



The 2011 SMSF Forum

National Tax Liaison Group Superannuation
Technical Sub-Group Review

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Introduction

Topics to be discussed in this session

1. When a superannuation income stream (pension) commences and ceases – TR 2011/D3 – SISFA's view and submission.
2. Draft ruling on borrowing arrangements under sections 67A and 67B SISA.
3. Draft ruling on return of excess contributions and TA 2010/2.



Introduction cont.

4. Excess contributions and reserve and suspense accounts.
5. Conversion to non-g geared unit trusts and companies and Division 13.3A SISR.
6. Non-arm's length income and the *Allen's Asphalt* case.



Introduction cont.

7. Property owned by a SMSF and another party as tenants-in-common and the other party using its share of the property to secure debt.
8. Differential voting rights under trust deeds of SMSFs on member account balances.



When a superannuation income stream (pension) commences and ceases

1. ATO view in TR 2011/D3 a pension:
 - 1.1 commences on day on which member and trustee agree under the terms of the SF's deed it is to commence; or
 - 1.2 ceases – when there is no longer a member who is entitled or a dependent beneficiary of a member who is automatically entitled to be paid benefit.



When a superannuation income stream (pension) commences and ceases cont.

- e.g. upon death a pension will cease unless a dependant of the deceased is automatically entitled under the SF's deed or the rules of the pension to receive the pension on death.



When a superannuation income stream (pension) commences and ceases cont.

2. SISFA view (and based on submission of March 2009, it is believed industry view) a pension:

2.1 commences – in accordance with the ATO view (i.e. based on pension agreement and the SF deed);

2.2 ceases – when under SF deed and pension agreement ceases.

SISFA's submission forwarded to the ATO on 31/8/2011.



Draft ruling on borrowing arrangements under ss.67A and 67B

1. Proposed date for release 14 September 2011.
2. To cover the meaning of:
 - 2.1 single acquirable asset; and
 - 2.2 maintain, repair and improve the acquirable asset.
3. How the in-house asset rules to apply to bare trusts or custodial trusts to be “looked at” separately. The ATO has confirmed “it is currently working on its position on this issue” – (NLTG Superannuation Technical Sub Group (NLTGSTSG) - June 2011 minutes.

From
NLTGSTSG
minutes



Draft ruling on return of excess contributions and TA 2010/2

From
NTLGSTSG
June 2011
minutes

1. ATO draft ruling which has been taken to the Public Rulings Panel and addresses the question of the return of “contributions” under each of:
 - regulation 7.04 SISR;
 - a clause in the trust deed; and
 - restitution of a mistaken payment.is on hold.



Draft ruling on return of excess contributions and TA 2010/2 cont.

2.

ATO has obtained advice from external counsel in relation to “contributions” returned pursuant to clauses in the trust deed.

From
NTLGSTSG
June 2014
minutes



Draft ruling on return of excess contributions and TA 2010/2 Neil Young QC comments

Neil Young QC in a paper delivered at the 2010 Victorian State Convention of the Tax Institute entitled “Can the Commissioner of Taxation be the Great Dissenter” writes and expresses the views as follows:

“Another recent example of the Commissioner’s tendency to press the boundaries of tax law is provided by Taxpayer Alert 2010/2...”



Draft ruling on return of excess contributions and TA 2010/2 Neil Young QC comments cont.

1. “The Law Council submitted that superannuation trust deed clauses of the kind in question were effective as a matter of ordinary trust law. The primary obligation on all trustees is to adhere to the terms of the trust deed. Consequently, the Law Council submitted that where the terms of the trust are such that the trustee is not entitled to retain the amount in question and that the amount does not form part of the superannuation trust fund, then there is no basis to treat the amount as a contribution attracting excess contributions tax.”



Draft ruling on return of excess contributions and TA 2010/2 Neil Young QC comments cont.

