

Can rent relief granted by a landlord SMSF amount to a breach of superannuation law?

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Donald and Melania have an SMSF that owns several properties.

With the Prime Minister announcing on 29 March 2020 that each state and territory will be enacting a six month moratorium on landlords evicting residential and commercial tenants due to rental arrears, each of their tenants have sought rent relief from the SMSF trustee (i.e. the landlord) as a way of maintaining the viability of their businesses during the COVID-19 pandemic.

Can the SMSF provide rent relief to a tenant and if so does it matter whether the tenant is a related party?

One of the properties that the SMSF owns is being leased by an unrelated party tenant for commercial use. As the tenant is not a related party tenant the SMSF may be in a position to grant rent relief without contravening the Superannuation Industry (Supervision) Act 1993 (Cth) ('SIS Act') or the Superannuation Industry (Supervision) Regulations 1994 (Cth) ('SIS Reg') so long as the SMSF is able to justify that the rent relief is favourable to the fund and in the best interest of the members of the SMSF.

This will depend on a number of factors such as the cash flow of the business, whether the tenant's operations are hindered by the COVID-19 restrictions, the term of the lease, whether the property can be leased to a new tenant and other lease incentives that are being offered by an arm's length landlord.

Even though it is unlikely that any compliance issues will arise as a result of the SMSF providing rent relief to an unrelated party tenant it is important that the SMSF documents any changes to the terms of the lease and that it keeps supporting evidentiary documents to justify the rent relief in the event that the ATO or a third party queries and requests such documentation.

Donald and Melania's SMSF is also leasing commercial property to a related party tenant. Usually, charging a related party rent that is less than market value is likely to result in a contravention of the SIS Act.

However, the ATO has recently announced that it will not take any compliance action during the 2019-20 and 2020-21 financial years if an SMSF provides a tenant (including a related party tenant) rent relief in the form of a temporary rent reduction, waiver or deferral as a result of COVID-19.

The ATO has extended this to SMSFs which hold an interest in an interposed entity such as a holding company or a non-geared unit trust and that interposed entity is leasing the property to a tenant. The ATO has said that it will not treat the investment in the interposed entity as an in-house asset for the current and future financial years as a result of a deferral of rent being provided to the tenant because of COVID-19.

Even though the ATO has announced that it will not be taking compliance action during the 2019-20 and 2020-21 financial years where an SMSF has agreed to provide rent relief to a tenant it is imperative that an SMSF ensures that any changes to the terms of the lease are made to ensure that the 'sole purpose test' is satisfied (i.e. the SMSFs investment decisions are made in the best interest of the members of the SMSF), are conducted at arm's length and that any changes to the terms of the lease including a reduction in rent are what an arm's length tenant would be offered in the current market place, that no in-house asset test is contravened due to non-payment of rent or that s.65 of the SIS Act which prohibits SMSFs from providing financial assistance to members or their relatives is triggered.

Now more than ever SMSFs should be reviewing their investment strategy to determine if the assets or the level of investment of the SMSFs assets fall outside of the SMSFs investment strategy which may be the case given the current downturn in market.

Any temporary changes to the terms of the lease as a result of rent relief being provided to a tenant by an SMSF or an update to the SMSFs investment strategy should be well documented in a minute or resolutions and held on the fund's register.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.