SMSFR 2008/D1 - Self Managed Superannuation Funds: application of the Superannuation Industry (Supervision) Act 1993 to unpaid trust distributions payable to a Self Managed Superannuation Fund

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Draft Self Managed Superannuation Funds Ruling

Self Managed Superannuation Funds: application of the *Superannuation Industry (Supervision) Act 1993* to unpaid trust distributions payable to a Self Managed Superannuation Fund

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This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the Superannuation Industry (Supervision) Act 1993, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

What this Ruling is about

1. This draft Ruling considers if a Self Managed Superannuation Fund (SMSF) contravenes certain provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA)[1] when the SMSF is presently entitled to distributions from a related trust which are not paid over to it.

The provisions considered are:

- the in-house asset rules in Part 8;
- the arm's length rules in section 109; and
- the sole purpose test in section 62.

[1] All legislative references in this draft Ruling are to the SISA unless otherwise indicated.

Funds to which the Ruling applies

2. This draft Ruling applies to SMSFs[2] and former SMSFs.[3] References in the Ruling to SMSFs include former SMSFs unless otherwise indicated.

Ruling

3. Where an SMSF is presently entitled to a distribution from a related or non-arm's length trust, and payment of this amount is not sought, contraventions of one or more provisions of the Act may occur. This draft Ruling discusses three of the most relevant provisions and identifies the circumstances where a contravention might occur.

In-house asset rules

4. Part 8 of the Act limits an SMSF to holding no more than 5% of its assets as in-house assets. For this draft Ruling, the definition of an in-house asset in subsection 71(1) includes:

- a loan to a related party of the fund; or
- an investment in a related party or a related trust of the fund.

Is the unpaid trust distribution a loan to a related party?

5. The recording of an unpaid trust distribution as a loan in the accounts will not of itself determine that the amount is a loan for the in-house asset rules. However, it is possible for other documents to be executed between the trustee of the SMSF and the trustee of the trust to bring into existence a loan between the parties. An example of this would be the execution of a loan agreement.

6. In addition, it is the Commissioner's view that, when an overall consideration of the factors surrounding the non-payment of the trust distribution may be seen as an arrangement for the provision of credit or financial accommodation, this will satisfy the extended definition of 'loan' in subsection 10(1).

7. Consequently, the unpaid amount will be included in the in-house assets of the SMSF, where:

- the trust in question is a related party of the SMSF; and

[2] As defined in section 17A.
[3] A former SMSF is a fund that has ceased being an SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee: see subsection 10(4).

- the circumstances indicate that a loan agreement has been entered into, or that a consensual agreement for the provision of credit or other form of financial accommodation has been reached, or can be inferred, between the parties.

Is the unpaid trust distribution an investment in a related party or a related trust of the SMSF?

8. The meaning of the term 'investment' may be derived from the definition of 'invest' in subsection 10(1). In this context it refers to the asset resulting from applying the assets of the SMSF or entering into a contract for the purpose of gaining interest, income, profit or gain. (See paragraphs 83 to 88 of this draft Ruling for further discussion of the term 'investment'.)

9. It is the Commissioner's view that when the trustee of the SMSF has merely failed to enforce the equitable right to payment of the distribution, they have not applied this asset (the equitable right) or entered into a contract for the purpose of gaining interest, income, profit or gain.

10. However, an investment of the unpaid trust distribution will occur where the trustee of the SMSF accepts payment of this amount in the form of additional units in the trust for the purpose of gaining interest, income, profit or gain. In addition, the trustee of the SMSF may enter into an agreement that the distribution be added to the corpus of the trust without the issue of additional units. Such an arrangement need not be in writing. However, to invest the distribution it is necessary that the equitable right to immediate payment of the distribution be extinguished and the amount reinvested into the main trust. Where such an agreement is entered into for the purpose of gaining interest, profit or gain, this will also be an investment for the purposes of subsection 71(1).

11. Consequently, where the trust in question is a related party or a related trust of the SMSF, and the circumstances indicate that an investment in that trust has been made, the amount will be included in the in-house assets of the SMSF unless any of the exclusions in sections 71 to 71E apply.

Arm's length rule

12. The Commissioner is of the view that where an SMSF trustee does not seek payment of trust distributions within a reasonable time, and no interest is paid or compensation is given for not seeking payment, that dealing is not consistent with the other party being at arm's length. Consequently, a contravention of the requirements of subsection 109(1A) would occur if the other party is not at arm's length with the SMSF trustee.

13. Subsection 109(1A) provides that, where an SMSF trustee or investment manager deals with a party who is not at arm's length in respect of an investment, that dealing must be undertaken in the same manner as it would if the other party was at arm's length. Therefore, where an SMSF holds an investment in a related trust, any dealings with the trustee of that trust must be undertaken in the same manner as it would if that trust was at arm's length. Decisions about whether to seek payment of trust distributions would form part of these dealings and should be done on the same basis as would be expected if the trust was not a related party.

14. The Commissioner's view is that arm's length beneficiaries would not generally allow substantial amounts of distribution entitlements to remain in the trust without receiving an appropriate return on this amount, for example a market rate of interest. The possibility of receiving greater distributions from the trust in the future due to the provision of low cost capital would not be adequate compensation where the SMSF is not the sole beneficiary of the trust. Where the SMSF is the sole beneficiary it may be able to validate a view that the non-payment of a trust distribution was undertaken in the same manner as it would if the other party was at arm's length. However, it is the Commissioner's view that such a non-payment would be seen as a consensual arrangement meeting the extended definition of a 'loan'. (See paragraph 93 to 106 of this draft Ruling for further discussion of the term 'arms length rule').

