



## SMSF early engagement and voluntary disclosure service

The ATO has introduced what it calls a new SMSF early engagement and voluntary disclosure service.

By way of background, an approved SMSF auditor must audit an SMSF each year. The auditor is required to report certain regulatory contraventions to the ATO via the auditor/actuary contravention report ('ACR').

SMSF trustees are encouraged by the ATO to voluntarily disclose regulatory contraventions that remain unrectified, and it is now possible for this to be done via the ATO's SMSF early engagement and voluntary disclosure service.

This service provides a single entry point for SMSF trustees and professionals to engage early with the ATO in relation to unrectified contraventions. This service can be used by SMSF trustees, SMSF auditors and SMSF professionals (such as tax agents, accountants, financial planners, lawyers and fund administrators acting on behalf of SMSF trustees).

The ATO says that if unrectified contraventions are voluntarily disclosed before it commences an audit, this disclosure will be taken into account when determining the enforcement action the ATO takes and the appropriate level of remission of administrative penalties.

The ATO says the new disclosure service should only be used when:

- ◆ It is clear there has been a contravention of the Superannuation Industry (Supervision) Act 1993 (SIS Act) or regulations; and
- ◆ The contravention remains unrectified at the time the SMSF auditor reports it to the ATO.



Prior to using this service, the ATO says trustees should engage with an SMSF professional to receive guidance about rectifying the contravention so they have a rectification proposal to include with their voluntary disclosure.

The SMSF auditor is still required to report regulatory contraventions via an ACR. However, the ATO says it will not commence an audit based on an ACR if the issue has been resolved through a voluntary disclosure, unless it receives additional information that requires further investigation.

The ATO warns that SMSFs should not use this service if they have already received notification of an ATO audit or review in relation to the contravention.

The ATO notes that where disclosures are made about contraventions that occurred in previous years, any outstanding SMSF annual returns must be lodged.

## No 'special circumstances' regarding excess super contributions

In a recent decision, the AAT has affirmed the ATO's decision disallowing an objection concerning excess concessional superannuation contributions on the basis that the taxpayer's predicament did not amount to a special circumstance.

In this case, the taxpayer worked a number of part-time, casual jobs, in addition to his full-time job in the Victorian Public Service. The taxpayer salary sacrificed some of his earnings into various superannuation funds.

The Commissioner subsequently issued to the taxpayer a notice of amended assessment for the 2013/14 income year that included excess concessional contributions of \$11,055.21.

The taxpayer gave evidence that he did not check the balances of his superannuation contributions, and argued that had he been aware of the balances, he would have stopped the contributions and instead received the earnings in cash.

For excess contributions to be disregarded, it needs to be demonstrated that the circumstances are regarded as special. In this case, the taxpayer argued that his special circumstances were (among other things) that he was doing what he did to support himself and his family and to provide for his retirement; that he was trying his best, and the rules governing superannuation are hard to understand given they change from year to year.

On appeal, the AAT said that in a system where there are limits on what can be contributed to a superannuation fund while retaining concessional treatment, to waive compliance in this case would effectively provide the taxpayer with an advantage in the form of being allowed to contribute extra to his superannuation funds. To enjoy the benefit of that without any cost associated with the excess would provide an advantage over other taxpayers in the community who observe the limits.

The AAT held that while the taxpayer's circumstances are understandable, and his motives for working hard and stowing money away for retirement income are admirable, his predicament did not amount to a special circumstance.

Inadvertent mistakes are not special circumstances. The complexities of the system of taxation of retirement income and providing for retirement income are complexities the whole community has to deal with.

Refer *Azer v FC of T* [2016] AATA 472

## Providing facts or giving advice?

With the accountants' exemption a thing of the past, care needs to be taken when discussing superannuation with your clients.

As we are aware, to provide advice to clients about their superannuation situation requires the adviser to be authorised under an Australian Financial Services Licence ('AFSL').

It is possible though for an accountant to give a client factual information about superannuation issues.



Factual information is defined as being information that is based on details that can be supported by legislation or other objective information. Where there is any room for interpretation, this would not be viewed as "factual information".

An example of this would be giving detail of:

- ◆ Contribution caps;
- ◆ Conditions of release; or
- ◆ Minimum pension payment amounts.

However, while we might believe we are providing clients with factual information, we also need to consider advice may actually have been given.

What is 'advice'?

Advice will have been given to a client if:

1. A statement is made that may influence the client to take action about a financial product of some kind; or
2. The client interprets that statement as a suggested course of action.

Point 2 is particularly important. If a comment is made to a client and the client interprets this as a suggested course of action, then the comment would be regarded as advice.

This position is confirmed by ASIC, the body that oversees the provision of financial advice.

ASIC's Regulatory Guide 36 (RG36) confirms that financial product advice is:

*"A recommendation or statement of opinion (written or verbal), that:*

- a. Is intended to influence a person to take a certain action in relation to what to do about a financial product or class of financial product; or*
- b. Could be reasonably regarded as being intended to influence a decision."*

This position clearly leaves what has been discussed between you and your client open for interpretation.

This is because the test of whether advice has been given or not is dependant upon what the client thinks has been said, and not necessarily what you believe has occurred.

This is a concern for both those accountants who have chosen to provide advice under an AFSL, as well as those accountants who are unauthorised.

For accountants authorised under an AFSL, the provision of advice is guided by legislative requirements to be provided in a Statement of Advice. If what has been taken to be advice is not documented in this way, this would be a breach of licence requirements.

#### **What can I do to support my position?**

Many accountants consider that they are not providing advice when giving clients information.

However, your position in the eyes of your clients as being their trusted adviser needs to be considered. With your clients coming to you for advice, it is likely that even statements of fact will be taken as being a direction of what should be done.

Because of this, those accountants authorised to give financial advice should consider providing confirmation of these discussions in a Statement of Advice, even where part of this might be confirming what has been factually stated. Inclusions can be made in this document to disclose what is advice and what is factual information; this leaves no doubt of what was said and in what context.

For unauthorised accountants, where you believe factual advice has been given, this should still be provided to the client in writing.

The fact that what you have said is factual information and not advice should be highlighted in that document with statements to confirm:

- ◆ What was stated was factual information about the situation;
- ◆ The statement was not a recommendation to take any action;
- ◆ That the clients personal situation has not been considered in providing the information; and
- ◆ That any action to be taken in relation to the information provided, should take into account the clients personal situation and consideration must be given as to whether action will be appropriate for the clients' objectives and needs.

