

ATO SMSF compliance focus for 2011-12

Due to the self-assessment nature of the tax system the ATO does not review the returns of all taxpayers. Rather, it sets up a compliance program which audits and reviews particular classes of taxpayers and particular aspects of the taxation laws having regard to the perceived risks of tax avoidance. SMSFs are no exception in this regard.

Because of the large number of SMSFs, the relatively small number of approved auditors¹ and the role SMSF auditors play within the SMSF system, the ATO also conducts audits and reviews of approved auditors of SMSFs.

The ATO has recently released information on its SMSF compliance focus for the 2011-12 year. While it is, obviously, necessary for SMSF trustees, service providers and auditors to pay attention to all aspects of SMSF compliance it makes sense to give extra attention to the areas on which the ATO will be focusing. These areas are as follows:

- Illegal early release of benefits by newly established funds:** Illegal early release involves the rolling over of a member's benefits to an SMSF which is then paid out to the member in contravention of the preservation rules. Trustees of funds receiving a rollover request to an SMSF can reduce the chances of becoming involved in such schemes by ensuring that the SMSF is listed on the registered fund database² before rolling over the member's benefit to it.
- Funds lodging their first annual return:** A new SMSF only achieves full complying status once it has lodged its first annual return³. After that point, a complying SMSF continues to be a complying fund until the ATO deems it to be non-complying. The ATO is seemingly trying to identify funds which they perceive to have a high compliance risk at an early stage in the registration process.
- Auditor contravention reports:** SMSF auditors are required to inform the ATO of contraventions that come to their attention⁴. These reports are, obviously, a prime indication to the ATO that an SMSF is not complying with

¹ The top 100 auditors complete over 30% of all SMSF audits.

² The database can be searched online at superfundlookup.gov.au.

³ Although it will still qualify in the interim for concessional tax rates and is eligible to receive rollovers.

⁴ See section 129 of the *Superannuation Industry (Supervision) Act 1993*.

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the law and more than likely to be investigated further by the ATO. Of course, auditors can probably expect to receive a "please explain" from the ATO⁵ where they have failed to report a contravention that comes to the attention of the ATO through other means.

- **Related party investments:** Loans to members and the in-house asset restrictions appear to be of particular concern to the ATO. An SMSF is not permitted to make loans to members⁶ and may only invest 5% of the fund in in-house assets⁷.
- **Exempt current pension income and non-arm's length income:** Each of these types of income have non-standard tax treatment – the first being exempt from tax and the latter being taxed at the top marginal rate. The rules for both are fairly technical and prone to mis-calculation⁸.
- **Re-reporting of contributions and excess contributions tax (ECT) releases:** Presumably, the ATO is looking out for funds that refund a "mistaken" contribution that just happened to trigger an ECT liability. ECT remains one of the major problem areas in superannuation at present. Hopefully, it will become less of a problem in the future due to the more lenient rules announced in the Federal Budget.

Keep in mind that there are many areas of SMSF compliance that are not included within the ATO's compliance focus. However, their potential to make an SMSF non-complying (together with the severe consequences that follow) are just as real.

⁵ Not forgetting that the ATO has the power to disqualify auditors in certain situations.

⁶ See section 65 of the *Superannuation Industry (Supervision) Act 1993*.

⁷ See section 83 of the *Superannuation Industry (Supervision) Act 1993*.

⁸ See, for example, *Darrelen Pty Ltd v FCT [2010] FCAFC 35* and *Allen's Asphalt Staff Superannuation Fund v FCT [2010] FCA 1276*.