

ACQUISITION OF ASSETS WORKSHOP

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Agenda



Fundamentals



Section 66

Trustee must not intentionally acquire asset from related party

Number of exceptions where acquired at market value

Penalty: 12 months imprisonment



ATO valuation guidelines

Can be undertaken by anyone

Fair and reasoned process based on objective and supportable data

- all relevant factors likely to impact value
- undertaken in good faith and capable of explanation



Consider use of qualified independent valuer

Asset represents significant portion of fund's value

Nature of asset means valuation complex

Avoid potential for NALE

Listed securities



Security listed for quotation

Securities include:

- Shares
- Bonds
- Debenture
- Unit
- Option

Approved stock exchange

Schedule 5 1997 Tax Regulations

- ASX, New York, London, Hong Kong, Lublijana

Licensed & exempt markets under Corporations Act¹

- Australian Securities Exchange
- Chi-x Australia
- BrokerTec Europe Ltd

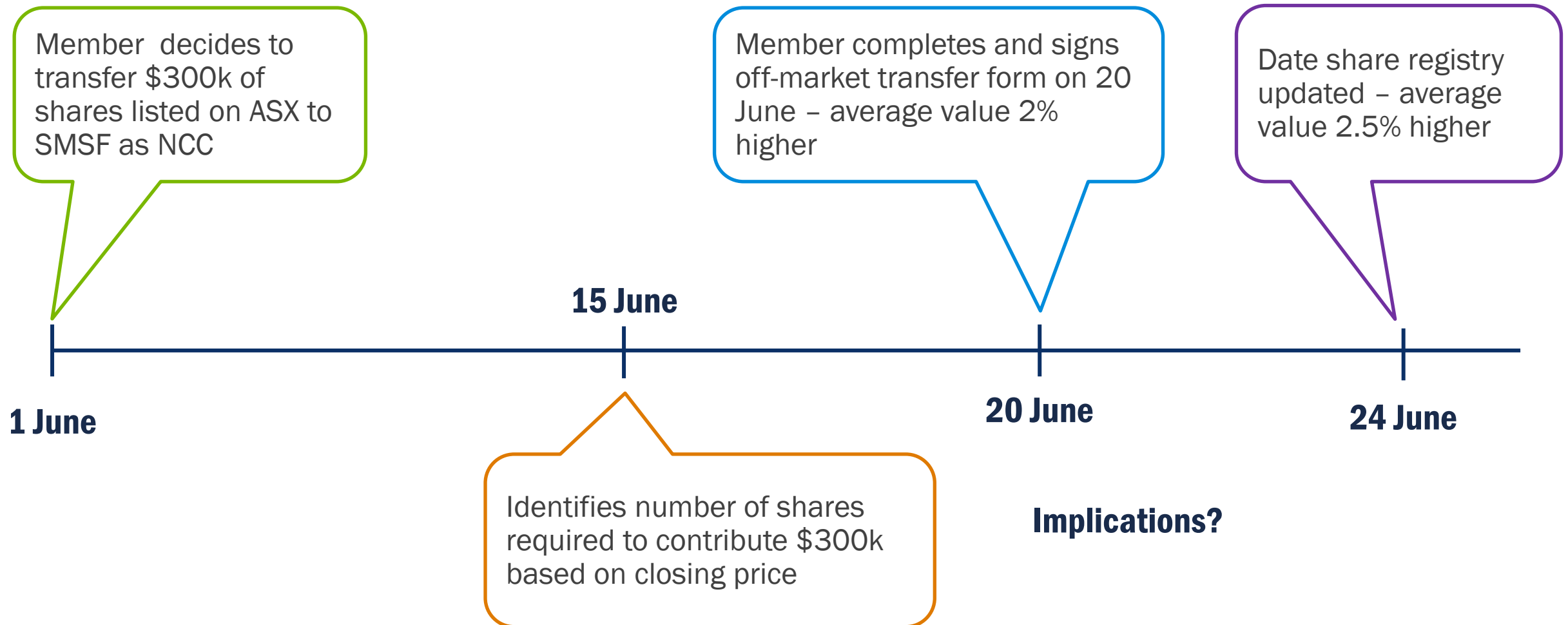
Market value

End of year valuation – closing price at 30 June

Acquisition of asset from related party rules

- objective and supportable data

Listed securities: Case study



Answer



Acquisition timing?