Sole purpose test

15. The sole purpose test in section 62 requires that an SMSF uses concessionally taxed superannuation savings for the specified core purposes of providing retirement or death benefits for or in relation to its members or for one or more of these purposes and other stipulated ancillary purposes.

16. Whether the SMSF is being carried on solely for the required purposes is determined by looking at the overall conduct of the fund and generally one factor alone will not be decisive. However, the Commissioner is of the view that where an SMSF trustee maintains a substantial proportion of the assets of the SMSF in a related trust as unpaid trust distributions, upon which no or below market rate interest is being paid, this suggests that the fund is not being maintained in a way that satisfies the 'Sole Purpose Test' in section 62.

17. Rather, this might indicate that the SMSF assets are being employed as a low cost source of capital for the related trust. This conclusion would be further supported where the SMSF is not the sole beneficiary of the related trust, particularly where the other beneficiaries of the trust are related parties.

18. Where it is concluded that the SMSF is not being maintained for the requisite purposes specified in section 62, the trustee of the SMSF will be in contravention of this requirement.[4]

Date of effect

19. Subject to comments received, this draft Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to SMSF's to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling.

Commissioner of Taxation
19 March 2008

[4] Section 62 is explained in more detail in SMSFR 2007/D1: the application of the sole purpose test in section 62 of the *Superannuation Industry (Supervision) Act 1993* to the provision of benefits other than retirement, employment termination or death benefits.

Appendix 1 – Examples

Example 1 – unpaid distribution which is a loan – contravention of subsection 71(1) and subsection 109(1A)

20. Sonya and Henning are the sole members of the S&H SMSF. This SMSF has a corporate trustee, S&H Pty Ltd.

21. Since 1988 the S&H SMSF has held units in a related unit trust, the Jasmine Trust, which also has S&H Pty Ltd as its trustee. Sonya and Henning also hold units in this trust. The Jasmine trust carries on a business, producing gourmet pâté. Sonya and Henning are employed in the business by S&H Pty Ltd as trustee of the unit trust. Correspondingly S&H Pty Ltd contributes superannuation to the S&H SMSF on their behalf.

22. The market value of the original units held by the S&H SMSF is $40,000.

23. Since 1988, the trustee of the Jasmine Unit Trust has resolved to distribute income to the S&H SMSF totalling $800,000. However, rather than paying these distributions to the S&H SMSF, the funds have been retained in the Jasmine Unit Trust to fund its expansion. These amounts have been recorded in the books of both entities as loans. There is no clause in the unit trust deed regarding the character of the unpaid trust distributions and no documents formalising any loan agreement.

24. The S&H SMSF does not seek payment by a specific date but it is intended that payment will occur at a later time. No interest is paid on the unpaid amount.

25. The assets of the S&H SMSF are described as follows:

- units in Jasmine Unit Trust $40,000;
- loan account to Jasmine Unit Trust $800,000;
- investment in a managed fund $200,000; and
- shares $60,000.

26. Although there is no specific loan arrangement or definite date for payment, an arrangement for the deferral of the payment can be inferred between S&H SMSF and the Jasmine Unit Trust. This is because the two trusts have the same trustee, the amounts of the distributions deferred are substantial, the time frame of the deferral is also large and a pattern of deferring payment of the distributions is well established over many years. As a consequence, the unpaid trust distributions of $800,000 are loans pursuant to the extended definition of ‘loan’ in subsection 10(1).

27. The Jasmine Unit Trust is a related party of the SMSF due to being an employer sponsor of the beneficiaries, Sonya and Henning. As a consequence, the $800,000 in unpaid trust distributions would be included in the in-house assets of the S&H SMSF unless any of the exceptions in sections 71 to 71F apply. In this case they do not. Consequently, $800,000 of the $1,100,000 assets of the superannuation fund are in-house assets, far in excess of the 5% allowed.

28. In addition, the trustee of the S&H SMSF is not at arm's length to the trustee of the Jasmine Unit Trust. Consequently it is necessary to determine whether the dealings in relation to the units held by the SMSF in the unit trust have been carried out on the same basis as they would with an arm's length party. It is unlikely that the S&H SMSF would have allowed $800,000 to remain unpaid without appropriate compensation if the distribution entitlement lay with an unrelated unit trust. As a consequence, the trustee of the S&H SMSF is in contravention of subsection 109(1A) in respect to the units held in the Jasmine Unit Trust.

29. Finally, the majority of value of the assets of the S&H SMSF are being maintained in a related unit trust, which provide it with no-cost capital for its business. This is not a permitted purpose for the SMSF under section 62 and it is very likely therefore that the trustee of the S&H SMSF contravenes this requirement as well.

Example 2 – unpaid distribution which is not a loan

30. Phillip and Carol are the sole directors and shareholders of PC Sales & Repairs Pty Ltd, a private company which operates the family business. Phillip and Carol are also sole trustees and beneficiaries of the PC Superannuation Fund, a SMSF.

31. As at 30 June 2007 this SMSF had total assets of $850,000, of which $750,000 was invested in the PC Unit Trust through the purchase of units. PC Sales and Repairs Pty Ltd is also the trustee of the PC Unit Trust. The other units in the PC Trust are held by Phillip, Carol and their 3 children and the trust's only major asset is the business premises on which the family business is conducted. This property is leased to PC Sales and Repairs Pty Ltd at commercial rates. The requirements of the Superannuation Industry (Supervision) Regulations 1994 Regulation 13.22C are satisfied and consequently the value of the units in this trust are not included in the in-house assets of the PC Superannuation Fund by virtue of paragraph 71(1)(j).

