NTAA ADVICE

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Only one year to go

The removal of the accountants' exemption is 12 months away!

With two years of the transition process gone, now is the time to make sure you have taken steps to work with the changes.

Many accountants are considering not becoming licensed, believing that:

(a) They don't have sufficient numbers of SMSFs to justify this path; and

(b) They won't have to change the way that they are doing business, because they really don't give advice.

An important concept to understand is that whether or not you have given advice will be determined ultimately by the client.

Advice is not so much about what you say, but whether the client takes what you have said and acts upon it.

Because of this, if you choose not to be licensed after 1 July 2016 you will need to review the manner in which you discuss SMSFs with clients. Consider:

- The client who comes in wanting to set up an SMSF. If you suggest how this might be best structured you will be giving advice.
- The client who has a business real property in their own name. Recommending that they bring this into their SMSF is giving advice.
- The client who has retired and wants to transfer from accumulation to pension phase. Telling them how to do this can be seen as giving advice.

There are business practice strategies that can be put into place to make sure advice is not given, however there will be a need to adjust the way clients will be assisted if you are not licensed.

When deciding not to become licensed, these factors should be considered:

- If a client does need advice, you will need to refer them to a licensed adviser that you can trust;
- Obtaining this advice from this referral partner will be an extra cost to the client; and
- As you are the clients' trusted adviser it is likely they will ask your opinion on the advice anyway, at which point you would be seen as giving them advice.

With a year to go before things have to change, make sure you take the time to fully consider your options and what the ramifications will be of the decision you make for the future of your practice.

Meaning of "legally qualified medical practitioners" for super purposes

A recent ATO Interpretative Decision (ATO ID 2015/11) considered what is meant by the term 'legally qualified medical practitioners' within the definition of 'disability superannuation benefit' in the relevant taxation legislation.

This question is relevant because, in order to work out the tax to be withheld from the payment of a superannuation lump sum, the trustee needs to consider whether the benefit paid will be a 'disability superannuation benefit' for the purposes of section 307-145 of the *Income Tax Assessment Act 1997 (ITAA 1997).*

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The term ‘disability superannuation benefit’ in S.307-145(1) is defined as follows:

Disability superannuation benefit means a superannuation benefit if:

(a) The benefit is paid to an individual because he or she suffers from ill-health (whether physical or mental); and

(b) 2 legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the individual can ever be gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.

The Commissioner considers that in this context, the term ‘legally qualified medical practitioners’ should be construed as referring to those who are legally qualified under the relevant legislation to practice medicine in Australia.

The requirement in paragraph (b) of the definition of ‘disability superannuation benefit’, involves providing an opinion about whether the two individuals in question are “legally qualified”.

It was decided in this ATO ID that the term ‘legally qualified medical practitioners’, within the definition of ‘disability superannuation benefit’, is not a defined term in taxation legislation.

The Commissioner instead relies on its ordinary meaning, and takes the view that ‘legally qualified medical practitioners’ are persons who have general or specialist registration with the Medical Board of Australia (MBA).

It is the Commissioner’s view that persons who have general or specialist registration with the MBA are legally qualified medical practitioners for the purposes of the definition of ‘disability superannuation benefit’. Also, for a benefit to be a disability superannuation benefit, certification must have been provided by 2 medical practitioners as opposed to other types of health practitioners.

It is important to discuss this aspect of a potential claim with any clients who may be in such a situation to ensure that they meet their obligations as trustee and meet the legislated requirements for release.

SMSF liable to repay contributions received in breach of director’s duties

A recent decision of the Victorian Court of Appeal concerned a business that had borrowed to make large superannuation contributions to an SMSF, after which the business went into liquidation.

In this case, Australasian Annuities Pty Ltd (AA) borrowed $2.5 million from a bank in 2007. The sole director of AA had an SMSF, and much of the $2.5 million was contributed to this SMSF.

In 2009, AA went into liquidation, and the liquidators of AA brought a claim against the trustee of the SMSF to recover at least part of the $2.5 million.

The liquidators’ first attempt to recover the money failed before the Supreme Court in 2013, and the liquidators then appealed.

One argument of the liquidators on appeal was that the money should be returned because the trustee of the SMSF had provided no consideration in return for the money, and therefore should be forced to make restitution by paying the money back.

However, the majority held that the trustee of the SMSF did in fact provide valuable consideration in exchange for the contributions (the consideration being the obligations of the SMSF trustee to provide beneficiaries with the rights and benefits under the rules of the fund). Because of this view, the liquidators’ argument failed.

The liquidators also argued that the SMSF was liable to return money because of the principle of “knowing receipt”. That is, the SMSF received property (money) that had been misapplied or transferred pursuant to a breach of fiduciary duty or trust, and the SMSF had knowledge of this.

This second argument was successful. The sole director of AA was held to have breached his fiduciary duties in borrowing money, mainly for the benefit of himself and his wife.

It was also held by the majority that the SMSF had knowledge (through the mind of one of the directors of the corporate trustee, who was instrumental in the relevant transactions) that the money was received in breach of fiduciary duty.

Accordingly, the trustee of the SMSF was liable to pay back money to the liquidators of AA.

Utilising the lifetime CGT cap to boost retirement savings!

Non-Concessional Contributions ("NCCs") made to a superannuation fund are currently capped at $180,000 (from the 2014/15 income year), or $540,000 under the three-year averaging (or 'bring forward') rule that applies to individuals under the age of 65.

However, where the CGT liability concerned arises from the sale of a business asset (e.g., goodwill or business premises), an individual may elect to exclude certain amounts from the CGT small business concessions and their regular NCCs cap, and have them count towards an indexed "CGT cap" instead. The cap for this concession is $1,355,000 from the 2014/15 income year:

The following amounts can be counted towards this cap:

- An NCC relating to the capital proceeds from the sale of an asset that qualifies (or that would have qualified in certain circumstances) for the 15-year exemption in subdivision 152-B of the *Income Tax Assessment Act 1997 ("ITAA 1997");*
- An NCC equal to all or part of a capital gain (up to a lifetime limit of $500,000) that was disregarded under the retirement exemption in subdivision 152-D of the ITAA 1997.

Utilising the CGT cap is a particularly useful strategy where an individual has exhausted or wishes to preserve their NCCs cap. It can also be used in the situation where the retirement exemption is chosen, and the contribution required to be made under the exemption will result in the individual's NCCs cap being exceeded.

Also, when utilised with both the NCCs and the Concessional Contributions ("CCs") caps, the CGT cap allows an individual to maximise their retirement savings. For example, this means that total contributions of up to $1,925,000 (i.e., $1,355,000 CGT cap + $540,000 NCC cap + $30,000 general CC cap) can be made in the 2015 income year for an individual under the age of 65 (assuming the general CCs cap applies), without resulting in excess contributions.

Note: An election for the CGT cap to apply (instead of the NCC cap) must be made in the approved form available from the ATO's website, generally by the time the contribution is made.

Detailed superannuation and tax advice should be sought as required in relation to the above (preferably before the contributions are actually made).