

Why should the deposit be paid by the SMSF trustee?

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When self managed superannuation funds ('SMSFs') borrow to acquire real property, one of the common mistakes is not having the deposit paid from the bank account of the SMSF trustee. This article highlights the importance of the deposit being paid the SMSF's bank account and identifies some possible rectification options where the deposit was paid by another party.



Why should the deposit be paid from the SMSF's bank account?

The source of the deposit is important as it affects the duty efficiency of the holding trust arrangement. On first blush, a transfer of dutiable property from the holding trustee (also commonly referred to as the bare trustee or custodian) to the SMSF trustee gives rise to a duty liability in the applicable state or territory where the asset is located. However, an exception generally applies across all jurisdictions where the relevant criteria is satisfied and dutiable property is transferred to a real purchaser (eg, the SMSF trustee) by an apparent purchaser (eg, the holding trustee) that was previously holding the asset on trust for the real purchaser.

In order for the SMSF trustee to be the real purchaser, the SMSF trustee must provide all of the purchase monies (even if these include borrowings by the SMSF trustee to fund that purchase). Practically, this means that the deposit must also be paid from the SMSF's bank account.

Best practice is to retain evidence showing that the SMSF trustee provided all of the purchase monies. The evidence can be in the form of bank statements in the name of the SMSF showing the money leaving the bank account. The evidence may be needed many years later when the borrowing has been fully repaid and the SMSF trustee seeks to

transfer the asset from the holding trustee to the SMSF trustee, eg, in 15 years' time when the final loan repayment is made and the title needs to be transferred from the holding trustee to the SMSF trustee.

If the deposit is not paid from the SMSF's bank account, there is a risk that an additional duty liability may arise when the asset is transferred from the holding trustee to the SMSF trustee. This is because the revenue offices in all Australian jurisdictions have broad discretion in these matters and the document trail concerning the deposit will not be perfect in respect of all the purchase monies coming from the SMSF trustee.

Separately, if the SMSF is borrowing from a bank, there is some risk that the bank (or the lawyers acting for the bank) may object to the deposit in a way that delays or jeopardises the loan. Furthermore, although there may be some possible rectification options, the bank might not accept a particular rectification option, which might also delay or jeopardise the loan.

Why is the deposit not paid from the SMSF's bank account?

While not recommended, there are various reasons why the deposit is sometimes not paid from the SMSF's bank account. These include but are not limited to the following:

- The SMSF trustee does not have enough cash to pay the deposit so a related entity (eg, a member of the SMSF) pays for the deposit.
- The SMSF does not yet open a bank account at the time that the deposit is paid.

What are some possible rectification options?

If the deposit is not paid from the SMSF's bank account, there are three possible rectification options:

1. Arrange for the vendor to refund the deposit to the entity that paid it and then have the deposit re-paid from the bank account in the name of the SMSF. Naturally, this option would depend on the cooperation from the vendor and would not be viable if the vendor refuses to refund the deposit.
2. Make a journal entry in the SMSF's accounting records to record the deposit as being paid as a contribution to the SMSF on behalf of the SMSF members. Prepare a trustee minutes/resolution to confirm that the SMSF trustee paid the deposit. Please note this option is subject to the SMSF members' non-concessional contributions caps ('NCCs') and appropriate advice should be obtained if the SMSF members' have any queries. (For more detail about the eligibility criteria for SMSF members' who wish to bring forward their NCCs cap, please refer to the following link: <https://www.dbalawyers.com.au/contributions/triggering-bring-forward-non-concessional-contributions-cap-post-1-july-2017/>.)
3. Reimburse the entity that paid the deposit.

Separately, we note that if the asset is sold before the loan is paid off, the issue of duty is overcome altogether as the purchaser pays for any duty.

Please note that the above list of rectification options is not exhaustive. Each of these options imports commercial, taxation and compliance risks. We have mentioned these options as general commentary only and do not necessarily endorse them.

Moreover, there is no guarantee that the above options will ensure duty efficiency. In particular, options 2 and 3 may still attract the risk of additional duty liability arising when the asset is transferred from the holding trustee to the SMSF trustee since the money trail is not perfect and the revenue offices in all Australian jurisdictions have broad discretion in these matters. As mentioned above, if the SMSF is borrowing from a bank, another relevant consideration is whether the bank will accept any of these options.

Conclusion

To maximise the chance of duty efficiency, it is important that all of the purchase monies (including the deposit) are paid from the bank account in the name of the SMSF. Best practice is to ensure that evidence of this is retained.

The application of the duty exemption will ultimately depend on the SMSF trustee's dealings with the relevant revenue office. The description of the purchaser in the contract of sale and also the quality of the documentary evidence provided to the relevant revenue office are other factors that affect duty efficiency. We have not discussed these aspects in this article.

The law in relation to LRBAs is a complex area of law and where in doubt, expert advice should be obtained. Naturally, for advisers, the Australian Financial Services Licence under the *Corporations Act 2001* (Cth) and tax advice obligations under the *Tax Agent Services Act 2009* (Cth) need to be appropriately managed to ensure advice is legally provided.

DBA Lawyers offers a range of consulting services in relation to LRBA issues, eg, the premium service for LRBA documentation. DBA Lawyers also offers a wide range of document services in relation to LRBAs.

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