NTAA ADVICE

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Enduring power of attorney exception to the SMSF trustee/ member rules

The trustee/member rules for self managed superannuation funds (SMSFs) generally require that all members of an SMSF must also be trustees (or directors of the corporate trustee).

However, one specific exception to these rules allows a person who holds an enduring power of attorney (EPOA) in respect of a member to be a trustee/director of an SMSF in the place of the member.

More specifically, S.17A(3)(b)(ii) of the Superannuation Industry (Supervision) Act 1993 (SIS Act) provides as follows:

> *"A superannuation fund does not [cease to be an SMSF] by reason only that……the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when……..the legal personal representative has an enduring power of attorney in respect of the member of the fund."*

Refer also to SMSFR 2010/2 in relation to the above provision.

This provision may be especially useful for a member of an SMSF who has lost capacity (and who had already made an EPOA), and so cannot continue to be a trustee/director of an SMSF.

If the holder of an EPOA is to become a trustee/ director in the place of a member, then the member must actually cease to be a trustee/director, and this change to the trustees/directors of the SMSF must be properly documented.

The following in particular should be noted:

- the power of attorney made by the member must be an **enduring** power of attorney (i.e., it cannot be another type of power of attorney such as a general power of attorney);
- the member who has made the EPOA **cannot** be a disqualified person as defined in the SIS Act (refer S.17A(10) of the SIS Act);
- where members of an SMSF are going to reside overseas, it may **not** be appropriate for person(s) holding an EPOA on their behalf to become trustees/directors in their place (especially if contributions are to continue to be made by or on behalf of the members).

We recommend that detailed advice be sought in relation to the above and other issues before this strategy is adopted.

Major update regarding deductions for superannuation funds

On 17 May 2017, the ATO issued the ***Addendum to Taxation Ruling TR 93/17*** to clarify and update the Commissioner's views on the deductions available for superannuation funds. By way of background, superannuation funds (in common with other taxpayers) are generally restricted to claiming deductions to the extent that they are incurred in the production of assessable income.

The Addendum sets out the acceptable methods for super funds to apportion tax deductions for expenses incurred in ***partly*** **gaining non-assessable income** (e.g., exempt current pension income from earnings on fund assets set aside to pay pensions). Six examples have been added to illustrate the apportionment methods, including:

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- an acceptable/unacceptable method of apportionment;
- an acceptable method of apportionment involving a service provider;
- expense of a capital nature (creating a new in house reporting system);
- expense of a revenue nature (enhancing an existing in house reporting system); and
- expense of a revenue nature (additional services received from external provider).

As from 1 July 2017, the pension earnings exemption will be removed for assets supporting **transition to retirement income streams (TRISs).**

As a general rule, the Addendum states that the costs incurred by a trustee in **establishing a superannuation fund** are not deductible because they are expenses of a capital nature, including (a) establishing a trust, (b) executing a new deed for an existing fund, or (c) amending the fund's trust deed to enlarge or significantly alter the structure or function of the fund.

Costs associated with **amending trust deeds** will be deductible if the amendments simply make the administration of the fund more efficient and do not amount to a restructuring of the fund.

The Addendum includes a note that the **exempt current pension income (ECPI) provisions** will no longer apply for all types of superannuation income stream benefits from 1 July 2017 (and will not apply for TRISs), but will be limited to income stream benefits in retirement phase (i.e., within the $1.6m transfer balance cap). Also, from 1 July 2017, the ECPI provisions will not apply to income from 'disregarded small fund assets' (as defined) for SMSFs where a member's total super balance (across all funds) exceeds $1.6m.

Superannuation guarantee obligations of a personal services entity

A previous ATO Interpretative Decision (ATO ID 2015/9) considered whether attributed personal services income attracts superannuation guarantee (SG) obligations on the part of the relevant personal services entity (PSE).

Your income, or the income of any other entity is your personal services income (PSI) if the income is mainly a reward for your personal efforts or skills.

A personal services entity is a company, partnership or trust whose income includes the PSI of one or more individuals.

In certain circumstances, an amount of income derived by a PSE from the personal services (principal work) provided by an individual may be included in the assessable income of the individual. These amounts (referred to as attributed amounts) are excluded from the assessable income of the PSE under the relevant taxation legislation.

Attributed amounts do not include PSI paid by the PSE to the individual, as an employee, as salary or wages, provided that the payment is made before the end of the 14th day after the relevant PAYG payment period.

An employer's obligation to make SG contributions hinges upon the receipt by an employee of a payment in return for work or services.

If the worker (the personal services provider) was not an employee of the PSE for the purposes of the SG legislation, then the PSE would not have an obligation to make superannuation contributions on behalf of the worker under the SG legislation.

It was held in this ATO ID that attributed PSI will not generally give rise to an SG obligation, as the amounts of attributed PSI are generally not *paid* to the personal services provider and the obligation to provide superannuation support under the SG legislation hinges upon the notion of receipt of payment for work.

However, where the personal services provider is in receipt of salary or wages, and the payment is made after the end of the 14th day after the PAYG payment period, this amount is treated as attributed PSI, and it will still give rise to an SG obligation.

Services provided by SMSF member may be treated as a contribution!

Although the superannuation legislation prohibits superannuation funds from intentionally acquiring **assets** from related parties, there is no such specific prohibition on superannuation funds acquiring **services** from related parties.

However, the provision of services to a fund by related parties may in some circumstances be considered a contribution to the fund. This will obviously be a concern if it could cause the relevant members of the fund to breach their contribution caps.

The ATO's ruling on contributions (TR 2010/1) defines a contribution as "...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 members in general" – refer paragraph 4 of TR 2010/1.

According to the ATO, if a related party of an SMSF provides the materials used to make an improvement to real property owned by the fund at no cost to the fund (or for less than market value consideration), and supplies labour/services to effect the improvement free of charge, the increase in the value of the real property as a result of the improvement, will increase the capital of the fund. If the improvement is made by the related party with the purpose of benefiting one or more members of the fund, it will be a 'contribution' within the ordinary meaning.

In such a case, the ATO considers that the value of that contribution would be equal to the value of the improvement, being the resulting increase in the value of the real property owned by the fund, and not simply the value of the materials and labour supplied for no cost.

However, if, e.g., a member of an SMSF that is a qualified accountant was to prepare the accounts and income tax return for the SMSF without remuneration, that would not be regarded as a contribution, as it has not increased the capital of the SMSF. Refer to example 2 in TR 2010/1.

If a member provides the free services for the benefit of him or herself (i.e., they are recognised in the accounts of the fund as their own contributions), or for their spouse or a child under 18, and they do not claim a deduction for them, then the contribution should be non-concessional (and so count towards the member's non-concessional contributions cap) and not be taxable to the fund.