




ATO Interpretative Decision

ATO ID 2010/170

Superannuation

Self managed superannuation fund: limited recourse borrowing arrangement - third party guarantee

FOI status: may be released

 **CAUTION:** This is an edited and summarised record of a Tax Office decision. This record is not published as a form of advice. It is being made available for your inspection to meet FOI requirements, because it may be used by an officer in making another decision.

This ATOID provides you with the following level of protection:

If you reasonably apply this decision in good faith to your own circumstances (which are not materially different from those described in the decision), and the decision is later found to be incorrect you will not be liable to pay any penalty or interest. However, you will be required to pay any underpaid tax (or repay any over-claimed credit, grant or benefit), provided the time limits under the law allow it. If you do intend to apply this decision to your own circumstances, you will need to ensure that the relevant provisions referred to in the decision have not been amended or repealed. You may wish to obtain further advice from the Tax Office or from a professional adviser.

Issue

Can a borrowing by the self managed superannuation fund (SMSF) trustee satisfy the requirements of former subsection 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (SISA) where a related party of the SMSF has given the lender a personal guarantee as part of the arrangement?

Decision

Yes, a borrowing arrangement that includes a guarantee to the lender by a related party of the SMSF can satisfy the requirements of former subsection 67(4A) of the SISA.

Facts

An SMSF trustee has borrowed money from a financial institution in order to acquire an asset under a limited recourse borrowing arrangement.

The arrangement was entered into on 18 June 2009.

A member of the SMSF has given the bank a personal guarantee in respect of the borrowing that may be called upon by the bank in the event of a default on the borrowing.

In the event of a default on the borrowing the rights of the lender against the SMSF trustee are limited to rights relating to the asset being acquired. In addition, the lender can call on the guarantee of the member.

The arrangement otherwise satisfies the requirements of former paragraphs 67(4A)(a) to (e) of the SISA.

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 former subsection 67(4A) of the SISA (applying to limited recourse borrowing arrangements entered into before 7 July 2010).

In order to satisfy former subsection 67(4A) of the SISA, the limited recourse borrowing arrangement must meet the following requirements set out in former paragraphs 67(4A)(a) to (e) of the SISA:

- the borrowed monies are applied to acquire an asset which the SMSF is not otherwise prohibited from acquiring (paragraph 67(4A)(a)).
- the asset is held on trust (the holding trust) so that the SMSF receives a beneficial interest in the asset (paragraph 67(4A)(b)).
- the SMSF has the right to acquire legal ownership of the asset by making one or more payments after acquiring the beneficial interest (paragraph 67(4A)(c)).
- any recourse that the lender has under the arrangement against the SMSF trustee is limited to rights relating to the asset held in the holding trust (paragraphs 67(4A)(d) and (e)).

Unless varied by the express terms of the guarantee, then in the event of a call on the guarantee resulting in a payment by the guarantor to the lender, a guarantor will generally have rights at common law and in equity against the principal debtor (the SMSF trustee) to recover amounts paid in satisfaction of the obligations under the guarantee. This may include interest and costs and in some circumstances, damages. The recourse of the guarantor is therefore not necessarily restricted to the asset which is the subject of the arrangement.

The rights of the guarantor are not rights of the lender against the SMSF trustee for the purposes of former paragraphs 67(4A)(d) and (e) of the SISA. The rights of the guarantor do not cause the arrangement to fail to meet the requirements of former subsection 67(4A).

Guarantor's rights now must be limited

Limited recourse borrowing arrangements entered into by SMSF trustees on or after 7 July 2010 must meet the requirements of section 67A of the SISA. Arrangements involving guarantees will not meet these requirements unless the rights of the guarantor against the SMSF trustee are limited to rights relating to the asset which is the subject of the arrangement. One way in which the rights of a guarantor may be excluded or limited is by the express terms of the guarantee.

Date of decision: 30 June 2010

Year of income: Year ended 30 June 2009

Legislative References:

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

Keywords

Self managed superannuation funds
SMSF borrowings

Date of publication: 24 September 2010

ISSN: 1445-2782

Copyright notice

© Australian Taxation Office for the Commonwealth of Australia

You are free to copy, adapt, modify, transmit and distribute material on this website as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).
