15 November 2019

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Tax Council Network
Law Design and Practice Group Australian Taxation Office

Submitted via email – Kendrick.yim@ato.gov.au

Dear Kendrick

Submission – Draft Law Compliance Guide (LCR) 2019/D3 and Draft Practical Compliance Guide (PCG) 2019/D6

Chartered Accountants Australia and New Zealand welcomes the invitation to make a submission on the above draft LCR and PCG.

We would be pleased to discuss any aspect of our submission.

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward- looking approach to business which contributes to the prosperity of our nations.

Our submission includes the following key recommendations:

1. The ATO should arrange a meeting, that includes Treasury officials, to consult and explain the proposed positions to be adopted in the final guidance and the potential, if necessary, for legislative adjustment.
2. The ATO reconsiders its legislative interpretation of the requisite NALI nexus test and the conclusions it has reached as a result.
3. The final PCG needs much more detailed guidance on how low risk behavior can comply with the legislation under safe harbour arrangements without incurring unnecessary additional cost.

Our appendix contains a list of questions that our members have asked us after considering how the draft LCR and PCG might impact their clients and themselves. We suspect that overtime a larger number of issues and concerns will arise. We do not believe it good policy that a cohort of super funds should face significant uncertainty and higher tax compliance costs as a result of this legislation and the proposed ATO administration of it.

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Introductory Comments

We note that these draft ATO documents deal with legislative amendments made to Sec 295-550 of the *Income Tax Assessment Act 1997* (ITAA97) and apply from 1 July 2018.

If this section applies to a super fund then it is said to have Non-Arm's Length Income (NALI). A higher income tax rate will apply to the relevant ordinary and statutory NALI of a super fund. That tax rate is currently 45%.

The explanatory memorandum for the legislative amendments says the purpose of NALI is to "prevent the inflating of superannuation fund earnings through non-arm's length dealings, for example, schemes involving non-commercial arrangements that stream income to the superannuation fund"[1] and the purpose of the proposed amendments is to remove a "technical deficiency in the non-arm's length income provisions whereby non-arm's length expenses (including where no expenses are charged) result in income not being treated as non-arm's length income as intended. The amendments seek to remove any ambiguity in this respect and ensure that superannuation entities cannot circumvent the provisions by entering into schemes with non-arm's length expenditure (including where they do not charge expenses)".[2] Expenses in this case may be either revenue or capital in nature.

It would appear from the explanatory memorandum for the amending legislation that these provisions are primarily targeted at two areas:

1. Super funds entering into non-arm's length Limited Recourse Borrowing Arrangements (LRBAs) which are not based on terms equivalent to an arm's length relationship which results in the fund not incurring arm's length expenses, and
2. The acquisition of investments for a significant discount compared to other investors.

The amending legislation is broadly drafted and could conceivably apply to other circumstances.

Summary

Feedback from our members indicates that the amending legislation together with the draft LCR and PCG represent significant issues for our members personally and for many of their clients.

We have received numerous questions from our members, some of which are in the appendix of this correspondence.

CAANZ's concerns with the draft LCR and PCG can be summarized as follows:

- The draft LCR is re-affirming these amendments are broadly drafted and it appears that the ATO is proposing to administer the law (at least in theory, refer further comments below) such that a wide range of related party activities would be caught, extending far beyond those activities identified in 1. and 2. above.

- In our view, the administration of the law as outlined in the draft LCR would result in adverse tax outcomes that, in many cases, are grossly disproportionate to the perceived mischief.

[1] See paragraph 2.6 of the explanatory memorandum to the *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018*
[2] Ibid, paragraph 2.9

- For example, if a SMSF Trustee (who is also an accountant in an accountancy firm):-
  - prepares the SMSF's book keeping, accounts and annual returns free of charge (saving the fund a small amount of regulatory and administration costs); but
  - merely uses the firm's computer to undertake such work; or
  - even lodges the SMSF's annual return via the firm's tax agent lodgment program,

  then the draft LCR is strongly suggesting a potential tax outcome whereby all the SMSF's income is now NALI. In our view, such an alleged outcome would suggest there is an urgent need for a legislative correction.

