NTAA ADVICE

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Appeal against excess contributions tax assessment allowed

In a recent decision, the Full Federal Court has allowed the taxpayer's appeal from the decision of the AAT concerning an excess contributions tax assessment.

In this case, the taxpayers were a married couple who retired in September 2007. In 9 July 2008, after seeking advice, they put $450,000 into a superannuation fund.

As the husband was then under the age of 65, and the amounts so deposited were non-concessional contributions ('NCCs'), the 'bring forward' rule was triggered for the 2008/09 year. A taxpayer is generally limited to making NCCs of (then) $150,000 (currently $180,000) in any financial year. Under the bring forward rule, payments may be made above this cap, up to (then) $450,000 (currently $540,000), but the effect of such a payment is that no NCCs can be made in the subsequent two financial years.

Following further advice in 2010, the taxpayers established an SMSF, and the husband and the wife made separate NCCs of $450,000 each (totalling $900,000) to the SMSF.

The Commissioner, in November 2012, issued an excess contributions tax assessment to the husband of $450,000 for the 2010/11 income year and which stated a liability for excess contributions tax of $209,250.

On appeal, the AAT said that notwithstanding that the husband acted honestly and in good faith, it was not satisfied that he had established the existence of 'special circumstances' that could allow the Commissioner to disregard the contributions.

On further appeal to the Full Federal Court, the Court found that it was open to the AAT to find that there were 'special circumstances' if it found that the legislative provisions operated on the husband, in his individual circumstances, in an unfair or unjust way because, through a misunderstanding of an adviser, the husband, acting honestly and carefully, accidentally breached the bring forward rule which had consequences disproportionate to the intended operation of the law.

The Court held that the AAT erred in law by taking too narrow a view of what may constitute 'special circumstances' within the meaning of the legislative provisions.

Refer Ward v Commissioner of Taxation [2016] FCAFC 132.

Can super death benefits be paid to a former spouse?

It is clear that a deceased member's superannuation benefits can be paid directly to the member's current spouse, i.e., the member's spouse at the time of their death. However, there is some uncertainty (and legislative inconsistency) as to whether a deceased member's benefits can be paid directly to a **former** spouse.

More particularly, the applicable tax legislation provides that the taxable component of superannuation death benefits are only received **tax free** if the recipient is a 'death benefits dependant' of the deceased member. A 'death benefits dependant' is defined to include (among others) the deceased person's spouse **or former spouse.**

However, it is important to note that, irrespective of their tax treatment, superannuation death benefits

can generally only be paid to a 'dependant' as defined of the deceased member (unless they are paid to the deceased member's legal personal representative).

'Dependant', in relation to a person, is defined to include the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.

While 'spouse' in turn is defined broadly to include a de facto spouse and a same sex partner, it does not specifically include a **former** spouse or partner.

The applicable legislation is therefore somewhat inconsistent in that, while superannuation death benefits that are paid to a former spouse are to be received tax free, it is not clear that these benefits are able to be paid to a former spouse in the first place! There is additional doubt that superannuation death benefits can be paid to a former spouse where the deceased member had a 'subsequent' spouse, as the definition of spouse appears to refer to just one spouse.

While the above definition of 'dependant' may not be exhaustive (note it does not specifically include financially dependent persons, who are generally accepted as dependants), detailed advice should be sought before paying superannuation death benefits directly to a former spouse. Alternatively, these benefits could be paid to a former spouse **indirectly** (that is, via the deceased member's Will), in which case, the benefits should still be received tax free by the former spouse.

SMSFs and non-arm's length income

A recent taxation determination (TD 2016/16) considered whether the income of an SMSF will be 'non-arm's length income' under the tax legislation when the parties to a scheme have entered into a limited recourse borrowing arrangement on terms which are not at arm's length.

When parties to a scheme, that include a trustee of an SMSF, have entered into a limited recourse borrowing arrangement (LRBA) on terms which are not at arm's length, it is necessary to consider whether the SMSF has derived more income under the scheme than it might have been expected to derive if the parties had been dealing with each other at arm's length in relation to the scheme. Non-arm's length income (NALI) will only arise in those cases where the answer to this question is affirmative.

In answering the question above, it is necessary to identify both the steps of the relevant scheme and the parties that deal with each other under those steps of the scheme. Having identified the steps and parties to the scheme, it is then necessary to determine the amount of income that the SMSF might have been expected to derive if the same parties to the scheme had been dealing with each other on an arm's length basis under each identified step of the scheme.

It is therefore necessary to identify what the terms of the borrowing arrangement may have been if the parties were dealing with each other at arms' length ('the hypothetical borrowing arrangement').

Having identified a hypothetical borrowing arrangement between the SMSF and the lender (the terms of which are on an arm's length basis), it is then necessary to establish whether it is reasonable to conclude that the SMSF could have and would have entered into the hypothetical borrowing arrangement.

Where it is reasonable to conclude that the SMSF could not have, or would not have entered into the hypothetical borrowing arrangement, the SMSF will have derived more income under the scheme than it might have been expected to derive under the scheme with the hypothetical borrowing arrangement. In this instance, the income derived under the scheme is NALI.

SMSFs and SuperStream compliant contributions

The ATO has recently reminded tax practitioners that all SMSFs now need to be able to receive SuperStream-compliant contributions. Also, as of **28 October 2016** (recently extended from 30 June 2016), all employers are required to be SuperStream compliant.

Under SuperStream, employers need to pay superannuation contributions for their employees electronically (e.g., by electronic funds transfer (EFT) or BPAY), and also send the associated data electronically.

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The ATO has recently reminded tax practitioners that if their business clients are still paying superannuation for their employees by cheque, then they are not SuperStream compliant. Employers who are paying via EFT or BPAY directly to their superannuation funds are also likely to need to make some changes to get across the line.

In order for SMSFs to be able to receive SuperStream compliant contributions (refer above), SMSF trustees will need to provide the following details to their employer:

- SMSF Australian business number (ABN);
- SMSF bank account details to receive the contributions; and
- an active electronic service address to receive the data associated with the contributions.

If this information is not provided to an employer, they may direct contributions made on behalf of an SMSF to the employer default fund.

The ATO has reminded SMSF trustees to make sure their electronic service address is active before giving it to their employer, otherwise the superannuation contributions may not reach the SMSF. SMSF trustees should only use an electronic service address where they have permission to do so from their provider.

The ATO has also prepared a template email to make it easier for SMSF trustees to give details of their SMSF to their employer.

Exemptions

An SMSF does not need to use SuperStream if it does not receive any employer contributions, or if it only receives employer contributions from a related-party employer. For example, if you are an employee of your family business and your superannuation guarantee contributions go to your SMSF, these contributions are exempt from the SuperStream standard.

SuperStream also does not apply to:

- personal contributions made by members; or
- rollovers to or from an SMSF.