

# ATO's SMSF BORROWING ARRANGEMENTS – Q AND A

On 2 April 2012 and then on 29 June 2012, the ATO released updated versions of its SMSF Borrowings Q & As titled 'Limited recourse borrowing arrangements by self-managed super funds - questions and answers'. This article reviews the latest version of the Q and As.

The major change in the Q & As from the July 2010 version revolves around the interpretation of what constitutes a 'single acquirable asset', following from the earlier issue by the ATO of SMSF Ruling, SMSFR 2011/D1 - Self-Managed Superannuation Funds: limited recourse borrowing arrangements - application of key concepts, and then in May 2012 the final ruling, SMSFR 2012/1, with the same title.

This article explains the changes which have been made since the July 2010 ATO Q & As, and provides a reflection on some aspects not yet settled.

## History

The ATO Q & As was first issued in May 2010, in anticipation of the July 2010 amendments to the legislation which had permitted borrowings under s 67(4A) of the SIS Act. That legislation removed s 67(4A) and introduced sections 67A and 67B, which currently form the basis of the legislative rules under which SMSF Borrowing Arrangements operate.

Shortly after the legislative changes became effective in early July 2010, the ATO released an updated version of their Q & As, also in July 2010.

## April 2012 changes

Many of the changes contained in the 2 April 2012 release are more of a structural nature than technical. For example, most of the first page of this version sees the addition of a section introducing the topic of SMSF Borrowing Arrangements, with information under the headings of:

- What is limited recourse borrowing?
- Is an SMSF right for you? and
- Is limited recourse borrowing right for your SMSF?

There was one significant technical change, however, which is of interest, under the question:

### Can an SMSF trustee acquire more than one real property title under a single limited recourse borrowing arrangement?

The ATO's response, in regards to arrangements entered into between 24 September 2007 and 7 July 2010, is an unchanged 'yes'.

However, the response for arrangements entered into on or after 7 July 2010 changed from the previous version of the Q & As, primarily to reflect the ATO's position in the draft SMSF Ruling, SMSFR 2011/D1.

Previously, the ATO's response (July 2010) to the question above was:

No. The asset being acquired under one arrangement must be:

- a single asset
- a collection of assets that are identical, have the same market value as each other, and are treated as a single asset (that is, bought and sold together as a collection).

Real property on separate titles is not allowed, even if the properties are substantially the same at the time of acquisition.

That was changed, in the April 2012 update, to:

We have recently issued Draft SMSF Ruling SMSFR 2011/D1 - Self-Managed Superannuation Funds: limited recourse borrowing arrangements - application of key concepts. This draft ruling explains the key terms 'acquirable asset' and 'single acquirable asset' and provides examples relating to the meaning of those terms

For more information, refer to SMSFR 2-11/D1 - Self-Managed Superannuation Funds: limited recourse borrowing arrangements - application of key concepts.

*Note: replicated from the ATO document, including typographic errors.*

Current as at 20 July 2013.

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## June 2012 changes

The main change of relevance in the June 2012 version is actually a continuation/update of the previous thread, under the same question, whereby the quoted reference above to SMSFR 2011/D1 has been replaced with:

Multiple real property titles cannot generally be acquired under a single limited recourse borrowing arrangement. However, acquisition under a single limited recourse borrowing arrangement may be possible if it is reasonable to conclude that what is being acquired is distinctly identifiable as a single asset. Factors relevant in determining if this is the case are set out at paragraphs 12 and 13 of self-managed super funds ruling SMSFR 2012/1 - Self-Managed Superannuation Funds: limited recourse borrowing arrangements - application of key concepts.

Topdocs has updated a [technical paper explaining the policies adopted by the ATO](#), in the final ruling, [SMSFR 2012/1](#), in some detail. As we have covered the issue of 'acquirable asset' and 'single acquirable asset' in the paper, we recommend a review of the Tech Talk paper for a more detailed coverage.

## Still no change

One other aspect which did not change, in either of the updated Q & As, is the suggestion by the ATO that the asset may become an in-house asset, if retained by the bare or security trustee, after the loan has been paid out. In response to the question: Can the holding trust trustee continue to hold the property for the investor after the

borrowing has ended?, the ATO has so far responded:

Yes, but the SMSF's interest in the holding trust will be an in-house asset of the SMSF if the interest represents an investment of the SMSF trustee in the holding trust. This is because, under subsection 71(8) of the SISA, once a limited recourse borrowing arrangement has ended, even if there are other amounts outstanding, the in-house asset exception ceases to apply.

There is a contravention of the super law if:

- the asset is not transferred to the SMSF or the interest in the holding trust does not otherwise end once the borrowing comes to an end
- the interest in the holding trust becomes an in-house asset of the SMSF and this causes the SMSF to exceed the permitted 5% level of in-house assets.

For more information about the in-house asset rules applying to SMSFs, refer to self-managed super funds ruling SMSFR 2009/4 Self-Managed Superannuation Funds: the meaning of 'asset', 'loan', 'investment in', 'lease' and 'lease arrangement' in the definition of an 'in-house asset' in the Superannuation Industry (Supervision) Act 1993.

Whilst it has been anticipated that the ATO was taking a more realistic approach to this position, any softening of the attitude has not yet been reflected in the SMSF Borrowings Q & As.

## More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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