- Moreover, the ATO's draft PCG is only offering a limited transitional solution up to 30 June 2020. It is not attempting to mitigate the theoretical harsher outcomes of the legislation arising from the LCR's proposed interpretation of the law. For example, the PCG is not proposing any safe harbour rules or low risk rated related party activities that might ameliorate the above concerns.

- Consequently, many super funds, trustees and their advisors are faced with the prospect of having to reassess and potentially redesign benign fund administration processes that should really be of little concern to the tax administrator or the legislator. Moreover, as highlighted later in the Trustee capacity and Trustee fee sections of this submission, there is the competing tensions of charging too little remuneration resulting in adverse the Tax Act outcomes vs charging too much remuneration resulting in adverse *Superannuation Industry (Supervision) Act 1993* (SIS Act) outcomes.

- These practical consequences for taxpayers, arising from the approach proposed in the draft LCR, are even more frustrating given we doubt the ATO's assurance programs would have resources (or the inclination) to administer the law consistent with the draft LCR.

- The key ATO compliance concerns would centre around those activities identified in 1. and 2. above and any other attempts to artificially inject sizable amounts of income into the fund. The PCG could and should legitimately distinguish between these types of breaches and minor transgressions involving small amounts of money.

Recommendations

After considering the feedback received on the draft LCR and PCG, the ATO should prepare revised drafts of these guidance products (or, in the interests of time, produce a document listing proposed changes, if any).

The ATO should then convene a face to face consultation process, that includes Treasury officials, to explain the proposed positions to be adopted in the final guidance.

This limited consultation process is intended to quickly address what is, and is not, administratively feasible within the confines of the existing law; the practical impacts of the ATO's final views; whether the Commissioner's discretion is of any assistance; whether the proposed outcomes are, or are not, consistent with intended tax policy settings; and, whether any legislative changes (or at least an announcement thereof, before 30 June 2020) might be contemplated.

PCG 2016/5 should be adjusted to cater for a number of all non-arm's length borrowing situations; including for example, annual interest payments which are possible under arm's length arrangements as opposed to monthly interest payments as currently required in this PCG.

Super fund annual returns costs, the income/expense nexus and LCR 2019/D3 example 2

In example 2 of the draft LCR it is stated that the whole income of the fund, including income that maybe exempt from tax because it is supporting the payment of pensions, will incur the non-arm's length income tax rate because "the arm's length expenditure (being a nil amount incurred for the [accounting] services) has a sufficient nexus with all the ordinary and statutory income derived by the SMSF".

In this regard, we make the following comments: -

- By way of background, we note that under the SIS Act all super funds have reporting obligations. For example, Part 4 of that legislation demands SMSFs must submit an annual return to the Commissioner of Taxation, demands that super funds retain accounting records that correctly records an entity's financial transactions and prepare various annual financial statements that should be audited. Similarly, the *Taxation Administration Act 1953* demands that all super funds submit an annual tax return even if the fund has no assessable income for income tax purposes.

  Thus, whilst it is highly likely that most super fund trust deeds would also demand that a trustee retain financial records, prepare accounts, etc; the regulatory regime is establishing various financial reporting tasks whereby at least annually annual returns are submitted to the relevant government regulator.

  The financial reporting, auditing and annual return/tax return filings are part of the fund's administrative processes to properly record and report on transactions already undertaken in the past. Accordingly, the associated regulatory and administrative expenses incurred with these processes do not directly relate to the income earned in the current year. Indeed, it is possible that some/or all of the accounting services referred to in Example 2 of the draft LCR do not even relate to current year income, but rather, relate to the reporting on the prior year's income.

  In addition, included within the category of regulatory and administrative expenses will be various establishment expenses, possibly expenses related to trust deed or trustee changes at points in time, as well as other ongoing legal costs that do not directly relate to any income earnt by the fund.