Transfer of ownership

- beneficial ownership can transfer before legal ownership
- obtains possession of a properly executed transfer that is in registrable form together with any title deeds and other documents necessary to procure registration

Acquisition

When transfer forms completed

- 20 June

Market value

- \$306,000

Acquired at market value?

Options

Redo transfer forms

If forms already sent to registry

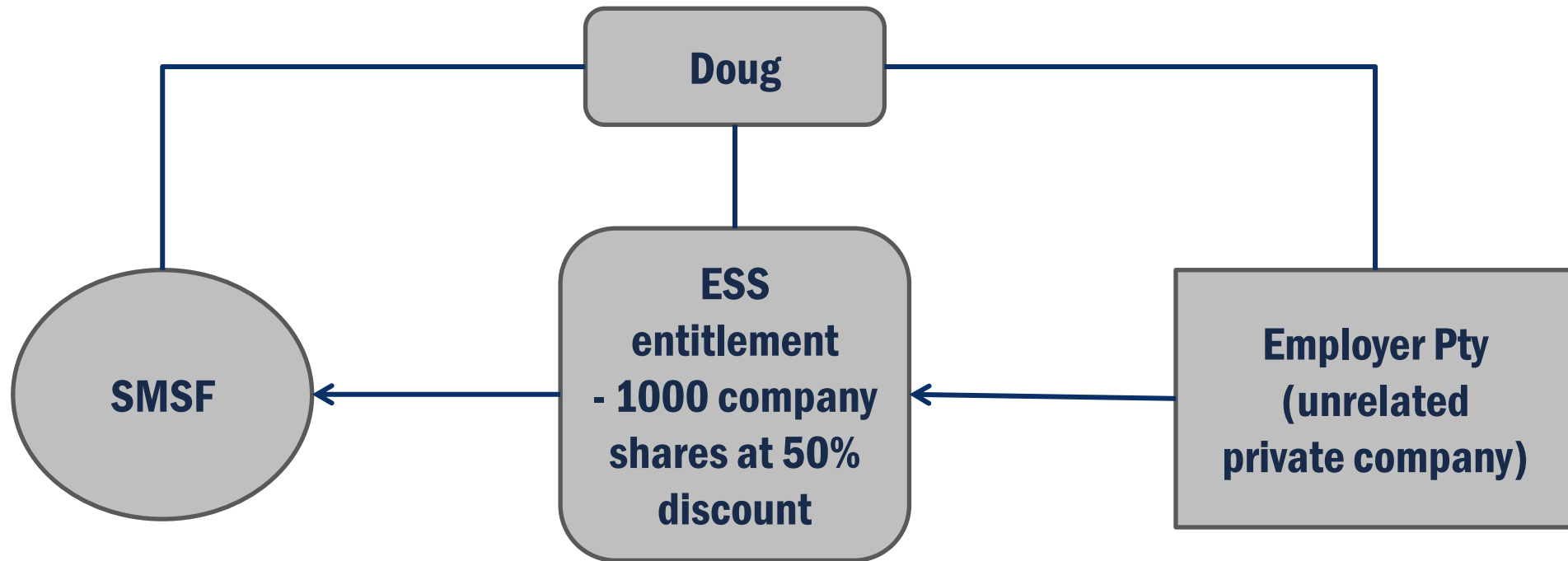
- \$306k NCC stands
- need to dispose of shares

Issues

Documents don't match

NALE

Employee share scheme: Case study



Can Doug nominate his SMSF to take up his entitlement?

Answer



Breach

Nomination results in Doug participating in the scheme and constructively receiving shares
Fund acquired unlisted shares from related party

What if shares listed?

Permitted acquisition
ATO ESS and SMSFs Q&A¹:

- discount treated as personal contribution
- contribution is difference between consideration paid and market

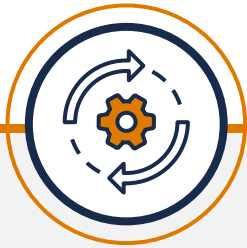
LCR 2021/2

LCR 2021/2
Below market transactions result in NALE
Part purchase/part in-specie contribution – docs must outline:

- shares sold
- shares via in-specie contribution

ESS and NALE?

