PERSONAL FINANCIAL STRATEGIES

YOUR PERSONAL GUIDE TO WEALTH CREATION

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A DIFFERENT PERSPECTIVE

Tax laws concerning wash sales

In 2008, the ATO issued tax ruling TR 2008/1 which specifically indicated that a wash sale of shares is regarded as tax avoidance.

Despite this, wash sales are still a regulatory grey area for many investors. Australian tax laws on wash sales have not always been clear.

Previous to TR 2008/1 investors were asked to interpret Part IVA of the Income Tax Assessment Act (ITAA) 1936 to determine whether they had gained a benefit from their tax activity and whether it could be concluded that they had entered into the scheme for the sole purpose of gaining a benefit.

Some countries have clear definitions on what constitutes a wash sale. In the United States individuals cannot claim a capital loss if the same stock is sold and bought back within 30 days. Australia, however, did not have a specific timeframe for which a buyback is not allowed. Due to the ambiguity surrounding the guidelines wash sales became very popular. In 2008, the ATO issued TR 2008/1 which specifically outlawed wash sales in certain arrangements.

Despite this, a timeframe was still not defined. Instead, the ATO stated that individuals couldn't buyback a share "within a short period" of time.

The ATO defines a wash sale as the quick sale and purchase of an asset where these two transactions cancel each other out so that there is no economic exposure to the owner to the asset.

The ATO are not concerned with the genuine disposal of an asset at market value; however if a wash sale arrangement has deemed to be used to reduce an individual's tax bill then there may be significant penalties.

The ATO's ruling states that it is primarily concerned with those arrangements that create a tax loss that delivers a tax benefit that ordinarily would not be available.

TR 2008/1 contains 11 arrangements that the ATO will look unfavourably upon. Some super funds may find themselves caught out by this as the arrangements are often common super fund strategies and transactions. However, there are no examples in the ATO's wash sale ruling that relate directly to superannuation or self managed super funds.

Some of the arrangements outlined in TR 2008/1 that could cause problems are:

- a taxpayer who is a shareholder in a company sells an asset to that company
- a taxpayer sells an asset to a family member, and a pre-existing arrangement between the parties exists so that the taxpayer will continue to benefit from the asset's income.

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Managing the DIY super fund in retirement

As some Australians get older and begin to approach retirement they may face the challenge of finding a suitable person to look after their retirement assets.

This issue highlights the possibility that many DIY super funds could have a use-by-date. As Australians become older many may no longer have the interest, desire and eventual ability to maintain sufficient knowledge to continue to manage their DIY super fund. Research has shown that a quarter of the population might eventually suffer moderate or severe health problems that will affect their capacity to manage their DIY super fund.

However, the remaining 75 per cent often have enough time to prepare themselves and consider their options for the future.

Here are some options when considering the future of the DIY super fund:

Trusted professional advisor One option to consider is relying on a trusted advisor to take over the responsibility of looking over the fund. An advisor would be able to give specialised investment advice and would also have a good knowledge of DIY super funds and their maintenance. However, it may not always be possible to find a suitable advisor to give the level of service required.

Public super fund Another possibility is to move out of a DIY fund and back into a public offer super fund. However, this move will require research and careful consideration. The decision to move into a public super fund would need to be considered earlier, rather than later.

Adult children Adding children to the family's DIY super fund would allow them to contribute their own super into the fund. This would allow them to become involved in the running and maintenance of the fund, and ultimately becoming the dominant members in place of their parents. The decision to add adult children to the DIY super fund would need careful consideration.

The children would need to show an interest in taking a significant role in the running of the fund. There is also always the chance that children could change the fund's investments arrangements.

Investments Also, there is the possibility of leaving the super in favour of retirement investments, such as annuities that pay a guaranteed income for the rest of the investor's lifetime.

Non-lodging SMSF's

The ATO is getting serious about the non-lodgement of self managed super fund (SMSF) annual returns.

The ATO currently has a number of compliance strategies in place to address this issue; however, this year they are taking additional steps to engage the trustees of SMSF's that have two or more overdue lodgement obligations.

In September 2013, any SMSF with two or more overdue annual returns will have their regulation details removed from the Super Fund Lookup register until they bring their lodgements up to date. SMSFs affected by this compliance strategy will be unable to receive rollovers and establish new contribution arrangements until they address their lodgement obligations.

Capital gains tax discount

Changes have been made to the capital gains tax (CGT) discount for foreign or temporary resident individuals and Australian residents with a period of foreign residency.

On 8 May 2012, changes to the CGT discount were announced in the 2012-13 Budget. These changes became law as of 29 June 2013. The changes mean that foreign or temporary residents and Australian residents who have lived overseas may not receive the complete CGT discount.

