PERSONAL FINANCIAL STRATEGIES

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INSIDE

Record keeping requirements for SMSF

Poor and inadequate record keeping are often recognised as a major problem for self managed super funds (SMSF).

One responsibility of being a trustee of a SMSF is to keep proper and accurate tax and super records.

It is important to keep updated records so that they can be made available to the fund's auditor when they audit the fund each year. Accurate records must also be provided when requested by the ATO

Accurate records can also help trustees to manage the fund efficiently.

Attention needs to be given to record keeping as it can pose a compliance risk. Trustees of a SMSF should ensure that they remain compliant as penalties do apply for those who fail to keep accurate and accessible records for the required timeframe.

The following records must be kept for a minimum of five years:

- accurate and accessible accounting records that explain the transactions and financial position of the SMSF
- an annual operating statement and an annual statement of the SMSF's financial position
- copies of all the SMSF annual returns lodged
- copies of any statements that are required to be lodged to the ATO or other super funds

The following records must be kept for a minimum of ten years:

- records of all changes of trustees
- trustee declarations recognising the obligations and responsibilities for any trustee, or directors of a corporate trustee, appointed after 30 June 2007
- member's written consent to be appointed as trustees
- copies of all reports given to members
- documented decisions about storage of collectables and personal-use assets
- minutes of trustee meetings and decisions, if matters affecting the fund were discussed

It is also important to take minutes of all investment decisions, including why a particular investment was chosen and whether all trustees agreed with this decision.

This is important because if an individual invests the SMSF's money in an investment that fails, the other trustees are able to take action against the individual for failing to be diligent in their duties.

However, if the investment decision was recorded in the meeting minutes that were signed by the other trustees, there will be evidence on record that all trustees were in support of the decision.

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Managing the DIY super fund in retirement

Individuals with high debts can see bankruptcy as a solution to their problems.

However, being declared bankrupt has some serious long-term consequences and should be seen as a last resort.

A personal insolvency agreement (PIA) is a formal way to deal with unmanageable debt without having to declare bankruptcy.

It provides a flexible way for individuals to come to an agreement with their creditors to settle debts. A PIA is a legally binding agreement in which an individual agrees to pay creditors in full or in part by instalments, or a lump sum.

For an individual to propose a PIA certain conditions must be met, they:

- must be insolvent
- must be present in Australia, or otherwise have an Australian connection
- must not have proposed another PIA in the previous six months

For a PIA to work, the insolvent individual must first appoint a controlling trustee to take control of their property. The controlling trustee examines the proposal, makes enquiries into the individuals financial affairs and reports to creditors.

A creditors' meeting is then held within 25 working days of the trustee's appointment, at which the creditors consider the proposal. If the proposal is accepted the creditors are then bound by the terms of the agreement if it is rejected the creditors will either vote in favor of bankruptcy or leave the decision to the individual.

The appointment of a controlling trustee:

- automatically disqualifies the individual from managing a business until the terms of the PIA have been complied with
- prohibits the individual from dealing with their property without the consent of the controlling trustee

Also, when an individual appoints a controlling trustee they are committing an 'act of bankruptcy.' A creditor is able to use this to apply to the courts in forcing the individual into bankruptcy if the attempt to set up a PIA fails.

Division 7A

The ATO is continually monitoring Division 7A as it has been recognised as a high risk area of tax.

Division 7A tax applies to all loans, advances, and other credits made by private companies to shareholders, or their associates.

It is important to consider any tax consequences under Division 7A. For example, if:

- shareholders or associates have extracted profits from a private company during the year other than by dividend
- a shareholder or associate uses an asset of the private company and does not pay the company for its use or pays less than an arm's length amount
- intra group loans have been made by a private company

Trustee obligations for a disqualified person

There are ramifications when a trustee in a self managed super fund (SMSF) becomes a disqualified person.

An individual can become a disqualified person if any of the following conditions apply. If they:

- have been convicted of an offence involving dishonesty
- have been subject to a civil penalty order under the super laws
- are insolvent under administration
- have been disqualified by a court or regulator

A company can become disqualified if any of the following conditions apply:

- a responsible officer of the company (such as a director, secretary, or executive officer) is a disqualified person
- a receiver, official manager, or provisional liquidator has been appointed to the company
- action has been taken to wind up the company

Under superannuation laws, if an individual becomes a disqualified person they must notify the ATO immediately of their disqualification – unless they were disqualified by the ATO – and cease being, or acting as, a trustee.

