SMSF Association Q&A

Business Real Property

Key Points

- Business Real Property being sold to an SMSF by a related party
- Section 66 of the SIS Act prohibits a fund from acquiring assets from related parties.
- Business Real Property is an exception to this rule and is defined in section 66(5) to mean real property which is used wholly and exclusively in one or more businesses.

Q	This query relates to business real property being sold to an SMSF by a related party. In summary, the facts are as follows: • business real property is owned by the clients jointly in their personal names (they are not personally registered for GST); • the clients private company currently uses the majority of the property to conduct a business and a smaller part of the property is leased to an arm's length tenant to conduct a business. For completeness it could also be said that there is a small part of the property which is unused; • these same clients are trustees and members of their own self-managed superannuation fund and want to sell the business premises into the SMSF; • following preliminary investigation regarding a valuation for the property the SMSF has enough in cash to purchase the property outright. Can the sale occur and is it subject to GST?
A	The following information is provided to assist you in your research. Under section 66 of the SIS Act prohibits a fund from acquiring assets from related parties. There are a number of exceptions to this general rule which includes business real property. The terms 'related party' is defined in section 10(1) of the SIS Act to include the member and trustee of the superannuation fund, their relatives and any trust or company that any of those parties control either individually or as a group. Business real property is defined in section 66(5) to mean real property which is used wholly and exclusively in one or more businesses. The definition is discussed at length by the ATO in SMSF Ruling 2009/1 which can be located on the following link: http://law.ato.gov.au/atolaw/view.htm?DocID=SFR/SMSFR20091/NAT/ATO/00001

	The term acquisition used in section 66 relates to an asset being purchased in whole or in part by the superannuation fund or as an in specie transfer of the asset to the fund. Any business real property is required to be acquired by the fund at market value. The market value requirement is set out in section 66(2). In addition, any transaction of the fund must meet the arm's length transaction requirements in section 109 of the SIS Act. Any business real property that is acquired must have no encumbrance, such as a mortgage or other charge, over it. Also, the investment strategy of the fund must enable the fund to own the business real property. If all of these requirements are met there should be no impediment to the fund purchasing the property as proposed as the fund is able to acquire it from the fund's resources. The question of whether the purchase of a property is subject to GST. As a general rule, it is reasonable to expect GST would apply to the transaction. However, we recommend you seek tax advice on its application in your client's circumstances.