Published: Australian Financial Review May 21—22 2011

YOUR QUESTIONS JOHN WASILIEV

Keep family farm out of the fund

Can my self-managed super fund lend money to my son-in-law's farming business partnership, whether my daughter is in that partnership or not? It would be at commercial rates and, therefore, an attractive investment. Would the loan be treated as an in-house asset and be limited to 5 per cent of the fund's balance? Would I be inviting a Tax Office query or audit?

Like so many super questions, your inquiry appears to be in two parts. Can a super fund lend money to the farming business run by your son-in-law and, second, if your daughter wasn't a partner in this business, would this make a difference to the rule that limits loans to a business run by a member or a related party of a member to 5 per cent of the fund's balance? This rule is known as the in-house asset restriction.

Your question suggests you are aware that a loan on commercial terms by a self-managed fund to a member or a related party's business is considered to be an in-house asset and therefore limited by the 5 per cent rule, says lawyer Richard Dwyer of Dwyer & Willett Lawyers. So it would seem to boil down to whether your son-in-law's business is a related party if your daughter isn't involved.

The definition of a related party of a super fund includes a wide range of relatives of members and certainly embraces your daughter – but as well as your daughter, who comes under the category of being a lineal descendant, the rules also include the spouse of any relative.

So if your fund does lend the business money, you'll need to make sure the loan never represents more than 5 per cent of the fund's balance. If pension or lump-sum withdrawals reduce your fund balance or investment values plunge so that any loan represents more than 5 per cent, you must correct this instantly or, better still, avoid any problems in advance. All this pre-supposes that your son-in-law's business is a good investment risk for a prudently managed super retirement fund. As a fund trustee, you would have to seriously consider this.

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My super includes non-concessional contributions made more than 20 years ago. Is there any benefit in withdrawing this money and reinvesting it in the fund?

A short answer is no, says Olivia Long, chief executive with super administrator SuperGuardian. Non-concessional contributions made more than 20 years ago would have formed part of the tax-free component of your member super balance as at June 30, 2007.

All super providers were required to perform what was called a crystallisation calculation at this time to determine the tax-free component of a super interest. Undeducted contributions, as non-concessional contributions were called back then, were included in the crystallised segment as tax-free amounts. The strategy behind recontributions into your super fund is to convert taxable components to tax-free components for succession planning. In this instance, your non-concessional contributions are already tax-free so there is no benefit in withdrawing and then recontributing them.

I plan to sell a business I've owned for about 20 years for which I expect to receive about $825,000, tax-free. I'll be 65 in December. Can I contribute this all into my super?

Assuming you qualify for the small business 15-year exemption, you should be able to disregard the full capital gain for income tax purposes, says Deloitte super director Noelle Kelleher. From July 1, 2007, if you contribute to super under the 15-year exemption entitlement, this is generally a non-concessional contribution.

It can be excluded from the non-concessional contributions cap and count towards your super CGT concessional cap, which is $1.155 million for 2010-11, but you'll need to provide your fund with a CGT cap election using a form from the Tax Office. The form must be completed no later than the time you make the contribution. Given you are getting close to 65, it's smart to complete any transaction before this age as the super contribution rules are not as generous after this age.

Based on your letter, it is not clear if the $825,000 is the proceeds received from the sale or the capital gain, so this example may be useful to explain the difference. Sharon, who is 58, sells an asset used in her small business and receives capital proceeds of $1.6 million. The capital gain from the sale is $580,000. The asset qualifies for the small business 15-year exemption and she can choose to disregard the capital gain for income tax purposes. She has not made any other non-concessional contributions and makes the contribution when her super CGT cap is $1.155 million.

She can contribute all of the $1.6 million – made up of $1.155 million CGT and a $445,000 amount under the three-year non-concessional contributions cap rules. She could contribute $450,000 under these rules. But she can only contribute an extra $5000 of non-concessional in the two years after she has made these contributions, otherwise she risks an excess contribution that will incur a liability.