

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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25 | Partial Commutations Require an AFSL

Do partial commutations require an AFSL? Most of us will have had some clients last year with pension balances in excess of \$1.6m. As we all know that is a problem. It is a problem our clients expect us to solve. And we usually solve it by partially commuting the excess back to accumulation. But are we allowed to do this without an AFSL – an Australian Financial Services Licence ? Are we providing financial advice the moment we whisper the word “partial commutation” into our clients’ ears?

Do Partial Commutations Require an AFSL?

The timing couldn't have been worse. Accountants lost their AFSL exemption on 30 June 2016. And just 12 months later the super reforms throws a big spanner into our clients' accounts, requiring partial commutations left, right and centre.

If you hold an AFSL licence, you can stop reading. Doesn't affect you. But if you don't hold an AFSL licence, this is for you. Can you still deal with the excess balance and partially commute the excess?

Let's take a step back. What can you do without an AFSL licence?

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Factual advice

You can provide objective and factual information that is not to influence your client's decision on a financial product. This factual advice is not financial product advice.

So you can talk to your clients about transfer balance accounts, transfer balance caps, excess balances, partial commutations and the lot, as long as you don't tell them what to do.

Taxation advice

If you register as a tax agent, you can give tax advice. You can give any advice in the ordinary course of activities as an agent and is reasonably regarded as a necessary part of those activities s 766B(5)(c) and reg 7.1.29(4). So the question is whether telling your clients about partial commutations is tax advice. Where does tax advice stop and financial advice start?

Traditional Accounting Services

You can provide traditional accounting services under Reg 7.1.29.

Broad asset allocation advice

You can give your client general advice about possible asset allocations of his or her investments. What percentage should be in shares or bonds for example.

Do As Told

You can do as told. If your client tells you to do this or that and you just do it, you are not providing financial advice. So if you simply facilitate a client's instructions and for example set up an SMSF, then you are generally not providing a financial service.

So if your client tells you to partially commute the excess and you just follow their instructions, you are ok. The question is whether your client will have the knowledge and expertise to tell you this without you advising them.

So all of this is ok. But when does it stop being ok. When do you need a licence?

Financial Services Business

A person who carries on a financial services business must hold a Licence covering the provision of the financial services (s 911A(1)).

Financial Product Advice

You provide a financial service under s 766A(1) if you:

1. provide financial product advice (s 766B); or
2. deal in a financial product (s 766C).

A financial product, under s 763A(1), is broadly a facility through which a person does one or more of the following:

1. makes a financial investment (s 763B);
2. manages financial risk (s 763C).

Financial product advice, under s 766B(1), means a recommendation or a statement of opinion that:

1. is intended to influence a person in making a decision in relation to a particular FP or class of FPs; or
2. could reasonably be regarded as intended to have such an influence.

So looking at all this, there might be a way out of this dilemma – but it requires time and a smart client. You explain all the intricacies of the super reforms to your client – just factual or tax advice – you don't make any recommendations. You don't tell them what to do. And then your client has to be quick in the uptake, work out that partial commutation is the way to go and tell you to do it. Without you having had any input whatsoever in that decision.

Maybe in the end it is just easier to get that AFSL licence.

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