2. “Similar concerns and objections were raised with the Commissioner by the Association of Small Independent Superannuation Funds. The Association made the point that the provisions operate to ensure that the trustee never accepts the excess amount under the main superannuation fund trust and consequently there is no excess contribution that will attract excess contributions tax. The Association pointed out that there is no conflict between the clauses and any of the SIS Regulations, including regulation 7.04.”



Draft ruling on return of excess contributions and TA 2010/2 Neil Young QC comments cont.

3. “The Association also submitted that there is no basis upon which superannuation trust deed clauses of the kind in question would be regarded as a tax exploitation scheme.”



Draft ruling on return of excess contributions and TA 2010/2 Neil Young QC comments cont.

4. “My own view is that there is considerable force in the arguments and objections raised by the Law Council of Australia and the Small Independent Superannuation Funds Association Limited.”



Draft ruling on return of excess contributions and TA 2010/2 cont.

From
NTLGSTSG
June 2011
minutes

3. The ATO is considering the advice more specifically in relation to the position taken in TA 2010/2. The ATO was to announce its position on TA 2010/2 in July 2011.
4. On mistaken payment the ATO is aware of a case which it is proposed be litigated which if it proceeds will be heard later this year.



Draft ruling on return of excess contributions and TA 2010/2 cont.

5.

On the operation of Reg. 7.04 the ATO has been requested to issue a ruling due to confusion concerning ATO ID 2007/225.

From
NTLGSTSG
June 2011
minutes



Excess contributions and reserve and suspense accounts

From the NTLGSTSG minutes of 16 June 2009:

1. Where a non-concessional contribution is allocated to a member's account in a later financial year than the year the contribution was made, it will count towards the member's non-concessional contributions cap for the financial year during which it is allocated to the member's account.



Excess contributions and reserve and suspense accounts cont.

2. The non-concessional contribution does not need to be paid into a “reserve” but may be paid into an account, such as a suspense account set up for recording contributions prior to allocation to fund members.
3. In the minutes the ATO indicates it has the same view in relation to concessional contributions.



Excess contributions and reserve and suspense accounts cont.

4. The ATO is aware this leaves scope for the manipulation of the excess contributions cap. Consequently it will only be to amounts allocated within 28 days of 30 June i.e. 28 July, that will not be counted towards the members contributions caps for the year in which those amounts are received.



Excess contributions and reserve and suspense accounts cont.

5. The ATO expressed the view in the meeting that the timing of the allocation of amounts to a member's account "does not alter the timing of the deduction."



Conversion to non-geared unit trusts and Division 13.3A SISR

1. From the NTLG minutes of the June and September 2010 meetings, in the view of the ATO where a unit trust, regardless of its date of establishment, in which a SMSF has units, borrows money at any time on or after 28 June 2000 an investment in further units in that unit trust after 30 June 2009 will be an in-house asset.



Conversion to non-g geared unit trusts and Division 13.3A SISR cont.

2. SISFA agrees with the ATO's interpretation of Division 13.3A SISR.
3. However on 4 August 2011 SISFA lodged a submission with Treasury for the law to be amended so that an investment in a non-g geared unit trust by a SMSF will not be an in-house asset if the requirements/provisions of Division 13.3A are satisfied.



Conversion to non-gearred unit trusts and Division 13.3A SISR cont.

4. If in accordance with SISFA's submission Division 13.3A SISR is amended then a further investment by a SMSF in units in an ungeared unit trust which was previously geared will be treated in the same way as an initial investment by a SMSF in units in an ungeared unit trust that was previously geared.

