NTAA ADVICE

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Change of ATO approach with reporting contributions to an SMSF under a contribution reserving strategy

The ATO has recently (on 31 July 2015) released changes in relation to the reporting of concessional contributions which have not been allocated to a member's account in an SMSF before the end of a financial year.

Under the relevant legislation, a contribution must generally be allocated to a member's account in an SMSF within 28 days after the end of the month in which the contribution is received by the SMSF.

If a concessional contribution is made at the end of a financial year (i.e., in June), the contribution will be taxed in that financial year, but will be counted towards the member's contributions cap when it is allocated to the member (which may be in the next financial year).

The ATO has now advised that, in this situation, a specific form needs to be completed and lodged with the ATO. The ATO will then adjust the SMSF's contribution records accordingly, so that the contributions are counted against the member's concessional contributions cap in the correct financial year (i.e., in the year of allocation).

This will ensure that the ATO does not incorrectly assess an individual in relation to excess contributions and/or for the 15% additional (or Division 293) tax for clients earning more than $300,000 per annum.

Editor's note – this new development will be covered in more detail at the NTAA's upcoming Super Schools Day 1 Seminar.

Disability superannuation benefit – medical certificates

A recent ATO Interpretative Decision (ATO ID 2015/19) considered whether medical certificates supplied by an individual in relation to a particular superannuation lump sum could satisfy the requirements of paragraph (b) of the definition of 'disability superannuation benefit'. In particular, this was considered in relation to paying later superannuation lump sums to the individual by the same superannuation fund.

In this particular case, in November 2007, a member of a complying superannuation fund was paid a superannuation benefit on the basis of having satisfied the permanent incapacity condition of release. At this time, the member was less than his preservation age.

Two medical practitioners had certified that the member was incapable of ever being gainfully employed in a capacity for which the member was reasonably qualified because of education, training or experience. These certificates were presented to the fund before the trustee paid the benefit.

Three subsequent superannuation lump sums were paid in the same financial year; the last payment being made in April 2008.

Paragraph (b) of the definition of 'disability superannuation benefit' in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) requires that 2 legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the individual can ever be gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.

ADVICE

The Tribunal held that there were no additional requirements upon medical practitioners to set out the evidence upon which the medical certificates were based, provided the medical certificates properly answered the questions raised by the relevant legislation.

Accordingly, it is the Commissioner's view that medical certificates supplied in relation to a particular superannuation lump sum can be used in relation to later superannuation lump sums, provided the superannuation lump sums are paid over a short period of time (in this case November 2007 for the first and April 2008 for the last), and there is no evidence to suggest that the individual's circumstances have changed in some relevant way.

"Accountants' Exemption and YOU" seminars completed

In late July and early August the NTAA presented its "Accountants' Exemption and YOU" seminars to members around Australia.

From the reaction of members and questions raised during and after the sessions, it is clear there are still many members that are unsure of the requirements for dealing with clients' SMSF issues past 1 July 2016, when the accountants' exemption will no longer exist.

The main thing to remember is that no matter whether you choose to be licensed or not, changes will have to be made to the way that you deal with SMSFs as part of the way you operate your practice.

Beyond that, here are some questions that were regularly asked at the sessions, along with our responses.

Q – Can I give SMSF advice to clients once I have completed an RG146 course?

A – No. An RG146 course only provides the accreditation to become licensed – it does not give you a licence or allow you to provide licensed advice.

Q – I understand I can get a limited licence from ASIC by handing over my practicing certificate – is that right?

A – Not entirely. The application process for getting your own licence involves a lot more – not just providing your practicing certificate.

Q – If I get my own limited licence I don't have to provide the advice in writing, do I?

A – Yes, you do. Though it is a "limited" licence you still need to meet the requirements under the Corporations Act for giving advice. This includes providing clients with a written document to outline your advice – even if you have given advice to them verbally.

Q – Isn't having my own limited licence a cheaper option than being authorised?

A – Not necessarily. You will still have to meet payments for items such as the licence application fee, being a member of an approved External Dispute Resolution scheme, and any ongoing compliance requirements for the licence that you need to outsource.

Q – Once I have my own limited licence I can then get on with business though, can't I?

A – Once you have your licence you will need to ensure it is managed in line with the requirements of the Corporations Act. If you don't have the expertise to meet these requirements, you will need to engage someone who can. If you choose to do it yourself, this can take you away from some of the activities your accountancy practice needs you to perform.

Q – What are the restrictions of operating under someone else's licence?

A – Generally they need to make sure you meet the Corporations Act requirements for giving advice, so they will provide you with a compliance regime that determines how you will operate. You also need to ensure clients understand who the licensee is (since they are responsible for the advice), as well as directing payment for advice services to the licensee.

Q – So what are the benefits of being authorised by someone?

A – Because they are responsible for your conduct and the advice you give, they will generally provide you with the tools you need to give advice, including document templates, some CPD, and a regular audit of the advice being given. Also, they are the ones who have to deal directly with ASIC regarding the licence operations.

Q – So can we have one member of the practice accredited to cover all the others in the practice giving SMSF advice?

A – No. The person giving the advice has to be accredited and authorised; not just a single person within the practice being responsible for it.

Q – So do all members of the practice have to be accredited and authorised?

A – No. Only the people giving the advice need to be accredited. Support staff can prepare advice documents and other requirements without being authorised or accredited, provided they don't give the clients any advice.

Q – But I don't give the clients advice. I just tell them that "other clients have started an SMSF and not regretted it". Isn't this ok?

A – No. Whether you give advice or not isn't just about whether you tell the client to do something. If the client is influenced by something you say, you would be seen to have given them advice about it.

Q – But aren't the changes just about whether to set up an SMSF or not?

A – No. Anything to do with how to treat an SMSF is financial advice. After 1 July 2016, the ability to tell them to set up a fund is gone, but so is the ability to discuss issues with a client that might influence what they do with their SMSF.

Q – Will my PI Insurance cover me for giving advice?

A – If you choose not to be licensed, your PI insurance will not cover you for providing SMSF advice without a licence (as this would be engaging in an illegal activity). And while a PI policy may cover superannuation advice, this will usually only be if you have your own licence – not if you are authorised under someone else's licence.

These questions were covered in detail during these sessions. For those who did not attend and are interested, comprehensive "Accountants' Exemption and YOU" notes are available to purchase online.

For those who prefer the seminar experience, we are planning to offer these seminars again early in 2016.