




ATO Interpretative Decision


ATO ID 2010/162

Superannuation

Self managed Superannuation Fund: limited recourse borrowing arrangement - borrowing from a related party on terms favourable to the self managed superannuation fund

 This ATO ID was amended by adding the final paragraph to clarify that the answer to the issue applies to dealings in respect of the borrowing as well as the initial borrowing. Date of amendment 9 September 2011

FOI status: may be released

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Issue

Does a self managed superannuation fund (SMSF) trustee contravene section 109 of the *Superannuation Industry (Supervision) Act 1993* (SISA) if it borrows money from a related party of the SMSF under a limited recourse borrowing arrangement on terms favourable to the SMSF?

Decision

No. The terms cannot be more favourable to the related party than would have been the case had the parties been dealing at arm's length, but there is no contravention of section 109 of the SISA if the terms are more favourable to the SMSF.

Facts

An SMSF trustee has entered into a limited recourse borrowing arrangement on 1 June 2009. The arrangement meets the requirements of former subsection 67(4A) of the SISA.

The arrangement is to acquire an income producing asset for the SMSF.

The lender under the borrowing arrangement is a related party of the SMSF.

The interest rate imposed under the borrowing arrangement is lower than the rate that would be available to the

SMSF from an arm's length lender for an otherwise similar loan.

Apart from the interest rate charged, the borrowing is on arm's length terms and conditions and is supported by appropriate documentation and record keeping.

Reasons for Decision

'Invest[0]' is defined in subsection 10(1) of the SISA to mean applying assets in any way, or making a contract, for the purpose of gaining interest, income, profit or gain.

When entering into the limited recourse borrowing arrangement the SMSF trustee is investing for the purposes of section 109 of the SISA.

Subsection 109(1) of the SISA imposes requirements with respect to relevant transactions for investments made by SMSFs.

In particular paragraph 109(1)(b) of the SISA applies where the other party to the transaction is not at arm's length to the SMSF. The provision requires that the terms and conditions of the transaction must not be more favourable to the other party than would be reasonably expected if the parties were at arm's length.

Borrowing money under the limited recourse borrowing arrangement is a transaction entered into in the course of making an investment by the SMSF. It is therefore a transaction to which paragraph 109(1)(b) of the SISA applies where the other party is not at arm's length to the SMSF.

It is expected that establishing the arrangement, including establishing the borrowing, would be documented and conducted in a business-like manner in the same way as an arrangement when dealing with an arm's length lender.

The borrowing entered into by the SMSF trustee in this case entails no contravention of paragraph 109(1)(b) of the SISA because the terms and conditions of the borrowing are not more favourable to the other party than would be reasonably expected if the parties were dealing with each other at arm's length.

Similarly subsection 109(1A) of the SISA applies to dealings with parties that are not at arm's length, during the term of the investment. Subsection 109(1A) of the SISA applies after an investment to which paragraph 109(1)(b) applies has commenced and is interpreted in that context. As a result provided the dealing is not more favourable to the other party than would be expected had the parties been at arms length then the provision will not be contravened.

Date of decision: 9 September 2010

Year of income: Year ended 30 June 2009

Legislative References:

Superannuation Industry (Supervision) Act 1993
subsection 10(1)
former subsection 67(4A)
subsection 109(1)
subsection 109(1A)

Related Public Rulings (including Determinations)

Self Managed Superannuation Funds Ruling SMSFR 2009/2

Keywords

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SMSF borrowings

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