The CGT discount was previously known as the 'CGT 50% discount.' This discount used to be available to any individual deriving a taxable capital gain on disposal of an asset held for more than 12 months, regardless of their residency.

However, from 8 May 2012, individuals, including beneficiaries of a trust and partners in a partnership, must meet certain eligibility conditions to apply for the CGT discount. This means that they may be no longer entitled to receive the full CGT discount.

These changes to the CGT discount will affect foreign or temporary residents, Australian residents with a period of foreign residency after 8 May 2012, and individuals who had a discount capital gain from a CGT event that occurred after 8 May 2012.

The application of the discount will now depend on:

- whether the CGT asset was held before or after 8 May 2012
- the number of days foreign or temporary residents had a period of Australian residency
- number of days Australian residents had a period of foreign residency

Australian residents must calculate the CGT discount they can apply to the capital gain if they are an Australian resident and, after 8 May 2012, have:

- a capital gain from a CGT event
- a period of foreign or temporary residence

These changes are only intended to affect the discount percentage applied to a capital gain and do not plan to affect other rules in the CGT regime.

What is Stronger Super?

The Federal Government has introduced changes to the superannuation system designed to make Australia's superannuation system stronger and more efficient.

These reforms are called Stronger Super and have been introduced following a Government review of the country's superannuation system in 2009. A variety of recommendations were made in 2010, and the first changes have been implemented in 2013.

Australia's current superannuation system can be complex and difficult for people to navigate, so these changes have been introduced to help simplify and give greater transparency to superannuation. From now until June 2016 the legislated changes will aim to simplify the superannuation system in a bid to help protect and maximise superannuation retirement income.

There are a number of important elements involved in the Stronger Super reforms:

MySuper

From 1 January 2014, employers must pay superannuation contributions into an authorised MySuper fund. MySuper funds will offer lower fees and simplified features, so members are not paying for services they do not need. Employees are still able to select their own fund if they wish, or manage their own superannuation affairs through a self-managed superannuation fund.

SuperStream

SuperStream is designed to improve the processing of superannuation transactions and to reduce the time it takes for these transactions to occur. The concept behind SuperStream is to reduce error and remove human involvement from the system.

Superannuation Guarantee rate rise

Another major change to the superannuation system is the steady rise in the Superannuation Guarantee rate. The Superannuation Guarantee rate is scheduled to increase to the 12 per cent target over the coming years.

From 1 July 2014, this rate is expected to be 9.5 per cent, however the current Government has introduced legislation which is before Parliament to delay the increase for a two year period. The upper age limit for paying the Superannuation Guarantee to an employee has also changed.

Employers must now continue to pay eligible employees super if they are over 70 and continue to work.

SuperSeeker

SuperSeeker is a tool that has been developed to help people track their lost super. The ATO reports that more than $17 billion sits in lost and unclaimed super funds. This program will also allows individuals to electronically transfer the lost super into an account they choose.

Splitting superannuation

There are both legal and tax implications to be considered when former partners in a SMSF decide to split after the breakdown of the relationship.

It is possible to transfer assets, such as property, from one super fund into another; however, there are four things individuals need to consider:

1. Separating couples need to work out how they will go about splitting their superannuation fund.

They can choose to enter into a formal written agreement, seek consent orders, or if the separating couple cannot reach an agreement, they can seek a court order.

2. It is important to have the necessary documentation as they are essential in the event of an ATO audit.

Due to there being beneficial tax consequences in splitting a superannuation fund, it is essential that the documentation, such as the notice for splitting the super, show a genuine separation.

3. If the super fund has property as the major form of investment there is the potential that it may create a liquidity problem; however, this can be addressed with future contributions.

Individuals will also need to aware of the market valuation rules for real estate in DIY funds.

4. If the new fund is to be a single member fund it is advisable to incorporate a special purpose company to be the trustee. This avoids having a second person as a trustee.

Check up on savings

Older individuals often forget to perform checks on their retirement savings.

It is essential that individuals check that their retirement savings are on track to finance their planned standard of living in retirement. Otherwise, they could be left short when they are ready to retire.

A common time to perform these checks is in the final decade before the date of intended retirement; however, it is a good idea to perform them throughout a person's working life.

Performing these checks can also allow an individual to focus on maximising their super in the countdown to their retirement.

Policymakers are also interested in retirement savings checks as it allows them to gain an understanding of whether Australia's retirement savings will be adequate, or if there will be strong demand for the age pension.

Self managed super fund audits

There are various guidelines to follow when organising a self managed super fund (SMSF) audit, including who should perform the audit and how much it should cost.

All SMSFs are subject to annual audit requirements. Audits are an essential tool in maintaining the health and integrity of the SMSF system.

Auditors are a positive influence on SMSF trustees and give assurance to the community that law is being followed.