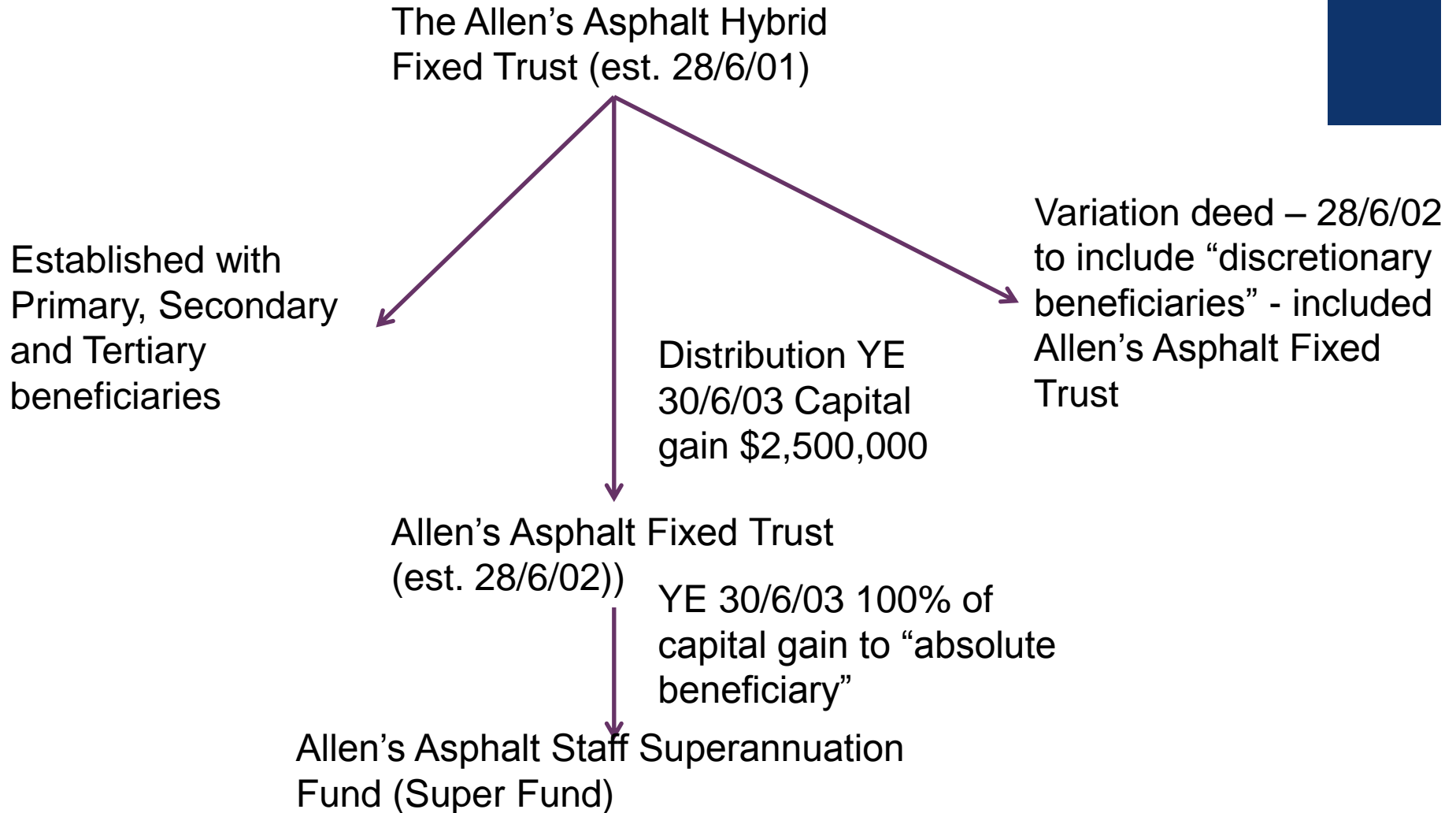


Conversion to non-g geared unit trusts and Division 13.3A SISR cont.

5. Unless Division 13.3A is amended as recommended by SISFA where a unit trust has borrowed money on or after 28 June 2000 it is the ATO and SISFA's view a further investment in that unit trust after 30 June 2009 will be an in-house asset.



Non-arm's length income and the Allen's Asphalt case cont.



Non-arm's length income and the Allen's Asphalt case cont.

1. Court held:

“...the Super Fund acquired the fixed entitlement to income and subsequently derived the income under an arrangement, where some or all of the parties were not dealing with each other at arm's length.”

