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May 2010 **Business real property**

This article appeared in this month's edition of the Law Society Journal (NSW).

Sam and Bridget recently attended a superannuation seminar where the speaker recommended that business operators should always own their business premises in a Self Managed Superannuation Fund ("SMSF"). The business gets a tax deduction for the rent paid and the rent is taxed at a concessional rate within the SMSF.

Sam and Bridget have a SMSF and operate a bookshop from a jointly owned business premises. They come to see you about transferring the business premises into their SMSF. As there is very little debt on the property and they do not get any negative gearing benefits they like the idea of building up their superannuation through the rent.

You tell them it is a simple matter of signing a real property transfer, paying out the mortgage and registering the transfer and discharge of mortgage at the Land Titles Office. You also tell them that stamp duty will be payable on the market value and that tax may be payable if the value of the property has increased since they purchased it.

They tell you they are happy to pay the stamp duty to get tax benefits and that the value of the property has decreased in the current economic climate. It is currently not worth any more than they paid for it.

You arrange a valuation, prepare the transfer and, after it is signed and stamped, you have it registered and close the file.

The sting

Sam calls you some months later to tell you that his SMSF has failed its latest audit due to the transfer of the property into it.

The only real estate a SMSF can acquire from a member is business real property. Business real property is defined in s.66(5) of the *Superannuation Industry (Supervision) Act* as:

(a) any freehold or leasehold interest of the entity in real property; or

(b) any interest of the entity in Crown land, other than a leasehold interest, being an interest that is capable of assignment or transfer; or

(c) if another class of interest in relation to real property is prescribed by the regulations for the purposes of this paragraph - any interest belonging to that class that is held by the entity;

where the real property is *used wholly and exclusively in one or more businesses* (whether carried on by the entity or not), but does not include any interest held in the capacity of beneficiary of a trust estate.

What Sam and Bridget didn't tell you - and you didn't ask is that the second story of the property is rented out as a private residence.

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As the property is not used *wholly and exclusively in one or more business businesses* (renting out one residential premises does not constitute a business) it is not business real property.

It is very important to ask clients what a property is used for if they intend to transfer it to their SMSF.

If Sam and Bridget are lucky the ATO will not tax the assets of their fund at 46.5% and will allow them to transfer the property out of the SMSF to fix the problem, however, it will mean they have to pay stamp duty again.

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