32. The other $100,000 of assets in the PC Superannuation Fund is made up of an unpaid trust distribution from the PC Unit Trust. This distribution was resolved by the trustee on 30 June 2007 and is due for payment by 30 July 2007, the same as for the other unit holders of the trust. Similar terms for payment of trust distributions were observed in the previous 5 years in which the Unit Trust has been in operation.

33. The outstanding $100,000 trust distribution as at 30 June 2007 is not a loan to the PC Unit Trust for the purposes of subsection 71(1). This is because the payment arrangement is in line with normal operation of a trust. Also, the activities of previous years show that the distributions are regularly paid each year, rather than being accumulated as unpaid amounts.

34. Although the PC Superannuation Fund and the PC Unit Trust are controlled by the same trustee, it cannot be inferred that there is a consensual arrangement between the trustees of these entities for the provision of credit or other financial accommodation. The unpaid trust distribution is therefore not included in the in-house assets of the PC Superannuation Fund and the 5% limit is not exceeded. As a result, the PC Superannuation Fund does not contravene the in-house asset rules.

35. In addition, the PC Superannuation Fund does not contravene the arm's length rule in subsection 109(1A). The terms for payment of the distribution are in line with normal arm's length practices and are consistent between the different unit holders.

36. Finally, the arrangement for payment of the distribution is consistent with the requisite purposes set out in section 62.

Appendix 2 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Background

37. SMSFs can hold investments in related trusts in a variety of circumstances, commonly via units in a unit trust. It is also common for the related trust to declare distributions of income in favour of the SMSF creating a present entitlement to income of the trust. However, it has been noted that often these entitlements are not paid to the SMSF but rather maintained as an asset of the SMSF, sometimes recorded as a loan. The Commissioner believes that the maintenance of these unpaid amounts can contravene several provisions of the Act, potentially resulting in the fund becoming non-compliant.

The nature of a beneficiary's entitlement to an unpaid trust distribution – Debt or Equity?

38. The right of a beneficiary to seek payment from the trustee of an unpaid trust distribution is, in the normal course, enforceable in equity, and is not a debt enforceable at common law.

39. In the 1996 case of *Re Euroasian Holdings Pty Ltd v. Ron Diamond*[5] the Federal Court considered an application to set aside a statutory demand in respect of a trust distribution. The applicant was the trustee of a trust who had resolved to distribute an amount of income to the respondent beneficiary. However, rather than pay the amount to the respondent, the applicant paid the amount directly to a third party creditor who held a crystallised floating charge over the assets of the respondent. The respondent consequently issued a statutory demand on the applicant in respect of the trust distribution amount. Heerey J considered the character of unpaid trust entitlements and noted at FCR 150:

> The resolutions in question did not bring about the relationship between the applicant and respondent of debtor and creditor. Whether or not the respondent may have been 'presently entitled' for the purposes of the Income Tax Assessment Act, it seems to be the position that rights of the respondent were enforceable in equity only.

40. As a result, Heerey J set aside the statutory demand because the resolution to distribute the income to the respondent did not result in debt for which a statutory demand can be issued.

[5] (1996) 64 FCR 147.

41. The recording of the unpaid distribution as a loan from the beneficiaries to the trust does not of itself change the character of the unpaid trust distribution from an equitable right to a debt. Rather, the Administrative Appeals Tribunal (AAT) decided that unpaid trust distributions were held in a separate trust between the trustee and the specific beneficiary in cases where specific clauses were included in the trust deeds to this effect.[6] Further, the same conclusions were drawn by the AAT in cases where the trust deeds did not contain any such specific clauses.[7]

42. Equitable rights, however, can be converted into common law debt. In the Privy Council case of *Space Investments Ltd v. Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd and others*[8] a bank, acting as trustee, deposited trust money into accounts in itself in its capacity as a bank. The Privy Council held that as the trust deed authorised the trustee to deposit the trust money into bank accounts, including with itself, the money held in those deposit accounts was a normal debt, ranking alongside the other deposit holders.

43. Similarly, the equitable right to enforce payment of a trust distribution to which the beneficiary is presently entitled can also be converted into a common law debt. This was demonstrated in the 1990 Federal Court case of *East Finchely Pty Ltd v. Federal Commissioner of Taxation*[9] where a trustee prepared two letters for overseas beneficiaries in respect of a distribution of income from the trust. The first letter advised of the exercise of the trustee discretion in respect of the income and stated that the distribution would be credited to each beneficiary's loan account at call, subject to authorisation. The second letter was prepared from each beneficiary to the trustee authorising the amount to be credited to their loan account. The appropriate entries were also made in the books of the trust. Hill J accepted that these documents were sufficient to evidence that the distribution was paid to the beneficiaries in question and that this amount was loaned back to the trustee. At ATC 5291; ATR 1635 he stated that:

> Further I can see no reason the combination of the two letters should not in any event have constituted a sufficient demand for payment to bring about a situation that there was an obligation in equity by force of the trust deed to pay to the beneficiaries and an obligation by virtue of the loan agreement between the trustee and the beneficiaries so that the principle in *Spargo's* case brought about the result that there was in law a payment.

