



Taxpayer Alert

TA 2009/1

Superannuation Illegal Early Release Arrangements

FOI status: may be released

Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax planning issues or arrangements that the Australian Taxation Office has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed .

Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform tax officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the Tax Office has under risk assessment will be the subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the Tax Office. In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert .

Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which are of concern to the Tax Office. These issues will generally require more detailed analysis to provide the Tax Office view to taxpayers .

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert might obtain their own advice or contact the Tax Office to seek guidance in relation to the income tax and superannuation regulatory issues covered in the Taxpayer Alert .

This Taxpayer Alert is issued under the authority of the Commissioner .

This Taxpayer Alert describes arrangements incorrectly offering people early release of their preserved superannuation benefits prior to retirement without meeting statutory conditions for such release. This Alert reiterates our concerns about substantially similar arrangements to those described in TA 2002/3, as well as highlighting additional features of concern that we are currently seeing.

People are reminded that they should take special care when approached by any one promising early access to their superannuation benefits in particular where a fee is charged.

Description

The Alert applies to arrangements having the following features:

1. A group of Australian residents have existing superannuation benefits held in funds.
2. A person or group of persons (the organiser) approaches such Australian residents, either directly or indirectly, to enter into an early release arrangement. The group may be composed of members of an ethnic community or share a common employer.
3. The organiser incorrectly informs such Australian residents that they can use the early release arrangement to gain immediate access to their superannuation contributions for use for personal or investment purposes.

4. The organiser purports to establish and operate a self-managed superannuation fund (SMSF) for retirement purposes as prescribed under the *Superannuation Industry (Supervision) Act 1993* (SIS Act).
5. The organiser arranges the rollover of superannuation benefits of the individual into the SMSF.
6. The superannuation benefits of the Australian residents are subsequently released from the SMSF by the organisers of the arrangement without a condition of release being satisfied.
7. A significant fee is normally charged upon the release of benefits, as much as 30% of the benefits improperly released.

Features which concern us

The Tax Office considers that arrangements of this type give rise to the following income tax and superannuation regulatory issues, including whether:

- a. the organiser of the arrangement, the trustee of the SMSF or any other person may have committed a criminal offence, such as those under the SIS Act;
- b. the arrangement, or certain steps within it, may constitute a sham at general law;
- c. the purported SMSF used in the arrangement was properly established for the provision of superannuation benefits upon retirement, as prescribed under the SIS Act;
- d. the release of the superannuation benefits under the arrangement was properly authorised by meeting a relevant condition of the release;
- e. any amounts received by the Australian resident that breach the preservation requirements have been properly included in their assessable income for the relevant income year;
- f. any penalties or interest charges should be applied to any understatement of such assessable income for the Australian resident;
- g. any fee or commission received by the organiser/s of an illegal early release arrangement should be included as assessable income for the relevant income year;
- h. any fee or commission should not be allowable as a deduction by the Australian resident taxpayer for that income year;
- i. any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

The Tax Office has reviewed these arrangements and considered that they are ineffective because of some or all of the above features.

In addition to conducting its own income tax, regulatory and criminal investigation which may involve breaches of the sole purpose test and misleading or deceptive conduct, the Tax Office is also working very closely with the Australian Securities and Investments Commission (ASIC) in relation to charges brought by ASIC and other investigations by ASIC concerning early release matters.

Civil and criminal penalties including significant fines and/or terms of imprisonment may be imposed.

Note 1 : *There are legislative rules restricting when superannuation can be accessed prior to retirement. These rules take the form of direct restrictions to access superannuation benefits prior to retirement, as well as rules restricting the investment activities of superannuation funds. They have the aim of ensuring superannuation is properly invested for retirement purposes, rather than in a way designed to provide current day benefits to individuals .*

Note 2 : *Access to superannuation prior to retirement is only allowed in very limited circumstances where the individual is considered to be in severe financial hardship or there are strong compassionate grounds for allowing release. Individuals do not need to pay an organiser to access their superannuation benefits on these grounds. Rather they should contact their superannuation fund directly or the Australian Prudential Regulation Authority to discuss whether benefits can be accessed before retirement .*

Note 3 : *Any superannuation benefit accessed illegally will form part of your assessable income, and as a result, you are likely to face higher taxes and additional penalties .*

Note 4 : *Trustees of SMSFs which are used for illegal early release arrangements can be disqualified under superannuation legislation .*

Note 5 : *Trustees of superannuation funds who allow illegal early access of superannuation benefits may face penalties of up to \$ 220,000 and/or jail terms of up to five years for individuals or fines of up to \$ 1.1 million for corporate trustees .*

Note 6 : *Persons involved in the operation and organisation of illegal early release arrangements will be assessed on all fees and commissions received. If the amounts have not been included in their tax return, penalties will apply to any tax shortfall. An interest charge will also be payable .*

Note 7 : *Base penalties of up to 75% of the tax avoided can apply where someone makes a false and misleading statement to the Commissioner. Reductions in base penalty will be available if the taxpayer makes a voluntary disclosure to the Tax Office. If you have any information about the current arrangement, phone us on 13 10 20. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this alert should call the tax agent integrity service on 1800 639 745 .*

Note 8 : *Penalties of up to 5,000 penalty units for individuals, 25,000 penalty units for bodies corporate or up to twice the amount of consideration received or receivable may apply to promoters of tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953. The Commissioner can also apply to the Federal Court of Australia for restraining and performance injunctions against promoters where prohibited conduct has occurred, is occurring or is proposed .*

Note 9 : *Where appropriate, section 167 of the Income Tax Assessment Act 1936 (ITAA 1936) may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, PSLA 2007/7 and PSLA 2007/24 .*

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Subject References:

self-managed superannuation fund
illegal early release
sole purpose
financial assistance
conditions of release

Legislative References:

Superannuation Industry (Supervision) Act 1993

The Act
Superannuation Industry (Supervision) Regulations 1994
The Act
Income Tax Assessment Act 1997
The Act
Income Tax Assessment Act 1936
167
Taxation Administration Act 1953
Division 290

Related Practice Statements:

PS LA 2008/15
PS LA 2007/7
PS LA 2007/24

Related Taxpayer Alerts:

TA 2002/3

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