BRP definition



Section 66(5)

Real property used wholly and exclusively in one or more businesses

Market value

Recent sale price of similar properties / performance of property in area
Real estate and online valuations

Real property

Land & interests in land

- freehold
- leasehold

Structures

permanently fixed to the land

Businesses

No absolute test

Question of fact and degree

- Profit motive
- Scale
- Regularity and repetition
- Nature of operations distinct from passive investment

Used wholly and exclusively...

Physical use - activities, operations or actions

All of the property
100% of the time

- incidental and relevant or occasioned by: ok
- partial non-use: ok

BRP: Case study



Zhee

Would like his SMSF to buy his industrial premises from his private company and lease back

Includes:

- Office building
- Factory
- Warehouse
- Car park (on separate title)

Can he?



Answer



Acquisition permitted



Land and buildings only
Beware separate assets

Non-business use of car park by employees



Incidental and relevant to business
being carried on

Valuation



Independent valuation?
- difficult or complex
- large proportion of fund
Acquisition rules

BRP: Case study



Factory has large grid connect PV system on roof

How does your answer change?

If fixture:

- forms part of BRP
- acquire and lease back
- lease value if business using solar energy?
- documents?

Residential property and BRP: Case study



Harry and Jason – unrelated friends

Own 2 bedroom property 50/50 (TiC):

- Available for short-term accommodation throughout the year
- Advertised via multiple platforms
- Manage all aspects of property themselves
- Do not live or stay at the property
- Earn \$50k net per year (50/50)

Jason wants to sell and Harry wants to use his SMSF to buy him out – can he?

Residential property and BRP: Case study



Part 1: Is Jason a related party of Harry?

Jason is a related party of Harry

Related party

Member of the fund
Standard employer sponsor of the fund
Associate of member or standard employer sponsor

Part 8 associates

Other members
Non-member trustees/directors of single member fund
Partner/partnership
Trustee of controlled trust
Controlled company

Partnership

Same meaning as ITAA 97

- persons...carrying on business as partners, or
- in receipt of income jointly

Earn income jointly where co-own asset either jointly or TiC

Residential property and BRP: Case study



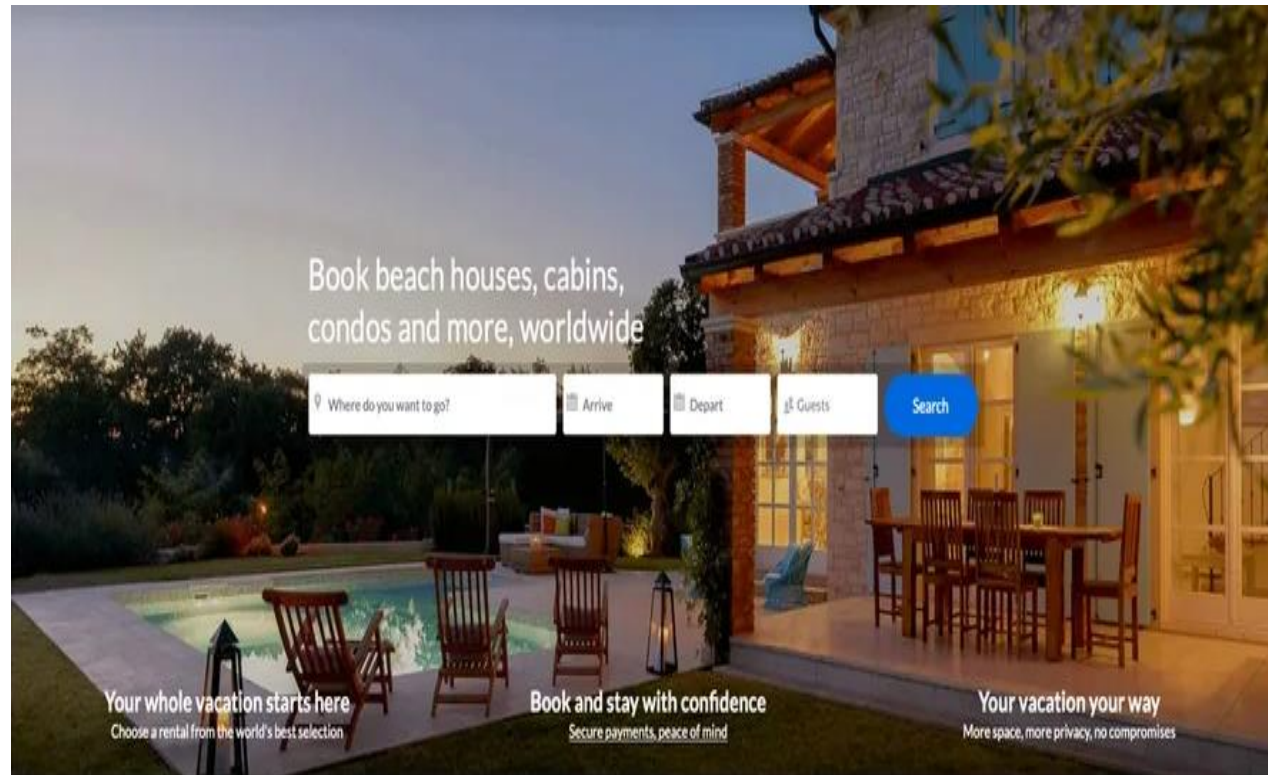
Part 2: Are they running a business?