44. As a result, although the recording of unpaid trust distributions as loans in the trust accounts would not by themselves be sufficient to change their character to those of common law loans, other documents executed between the trustee and the beneficiaries can bring about payment of the distribution and a subsequent loan back to the trustee.

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[6] *Case U111* 87 ATC 667; *Case 83* (1987) 18 ATR 3602; *Case 5/94* 94 ATC 130; (1994) 27 ATR 1117.
[7] *Case U157* 87 ATC 912; *Case 108* (1987) 18 ATR 3772; *Case V4* 88 ATC 123.
[8] [1986] 3 All ER 75.
[9] 89 ATC 5280; (1989) 20 ATR 1623.

In-house asset rules in subdivision C of Part 8

45. Subdivision C of Part 8 limits the percentage of assets held by a SMSF which are 'in-house assets'.

46. An in-house asset is defined in subsection 71(1) as:

> … an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or…

47. Therefore, to be an in-house asset of the SMSF, the asset in question must be either:

- a loan;[10] and
- to a related party[11] of the SMSF; or
- an investment[12] in:
  - a related party[13] of the SMSF; or
  - a related trust[14] of the SMSF.

48. It is therefore necessary to first consider whether an unpaid trust distribution is a loan or an investment for the purposes of the Act.

Is the unpaid trust distribution a loan?

49. Subsection 10(1) defines the term 'loan' as including:

> … the provision of credit or any other form of financial accommodation, whether or not enforceable, or intended to be enforceable, by legal proceedings.

50. As this definition is inclusive, a 'loan' can be any or all of the following:

- a loan according to the general or legal usage of the term;[15]
- the provision of credit;[16] and/or
- any other form of financial accommodation.[17]

[10] See paragraphs 49 to 77 of this draft Ruling.
[11] See paragraphs 78 to 82 of this draft Ruling.
[12] See paragraphs 83 to 88 of this draft Ruling.
[13] See paragraphs 78 to 81 of this draft Ruling.
[14] See paragraphs 89 and 92 of this draft Ruling.
[15] See paragraphs 51 to 61 of this draft Ruling.
[16] See paragraph 62 of this draft Ruling.
[17] See paragraphs 63 to 68 of this draft Ruling.

General meaning of 'loan'

51. The term 'loan' is defined in the Macquarie Dictionary 5th Edition as:

> **1.** the act of lending; a grant of the use of something temporarily: *the loan of a book.* 2. something lent or furnished on condition of being returned, especially a sum of money lent at interest…

52. Similarly, the Shorter Oxford English Dictionary 3rd Edition defines 'loan' as:

> …**2.** A thing lent; *esp*. a sum of money lent for a time, to be returned in money or money's worth, and usually at interest… **3.** The action, or an act, of lending…

53. The definitions above both point to a loan involving something being given temporarily with the intention that it will be returned and this is reflected in the case law considering the meaning of the term.

54. In the 1964 case of *De Vigier v. Inland Revenue Commissioners*[18] the House of Lords considered whether an amount lent by a trustee to a trust was a loan. The case concerned a family trust acting in favour of the children of one of the trustees. The trust became entitled to a rights issue of shares but had insufficient funds to subscribe for the shares. Consequently, the wife paid over $7,000 into the trust bank account in two cheques. This amount was repaid into the wife's bank account from the trust bank account less than 12 months later. The question being considered by the court was whether the $7,000 was a 'loan' and consequently subject to a surcharge under the *Income Tax Act 1952.*

55. The court held that; the fact that any legal rights for repayment of the amount would lie in equity was not fatal to the nature of the arrangement as a loan. At page 911 Lord Pearce stated:

> Where the circumstances of payment clearly indicate an intention by all concerned that there should be repayment, the court can properly infer that the money was lent. The precise legal rights of the persons concerned as between one another do not destroy the nature of the transaction and make it cease to be a loan.

56. Lord Upjohn concurred with this view and stated at page 915:

> The mere fact, however, that under the old forms of pleading, in the circumstances of this case, an action of debt for return of a loan would not lie, does not prevent the transaction being properly described as a loan.

[18] [1964] 2 All ER 907.

57. Later, in the Victorian Supreme Court case of *Brick and Pipe Industries Ltd. v. Occidental Life Nominees Pty. Ltd. and others*[19], Ormiston J noted at pages 321 and 322:

> Strangely the word 'loan' has not been frequently defined and in the many authorities cited, although the concept of lending was assumed to be understood, only one definition appears, namely in the judgement of Richardson J. in *Re Securitibank Ltd. (No. 2)* [1978] N.Z.L.R. 136, at p. 167: '… the essence of a loan of money is the payment of a sum of money on condition that at some future time an equivalent amount will be repaid.' …

58. The fact that a debt exists is not of itself sufficient to characterise an arrangement as a loan. In the case of *Prime Wheat Association Ltd* (ACN 000 245 269) *v. Chief Commissioner of Stamp Duties*[20] the New South Wales Supreme Court considered a share sale agreement which provided for payment by instalments over a 20 year period. The question being considered was whether the sale agreement was a 'loan security' attracting stamp duty. This question turned on whether it could be said that the share sale agreement which provided for payment over a 20 year period evidenced a loan of money. At pages NSWLR 512; ATR 484; ATC 5019 - 5020 Gleeson CJ concluded that:

> Here there was no advance of money. There was, as required by the language of the definition of advance, financial accommodation, but that is not sufficient. An agreement for sale which allows credit to a purchaser does not, on that account alone, involve an advance of money… Ultimately, there was a debt, but not a loan.
>
> …
>
> The essence of a loan is an obligation of repayment. Here what was involved on the part of the purchasers was payment, not repayment…