- Section 295-550 of the ITAA 1997 operates to deem an amount of income to be NALI if, as a result of a scheme, in gaining or producing that income, the entity does not incur arm's length expenditure.

- Our issue is whether the interpretation of these words means any such nexus is sufficient (as is alluded to in Example 2), or alternatively, should the provision be read such that expenses need a more direct nexus to particular amounts of income (as alluded to in the words used in the relevant sub-heading in the EM and the related example given at EM 2.39)?

- We acknowledge the EM comments concerning the linkages with section 8-1 ITAA 1997 at EM 2.38. However, we query whether the actual wording and intent of the provision is better served by requiring a more direct nexus when it comes to regulatory and administrative expenses that, whilst satisfying a section 8-1 nexus, do not give rise to any income at all?

- We would argue the nexus between the ordinary and statutory income of the fund and any non-arm's length expenditure (be it of revenue or capital in nature) referable to regulatory and administration expenses is almost always of an incidental nature and relates to relatively minor amounts of expenditure compared to the income earned and total assets of most super funds.

- Whilst the draft LCR's interpretative approach is arguable, we are of the view the policy is better served by the alternate approach, namely, this type of expenditure is insufficiently related to the income earned to invoke the operation of this integrity measure. This nexus issue reappears when we discuss LCR example 4 later on in this submission.

- In our view, the outcomes under the draft LCR approach are anomalous, namely, even though the administration expenses do not relate to any specific income nevertheless the tax policy is best achieved by reading the provisions such that all the fund's income becomes NALI.

Recommendations

The ATO reconsiders its legislative interpretation of the requisite nexus test and the conclusions being reached in Example 2 in the context of regulatory and administrative expenses (including the accounting services mentioned in the example).

If the ATO is of the view that its current interpretation is still preferred, then the LCR should examine whether some of the regulatory/administrative expenses that: -

- fall within Section 25 -5 of the ITAA 1997 (i.e. costs related the management of the entity's tax affairs or complying with obligations imposed relating to the tax affairs of an entity, such as the fund's annual return costs) will not be impacted by Section 290-550 on the basis that they are incurred after the income earning process; or

- arise on establishment or termination of the fund will not be impacted by Section 290-550 on the basis that are incurred before or after the income earning process; and

- If these conclusions are accepted, then example 2 would require modifications as some of the accounting services will not fall within scope of Section 290-550.

If the ATO is of the view that its current interpretation is still preferred, then the ATO should consider expanding the scope of the PCG to ameliorate a theoretical outcome that $1 of undercharged section 8-1 administration expenses will result in 100% of the fund's income being deemed NALI.

In our view, the mischief to which this integrity measure is targeting would rarely extend to the accounting and legal regulatory and administrative expenses of a fund because such expenses are only incidental to the income generating activities; the outcomes under the draft LCR's approach to section 290-550 are grossly disproportionate to the actual misconduct; such expenses are almost always small amounts when compared to income/assets of the fund; and thus, there is little motivation to enter into deliberate tax planning to convert these type of expenses into NALE.

Our recommendations on what might be contemplated in the PCG in connection with regulatory and administration expenses are discussed later.

TR 2010/1 and LCR 2019/D3

TR 2010/1 provides important information about when the ATO believes a superannuation contribution has been made. It states that a superannuation "contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general." This tax ruling specifically recognizes in specie contributions if a super fund "pays no consideration or pays consideration less than the market value of the asset".

In our view, it is difficult to reconcile some of the comments in the draft LCR with TR 2010/1 and we consider that the draft LCR needs to include additional analysis on how the two pieces of guidance interact. We also query whether it was the legislator's intention to effectively apply a 'double taxation consequences' regime by counting a below market value capital acquisition as both a superannuation contribution (but such deemed contribution does not adjust the acquisition value for NALI purposes) and then also applying the NALI provisions upon disposal of that asset.

Recommendations

The LCR should include additional guidance on how TR 2010/1 interacts with the operation of new Section 295-550 ITAA 1997 and when the NALI provisions do, and do not, recognize any deemed contribution amounts in acquisition price of assets acquired. TR 2010/1 may need to be updated in light of the final LCR.

