Why SMSFs call Australia home

DIY super

Monica Rule


True blue: To get tax concessions, a SMSF must be Australian.

This time of year our thoughts turn to Christmas, family gatherings, overseas trips or new opportunities offshore. But what does moving overseas have to do with self-managed superannuation fund trustees?

One SMSF trustee obligation is ensuring that your SMSF remains an Australian super fund. The income tax law lists three conditions that a SMSF must satisfy to maintain its complying status and receive concessional tax treatment.

Obviously the government isn't keen to provide tax concessions to people who aren't contributing to the nation's coffers.

The first condition is that the SMSF is established in Australia or any SMSF asset is situated in Australia. The second condition is that the major decisionmaker for the SMSF usually lives in Australia. The third condition is if any contribution is received by the SMSF while its members are overseas, at least 50 per cent of the value of the SMSF's assets must belong to resident members.

If the high-level SMSF decision maker goes overseas, that person needs to ensure the absence is temporary.

The Australian Taxation Office decides this by using a real-time test. This means the duration of absence must be defined in advance or related to the fulfilment of a specific, passing purpose. It cannot be established in retrospect or with the benefit of hindsight. The person must intend to return to Australia and not establish a home overseas. If their intention ceases, their absence ceases to be temporary. They cannot be away indefinitely.

Tax office ruling 2008-09 provides examples. In example 7(a), husband and wife trustees go overseas for three years because the husband is transferred to London by his employer.

The couple intend to return to Australia at the end of the husband's transfer. They rent out their family home and live in a furnished house in London. They maintain bank accounts and private health cover in Australia. They return to Australia for a holiday at Christmas. The ruling states that the high-level decision-making exercised by the trustees overseas would result in the trustees being ordinarily in Australia as their absence is considered temporary.

At example 7(b), it is the same scenario but this time the husband abandons his intention to return and continues to work in London indefinitely. From the time they changed their minds, the trustees' absence ceases to be temporary.

Another thing to consider as well as the trustees' intention is the two-year period of absence stipulated under the tax legislation.

Many trustees incorrectly believe that as long as they are overseas for less than two years, their SMSF remains a resident fund.

Example 8(b) of the ruling outlines where the trustees were outside Australia for less than two years. However, before leaving Australia, they sold most of their assets. They intended to leave indefinitely but returned after 18 months due to a family illness. In this example, the absence would still not be considered temporary even though it was less than two years.

One thing you can do is give someone in Australia an enduring power of attorney. You need to pick someone who is capable of high-level decisionmaking and is trustworthy. You should also remember that if you make contributions into your SMSF while overseas at least 50 per cent of the assets in the SMSF must belong to resident members.

Remember your actions signal your intent to the tax office. If you do anything to cut ties with Australia, the tax office may assume that your overseas sojourn is permanent and remove your SMSF tax concessions.

Monica Rule is the author of The Self Managed Super Handbook —Superannuation Law for Self Managed Superannuation Funds in plain English www.sunshinepress.com.au

BORROWING THROUGH YOUR DIY SUPER FUND?

Ratings house CANSTAR has identified Australia's best-value self-managed super fund loans