All auditors had to register with the Australian Securities and Investments Commission (ASIC) by 1 July 2013 to continue auditing SMSFs after this date.

As well as registering auditors need to satisfy their professional body requirements such as doing professional development courses and having insurance. Not all accountants are able to perform SMSF audits.

The role of an auditor is to:

- conduct a financial and compliance audit of a SMSFs operation for the income year
- give the trustees an audit report in the correct form within the specified time period after the end of the income year
- advise the ATO of any reportable contraventions

It is the responsibility of the SMSF auditor to ensure their independence from the fund and to not accept work in which they have a personal or business relationship with the fund, or trustees.

However, it is the trustee's responsibility to appoint an approved SMSF auditor no later than 45 days before the annual return is due. Trustees must also provide their auditor with all the relevant records and documentation.

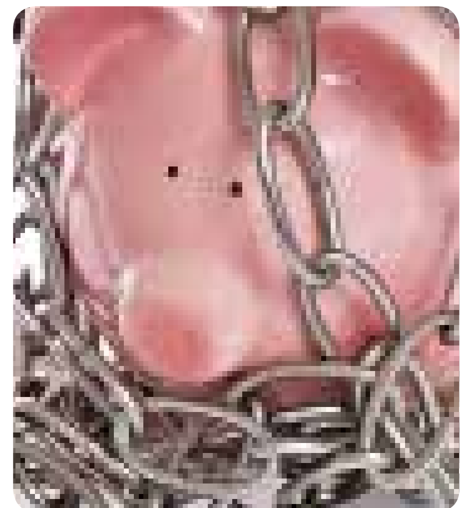
Once the auditor has received all the necessary documentation, they need to complete the audit and provide the audit report to the trustees within 28 days.

An auditor must audit the fund's financial report and its compliance with the provisions of Superannuation Industry (Supervision) Act 1993 and Superannuation Industry (Supervision) Regulations 1994. The ATO publishes an approved form for the audit report.

There is a big cost variance in audit providers. It is important to be wary of low-cost auditors as their private financial information may be heading offshore.

If trustees want their audit done in Australia, they should ensure that their audit provider does not outsource. A trustee who is a qualified accountant cannot do the audit, under any circumstances.

Due to the independence standards issued by professional accounting bodies and the ASIC competency standards, a trustee who is a qualified account is not considered independent of themselves. The ATO and the Australian Securities and Investments Commission (ASIC) work collaboratively to monitor the effectiveness of SMSF audits and will take action if performance and compliance issues are identified.



Adding children to super funds

It is quite common for parents to consider inviting their children to join their DIY super fund.

Although only about 10 per cent of self DIY super funds have more than two members, there are a number of benefits in including children in the family super fund.

There are financial benefits to including children in a super fund, such as the increased pool of assets created over time that can allow for a greater diversification of assets.

Parents also choose to invite their children to join their super fund as it allows them to provide their children with a financial education on how to manage money and appreciate the benefits of super.

A multi-generational super fund is a good way of passing on well performing investments. It also allows children to help their parents with the financial affairs of the fund as they grow older.

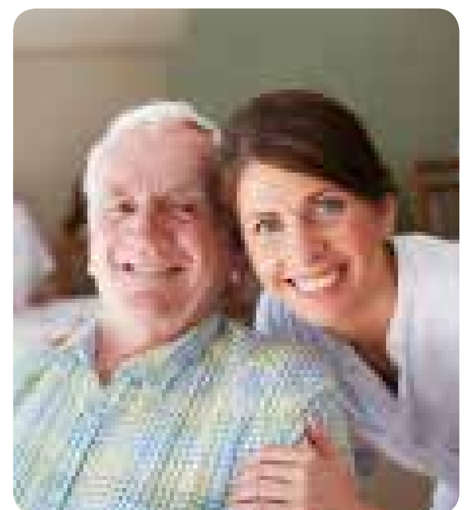
However, the decision to include children within the super fund should be given careful consideration. There is a variety of issues to think about before including children in the super fund. The super fund will have a wide range of ages, which can present challenges associated with parties that have different needs.

Other issues such as the children's working patterns and whether they might consider going overseas or working interstate can complicate the fund's affairs and increase administrative complexity.

Also, all members of a DIY fund with a corporate trustee are expected to be actively involved directors of the fund. This means that the children will also be expected to be directors of the fund and will, therefore, play an important role in the fund's decision-making.

Although the children may be happy to leave the fund's investment arrangements as they are, will they be in the future when their circumstances may change?

Another consideration is what will happen when the children acquire partners as there is a limit of four members per fund. The only way around this problem is to run two or more funds in parallel; however, this only adds to the already complex situation.



The handling of situations listed above will need to be mapped out before children are invited to join the super fund to avoid any arguments or confusion.

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