




ATO Interpretative Decision

ATO ID 2011/81

Superannuation

Self managed superannuation funds: meaning of 'give a charge' under regulation 13.14 of the Superannuation Industry (Supervision) Regulations 1994

FOI status: may be released

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Issue

Does the trustee of a self managed superannuation fund (SMSF) 'give a charge' for the purposes of regulation 13.14 of the Superannuation Industry (Supervision) Regulations 1994 (SISR) if the trustee purchases an asset subject to a charge that was established before the trustee purchased the asset?

Decision

No. The trustee of an SMSF does not 'give a charge' for the purposes of regulation 13.14 of the SISR if the trustee purchases an asset subject to a charge that was established before the trustee purchased the asset.

Facts

An SMSF trustee acquires real property from an unrelated party. At the time of purchase, the trustee is aware that the property is subject to a charge in favour of another unrelated party. The property remains subject to the charge after it is acquired by the SMSF trustee.

Reasons for Decision

Subsection 31(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA) provides for the regulations to prescribe standards applicable to the operation of regulated superannuation funds and to trustees of those funds. Subsection 34(1) of the SISA requires a trustee of a superannuation entity to ensure that the operating standards are complied with at all times.

Regulation 13.14 of the SISR relevantly states:

For the purposes of subsections 31(1) and 32(1) of the Act, it is a standard applicable to the

operation of regulated superannuation funds and approved deposit funds that ... the trustee of a fund must not give a charge over, or in relation to, an asset of the fund.

'Give' is not defined in SISR or SISA. Accordingly, the ordinary meaning of the word understood in its context must be considered.

According to the *Australian Oxford Dictionary* (2nd edition, 2004, Oxford University Press) relevant meanings of 'give' include: transfer the possession of freely; hand over as a present; transfer the ownership of, with or without actual delivery; confer; grant; allot; assign. The verb 'give' has characteristics of positive action.

In *International Art Holdings Pty Ltd (admin apptd) & ors v. Adams & ors* ([2011] NSWSC 164), the Supreme Court of New South Wales held that regulation 13.14 of the SISR does not prevent a court from imposing an equitable lien or statutory lien over artwork owned by an SMSF to secure an administrator's expenses in determining competing claims.

The Court (at paragraph 96) distinguished the imposition of a charge or lien by the trustee of a fund, from a situation where a court imposes an equitable lien or a statutory lien arises as a matter of law. The Court said there was no basis on which it might be said that the trustee had allowed the creation of a charge over the assets of the fund.

The Explanatory Statement accompanying the introduction of the SISR gives no explanatory detail in relation to regulation 13.14. However, differences in the language used in regulations 13.12, 13.13 and 13.14 of the SISR, which were introduced together, support the view that regulation 13.14 is intended to apply to the creation of a charge by the fund trustee as distinct from the trustee recognising an existing charge on acquiring an asset.

Subregulation 13.13(1) of the SISR, concerning a charge over or in relation of a member's benefits, relevantly states:

the trustee of a fund must not recognise, or in any way encourage or sanction, a charge over, or in relation to a member's benefits.

Regulation 13.11 of the SISR provides that 'recognise includes act on or give effect to'.

Regulation 13.12 of the SISR, concerning assignment of a superannuation interest, is worded similarly to subregulation 13.13(1) of the SISR. Both are in contrast to regulation 13.14 of the SISR which prohibits only that the superannuation trustee must not 'give a charge'.

The ordinary meaning of the word 'give', and the difference in wording between regulations 13.12, 13.13 and 13.14 of the SISR, indicate that the phrase 'give a charge' in regulation 13.14 requires a trustee, by some positive action, to create a charge and not merely recognise (including act on or give effect to) a previously established charge.

Note: *this ATO ID considers only the application of regulation 13.14 of the SISR to the arrangement described. The SMSF trustees must also consider compliance with other SISA or SISR regulatory provisions that may apply to the arrangement. These include whether the arrangement:*

- *is consistent with the SMSF's investment strategy and the requirements in paragraph 52(2)(f) of the SISA and regulation 4.09 of the SISR (the other covenants in subsection 52(2) of the SISA are also relevant)*
- *provides current day benefits to a member or a related party contrary to the sole purpose test in section 62 of the SISA*
- *assists a member or relative of a member using SMSF resources and therefore provides financial assistance in contravention of section 65 of the SISA; and*
- *is on arm's length terms as required by section 109 of the SISA.*

Date of decision: 20 October 2011

Year of income: Year ended 30 June 2012

Legislative References:

Superannuation Industry (Supervision) Act 1993

subsection 3(1)

subsection 31(1)

subsection 32(1)

subsection 34(1)

subsection 52(2)

paragraph 52(2)(f)

section 62

section 65

section 109

Superannuation Industry (Supervision) Regulations 1994

regulation 13.11

regulation 13.12

regulation 13.13

regulation 13.14

Case References:

International Art Holdings Pty Ltd (admin apptd) & ors v. Adams & ors

[2011] NSWSC 164

Other References

The Australian Oxford Dictionary, 2nd edition, 2004, Oxford University Press

Keywords

Self managed superannuation funds

SMSF charge over assets

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