




Taxpayer Alert

TA 2009/10

Non-commercial use of negotiable instruments involving self-managed superannuation funds

 The ATO view on the arrangement described in TA 2009/10 is set out in SMSFR 2010/1, TR 2010/1 and SMSFD 2011/1.

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 superannuation regulatory issues covered in the Taxpayer Alert.

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

This Taxpayer Alert describes arrangements involving non-commercial use of negotiable instruments to pay a benefit from or make a contribution to a self-managed superannuation fund (SMSF). The Tax Office is concerned that some SMSF trustees and members are attempting to use negotiable instruments in a non-commercial and contrived manner to artificially avoid liquidity problems, change the timing of transactions or to obtain taxation advantages.

DESCRIPTION

This Alert applies to arrangements with features that are substantially equivalent to the following:

1.
 - A non-commercial use of a negotiable instrument (usually a promissory note) involves a transaction between an entity and an SMSF. Such transactions involving an SMSF may include:
 - a)
 - a trustee of an SMSF giving a promissory note to a member to pay a benefit;
 - b)
 - a person giving a promissory note to an SMSF as a contribution;

or

- c) a combination of the above two transactions, often within a very short period of time.

The same effect may be attempted through non-commercial use of cheques, such as post-dating a cheque or only presenting a cheque for payment after a significant period of time has passed.

2.

Such non-commercial use of a promissory note includes where the note is:

- a) never intended to be honoured;
- b) immediately re-endorsed back to the issuer;
- c) post-dated; or
- d) while on its face immediately payable, it is only intended to be honoured after a significant period of time has passed (e.g. longer than would occur in a normal commercial context for arm's length parties).

FEATURES WHICH CONCERN US

The Tax Office is considering the following issues for arrangements of this type:

Superannuation regulatory issues

The Tax Office considers that arrangements of this type give rise to the following issues relevant to the application of the *Superannuation Industry (Supervision) Act 1993* and Regulations, being whether the:

- a) arrangement, or some step within it, may be a sham at general law;
- b) benefit payment standards may not be met;
- c) contributions standards may not be met;
- d) restriction on SMSFs acquiring assets from related parties may apply;
- e) restriction on SMSFs providing financial assistance to a member or relative of a member may apply; and
- f) in-house asset provisions may not be met.

Taxation issues

The Tax Office considers that arrangements of this type give rise to the following issues relevant to taxation laws, being whether:

- g) the arrangement, or some step within it, may be a sham at general law;

- h) the arrangement attempts to change the timing of a contribution to an SMSF in order to reduce or eliminate liability for excess contributions tax under Division 292 of the *Income Tax Assessment Act 1997*;
- i) any assessable income may arise to one of the parties, and if so, at what time such income may arise;
- j) income tax deductions may be available to one of the parties, and if so, at what time such deductions may be allowable;
- k) the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) may apply to the arrangement or some part of it; and
- l) 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 is currently examining these arrangements.

Note 1:

Base penalties of up to 75% of the tax avoided can apply where someone makes a false or 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 practitioner integrity service on 1800 639 745.

Note 2:

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 3:

Note 3: Where appropriate, section 167 of the 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.

Date of Issue: 18 May 2009

Date of Effect: 18 May 2009

Subject References:

Self-managed superannuation fund
Contribution
Benefit
Negotiable instrument
Promissory note
Cheque

Legislative References:

Superannuation Industry (Supervision) Act 1993
Superannuation Industry (Supervision) Regulations 1994
Income Tax Assessment Act 1936
Income Tax Assessment Act 1997
Taxation Administration Act 1953

PS LA 2007/7
PS LA 2007/24

Stephanie Martin
Deputy Commissioner

Phone:

Stuart Forsyth
Superannuation
(07) 3149 5504

© 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).