If the ATO is of the view that double taxation consequences will arise, those outcomes should be specifically discussed in the proposed face to face discussions as per our earlier recommendation.

Trustee capacity to perform duties

Section 17B of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) permits a trustee to perform functions for their SMSF and receive remuneration for those functions but this is subject to various conditions. Par 39 of the LCR lists a range of factors to be taken into account when determining if a trustee is performing their duties in their personal capacity or as a fund trustee.

We reviewed the draft LCR whilst taking into account Sec 17B. We have reached the following conclusions:

The draft LCR infers that if you charge a fee for performing services for a fund then you are likely to be operating in a non-trustee capacity. In relation to this both Sec 17B and the draft LCR seem to be consistent. However if a trustee acting in another capacity does attempt to charge charge an arm's length rate – but, for example, charges just $1 more than an arm's length rate – then this is a breach of Sec 17B. On the other hand if that person charged just $1 less than the arm's length rate then under the LCR this would see the fund subject to NALI.

There is clearly a practical tension here. The draft LCR then goes onto say if there is no charge then this can still result in the person acting in another capacity. However if this conclusion is not replicated under the SIS Act rules then the ATO requirement to demand a fee be charged (otherwise risk NALI) potentially now conflicts with the SIS Act requirements.

This is why we believe the LCR or the PCG should attempt to reach the position that charging no cost (or mere cost recovery) would be deemed to be acting in a trustee capacity unless there is strong evidence to the contrary, but if charging for services under other methods then you are deemed to be acting in another capacity.

If a trustee uses business or employment assets then the draft LCR says you may be acting in an individual capacity. This is not one of the requirements of Sec 17B and hence potentially inconsistent with it. It would seem under the SIS Act you would more likely be deemed to be acting in your trustee capacity. The draft LCR and PCG should preferably say that charging no consideration – or a minimal cost recovery fee – but using these types of assets will mean you have acted in your trustee capacity. If the ATO is not prepared to amend the draft LCR then it should make this concession in the PCG.

If an individual performs a function under a license then the draft LCR says you may be acting in another capacity. We believe this is potentially inconsistent with Sec 17B and suggest this should be reconsidered. If the ATO believe this is still a valid point then we would argue that it should not override our nil consideration and minimal cost recovery point made above.

If an individual performs an activity under a business insurance policy the then draft LCR says you may be acting in another capacity. This does not seem to be inconsistent with Sec 17B however as noted above this should not override our nil consideration and minimal cost recovery point made above. Our proposed nil consideration or minimal cost recovery carve out from these new NALI provisions are designed to make these rules as clear and simple as possible.

In the next section of the submission we attempt to bring together a number of compliance safe harbours that we feel should be incorporated into the PCG.

Recommendations

The PCG needs additional guidance on how the new NALI provisions interact with Sec 17B of the SIS Act. It will be important to deal with practical tensions caused by merely charging $1 more or less than an arm's length rate for services provided. In addition charging no cost, or mere cost recovery, should mean that you will be seen as acting in your capacity as trustee unless there is strong evidence to the contrary. The use of business assets, providing services under a license or a business insurance policy all require clarification and should preferably not override the no cost or cost recovery safe harbour.

Capacity in which activities are performed

We acknowledge the draft LCR's observation that whether activities are performed in the capacity of trustee (or as a director of a corporate trustee) is highly fact dependent. Nevertheless, in respect of the draft LCR's guidance on this issue we note the following:

- Given the legislation is drafted on the basis that dealings between the same party do not trigger the operation of the provisions, this is one area of the legislation that allows the ATO to potentially mitigate some of the harsher aspects of Section 295-550 of the ITAA 1997.

- As is apparent from our earlier comments in the Trustee Capacity section of this submission, it would be helpful if the LCR's guidance commenting on the capacity in which activities are performed, discussed the similar requirements in the SIS Act. Indeed, it would be very beneficial if the LCR and PCG views did not create inconsistencies in approaches between the two regimes.