2. Result capital gain special income of the Super Fund. *Allen's Asphalt Case [2010]*
FCA 1276



Non-arm's length income and the Allen's Asphalt case cont.

2. Warning under s.295-550 income of a SF will be non-arm's length income and taxed at 45% if:
 - 2.1 it is derived from a scheme the parties which were not dealing with other at arm's length in relation to the scheme; and
 - 2.2 that amount is more than the amount that the entity might have been expected to derive if those parties had been dealing at arm's length in relation to the scheme.



Property owned by a SMSF and another party as tenants-in common and the other party using its share of the property to secure debt

1. The ATO preliminary view is that it would be difficult to conclude that regulation 13.14 SISR (prohibition on a SMSF changing assets) has been contravened by the trustee of an SMSF if the SMSFs proportionate interest does not in some way secure payment of the money owed, whether by the SMSF or the other tenant in common, to another party.



Property owned by a SMSF and another party as tenants-in common and the other party using its share of the property to secure debt cont.

2. However in the ATO view the SMSF trustee should consider:
 - 2.1 the SMSF investment strategy;
 - 2.2 the requirements of s.52 (formulation of investment strategy) and consideration of investment strategy (regulation 4.09 SISR).
 - 2.3 sole purpose test (s.62 SISA).



Property owned by a SMSF and another party as tenants-in common and the other party using its share of the property to secure debt cont.

- 2.4 provision of financial assistance to a member or relative in contravention of s.65 SISA.
- 2.5 possibility that SMSF's share of any sale proceeds (e.g. under a statutory trust for sale) could be used to meet the liability of a mortgagee.



Differential voting rights under trust deeds of SMSFs on member account balances

1. From the NTLGSTSG minutes of June 2011:
 - 1.1 ATO has been asked to consider whether clauses in SMSF trust deeds which provide for differential voting rights of trustees based on member balances are consistent with SISA.
 - 1.2 It was highlighted that if a trustee was to use their voting power to act for their own benefit to the detriment of other members, this would be a breach of trust.



Differential voting rights under trust deeds of SMSFs on member account balances cont.

- 1.3 “...it was a matter for trust law between members of the fund.”
- 1.4 “It was noted that differential voting rights can be used in respect of a corporate trustee.”



Differential voting rights under trust deeds of SMSFs on member account balances cont.

Comments on trustee duties and differential voting rights:

1. The fiduciary duties of trustees and directors of trustee companies are paramount – any differential voting rights will be subject to those duties.
2. On differential voting and trustees duties:
 - 2.1 “It has never been doubted that a trustee stands in a fiduciary relation to a cestui que trust [that is a beneficiary] ...(Jacobs Law of Trusts 7th edition at[202].



Differential voting rights under trust deeds of SMSFs on member account balances cont.

- 2.2 “What is involved in the notion of a fiduciary duty? Broadly speaking, it is a duty not to place the fiduciary’s interest in conflict with his or her duty, and so not to use the fiduciary’s position for the purpose of acquiring an advantage for himself or herself, coupled with an inability to retain any advantage so acquired unless the person to whom the duty is owed freely and with full knowledge consents to both the acquisition and retention of it. The fiduciary may be in breach of duty even though the principal would not or could not, have sought the benefit obtained by the fiduciary” (Jacobs [206]).



Differential voting rights under trust deeds of SMSFs on member account balances cont.

3. On duties of directors:
 - 3.1 From Brereton J in Hitchcock v Pratt [2010] NSWSC 1508 at [29] “In my view, a director cannot be said to be entitled to exercise a power to dispose of a company’s property to himself or to an eligible person other than for valuable consideration.”
 - 3.2 “...the director of a company is required in respect of the affairs of the company to act for the benefit of the company and not for the director’s own benefit...”



Differential voting rights under trust deeds of SMSFs on member account balances cont.

In summary the inclusion of differential voting rights of trustees of superannuation funds based on their respective member account balances is fraught with danger from the perspective of the trustees; in many instances it will lead trustees to a breach of their duty to the members of the relevant SMSF as a whole.



Thank you for your attention.