Online P2P platforms

- Airbnb/Stayz

Offer property for short-term accommodation

Manage everything themselves



Discussion



What's involved

- Prepare/maintain property
- Manage listing details, pricing and calendar
- Apply for and maintain registrations
- Manage marketing / advertising
- Monitor booking enquiries
- Manage reservations and cancellations

- Manage payments and refunds
- Welcome and support during stay
- Organise inspections, cleaning, re-stocking
- Co-ordinate repairs/replacements
- Deal with complaints
- Keep records and accounts and pay outgoings

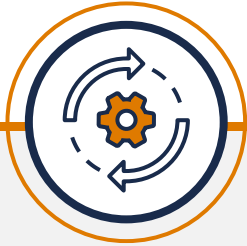
Business?

- YPFD v FCT¹ – running a business of letting residential properties
 - profit motive
 - extent of active involvement
 - oversight and part management
 - intention to engage in business of renting properties regularly and routinely
- ATO PBR application guidance: 33 items²

¹ YPFD and Commissioner of Taxation [2014] AATA 9

² <https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/Supporting-documents/Income/Carrying-on-a-business-of-letting-rental-properties---supporting-information/>

In-house assets



Acquisition of asset that constitutes an in-house asset where:

- **acquired at market value**
- **will not cause fund to exceed 5% in-house asset limit**