59. The same approach was taken in the Full Federal Court case of *Eastern Nitrogen Ltd v. Commissioner of Taxation*[21] when considering whether a sale and leaseback arrangement was a loan. In deciding that a finance lease is not a loan Carr J. stated at FCR 39; ATC 4173; ATR 485:

> I accept the appellant's submissions that although the overall arrangement was a financing arrangement, it did not involve a loan. There was no obligation to repay a sum advanced. The authorities recognise that arrangements can be made for financial accommodation without a loan being involved…

[19] [1992] 2 VR 279.
[20] (1197) 42 NSWLR 505; (1997) 37 ATR 479; 97 ATC 5015.
[21] (2001) 108 FCR 27; 2001 ATC 4164; (2000) 46 ATR 474.

60. The authorities clearly show that the term 'loan' in its normal legal use refers to an agreement consisting of a payment and a repayment of an amount. In cases where the SMSF is presently entitled to a distribution from another trust which has not been paid, the characteristics of a loan being payment and repayment do not exist. Rather there is merely an equitable right to payment of the distributed amount.

61. Alternatively, where a further arrangement is entered into between the trustee of the SMSF and the trustee of the trust whereby the trust distribution is lent back to the trust as in *East Finchley*,[22] the resulting amount recorded in the beneficiary loan account would be characterised as a loan according to its ordinary usage.

Extended definition of a loan

62. The definition of the term 'loan' in subsection 10(1) extends the term to include 'the provision of credit or any other form of financial accommodation'. The reference to 'the provision of credit' extends the definition to include arrangements allowing for delayed payment, for example the situation in *Prime Wheat*[23] discussed above. However, the definition goes further to also include 'any other form of financial accommodation'.

63. The term 'financial accommodation' is not defined in the Act and therefore it takes on its ordinary meaning. The New Shorter Oxford English Dictionary[24] does not define the term 'financial accommodation'. However it does define the words individually as:

> **financial** … **1** Of or pertaining to revenue or money matters…
>
> **accommodation** ... **1** Something which supplies a want or ministers to one's comfort … **3** An arrangement of a dispute; a settlement; a compromise. M17 **4** The action of accommodating or the process of being accommodated; adaptation, adjustment. M17 …**5** Adaptation to a different purpose, function, or meaning. E18. **6** Self adaptation; obligingness; a favour. M18. **7** The action of supplying with what is requisite. *Rare*. M18. **8** Pecuniary aid in an emergency; a loan. L18.

64. Similarly, the Macquarie Dictionary[25] doesn't define the phrase 'financial accommodation' but defines the words individually as:

> **Financial** … **1.** relating to monetary receipts and expenditures; relating to money matters; pecuniary…
>
> **Accommodation** … **1.** the act of accommodating … **5.** anything which supplies a want; a convenience … **7.** readiness to aid others; obligingness. **8.** a loan or pecuniary favour …

[22] 89 ATC 5280; (1989) 20 ATR 1623.
[23] (1197) 42 NSWLR 505; (1997) 37 ATR 479; 97 ATC 5015.
[24] Volume 1.
[25] 4th Edition.

65. Combining these two definitions indicates that the phrase 'financial accommodation' is a reference to a supply or grant of some form of pecuniary assistance or favour. This definition is very broad and could be construed to include a wide range of arrangements. It is therefore necessary to look to other material to discern the intended scope of this definition.

66. The extended definition of 'loan' in subsection 10(1) has not been judicially considered. However, the former section 46D of the *Income Tax Assessment Act 1936* contained a definition of 'loan' using essentially the same terms. This definition was considered by the Full Federal Court case of *FC of T v. Radilo Enterprises Pty Ltd*.[26] The case concerned the issue of non-redeemable preference shares which paid a fixed annual dividend of 13.25% of the issue price and which converted to ordinary shares after a fixed time. The question at issue was whether the arrangement was a loan as defined in that section, consequently disentitling the respondent to imputation credits on the dividends. At FCR 312; ATC 4160 - 4161; ATR 645 Sackville and Lehane JJ stated:

> We have not overlooked the fact that s. 46D(1) defines 'loan' to include 'the provision of credit or any other form of financial accommodation'. However, there is nothing in the extended definition which detracts from the conclusion that s. 46D(2)(c) requires attention to be directed to the relationship between the company and the shareholder, pursuant to which the dividend is paid. The provision of credit implies a consensual transaction, such as the delivery of goods on terms permitting deferred payment or the granting of overdraft facilities by a bank; compare *Herbet v. The King* (1941) 64 CLR 461, at 467, per McTiernan J. Similarly, in its statutory context, the expression 'or any other form of financial accommodation' refers to a consensual arrangement between the person providing the accommodation and the recipient. Under a consensual arrangement for the provision of credit or financial accommodation a principal sum, or its substantial equivalent (by way of indemnity against a liability on maturing bills, for example, in the case of accommodation provided in the form of a bill acceptance facility), will ultimately be payable.

67. The court concluded that there was no such amount payable in this case as the company did not redeem the preference shares, rather they were converted to ordinary shares which the holder could sell if they wished. Importantly, the company would retain the capital rather than having to repay it. It was decided therefore, that the issue of the preference shares did not fit within the extended definition of 'loan' in section 46D of the *Income Tax Assessment Act 1936*.

[26] (1997) 72 FCR 300; 97 ATC 4151; (1997) 34 ATR 635.

