

[Berry Superannuation Trust]

9 October 2018 -4.26pm

Dear Committee Secretary,

I apologise for the brevity of this submission but I was only informed of the closure date by a business colleague on Friday, and I am overseas at the moment without access to my normal office facilities.

On that basis, I am submitting to you only a synopsis of my litany of dealings with the ATO. In point form only, but I am back in Australia on 21Oct, so will be able to provide full documentation of the below after that time.

My brief:

1. My wife and I commenced a small cleaning business in 1985 and built it over 25 years before selling it to retire in 2010.
2. When we could, we set up a joint SMSF to put aside what savings we could.
3. Around 2003, we had the opportunity to purchase the rented premises from which we operated our business. On professional advice, we set up a unit trust (Berry Investment Trust) under our joint Super Fund (Berry Superannuation Fund), and purchased this property. The property had a number of minor tenants as well as our business, which generated a rental income for Berry Investment Trust.
4. Upon the sale of our cleaning business in 2010, we used the proceeds of the sale (business was owned by our family Trust -Berry Family Trust) to lend funds (approx \$2 million) to the Berry Investment Trust to purchase land in outer Perth and to build two factory units.
5. In 2016, I received correspondence from the ATO, informing me that I had been classified as a "high wealth individual" and as a prize for that I was to be subject to review. You would be aware of the depth of these forensic "reviews", which in my case extended to nearly two years and has cost me, to date, in excess of \$60,000 of additional accounting fees to comply with their requests.
6. As a result of these reviews, the ATO had identified that the loan for the land purchase and build cost of the two factory units in Perth (suburb of Landsdale), had not attracted any interest.
7. As this was a loan between two entities which my wife and I both owned, it did not occur to us that interest would have to be paid.
8. Further, in preparation of our annual financial reports and tax preparation, this matter was not identified by either our accounting firm nor indeed by the independent auditor of the SMSF.
9. When this matter was identified to us by the ATO, we agreed to make recompense as is our right to offer under a period of review. Our accountants calculated the commercial interest income which would have accrued to the Berry Family Trust for the 5 years of the review in question and calculated the sum (including interest) to be remitted to the ATO was in the vicinity of \$160,000.
10. The ATO outright rejected this offer, and, without advising us of this change, moved from review to audit with the consequent curtailment of our rights under review.
11. The ATO, then advised that they considered the situation to be NALI, and that they would now consider the Berry Investment Trust to be 'non compliant' for Super provisions from the initial loan date forward. This would mean that ALL the income from both properties owned by the Berry Investment Trust would now attract the maximum tax rate rather than having the benefit of the SMSF.
12. On top of this, the ATO now DEEMED, that I had engaged in a scheme to avoid tax by failing to impose an interest payment on the original loan. This despite the fact that I am not an expert in these technical matters and had engaged professional accountants and an overarching auditor to

ensure compliance. Having deemed that my actions constituted 'recklessness', the ATO proceeded to impose a 50% penalty on any tax imposed.

13. Needless to say, they also now included to punitive 11% interest rate on the outstanding deemed amounts dating back to 2012.

14. Throughout these negotiations, the ATO, failed to commit to a final assessment of the tax due to the Berry Super Fund (Berry Investment Trust is 100% owned by Berry Super Fund).

15. Throughout these 'negotiation' enormous stress was placed on my family situation. My wife wanted to knuckle down and give up to the ATO , whilst I was determined to continue the fight for some justice. In the end, this was a major contributor to the breakdown of a 30 year successful marriage. We have subsequently had a Legal separation.

16. As a consequence of that separation, my wife and I have had to separate our assets and this included our interest in Superannuation. We have set up two new Super funds in our own name and taken action to close the now defunct joint Super Fund.

17. In order to close the old joint Super Fund, we have obviously needed to leave sufficient funds there to cover any liabilities. Obviously the tax liability to the ATO was a matter to be provided for.

18. As tax is still by self assessment, we had to seek independent advice as to the amount of tax we would need to pay. We sought advice from the best legal counsel that we were able to find (Sladens in Melbourne) and briefed them to prepare a best estimate of the tax liability. Having spent in excess of \$30,000 for this advice, they advised that the figure would be \$341,000.

19. Having this advice, we moved funds and assets out of the joint Super Fund into our new individual SMSF's, leaving sufficient funds to cover the contingent liabilities (including the agreed fee for an Administrator to close down the old Super Fund.

20. Having made these transfers and appointing the Administrator, this advice was promptly made aware to the ATO.

21. Within a week of the Administrator advising of his appointment, the ATO had suddenly confirmed an assessment of the Berry Super Fund liability of \$743,000 !!

22. Even more astounding, they have additionally advised the Administrator at the subsequent creditors meeting of a further contingent amount of \$1,762,000 as unspecified liability against the 2018 tax return.

23. In simple terms, the ATO has escalated a \$160,000 tax omission into a \$2,505,000 liability.

I know that this commission was largely in response to the 4 Corners programme ' A mongrel butch of bastards, but I just think that didn't go far enough by half !

As you might imagine, my confidence in the Australian tax jurisdiction and administration is non-existent.

I hope that you will consider my situation worthy of further investigation.

Regards,



[Director, Berry Superannuation Trust]