- In the context of free of charge or cost reimbursement arrangements we have earlier highlighted areas of tension between the SIS Act requirements and the draft LCR guidance.

- In our view, in the case of many free of charge or cost reimbursement arrangements between the fund and the trustee/corporate trustee director, both the LCR and the PCG (or failing that just in the PCG) should be able to conclude these are dealings between the same party, without giving rise to adverse unintended consequences for the Revenue.

  Indeed, we are also of the view that even where there is evidence of the use of business or employment equipment; use of professional qualifications; and, potential coverage under insurance policies, the conclusion should not change.

- In suggesting the above 'safe harbour' we acknowledge that some such free of charge or cost reimbursement arrangements might have the effect of 'adding value' to the underlying assets.

  We have difficulty seeing any real concerns with regulatory and administration type services, undertaking general repairs and maintenance work or generic services related to asset selection including where these services are provided for assets held in related investment vehicles.

  At the other end of the spectrum, free of charge services entailing either the construction of new buildings or making substantial improvements to existing buildings would be outside the safe harbour.

  At some point a trustee using their specialized skills developed through education, training, experience and knowledge may cease to have access to a safe harbour. That point must be clearly articulated.

  In any event, between the two ends of the spectrum there might be ongoing asset management services and irregular brokerage services where, an alternate safe harbour might be an observed market de-minimis threshold.

- The safe harbour rules then need to address some situations where remuneration is being charged and what is a safe harbour arm's length amount.

- Presumably, certain ATO statistics extracted from annual return reporting and consultation with key fund administrators would be able to develop safe harbours for common expense line items for funds with certain asset/income ranges.

- The explanatory memorandum to the amending legislation states that LRBA's that satisfy the safe harbour terms in PCG 2016/5 will not be subject to NALI. This should be noted in the draft LCR.

  PCG 2016/5 should be adjusted to cater for a number of all non-arm's length borrowing situations; including for example, annual interest payments which are possible under arm's length arrangements as opposed to monthly interest payments as currently required in this PCG.

Recommendations

It would be helpful if the LCR's guidance commenting on the capacity in which activities are performed discussed the similar requirements in the SIS Act.

It would be very beneficial if the LCR and PCG views did not create inconsistencies in approaches between these two regimes.

We propose a number of safe harbour rules that should be considered in the final PCG and adjustments to PCG 2016/5.

Limited Recourse Borrowing Arrangements (LRBA)

In example 4 of the LCR, Kellie's SMSF acquires a commercial property for $2m using a LRBA. In this example Kellie loaned 100% of the $2 million purchase price of the property on non-arm's length terms. The example notes that the rental income would be subject to NALI provisions because the fund's expenditure was less than would ordinarily have been expected.

The example notes that in addition, "the non-arm's length expenditure incurred under the LRBA will also result in any capital gain that might arise from a subsequent CGT event happening in relation to the property … being NALI".

We presume in this example that Kellie's SMSF acquired this property on arm's length terms and we assume the SMSF will ultimately sell the property on arm's length terms.

It appears that the rationale for concluding the capital gain is subject to NALI is because of the commentary in paragraph 17 (albeit it references example 1 not 4). That is, non-arm's length financing costs associated with the acquisition of the asset has sufficient nexus to the capital gain.

Again, the conclusion in the draft LCR on this point (like our earlier nexus observations) depends on the view taken as to the degree of the nexus required to trigger the operation of the NALI provisions.

Consistent with our earlier recommendation, we believe the ATO should reconsider its legislative interpretation of the requisite nexus test. If the ATO is of the view that its current interpretation is still preferred, the final LCR would benefit from a more detailed explanation of why the ATO has reached the conclusions noted in example 4.

The LCR is silent about the use of SMSF trustee 'free of charge' guarantees including those supported by a registered mortgage or charge over the trustee's family home.

An alternative to using a guarantee or charge may be mortgage insurance purchased by the super fund which as a result would be an asset of the super fund.

