




ATO Interpretative Decision

ATO ID 2007/57

Superannuation

Self Managed Superannuation Funds: contracts for differences (CFDs) - fund assets deposited with CFD provider - charge over fund assets

FOI status: may be released

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Issue

Has a trustee of a self managed superannuation fund (SMSF) contravened the *Superannuation Industry (Supervision) Act 1993* (SISA) by depositing fund assets with a CFD provider as security in relation to the fund's obligations to pay margins?

Decision

Yes. The trustee of an SMSF has contravened subsection 34(1) of the SISA as it has breached the prohibition against trustees giving a charge over, or in relation to, fund assets.

Facts

CFDs are synthetic financial products that enable the investor to access the price movement in shares and other instruments such as stock indices, stock options, currencies and futures contracts without owning the underlying product.

When a CFD is opened the investor pays a deposit and may be required to make additional margin payments to cover running losses on open positions. CFDs have a leveraging effect with consequent exposure to potentially large gains and losses stemming from exposure to short term financial risk in relation to a relatively small deposit.

The trustee of an SMSF has invested in CFDs.

The investment is in accordance with the fund's investment strategy as required under paragraph 52(2)(f) of the SISA and regulation 4.09 of the Superannuation Industry (Supervision) Regulations 1994 (SISR).

Under a separate written agreement with the CFD provider, the trustee has deposited fund assets with the provider

as security in relation to the trustee's obligations to pay margins. The terms of the agreement set out the circumstances under which the assets will be realised.

Reasons for Decision

No provision of the SISA or the SISR specifically prohibits trustees of SMSFs from investing in CFDs.

The requirement to pay a deposit and meet margin calls in relation to the CFD does not represent borrowing by the trustee; they are rather contractual liabilities to make payments if and when required and are not repayments (*Prime Wheat Association Ltd v. Chief Commissioner of Stamp Duties (NSW)* 97 ATC 5015; (1997) 37 ATR 479). Investing in the CFD did not therefore contravene the prohibition on borrowing in section 67 of the SISA. The obligations in relation to CFDs are distinguished from margin lending through a broker's margin account in relation to the purchase of shares by an SMSF, which does represent a prohibited borrowing under the SISA.

The operation of the CFD bank account and the obligation to pay deposits and margins does not create a charge over any assets of the fund. The parties are relying on the contract and not on any security interest to be created by the contract (*White v. Conroy* (1921) 21 SR (NSW) 257; (1921) 38 WN (NSW) 63, *Berrington v. Evans* (1839) 3 Y & C Ex 384; 160 ER 73). Under the CFD, the monies in the CFD bank account are the property of the CFD provider and the fund (investor) has no beneficial interest in the account.

However the trustee and the CFD provider entered into a separate written agreement under which fund assets were deposited with the CFD provider in fulfilment of the fund's obligation to pay margins. Regulation 13.14 of the SISR prohibits trustees from giving a charge over, or in relation to, an asset of the fund. This regulation is an operating standard for regulated superannuation funds under section 31 of the SISA. Subsection 34(1) of the SISA requires that the operating standards are complied with at all times. The terms of the agreement stated the circumstances in which the fund's assets would be realised, and showed an intention to create a charge over the assets. By entering into the agreement with the CFD provider the trustee has contravened subsection 34(1) of the SISA.

Regulation 13.15A of the SISR, which allows trustees to give a charge over fund assets in relation to options and futures contracts in accordance with the rules of an approved body, and in accordance with the fund's derivatives risk statement, does not apply. A CFD is not an options contract or a futures contract, and the charge was not given in relation to the rules of an approved body.

The trustee has therefore contravened regulation 13.14 of the SISR and consequently subsection 34(1) of the SISA.

Date of decision: 9 March 2007

Year of income: 30 June 2007

Legislative References:

Superannuation Industry (Supervision) Act 1993

section 67

section 52

Superannuation Industry (Supervision) Regulations 1994

regulation 4.09

regulation 13.14

regulation 13.15A

Case References:

Prime Wheat Association Ltd v. Chief Commissioner of Stamp Duties (NSW)

97 ATC 5015

37 ATR 479

White v. Conroy

(1921) 21 SR (NSW) 257

(1921) 38 WN (NSW) 63

Berrington v. Evans

(1839) 3 Y & C Ex 384

160 ER 73

Related ATO Interpretative Decisions

ATO ID 2007/56

ATO ID 2007/58

Keywords

Superannuation

Self managed superannuation funds

SMSF borrowings

SMSF charge over assets

SMSF investment strategy

SIS covenants

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