68. Similarly the words of the extended definition of 'loan' in subsection 10(1) need to be construed in their statutory context. It is the Commissioner's view that the extended definition was included to extend the definition of 'loan' to situations which do not have the elements of payment and repayment. That outcome is achieved by including 'the provision of credit' in the definition which would include the sale of goods on credit or deferred payment arrangements. The further inclusion of the words 'any other form of financial accommodation' points to an intention to further extend the definition beyond the provision of credit alone.

69. In addition, the inclusion of arrangements:

> …whether or not enforceable, or intended to be enforceable, by legal proceedings…

further indicates that the legislature was not concerned with the legal formalities of the arrangements, but rather with the substance of the arrangement.

70. This is consistent with policy objectives stated in the Explanatory Memorandum to the *Superannuation Legislation Amendment Act (No. 4) 1999,* which introduced the definition of 'loan' into subsection 10(1). At page 5 it explained the policy objective as:

> The primary policy objective is to ensure that the investment practices of the superannuation funds are consistent with the Government's retirement incomes policy. That is, superannuation savings should be invested prudently, consistent with the SIS requirements, for the purpose of providing retirement income and not for providing current day benefits.

71. Further, the purpose of the 5% limit on the level of in-house assets was to:

> …limit(s) the risk to superannuation savings from investment in an employer-sponsor or associate[27].

72. Read in this context, it is the Commissioner's view that the definition of 'loan' in subsection 10(1) is concerned with identifying arrangements which result in the assets of the superannuation fund being held as amounts receivable from another party, regardless of the form of the arrangement under which this arises.

73. Often there will not be any formal agreement between the trustee of the SMSF and the trustee of the trust from which the distribution originates. However, where the trustee of both of these trusts is either the same or substantially under the same control, it may be possible to infer the existence of such an agreement. Factors which would lead to the inference that a consensual arrangement for the provision of credit or financial accommodation does exist include:

- the trustees are the same or under substantially the same control;

[27] Page 4.

- the amount of the unpaid trust distribution is substantial;
- the amount has remained unpaid for a substantial period of time; and
- distributions for multiple years remain unpaid.

74. In the normal course of events there will be a delay between the resolution to make a distribution in favour of a beneficiary and payment being made. This is due to the various administrative processes which need to be performed. Where these administrative processes are completed in a timely manner, the Commissioner accepts that the resultant delay will not amount to an arrangement for a financial accommodation. In addition, special circumstances might exist which prevent payment of trust distributions for a further time, for example where a legal impediment to payment exists. Such further involuntary delays will also not lead to a conclusion that an arrangement for the provision of a financial accommodation exists. However, the Commissioner does not accept that delays due to insufficient cash being held to pay the distributions are such special circumstances. Consequently, such delays may evidence an arrangement for the provision of a financial accommodation.

75. Where, looking at all of the circumstances it can be inferred that an arrangement exists between the trustee of the SMSF and the trustee of the trust for deferral of the payment of a distribution to a later time, the unpaid amount will be considered to be a loan under the extended definition set out in subsection 10(1).

76. To summarise, a trust distribution which remains unpaid will be a loan for the purposes of subsection 71(1) where any of the following apply:

- a formal loan agreement is entered into between the trustee of the trust and the trustee of the SMSF as in *East Finchley*[28] discussed above;
- a formal agreement is entered into between the trustee of the trust and the trustee of the SMSF for the deferral of payment of the distribution; or
- an arrangement between the trustee of the trust and the trustee of the SMSF for the deferral of payment of the distribution can be inferred in the circumstances.

77. Where a loan does exist for the purposes of subsection 71(1), it will be necessary to consider whether the trust in question is a related party of the fund.

[28] 89 ATC 5280; (1989) 20 ATR 1623.

To a related party of the fund?

78. The term 'related party' is defined in subsection 10(1) as any of the following:

(a) a member of the fund;

(b) a standard employer-sponsor of the fund; or

(c) a Part 8 associate of an entity referred to in paragraph (a) or (b).

79. The terms 'member' and 'standard employer-sponsor' are further defined in subsection 10(1).

80. Subdivision B of Part 8 sets out the rules governing the determination of whether an entity is a Part 8 associate of a member or an employer-sponsor. Where the trust to which the loan is made has an individual trustee, section 70B defines whether that individual is an associate of the SMSF. Alternatively, where the trustee of that trust is a company, section 70C defines when that will be an associate of the SMSF. The definitions in respect of a trust look to who has 'control of the trust' which is further defined in section 70E.

81. Whether the trust from which the unpaid trust distributions originate is a related party is a question of fact which must be determined in each individual case by reference to these definitions. It is the Commissioner's view that where an inference can be drawn that the trustee of the trust and the trustee of the SMSF have an arrangement for the deferral of payment of trust distributions, it is also likely that the trust will be a Part 8 associate of an employer-sponsor or a member of the fund. As a consequence, it follows that the trust in question would be a related party of the fund.

82. Where amounts of unpaid trust distributions are considered to be loans to a related party of the SMSF, these amounts are included in the in-house assets of the SMSF unless any of the exclusions set out in sections 71 to 71E apply.

Is the unpaid trust distribution an investment?

83. Subsection 71(1) also includes in the in-house assets of a SMSF an 'investment' in a related party or a related trust.

84. The term 'investment' isn't defined in the Act. However the term 'invest' is defined in subsection 10(1) as follows:

invest means:

(a) apply assets in any way; or

(b) make a contract;

for the purpose of gaining interest, income, profit or gain.