If the ATO takes the view that the use of a trustee guarantee or charge is problematic and gives rise to NALI then perhaps a safe harbour solution could be that the use of a guarantee/charge is deemed to be a contribution of an amount equal to the cost of mortgage insurance given that all these options produce similar economic results. Alternatively, safe harbour guarantee fee guidance needs to be developed that does not conflict with SIS Act requirements.

We request that the LCR deal with the use of guarantees, charges and mortgage insurance including examples and whether there are any safe harbour options might be needed.

Recommendations

The ATO should reconsider its legislative interpretation of the requisite nexus test giving rise to the capital gains conclusions in example 4.

If the ATO is of the view that its current interpretation is still preferred, the final LCR would benefit from a more detailed explanation of why the ATO has reached the conclusions noted in example 4.

The final LCR should include further examples covering related LRBA issues associated with guarantees and mortgage insurance.

Trustee fees and interaction with the SIS Act "*Sole Purpose Test*"

The ATO's views about the operation of the SIS Act *Sole Purpose Test* are contained in SMSFR 2008/2. We believe that the draft LCR and PCG will encourage some trustees to begin charging a fee for the services they provide to their fund in order to avoid the NALI income tax rate. However as a result they may unwittingly fall foul of Sec 17B of the SIS Act, as we have noted above, but also the SIS Act *Sole Purpose Test*.

The LCR and PCG need to fully explain how a trustee can remain compliant with all relevant SIS Act requirements. In addition, the commentary in SMSFR 2008/2 may need updating.

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Should you wish to discuss the contents of this submission, please contact me on +612 8078 5404 or tony.negline@charteredaccountantsanz.com.

Yours faithfully,

Tony Negline CA
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Appendix – Summary list of questions

LCR 2019/D3 example 2 and example 6

- We presume in example 2 that Mikasa was the individual trustee of her fund and in example 6 Leonie is also the individual trustee of her fund?

  Given that many super funds, including Self Managed Super Funds (SMSFs), have a corporate trustee we believe these examples also need to consider potential outcomes if Mikasa's/ Leonie's SMSF had a corporate trustee. The outcomes will need to be carefully explained otherwise the ATO will face ongoing requests for further explanation including via binding private rulings.

- The Law Companion Ruling and/or the related Practical Compliance Guide (PCG 2019/D6) will need to detail what the ATO regards as an acceptable methodology in determining an arm's length rate to avoid the outcomes in example 2, otherwise the ATO will also face ongoing requests for further explanations.

  Would an arm's length accounting fee in example 2 be a rate available in the market-place for a similar sized SMSF in similar circumstances (e.g. accumulation or pension phase), or, can it only be the rate that Mikasa's accounting practice would charge for that type of stand-alone super fund?

  For example, if Mikasa's accounting practice was quite large and its main business focus was directed towards larger businesses or, larger private groups, it is distinctly possible that their charge out rates for the accounting services for Mikasa's stand-alone SMSF are not competitive. Are lower third party pricing evident in the market place still acceptable? In such third party pricing can you disregard any first year 'on boarding fees' if Mikasa's SMSF has being using the services of her accounting practice for a number of years?

- Refer to paragraph 42 of the LCR. Would an amount charged to Mikasa's SMSF be considered arm's length (or non-arm's length rate) if the amount charged by her accounting firm was a discounted rate because
  - It was applicable to all partners and employees of the accounting practice; or
  - It was consistent with other discounts provided, albeit usually restricted to larger and/or long-standing clients of the firm or new clients of the firm; or
  - It was in recognition that Mikasa's was bearing total responsibility for all errors in work performed, and the firm bore none;
  - The size of the accounting practice; it's level of automation; and, Mikasa's oversight role of the final outputs justifies a 'cost recovery charge';
  - The practice was restricting their partners' compliance options because it required partners and their associated entities to file all tax returns through their tax agent lodgment program (so as to have some oversight of their personal tax affairs)?

