




ATO Interpretative Decision

ATO ID 2012/53

Superannuation

Self Managed Superannuation Fund: in-house assets - additional investment in a related trust - trust borrowings at 28 June 2000 increased and discharged prior to additional investment in the related trust

FOI status: may be released/not to be released/requires editing/edited for FOI purposes - TCO delete inappropriate references before sending to PMU

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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 borrowed additional money after 28 June 2000 and the total borrowings were discharged before the SMSF acquired the additional trust units?

Decision

No. Subparagraph 71(1)(j)(ii) of the SISA will not apply because Superannuation Industry (Supervision) Regulations 1994 (SISR) regulation 13.22C will not apply to the additional units.

Facts

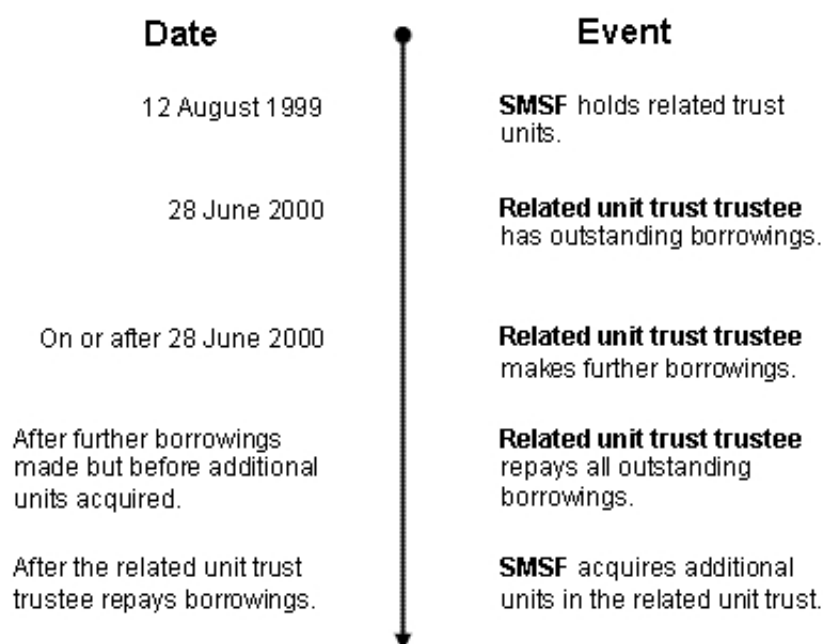
An SMSF acquired units in a related unit trust prior to 12 August 1999. These trust units continue to be held by the SMSF. By the application of section 71A of the SISA these units are not in-house assets.

On 28 June 2000 the trustee of the unit trust had an amount of outstanding borrowings. After 28 June 2000 the trustee of the unit trust made additional borrowings. All borrowings of the trustee of the unit trust were subsequently repaid.

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 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.

When the trustee of the unit trust borrowed money after 28 June 2000, the event set out in subparagraph 13.22D(1)(c)(i) of the SISR happened in relation to the original units in the related unit trust to which regulation 13.22B of the SISR applied. Consequently, regulation 13.22B ceased to apply to the SMSF's original investment in the unit trust at that time. In addition, subregulation 13.22D(3) of the SISR has the effect of excluding any other investments in the unit trust from the application of regulation 13.22C of the SISR.

As subregulation 13.22C of the SISR does not apply to the acquisition of additional units in the unit trust, those units will not be excluded from being in-house assets by subparagraph 71(1)(j)(ii) of the SISA.

Notwithstanding that regulation 13.22B of the SISR no longer applies to the SMSF's original investment in the unit trust, section 71A of the SISA continues to apply to exclude those units from the definition of in-house asset.

Date of decision: 29 May 2012

Legislative References:

Superannuation Industry (Supervision) Act 1993

- subsection 71(1)
- subparagraph 71(1)(j)(ii)
- section 71A
- section 71D
- section 71E

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)
- regulation 13.22D
- subregulation 13.22D(1)
- subparagraph 13.22D(1)(c)(i)
- subregulation 13.22D(3)

Related Public Rulings (including Determinations)

SMSFR 2009/4
SMSFD 2008/1

Related ATO Interpretative Decisions

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Keywords

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Self managed superannuation funds
SMSF investments
Superannuation fund in house assets
SMSF related parties

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