85. Further, section 18A of the *Acts Interpretation Act 1901* provides that:

> In any Act, unless the contrary intention appears, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

86. In this context, the corresponding meaning of the term 'investment' derived from the definition of 'invest' in subsection 10(1) is the asset resulting from applying the assets of the SMSF or entering into a contract for the purpose of gaining interest, income, profit or gain. Where the trustee of the SMSF has merely failed to enforce the equitable right to payment of the distribution, they have not applied this asset (the equitable right) or entered into a contract for the requisite purpose as specified by this definition. As a result, this asset (the equitable right) would not be an 'investment' of the SMSF.

87. Alternatively, the trustee of the SMSF may enter into an arrangement whereby the equitable right to payment of the trust distribution is converted into a different equitable right. This commonly could occur by the satisfaction of that right in the form of additional units in the trust.. However, the issue of new units is not necessarily required for an investment of the distribution to occur. Instead, the trustee of the SMSF may enter into an agreement that the distribution be added to the corpus of the trust without the issue of additional units. Such an arrangement need not be in writing, However to invest the distribution it is necessary that the equitable right to immediate payment of the distribution be extinguished and the amount invested into the main trust. The discharge of an equitable right and its replacement by a different equitable right is an application of the assets of the SMSF.

88. Where such an agreement exists, and is entered into for the purpose of gaining interest, income, profit or gain, the amount will be an investment for the purposes of subsection 71(1).

In a related party or a related trust?

89. Where the unpaid trust distribution is converted into an investment in the trust, to be an in-house asset under subsection 71(1) that trust will need to be either a related party or a related trust of the SMSF.

90. Similarly to the term 'related party' discussed above, the term 'related trust' is defined in subsection 10(1) as:

> ***Related trust***, of a superannuation fund, means a trust that a member or a standard employer-sponsor of the fund controls (within the meaning of section 70E), other than an excluded instalment trust of the fund.

91. This definition is concerned with the control of the trust by members or employer-sponsors of the SMSF and is comprehensive. Whether a trust in which the SMSF holds an investment is a related trust is question of fact which must be determined in each individual case by reference to these definitions.

92. Where the unpaid trust distributions are converted into an investment in a related trust or a related party, the value of this investment must be included in the in-house assets of the SMSF unless one or more of the exceptions contained in sections 71 to 71E apply.

Arm's length rule

93. Section 109 requires that investments of an SMSF are made and maintained on an arm's length basis. Subsection 109(1) applies to the dealings surrounding the making of the investment and subsection 109(1A) applies to the non-arms length dealings during the term of an investment.

94. Where an entitlement to a trust distribution is not sought by the trustee of an SMSF from a non-arm's length trustee, this may indicate that the investment in that trust [that is the units held] is not being dealt with on an arm's length basis and could contravene subsection 109(1A).

95. Subsection 109(1A) states:

> If:
>
> (a) a trustee or investment manager of a superannuation entity invests in that capacity; and
>
> (b) at any time during the term of the investment the trustee or investment manager is required to deal in respect of the investment with another party that is not at arm's length with the trustee or investment manager;
>
> the trustee or investment manager must deal with the other party in the same manner as if the other party were at arm's length with the trustee or investment manager.

96. The Explanatory Memorandum to the Bill which introduced subsection 109(1A)[29] stated at Item 36:

> This item inserts after subsection 109(1) of the SIS Act subsection 109(1A). Subsection 109(1A) introduces a requirement that investments must at all times be maintained as if they were arm's length investments. This works in conjunction with existing section 109 which ensures that all dealings regarding entering into an investment are also carried out on an arm's length basis.

97. This subsection operates during the term of the investment where the trustee (or investment manager) of the SMSF is required to deal with a party who is not at arm's length. It is therefore necessary to clarify whether the trustee of the SMSF is 'required to deal in respect of the investment with another party' when making decisions in respect of distributions entitlements.

98. The definition of 'deal' contained in the New Shorter Oxford Dictionary includes:

> …An act of trading or buying or selling; a business transaction, a bargain, an arrangement; *esp.* a private or secret arrangement entered into by parties for their mutual benefit…

99. The definition of 'deal' in the Macquarie Dictionary Version 5.0.0 includes:

> **1.** to conduct oneself towards persons…
>
> **6.** *Colloquial* a business transaction…
>
> **7.** a bargain or arrangement for mutual advantage, as in commerce or politics, often a secret or underhand one…
>
> **14.** any undertaking, organisation, etc; affair…
>
> **22. deal with,**
>
> a. to do business with.
>
> b. to occupy oneself or itself with: *deal with the first question, botany deals with study of plants.*
>
> c. to take action with respect to: *law courts must deal with law-breakers…*

100. The Commissioner considers that the term 'deal' can refer to an agreement between parties or it can also be used to describe an entity's activities or business activities. Looked at in the context of section 109 as a whole, the broader meaning is preferred, that is that the term 'deal' is a reference to the conduct of the SMSFs in respect of the investment.

101. Likewise, the Commissioner believes that the term 'required', in the context of section 109, is a reference to the commercial and fiduciary requirements imposed on the trustee of the SMSF.

[29] Superannuation Industry (Supervision) Legislation Amendment Bill 1995.

102. The Commissioner considers that decisions that the trustee or investment manager of the SMSF make whether to require payment of a trust distribution to which the SMSF is entitled, forms part of dealing with the investment in that trust.

