SMSF Association Q&A

Sophisticated Investor Certificates for SMSFs

Key Points

- Regulations 7.6.02AB or 7.6.02AC of the Corporations Regulations.
- Main issues in terms of signing off on a certificate relate to control
- Reduction in the amount of the threshold from $10 million to $2.5 million.

Q	I have a question in relation to sophisticated investor certificates for SMSFs after ASIC revised its views and published a media release: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-191mr-statement-on-wholesale-and-retail-investors-and-smsfs/ The more I look at the media release there are many uncertainties arising from how it is worded. When doing a search recently I found that I was not the only one to have significant questions. Have you obtained any clarity from ASIC?

A	The following information is provided to assist you in your research. We wrote to ASIC concerning the matter and here is their reply of 10 September 2014. ASIC indicate that the $2.5million assets test is satisfied where a financial product or service is acquired by a company or trust which is controlled by a person who meets the net assets test. The assets of the individual for these purposes are taken into account if the member controls the SMSF. Assets are aggregated for these purposes if the individual satisfies Regulations 7.6.02AB or 7.6.02AC of the Corporations Regulations. This does not shed any further light on what was the case previously except with the reduction in the amount of the threshold from $10 million to $2.5 million. Whether a person can be treated as a wholesale or retail client is left up to advisers and the respective case. The main issues we see in terms of signing off on a certificate relate to control: 1. Where it is a mum and dad fund, they would often make decisions together and therefore nobody would be deemed to control it under 50AA(3). Therefore: a. The value of the fund can't be used as part of them personally meeting the $2.5M test (as per the ASIC letter); 2. The fund can't benefit from an individual meeting the $2.5M test themselves, unless it can be demonstrated that they control the fund. They don't control it if both mum and dad are involved in the decisions under 50AA(3). Based on the above, strictly: • An individual will only be able to use the value of assets in the fund in their test if they are a sole member /director, or where they can demonstrate without a doubt that they are the only one making the decisions for the fund; • An individual who has met the test will only be able to have that status applied to their SMSF if they are the sole member / director, or where they can demonstrate without a doubt that they are the only one making the decisions for the fund; • So, if you don't control, you: – Can't use the fund assets towards your own test; or – Have the fund be sophisticated for investment purposes; It would appear it is all or nothing.

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- Even the fund meeting the test itself (ie, more than $2.5M in assets) is irrelevant, as the test applies to a “person” and the entities they control, not the entity itself;
- Where a fund is a standard mum and dad fund:
    - The assets of the fund can’t be used in the test for either mum or dad, as neither controls;
    - The fund can’t take advantage of mum or dad’s soph. investor status, as neither controls;
    - Even if both mum and dad separately meet the test given other assets, as neither controls the fund, the status doesn’t apply

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