

TAX TALKS

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

The following information is only of a general nature and should not be taken as professional advice.

98 | Top 10 SMSF Hot Spots July to October 2018

The top 10 SMSF hot spots for July to October 2018 cover a wide range of topics. What was hot? What did the industry talk about?

Top 10 SMSF Hot Spots July to October 2018

Where were the pain points? Miranda Brownlee is a journalist at SMSF Adviser and listens to the SMSF industry every day. So we asked her what got the most attention in the past 4 months. Here is her answer.

To listen while you drive, walk or work, just access the episode through a podcast app on your mobile phone.

1 Aussiegolfa re Sole Purpose Test

The full Federal Court decided on the appeals of *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122) that an SMSF dealing with a related party on the same terms as arm's-length parties does not breach the sole purpose test. But still breaches the in-house asset rules. This decision surprised many in the industry.

The *Aussiegolfa* SMSF had invested into a sub-fund in a managed investment scheme. The sub-fund bought a student flat that students and in the end the member's daughter rented at market value. The initial Federal Court judge agreed with ATO. It ruled that the investment breached both the in-house asset rules and the sole purpose test.

On appeal the full Federal Court unanimously affirmed the decision on the in-house asset question. But it decided the investment did not breach the sole purpose test as the terms of the rental arrangement were the same as they were with arm's-length tenants.

The full Federal Court pointed out in their decision that the timing of the investment was well before any lease to the member's daughter. The member's daughter was a suitable tenant. The property was first leased to other arm's-length tenants before the member's daughter. A third-party arranged the tenancies with no involvement from the member. And the property was a suitable investment.

So the full Federal Court still confirmed the breach of the in-house asset rules. The ATO had deemed the investment to be an in-house asset in case it was found not to be an in-house asset under the general rules, and the Federal Court confirmed its power to do so.

2 Ryan Wealth re SMSF Liability

Cam & Bear was the first case that really put SMSF auditors on alert. But now *Ryan Wealth* has come along compounding the issue.

Cam & Bear

In *Cam & Bear Pty Ltd v McGoldrick [2018] NSW 110* ('*Cam & Bear's case*') the Supreme Court of NSW Court of Appeal found that an SMSF auditor had breached his duty of care and was responsible for 90% of the fund's losses.

The trustee of the fund had given the fund's money under a custodial arrangement to a finance business that belonged to a close friend. The trustee trusted this friend and didn't realise for a long time that the money was gone.

Not surprisingly, the SMSF auditor had difficulty verifying the amounts stated in the accounts. Neither the trustee's close friend nor the close friend's accountant who had prepared the accounts were forthcoming with any answers when the auditor started asking questions.

But nevertheless did he sign the audit report without any qualifications. And that led to his downfall. He was found to have acted in negligence when failing to conclude that the 'cash' was in fact an unsecured loan (and should have been recorded as such) with a doubtful chance of recovery and not reporting these facts to the fund's directors (i.e., by failing to qualify the audit report).

Ryan Wealth

Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWSC 1502 has many similarities to *Cam & Bear*. A SMSF trustee blindly follows financial advice, invests money in unsecured loans. And the SMSF auditor doesn't realise that there is an issue.

In *Ryan Wealth*, the trustee, following a family law settlement in 2006, followed financial advice and invested over \$7m in unsecured loans pursuant to a series of facility agreements. The loans were to finance the development of various projects, all closely connected to the trustee's financial adviser.

In early 2013, the professional indemnity policies of insurance formerly held by the financial adviser lapsed. So the SMSF auditor was the last one standing.

In mid-2013, the trustee received a letter from another investor expressing concerns about the financial position of the investment and proposing that an independent forensic accountant be appointed to investigate the affairs. The trustee engaged a forensic accountant as well as a solicitor and recovered just over \$3m. But the rest was gone.

And so the trustee went for the SMSF auditor claiming that the losses would have been less if the SMSF auditor had identified the issue right at the start. The court agreed and found the SMSF auditor responsible for 90% of the losses.

3 ATO Review of SMSF Auditors

The ATO intends to review the top 100 SMSF auditors and do this with a day's notice. The top 100 SMSF auditors cover about a third of SMSFs that lodge annual returns.

4 Draft Legislation for Work Test Measure

Treasury put out the draft legislation for the work test measure, which will affect SMSFs with less than \$300,000 in super.

5 Re Naraman re Trustee Powers

The *Re Narumon Pty Ltd [2018] QSC 185* case was about the trustee's powers to renew a lapsing binding death benefit nomination that the trustee is a beneficiary of. The main point working in the trustee's favour was that it was only a renewal and not a new nomination.

6 Lenders Pulling out of LRBAs

More and more lenders are pulling out of LRBAs. NAB still acts in that space but AMP just pulled out.

7 Labour's Franking Credit Draft Policy

There is more talk about Labour's franking credit policy. A review is to look at how it will affect investor behaviour.

8 Accountant's Exemption

The Institute of Public Accountants (IPA) and Ron Lesh of BGL are lobbying to have the accountant's exemption reinstated.

9 TBAR Inefficiencies

The industry has pointed out inefficiencies in the TBAR and asked the ATO to streamline the process and form.

10 Access to lodged TBAR data

The industry would like to have access to clients' TBAR data that has been reported. The ATO is working on this, at this stage only for tax agents.

MORE

[Trust Income Streaming](#)

[Taxation of Trusts Div 6 ITAA36](#)

[Family Trust Elections](#)

Disclaimer: *Tax Talks does not provide financial or tax advice. This applies to these show notes as well as the actual podcast interview. All information on Tax Talks is provided for entertainment purposes only and might no longer be up to date. You should seek professional accredited tax and financial advice when considering whether the information is suitable to your or your client's personal circumstances.*

The information above is for general information only and should not be taken as constituting professional advice from Tax Talks. We are not a financial, legal or tax adviser. You should consider seeking independent legal, financial, taxation or other advice to check how the above information relates to your unique circumstances.