- What would be the outcome in example 2 be different if Mikasa's accounting firm elected to charge a single fee upfront for say 2-3 years services or a back-end fee after 2-3 years (or some variation thereof)? Would it be acceptable to establish a fee arrangement that specifies a fixed price, but if the ATO determines the amount is a NALE at any point in time, an additional amount must be immediately paid (possibly with interest) to ensure a non-arm's length price is not accidentally chosen in any year?

- Presumably no non-arm's length income arises if Mikasa, in example 2, prepares the fund's financial accounts and annual return in her own time as trustee of the fund (or as the director of the trustee company) and does not charge the fund for her work (consistent with example 6 outcomes) even though Mikasa is clearly using her professional qualifications in doing such work?

  However, if as per paragraph 39 of the draft LCR, Mikasa uses "the equipment and other assets" of the accounting practice of which she is a partner, or lodges the annual return using the firm's lodgment program, then her SMSF faces the risk that its entire income is now NALI. Perversely, the possible behavioral responses to this outcome might include: -

  - Some trustees purchasing their own computers and accounting software, purely to demonstrate compliance with the draft LCR;
  - The encouragement of paper filing of annual return lodgments in 'DIY' cases;
  - Accounting and legal practices establishing cross referral work arrangements with other firms merely because of the tax risks associated with using their own acknowledged professional skills to their own affairs;
  - Establishing annual survey processes to demonstrate 'arm's length pricing' in any future ATO risk review.

- Assume the following facts : Mikasa (not her accounting firm) does all the accounting data entry work in her own time, but she decides it is quicker and easier to use the accounting practices' computer equipment and super fund administration software to record the fund's financial transactions, prepare the fund's financial statements and ultimately use the practices' tax agent lodgment program to lodge the fund's ATO filings including the annual statutory return.

  How does the ATO suggest that the use of these items should be valued when, most likely, there is currently no comparable service offered in the market place?

  Some of our members have also indicated that if an appropriate exclusion cannot be developed in the LCR and/or PCG for these 'minor services' and their accountancy practice must in theory charge small amounts for such services, then consideration will be given to their partner/employee SMSF reporting obligations reverting to paper lodgment as a cheaper compliance option.

Other questions

- What compliance resources will the ATO apply against accountants and other similar professionals should the draft LCR and PCG be finalized in their current form?

- Will these rules apply in the same way to the following: -

  - Actuaries preparing SMSF actuarial certificates for their fund
  - Solicitors and barristers providing legal services to their fund such as drafting trust deeds and amendments, binding death benefit nominations and representing their fund in disputes
  - Real estate agents buying, selling or leasing their fund's real estate holdings
  - Financial advisers (including licensed financial advisers and share brokers) when buying and selling fund investments
  - Investment professionals

  - Professional artwork and other collectable dealers

- Is it the ATO's view that these professionals when acting as SMSF trustees and trustee directors must consider now not applying their skill and expertise in managing their SMSF activities, given the legislative drafting risks? For example, if an acknowledged artwork specialist faces the prospect that some of super fund's income will defined as NALI because that trustee used their expertise – developed through education, training and experience – free of charge, to help the SMSF choose a piece of artwork that is leased to an unrelated party, the legislative provisions seem to be in conflict with the whole concept of a 'self-managed' fund?

- It would appear that a SMSF trustee who is employed in either the private or public sector cannot risk using any of their employer's computer equipment to review the fund's portfolio performance in the markets, prepare their fund's financial accounts or perform normal banking services – is this really an appropriate legislative/administrative outcome?

- Most SMSF trustees prepare their financial accounts after year end but the associated fees charged might be billed as quarterly fees during that year or all charged in the year the accounts are actually prepared, with a "cash accounting" methodology used for claiming tax deductions. The LCR and/or the PCG should contain a confirmation that both billing methods are acceptable and of themselves do not create issues as far as any ATO compliance activities are concerned.

- An additional example should be included that examines how the NALI provisions may apply if a super fund trustee performs work for assets held by a related party unit trust (in which the super fund holds units). For example, organizing plumbers and other trade professional to complete maintenance work or prepare annual financial accounts for that trust for no, or very little, remuneration.