

Leather bound box sets of ‘The Basics of Dianetics and Scientology’ a permitted investment; and other lessons in SMSF compliance

- by Matthew Burgess, Director, View Legal

At the heart of the self-managed superannuation fund (SMSF) regime is whether the Commissioner will issue a Notice of Compliance.

In particular, pursuant to section 42A(5) of *Superannuation Industry (Supervision) Act 1993* (SIS), it must be the case that the Commissioner is satisfied that “no trustee of the entity contravened any of the regulatory provisions in relation to the entity during the year of income”. This said, where there have been breaches, the Commissioner retains a wide discretion to take into account “all other relevant circumstances”.

Before refusing to issue a Notice of Compliance, however, the Commissioner must consider the tax consequences if the fund were to be treated as non-compliant and the seriousness of the contraventions. The tax consequences can be particularly punitive; namely the market value of the assets of the SMSF, less non-concessional contributions, are taxed at 45 per cent in each year of contravention.

Coronica

The decision in *Coronica and Commissioner of Taxation (Taxation) [2021] AATA 745* is an example in this area, involving breaches such as:

- 1 Section 66(1): Prohibition on a trustee intentionally acquiring an asset from a related party.
- 2 Section 83: Restrictions on the acquisition of in-house assets if the ratio of in-house assets to total assets exceeds 5 per cent.
- 3 Entering into transactions not at market value (as defined under section 10).
- 4 Contraventions of the accounting recordkeeping requirements, via the operation of a “suspense account” (section 35A and section 65, which prevent the provision of financial assistance), despite the trustee arguing the approach was supported by Taxation Determination TD 2013/22, ATO ID 2012/16, APRA SMSF Regulator’s Bulletin 2018/1 and ATO ID 2015/21.
- 5 Contravention of the sole purpose test (section 62) and the covenants prescribed in section 52 to keep the money and other assets of the SMSF separate from “those (assets) that are held by the trustee personally”.
- 6 Breach of regulations regarding contributions mandated by section 34.

The decision confirmed that in the circumstances, it would be inconsistent with the objects of SIS to issue a Notice of Compliance. Thus, the fund was held to be non-compliant and taxed at the penalty rate of 45 per cent.

Some of the issues that supported this conclusion, in addition to those outlined above, were listed as follows, the seriousness of which was amplified by the trustee being an experienced accountant (of more than 50 years), registered tax practitioner and registered company auditor:

- (a) multiple contraventions over an extended period of time;

- (b) implementation by an experienced accountant, registered tax agent and registered company auditor, who ought to have known that the arrangements constituted contraventions of SIS;
- (c) breaches of the provisions of the trust deed;
- (d) lodgement of misleading documents with the Tax Office;
- (e) reliance on undocumented valuation of a private investment company that, while not wilful, was grossly negligent if not incompetent; and
- (f) the contravention in (e) above was not corrected within amnesty periods made public by the Tax Office and instead only corrected well after audit activities had concluded.

Driscoll

More recently, in *Driscoll and Commissioner of Taxation (Taxation)* [2021] AATA 3892 a similar conclusion was reached.

In this case, a sole member SMSF:

- A failed to lodge returns within the required time limits;
- B invested a substantial percentage of the SMSF's assets in purchasing a "Signature Collection" of books, which were described as a limited edition 18-volume set of *The Basics of Dianetics and Scientology* by L Ron Hubbard (for \$11,000);
- C otherwise treated the SMSF bank account as the personal account of the member, including to pay for the member to attend a "Havingness Rundown" course conducted by the Church of Scientology.

In deciding, the Commissioner was correct to refuse to issue a Notice of Compliance; it was confirmed:

- A The centrepiece of the superannuation regime is the sole purpose test under section 62 of the SIS Act, namely that SMSFs must be maintained for one or more "core purposes" or "ancillary purposes".
- B Despite the 18-volume book set being stored in the member's bedroom and being unable to be sold (despite attempts to do so), the set was kept in its original packaging (and not ever used by the member). It was, therefore, determined that it was a permissible investment, although not "a particularly good" one.
- C The failure of the SMSF to lodge the tax returns were clearly contraventions; however, the consequences of the late lodgement were held to not have created any prejudice to anyone.
- D The use of the SMSF for personal benefit was, however, considered a serious matter and antithetical to the core objects of SIS; thus, this conduct wholly justified the Commissioner's refusal to issue a Notice of Compliance.
- E (E) This conclusion was reinforced by the fact that the withholding of a Notice of Compliance is a tool for the Commissioner in deterring, specifically and generally, people from using superannuation monies for personal purposes. The level of seriousness placed on the deterrence device is further highlighted by the fact that SIS permits the Commissioner to impose maximum penalties (in addition to the 45 per cent tax impost) of over \$530,000 for those involved in contraventions.