Pensions and death

New regulations were registered on 3 June 2013 that provide much awaited clarity on the treatment of pensions upon death.

As anticipated, the regulations provide that the 'pension exemption' will not automatically cease upon a member's death. Surprisingly, the regulations also broadly maintain the proportioning of pensions.

For example, consider Joanne. Joanne might have two non-reversionary pensions in her SMSF. One is comprised entirely of the taxable component and one entirely of the tax free component.

Based on the approach adopted in TR 2011/D3 and the exposure draft of the legislation it was thought that upon Joanne's death the two interests would merge, giving rise to adverse tax concerns. However, the finalised regulations broadly provide that a member's pension interest in a fund will retain the status of its tax free and taxable components even after death.

Therefore, Joanne's interests effectively will not mix automatically upon her death. (Note anti-detriment increases and insurance payments may impact on the pension's components.)

We will drill down on pensions in our SMSF Core Course and upcoming education programs.

Year end super planning

The end of the financial year is fast approaching. We now address some of the key items that should be considered in the lead up to 30 June 2013.

DBA Lawyers offers a range of kits that can assist SMSF trustees and advisers in meeting their end of financial year obligations. For more information visit: www.dbalawyers.com.au/strategy-compliance-kits.

Contributions

Exceeding the contribution caps can give rise to significant tax liabilities and therefore, before any contributions are made, check them against the member's relevant caps and any contributions previously made.

Contribution reserving strategies can be used to assist in managing a member's contribution caps and might be worthwhile considering. ATO ID 2012/16 provides support for such strategies.

Note, however, that successful implementation of contribution reserving typically relies on the necessary documentation (eg, the reserving strategy) being in place *before* a contribution is made.

Contribution Reserving Kit

Contains a detailed memo outlining the practical 'how to', pros, cons and inherent risks of contribution reserving as well as template resolutions for those wishing to implement such a strategy. See: www.dbalawyers.com.au/strategy-compliance-kits.

Remember that the financial year in which a member turns 65 is the last opportunity they will have to access the non-concessional contribution 'bring forward provisions'.

Pension minimums

Advisers should ensure that the minimum pension payment has been paid in respect of each pension that a member is receiving. Ideally, an additional buffer amount should also be paid, to cater for any calculation errors, differences in asset values, etc.

The implications of not paying the minimum can be severe. For instance:

- the fund's 'pension exemption' for the entire financial year could be at risk;
- it could result in the mixing of pension and accumulation interests in the fund; and
- in the case of a transition to retirement income stream, any 'pension' withdrawals may constitute unauthorised lump sum payments.

Note, the ATO now has the ability to allow a trustee to treat a pension as not having ceased, despite the minimum not being paid. However, this is only available in limited circumstances.

Unpaid present entitlements ('UPEs')

SMSFs with UPEs owing from related unit trusts as at 30 June 2012 should ideally seek to have these amounts paid prior to 30 June 2013.

Broadly, the ATO may consider a UPE to constitute a loan by the SMSF to the unit trust if it is not paid within 9–10 months of the end of the relevant financial year.

The ATO, in SMSFR 2009/3, state that a UPE of this type could result in a contravention of the in-house

asset rules, the arm's length rules and the sole purpose test. This is disastrous for non-geared unit trusts as it will constitute a borrowing. Accordingly, SMSFs should ensure that any UPE from a related trust is paid to them in a timely manner.

***NEW* Unit Trust Compliance Kit**

Just launched, this kit provides template documentation to issue partially paid units along with many other helpful templates for popular unit trust transactions. See: www.dbalawyers.com.au/strategy-compliance-kits.

Investment strategy

Each fund's investment strategy should be reviewed annually and revised as necessary.

When formulating or revising the fund's investment strategy, SMSF trustees are now required to consider whether they should hold a contract of insurance for fund members. Advisers should ensure SMSF trustees are aware of, and comply with, this requirement (eg, by annually executing a resolution).

Investment Strategy Kit

Contains guidance and template documentation with a practical, comprehensive explanation of how to draft investment strategies for SMSFs. See: www.dbalawyers.com.au/strategy-compliance-kits.

Reserves

If there are any reserves, each fund's reserving strategy should be reviewed and revised as needed. Will reserves augment earnings to boost member accounts or will some earnings be allocated to reserves instead?

Investment Reserving Kit

Contains guidance and template documentation on how to establish, maintain and apply reserves in an SMSF, as well as explaining the benefits of reserves and where their use would be very valuable. See: www.dbalawyers.com.au/strategy-compliance-kits.

Remember that an allocation from reserves will generally constitute a concessional contribution unless:

- the amount is allocated in a fair and reasonable manner; and
- the amount allocated is less than 5% of the value of the member's interest in the fund at the time of the allocation.

Other items

Also consider in the lead up to 30 June 2013:

- The ATO will soon have the ability to issue administrative penalties for minor breaches of super law. Therefore, any outstanding compliance issues should be rectified prior to 1 July 2013.
- Where an SMSF has assets leased to a related party, ensure that all rents and other amounts have been paid on time. Is there any evidence to support these being at arms-length? Do the terms reflect current commercial practices?
- Consider whether any expense or other payment needs to be made prior to 1 July 2013 including any tax payment, operating cost or insurance premium.
- The level of the fund's in-house assets must be calculated at 30 June 2013. Appropriate action should be taken before the end of the following financial year, if the fund's in-house assets exceed the 5% threshold.

Trustee Compliance Kit

Contains guidance and template documentation on how to record trustee resolutions. The kit is very handy for advisers whom wish to draft resolutions on behalf of their SMSF clients. See: www.dbalawyers.com.au/strategy-compliance-kits.

Related party acquisitions and disposals

The proposed reforms to the laws surrounding related party acquisitions and disposals are no longer proceeding. Also, based on a reading of Hansard, it appears unlikely that the amendments will be implemented in the future.

While the above is good news, it does not necessarily change the processes that advisers and trustees should adhere to when dealing with related party acquisitions and disposals.

For instance, we would broadly recommend that appropriate independent evidence of an asset's market value be obtained before an asset is transferred.

For further Information please contact:

DBA LAWYERS PTY LTD (ACN 120 513 037) Level 1, 290 Coventry Street, South Melbourne Vic 3205

Ph 03 9092 9400 Fax 03 9092 9440 dba@dbalawyers.com.au www.dbalawyers.com.au