103. Subsection 109(1A) only operates where the trustee or investment manager's dealings are with a party who is 'not at arm's length'. The phrase 'not at arm's length' was considered in the Full Federal Court case of *Australian Trade Commission v. WA Meat Exports Pty Ltd*[30] in the context of section 4 of the *Export Market Development Grants Act 1974*. At ALR 291 the court concluded that:

> There is no reason to suppose that the ordinary meaning of the phrase was not intended to be applied here. That is to say, the context of s 4 is consistent with the disqualification of expenditure by one party in favour of another where one of them has the ability to exert personal influence or control over the other. It is evident that the policy of the legislation would seek to exclude payments to such person, because, if such payment were not excluded, abuse of the incentive scheme provided by the Act would be open.

104. In the context of subsection 109(1A) the Commissioner considers that the reference to dealing with parties who are not at arm's length is intended to identify dealings with parties who have a level of influence or control over the trustee or investment manager of the SMSF. This is a question of fact. Where the trustee of the trust in which the investment is held is also the trustee of the SMSF, the requisite level of control will exist. Similarly, where the investment is held in a related party or trust to the trustee of the SMSF, it is likely that the requisite level of control will exist. Where this level of control does exist, decisions by the trustee or investment manager of the SMSF regarding the maintenance of the investment of that trust, including decisions on whether to seek payment of distributions, must be made on an arm's length basis.

105. The Commissioner does not consider that arm's length beneficiaries would generally allow substantial amounts of distribution entitlements to remain in the trust without receiving an appropriate return on this amount, for example a market rate of interest. The possibility of receiving greater distribution from the trust in the future due to the provision of low cost capital would not be adequate compensation where the SMSF is not the sole beneficiary of the trust. Where the SMSF is the sole beneficiary it may be able to sustain a view that not requiring the payment of the distribution is consistent with the way the investment in the units would be dealt with if the trust was at arms length[31] However, it is the Commissioner's view that such a non-payment would be seen as a consensual arrangement meeting the extended definition of a 'loan' discussed above.

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[30] (1987) 75 ALR 287.

[31] However the SMSF holding all units in the trust and not requiring distributions to be paid does not of itself lead to the conclusion that the SMSF is dealing with the trust as though it was at arms length.

106. Therefore, where an SMSF trustee holds an investment of units in a non-arm's length unit trust and

- does not seek payment of substantial trust distributions within a reasonable time; and
- no interest is paid or compensation is given in respect of not seeking that payment,

this would strongly lead to the conclusion that the dealing is not in the same manner as if the other party was at arm's length. Consequently, the requirements of subsection 109(1A) would be contravened.

Sole purpose test

107. The sole purpose test in section 62 ensures that an SMSF uses concessionally taxed superannuation savings for the specified core purposes of providing retirement or death benefits for or in relation to its members[32] or for one or more of these purposes and other stipulated ancillary purposes.[33]

108. Whether the SMSF is being carried on solely for the required purposes is determined from looking at the overall conduct of the fund and generally one factor alone will not be decisive. However, where a substantial proportion of the assets of the SMSF are held in a related trust as unpaid trust distributions, upon which no or below market rate interest is being paid, this would suggest that the fund is not being carried on for the required purpose. Rather, this might indicate that the SMSF assets are being employed as a low cost source of capital for the related trust. This conclusion would be further supported where the SMSF is not the sole beneficiary of the related trust, particularly where the other beneficiaries of the trust are related parties.[34] Where it is concluded that the SMSF is not being carried on for the requisite purposes specified in section 62, the trustee of the SMSF will be in contravention of this requirement.

[32] Paragraph 62(1)(a).
[33] The application of section 62 to the provision of benefits is explained in more detail in SMSFR 2007/D1.
[34] However, the holding of all of the units in the trust by the SMSF does not, of itself, necessarily support a conclusion that the SMSF is being carried on for the required purpose. This will need to be determined by reference to the overall conduct of the SMSF.

Contraventions – audit requirements and consequences

109. SMSF trustees are required to appoint an approved auditor to audit the financial accounts and statements of the fund each year.[35] When conducting an audit, the approved auditor is also required to conduct a compliance audit to ensure the SMSF has complied with the SISA and the Superannuation Industry (Supervision) Regulations 1994. There is an approved form for notifying the Tax Office of contraventions.[36]

110. Non-compliance with these rules may expose trustees or investment managers of SMSFs to penalties.[37] Contravention or involvement in a contravention of the rules attracts both civil and criminal consequences and places at risk the SMSFs status as a complying superannuation fund under the SISA.[38]

[35] See section 113.
[36] See section 129.
[37] See subsection 62(2).
[38] See subsection 42A(5) in relation to SMSFs. The status of a fund as complying or non-complying for SISA purposes will also have consequences for the fund under the income tax law and other parts of the superannuation law. Also see generally Law Administration Practice Statements PS LA 2006/17, PS LA 2006/18 and PS LA 2006/19.

Appendix 3 – Your comments

111. We invite you to comment on this draft Superannuation Regulator's Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date:	**2 May 2008**
Contact officer:	**Peter Hawkins**
Email address:	**Peter.Hawkins@ato.gov.au**
Telephone:	**(08) 8208 1262**
Facsimile:	**(08) 8208 1898**
Address:	**91 Waymouth Street**
	Adelaide SA 5000

Appendix 4 – Detailed contents list

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

SMSFR 2007/D1

Subject references:

- breach of sole purpose
- complying superannuation fund
- self managed superannuation fund
- superannuation fund – in house assets

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