SUPERMATTERS

SUPERANNUATION STRATEGIES FOR YOU AND YOUR BUSINESS

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Ineligible downsizer contributions and how they are administered

The Downsizer Measure allows eligible Australians to contribute part of the proceeds of the sale of their home towards their superannuation.

Individuals that are 65 years and older may be able to make a contribution into their superannuation of up to $300,000 from the proceeds of selling their family home. This scheme came into effect on 1 July 2018 as one of several measures announced in the May 2017 Federal Budget.

When a downsizer contribution does not meet the criteria and is deemed ineligible, the fund must re-assess the amount in accordance with the Superannuation Industry (Supervision) Regulations 1994 and the trust deed. This is to determine if the amount can be retained as a non-concessional contribution.

Provided the trust deed allows so, the fund can return the contribution to the member or adjust the prior downsizing contributions to nil and report this amount as a non-concessional contribution when the member meets the age and work tests.

When a contribution can't be returned or returned in full:

Members who no longer have a super interest with the fund, or an insufficient return amount, must have their contribution re-reported as non-concessional, even if the contribution was returned because the member did not meet the age/work tests. Some of the contributions may be an excess non-concessional contribution (ENCC). Regardless of the age of the member, if this is the case the member will receive an ENCC determination or when the fund can't return the full amount.

Members will continue to have access to all review rights under the ENCC scheme including:

- Applying for a Commissioner's Discretion if they have special circumstances; or
- Lodging an objection to the ENCC determination.

Even if the member is in pension phase, the funds will still need to return an ineligible downsizer contribution if it cannot be accepted.

When a fund receives a release authority:

An amount released under these circumstances is treated as a super lump sum as it is a portion of the member's super interest. Being in pension phase doesn't prevent a fund from complying with the release authority although it may mean the full amount can't be released, as the available balance may be lower than the amount stated in the release authority. Where the member's available balance is lower than the release authority amount, the fund must release the maximum amount available.

The ATO monitors the rectification of this contribution reporting. Where funds don't act within legislative timeframes, the Australian Prudential Regulation Authority (APRA) may be contacted.

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Illegal early release of super on ATO watch-list

Illegal early release of super (IER) is one of the risk areas that the ATO has identified as being of most concern and in need of action.

Each year, the ATO analyses its data to identify the areas of high risk that will form part of its compliance program. Aside from illegal early release, another key risk area is non-lodgement. In the last year, the ATO has targeted individuals and promoters who register self-managed super funds with the intention of using the fund to illegally access super benefits.

In the 2019 financial year, the ATO cancelled the registration of 609 newly registered SMSFs who intended to use the funds for IER. They also withheld the details of 352 funds from the Super Fund Lookup, meaning they couldn't receive payments and rollovers.

Some of the most common reasons for IER are:

- Financial stress.
- A desire to spend funds on a current-day benefit.
- Individuals having limited knowledge of setting up an SMSF and are therefore targeted by scrupulous promoters.

The ATO has warned of severe consequences for you and your fund if super is accessed before you are legally entitled to it. These include disqualification of trustees, administrative penalties, the fund BEING deemed as non-complying, or even prosecution.

Fund trustees or members who have knowingly been involved in a scheme or been approached by anyone claiming that they can withdraw their super early should contact the ATO immediately to advise of the situation and avoid further penalties.

Succession planning for your SMSF

Managing a self-managed super fund (SMSF) in the event a trustee passes can be a difficult and complicated process.

While succession planning may not be one of the first responsibilities that comes to mind when managing an SMSF, it can ensure a funds stability for remaining members as well as providing certainty and peace of mind for a deceased trustee's family. There are a few avenues for trustees to take when future-proofing their SMSF.

Appoint a new trustee:

In the event of a trustees death, sole member funds can nominate another trustee. Note that the non-member trustee cannot be the employer of the member unless they are related. This would not be an option for a fund with two members as the available exemptions only apply to single member funds. Those who appoint a family member or close friend must consider first whether they are suitable for a role; running an SMSF requires expertise and knowledge, and appointing someone with limited experience may not be in the best interest of the fund's future.

Enduring power of attorney:

SMSF trustees may choose to appoint an enduring power of attorney as a replacement trustee. An enduring power of attorney is someone who makes decisions on the trustee's behalf if they become incapacitated or pass away. Common power of attorneys include accountants, financial advisors and lawyers; people who understand SMSF management and the associated challenges. For an enduring power of attorney nominee to be appointed, legal documents, i.e. the succession documents appointing the replacement director, must be in place before the member loses their capacity to be a member.

Binding death benefit nomination:

By using a binding death benefit nomination (BDBN), trustees can dictate where their super goes if they pass away. Since a person's superannuation does not make up part of their estate and is therefore not automatically covered by their Will, a BDBN is often a good solution to help with the distribution of super member benefits.

There are alternative strategies that may be more appropriate than an SMSF, depending on your individual financial situation. Investment decisions are best made with the input of an appropriate financial advisor.

Areas of super under development

The ATO has released a list of superannuation issues that they are currently developing advice and guidance for.

Superannuation income stream:

The ATO is working on an addendum to Taxation Ruling TR 2013/5 in regards to income tax: when a superannuation income stream commences and ceases. Its purpose is to address impacts made by the 2016 Budget announcement of the transfer balance cap.

SMSF property development:

This bulletin aims to outline potential tax and regulatory consequences of deals entered into by SMSFs to develop property.

Superannuation guarantee remission of penalty:

The statement was created to discuss the imposition and appropriate remission of penalty. It is also designed to provide further guidance to ATO staff on the various steps during an audit, the finalising of remission decisions and how the penalty concessions may apply.

Proposed superannuation guarantee amnesty:

The proposed Superannuation Guarantee (SG) Amnesty and associated legislation has been re-introduced to parliament. Under existing law, missed payments or failure to pay an employee's super on time requires you to lodge a Super guarantee charge (SGC) statement and pay the super guarantee (SG) charge on any SG shortfall amounts. Until the proposed amnesty law is enacted, the ATO will continue to apply the existing law to the SGC statements lodged.

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