



Can an SMSF sell a property to a related party?

It is generally known that an SMSF is prohibited from **acquiring** a property or other asset from a related party such as a member, subject to some specified exceptions (such as where the property is 'business real property').

It may be assumed from this that an SMSF cannot **sell** a property already holds to a related party. However, that is not the case – there is no legislative provision that prohibits an SMSF from selling a property or other asset to a related party.

If an SMSF is to sell or transfer a property it holds to any party (including a related party such as a member), the applicable legislation requires that this be done on an arm's length basis, with the property first being valued, and the purchase price reflecting the current market value of the property. The trustee of the SMSF should also have regard to the SMSF's written investment strategy before selling any property or other asset.

If a member was to purchase a property from an SMSF, then the purchase price paid by the member to the SMSF's trustee would **not** be regarded as a contribution (and so the annual contribution caps are not an issue). However, stamp duty and capital gains tax may apply, and detailed advice should be sought in this regard (and also in relation to any possible exemptions that may apply).

It is also generally known that an SMSF is prohibited from borrowing (subject to some specified exceptions such as a 'limited recourse borrowing arrangement'). However, this does not prevent a **member** borrowing to acquire an asset from an SMSF, provided that it is clear that the member is borrowing in his or her own personal capacity, and the lender cannot have recourse against the SMSF or any asset held by the SMSF.

Of course, the fact that an SMSF is not prohibited from selling a property to a related party does not necessarily mean that it is appropriate for the SMSF to do so – that depends on all the relevant circumstances of the SMSF and other parties concerned. A full investigation of the clients' situation should take place before such a transaction was to take place.

Confirmation of super guarantee charge assessments by AAT

In a recent decision, the Administrative Appeals Tribunal (AAT) has upheld superannuation guarantee charge assessments issued to an employer who had not ensured that superannuation payments for his employees had been made to a 'complying superannuation fund'.

In this case, the Commissioner had determined that the employer (applicant) had not satisfied his superannuation guarantee obligations in relation to various employees, and issued Superannuation Guarantee Charge ('SGC') default assessments.

On appeal to the AAT, the applicant contended that his SG contribution obligations had been fulfilled in relation to one employee because he had paid the SG contributions to her directly, as part of her salary and wages. He argued that it was not his responsibility, but rather the employee's, as the trustee of her SMSF, to ensure that the SG contributions were transferred into her fund's bank

account. The applicant also contended that he paid the applicable shortfall amount in relation to the other employees.



The AAT held, however, that the applicant had a statutory obligation to ensure that the appropriate level of SG contributions were made on behalf of his employees to complying superannuation funds and this obligation included ensuring that the applicable contributions made it into the bank account of the relevant superannuation fund.

The AAT also held that, as the payments made by the applicant did not occur within 28 days of the relevant quarter (as required by the relevant legislation), they cannot be considered a deduction to his SGC as a 'late payment'. Further, none of the payments concerned were made in the relevant quarter to which the assessments relate.

The AAT said in any case, that, under the relevant legislation, an election was required in relation to the payments, as well as an amendment to the relevant assessments by the Commissioner. However, the applicant had not made an election, nor had he sought an amendment to the relevant assessments.

The AAT also affirmed that it could not remit either the interest or administration component of the superannuation guarantee charge.

Refer *Payne v FC of T*, AAT ref: [2016] AATA 104, 25 February 2016.

Superannuation rates and thresholds for 2016-17

The release of the average weekly ordinary time earnings ('AWOTE') data for the December 2015 quarter has enabled the calculation of certain superannuation rates and thresholds for 2016/17, as set out below. **However, all figures should be confirmed against the Tax Office Website document, Key superannuation rates and thresholds.**

Contributions caps unchanged

The general **concessional contributions cap is \$30,000 for 2016/17** (unchanged from 2015/16). Note the higher temporary concessional cap of \$35,000 (not indexed) applies for those aged 49 years or over on 30 June.

The **non-concessional contributions cap is \$180,000 for 2016/17** (unchanged from 2015/16). The non-concessional cap is therefore unchanged at \$540,000 under the bring-forward rule over 3 years.

The **CGT cap amount** for non-concessional contributions is **\$1.415m for 2016/17** (up from \$1.395m for 2015/16).

