TAX TALKS

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SMSF joint property acquisitions are one way to get property into SMSFs when there is not enough cash within the SMSF.

SMSF Joint Property Acquisitions

All is easy when there is enough cash within the SMSF to buy a property. Where it gets more complicated is when the SMSF wants to buy but doesn't have the cash to buy. That is where SMSF joint property acquisitions come into play as one option to still acquire some part.

If you don't have enough cash in super, but there is enough cash outside of super, you can get your SMSF to jointly buy a property with whoever has that cash – you, or another member or a third party like another SMSF or unit trust or whoever it is.

But how exactly does this work? That's pretty much the summary of the questions you sent in. So Peter Bobbin of Argyle Lawyers in Sydney kindly agreed to give you an answer.

Here is what we learned but please listen in as Peter Bobbin explains all this much better than we ever could.

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An SMSF can buy a property jointly with another entity. This might be an individual, another SMSF, a unit trust or a company.

Individual

The individual might be you or another member. But it doesn't even need to be a member. It could also be a third party like a distant aunt who has too much cash on her hands.

Another SMSF

If one SMSF doesn't hold enough cash to buy the property, but two SMSFs. do, then there is nothing that stops these two SMSFs to buy the property as tenants in common. Both corporate trustees are listed on the title – assuming that both SMSFs have corporate trustees.

Each corporate trustee will hold a tenants in common share of the property. What percentage each party holds is up to the SMSFs to decide. The rent as well as costs and expenses are then applied according to these percentages.

Unit Trust

The unit trust acquires the property and both SMSFs acquire units in this trust. If no SMSF holds more than 50% in the unit trust, the unit trust can even borrow without falling under the LRBA rules.

Start with the End Game

Before you enter into a joint property acquisition, start with the end game. Work out what happens if one party wants to sell. Should the other party have a right of refusal? Is it necessary to sell at a public auction?

Standard Practice

A joint acquisition of assets doesn’t require a specific term within the deed. You don’t need the trust deed to specifically empower the trustee to make a joint acquisition.

Trustees have had that power for over 700+ years. The power to acquire a property completely and independently or jointly with others. So joint acquisitions are business as usual. They are standard practice.

Hierarchy of Rules

It is Common Law first, the Trust Act second and then trust deed third. But for practical reasons you would usually start with the trust deed.

LRBAs

Over the past 700+ years of Common Law around trusts, trusts had no power to borrow. The trust just holds the assets for the benefit of its beneficiaries and for the purposes of the trust. But a trust has no power to borrow against its assets. Common Law doesn’t give trustees that power.

The same applies to the Trust Act. There is no provision in the Trust Act either that would give trustees the power to borrow. The common provision just says that the trustee is empowered to invest as a a prudent man who owes a duty to another. It does not mention borrowing.

So for this reason you need the trust deed to specifically empower the trustee to borrow. Read the Deed.

So for limited recourse borrowing arrangement it is critical that you refer to the trust deed. The power to borrow needs to be expressly stated in the trust deed. If it is not, then there is no power to borrow since Common Law and Trust Act are silent on the issue.

Commercial v Residential Property

The most common scenario for a joint acquisition (as well as for an LRBA) is commercial property that gets leased back to the member’s business. The most important factor in all this though is that transaction must be wholly at arm’s length – not just to comply with the SIS Act but also ITAA 97.

If the Commissioner of Taxation finds that the superannuation fund has non-arm’s length income then that portion of income gets taxed at the top marginal rate and not the concessional superannuation rate. So always make sure that there is paperwork in place that can demonstrate that it is on arm’s length terms.

Land Title

What names go onto the title in a joint acquisition varies across Australia. In New South Wales the land register doesn't note any trust relationships, so the names on the title would just be those of the individual or corporate trustees.

Queensland on the other hand does note trust relationships. So for a Queensland property the title would note that the company is holding the title in its capacity as a trustee of the super fund. So whose name goes on title depends on the state or territory where the land is situated.

Stamp Duty

Whenever there is a property transaction, there is a potential stamp duty issue. Stamp duty is state law, so it varies from state to state and territory.

In New South Wales, Section 62A of the Duties Act treats a transfer of property from an individual name to a super fund concessionally. The transfer into the super fund must be wholly reflective of their interest in the fund. And the property is promised by the super fund to be held solely for them for the provision of their future benefits. In that case there is a maximum stamp duty transaction value of $500 and that can be quite favourable.

Let's say Jim owns a commercial property and he wants to transfer the property into Jim's super fund. Without the concessions in s62A the stamp duty would be $40,490. But because Jim is able to show that he still holds the same interest – just now through his SMSF – then the stamp duty goes down to $500.

There is also a stamp duty concession on transferring property between super funds where that is in a context of a member changing funds as the result of a relationship breakdown. So there are some other stamp duty concessions.

MORE

SMSF Corporate Trustees

LRBA

TPD Insurance

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