Australian Government
Australian Taxation Office

DomaCom Ltd

Attention: Mr Arthur Naoumidis
L6, 99 Queen Street
MELBOURNE VIC 3000

26 September 2016

**Self-managed superannuation funds investing in the DomaCom Fund**

Dear Mr Naoumidis

Thank you for your continued engagement with us to address the compliance implications of self-managed superannuation funds (SMSF) investing in the DomaCom Fund.

Trustees of SMSFs are required to manage their fund's investments in the best interests of fund members and in accordance with the law. There are a number of investment restrictions trustees need to be aware of when making any investment decisions including limits on related party dealings and meeting the sole purpose test.

Consequences of not complying with these restrictions include significant penalties, such as disqualification as a trustee and even prosecution. As Regulator, we always remind trustees to consider speaking to an SMSF professional to make sure all investments comply with the law.

**When will an SMSF investment in the DomaCom Fund satisfy the regulatory rules under the superannuation laws?**

Based on information provided by the DomaCom Fund and its advisers, the ATO is satisfied that an SMSF will not contravene the regulatory rules in the Superannuation Industry (Supervision) Act 1993 (SISA) applicable to its investment in the DomaCom Fund in specific scenarios as detailed below.

*Scenario 1: The SMSF investment is undertaken on a genuine fractional basis*[1]

The ATO is satisfied that an investment in the DomaCom Fund would not contravene the regulatory rules about SMSF investments in the SISA in circumstances where an SMSF invests in the DomaCom Fund in a manner that is consistent with a genuine fractional property investment.

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1 *The DomaCom Product Disclosure Statement (10 December 2014) states at 3.2: The DomaCom Fund suits Investors that want an investment exposure to property without the need to purchase a property outright. The DomaCom Fund simulates investing in direct property by providing opportunities for Investors to hold relatively small investments and achieve diversification in this asset class.*

This will be the case where an SMSF participates in a successful public book build that is open to any interested investor for the acquisition of a property, and:

(i) the property underlying the public book build and acquired by the Responsible Entity (RE) is not acquired from a party that is related to the SMSF investor; and
(ii) the SMSF and related parties of the SMSF hold less than 50% of the units in the sub-fund that is created following the successful public book build and acquisition of the property by the RE.

<u>Example: Pure fractional investment that does not contravene superannuation laws</u>

1. The trustees of an SMSF complete an application form and deposit funds into the DomaCom Cash Pool. They subscribe for an interest in a property listed by a real estate agent on the DomaCom Website to be acquired through a public book build.

2. Sufficient investor interest is generated and the book build is successful. After DomaCom have completed due diligence enquiries the property is acquired by the RE and a sub-fund is created.

3. The trustees are one of 20 successful bidder groups who are issued units in the sub-fund created on acquisition of the property. The trustees hold 10% of the issued units. The remaining 19 unit holders are unrelated to the trustees.

*Scenario 2: The underlying property meets the definition of Business Real Property*

The ATO is satisfied that an SMSF will not contravene the superannuation laws applicable to its investment in the DomaCom Fund if the property acquired by the RE satisfies the meaning of Business Real Property under those laws. This will be the case regardless of whether or not the investment is undertaken on a genuine fractional basis.

<u>Example: underlying property is Business Real Property</u>

1. The trustees of an SMSF complete an application form and deposit funds into the DomaCom Cash Pool. They identify a commercial property they wish to acquire. The property is not listed on the DomaCom Website and the trustees wish to acquire an interest of 100% (i.e. the trustees do not wish to acquire a fractional interest).

2. No public book build occurs and the property is acquired at market value by the RE.

3. The trustees are issued 100% of the units in the sub-fund created on acquisition of the property.

4. The property is tenanted at market value by a business carried on by a related party of the fund after its acquisition by the RE.

**Circumstances where it is still unclear whether an SMSF investment in the DomaCom Fund satisfies the regulatory rules under the superannuation laws**

Whilst the DomaCom Fund is marketed as a fractional property investment platform, it is the ATO’s understanding that rules governing the DomaCom Fund do not prevent an individual investor and/or their related parties holding 100% of the units in a sub fund created after the acquisition of a property by the RE.

We also understand that there is nothing in the DomaCom Fund’s governing rules which prevent the acquisition of a property from one of the investors in the relevant sub fund or a party or parties related to a sub-fund investor. Similarly, there does not appear to be any prohibition on the property acquired being leased to one of the investors in the relevant sub-fund or a party or parties related to a sub-fund investor.

Depending upon the individual circumstances in each case (regardless of whether each of the sub-funds created as part of the overall DomaCom Fund is considered to be a separate trust or not) the ATO considers that an SMSF investing in the DomaCom Fund in the abovementioned circumstances may give rise to contraventions of one or more of the superannuation regulatory rules and restrictions contained in the SISA that apply to related party transactions, as well as the sole purpose test in section 62 of that Act.

The particular regulatory provisions we are concerned may be contravened include:

Section 66 – prohibition on acquisitions from related parties

Section 84 – in house asset rules

Section 85 – in-house assets anti avoidance provision

Section 109 – investments made and maintained on an arm’s length basis

Trustees need to also ensure that any investment in the DomaCom Fund is permitted by the fund’s trust deed and is in accordance with the fund’s investment strategy.

The ATO is working with DomaCom to further clarify when, and if, any or all of the provisions listed above could apply to certain investments that a SMSF Trustee may make in the DomaCom Fund. Where the ATO is able to provide further information to prospective investors in respect to these issues we will do so.

In the meantime an SMSF investor will need to seek independent professional advice or seek specific advice from the ATO about how the superannuation regulatory rules apply to their individual circumstances if they are contemplating investing in the DomaCom Fund in the following instances:

(i) The SMSF investor either alone or together with related parties propose to invest in the DomaCom Fund that will result in the SMSF on its own or together with related parties holding 50% or more of the allocated units in a particular sub-fund and the underlying property is not business real property; or

(ii) It is proposed that the underlying property to be acquired by the RE for the purposes of the relevant sub fund will be acquired from a party that is related to the SMSF; or

(iii) It is proposed that the underlying property to be acquired by the RE for the purposes of the relevant sub fund will be tenanted by or leased to a party that is related to the SMSF.

More information

For further information on specific arrangements, SMSF trustees may contact the ATO on 13 10 20 between 8.00am and 5.00pm, Monday to Friday.

Yours sincerely

Kasey Macfarlane
Assistant Commissioner of Taxation