




Taxpayer Alert

TA 2010/3

Non market value acquisition of shares or share options by a self-managed superannuation fund

 ATO fact sheet Employee share scheme options and acquisition of shares by self-managed superannuation funds provides guidance to self-managed superannuation fund trustees on issues raised in this Taxpayer Alert.

FOI status: may be released

Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax and superannuation planning issues or arrangements that the Australian Taxation Office (ATO) 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 and superannuation planning issues. Not all potential tax and superannuation planning issues that the ATO 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 ATO. In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 ATO. These issues will generally require more detailed analysis to provide the ATO 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 ATO to seek guidance in relation to the 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 an arrangement where an individual nominates their self-managed superannuation fund (SMSF) as the acquirer of shares or share options under an employee share scheme. The trustee of the SMSF pays no consideration or less than market value consideration for the shares or the share options. This arrangement may give rise to issues concerning the recognition of any superannuation contributions and the application of the excess contributions tax provisions. The SMSF may have issues under the superannuation and income tax laws. The individual may also not recognise the relevant income tax consequences resulting from such transactions.

Context for the arrangement

Under the superannuation law trustees of SMSFs are prohibited from intentionally acquiring assets from a related party of the fund except in limited circumstances. Contravention of this provision may result in the SMSF becoming a non-complying superannuation fund for tax purposes, i.e. subject to 45% tax rates on its income (and assets other than undeducted contributions in the year that the fund becomes non-complying). The trustee of the fund may be guilty of an offence if an asset other than of the limited type is intentionally acquired from a related party or an asset of the limited type is acquired from a related party at a value other than market value as accepted by the law.

From 1 July 2007 the concessional taxation of superannuation benefits is restricted by placing a limit on the amount that can be contributed in respect of a superannuation fund member. There are two caps in operation. From 1 July 2009, the annual concessional contributions cap is \$25,000 (indexed) for those aged under 50 and \$50,000 for those aged 50 and over for the transition period ending 30 June 2012.

Non-concessional contributions are subject to a cap of \$150,000 per annum. (Individuals under 65 years of age may 'bring forward' two years of future entitlements of non-concessional contributions giving them a cap of \$450,000 over three years.)

A contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general. This may include a transfer of shares in public listed companies. Where contributions exceed the caps specified in the legislation, the individual will be liable to excess contributions tax.

The tax law also contains specific rules for the taxation of shares, stapled securities and rights acquired by an employee (or their associate) at a discount and in relation to employment. These rules also apply to shares, stapled securities and rights acquired by taxpayers (or their associates) in relation to services, where those services are provided under arrangements similar to employment. Recent changes to the law have modified these rules. The newly enacted Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997) now applies to shares, stapled securities and rights acquired on or after 1 July 2009 and newly enacted Transitional Provisions apply to certain shares, stapled securities and rights acquired prior to 1 July 2009.

Description

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

1. A public or private company ('the company') establishes an employee share scheme ('ESS').
2. The company invites any or all of the following parties to participate in the ESS:
 - a. employees;
 - b. directors; and/or
 - c. independent contractors who are in relationships similar to employment.
3. The ESS allows the individual or their associates (including the trustee of an SMSF) to acquire shares or rights to acquire shares ('share options') in the company.
4. The shares or share options are provided in relation to employment or services provided similar to employment for no consideration or less than market value consideration.
5. The individual ('the taxpayer') nominates the trustee of their SMSF ('the trustee') as the acquirer of the shares or the share options.
6. The trustee pays no consideration for the shares or share options, or the consideration given is less than market value.
7. The trustee of the SMSF may not recognise and record the market value of the shares or the share options.

8.

The taxpayer may not appropriately account for any income tax liability arising from the above transactions.

Features which concern us

Taxation issues

The ATO considers that arrangements of this type give rise to the following taxation issues, being **whether**:

- (a) the individual taxpayer has properly accounted for the tax liability arising under the employee share scheme provisions in the former Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), Division 83A of the ITAA 1997 or any other relevant provisions of the ITAA 1936, ITAA 1997 or the *Income Tax (Transitional Provisions) Act 1997*;
- (b) the share options and company shares acquired by an SMSF are in fact superannuation contributions and reported for excess contributions tax under Division 292 of the ITAA 1997 at their market value;
- (c) the dividend income derived by the SMSF under the arrangement is 'non-arm's length income' for the purposes of section 295-550 of the ITAA 1997 and therefore is subject to a higher rate of tax; and
- (d) the correct cost base is used by the SMSF in calculating any capital gains tax liability upon the disposal of the company shares.

Superannuation regulatory issues

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

- (e) in some circumstances the trustee may have breached s66 of the SIS Act which prohibits the trustee from intentionally acquiring assets from a related party of the fund except as permitted by subsections 66(2) and 66(2A).

The ATO is currently examining these arrangements.

Our view about what is a contribution is contained in Taxation Ruling TR 2010/1 *Income tax: superannuation contributions*. We have also provided guidance to SMSF trustees on the issue of acquisition of an asset from a related party in *Self Managed Superannuation Funds Ruling SMSFR 2010/1*.

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 us on **13 72 86** (and then key 3 and 4 for speed connection).*

Note 2:

An administrative penalty of 20 penalty units may apply to a trustee of a superannuation fund who makes a false or misleading statement to the Commissioner.

Note 3:

A superannuation fund trustee who contravenes subsection 66(1) or (3) of the SIS Act is guilty of an offence punishable by imprisonment for a term not exceeding one year.

Date of Issue: 30 June 2010

Subject References:

Self-managed superannuation fund
Employee share scheme
Share option
Market value
Division 83A
Division 13A

Legislative References:

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

Related Rulings/Determinations:

TR 2010/1
SMSFR 2010/1

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