Super Guarantee - maximum contribution base

While the minimum level of employer superannuation guarantee support has been frozen at 9.5% from 2014/15 until 2020/21, the '**maximum contribution base**' has been increased to **\$51,620 per quarter for 2016/17** (up from \$50,810 for 2015/16).



An employer is not required to provide the minimum superannuation guarantee support for that part of an employee's ordinary time earnings ('OTE') above the quarterly maximum contribution base (\$51,620

for 2016/17). This quarterly maximum contribution base represents a per annum equivalent of \$206,480 for 2016/17.

Government co-contribution

The Government co-contribution '**lower income threshold**' is **\$36,021 for 2016/17** (up from \$35,454 for 2015/16); '**higher income threshold**' is **\$51,021** (up from \$50,454).

Superannuation benefits 2016/17

The following thresholds have been increased for 2016/17:

- ◆ Superannuation lump sum low rate cap - \$195,000 (unchanged from 2015/16).
- ◆ Untaxed plan cap - \$1.415m (up from \$1.395m).
- ◆ Employer Termination Payment ('ETP') cap amount is \$195,000 (unchanged from 2015/16).
- ◆ Genuine redundancy and early retirement payments - tax-free amounts: base amount - \$9,936 (up from \$9,780); service amount - \$4,969 (up from \$4,891) for each whole year of service.

ASIC stops potentially misleading SMSF social media advertising

With the growing popularity of social media sites including Facebook, Twitter and YouTube, social media has become an increasingly important channel for the promotion of financial products and services, including SMSFs.

In 2012 in response to the growth in SMSFs, ASIC established the SMSF Taskforce. A specific focus of the taskforce has been misleading advertising of SMSFs. Particular problems identified include misleading or deceptive statements about SMSF fees, returns and risks.

In 2014 and 2015 ASIC's SMSF Taskforce expanded its work on SMSF advertising to include a review of online SMSF advertising through social media platforms such as Twitter, Facebook and Youtube.

Outcomes and actions stemming from the SMSF Taskforce include:

- ◆ Following an ASIC investigation, Ms Sarah Jane Busted was charged with three counts of dishonestly obtaining a financial advantage by deception and one count of dealing with over \$100,000 that was the proceeds of crime (refer: [16-040MR](#));
- ◆ The Supreme Court of NSW found Park Trent Properties Group Pty Ltd had been unlawfully carrying on a financial services business for over five years by providing advice to clients to purchase investment properties through a SMSF (refer: [15-300MR](#));
- ◆ Dixon Advisory Group Limited complied with two ASIC infringement notices, paying two \$10,200 penalties after including potentially misleading claims on its website (refer: [15-207MR](#));
- ◆ Omniwealth Services paid a \$10,200 penalty for potentially misleading claims on its website (refer: [15-190MR](#));
- ◆ The principal of Sherwin Financial Planners, Bradley Thomas Sherwin, was charged with fraud. The charges relate to the use of SMSFs of former clients of Sherwin Financial Planners (refer: [15-158MR](#));
- ◆ The Federal Court of Australia ruled that Craig Gore and several other parties and financial services businesses, including Queensland-based ActiveSuper and Royale Capital, contravened sections of the Corporations Act or were knowingly concerned in those contraventions. (refer: [15-134MR](#));
- ◆ Australian Financial Planning Solutions Pty Ltd paid \$10,200 in penalties for potentially misleading SMSF ads (refer: [15-052MR](#));

- ◆ SuperHelp Australia paid a \$10,200 penalty after making potentially misleading statements about the cost of setting up an SMSF (refer: [14-051MR](#));
- ◆ Media Super paid \$10,200 in penalties for potentially misleading SMSF ads (refer: [14-001MR](#));

ASIC Deputy Chair Peter Kell said, "Accuracy in advertising is integral to maintaining consumer trust and confidence in the SMSF sector. ASIC will continue to take action where we see advertising that might mislead consumers, whether that advertising is on social media or more traditional media".

Companies identified by ASIC have all removed the relevant posts and videos, and will have to ensure any future marketing on social media will undergo appropriate review and approvals processes, after fully cooperating after responding to ASIC's concerns.

SMSFs will continue to be a focus in ASIC's enforcement work, so it is important for any practice with a social media presence to ensure that any representations made can be substantiated, and any required disclosure (for example, from their licensee) is included.

