



Taxpayer Alert

TA 2016/6

Diverting personal services income to self-managed superannuation funds

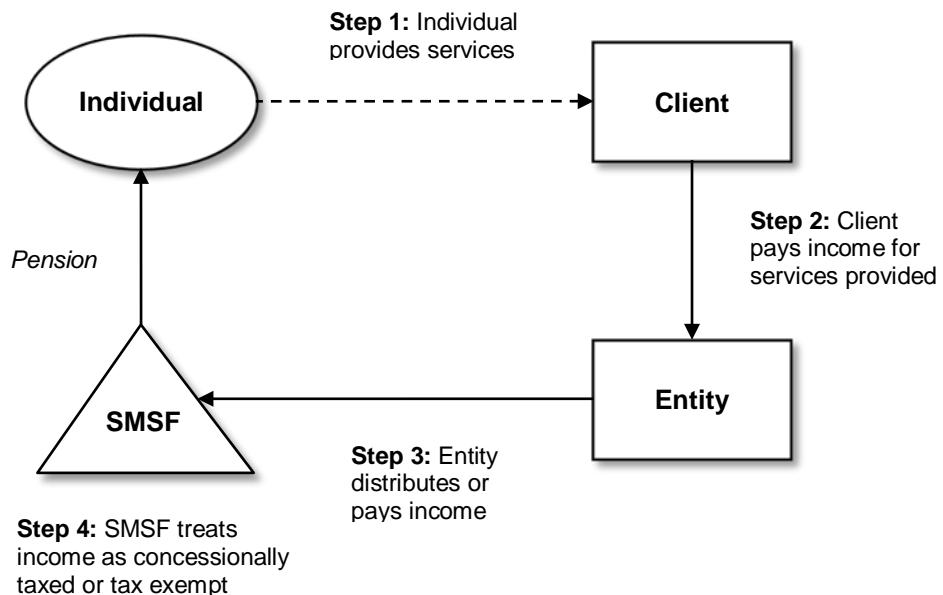
Alerts provide a summary of our concerns about new or emerging higher risk tax or superannuation arrangements or issues that we have under risk assessment.

While an Alert describes a type of arrangement, it is not possible to cover every potential variation of the arrangement. The absence of an Alert on an arrangement or a variation of an arrangement does not mean that we accept or endorse the arrangement or variation, or the underlying tax consequences.

Refer to [PS LA 2008/15](#) for more about Alerts. See [Alerts issued to date](#).

Description

We are currently reviewing arrangements where individuals (typically self-managed superannuation fund (**SMSF**) members at or approaching retirement age) purport to divert income earned from their personal services to a SMSF to minimise or avoid tax on their income.



These arrangements typically display all or most of the following features:

1. An individual performs services for a client, or an acquirer of the personal services (**client**), for which the individual does not **directly** receive any (or adequate) consideration for the services provided.

2. The client does not pay or remit funds to the individual directly; rather the client remits the consideration for, or in respect of, the services provided by the individual to a company, trust or other non-individual entity (**entity**). The entity may be an unrelated third party.
3. The entity then distributes the income to a SMSF, of which the individual is a member, purportedly as a return on an investment of the SMSF in the entity.
4. The trustee of the SMSF treats the income received as subject to a concessional rate of tax, or as exempt current pension income of the SMSF.

The arrangement may also include one or more of the following characteristics or variations:

5. The income may be remitted by the entity to the SMSF via a written or oral agreement between the entity and SMSF, instead of as a return on an investment in the entity.
6. The SMSF may receive the income from more than one entity or through a chain of entities. Alternatively, the entity may distribute the income to more than one SMSF of which the individual and/or associates are members.

What are our concerns?

We are concerned that in order to avoid paying tax at their personal marginal rate these arrangements are being entered into by individuals in an attempt to divert their personal services income to an SMSF, where the income is concessionally taxed, or treated as exempt current pension income.

We consider that:

- The arrangement may be ineffective at alienating income such that it remains the assessable income of the individual under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).
- The income may be included in the individual's assessable income as personal services income under Part 2-42 of the ITAA 1997.
- The amounts received by the SMSF may constitute non-arm's length income of the SMSF under section 295-550 of the ITAA 1997 such that the income is not eligible to be concessionally taxed and is not exempt current pension income.
- The general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936* may apply to cancel tax benefits obtained by the individual.
- Other compliance issues for arrangements of this type may include:
 - the amounts received by the SMSF under the arrangement may be a contribution to the fund and subject to the contributions caps which may have excess contributions tax consequences, and/or
 - superannuation regulatory issues, in particular the SMSF is maintained for purposes other than those set out in section 62 of the *Superannuation Industry (Supervision) Act 1993* (SISA). Breaches of the SISA may lead to the SMSF being made non-complying or the disqualification of an individual as a trustee.

What are we doing?

We are currently undertaking reviews of a number of cases involving arrangements of this type and we will be engaging with taxpayers whose affairs concern us over the coming months.

For general information about personal services income regime refer to this [ATO fact sheet](#).

What should you do?

If you have entered into, or are contemplating entering into, an arrangement of this type we encourage you to:

- a) phone or email us at the contact details provided below
- b) ask us for our view through a [private ruling](#)
- c) seek independent professional advice, or
- d) make a [voluntary disclosure](#) to reduce penalties that may apply.

Penalties may apply to participants and promoters of this type of arrangement, including serious penalties under Division 290 of Schedule 1 to the *Taxation Administration Act 1953* for promoters. Registered tax agents involved in the promotion of this type of arrangement may be referred to the Tax Practitioners Board to consider whether there has been a breach of the *Tax Agent Services Act 2009*.

Do you have information?

To provide information about this or another arrangement or a promoter of this or another arrangement:

- phone us on **1800 177 006** (after the initial messages, wait for the 'Taxpayer Alert' option then press **1**), or
- complete the [ATO Tip-Off Form](#)

References

Subject References:

excess contributions tax
non-arm's length income
personal services income
Part IVA
self-managed superannuation funds
superannuation

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| Date issued: | 29 April 2016 |
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