NTAA

ADVICE

The NTAA's Financial Advice Newsletter

Edition No. 34

Good bye, accountants exemption

With the end of the 2016 financial year comes the removal of the accountants' exemption from the Corporations Act.

While many accountants have made arrangements to provide advice under an Australian Financial Services Licence (AFSL) from 1 July 2016, there are many who do not appear to be going down this path.

It's timely to remind our members about what can and can't be discussed after 30 June 2016

You can:

- Provide them with factual information about superannuation (contribution caps, pension minimum and TRIS maximum payments).

You can't:

- Advise them whether to set up an SMSF or not;
- Recommend the amount of contribution they should make to their superannuation fund;
- Tell them what type of contribution they should make to their superannuation fund;
- Advise them to move their SMSF from accumulation phase to pension phase; or
- Tell them to wind up their SMSF.

While these points are very specific, it is the meaningful conversations that occur during your normal interaction with the clients that will be hit the hardest.

If, during a meeting, a client asks something about their superannuation position, you can't answer, (even if the clients asks for your opinion) unless you are licensed.

You would need to inform the client of this and if necessary, refer them to another party.

If you are not authorised, how will this impact on your relationship with the client?

If you haven't considered this yet, it's not too late to act – you can still complete the required R146 superannuation and SMSF courses and apply to be authorised under an AFSL and NTAA has a solution for both accrediting and licensing.

But remember, until you are authorised, you can't make recommendations about superannuation.

Please contact us on **1800 808 105** for more information.

Making use of the spouse contribution splitting rules

Generally, since 1 January 2006, members of superannuation funds (including SMSFs) have been able to 'split' certain contributions with their spouse under the applicable superannuation legislation.

Splitting super contributions might be used for the following strategies:

- to split contributions in favour of an older spouse, thereby allowing a couple to get access to superannuation benefits earlier;
- to provide access two low-rate caps for lump sum benefits withdrawn before reaching age 60;
- to split contributions in favour of a spouse who has already used up their concessional contributions cap during the income year, and provide a means of further boosting the spouse's superannuation entitlements without breaching their cap; and
- to split contributions in favour of a spouse earning more than $300,000, without those contributions being subject to the 15% additional tax.

To use contribution splitting for such strategies, a fund member must lodge a valid application, in the approved form, with the fund trustee(s).

This application must be lodged in the income year **after** the year in which the contributions (which are being split) were made.

The eligibility requirements for using this strategy are that the receiving spouse must be either under their applicable "preservation age" or aged between their preservation age and 65 years of age, **without** having satisfied the 'retirement' condition of release.

An SMSF is **not** obliged to offer its members the choice of splitting contributions. However, after receiving a valid application, the trustee(s) must within 30 days give effect to the split by transferring the relevant amount for the benefit of the receiving spouse.

A member can split (with their spouse) up to the lesser of:

(i) 85% of the 'taxed splittable contributions' (basically concessional contributions) for an income year; and

(ii) their concessional contributions cap for the year.

Note that post tax (or non-concessional) contributions **cannot** be split with a spouse.

The new benefit of the receiving spouse is taken to consist entirely of a taxable component, although no tax is payable at the time of the transfer.

The amount is **not** treated as a contribution for the receiving spouse and does **not** count towards their concessional contributions cap (i.e., the split contributions continue to count towards the splitting member's concessional contributions cap).

Treatment of in-specie superannuation contributions

There has been a great deal of uncertainty in relation the treatment of in-specie contributions of business real property to superannuation funds. This confusion particularly relates to how capital gains disregarded under certain small business CGT concessions should be classified.

The applicable tax legislation allows certain CGT related payments to be excluded from being a Non-Concessional Contribution ('NCC'). This is provided the contribution is less than the taxpayer's CGT cap (currently $1,395,000 for the 2015/16 income year) when it is made. Such contributions are also referred to as 'CGT cap' amounts.

These CGT-related payments include:

(a) the capital proceeds from a capital gain disregarded under the small business 15-year exemption, and

(b) part or all of a capital gain disregarded under the small business retirement exemption.

The ATO has generally (but not always) taken the view that the applicable legislation contemplated that the CGT event in question (the choice to disregard the capital gain under the relevant small business CGT concession and the contribution to the SMSF), must occur in sequence (i.e., not at the same time) for the contribution to be excluded from being an NCC.

This meant that in-specie contributions relating to the above small business CGT concessions would be deemed to be NCCs where the CGT event, the choice to disregard the capital gain and the contribution to the taxpayer's superannuation fund occurred at the same time.

The ATO will hopefully soon issue a firm position in a taxation determination setting out how they will consistently interpret the law as applying to in-specie contributions of business real property.

It may be that the ATO's view will be the CGT event (the choice to disregard the capital gain and the contribution to the taxpayer's SMSF) must occur separately and sequentially for the contribution to be treated as a CGT cap amount.

This would be unfortunate for taxpayers, as it would mean that the in-specie contributions of business real property will be treated as an NCC, and so would be subject to the NCC cap, rather than the separate CGT cap.

We also note in this regard the recently announced proposed NCC lifetime cap of $500,000, which (if and when it becomes law) will impact on the amount of NCCs that may be made.

ATO's deadline for review of non-arm's length LRBAs extended

The ATO is allowing trustees of SMSFs additional time until **31 January 2017** to ensure that any Limited Recourse Borrowing Arrangements ('LRBAs') are on terms consistent with an arm's length dealing, or alternatively are brought to an end.

Previously (in December 2015), the ATO had advised SMSF trustees to review LRBAs in their fund and ensure that they are on terms consistent with an arm's length dealing by 30 June 2016.

The ATO says that since the issue of Practical Compliance Guideline **PCG 2016/5** on 6 April 2016, it has received requests from SMSFs to allow them further time beyond 30 June 2016 to review the terms of their LRBA arrangements to ensure that their arrangements are on terms consistent with an arm's length dealing.

Requests from taxpayers have also highlighted that taxpayers may benefit from further ATO guidance about some aspects of the non-arm's length income rules.

In particular, taxpayers may benefit from further practical guidance clarifying when an SMSF will be taken to receive a greater amount of ordinary or statutory income under a particular non-arm's length arrangement, compared to the amount which it would have received under an arm's length arrangement.

The ATO says it will provide further information and illustrative examples to assist SMSF trustees and advisers to make decisions about relevant arrangements by 30 September 2016.

Accordingly, it will not select an SMSF for review purely because it has an LRBA for the 2014/15 income years and prior years, provided that:

- the SMSF trustee ensures that any LRBAs that their fund has are on terms consistent with an arm's length dealing, or are brought to an end by **31 January 2017**, and
- payments of principal and interest for the year ended 30 June 2016 must be made under LRBA terms consistent with an arm's length dealing by **31 January 2017**.