



# CAVENDISH SUPERANNUATION PTY LTD

## SPECIALISTS IN SELF MANAGED SUPERANNUATION

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## TECHNICAL UPDATE

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### Australian Superannuation Fund

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The September 2007 and December 2006 bulletins highlighted issues relating to Resident Superannuation Funds and options available for expatriate trustees. This month's bulletin highlights some additional information raised by the ATO in Taxation Ruling TR 2008/9 – meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997.

#### RE-ADDRESSING THE ISSUES

As noted in September 2007, available at [www.cavendishsuper.com.au](http://www.cavendishsuper.com.au), there are three tests that need to be addressed to determine whether a fund satisfies the definition of an Australian superannuation fund.

#### FUND ESTABLISHMENT

The first test refers to the fund being established in Australia or the assets of the fund being held in Australia. It is generally accepted that the majority of funds satisfy this test. The ATO have

provided clarity on when a fund is considered established.

To establish a fund a trust deed must be executed. In addition a contribution must be received by the fund as a cash or in-specie contribution including rollovers. For the purposes of when a fund is established the ATO is only concerned with the contribution, this must be 'paid to and accepted by the trustees in Australia'. The execution of the deed does not need to occur in Australia.

If a fund satisfies this test it will satisfy it for all time.



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## CENTRAL MANAGEMENT AND CONTROL

The second test relates to the central management and control test. The primary focus of the Tax ruling was to attempt to clarify what constituted central management and control, who is exercising it and to define the terms 'ordinarily' and 'temporary absence'.

The key to satisfying the Australian superannuation fund definition is to ensure that the central management and control of the fund is ordinarily in Australia, so let's break down that requirement.

### NATURE OF CENTRAL MANAGEMENT AND CONTROL

The ATO has determined that the central management and control relates to the strategic and high level decision making processes and activities of the fund. The requirements that the ATO places on the Fund is to know who is exercising this, when are they doing it and where are they located at the time. Paragraph 20 of the ruling states that the strategic and high level decision making process includes:

- Formulating the investment strategy for the fund;
- Reviewing and updating or varying the fund's investment strategy as well as monitoring and reviewing the performance of the fund's investments;
- If the fund has reserves – the formulation of a strategy for their prudential management; and
- Determining how the assets of the fund are to be used to fund member benefits.

Day to day operations of the fund are not considered as part of the central management and control as they are felt to be administrative in nature. Operational activities include, but are not limited to, acceptance of contributions, payment of benefits and purchasing/redeeming fund investments.

### WHO IS EXERCISING CENTRAL MANAGEMENT AND CONTROL

Who when and where, when relating to central management and control, are all going to be determined by facts. The trustees of a fund, or directors of a corporate trustee, have the legal responsibility and duty to exercise the central management and control however it is the actual performance of those duties and activities stated above that will determine who exercises it.

As mentioned in our previous bulletins a trustee can delegate their duties to another party or alternatively be replaced as trustee by their legal personal representative holding an enduring power of attorney. The key to any delegation and vital to satisfying the central management and control test is whether those delegated powers are undertaken "independently and without any influence from the trustee".



**CENTRAL MANAGEMENT AND CONTROL (continued)****EXAMPLE**

An SMSF has 3 members, two of the members currently reside overseas but have delegated their trustee powers to member 3 who is an Australian resident. Member 3 makes all decisions regarding the fund's investment strategy without reference to members 1 and 2. In this instance all strategic and high level decisions are being made by member 3 so the central management and control would be in Australia.

If member 3 makes all the decisions but sends them to members 1 & 2 to review before implementing, then those decisions are not being made without influence or independently of the other trustees and the central management and control would be considered where the majority of trustees are making the decision which is overseas.

**ORDINARILY**

In the ruling the ATO have expanded on the definition of central management and control being "ordinarily" in Australia. They have determined that there must be some continuity or permanence about where the central management and control is exercised to satisfy the "ordinarily" requirement. Therefore the ATO will look at the facts to see if the central management and control is usually, regularly or customarily exercised in Australia.

**EXAMPLE**

Members/Trustees residing overseas regularly return to Australia. Whilst in Australia those trustees hold a meeting to review the investment strategy of the fund. Reviewing the investment strategy is considered part of the strategic and high level decision making processes highlighted as central management and control. As this review is physically occurring in Australia the central management and control is in Australia.

Had the trustees reviewed their investment strategy via electronic means from abroad then their physical location would determine that the central management and control was outside of Australia.

If a fund that satisfies the "ordinarily" definition subsequently exercises central management and control whilst outside of Australia it will not necessarily prevent the test being from being satisfied.



## TEMPORARY ABSENCE

The legislation defining an Australian superannuation fund states that the central management and control is ordinarily in Australia even if it is temporarily outside Australia for not more than 2 years. The ruling expands the definition of temporarily and establishes that the nature rather than the time are true factors when determining whether the absence is indeed temporary.

### Paragraph 33 of the ruling states:

“The CM&C of a fund will be ‘temporarily’ outside Australia if the person or persons who exercise the CM&C of the fund are outside Australia for a relatively short period of time and during that time they exercise the CM&C of the fund overseas. The duration of the absence must either be defined in advance or related (both in intention and fact) to the fulfilment of a specific, passing purpose.”

The ATO consider the 2 year rule to be a ‘safe harbour’ provision mainly for Self Managed Superannuation Funds to provide certainty that the trustees can maintain central management and control without question if their temporary absence is for a period no greater than 2 years.

Absence beyond two years can still satisfy the definition of “ordinarily”. As stated above, intention and fact will determine whether central management and control is ordinarily in Australia.

### EXAMPLE

Member A and B are the only trustees of the SMSF. Member A gets a job offer with his employer’s parent company overseas. The contract is for 3 years and it is the intention of Member A to return to Australia at the completion of his contract. Member B travels overseas with Member A for the duration of the contract, they retain their home and other assets in Australia, their house is leased for the period. After 3 years Member A and B return to Australia.

On the facts provided this fund would satisfy the definition of ordinarily as the duration of absence was pre-defined and the purpose was to fulfil a specific purpose being the employment contract.

## OTHER FACTORS

The ruling also clarifies that central management and control can be exercised in more than one location. If there are an equal number of trustees in Australia and overseas then the central management and control is considered to be in Australia.

Importantly for this to be the case those trustees in Australia must be substantially and actively participating in the central management and control of the fund. Passive acceptance of the decisions made by trustees in the other location would not satisfy the requirements of active participation and would effectively deem the central management and control to reside overseas.



## ACTIVE MEMBER

As indicated in previous bulletins the active member test is the third test to be satisfied to determine whether a fund is an Australian superannuation fund. A fund with no active members need only satisfy the first two tests.

Broken down, an active member is one who:

- (a) is a contributor to the fund at the particular 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.

To satisfy the active member test, at least 50% of the assets held by active members must be Australian residents. Alternatively at least 50% of the sum of the amounts that would be payable to or in respect of active members if they voluntarily ceased to be members was attributable to members who are Australian residents.

For the purposes of this definition contributions include rollovers. Members in receipt of a pension are not active members unless they are also contributing to an accumulation interest.

## CONCLUSION

The ATO ruling has provided greater clarity than previously available via the legislation and explanatory memorandum. For funds wanting to remain a Self Managed Superannuation Fund it confirms the ability of the trustees to delegate their powers whilst overseas so long as those powers are being exercised independently of the trustee. It also provides greater flexibility for those trustees who intermittently return to Australia to ensure that they meet on those occasions and document the outcome of those meetings.

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