

# TAX matters

APRIL 2007

Ground Floor, 38 Colin Street, WEST PERTH WA 6005

Telephone: (08) 9481 8311 Fax: (08) 9481 8322 E-mail: [taxlaw@nortonsmailes.com.au](mailto:taxlaw@nortonsmailes.com.au)

## In this Issue

- ◆ Stamp Duty – Transfer of Property to and from Superannuation Funds ..... Page 1

### Stamp Duty – Transfer of Property to and from Superannuation Funds

As most are aware, up until 30 June 2007, there is an opportunity for an individual to make an undeducted (or after tax) contribution for up to \$1m into a superannuation fund.

In some circumstances, members of a superannuation fund do not have the cash available to make the superannuation contribution but may instead wish to transfer their business real property into the fund.

In this situation, there appears to be considerable uncertainty regarding the law and practice concerning stamp duty payable on the transfer of business real property (as defined in the *Superannuation Industry (Supervision) Act 1993* or the SIS Act) between a self-

managed superannuation fund (“SMSF”) and its members.

As a general rule any transfer of business real property in and out of an SMSF is likely to attract ad valorem stamp duty (ie stamp duty at general conveyance rates). However, where the transfer of business real property is made between an SMSF and its members, it may be possible to successfully argue that the transfer of the business real property is exempt or subject to nominal stamp duty only, on the basis that there is no change in beneficial ownership.

Broadly, business real property is defined in the SIS Act to mean property that is used wholly and exclusively in one or more businesses. Under current superannuation laws a superannuation fund is generally precluded from acquiring assets from members, however, the acquisition of business real property and listed shares from members is allowed for SMSFs.

No stamp duty issues arise in relation to the other property which is permitted to be transferred to a SMSF under the SIS Act, namely listed shares. The transfer of listed shares has been exempt from stamp duty from 1 July 2001.

This article focuses on a number of alternatives in which business real property can be transferred in and out of a SMSF.

1. In-specie contribution of business real property by a member of the SMSF

Under this alternative, a member owns unencumbered business real property in his or her own name and makes an in-specie contribution of the property into his or her SMSF. This contribution may be made as an undeducted contribution or as a deductible contribution (or a mixture of both).

The transfer of business real property may be subject to nominal duty only where the following conditions are satisfied:

- (a) The membership of the SMSF is restricted to the owner of the business real property.

In our experience, the Office of State Revenue will only accept that the membership of a fund is restricted where the restriction is clearly contained in the trust deed of the fund. Given that most trust deeds typically

allow the trustee a broad discretion to admit members, any requirement to restrict the fund membership ordinarily requires an amendment to the trust deed.

- (b) The business real property is set aside in the SMSF in the Member Account of the owner of the business real property.

Again, the trust deed of the SMSF needs to be reviewed to determine whether it allows members to have separate investment accounts. On the basis that the trust deed allows separate member accounts or investment choice, the trustee of the fund should then resolve to hold the business real property in the relevant member account. This resolution should be evidenced by minute.

2. Acquisition of Business Real Property by an SMSF from a member of the SMSF for market value consideration

Under this option, an SMSF acquires unencumbered business real property from a member for market value consideration.

Again, such a transfer may be subject to nominal duty where the following conditions are satisfied:

- (a) the membership of the fund is restricted to the owner of the business real property; or

- (b) the business real property set aside in the fund for the owner of the business real property.

Under both alternatives, complications can arise where there is more than one owner of the business real property, for example, where the property is owned by a husband and wife as joint tenants or as tenants in common. Provided the members retain the same underlying beneficial ownership of the property in the SMSF, then it may be possible to successfully argue that there has been no change of beneficial ownership.

3. Property held by a family trust

It is often the case that a family trust (also called a discretionary trust) will own the business real property rather than the members in their own names.

In these situations, if the family trust were to transfer the business real property directly to the SMSF, stamp duty at general conveyancing rates would be imposed.

In these situations, it may be better to structure the transaction as follows:

- (a) vest the business real property out of the family trust to an individual member or members; and
- (b) the member(s) then make an in-specie contribution of the property into the SMSF.

Provided certain conditions are met both steps should incur nominal duty only.

4. Acquisition of Property by a member of an SMSF from an SMSF for market value

Similar submissions regarding no change in beneficial ownership can be raised in relation to the in-specie distribution of assets from an SMSF to its members. This can occur for example when the SMSF is paying out a member's superannuation entitlements. Rather than satisfying the member's superannuation entitlements with cash from the fund, the trustee of the fund could make an in-specie distribution of fund assets. Unlike the restrictions placed on SMSFs in acquiring assets from members, the current superannuation laws place no such restrictions on SMSFs disposing of their assets to members, provided of course that the transfer occurs at market value.

Caution

Of course, there are normally capital gains tax implications of such disposals that need to be considered. The small business CGT concessions will often provide substantial relief in these situations.

Contact: Daniel Fry  
Chris Smailes

**Recent Additions at Norton & Smailes – New Solicitor**

We are pleased to announce that Rachael Delamare has rejoined our office after 2 years away.