




ATO Interpretative Decision

ATO ID 2010/169

Superannuation

Self managed superannuation fund: limited recourse borrowing arrangement - refinancing

FOI status: may be released

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Issue

Can a self managed superannuation fund (SMSF) trustee that entered into a limited recourse borrowing arrangement before 7 July 2010, refinance the arrangement on or after that date without contravening the general borrowing prohibition in subsection 67(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA)?

Decision

Yes, provided

- the money borrowed under the refinance arrangement is applied solely for the purpose of replacing the financing arrangement for the earlier arrangement, and
- the refinanced limited recourse borrowing arrangement meets the requirements of section 67A of the SISA (if the refinancing occurred on or after 7 July 2010), and
- legal ownership of the asset is not temporarily acquired by the SMSF trustee when changing to the new arrangement.

Facts

An SMSF trustee entered into a limited recourse borrowing arrangement to acquire an asset (the underlying asset) on 15 June 2009. The arrangement met the requirements of former subsection 67(4A) of the SISA.

The SMSF trustee refinanced the borrowing with a new lender on 15 July 2010.

The money borrowed from the new lender was used to extinguish the first arrangement and substitute the refinanced borrowing arrangement over the underlying asset. The refinanced limited recourse borrowing arrangement otherwise meets the requirements of section 67A of the SISA.

The underlying asset was transferred directly to another holding trust, the trustee of which is an associate of the new lender.

Reasons for Decision

Regulated superannuation funds are generally prohibited from borrowing money or maintaining a borrowing of money by subsection 67(1) of the SISA unless the borrowing satisfies one of the exceptions provided for by section 67 of the SISA.

One such exception is provided for by subsection 67(4A) of the SISA (applying to limited recourse borrowing arrangements entered into before 7 July 2010).

Another exception is provided for by section 67A if the SISA (applying to limited recourse borrowing arrangements entered into on or after 7 July 2010)

For the purposes of section 67 of the SISA, a refinanced limited recourse borrowing arrangement is regarded as a new arrangement entered into at the time of refinancing. In this case

- the refinancing occurred on 15 July 2010, (and therefore section 67A of the SISA applies), and
- the refinanced limited recourse borrowing arrangement otherwise meets the requirements of section 67A of the SISA.

The question to be considered is whether using the money borrowed from the new lender to extinguish the previous arrangement and substitute the refinanced arrangement over the underlying asset means that the borrowed money 'is or has been applied for the acquisition of a single acquirable asset' as required in paragraph 67A(1)(a) of the SISA. Subparagraph 67A(1)(a)(ii) specifically includes money applied to refinance a borrowing over a previous limited recourse borrowing arrangement that met the requirements of the SISA and in relation to a single acquirable asset (and no other acquirable asset).

'Apply' is relevantly defined in the Macquarie Dictionary (*Macquarie Dictionary on CD-ROM Version 5.0.0 01/10/01*) as follows:

4. to devote to some specific purpose: *to apply a sum of money to pay a debt.*

The Commissioner accepts that the money borrowed from the new borrower is or has been applied for the acquisition of the underlying asset if it is applied for the purpose of acquiring that asset. Whether the money has been applied for the required purpose in a particular case is a question of fact resolved by a consideration of all of the circumstances.

In this case the previous limited recourse borrowing arrangement for the acquisition of an asset was brought to an end and substituted by another limited recourse borrowing arrangement over the same asset. All of the money borrowed from the new lender was necessarily expended to bring about that change. On the facts the refinancing served no other purpose.

The requirements of section 67A of the SISA in respect of the refinanced limited recourse borrowing arrangement are satisfied.

Placing an existing fund asset into a limited recourse borrowing arrangement where the asset is subject to a charge would contravene the operating standards, specifically the requirement in regulation 13.14 of the Superannuation Industry (Supervision) Regulations 1994 that an SMSF trustee cannot give a charge over or in relation to an asset of the fund. In this case the underlying asset was transferred directly to the new holding trust, and not temporarily acquired by the SMSF trustee, so the refinanced arrangement is not over an asset that the

SMSF trustee had already acquired.

Date of decision: 20 July 2010

Year of income: Year ended 30 June 2011

Legislative References:

Superannuation Industry (Supervision) Act 1993

subsection 67(1)

former subsection 67(4A)

section 67A

Superannuation Industry (Supervision) Regulations 1994

regulation 13.14

Keywords

Self managed superannuation funds

SMSF borrowings

SMSF charge over assets

Date of publication: 24 September 2010

ISSN: 1445-2782

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