



SELF-MANAGED INDEPENDENT SUPERANNUATION FUNDS ASSOCIATION

23 August 2020

Stephen Keating
Australian Taxation Office

By email - Stephen.Keating@ato.gov.au

Dear Steve

Further submission in relation to LCR 2019/D3

The Self-managed Independent Superannuation Funds Association (**SISFA**) is Australia's original SMSF advocate, established in 1998 to represent the interests of trustees and industry to Government and the Regulators. SISFA's mission includes the encouragement of high professional standards through its professional membership and public education initiatives.

Further submission

SISFA understands that the ATO is open to receiving further submissions in relation to LCR 2019/D3, This submission has therefore been prepared on that basis.

SISFA recommends changes to LCR 2019/D3

We refer to SISFA's submission to the ATO, dated 13 December 2019, in relation to LCR 2019/D3 and PCG 2019/D6, a copy of which is attached. We understand that the ATO is open to receiving further submissions and feed back in relation to LRC 2019/D3.

Consistent with our previous submission, it is SISFA;s view that treating all the income and capital gains of a SMSF as non-arm's length income (**NALI**) when general or unallocated expenses are considered to be non-arm's length expenditure (**NALE**) is inappropriate and inconsistent to retirement income policy objectives.

In our view, this would result in adverse tax outcomes which would be disproportionate to the perceived mischief. In other words, the potentially large penalty for a minor NALE transaction disproportionately outweighs the "crime".

SISFA considers that it is unreasonable that all income and capital gains derived from an investment should be tainted by only a minor and insignificant non-arm's length component of a transaction involving a general or unallocated expense.

A SMSF generally incurs the following general or unallocated expenses which are not directly related to the derivation of income from a SMSF asset:

- Accounting fees
- Actuary fees
- Audit fees
- Administration fees
- Tax return preparation fees

These compliance fees generally do not vary from year to year regardless of the fund size, nature and level of assets and level of income.

They are often insignificant when compared to specific expenses such as portfolio management fees and property investment expenses yet can result in a greater penalty tax outcome if a component of a general or unallocated expense is considered to be non-arm's length.

The ATO's view also has many practical difficulties. For example, how does one determine if an accounting service is transacted on a non-arm's length basis? Based on the draft ATO view, a \$100 reduction in accounting fees for a year, when fund assets are sold, could expose all the income and capital gains to NALI which is unfair and inappropriate. In SISFA's view the introduction of the NALE provisions were not intended to give rise to such a result.

Accordingly, without any ATO guidelines for standard commercial prices for general or unallocated expenses, the allocation of compliance resources devoted to this area would be time consuming, inefficient, impractical and costly for SMSF trustees on an annual basis.

The perceived mischief tends to be targeted at accountants, actuaries, auditors, financial planners and lawyers who run their own SMSF and use the resources of their firm (whether as a partner or employee) and their own time free of charge. We consider it is an extremely harsh penalty to taint all the ordinary and statutory income of their SMSF as NALI given the insignificant component of general/unallocated expenses incurred compared to an expense which is clearly identifiable as specifically related to a fund asset.

The objective of the professionals in this case is to enhance their retirement income and not to obtain a tax benefit. Therefore, we consider Example 2 in draft LCR 2019/D3 is harsh and inappropriate.

In any event, in SISFA's view, such unallocated or general expenses of a SMSF will generally not have a sufficient nexus to the gaining or producing assessable income of an asset. Rather, such costs are incurred to comply with the relevant law. An internal arrangement not to charge (or charge less than market rates) for accountancy services or other general administrative services to a SMSF has nothing directly to do with generating the income from fund assets. As such, in SISFA's view, the NALE and NALI provisions have no application in such cases.

Recommendations/suggestions

1. Remove general/unallocated expenses from NALE from to LCR 2019/D3 and PCG 2019/D6 on the basis that they have no application at law and/or due to the unfair and disproportionate adverse tax outcomes that result from that view.
2. In the alternative, if the ATO maintains its view then the ATO should publicly provide:
 - 2.1. guidance as to how SMSFs should determine standard commercial prices for general or unallocated expenses to better and efficiently determine potential breaches of NALE by a SMSF.
 - 2.2. a de minimis threshold under which general or unallocated expenses of an SMSF would not trigger NALE. For example, where such costs are less than say \$10,000 each year.

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If you have any questions in relation to this submission, please contact Phil Broderick on 0419 512 801.

Yours Faithfully



Phil Broderick, Chair of Technical and Policy Committee

A handwritten signature in blue ink, appearing to read 'C. Balalovski', with a stylized, cursive script.

Chris Balalovski, Chair