

Rigby Cooke Tax Update

SMSF Borrowing: Draft Ruling

Our Team

The ATO has released draft Ruling SMSFR 2011/D1 which clarifies its views on certain key concepts in the limited recourse borrowing arrangement (LRBA) provisions as they apply to Self Managed Super Funds (SMSFs). The draft Ruling focuses primarily on real property.

The draft Ruling does not change the law, which still embodies certain aspects which must be carefully managed. However, the ATO has taken a reasonable approach in clarifying a number of areas which will make it easier for trustees and advisors to proceed with confidence.

Certainly borrowing arrangements are now common place and potentially a good way to increase wealth in superannuation.

Key concepts clarified in the Ruling include:

- The asset acquired must be a single acquirable asset
 - This may embody more than one title if there is a physical or legal impediment to the land being dealt with separately,
 - e.g. An entire factory built on three separate titles can be a single acquirable asset
 - e.g. An apartment with a separate car park can be a single acquirable asset where the law does not allow the titles to be disposed of separately
 - e.g. A completed 'off the plan' apartment can be a single acquirable asset; any deposit would have to be paid from non-borrowed money
 - e.g. A farm on two titles though operated as one farm, is capable of separate sale and so would not be a single acquirable asset
- Borrowings can be applied if maintaining or repairing but not improving the asset
 - Reference is made to the asset's qualities and characteristics at the time of acquisition
 - Trustees cannot borrow to maintain or repair an asset that is not under a LRBA

Ross Higgins
Partner



Graham Candy
Senior Consultant



Ben Elbaum
Associate



Timothy Stokes
Associate



SMSF Borrowing: Draft Ruling

- For improvements, non-borrowed moneys can be used. However, any improvements must not result in the acquirable asset becoming a different asset(s)
 - e.g. Vacant land is subdivided – this improvement results in different assets
 - e.g. Existing residence is demolished and replaced by three strata units. This results in different assets
 - e.g. Four bedroom house is destroyed by fire and rebuilt using insurance moneys. This restores the asset to its original character
 - e.g. A residential property is improved by adding a pool, new garage or a second storey, using fund moneys. This does not fundamentally change the character of the asset

The multiple title problem can still prevent acquisition of certain real property, or require multiple LRBA's, suggesting consolidation of title first or possible acquisition via a unit trust with the LRBA in relation to the units in the trust.

The inability to develop property after it is acquired with either borrowed money under a LRBA or non-borrowed fund money remains a significant constraint under the legislation. Again, possible acquisition via a unit trust with the LRBA in relation to the units in the trust may be a solution.

We can assist you in all aspects of advising on and implementing a LRBA.



Ben Elbaum
Associate
belbaum@rigbycooke.com.au
61 3 9321 7831

Ross Higgins
Partner
rhiggins@rigbycooke.com.au
61 3 9321 7830

Timothy Stokes
Associate
tstokes@rigbycooke.com.au
61 3 9321 7819

Graham Candy
Senior Consultant
gcandy@rigbycooke.com.au
61 3 9321 7803

Important Notice

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.

Rigby Cooke is not licensed to provide financial product advice under the Corporations Act 2001. Taxation is only one of the matters that must be considered when making a decision on a financial product. Clients should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by send an email to:

marketing@rigbycooke.com.au

Your request to remove you as a subscriber should include the word "unsubscribe" and your full email address to allow us to correctly identify your removal from our lists.

Reprinting articles

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained.

To obtain approval, please contact Rigby Cooke on +61 3 9321 7852 or email marketing@rigbycooke.com.au.

rigbycooke | lawyers

Level 13, 469 La Trobe Street
Melbourne Vic 3000
T 61 3 9321 7888
F 61 3 9321 7900
www.rigbycooke.com.au