SMSFAdviser

The super powers of SMSFs do not extend to enabling early access - legal expert

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

The dangers of accessing superannuation early through the establishment of an SMSF was highlighted in a recent court decision.

Matthew Burgess, director of View Legal, said the decision in Santavas and Commissioner of Taxation (Taxation) [2025] ARTA 2515 highlights the significant tax penalties, disqualification as a trustee, and potentially criminal charges that can result from this practice.

“Despite the undoubted best efforts of the Tax Office and SMSF advisers, schemes claiming the ability to ‘unlock’ superannuation savings before a legal condition of release is met appear to be ongoing,” Burgess said.

“Often, promoted arrangements involve setting up an SMSF and rolling over existing super balances, followed by ‘tax free’ withdrawals or loans for personal use – such as paying debts or funding lifestyle expenses. While generally marketed as ‘legal loopholes’ the schemes are both unlawful and can lead to severe adverse consequences.”

Burgess continued that as specialist SMSF advisers are acutely aware members cannot legally access their superannuation benefits until a condition of release is met such as retirement, reaching preservation age, or in limited circumstances, material financial hardship.

The facts presented to the court in the Santavas case outlined how a couple who were employed as a retail worker and teacher were also engaged in property development that encountered financial misfortune. Based on oral advice, supported by the sharing of an article titled “Can an SMSF invest in property development?” from at the time a registered tax agent, the couple transferred around $380,000 from their industry super funds to a newly established SMSF.

“The article was not read by the members at any time before embarking on the scheme or indeed by the hearing date. At no time did the members read the trust deed for the SMSF, the constitution of the trustee company, nor any of the other related documents,” Burgess said.

“The funds were then withdrawn from the SMSF to a joint personal bank account of the members and used to assist with completion of the property development. Neither member was at preservation age nor had any of the other conditions of release been met.”

Burgess said the court heard the issue considered by the tribunal was whether section 304-10(1) of the Tax Act applied to tax the withdrawals.

“The section provides as follows, namely that a superannuation benefit is included in the assessable income of a taxpayer if:
(a) the superannuation benefit is received by that taxpayer from a complying or previously complying superannuation fund, or the superannuation benefit is attributable to the assets of a complying or previously complying superannuation fund; and
(b) the fund was not maintained as required by section 62 of SISA or the superannuation benefit was received otherwise in accordance with the payment standards set out in subsection 31(1) of SISA,” he said.

“Alternatively, as argued by the members, the tribunal had to consider whether the concession in section 304-10(4) should have applied, which provides: ‘However, you do not have to include the amount in your assessable income to the extent that the Commissioner is satisfied that it is unreasonable that it be included having regard to:
(a) … the nature of the fund; and
(b) any other matters that the Commissioner considers relevant’.”

Burgess continued that in its judgment, the tribunal rejected the members’ request for the concession to be applied, although did remit the penalties the ATO had imposed given that imposition of tax under section 304-10 is substantial and a significant deterrent, thus there was no additional purpose in terms of deterrence to impose penalties.

“The tribunal confirmed that, firstly, funds in an SMSF are not to be used as a lender of last resort (see Smith v Federal Commissioner of Taxation [2011] AATA 563) and that it is not unreasonable to tax a superannuation benefit paid in breach of the legislation if there were no other consequences that arose, such as if the SMSF maintains its complying fund status,” he said.

“This is particularly if the taxpayer failed to rectify the prohibited withdrawals in such circumstances that applying the discretion would undermine the deterrent effect particularly if the superannuation benefit was within the taxpayer’s ‘effective control’ (see Mason v Federal Commissioner of Taxation [2012] AATA 133).” Furthermore, the tribunal said that where a taxpayer should have suspected the SMSF was not a bona fide fund, and makes no effort to find out information as to why funds could be accessed from a promoted fund when they were unavailable from an industry fund, the tax should be paid (see Brazil v Federal Commissioner of Taxation [2012] AATA 192).

“Additionally, it stated that an approach of signing of documents without them being fully completed (leaving them to be completed by others), weighs in favour of the discretion not being exercised, particularly given that ‘[m]ere financial difficulties experienced by members cannot be enough to bring the discretion into play’ (see Sinclair v Federal Commissioner of Taxation [2012] AATA 634),” Burgess said. “Ultimately, the principle is that concessions enjoyed by superannuation contributions and earnings cannot continue when funds are withdrawn contrary to the law – a high level of diligence is expected (see Brooks v Federal Commissioner of Taxation [2019] AATA 1236).”

In relation to PS LA 2021/D3 (Superannuation – Commissioner’s discretion where members receive benefits in breach of legislative requirements), it was confirmed that while being mindful of the policy statements of the ATO, these are not law, and the tribunal is not bound to follow any such policy, particularly if the policy is inconsistent with the legislation (see Drake v Minister of Immigration and Ethnic Affairs [1979] FCA 39).

“Here, while PS LA 2021/D3 was held to be consistent with the law, the tribunal did not rely on it and rather considered the legislation, regulations and case law,” Burgess said.

“In applying the above principles, the tribunal confirmed that in this case it was relevant when weighing up all factors to consider, that in the member’s own case, the tax liability might be fully compensated by other means (that is by way of a negligence claim against the registered tax agent). That is, the tribunal should ask whether from a policy perspective the tax legislation should be engaged in compensating taxpayers for alleged negligent advice when they have other potential options for a remedy.”

Burgess added that the tribunal also noted that the members did not read anything they were provided and relied passively on advice – which they could not articulate properly – which meant it was reasonable to refuse to exercise the discretion.

“In particular, the members should have suspected their understanding of the advice from the tax agent was incorrect and made obvious inquiries – it defied commonsense for the members to believe that superannuation funds could be so easily accessed prior to retirement merely by rolling them into an SMSF and then just withdrawing them,” he said.

“The strategy (allegedly) recommended by the tax agent was ‘hardly a complex scheme’, and yet the members made no effort to understand why it could possibly be right – there was a glaringly obvious ‘too good to be true’ factor. Further, by merely signing documents without reading them and without making any efforts to understand them, the members had acted in a manner that weighed against exercising the discretion.”

He continued that the attempt to devolve any responsibility by saying the tax agent “was a professional and we relied upon him” was “nonsense in the light of the very obvious questions which challenge(d) their expressed understanding” of the advice and was unpersuasive.

“Interestingly, the tribunal was also blunt in its assessment of certain aspects of the approach of the Tax Office, including observations that taxpayers relying on oral advice from tax professionals was not ‘highly unusual’ and while it would have been sensible for the members to clarify their understanding of the oral advice, in the real world for individual taxpayers they are not taxation specialists nor schooled in tax and superannuation law,” he said.

“Further, it was ‘hard to understand’ why draft rulings ‘hang about in draft form for years’, leading to the tribunal ‘wondering’ how hard it can be to finalise something that has already been written, and how much time is needed to consider submissions and comments received. While it was noted the Tax Office has a complex and enormous job, the tribunal noted that four years had passed since PS LA 2021/D3 was first issued.”