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Superannuation Update

Can a Self Managed Superannuation Fund (SMSF) acquire Real Estate from a member or a relative of a member?

We are often asked if a Self Managed Superannuation Fund (SMSF) can acquire real estate from a member or a relative of a member of the fund. The answer is generally no, but with one important exception, that being business real property. In a recent ruling the ATO gave further details of its interpretation of what constitutes business real property. We have summarized some essential parts of the ruling below. As this is an extremely complex area we caution any client against acting on the strength of this ruling summary alone without seeking detailed individual advice.

What does business real property mean?

Business real property in relation to an entity is defined as meaning:

Any freehold or leasehold interest of the entity in real property, or
Any interest of the entity in Crown land, other than a leasehold interest, being an interest that is capable of assignment or transfer,

Where the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not), but does not include any interest held in the capacity of a beneficiary of a trust estate. Two basic conditions must therefore be satisfied before an SMSF or any other entity related to or dealing within an SMSF can be said to hold *business real property*:

The SMSF or the other entity must hold an eligible interest in real property,
The underlying land must satisfy the business use test, which requires the real property to be used 'wholly and exclusively in one or more businesses' carried on by any entity.

What is an eligible interest in real property?

An eligible interest in real property is:

A freehold interest in real property
A leasehold interest in real property, or
An interest in Crown land that can be assigned or transferred
That is not an interest held as a beneficiary of a trust estate.

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These concepts take their ordinary meaning in the *business real property* definition. The final Ruling provides further details about these meanings, including the status of jointly-owned land, strata-titled land and real property held under company title.

What connection is required between property use and business?

Once it is established that the relevant entity holds an eligible interest in real property, that interest can only be *business real property* if the underlying land satisfies the business use test. The business use test requires the real property be used **wholly and exclusively in one or more businesses**, whether or not that business or those businesses are carried on by the relevant entity.

The character of the real property's use determines whether the business use test is satisfied. A holistic assessment, which takes into account all the facts and circumstances relating to the use of the property, is applied to work out whether the test is satisfied.

The subject of the business use test is the **underlying land**, rather than any interest held by the relevant entity in the real property that may become *business real property* on applying the definition. The use of the land itself must be considered.

For these purposes, use of the property refers to any activities, operations or actions occurring on the land in question. Any and all such use of the property must meet the requirement under the business use test that the real property is used 'wholly and exclusively in one or more businesses'. Land upon which activities, operations or actions occur can be contrasted with land that is idle or dormant and is therefore not being used.

Under the business use test, use of the land is more easily connected with a business where the business itself is the user of the land.

However, use of the land can also be connected with a business carried on by an entity that allows use of the land even if the activities, operations or actions occurring do not inherently have a business character. In these cases, the business to which the use of the land is connected is a property investment business under which rights to use the land are granted to others (often by way of lease).