Residential property purchased through illegal SMSF schemes

The ATO has recently warned taxpayers to watch out for illegal early release schemes that use an SMSF to help members buy property in their personal name.

These schemes often target first home buyers wanting to enter the Australian property market who are purchasing a house and land package. They may be structured differently, but typically involve the following:

- set up or use of an SMSF;
- roll-over of a member's super benefits from an existing fund to the SMSF;
- SMSF investing in a property trust for a fixed period and rate of return, being a contributory fund with other investors;
- on-lending of money by the property trust to individuals to help them purchase real property, secured by mortgages over the property.

Once the investment is in place, the member gains access to money from a third party entity to help the fund purchase residential property under an arrangement commonly referred to as a 'loan'.

Depending on the scheme, this money is used for all or part of the deposit, the balance of the purchase price, and/or costs related to the purchase. In some cases, the money is also used to help consolidate the member's personal debts to help them secure a home loan.

In return for a high fee paid by the fund, the scheme promoter commonly helps by:

- establishing the SMSF and the property investment; and/or
- organising the purchase of the property, including the payment of the deposit and home loan.

These arrangements are established and promoted to look like a genuine SMSF investment and scheme that wants to help individuals purchase a home.

However, the ATO notes that these arrangements often contravene the super laws, including the following:

- illegal early access of super benefits by members, (e.g., if fund monies are used to help purchase a house for a member, indirectly through the SMSF's investment in other entities);

- breach of the 'sole purpose test'; and/or
- giving of financial assistance or provision of a 'loan' to a member, using the resources of the SMSF.

In determining whether a scheme contravenes the super laws, the ATO will take a 'look through' approach and consider the arrangement as a whole and may decide that the SMSF involved is a 'sham'.

Serious penalties apply for trustees of SMSFs that have breached the super laws, including being personally liable to pay an administrative penalty, and being disqualified from acting as trustee.

Serious penalties may also apply to promoters of these schemes. Also, any fund monies illegally accessed by a member will be included in the member's assessable income and taxed at their marginal rate, and tax shortfall penalties may also apply.

The ATO advises SMSF trustees who are involved in these types of schemes to make a voluntary disclosure.