




ATO Interpretative Decision

ATO ID 2012/52

Superannuation

Self Managed Superannuation Fund: in-house assets - additional investment in a related trust - trust borrowings outstanding at 28 June 2000 not increased and were discharged prior to additional investment

FOI status: may be released

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Issue

Will subparagraph 71(1)(j)(ii) of the *Superannuation Industry (Supervision) Act 1993* (SISA) apply to an additional investment in a related unit trust by a self managed superannuation fund (SMSF) where section 71A of the SISA applies to the SMSF's original investment in the unit trust, the trustee of the unit trust did not borrow any additional money after 28 June 2000 and all borrowings were discharged before the additional investment was made?

Decision

Yes. Subparagraph 71(1)(j)(ii) of the SISA will apply to the additional investment because the requirements of Superannuation Industry (Supervision) Regulations 1994 (SISR) regulation 13.22C are met.

Facts

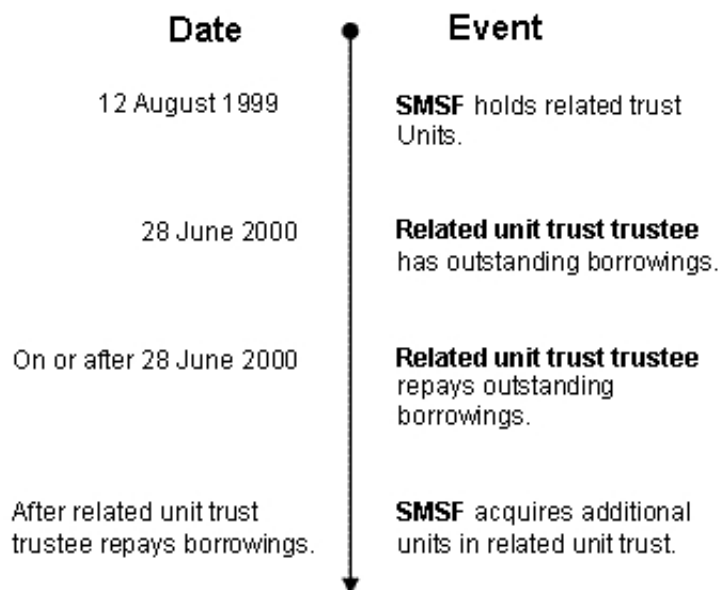
An SMSF acquired units in a related unit trust prior to 12 August 1999. These trust units continue to be held by the SMSF.

On 28 June 2000 the trustee of the unit trust had an amount of outstanding borrowings. The trustee of the unit trust did not borrow any further money after 28 June 2000 and later discharged all outstanding borrowings.

Subsequent to the trustee of the unit trust repaying all outstanding borrowings the SMSF acquired additional units in the unit trust.

Neither section 71D nor section 71E of the SISA applies to the additional investment.

Sequence of events



Reasons for Decision

Subsection 71(1) of the SISA sets out the basic meaning of in-house asset. An investment in a related company or a related unit trust is included as an in-house asset.

Subparagraph 71(1)(j)(ii) of the SISA excludes certain assets specified in the regulations (regulations 13.22B and 13.22C in Division 13.3A of the SISR) from the meaning of in-house asset. By virtue of subregulation 13.22B(1) of the SISR, regulation 13.22B applies to an investment in a related company or related unit trust which was made before 28 June 2000, being the date Division 13.3A commenced. By virtue of subregulation 13.22C(1) of the SISR, regulation 13.22C applies to an investment in a related company or related unit trust made on or after 28 June 2000.

It is relevant to note that regulations 13.22B and 13.22C of the SISR apply regardless of whether the shares or units satisfy the requirements contained in subregulations 13.22B(2) or 13.22C(2) of the SISR or whether they are excluded from being in-house assets under another provision of the Act.

The application of regulations 13.22B and 13.22C of the SISR to an asset are subject to regulation 13.22D of the SISR. If any of the events set out in subregulation 13.22D(1) of the SISR happen in respect of an asset to which regulations 13.22B or 13.22C apply, regulations 13.22B and 13.22C cease to apply to all current and future investments in that company or unit trust. Of particular relevance is subparagraph 13.22D(1)(c)(i) of the SISR which applies where the company or unit trust borrows money.

Subregulation 13.22D(1) of the SISR applies to events which happen on or after 28 June 2000. For this reason the borrowing made prior to 28 June 2000 will not trigger the operation of regulation 13.22D of the SISR notwithstanding that it was not discharged prior to 28 June 2000.

As the additional units in the unit trust were acquired on or after 28 June 2000 and an event in regulation 13.22D of the SISR has not occurred, regulation 13.22C of the SISR applies to these new units.

Paragraph 13.22C(2)(e) of the SISR requires that the unit trust does not have outstanding borrowings when the trust units were acquired by the SMSF. This requirement is satisfied in the present case because the borrowings were discharged in full before the units were acquired.

On the basis that the other paragraphs of subregulation 13.22C(2) of the SISR are also satisfied and that none of the events listed in subregulation 13.22D(1) of the SISR has occurred since 28 June 2000, the new units in the trust are excluded from being in-house assets of the SMSF under subparagraph 71(1)(j)(ii) of the SISA.

Whilst regulation 13.22B of the SISR would not exclude the original units in the trust acquired prior to 12 August 1999 from being in-house assets because of the borrowing which existed on 28 June 2000, section 71A of the SISA still applies to exclude those units from the definition of in-house asset.

Date of decision: 29 May 2012

Legislative References:

Superannuation Industry (Supervision) Act 1993

section 71D

section 71E

subsection 71(1)

subparagraph 71(1)(j)(ii)

section 71A

Superannuation Industry (Supervision) Regulations 1994

Division 13.3A

regulation 13.22B

subregulation 13.22B(1)

subregulation 13.22B(2)

regulation 13.22C

subregulation 13.22C(1)

subregulation 13.22C(2)

paragraph 13.22C(2)(e)

regulation 13.22D

subregulation 13.22D(1)

subparagraph 13.22D(1)(c)(i)

Related Public Rulings (including Determinations)

SMSFR 2009/4

SMSFD 2008/1

Related ATO Interpretative Decisions

ATO ID 2012/53

Keywords

Superannuation

Retirement income entities

Self managed superannuation funds

SMSF investments

Superannuation fund in house assets

SMSF related parties

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