

How to obtain specific SMSF guidance from the ATO

1 September 2015

A trustee can apply for guidance from the Australian Tax Office (ATO) when there is uncertainty about how the law applies to a self-managed superannuation fund (SMSF), in relation to a specific circumstance. Obtaining guidance from the ATO can provide certainty on how the law will be applied.

The answers to technical questions can often be found in ATO guidance previously issued (including Interpretative Decisions, media releases and taxpayer alerts). The ATO also provides guidance by phone on technical issues of a general nature. For registered tax agents the phone number is 13 72 86.

More information on these general advice avenues can be found on the ATO website for tailored technical assistance¹.

Types of specific guidance

The two options for obtaining specific guidance are a private ruling or SMSF specific advice. These options provide the SMSF trustee with written advice provided by the Commissioner of taxation that forms a view on how the law applies to a specific situation. There is no fee charged by the ATO to obtain specific guidance.

Private Ruling

A private ruling is binding advice from the ATO about how 'tax law' applies to the particular circumstance described. If a private ruling provides a benefit to the SMSF the ATO are bound by that ruling, even if it is later proved to be incorrect. The ATO can only apply the law in a manner inconsistent with a private ruling if applying the law correctly would provide a greater benefit. This is the case unless there has been a substantial change to the law. As such, the SMSF is protected against liability for tax shortfall even if the ruling is incorrect.

A trustee can object to most private rulings if they do not agree with the way the law has been interpreted in the ruling. If a trustee makes no objection but chooses not to rely on the private ruling and the position adopted by the SMSF is subsequently shown to be incorrect, the trustee will be liable to pay any underpayment of tax or repay any overpaid refunds. There may also be interest payable on these amounts.

Please note that the ATO may decline to provide a private ruling in circumstances where:

- ▶ the ATO is already considering or has considered the issue,
- ▶ making a ruling would prejudice or restrict the administration of the law,

- ▶ the application is considered frivolous, or
- ▶ it would be necessary to make assumptions in order to provide the advice and the ATO do not wish to make a ruling subject to those assumptions.

All private rulings are placed on a register which is publicly available. The register of private binding rulings can be accessed and searched from the ATO website².

SMSF Specific Advice

The alternative to a private ruling is to obtain SMSF specific advice. This relates to the Commissioner's view on applying 'superannuation law'.

SMSF specific advice is not legally binding on the Commissioner and does not have same review rights as a private ruling. If SMSF specific advice is relied upon the Commissioner must administer the law in the way set out in the advice, unless the advice is found to be incorrect. The ATO could later take the view that the law applies less favourably to the SMSF than the advice indicated. If the fund acted in accordance with the SMSF specific advice that would be a relevant factor in favour of the SMSF when considering what, if any, course of action to take in response to the breach of the law.

The trustee can ask the ATO to review SMSF specific advice or apply for new advice at any time. The ATO may revise advice without being asked, but generally only if the income year to which the advice relates has not yet begun. The ATO has set out detail on what they will or will not provide specific advice about for an SMSF.

SMSF specific advice can be provided for:

- ▶ investment rules
- ▶ in specie contributions/payments
- ▶ payments of benefits under a condition of release

¹<https://www.ato.gov.au/General/ATO-advice-and-guidance/Tailored-technical-assistance/>

²<https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/Register-of-private-binding-rulings/>

SMSF specific advice cannot be provided for:

- ▶ complying status of the SMSF
- ▶ trustee covenants and
- ▶ residency status of the SMSF (can apply for private ruling as this is a tax issue)

How to obtain specific guidance and timeframes

Where a client has a situation that requires specific guidance the trustee may seek assistance from their accountant or adviser in obtaining this guidance from the ATO.

To request guidance, for either a private ruling or SMSF specific advice, a form must be completed by the trustee and submitted to the ATO. It is important that sufficient and specific details about the transaction or situation in question are provided, as well as any supporting documentation required, as set out on the ATO website. The ATO may decline to provide advice where insufficient information is provided.

Once the ATO has all necessary information they aim to provide SMSF specific advice within 28 days and private rulings within 60 days.

Conclusion

When the application of the law to a client's specific SMSF circumstances is uncertain, it may be appropriate to recommend that the trustee apply for either a private ruling or SMSF specific advice, depending on the issue under consideration. If the guidance required relates to superannuation law then SMSF specific advice may be appropriate, however it is important to remember that this advice is not binding on the ATO, should their interpretation of the law be revised. A private ruling provides advice on the interpretation of tax law and provides greater certainty as it is binding on the ATO.

For further information on obtaining specific advice please refer to the ATO websites for SMSF specific advice and private rulings³.

³SMSF specific advice: <https://www.ato.gov.au/Forms/How-to-apply-for-SMSF-specific-advice/>

Private rulings: [https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-\(rulings\)/Private-rulings/](https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Private-rulings/)



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