




ATO Interpretative Decision

ATO ID 2010/172

Superannuation

Self managed superannuation fund: limited recourse borrowing arrangement - joint investors

FOI status: may be released

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Issue

Did the trustees of two self managed superannuation funds (SMSFs) who jointly borrowed under a limited recourse borrowing arrangement involving a single holding trust, contravene subsection 67(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA)?

Decision

Yes, because the arrangement, entered into before 7 July 2010, did not meet the requirements of former subsection 67(4A) of the SISA.

Facts

The corporate trustees of two SMSFs jointly borrowed money under a limited recourse borrowing arrangement. The arrangement was entered into on 15 June 2009.

Under the arrangement, legal title to a residential property is acquired by the trustee of a holding trust from a party that is not related to either SMSF using the money provided from the SMSF trustees. The property is leased to a party not related to either of the SMSFs.

The property is mortgaged to the lender.

Each SMSF trustee is an equal beneficiary of the holding trust and is entitled to an equal share of the income of the trust.

Each SMSF trustee has repayment obligations. It is a term of the arrangement that in the event of a default by either of the SMSF trustees the arrangement is terminated. On termination the property is sold with any excess

proceeds, after meeting the obligations to the lender and other costs of the arrangement, returned to the investors. The lender has no recourse other than to the real property in the arrangement.

On completion of the arrangement (repayment of the borrowing), the SMSF trustees acquire joint legal title to the real property held as tenants in common.

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).

Former subsection 67(4A) of the SISA requires an arrangement with a structure that meets the conditions listed in former paragraphs 67(4A)(a) to (e) of the SISA. Former paragraphs 67(4A)(a) and (b) require that under the arrangement the original asset or its replacement is held on trust and that the SMSF trustee must have acquired a beneficial interest in that asset.

Former paragraph 67(4A)(c) of the SISA further requires that the SMSF trustee must have the right to acquire legal ownership of that asset on making one or more payments. This requires a structure where the investor has an interest through the holding trust in the trust asset ultimately to be acquired by the SMSF trustee under the arrangement.

In this particular arrangement, the asset held by the holding trust is sole title to the residential property. However, the asset that the SMSF trustee intends ultimately to acquire is a partial interest in that residential property, namely an interest as tenant in common with the other SMSF investor.

The arrangement fails to meet the test in former paragraphs 67(4A)(a) and (b) of the SISA because the interest ultimately to be acquired as a tenant in common with the other SMSF trustee is not the same interest that is acquired and held on trust by the holding trust trustee.

The arrangement also fails to meet the requirements of former paragraph 67(4A)(c) of the SISA because the SMSF trustee does not have a right to acquire sole legal ownership of the real property held in the holding trust on making one or more payments. Rather, the SMSF trustee has a right, contingent on repayment of the borrowings by both investors, to acquire legal ownership of a partial interest in the property held as tenant in common with the other investor.

The decision would be the same under section 67A of the SISA for an arrangement entered into on or after 7 July 2010.

Date of decision: 15 July 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

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