I ❤ SMSF

Property Development, SMSFs and the ATO

"Doable but be careful"

Commencing at 12.30m AEST – 6 May 2020

Please use the chat facility throughout the webinar or contact support@ilovesmsf.com for support.

I have been involved in the tax and super side of property and property development by whole career with my first foray being the development of Circular Quay in the 1980’s. I started with big super but switched to SMSFs when I could see the power behind these mini-funds directly controlled by a family.

Since that time, my partner at Abbott & Mourly, Tony Anamourlis have been involved in more than $1Bn of property development transactions involving SMSF monies. It makes sense to ‘build’ wealth inside a fund to maximise retirement income. BUT there are a lot of catches, traps and ATO guidelines to watch out for but with more than $700Bn in SMSFs there is a lot of opportunity particularly in the syndication area.

Grant Abbott | CEO, I Love SMSF

SMSFRB 2020/1

Property development can be a legitimate investment for SMSFs, and the Commissioner does not have any concern with SMSFs investing in property development where it complies with the Superannuation Industry (Supervision) Act 1993 (SISA) and Superannuation Industry (Supervision) Regulations 1994 (SISR).

However, these types of investments can cause concerns where they are used to inappropriately divert income into the superannuation environment, or if SMSF assets are used to fund property development ventures in a manner that is inappropriate for and sometimes detrimental to retirement purposes.

The Commissioner of Taxation

But don’t do DIY Property Structures or you will lose your yield or worse

“The ill-informed arbitrariness with which the first defendant approached her duties also amounts to bad faith. The dismissive tenor of the correspondence from Hill Legal, the willingness to proceed with the appointment and distribution in the context of uncertainties and significant conflict and *the lack of specialist advice despite the recommendation of Mr Hayes*, all support the conclusions that her conduct was beyond ‘mere carelessness’ or ‘honest blundering’. This conclusion is reached without reference to the lack of evidence deposed by the defendants personally.”

McMillan J in Marsella v Wareham (No 2) [2019] VSC 65

Keys to Success are ………..

- Know the structures
- Know the law
- Know your risk and limits
- Know what the ATO is looking for particularly for streaming of income into a concessional environment
- Know your Corporations Act if you are getting investors
- Know your financier – where is the ultimate risk in the development?
- Build from the ground up including the SMSFs, SUIT, investment strategies – the whole caboodle

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Structures – most covered in SMSFRB 2020/1

- SMSF directly – is there a business and who cares but for me a lot of direct risk in an asset protection vehicle. Plus who has that money to plunge?
- SMSF JV with Family Trust, Bucket Company, related entity or a third party. Best to have the SMSF hold the property BUT watch out any charge – mortgage or caveat
- SIS Reg 13.22C company or trust – only in extreme, last ditch circumstances
- Superannuation unrelated investment trust – my go to, stick with what works but there will be dilution

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Structures – most covered in SMSFRB 2020/1

- SMSF directly – is there a business and who cares but for me a lot of direct risk in an asset protection vehicle. Plus who has that money to plunge? And not sure about LRBAs
- SMSF JV with Family Trust, Bucket Company, related entity or a third party. Best to have the SMSF hold the property BUT watch out any charge – mortgage or caveat
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Know the Law

- There is a whole range from section 62, section 84, section 66, section 67A, section 109 and section 54C
- There is also the Income Tax Assessment Act 1997 = section 295 – 550 for non arm's length investment income – taxed at 45%, both income and capital gains
- ATO Guideline – SMSFRB 2020/1 is a great analysis
- Also one not well known but super important is the ATO case studies dealing with property development and income streaming

Know the Corporations Act 2001

- An LRBA, investment strategy, an investment in property are not financial products plus the trustee of a SMSF is exempt from the licensing rules
- For other capital raisings, a SUIT is a managed investment scheme and a product disclosure statement is needed but not if meet one of the exemptions:
  - Wholesale investor – SMSF has more than $2.5M
  - Sophisticated investor - $250,000 annual income and $2.5M in assets
  - The raise is from no more than 20 investors and for no more than $2M in any 12 month period
  - Loan funds

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Simple Case Study

- John has a property in his SMSF worth $1.5m which needs developing. Architect has gone to work and with a spend of $2M will develop four townhouses worth $1.1M, even on current valuations
- John is a builder and has done developments through his development company before and has no shortage of funds to build the development
  - Direct
  - JV
  - SIS Reg 13.22C
  - SUIT

The Final Word

- Using a SMSF for any part of a development is a great idea for building family wealth but it is not for the faint hearted or the ill informed
- All of the documents can be found on LightYear Docs and for experienced practitioners it is a gold mine as they have been purpose built by a SMSF property professional
- Abbott & Mourly can help from review to full scale advice and implementation and we know that with property things have to be done yesterday so we turn around things quickly – contact Tony – tanamourlis@abbottmourly.com.au for an initial scoping call

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