

Can an estate or trust distribute or gift assets to an SMSF?

This topic has gathered some interest in recent times after the ATO considered the following issue:

Whether or not there is a breach of s 66 of the SISA, if an SMSF purchases residential property from the estate of a member's deceased uncle.

The ATO responded that the answer depends on whether the executor of the deceased estate is a related party of the SMSF. Where the executor was a relative, s 66 would be contravened. It is interesting to note that a 'relative' is defined in s 10 of the SISA to include, among others, a parent, grandparent, sibling, uncle, aunt, nephew, niece, lineal descendant of an individual or his or her spouse but not a cousin.

As a result of the ATO's response above, we have noticed several articles which suggest the logical extension of the above ATO analysis is that the parents could gift property via their estate by way of a specific gift in their will to their children's SMSFs provided the executor was not a relative. It was also claimed this strategy overcomes the contribution cap limits and was a prudent succession strategy.

DBA's analysis

Thus, when we have been asked to review the strategy, we examined, among other things, the following:

Would the value of the gift count as a contribution?

The ATO consider that a distribution from a discretionary trust to an SMSF is a contribution in its ruling on what is a contribution. The ATO state in TR 2010/1 that such an amount cannot be characterised as income, profit or gain from the use of the existing capital of the fund. Thus, based on this view, the ATO would treat a gift from a deceased person's estate to an SMSF subject to the usual contribution caps and any excess would be subject to excess contributions tax. Moreover, since the gift is made by someone other than the member, the member's concessional contributions cap would apply.

Do the non-arm's length income provisions apply to tax the gift at 45%?

The gift may well result in statutory income being received by the SMSF trustee for tax purposes. Several recent cases have confirmed that the predecessor of

the current non-arm's length income provisions apply to trust distributions of a net capital gain made to SMSFs: see *Allen v FCT [2011] FCAFC 118* and *SCCAS Holdings as trustee for the H&R Super Fund v FCT [2012] FCA 1052*.

Could the value of the gift be counted as both a contribution and non-arm's length income?

There is a general principle that taxpayers should not be subject to tax twice on the same income. However, the contribution rules are different to the non-arms' length income rules and we understand the ATO are willing to apply both provisions to discretionary trust distributions to SMSFs. Thus, we do not see why the ATO would not also seek to apply both of these provisions to a gift from a deceased estate.

Could the anti-avoidance provision in s 66(3) apply to prohibit the gift despite a non-related party being appointed as an executor?

This provision seeks to prohibit a person carrying out a scheme, or any part of it, if the person has the intent that the scheme would be likely to result in the acquisition of an asset by an SMSF trustee, where the asset is acquired from a person who has a connection (either direct or indirect through one or more interposed companies, partnerships or trusts) with a related party of the fund and the acquisition avoids the prohibition in s 66(1).

If, for instance, the deceased parents appointed an unrelated person as an executor to carry out a scheme that resulted in residential property being acquired by one of their children's SMSFs from their estate, that may be at risk of this provision. Contravention of s 66 is an offence punishable on conviction by imprisonment for a term not exceeding one year.

The need for expert advice

The above is a good reason why it is worthwhile seeking expert and considered advice before implementing any strategies. Moreover, this is not the first time we have viewed an ATO publication which, on its face, appears to provide a positive stamp of approval to a strategy but was focused on one particular provision. However, unless all facets are considered including the legal, tax and super laws as well as the financial, commercial and succession aspects of the strategy, you may be at risk.

SMSF materials quiz

Q1: Which ATO document states 'benefits ... provided in the form of ... pensions ... cannot be paid in-specie'?

Q2: Which ATO document considers an SMSF that borrowed to acquire half a property?

Q3: Which ATO ruling implicitly accepts that superannuation funds can run businesses?

Q4: Which SCT decision involved the holder of an enduring power of attorney executing a BDBN in respect of the donor of the power?

Q5: Where do the ATO consider what will satisfy the minimum pro-rated payment requirements for pensions commuted on 1 July?

Q6: Where do the ATO discuss the following: if a unit trust owes an SMSF distributions and the SMSF wishes to buy units in the unit trust, if they get the paperwork right, the SMSF is taken to have received the distribution from the unit trust and the unit trust is taken to have received money from the SMSF?

Q7: Which ruling considers whether part IVA applies where a business pays superannuation contributions that are considerably in excess of the value of the services provided?

Q8: Which SMSF case held a purported change of trustee was invalid because, although the correct signature appeared, the wrong heading was above it?

Q9: Which ATO IDs considered different kinds of contracts for difference concluding that one kind was allowable and the other was not as it provided a charge?

Q10: Where did the ATO state '... where there are an equal number of trustees both in Australia and overseas ... the [central management and control] of the fund will ordinarily be in Australia'?

Want more information?

At DBA Lawyers we have spent years creating an internal database for tracking the plethora of SMSF related materials. We now make this database available to assist our clients quickly track, identify and locate the materials they want. See below for information regarding the SMSF Materials Database.

Answers

Q1 SMSFR 2008/2 (see paragraph 73); Q2 ID 2010/172; Q3 TR 93/17 (see paragraph 16); Q4 D07-08\030 [2007] SCTA 93; Q5 National Tax Liaison Group superannuation technical minutes June 2009 (see heading 6.1); Q6 SMSFD 2007/1 (especially paragraph 25); Q7 TD 2005/29; Q8 *Moss Super Pty Ltd v Hayne* [2008] VSC 158; Q9 ATO ID 2007/55 and ATO ID 2007/56; Q10 TR 2008/D5 (see paragraph 32).

SMSF Materials Database (\$330)



The SMSF Materials Database is a must have for all SMSF advisers. It is a detailed database of relevant ATO materials including SMSFRs, SMSFDs, rulings, ruling compendiums, IDs, TDs, taxpayer alerts, circulars, practice statements, NTLG minutes, cases, AAT decisions and more that affect SMSFs. It provides a comprehensive resource for anyone who needs to quickly access SMSF related material and has hyperlinks to the materials on the web. Designed around an easily navigable Excel format, this is a highly practical source of information and is updated each 1 September. This product is purchased as a once-off licence. For full terms and conditions, see www.dbalawyers.com.au/smsf-materials-database.

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