It is an offence for a disqualified person, who is aware of their status of being disqualified, to continue to be, and act, as a trustee of the SMSF. Penalties for this can include fines and in some cases, imprisonment.

There is also the risk that the SMSF can be deemed non-compliant for not taking appropriate action against the disqualified person. Directors of a corporate trustee may also have an obligation to inform the Australian Securities and Investments Commission (ASIC).

A SMSF effectively has six months after the resignation of a disqualified person to restructure itself, so it continues to meet the definition of a SMSF. This generally means rolling out the disqualified person's super interest out of the fund.

To determine whether a disqualified person can again become an individual trustee of a SMSF depends on how they were made disqualified:

An offence involving dishonesty

An individual may apply for a declaration waiving their disqualified status within 14 days of the date of their conviction, and only if the penalty or prison term is less than stated in the legislation.

Insolvent under administration

Once the individual is no longer insolvent under administration they are no longer a disqualified person.

Disqualified by a court or regulator

Legislation sets out the circumstances in which an individual can request their disqualification to be revoked.

Individual vs corporate SMSF trustees

The ATO urges self managed super fund (SMSF) members to ensure they understand the differences between the two types of trustees- individual and corporate.

The choice of trustee will affect the way the fund is administered and the type of benefits it is able to pay, so it is important to choose a structure that suits the SMSF's circumstances.

A corporate trustee is a company incorporated under the law that acts as a trustee for the fund. If a member of the SMSF already owns a company, they may choose it as trustee as long as it meets the requirements. An individual trustee structure is one which is operated by fund members who also act as trustees.

When considering both structures it is important to look at the issues that affect SMSFs:

Costs and convenience

Individual trustees, with each member acting as a trustee, can have lower establishment costs because a separate company does not have to be set up to act as a trustee. However, there can be additional costs when transferring asset ownership in the case of a new trustee. Corporate structures are usually more expensive to set up and slightly more expensive to maintain.

Governing rules

Individual trustees must follow the rules in the fund's trust deed and superannuation laws. Directors of the corporate trustee must follow the rules in the fund's trust deed, superannuation laws, as well as the company's constitution and the Corporations Act 2001.

Administration/reporting

Individual trustees have fewer reporting obligations and, therefore, can be simpler to administer. They must also appoint an independent auditor to audit the fund's operations each year, lodge a self-managed super fund annual return for the fund and pay an annual supervisory levy to the ATO.

Having a corporate trustee can make it easier to administer the ownership of fund assets and keep the assets of the fund separate from any personal or business assets. In regards to reporting, corporate trustees have the same obligations as individual trustees, as well as reporting obligations to the ATO and an annual review fee to the ASIC.

Clarity of ownership

Individual trustees can run the risk of having their personal assets intermingled with that of the funds. Also, having to change the legal ownership of the assets each time there is a change in the trustee can be time consuming and expensive.

Under a corporate structure, the company is the legal owner of the fund's assets. This means that if the directors of the company change there is no change in the legal ownership of assets.

Reform of levy arrangements

The Government has made reforms to supervisory levy arrangements for self managed superannuation funds (SMSF).

Superannuation funds are required to pay an annual supervisory levy to the regulator of the fund. For SMSF's, the regulator is the ATO.

The changes made are:

- the timing for collection of the levy
- an increase to the levy ensuring that the ATO's regulatory costs are fully covered

The payment of the SMSF levy will be brought forward. It will now be levied and collected in the same financial year.

This is consistent with the Australian Prudential Regulation Authority (APRA) regulated funds, which pay the superannuation supervisory levy in the same financial year it is levied.

This change in the timing of the collection of the SMSF levy will be phased in over two years, allowing the time needed for the SMSF to adjust.

Transitional provisions apply to the levy for the 2013-14 year of income so that it is payable in two instalments.

Currently, there is a shortfall of SMSF levy revenue compared to the costs of regulating the sector.

The Government will increase the annual SMSF levy from $191 in 2012-2013 to $259 from 2013-2014 and onwards to ensure full cost recovery. The Government has indicated that the ATO supervisory levy will continue to increase

This increase in cost will allow the ATO to continue to regulate the rapidly growing and diverse sector effectively.

