

## SMSF's and Related Unit Trusts

### In-house Assets

Post 30 June 2009 an investment in a related unit trust comes under the definition of an in-house asset. As such a trustee must be aware that in-house assets are limited to 5% of the value of the assets of the SMSF. If the 5% limit was exceeded in any year the ATO will most likely remind the trustee that this is a breach of the SIS Act and request the transaction be unwound to ensure that the limit is not exceeded.

This prohibition does not prevent an SMSF trustee from investing in a related unit trust that meets the exception conditions that are outlined in the SISR. The relevant extract from the regulations is provided below:

#### 13.22C Assets acquired after commencement of Division 13.3A (Act s 71)

- (1) This regulation applies to an asset of a superannuation fund that:
  - (a) is an investment in a company or unit trust; and
  - (b) was acquired by the fund on or after the commencement of this Division; and
  - (c) is not affected by subregulation 13.22D (3).
- (2) For subparagraph 71 (1) (j) (ii) of the Act, the asset is not an in-house asset of the superannuation fund if, when the asset is acquired:
  - (a) the superannuation fund has fewer than 5 members; and
  - (b) the company, or a trustee of the unit trust, is not a party to a lease with a related party of the superannuation fund, unless the lease relates to business real property; and
  - (c) the company, or a trustee of the unit trust, is not a party to a lease arrangement with a related party of the superannuation fund, unless the lease arrangement:
    - (i) is legally binding; and
    - (ii) relates to business real property; and
  - (d) the company, or a trustee of the unit trust, is not a party to a lease, or lease arrangement, with another party in relation to an asset that is the subject of another lease or lease arrangement between any party and a related party of the superannuation fund (unless the asset is business real property); and
  - (e) the company, or a trustee of the unit trust, does not have outstanding borrowings; and
  - (f) the assets of the company or unit trust do not include:
    - (i) an interest in another entity; or
    - (ii) a loan to another entity, unless the loan is a deposit with an authorised deposit-taking institution within the meaning of the *Banking Act 1959*; or

- (iii) an asset over, or in relation to, which there is a charge; or
- (iv) an asset that was acquired from a related party of the superannuation fund after 11 August 1999, unless the asset was business real property acquired at market value; or
- (v) an asset that had been at any time (unless it was business real property acquired by the company, or a trustee of the unit trust, at market value) an asset of a related party of the superannuation fund since the later of:
  - (A) the end of 11 August 1999; and
  - (B) the day 3 years before the day on which the fund first acquired an interest in the company or unit trust.

This means that as long as the related unit trust meets the correct criteria the investment by the SMSF trustee is allowed. The unit trust is essentially a non-g geared passive real estate investment vehicle.

## Unit Trusts

It should be noted by trustees that the trust in which they invest should be a unit trust where the unit holders are entitled to fixed proportions of the net trust income and capital based on the number of units held. This is quite different to a discretionary trust where the trustee may distribute net trust income according to their discretion under the rules in the trust deed. The unit issued in a unit trust is a means of describing the proportion or share in the trust property. Importantly if the unit trust has a loss, in order for the trust to be able to carry forward the loss it must be a fixed unit trust. For the trust to be a fixed unit trust the rules in the deed must state that those units can only be redeemed or issued for a price determined on the basis of the net asset value, according to Australian accounting principles, of the unit trust at the time of redemption or issue. In order for the trust to be able to carry forward the losses it may also be required to satisfy other tests such as the “50% stake test”, “pattern of distributions test”, “income injection test” and the “control test”.

For the SMSF a distribution received from a fixed unit trust is able to be treated as income under the concessional rate of 15%. This is not the case for a distribution from a discretionary trust which is taxed at 45%.

Also depending on which state you are in, the fixed unit trust can give you advantages in terms of the state land tax levy. It should also be noted that a unit trust may be taxed like a company where the trust received more than 25% of its income from non-real estate rental activities and the SMSF owns more than 20% of the units issued.

It is quite important that an SMSF trustee invests in the correct type of structure not only for tax purposes but also to ensure that they are obeying the relevant superannuation regulations. If you have

any queries regarding these structures or would like Guardian Partners to establish a SMSF or Unit Trust that meets the above criteria please give our office a call.