SMSF investments and 13.22C unit trusts

- What can an SMSF invest in?
- SMSF investment considerations
- Restrictions on investments
- The role of 13.22C unit trusts

What can an SMSF invest into?

Poll #1

Which of the following can an SMSF own (select all that apply):

a) Bank account denominated in a foreign currency
b) Crypto assets
c) Residential property located offshore
d) Commercial property located offshore
e) Holiday rental located in Australia
f) Artwork
g) Racehorse

What can an SMSF invest into?

- Broadly, there are no restrictions

HOWEVER

- There may be limitations on who assets can be purchased from
- There may be limitations on how much the SMSF can have invested in a particular asset
- There may be restrictions on what can be done with an asset
- There may be additional obligations surrounding certain asset ownership
- The SMSF Trust Deed may impose additional restrictions / obligations over and above these

SMSF investment considerations

SMSF investment considerations

SMSF investment options will broadly be covered by one (or more) of the following:

1. SIS legislative requirements / constraints
2. SMSF Trust Deed restrictions
3. SMSF Investment Strategy considerations

Least

Flexibility

Most

Poll #2

Under superannuation law, is an SMSF’s investment strategy required to be in writing?

a) Yes

b) No

SMSF investment strategy – the legal requirements

SIS Regulation 4.09(2)

The trustee of the entity must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following:

a) the risk involved in making, holding and realising, and the likely return from, the entity's investments, having regard to its objectives and expected cash flow requirements;

b) the composition of the entity's investments as a whole, including the extent to which they are diverse or involve exposure of the entity to risks from inadequate diversification;

c) the liquidity of the entity's investments, having regard to its expected cash flow requirements;

d) the ability of the entity to discharge its existing and prospective liabilities;

e) whether the trustees of the fund should hold a contract of insurance that provides insurance cover for one or more members of the fund.

Discussion question

"The trustee of the entity must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the entity …"

Segregated v unsegregated investments / accounts etc

- Tax v accounting/admin
- Member v member
- Accumulation v pension
- Multiple investment accounts v singular approach
  - Which is better?
  - Cost v benefit?
  - Underlying assets may determine approach

Restrictions on investments

Acquisition of assets

SIS Section 66 places restrictions on acquisition of assets from related parties

- Main exceptions are business real property and listed securities
- An exception can also apply to in-house assets
  - If the asset would become an in-house asset of the SMSF immediately after its acquisition, and the acquisition does not cause the SMSF to exceed the 5% in-house asset limitation

Personal use and collectible assets – Section 62A items

Section 62A items

- jewellery;
- antiques;
- artefacts;
- coins, medallions or bank notes;
- postage stamps or first day covers;
- rare folios, manuscripts or books;
- memorabilia;
- wine or spirits;
- (motor vehicles;
- recreational boats;
- memberships of sporting or social clubs.

Restrictions

- Cannot be leased to a related party (no 5% threshold)
- Cannot be stored on private premises of a related party
  - Decision on where to store need to be documented and retained for 10 years
- Other than memberships, needs to be insured within 7 days of acquisition
- If sold to a related party, needs to be sold at market value

Poll #3

Which of the following are subject to the personal use and collectibles restrictions?

a) Loose diamonds

b) Gold bullion

c) Both loose diamonds and gold bullion

d) Neither loose diamonds nor gold bullion

In-house assets – SIS Section 71(1)

An in-house asset of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund, but does not include:

g) if the superannuation fund has no more than 6 members - real property subject to a lease, or to a lease arrangement enforceable by legal proceedings, between a trustee of the fund and a related party of the fund, if, throughout the term of the lease or lease arrangement, the property is business real property (within the meaning of subsection 66(5)) of the fund; or

h) an investment in a widely held unit trust; or

j) an asset included in a class of assets specified in the regulations:

   i. not to be in-house assets of any fund; or

   ii. not to be in-house assets of a class of funds to which the fund belongs.

Poll #4

Is an investment in a related trust an in-house asset?

a) Yes

b) No

Poll #5

Is the purchase of an investment in a related trust prohibited?

a) Yes

b) No

c) Maybe

13.22C unit trusts

Breadth of operation

- SIS Regulation 13.22C rules apply to:
  - Units in a related trust acquired on or after 11 August 1999
  - Shares in a related company acquired on or after 11 August 1999

- SIS Regulation 13.22B has similar provisions that apply to:
  - Units in a related trust acquired pre 11 August 1999
  - Shares in a related company acquired pre 11 August 1999

SIS Regulation 13.22C(2)

An asset of an SMSF is not an in-house asset when the asset is acquired if:

b) the unit trust is not a party to a lease with a related party unless the lease relates to BRP; and

e) the unit trust does not have outstanding borrowings; and

f) the assets of the unit trust do not include:

   i. an interest in another entity; or

   ii. a loan to another entity; or

   iii. an asset over, or in relation to, which there is a charge; or

   iv. an asset that was acquired from a related party of the superannuation fund after 11 August 1999, unless the asset was business real property acquired at market value; or

   v. an asset that had been at any time (unless it was BRP acquired at market value) an asset of a related party of the superannuation fund since the later of:

      A. the end of 11 August 1999; and

      B. the day 3 years before the day on which the fund first acquired an interest in the unit trust.

Discussion question

If a 13.22C unit trust looks to be at least as restrictive as a direct SMSF investment, when might a 13.22C trust add value?

Strategy considerations for 13.22C trusts

- SMSF geared investment strategies
  - Related party loans
  - Tenant in common ownerships with related party gearing their investments
  - Improvements to geared investments or “changing the nature” of the geared investment
- Future transfer of ownership of assets within trust
  - Transfer of units in trust, not transfer of property

Other considerations

- Non-geared related unit trust v geared non-related unit trust?
- Cost v complexity
- Pre 11 August 1999 investments in a geared related unit trust?

- SMSFs can potentially access a broad range of investments
- Generally not the acquisition that is the problem, but rather:
  - Who is the seller?
  - What is done with the asset?
- 13.22C unit trusts may provide some flexibility, but at what cost?

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