

Special SMSF paper — University of Melbourne

Bryce Figot from DBA Lawyers recently presented the SMSF component of the subject 'Superannuation Law', which is part of the University of Melbourne's Law Masters course. Bryce prepared a detailed paper for the Masters students. The paper focuses on the key legal areas of SMSFs and contains summaries of key cases and AAT decisions that impact upon SMSFs.

As a special 'value add' to newsletter subscribers, DBA Lawyers are pleased to make this paper available. You can download the paper [here](#).

Recent AAT Decisions affecting SMSFs

This month's version of DBA News focuses mainly on two recent decisions regarding superannuation.

Firstly, *ZDDD v Commissioner of Taxation* highlights the importance of rectifying a contravention of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA').

Similarly, *Johnson v Commissioner of Taxation* highlights the importance for members and advisers to be diligent with paperwork.

ZDDD v Commissioner of Taxation

The decision in *ZDDD v Commissioner of Taxation* encourages SMSFs to take any contravention of the SISA seriously.

Facts

Mr K, a lawyer, and Dr K, his wife, were directors of the corporate trustee and members of the K Superannuation Fund (an SMSF).

The SMSF owned units in a pre-1999 unit trust ('K Unit Trust'), which had investments in several properties.

Mr K had run a legal practice since the 1980s. Between 1996 and 1998, he employed a practice manager, who was charged with fraud related offences in relation to Mr K's firm's accounts. As a result, Mr K had to refinance in order to pay off his

loans. Mr K sold some of the properties owned by the K Unit Trust to pay his debtors.

The refinancing resulted in a loan from the K Unit Trust to Mr K of \$190,410.70 during the 2005 income year. Since that income year, the loan was never repaid.

In July 2009, the Commissioner contacted the SMSF to advise that the SMSF might be made non-complying. In response, Mr K offered to put an interest-only loan agreement in place with effect from 2009 (ie, several years after the money had left the unit trust).

The Commissioner did not accept this and in December 2009 the Commissioner issued a notice of non-compliance. Despite Mr K offering further undertakings during 2010, the Commissioner refused to withdraw the notice. The AAT confirmed the Commissioner's decisions in January 2011.

Contraventions of SISA

The Commissioner formed the view that the facts gave rise to three contraventions of the SISA that could potentially lead to the SMSF losing its status as a 'complying superannuation fund'. These were described as:

- the sole purpose test (ie, the SMSF was not being maintained for prescribed purposes);
- provision of financial assistance to fund members; and
- investments in a related party (ie, K Unit Trust) without ensuring the related party investments were made on commercial and arm's length terms.

Lack of action leads to non-compliance

The facts illustrate that if an SMSF contravenes the SISA, this doesn't necessarily lead to non-compliance. It was Mr K's failure to take the matter seriously which appears to have forced the Commissioner's hand.

A better outcome may have followed if Mr K had rectified the contraventions by paying the money back to the K Unit Trust with appropriate interest and appropriate documentation was put in place.

Indirect actions can lead to non-compliance

The K Unit Trust lent to Mr K, rather than the SMSF itself. However, the SMSF still had to explain why it

continued to hold units in the K Unit Trust. The Commissioner has effectively adopted a 'look through' approach to the transactions of the K Unit Trust. The AAT member found that the seriousness of the contraventions weighed in favour of issuing a notice of non-compliance.

Lesson

If a contravention occurs, positive action needs to occur to fully rectify the contravention immediately or as soon as possible.

Johnson v Commissioner of Taxation

Facts

The taxpayer, Mr Johnson, sold property in the 2008 income year. He received advice from his accountant, to deposit the sale proceeds into superannuation.

To claim a deduction for a personal superannuation contribution, a valid notice must be given to the trustee of a superannuation fund in an approved form (ie, NAT 71121) before their tax return is lodged, or by the end of the next income year. Mr Johnson did not give a valid notice to the trustee of his fund. By the time the ATO had denied Mr Johnson a deduction of \$40,000, the allowable period for lodgement of the

notice had lapsed. An administrative penalty of 25% (being \$10,000) was also charged by the ATO.

Decision

The AAT found that the accountant had failed to take reasonable care in his dealings with Mr Johnson. The accountant had assumed that the paperwork had been taken care of. The administrative penalty was ordered to be remitted. The AAT found that a penalty of \$10,000 was too harsh for an oversight relating to this paperwork. The deduction was, nevertheless, disallowed.

Impact

This case highlights the importance of SMSF members giving a valid notice for personal contributions before their tax return is lodged.

Advisers should insist on seeing a valid notice before claiming a personal contribution and have this included in their year end checklists. A simple bit of paperwork can potentially save clients a lot of money.

Also, see our January 2011 newsletter regarding timing of these notices when someone commences a pension.

DBA Network — Upcoming Seminars

Online SMSF Update

The first of four Online SMSF Updates for 2011 is on Friday 11 February 2011 between 10 to 11.30am (Melbourne time). The session will cover hot topics including the latest cases, legislation, regulatory developments and other SMSF tips and traps.

Quarterly SMSF Seminars — March 2010

DBA Network's first round of Quarterly SMSF Seminars is fast approaching. The topics for our March seminars include:

- SMSF borrowing
- succession planning and SMSFs
- quarterly SMSF update

The seminars will be held in various cities around Australia between 2–11 March.

To register please visit www.dbanetwork.com.au. Alternatively, call Marie Zarifis on (03) 9092 9400 or email dba@dbanetwork.com.au.

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