Self-Managed Superannuation Funds and Bankruptcy

There seems to be an increase in the number of people making use of Self-Managed Superannuation Funds or SMSF's. However, there also seems to be an increase in the number of people that either do not understand or are willfully disregarding the rules surrounding their SMSF which often leads to complications, tax penalties and adds an additional layer of complexity when you are dealing with the potential of Bankruptcy.

A SMSF is a trust set up for your retirement. The beneficiaries of a SMSF are also the trustees of the SMSF, so unlike retail superannuation funds you have ultimate control over how your money is invested for your retirement. This sort of control appeals to many people but with that control comes great responsibility…

As a general rule, if you have only been making the mandatory contributions or you have a historical pattern of contributing the same amount to your superannuation each year, under the Bankruptcy regime your superannuation will be protected and not accessible to creditors. However, this does not mean you can transfer the family home to your SMSF just before entering Bankruptcy.

Given that all members of the SMSF must either be a trustee of the SMSF or a director of the corporate trustee, that bankruptcy classifies you as a disqualified person under the *Superannuation Industry (Supervision) Act 1993* and that bankruptcy prevents you from being a director under the *Corporations Act 2001,* bankruptcy can cause some complications where your SMSF is concerned. Once you have become bankrupt you have a 6 month grace period to ensure your SMSF remains compliant. The options available to you in respect of your SMSF when you become Bankrupt include rolling your interest in the SMSF into a retail superannuation fund or appointing an approved professional trustee to manage the SMSF. Whatever option you are leaning towards, it is important that you seek financial and legal advice and be proactive.

SMSF are complex structures and, as mentioned above, you should seek financial and legal advice before setting one up but here are few practical tips on dealing with your SMSF:

<u>Tip One</u>: the cash in your SMSF is **<u>not</u>** for use by you or your business now!

The temptation is great when an ailing business is short on cash to simply take the money out of the SMSF bank account. Never mind the fact that you are literally putting your retirement nest egg at risk, the fact that you have to resort to taking cash out of your SMSF for your business or to pay your personal tax is an indication that you should probably seek advice on your or your business' solvency. Further, drawing cash out of your SMSF to financially support your business or for personal use is in all likelihood going to make the SMSF non-compliant which can result in severe taxation consequences.

<u>Tip Two:</u> the assets in your SMSF are **<u>not</u>** for personal use now!

Using that luxury boat you bought to hire out for charter to take your friends and family out on the weekend will generally make you SMSF non-complainant and result in severe tax consequences.

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Tip Three: there are only limited circumstances in which you can borrow money to purchase an asset in your SMSF.

Some of the structures that allow for borrowing in your SMSF, including certain types of unit trusts, can become rather complex. As a general rule, if you don't understand the structure, and after an explanation by a professional you still don't understand that structure, perhaps you should reconsider the transaction. How are you going to ensure that you do not breach the rules of your SMSF if you don't understand how the SMSF borrowing has been structured?

Tip Four: you can loan money to others from your SMSF but there are certain guidelines.

These guidelines include, your SMSF trust deed must allow for lending, you cannot lend to relatives and if you lend to a related party (ie your business) it must not equate to more than 5% of the total value of assets in your SMSF. Further, the lending must be on commercial terms and include interest.

Tip Five: in the ordinary course your superannuation will be protected in Bankruptcy.

Tip Six: if you are of retirement age and you owe the ATO money, the ATO is entitled to amongst other things issue a garnishee notice to your SMSF.

If you would like any further information regarding Self-Managed Superannuation Funds or Bankruptcy please contact Murfett Legal.

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

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