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## Unpaid trust distributions may be loans

*Self Managed Superannuation Funds Ruling SMSFR 2009/3* considers whether an unpaid distribution to a fund from investments in a related trust may amount to a fund giving financial accommodation in contravention of the SIS Act. The final Ruling follows the Draft Ruling *SMSFR 2008/D1* which whilst the subject of some controversy, was not substantially altered by the ATO. The Ruling states that unpaid trust distributions can have the following consequences:

- be a "loan" and as such an in-house asset of a self-managed fund; and
- as an investment, be included in the calculation of in-house assets for the purposes of the 5% limit.

Some care needs to be taken by fund trustees who have trust or related party distributions outstanding at 30 June 2009 which is the end of the transitional period for distributions to and re-investments by funds in related party transactions.

## Genuine redundancy payments

*Taxation Ruling TR 2009/2* released on 22 April 2009 outlines the Commissioner's view as to four factors which qualify a redundancy payment as a genuine redundancy payment:

- a payment is made "as a consequence of" termination of an employee;
- such a payment is genuinely made as a consequence of redundancy;
- an employee's termination is caused by the redundancy of an employee's position; and
- an employee's termination results in an employee being dismissed from employment.

The Ruling also points out that a decision to terminate an employee is made at the employer's sole initiative and suggests that where employees have a dual role (as an employee and a director), they may not be able to satisfy the four factors.

## Ordinary time earnings

In *Superannuation Guarantee Ruling SGR 2009/2*, the Commissioner explains his view as to the meaning of the expression "ordinary time earnings" ("OTE") used in the *Superannuation Guarantee (Administration) Act 1992*. Whilst "salary or wages" are included within OTE, "salary or wages" is a broader concept than OTE. The Ruling contains an exhaustive table containing a number of examples of payments to employees and determines whether they are "salary and wages" or OTE. Of course, if the payments are classified as OTE, they then attract the Superannuation Guarantee contribution. By way of example:

	<u>"Salary &amp; wages"</u>	<u>OTE</u>
Simple overtime	Yes	No
Overtime under an industrial award or agreement which does not distinguish between ordinary and overtime work hours or where no ordinary hours are stipulated	Yes	Yes
Workers' compensation return to work payments	Yes	Yes
Performance bonus	Yes	Yes
Annual leave	Yes	Yes

As these are but a few of the examples provided in the Ruling, reference should be made to the Ruling itself.

## When contributions are made

*Draft Taxation Ruling TR 2009/D3* states that a contribution to a superannuation fund is made when it is received by a fund. This principle also includes in-specie contributions of property which the Commissioner suggests, occurs only when a fund obtains beneficial interest in a property and has the necessary transfer forms to enable it to be registered as the legal owner of a property. The Draft Ruling is consistent with the Commissioner's *Taxpayers Alert TA 2009/10* where he condemns the non-commercial use of negotiable instruments, including promissory notes as being "contributions made". A "promise to transfer" or transfer of beneficial ownership only of property is not a contribution "made". A final Ruling is expected later in 2009.

## In-house assets

At first glance, *Self Managed Superannuation Funds Ruling 2009/4* appears innocuous - it "explains the core concepts in the definition of 'in-house asset' ". On closer examination, it extends the definition of "in-house asset". The Commissioner's view as to the definitions of "asset", "loan", "investment in", "lease" and "lease arrangement" are not of themselves controversial but, some of the examples provided in the Ruling may well be. For instance:

- The late payment of rent to a fund due to clerical error is not a "loan";
- An annuity arrangement between a fund trustee with a related company to provide an annuity arrangement for a fund member is an "investment" in the related party;
- A contractual funding arrangement whereby a fund contributes money to a company controlled by a member's family, in the expectation of long-term gain is an "investment" in that company as it is a contract to receive income from the company. This example should be contrasted with the carefully crafted Joint Venture Agreements seen some years ago (and still used today) where self-managed funds make a risk capital investment a joint venture which is not an "entity". Arguably, the mere fact that a fund is entitled to receive return on investment from a related party (an "entity" or not), according to the Commissioner's example, makes such an arrangement an in-house asset;
- The "lease" of artwork to an employer on arm's length terms and at a commercial rental is an in-house asset of a fund;
- The display of artwork owned by a fund at a member's home is a "lease arrangement" and thereby, an in-house asset; and
- A "lease" by a fund of a holiday house to a member for two months in a year means that the market value of the property is included in the in-house assets of a fund for two months, quite possibly breaching the 5% threshold.

As the Ruling points out, the definitions of "related party" and "related trust" as set out in the SIS Act are complex. A "related party" is any of a fund member, a standard employer sponsor of a fund or a Part 8 associate of a member or standard employer sponsor. A "related trust" is a trust controlled by a member or a standard employer sponsor other than an excluded instalment trust. The Ruling also provides a number of useful examples of "related parties" and "related trusts" and a detailed analysis of the anti-avoidance provisions set out in Division 1 of Part 8 of the SIS Act.

## Funds borrowing

A fund may not borrow money save for the very limited circumstances set out in Section 67 of the SIS Act. In *Self-Managed Superannuation Funds Ruling SMSFR 2009/2*, the Commissioner suggests that "borrowing" has two necessary elements. Firstly, the temporary transfer of money and secondly, an obligation by a borrower to repay a lender albeit, by the transfer of an asset. The Commissioner considers that margin lending accounts and bank overdrafts once drawn upon are forms of borrowing.

## And, the Federal Budget

Once again, your editor was in the United Kingdom on the eve of the Treasurer's delivery (by cable TV), in an English licensed house in the wee small hours of the morning. Alas though, the sternness of the Treasurer's presentation was interrupted by "Jack" an occasionally friendly highland terrier owned by the editor's esteemed and venerable client, Lord Tollywaddle. Now his Lordship (as always, resplendent with pork pie hat) seems to have taken a shine to his colonial adviser to whom it seems, his Lordship's terrier has taken dislike and even disdain at certain times. Jack is an intriguing creature who despises three things - motorcycles, televisions which show images and your editor. Jack can hear a motorcycle from kilometres away which immediately triggers an attack of barking, growling and snarling, something we suspect he's learnt from his Lordship himself. Of course, to avail himself of the late night presentation of the Treasurer, your editor needed to use a television. Unfortunately, Jack (and his Lordship too who was a trite "over-refreshed") reacted to the concept of a television producing images of our Federal Treasurer. Your editor's consumption and enjoyment of the important moment was marred by Jack's incessant barking, growling and snarling at your editor.

The suggestion was (most respectfully) made to his Lordship that Jack be returned to the gleaming, limited edition Silver Phantom (with fully fitted, matching Conway Stewart pens in the glove compartment), in which he occupies pride of place beside his Lordship. That suggestion was not well received by his Lordship. Unfortunately, the Federal Treasurer's delivery of the demise of superannuation as a savings incentive was endured in the company of Jack and others in Cockermonth, a town in Cumbria and, very aptly named for the very occasion. The Budget was a memorable event amidst Jack, the other patrons and Lord Tollywaddle's frequent, bellowing exclamations doubting not only the parentage of most Australians but notably, proclaiming that Gordon Brown was to thank for healing Wayne Rooney's knee!

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