

september 2011

business real property

The introduction of a stamp duty concession from 1 July 2010 has resulted in a high level of interest in transferring real estate into Self Managed Superannuation Funds ("SMSF").

It is important anyone thinking of transferring real estate into their SMSF is aware of, and complies with, the superannuation rules applying to such transfers both before and after the transfer occurs.

The only real estate you can transfer into your SMSF is business real property. Business real property is defined in the superannuation law as any freehold or leasehold interest in real property where the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not).

You can not transfer a residential investment property into your SMSF. You also can not transfer a property that has both business and non-business uses. In a ruling published by the ATO, the ATO have stated that the storage of domestic furniture that has nothing to do with the business can be sufficient to stop a property being business real property.

The only exception to this rule is houses on farms, which are not viewed as being used for business purposes, provided the house yard does not exceed 2 ha.

Not only does the real estate have to be business real property at the time it is transferred to the SMSF, it also must remain business of property after it is transferred and you must have a legally binding lease between your SMSF and your business. If you do not have a lease in place you will be breaching the superannuation laws.

The lease must be on arm's-length terms at market rent. If the rent is below market the ATO take the view that your SMSF is providing financial assistance to a related party in breach of the superannuation laws and if the rent is above market the ATO take the view that the excess above market is superannuation contributions. The best way to determine the market rent is to have it independently assessed.

If you transfer a property into your SMSF it is important that your business does not carry out significant improvements to the property that become an asset of the SMSF. The ATO take the view that doing so could breach the superannuation rules as the improvements amount to an acquisition by the SMSF from a related party.

For example, if your farming partnership builds a shearing shed on land owned by your SMSF, based on views published by the ATO, the construction of the shearing shed could breach the superannuation rules.

Author: Brendan Cockerill, JMA Legal September 2011.
For further information on this issue, please see the contacts below.

Contacts

Jim Main
Brendan Cockerill
Margot Gill
Linda Alexander
Amanda Tully
John English
Cynthia Guernier
Karen Lewin

www.jmalegal.com.au
Call 1800 618 869

Cootamundra
46 Cooper St
Cootamundra
NSW 2590
T 02 6942 1655
F 02 6942 3692

Canberra
11/60 Marcus Clarke St
Canberra
ACT 2601
T 02 6243 3610
T 02 6243 4848

Gundagai
195 Sheridan St
Gundagai
NSW 2590
T 02 6944 1755
F 02 6944 1850

Sydney
3 Spring St
Sydney
NSW 2000
T 02 8249 4028
T 02 8249 4872