SMSF LOANS STAR RATINGS SEPTEMBER 2013

Company name	Product name	Fees as at 1/9/2013#			Additional repayments	Principal + interest or int only	Max loan amount $	Refinance	Additional borrowing*	Max LVR personal trustees	Max LVR corporate trustees
		Interest rate	Up front fees $	Ongoing fees $							
FIVE STAR											
SMSF VARIABLE LOANS											
Bendigo Bank	Self Managed Super Fund Variable	POA	3550	15.00/m	Y	Both	1,000,000	Y	Y	70%	70%
Commonwealth Bank	SuperGear - Resi Variable	POA	2000	10.00/m	Y	Both	No Max	Y	N	80%	80%
nab	Tailored Variable SMSF	5.88%	2450	8.00/m	Y	Both	No Max	Y	Y	70%	80%
SMSF 1 YEAR FIXED											
BOQ	Investment Fixed - SMSF 1 yr	4.75%	POA	10.00/m	Y	Both	No Max	Y	Y	75%	80%
nab	Tailored Fixed Home Loan SMSF 1 yr	4.89%	2450	8.00/m	Y	Both	No Max	Y	Y	70%	80%
SMSF 2 YEAR FIXED											
BOQ	Investment Fixed - SMSF 2 yrs	4.79%	POA	10.00/m	Y	Both	No Max	Y	Y	75%	80%
nab	Tailored Fixed Home Loan SMSF 2 yrs	4.99%	2450	8.00/m	Y	Both	No Max	Y	Y	70%	80%
SMSF 3 YEAR FIXED											
BOQ	Investment Fixed - SMSF 3 yrs	4.99%	POA	10.00/m	Y	Both	No Max	Y	Y	75%	80%
nab	Tailored Fixed Home Loan SMSF 3 yrs	5.09%	2450	8.00/m	Y	Both	No Max	Y	Y	70%	80%
SMSF 5 YEAR FIXED											
BOQ	Investment Fixed - SMSF 5 yrs	5.49%	POA	10.00/m	Y	Both	No Max	Y	Y	75%	80%
Commonwealth Bank	SuperGear - Resi Fixed 5 yrs	POA	2000	10.00/m	Y	Both	No Max	Y	N	80%	80%
nab	Tailored Fixed Home Loan SMSF 5 yrs	5.65%	2450	8.00/m	Y	Both	No Max	Y	Y	70%	80%

SOURCE: CANSTAR

Poor advice is poor advice, no matter who gave it

David Huggins
Comment

The last time this column appeared I discussed agribusiness schemes that had failed.

These were schemes where clients bought units in a trust involved in an agricultural business. There were many kinds of schemes but some of the most notorious were forestry schemes. Since I wrote that article I've become aware of three things.

First, many investors were advised to enter into these schemes by an accountant rather than a financial planner.

From a legal perspective, this doesn't change anything. When accountants gave advice about these schemes they did so within the same legal framework that applied to financial planners.

This means that investors who got poor advice from an accountant have the same rights as investors who received poor advice from a financial planner.

A person who provides financial advice must hold an Australian Financial Services Licence or be authorised by the holder of a licence. Incredibly, some accountants were authorised by the promoter of the scheme about which they were providing advice.

Financial planners and accountants who accepted commissions for advice about these schemes had a conflict of interest that was made worse by the high levels of commissions paid by the promoters of these schemes.

In the case of some accountants this conflict of interest was made even worse because they were acting as representatives of the promoter. Some investors, did not realise that their accountant was acting on behalf of the promoter.

Second, some investors think that because the scheme that they invested in failed they will not have to repay the loan they took out to buy units in the scheme. Often investors borrowed from a company that was associated with the promoter of the scheme.

When the scheme failed that company was usually placed into liquidation and the loans were then controlled by a liquidator. In some cases investors' debts have been sold by the original lender to a financial institution.

Unless investors can establish a reason why they are not required to do so, everyone who borrowed to invest in these schemes will eventually be required to pay back their loans with interest.

Given the size of these loans, it is inevitable that some investors will be bankrupted as a result.

Third, some investors believe their predicament was caused by the scheme they invested in not being operated properly.

In my view, this is wrong. The failure of the scheme was, in many cases, a readily predictable event.

The real cause of their loss is that they were advised to make an unsuitable investment in circumstances in which the risks associated with investing in these schemes was grossly magnified by the very large loans taken out.

In my view, investors need to be thinking about whether they should have been borrowing to invest in these schemes in the first place and the options that are open to them if the quality of the advice that has been provided to them by their accountant or their financial planner did not meet the required standard.

They also need to be thinking about whether they have grounds to avoid paying out the loans that they took out to invest in these schemes.

David Huggins is a lawyer who specialises in resolving disputes about poor financial advice.