Limited recourse borrowing arrangements - off-the-plan apartments

**Issue raised**

Could the ATO confirm that, for the purposes of a limited recourse borrowing arrangement (LRBA), if:

* + the holding trust deed uses a pre-'strata titled' description of real estate for an off the plan apartment (eg 'Lot X on Plan of Subdivision PSXXXXXXX and being part of the land contained in Certificate of Title Volume XXXXX Folio XXX'); and
  + when the apartment is 'strata titled', a new description arises (eg 'land contained in Certificate of Title Volume YYYYY Folio YYY');

this does not cause a replacement asset?

**Background information provided by member**

Assume the exact facts as in example 4 of SMSFR 2011/D1. Further to these facts, assume the following.

When an SMSF trustee acquires an apartment off the plan typically the title has not been 'strata titled'. Accordingly, the contract of sale will describe the real estate as something along the lines of 'Lot X on Plan of Subdivision PSXXXXXXXX and being part of the land contained in Certificate of Title Volume XXXXX Folio XXX'.

The SMSF pays a deposit. No LRBA has been entered into at this stage.

In anticipation for settlement, the trustees commence to secure finance for an LRBA. The lender requires a completed 'holding trust deed' before approving lending.

The property might not be 'strata titled' until only one or two weeks before settlement. Therefore as a practical matter to secure lending approval, there is some pressure to describe the asset in the holding trust deed as 'Lot X on Plan of Subdivision PSXXXXXXXX and being part of the land contained in Certificate of Title Volume XXXXX Folio XXX'.

When the property has been 'strata titled', the legal name of the property changes to something along the lines of 'land contained in Certificate of Title Volume YYYYY Folio YYY'.

On its face, in years to come, the SMSF auditor might worry that a replacement asset has arisen because the description in the holding trust deed would be different to the current description of the property.

**Technical reference**

As outlined above

**Industry view / suggested treatment provided by member**

For all intents and purposes the pre-'strata titled' property is the exact same as the post-'strata titled' property. If the holding trust deed has to be delayed until the post-'strata titled' description is available, given the commercial realities of dealing with banks, this will cause delays in obtaining finance approval and thus delays in settlements. Naturally this in turn will cause SMSF trustees to incur what could be significant costs by way of penalties when they can not settle on time.

**Impact on clients suggested by member**

There are a number of SMSF trustees keen to invest in 'off-the-plan' apartments financed via LRBAs and clarification would be appreciated.

**Priority of issue where ATO view is required suggested by member**

Medium

**ATO initial response**

Draft Self-managed Superannuation Fund Ruling SMSFR 2011/D1 has now been finalised as SMSFR 2012/1. This ruling provides further explanation in relation to off-the-plan apartments. See paragraph 39 and example 7, paragraphs 64 and 65.

In the factual scenario posed in this question, provided the substance of what is being acquired under the LRBA (that is, the completed off-the-plan apartment that is described differently pre- and post-strata titling) has not changed, such a change in description will not, of itself, result in there being a different asset being held on trust under the LRBA for the purposes of the LRBA provisions.

**Meeting discussion**

Members were satisfied with the ATO initial response.

* Last modified: 26 Jul 2012QC 26298