NTAA ADVICE

The NTAA's Financial Advice Newsletter Edition No. 24

Statements on SMSF found by ASIC to be misleading and deceptive

A financial advice firm offering SMSF services has paid a $10,200 penalty after including potentially misleading claims on its website.

In a public statement, ASIC advised that the firm included a page on it's website about the advantages of investing in property within a SMSF, and compared the performance of a geared property investment within an SMSF to an ungeared equity investment within an SMSF.

The webpage was also promoted through the social media profile of the firm's CEO, with a statement that investing in property in an SMSF has taxation, leverage and diversification advantages. A link was provided from the social media profile to the related article on the firm's webpage.

ASIC said it was concerned the webpage did not give a balanced message about the returns, benefits and risks of investing in property in a self-managed super fund, and in particular that the uncertainty of forecasts was not made clear.

The firm has since removed the statements from its website and related social media profiles, and has fully cooperated in responding to ASIC's concerns.

ASIC deputy chair Peter Kell said making appropriate investment decisions is one of the important responsibilities of SMSF trustees:

> *"ASIC is determined that SMSF trustees get accurate information and are not misled by advertising, including on websites and through social media".*

As the use of social media for promoting financial products and advice services increases ASIC said it is important financial consumers are not misled or misinformed.

> *"ASIC encourages financial services providers using social media to regularly review their content and consider ASIC's guidance on promoting financial products and advice services in Regulatory Guide 234 Advertising financial products and advice services including credit: Good practice guidance,"* said ASIC.

As accountants move to being licensed to provide SMSF advice, they will be governed by ASIC in the same manner exhibited here. Consideration needs to be made in regard to teh way SMSF's are represented when promoted.

Accountants should also be aware, that advising to buy property in an SMSF requires the adviser to be licensed (as per ASIC's report 337). Giving such advice without a licence would not only be deemed misleading and deceptive conduct by ASIC, but also be subject to sanctions for giving unlicensed advice.

Disqualification of SMSF trustee for dishonesty offences – *Shaw v FC of T*

The AAT has recently upheld the disqualification of a person from acting as a trustee of an SMSF, because of his conviction for several offences involving dishonesty.

The applicant and his wife had been trustees of their own SMSF since 2002. In 2012, the applicant was convicted of offences relating to making false statutory declarations for several motor vehicle offences, and conspiring with others to pervert the course of justice.

As a result, the applicant was sentenced to six months imprisonment, and he became a "disqualified person" pursuant to S.120(1)(a)(i) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

The applicant unsuccessfully applied to the Commissioner for a waiver of his disqualified status. In rejecting the application, the Commissioner referred to S.52(2) of the SIS Act, which required a trustee to act honestly in all matters concerning the SMSF.

On appeal, the AAT said that the sole issues for it to determine were whether the applicant was "highly unlikely" to firstly, contravene the SIS Act and secondly, do anything that would result in an SMSF not complying with the SIS Act.

Section 126D(1A) of the SIS Act provides that if the Commissioner is satisfied that the applicant is "highly unlikely" to act in this way, then the Commissioner must waive the applicant's status as a disqualified person.

The AAT said that the applicant's offences were serious offences of dishonesty, and it was not persuaded that the applicant was "highly unlikely" to contravene the provisions of the SIS Act in the future. There were no other circumstances such as the applicant's age (45), the time that had elapsed since the commission of the offences, nor the sentence imposed by the court that would lead it to any other conclusion.

The AAT said the fact that the applicant made false statutory declarations and conspired with others to pervert the course of justice, was fundamentally contrary to the standards expected of a trustee. The applicant's history of non-compliance with the SIS Act meant that it was not "highly unlikely" that he would contravene the SIS Act in the future.

Proposed extended access to superannuation for terminal illness

The government has recently announced, as part of the 2015/16 budget, that it will extend early access to superannuation for people with a terminal medical condition.

Under existing superannuation legislation, a person with a terminal illness is required to have two registered medical practitioners (including one specialist) to certify that they are likely to die **within 12 months**, in order to access their superannuation.

The government acknowledged that this (and in particular, the stated life expectancy of 12 months) has proven difficult for some people who want access to their superannuation to relieve the financial burden associated with treatment costs, or who want to make the most of their time with their family.

Because of this, the government announced that it will amend the relevant legislation to change the life expectancy "certification period" from 12 months to 24 months, so that terminally ill people may have earlier access to their superannuation.

Therefore, under the proposed amendments, a person with a terminal illness may access their superannuation, provided that two registered medical practitioners (including one specialist) have certified that they are likely to die **within 24 months.**

Note however, that this proposed amendment is not yet law. Assuming that it becomes law, this amendment is proposed to apply as from 1 July 2015.

It should be remembered that:

- This condition of release may apply in the case of injury (as well as illness);
- The requirement for this condition of release to be satisfied is that **it is likely** at the time that the certificate is made that the illness or injury will result in the death of the person within the specified period (i.e., currently 12 months, proposed to be extended to 24 months). That is, it does not have to be certain that the person will die within the specified period;
- This condition of release applies irrespective of the age of the member; and
- Benefits may be received tax free under this condition of release, including for members under the age of 60 (provided the benefits are received as a lump sum).

USA retirement account not a foreign super fund

In *Baker v FC of T,* the AAT held that an overseas retirement account was not a foreign superannuation fund, and that a payment from the account would not be a payment from "a scheme for the payment of benefits in the nature of superannuation upon retirement or death".

In this case the taxpayer was an Australian resident for tax purposes, although he had also resided and worked in the USA. The taxpayer was a member of a Merrill Lynch Individual Retirement Account Rollover Plan (IRA), which was a personal tax-deferred retirement plan.

The taxpayer subsequently (unsuccessfully) sought a ruling from the Commissioner, that a payment he proposes will be made from his IRA will be either paid from a "*foreign superannuation fund*" or "*will be a payment from a scheme for the payment of benefits in the nature of superannuation upon retirement,"* for the purposes of the relevant legislation (being respectively sections 305-80(1) and 305-55(2) of the Income Tax Assessment Act 1997).

On appeal, the AAT concluded that the IRA was not a foreign superannuation fund within the meaning of S.305-80(1), as it was not a superannuation fund. It said there was a fundamental difference between the Australian and USA regimes directed to incentivise retirement planning and saving (e.g., among other things, under the USA regime, money could be withdrawn at any time prior to retirement at the complete discretion of the IRA holder).

Therefore, the AAT held that the IRA was not equivalent to or more restricted than an Australian superannuation fund, and therefore the IRA was not a superannuation fund as defined.

The AAT also said that the flexibility of monetary withdrawals from an IRA was such that payments in the nature of superannuation payments from it were but one of a number of possibilities which meant that the scheme did not qualify as one "*for the payment of benefits in the nature of superannuation upon retirement or death*" within the meaning of S.305-55(2).

Care should always be taken when dealing with overseas benefits and how they might be treated in the Australian superannuation regime.