




ATO Interpretative Decision

ATO ID 2002/697

Superannuation Retirement income entities - loan to a property trust

FOI status: may be released

Status of this decision: Decision Current

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Issue

Will a loan from a Self Managed Superannuation Fund (SMSF) to a Property Trust be treated as an in-house asset?

Decision

A loan from a SMSF to a Property Trust will not be treated as an in-house asset if the property trust is neither a related trust (a trust controlled by a member or a standard employer sponsor of the SMSF) nor a related party of the SMSF.

Facts

A SMSF made a loan to a Property Trust.

A related party of the SMSF (a Unit Trust) holds less than 10% of the issued units in the Property Trust.

The Unit Trust has as members of the class of general beneficiaries, members of the SMSF.

The loan was made under a commercial loan agreement.

Reasons for Decision

Subsection 65(1) of the SISA states that the trustee or an investment manager of a regulated superannuation fund must not lend money of the fund to a member or a relative of a member of the fund. A 'relative' as defined in subsection 65(6) of the SISA, includes only natural persons. As the Property Trust is not a natural person, subsection 65(1) of the SISA does not prohibit the SMSF from making the loan.

The meaning of an in-house asset is defined by section 71 of the SISA to include 'a loan to, ... a related party of the fund, ...' A related party of the superannuation fund, as defined in subsection 10(1) of the SISA, is a member of the fund, a standard employer sponsor of the fund, or a Part 8 associate of either of those entities. The Property Trust is neither a member of the SMSF or a standard employer sponsor of the fund. However, the Property Trust may be a Part 8 associate of the members of the SMSF.

The relationships between the parties involved requires analysis. In particular, it needs to be determined if the trustees of the Property Trust or any of the other unit holders of the Property Trust are Part 8 associates of the members of the SMSF (or employer-sponsor). Part 8 associates of the members of the SMSF are listed in section 70B of the SISA. The relevant Part 8 associates will be any relatives, other fund members and trustees of trusts that are controlled by the individual members of the SMSF.

According to section 70E of the SISA, a trust is controlled by an entity, for the purposes of section 70B of the SISA if:

- (i) a group in relation to the entity has a fixed entitlement to more than 50% of the capital or income of the trust; or
- (ii) the trustee of the trust or a majority of the trustees of the trust is accustomed or might reasonably be expected to act in accordance with the directions, instructions or wishes of a group in relation to the entity; or
- (iii) a group in relation to the entity is able to remove or appoint the trustee or a majority of the trustees of the trust.

A group is defined in subsection 70E(3) of the SISA to mean:

- (iv) the entity or a Part 8 associate of the entity acting alone; or
- (v) the entity and one or more Part 8 associates of the entity acting together; or
- (vi) two or more Part 8 associates of the entity acting together.

The Property Trust to whom the loan was made is not a Part 8 associate of the SMSF because the SMSF and its related parties hold less than 10% unit holdings in the trust and have no other control over the trust. Accordingly the loan has not been made to a related party and therefore does not meet the definition of an in-house asset. The SMSF would be able to lend the money to the Property Trust provided this investment is in line with the investment strategy of the SMSF.

Date of decision: 24 July 2001

Legislative References:

Superannuation Industry (Supervision) Act 1993

- subsection 10(1)
- subsection 65(1)
- subsection 65(6)
- section 70B
- section 70E
- section 71

Related ATO Interpretative Decisions

This decision replaces ATO ID 2001/234.

Keywords

Self managed superannuation funds
SMSF investments
SMSF loans

SMSF part 8 associate
SMSF related parties
Superannuation fund in house assets

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