Updating a Will

A Will is an important part of keeping estates and finances organised.

An absence of a Will means that the deceased's loved ones can lose control over what happens to the estate.

A Will is able to be updated at any time, and should be reviewed following any significant changes in an individual's family, life or finances.

There are various reasons as to why an individual would need to update their Will. These can include marriage or divorce, commencement of a de-facto relationship, birth or adoption of a child or the death of a beneficiary.

There are two options available when updating a Will. Individuals can choose to prepare and sign a new Will that revokes the old one, or prepare and sign a codicil.

The best option will depend on the specific circumstances of the individual's situation.

Estate planning for the future

As people get older they need to make arrangements on how to handle their estate, and their personal interests in the event of sickness or death.

Contrary to popular belief, an individual's parents, spouse or significant other are not always automatically empowered to make these decisions on their behalf.

It is always best to seek more detailed advice when making these important decisions as there are a number of options available. These include:

Enduring guardianship

A guardian is essentially a legally appointed substitute decision-maker. A guardian is granted powers only as is necessary to accomplish what an individual cannot do independently.

Individuals can choose to create a legal document called an 'enduring power of guardianship' that authorises a person to make personal, lifestyle or treatment decisions on behalf of themselves.

A guardian can also be appointed by the courts. Unlike the power of attorney, each state has a guardianship board or tribunal which supervises the guardian.

The most common functions of a guardian are making decisions on accommodation, health care and medical and dental treatment. Individuals are able to authorise guardians to exercise additional functions, such as the right to withhold consent for medical treatments in certain situations.

An enduring guardian cannot make financial or legal decisions, or perform the following on behalf of an individual:

- make a Will
- manage finances
- override any objections to medical treatment

Enduring power of attorney (financial)

A financial 'enduring power of attorney' is a legal document that remains valid if the nominator becomes mentally incompetent. The agent who is appointed can make any legal or financial decisions on the nominator's behalf.

The appointed attorney is able to make a decision on property or financial affairs, for example, operate bank accounts, pay bills and purchase and sell property. They are, however, unable to make lifestyle decisions.

Once an agent is appointed, the power will last until the nominator chooses to end it, they die, a specified terminating event occurs, or the power is cancelled by the court.

Enduring power of attorney (medical treatment)

An enduring power of attorney for medical treatment authorises the agent to make decisions about an individual's medical care and treatment. This power takes effect if, and when, the nominator becomes incapacitated, whether temporarily or permanently.

The agent holds all the powers over the treatment that the nominator would have held. They are allowed to refuse all medical treatment, except for emergency treatment and palliative care.

Choosing the age to retire

The age of retirement is becoming an increasingly topical issue.

As waves of baby-boomers are now reaching what was once a popular retirement age, as well as issues such as individual's greater longevity, the state of retirement savings and the rapid ageing of the population, the topic of retirement intentions is getting a lot of attention.

The Government has further focused attention on this issue with its plan to progressively increase the age for pension eligibility from 65 to 67 over the next few years.

The age that an individual chooses to retire can have a significant influence on their retirement savings, and as a result, their standard of living throughout their retirement. Undoubtedly, a shorter retirement is more affordable than a long one.

Those who elect to remain in the workforce have the opportunity to save for longer, for what will be a shorter retirement.

Some people are not in the position to choose their own retirement age given such considerations such as their health and the availability of employment opportunities.

The Australian Bureau of Statistics (ABS) released a report stating that the average age of retirement of individuals who retired over the past five years was 61.5 years.

However, the report also showed that of the 4.7 million in the labour force aged over 45:

- 79 per cent intend to retire 'sometime in the future'
- 8 per cent have not yet made up their mind about whether they will ever retire
- 13 per cent never intend to retire

Of those who intend to eventually retire, 17 per cent aim to retire at 70 years or older and almost half intend to retire between 65 and 69. Early retirement was not an attractive option with only 9 per cent intending to retire between 45 and 59.

Retirement is becoming a reality for many Australians. It is always a good idea to discuss potential retirement ages with a professional.

This will help individuals to understand the impact of the intended retirement age on the ability to finance their desired standard of living in retirement.

These conversations are best to have well before any targeted retirement date to allow for consideration of all options.