

The Commissioner's SMSF compliance concerns

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The Tax Commissioner has recently expressed concerns at potential superannuation compliance breaches arising from the recession, including the following:

- non-payment by employers of the superannuation guarantee;
- illegal early access to superannuation funds; and
- breaches of the in-house assets rule.

We consider below, in more detail, the issues identified by the Commissioner.

Non-payment of superannuation guarantee

The Commissioner stated that, as a result of certain compliance checks the ATO has found that some employers are not meeting their superannuation guarantee obligations. As a result, the ATO will visit 8,000 employers who have been identified as high risk.

The Commissioner pointed out that of 2,600 companies selected to be high risk and visited since July 2008, over 1,800 had not yet complied with their PAYG withholding obligations and around 1,250 had not yet met their superannuation guarantee obligations.

Although he said the ATO had no discretion in relation to unpaid superannuation guarantee there may be scope to help employers with their overall obligations.

Critique

What the Commissioner failed to comment on was the reasons for employers' poor compliance records. Poor compliance records may stem from, for example:

- increasing levels of compliance and red-tape confronted by businesses - including Government over-regulation and “form-filling” requirements by large institutional superannuation funds; and
- falling cash flow for businesses generally resulting from limited resources.

While there is no excuse for businesses not to comply with the law in these tough economic times. One can only wonder whether it is time to make further calls for real reform of the system which makes it difficult for businesses to comply. Calls for consolidated reporting to the Government and the ATO need to continue to ensure that compliance is made easier. Obviously, the compliance burden continues to overwhelm many businesses to the point where they simply fail to comply with the law. This is unacceptable, but not entirely businesses fault.

Illegal early access to superannuation funds

The Commissioner also noted that in the current environment preventing illegal access to superannuation funds is a priority. In this regard, the ATO has stepped up compliance activity and will apply penalties to individuals, trustees of funds, and promoters who breach the rules preserving superannuation for retirement.

The ATO has commenced action to amend over 1,000 tax assessments, increasing the liabilities with penalties for the individuals involved. It has also suspended 202 suspect SMSFs from receiving roll-overs from other superannuation funds.

Critique

It is not entirely clear why individuals are feeling a need to withdraw their superannuation early and/or “illegally”. The reasons for this may be many:

- there may be a need for new bases for the withdrawal of superannuation; or
- what actually appears to be an illegal withdrawal of superannuation may be driven by a real sense of desperation by the individual seeking to withdraw superannuation. That is, they may be close to defaulting on their house, have lost their job, be close to being bankrupt or confront a large medical bill; or
- it may be due to frustration at the serious underperformance of most superannuation funds.

Again the above should not be seen as excuses for a failure to comply with the law. However, it may perhaps be time to provide greater flexibility of choice of superannuation funds, including making it easier for individuals to manage their own superannuation. There may also be scope to increase the bases upon which superannuation can be withdrawn and to more widely educate the public about the real and legal basis for withdrawing their superannuation earlier than retirement.

Breaches of in-house assets rule

Finally, the Commissioner indicated that industry had raised concerns with the ATO in respect of the in-house assets rule and whether changing market values will lead some trustees to breach the 5% threshold.

Whether this is a problem will depend on year end values. If the year end results reveal a problem, then trustees will need to have a plan in place to address the proportion of in-house assets held and reduce it to an acceptable level within 12 months of year end.

If values recover in the following year there may be no need to dispose of the assets causing the problem. If values do not recover then the ATO will look at the action it should take based on each particular fund's circumstances. The ATO's stance in this regard is to consider cases sympathetically, particularly where the situation is clearly beyond the trustee's control and remedial action is being taken.

Critique

While the policy reasons for introducing the 5% rule may have been clear at the time of their introduction, in the current economic climate, it is unclear whether the rule is still with justification. In fact, if an individual can ensure greater returns for their retirement through investing in non-arm's length arrangements, than in the financial markets, then provided adequate safeguards are in place, it is only questionable whether the rule should exist at all. With some cynicism one can only ponder whether the rule was originally designed to ensure investors were forced to invest in large companies and institutions, to the detriment of promoting and fostering their own small businesses. Maybe current economic conditions call for rethinking of the so-called policies behind such rules and their legitimacy.