



## Monthly Information Newsletter – Tax & Super

October 2022

### SMSF member obligations

A recent Administrative Appeals Tribunal decision reminds us all that SMSF trustees (members) can be disqualified where serious breaches, be they advertent or inadvertent, of the super rules are committed.

One of the ways the ATO deal with non-compliance is by disqualifying an individual as a trustee (or director of a corporate trustee) of a self-managed super fund (SMSF). This can occur if the trustee does not comply with super laws or if the ATO believe a trustee is not a “fit and proper person” to continue managing their SMSF. Between 1 April 2022 and 30 June 2022, the ATO disqualified 80 trustees, resulting in a total of 252 disqualified trustees during the 2021-2022 financial year.

Turning back to the Tribunal’s decision, in *Goulopoulos and Commissioner of Taxation* [2022] AATA 2540 (9 August 2022) two directors of a corporate trustee of an SMSF were disqualified following serious contraventions that had occurred on multiple occasions.

One of the many contraventions included the illegal early access of super where no condition of release had been met. A total of \$878,365.86 was withdrawn from the fund for personal use, including the purchase of a new house and luxury car. A small amount was repaid to the fund, however any amount taken out was illegally accessed and in breach of the payment standards.

In addition to the illegal early access, the trustee's actions also resulted in breaches of the borrowing provisions, the in-house asset provisions, acquisition of assets from a related party, and failure to lodge a return for a period of four years.

Having been disqualified by the Commissioner, the taxpayers appealed to the Tribunal. In doing so, they relied on the fact that the ATO, for the most part, did not impose penalties for the contraventions, which they said indicated the contraventions were not serious. This was rejected out of hand by the Tribunal which found:

- the taxpayers knew what they were doing was wrong
- the contraventions were numerous and sustained

- full responsibility was not taken by the taxpayers who blamed their accountant for planting the seed to make the withdrawals, and
- some of the contraventions were of the most serious nature (member loans, unauthorised withdrawals and failing to lodge returns).

All these factors combined to provide the Commissioner with ample grounds for disqualification. Thus, the decision to do so was upheld by the Tribunal.

The Tribunal also accepted the Commissioner’s alternative submission that, in the circumstances, there should be disqualification on the basis that the “fit and proper person” test was not met.

Although this case is at the extreme end – involving a range of serious breaches of the SMSF rules – it does underscore the consequences that can flow from trustees breaching the rules, deliberately or accidentally.

If you have your own SMSF and are in any doubt around the rules that apply in relation to access to your funds, the borrowing provisions, the in-house asset provisions, the acquisition of assets from a related party or any other rules, seek expert advice before you act.

#### DISCLAIMER

All information provided in this article is of a general nature only and is not personal financial or investment advice. Also, changes in legislation may occur frequently. We recommend that our formal advice be obtained before acting on the basis of this information.

***Our liability may be limited by a scheme approved under Professional Standards Legislation.***