 30 June 2007 under the post-30 June contribution limits.

An effective transfer of BRP requires proper prior planning to assess the viability of each proposal and careful implementation of each transaction. We have encountered a range of tax, super and general legal issues that typically arise in these transfers some that have knocked the proposal on the head.

What are the relevant tax issues?

Transfers of BRP give rise to stamp duty, CGT, GST and land tax considerations. We note that the GST issues are often overlooked and a liability may easily arise where BRP is initially distributed from a family trust to a beneficiary before being contributed to a super fund.

This occurs because GST of 10% can be payable on a transfer even where there is no consideration (eg, a distribution from a trust to beneficiaries). Careful analysis of the GST anti-avoidance issues need to be considered if beneficiaries seek to become registered to hold BRP for a short time before contributing it to their super fund.

It is therefore critical to consider each party's GST registered status and obtain advice on the associated risks of any transfer. Alternative options for contributing BRP to super may be available, depending on the facts of each case. One alternative may give rise to Victorian stamp duty but involves less risk.

We also find that in some cases little attention has been paid given to the small business CGT concessions as a BRP may have been rented to a connected entity. The CGT concessions may still apply.

Further, the stamp duty relief for these transfers may appear straight-forward but state revenue offices

closely scrutinise whether each transfer qualifies for exemption.

What super rules must be complied with?

Naturally, transfers must also comply with the usual regulatory requirements. These include:

- The property must be free of any charge or mortgage. The property cannot therefore be used as security for borrowings once owned by an SMSF.
- All property must be acquired on an arm's length basis. This means that the property must be recorded in each member's account as being received at market value. A valuation should be sought from an independent registered valuer. A lease agreement with a commercial rate of rent and arm's length terms is also required.
- Any acquisition by a fund must be in accordance with its investment strategy. Further, investments must be made in the best interests of providing retirement benefits for the members, eg, will cash flow fund future pension payments, having regard to the minimum annual payments?

What other issues can arise?

We have also found that family trust and super fund deeds sometimes do not permit this strategy as they contain insufficient powers to distribute or accept property in the manner contemplated. A thorough review of all prior documents should therefore be undertaken to rectify any issues and in the case of SMSF deed to update them.

Conclusion

Transferring BRP may be an ideal way to contribute to super, provided it is done properly. However, if any step is overlooked severe penalties can be imposed.

Contributions Splitting Update

Following DBA's March feature on this topic, recent regulations have now confirmed that contributions splitting for undeducted contributions had to be contributed before 6 April 2007 and the split must be finalised before 30 June 2007 to ensure that it is not converted to a taxable component. Future splits of undeducted contributions are included in the taxable component. This change was unexpected and limits the potential for evening up a spouse's account balance in the future.

Do your SMSF deeds need updating?

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Laws are changing all the time and heavy penalties can apply in the event of non-compliance (eg, loss of concessional tax status). To assist in determining which deeds need to be upgraded, we offer the following general guidance:

- Due to the enormity of the recent superannuation reforms, we recommend that all deeds be reviewed. This is particularly critical where the members of an SMSF intend to consider superannuation or retirement planning in the near future.
- We acknowledge that if deeds have been updated recently, trustees may prefer not to upgrade them again immediately and may do so on a case-by-case basis. We strongly recommend, however, that such deeds be reviewed in detail before any major decision is implemented, eg, commencing an income stream, making substantial contributions, splitting a contribution with a spouse or undertaking their estate planning.

If you are upgrading SMSF deeds a review of your supplier should be undertaken to ensure they are up-to-date and skilled to undertake such work. We believe that a review of each prior deed is required for each upgrade. Moreover, unless the supplier is aware of the need to grandfather defined benefit pension and certain other provisions, significant penalties can exist. We are pleased to provide a checklist for determining whether a supplier is likely to be adequate: visit http://www.dbabutler.com.au/download/dba_deed_suppliers_checklist.pdf.

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