




## ATO Interpretative Decision

ATO ID 2008/52

### Superannuation

### Self managed superannuation fund: Division 13.3A of SIS Regulations - interest in another entity - listed company shares

FOI status: may be released

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## Issue

When a related unit trust of a self managed superannuation fund (SMSF) has assets including shares in a listed company, will the related unit trust have an interest in another entity for the purposes of Division 13.3A of the *Superannuation Industry (Supervision) Regulations 1994* (SISR)?

## Decision

Yes. A share in a listed security is an interest in that company and therefore an interest in another entity for the purposes of Division 13.3A of the SISR.

## Facts

An SMSF invests in a unit trust that is a related trust in accordance with section 10 of the *Superannuation Industry (Supervision) Act 1993* (SISA).

The related trust has assets which include shares in a public company listed on the Australian stock exchange.

## Reasons for Decision

Subsection 71(1) of the SISA gives the basic meaning of in-house assets of a superannuation fund. It includes an investment in a related party and a related trust of the fund. Paragraph 71(1)(j) of the SISA states that the term in-house asset does not include certain assets specified in the regulations.

Division 13.3A of the SISR says that an asset of a fund that is an investment in a related company or unit trust will not be included as an in-house asset provided that certain requirements are met. Regulation 13.22B of the SISR sets out the requirements for such an investment acquired before the commencement of the division and

regulation 13.22C of the SISR sets out the requirements for such an investment acquired on or after the commencement of the Division.

If any of the events listed in regulation 13.22D of the SISR happens, then regulations 13.22B or 13.22C of the SISR will cease to apply and the investments will not be excluded from the in-house assets of the SMSF.

Subparagraphs 13.22B(2)(f)(i) and 13.22C(2)(f)(i) of the SISR require that the assets of the related company or unit trust do not include an interest in another entity.

Subparagraph 13.22D(1)(b)(i) of the SISR states that regulations 13.22B or 13.22C of the SISR will cease to apply if an interest in another entity becomes an asset of the company or unit trust.

The term 'interest' is not defined in the SISA.

The *Australian Oxford Dictionary* (2002, Oxford University Press, Melbourne) defines interest as:

...a financial stake (in an undertaking etc.)

...a legal concern, title or right (in property)

The *Macquarie Dictionary* ([Multimedia], version 5.0.0, 1/10/01) defines interest as:

6.  
a share in the ownership of property, in a commercial or financial undertaking, or the like.
7.  
any right of ownership in property, commercial undertakings, etc.
9.  
something in which one has an interest, as of ownership, advantage, attention, etc.

The Courts have held that the meaning of 'interest' must be inferred from its context in the legislation ( *Gartside and Another v. Inland Revenue Commissioners* [1968] 1 All ER 121, *Leedale v. Lewis* [1982] 3 All ER 808).

The Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2000 (No. 2) (ES) which amended the SISR to include Division 13.3A of the SISR provides the context for the phrase 'interest in another entity' in subparagraphs 13.22B(2)(f)(i), 13.22C(2)(f)(i) and 13.22D(1)(b)(i) of the SISR.

The ES gives the purpose of the regulations:

The purpose of this Division is to provide an exception to the definition of in-house asset (under subparagraph 71(1)(j)(ii) of the SIS Act) to allow a small superannuation fund to jointly own business real property with related parties of the fund (through a company or unit trust).

The Regulation Impact Statement in the ES provides further background to the purpose of the regulations:

...some funds may prefer to hold joint investments in business real property through a company or trust. This would enable changes in ownership to take place by the sale of shares or units, rather than transferring direct ownership of the real property.

Some submissions received during consultation advocated that the exception should apply to a related company or trust that undertakes a wider range of activities, such as investing in other entities that a superannuation fund could invest in. However, this would go beyond the objective of the exception, which is to provide a means of jointly holding business real property. Superannuation funds can hold interests in other entities directly.

From the ES it is clear that Division 13.3A of the SISR was not intended to apply to related companies or unit trusts of SMSFs where the company or trust has investments in other entities.

In the context set by the ES an 'interest in another entity' in Division 13.3A of the SISR is as an 'investment' in another entity.

The Courts have considered the ordinarily understood meaning of 'investment' as the laying of money in the acquisition of some species of property from which profit or interest is expected ( *Inland Revenue Commissioners*

*v. Rolls-Royce Limited* [1944] 2 All ER 340 at 341-342, *Re Fraser; Ex Parte The Public Trustee as Manager of the Estate of Fraser* [2000] WASC 36 at paragraph 16).

In the case *Pilmer v. The Duke Group Limited (in liq)* [2001] HCA 31; 207 CLR 165, reference was made to the definition of a share in a company which is used most commonly by the Courts:

Next, it is important to understand the nature of a share in the capital of a company. Once issued, a share comprises "a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but not constituting a debt". It is, according to the classic description of Farwell J in *Borland's Trustee v Steel Brothers & Co Limited*:

"the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with [the relevant corporations legislation]."

A share in a company is accepted by the Courts as being an interest in that company and the acquisition of a share is an investment in that company.

Accordingly a share in a company is an 'interest in another entity' for the purpose of Division 13.3A of the SISR.

**Date of decision:** 20 March 2008

**Year of income:** : Year ended 30 June 2008

**Legislative References:**

*Superannuation Industry (Supervision) Act 1993*

section 10

subsection 71(1)

Paragraph 71(1)(j)

*Superannuation Industry (Supervision) Regulations 1994*

Division 13.3A

regulation 13.22B

regulation 13.22C

regulation 13.22D

subparagraph 13.22B(2)(f)(i)

subparagraph 13.22C(2)(f)(i)

subparagraph 13.22D(1)(b)(i)

**Case References:**

*Borland's Trustee v. Steel Brothers & Co Limited*

[1901] 1 Ch 279

*Gartside and Another v. Inland Revenue Commissioners*

[1968] 1 AllER 121

*Inland Revenue Commissioners v. Rolls-Royce Limited*

[1944] 2 AllER 340

*Leedale v. Lewis*

[1982] 3 AllER 808

*Pilmer v. The Duke Group Limited (in liq)*

[2001] HCA 31

207 CLR 165

49 ATR 324

*Re Fraser Ex parte The Public Trustee as Manager of the Estate of Fraser*

[2000] WASC 36

## **Related ATO Interpretative Decisions**

ATO ID 2008/51

## **Other References**

Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2000 (No. 2)

Australian Oxford Dictionary 2002, Oxford University Press, Melbourne

Macquarie Dictionary [Multimedia], version 5.0.0, 1/10/01

## **Keywords**

SMSF listed securities

SMSF related parties

Superannuation fund in house assets

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