In-house assets

Loans to related party

Investments in related party

Assets subject to lease or lease arrangement with related party

Market value

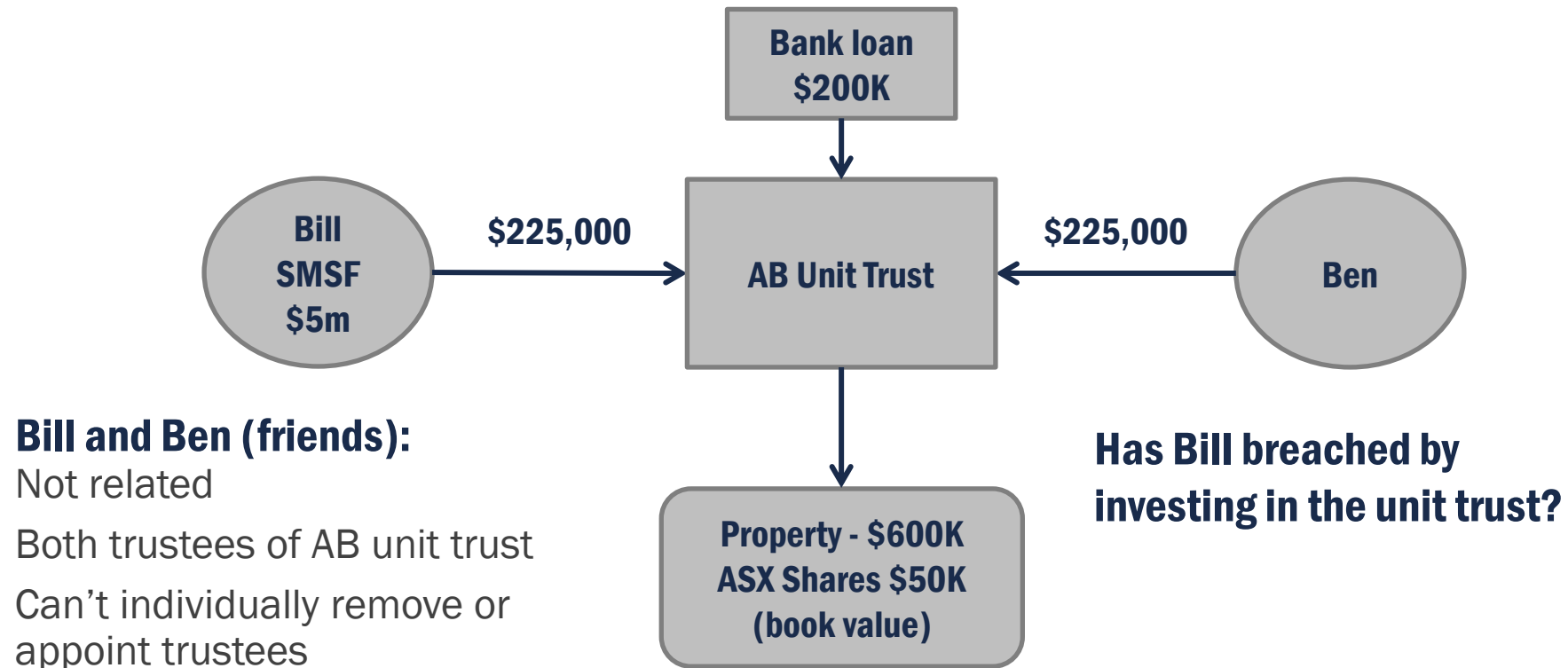
Unlisted entities?

- assets in entity
- tangible and intangible

Critical for:

- acquisition rules
- NALE
- contribution caps
- Tax (CGT)

In-house assets: Case study



Answer

Unit trust not related

Bill does not have:

- rights to more than 50% of the income or capital
- effective control

A group in relation to Bill is not able to remove or appoint the trustees or a majority of the trustees

Market value still critical

NALE/NALI does not just apply to related party transactions

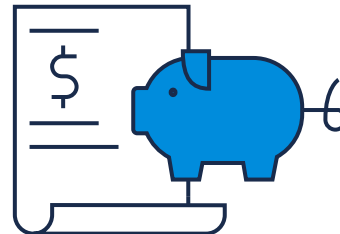
issued with more units

distributions out of proportion to unit holding

Hybrid trust rules

Not acquired at market value

Taint future income and capital gains



Sole purpose and acquisition of assets



Sole purpose

All trustee actions and decisions made for sole purpose of providing retirement benefits

Any decision or actions that purposefully provide current benefits: breach

5th most common breach

Aussiegolfa

SMSF invested in residential property via widely held trust

Leased to multiple unrelated entities

Leased to member's daughter on same terms and conditions

Sole purpose breach overturned on appeal

ATO Decision impact statement

Market rent not sufficient on its own

Fund will contravene sole purpose if fund acquires residential premises for collateral purpose of leasing to associate even where market rent paid

AAT case

Fund acquired listed shares from related trust at market value

Crystallised loss that offset gains in family trust

Breached:

- investment strategy
 - sole purpose
- Trustee disqualified

Sole purpose and acquisition of assets

Case study

Client in negotiations to buy primary production property

- located over three separate titles
- vendor selling as single asset (SMSF owns one of titles)

Strategy:

- acquire two titles in own name
- set up SMSF and acquire third title in name of fund
- third title leased back at market rate to use in farming business

Is the acquisition permitted?

Some more information

Client has insufficient capital or borrowing capacity to acquire all three titles

Super previously invested in growth assets with higher expected returns

File note wording:

“Client seeking advice on using to super to acquire part of a farm after bank declined loan application. Discussed option of setting up SMSF, getting fund to acquire third title which it could then lease back as would qualify as BRP...”

What is purpose of acquisition (assessed objectively)?

The end

Thanks