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Whether it is the allure of foreign soil, corporate restructure or just the need to try something different, more and more people are giving consideration to the opportunity of travelling or working overseas. While there are restrictions determining whether you can take your superannuation with you, the real issue is whether you can maintain your self managed superannuation fund while you are residing abroad. In this bulletin we explain the law and the traps associated with having a Resident Superannuation Fund.

COMPLYING v NON-COMPLYING SUPERANNUATION FUND

The Superannuation Industry (Supervision) Act 1993 (SISA) states that an entity is a complying superannuation fund if the entity was a resident regulated superannuation fund at all times during the year of income when the entity was in existence. Therefore by virtue of this definition, if the Fund is not a resident regulated superannuation fund at all times during the year, it is non-complying for tax purposes and not subject to the tax concessions otherwise afforded. The tax rate applicable to a non-complying superannuation fund is 45% on the assessable income of the current year

which is calculated using the following formula:

“Asset Values (market value previous 30 June) **less** Undeducted Contributions”

This should be motivation enough to ensure the Fund is a resident regulated superannuation fund at all times. However, if the Fund is unlikely to satisfy the definition, Trustees should consider winding up the fund, appointing an Approved Trustee or a legal personal representative (see below) or restructure the Fund to ensure compliance.



WHAT IS A RESIDENT REGULATED FUND

A superannuation fund is a resident superannuation fund at a particular time (the "relevant time") only if **all** of the following conditions are met:

1. The fund is a provident, benefit, superannuation or retirement fund at the relevant time; and
2. either the fund was established in Australia or any asset of the fund at the relevant time is situated in Australia; and
3. at the relevant time, the central management and control of the fund is in Australia or the fund trustees satisfy the temporary absence rule (see below); and
4. if the fund has at least one 'active member' at the relevant time, the total accumulated entitlements of *resident* active members are 50% or more of the total accumulated entitlements of active members of the fund at the relevant time. (A fund without an active member at the relevant time will therefore only need to satisfy the first three conditions).

CENTRAL MANAGEMENT AND CONTROL

Implied in the central management and control condition is the requirement for the trustees to be resident, as the "central management and control" of a fund is usually where the trustees (or directors of the corporate trustee) meet to attend to the business of a fund. As the place where trustees decisions are made is critical, it is possible that if the majority of individual trustees (directors of the corporate trustee) are located overseas (eg they work overseas), the central management and control condition cannot be met.

TRUSTEES TEMPORARILY ABSENT OVERSEAS

From 1 October 2001, a superannuation fund may satisfy an alternative test to the central management and control condition if it satisfies section 6E(1A) of the Income Tax Assessment Act 1936 (ITAA1936) (for funds with individuals as trustees) or section 6E(1B) ITAA1936 (for funds with a corporate trustee). The alternative test is known as the two-year temporary absence rule and is mainly directed at self managed superannuation funds where all the members must also be trustees or directors of the corporate trustee of the fund.



A superannuation fund satisfies section 6E(1A) or (1B) if, at the relevant time, the trustees are individuals or the trustee is a company and, at that time:

- a trustee or trustees of the fund (or a director or directors of the corporate trustee) are temporarily absent from Australia;
- the central management and control of the fund would be in Australia if the trustee(s) or director(s) were in Australia; and
- the continuous period for which the trustee(s) or director(s) have been outside Australia does not exceed two years.

A return trip to Australia for a period of more than 28 consecutive days may have the effect of re-starting the two-year temporary absence period on a literal reading of section 6E(1C), but this must be viewed in light of all the circumstances, in particular, whether the trustee(s) or director(s) are in fact “temporarily” absent from Australia.

ACTIVE MEMBER

An active member is defined in 6E of the Income Assessment act 1936 as follows:

“6E(4A) **Active member of fund.** A member of a fund is an **active member** of a fund at the relevant time if:

- (a) the member is a contributor to the fund at that time; or
- (b) another person had made before that time, or makes at or after that time, contributions to the fund on the member's behalf in respect of the year of income in which that time occurs.

6E(4B) A member of a fund is not an **active member** of the fund at the relevant time under paragraph (4A)(b) if:

- (a) the member is not a resident of Australia at the relevant time; and
- (b) the member has ceased to be a contributor to the fund at the relevant time; and
- (c) the only contributions that have been made to the fund on the member's behalf after the member ceased to be a resident of Australia have been payments in respect of a time when the member was a resident.”

For the purposes of this definition contributions include rollovers.



TRUSTEES OPTIONS

It can be assumed that most if not all SMSF's will satisfy the first two conditions required under Section 6E of the Income Tax Assessment Act 1936. Therefore the issues of concern will be non-resident members contributing to the Fund and/or satisfaction of the Central Management and Control or alternative 2 year absence rule. Should a Fund be confronted with these issues the following points should be considered.

Non-resident Member wishing to contribute

- ❖ Ensure Resident Active member accounts remain greater than 50% of total accumulated benefit of all members. If balances are similar between Resident and Non-resident members this may require Resident members to match any contribution made by Non-resident members
- ❖ Contribute to a Public Offer/Retail Fund and subsequently roll it over to the SMSF when they return to Australia

Maintaining Central Management and Control in Australia

- ❖ Delegate Trustee powers to a resident Trustee for period of absence
- ❖ Appoint a new Trustee/Member who is not an employee of the existing Trustee/s, and delegate Trustee powers to them
- ❖ Directors of Corporate Trustees could appoint a Legal Personal Representative who holds an Enduring Power of Attorney for their period of absence
- ❖ Appoint an 'Approved Trustee' and change the status of the Fund from a Self Managed Superannuation Fund to a Small APRA Fund (SAF). This will satisfy the Central Management and Control test but the member must still give consideration to the Active Member Test. The transfer between a SMSF and a SAF will not incur a Capital Gains Tax liability as there is no beneficial change of ownership of the underlying assets of the Fund.



CONCLUSION

While a fund's residency status is often clouded by the uncertainty associated with a member travelling from and to Australia, the rules are very specific and clearly outlined for all trustees. The problems usually stem from trustees not giving consideration to the circumstances until it is too late or their two years is about to expire. These issues can be avoided with some forward planning and in most instances trustees will want to implement the strategy that results in the least amount of impact on their Fund.

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