



Proposed Changes to SMSF Residency Rules

SPEAKER

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TITLE

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Reference Materials

Current Legislation

Income Tax **Assessment Act 1997, section 295-95 Deductions related to contributions.**

- (1) ...
- (2) A *superannuation fund is an **Australian superannuation fund** at a time, and for the income year in which that time occurs, if:
 - (a) the fund was established in Australia, or any asset of the fund is situated in Australia at that time; and
 - (b) at that time, the central management and control of the fund is ordinarily in Australia; and
 - (c) at that time either the fund had no member covered by subsection (3) (an **active member**) or at least 50% of:
 - (i) the total *market value of the fund's assets attributable to *superannuation interests held by active members; or
 - (ii) the sum of the amounts that would be payable to or in respect of active members if they voluntarily ceased to be members;is attributable to superannuation interests held by active members who are Australian residents.
- (3) A member is covered by this subsection at a time if the member is:
 - (a) a contributor to the fund at that time; or
 - (b) an individual on whose behalf contributions have been made, other than an individual:
 - (i) who is a foreign resident; and
 - (ii) who is not a contributor at that time; and
 - (iii) for whom contributions made to the fund on the individual's behalf after the individual became a foreign resident are only payments in respect of a time when the individual was an Australian resident.
- (4) To avoid doubt, the central management and control of a *superannuation fund is ordinarily in Australia at a time even if that central management and control is temporarily outside Australia for a period of not more than 2 years.

Australian Taxation Office Guidance

Taxation Ruling: TR 2008/9

Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997 (Extracts)

Central Management and Control – Temporary Absence

29. Subsection 295-95(4) of the ITAA 1997 states: To avoid doubt, the central management and control of a *superannuation fund is ordinarily in Australia at a time even if that central management and control is temporarily outside Australia for a period of not more than 2 years.

...

33. 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. Whether an absence is considered to be temporary involves consideration of questions of degree which must be decided by reference to the circumstances of each particular case.

34. Whether an absence is temporary must be determined objectively by reference to all the relevant facts and circumstances on a 'real time' basis. That is, it cannot be established in retrospect.

Active Member Test

...

72. However, a member of a fund is not an active member of the fund at the relevant time under paragraph 295-95(3)(b) of the ITAA 1997 if:

- the member is a foreign resident (subparagraph 295-95(3)(b)(i) of the ITAA 1997); and
- the member is not a contributor at that time (subparagraph 295-95(3)(b)(ii) of the ITAA 1997); and
- the only contributions made to the fund on the member's behalf since the member became a foreign resident were made in respect of a time when the member was an Australian resident (subparagraph 295-95(3)(b)(iii) of the ITAA 1997).

73. The concept of a 'contributor' in the active member test applies to attribute to a member a status as a contributor. In order to determine whether a member is a contributor at any particular point in time, regard must be had to all of the relevant circumstances. Particular regard should be given to the member's intention established by reference to objective evidence. Such evidence includes the member's pattern of conduct having regard to contributions that were made and contributions that may be made to the fund by the member.

74. Subparagraph 295-95(3)(b)(iii) of the ITAA 1997 will be satisfied where the member's entitlement to the contribution arises at a time when the member was an Australian resident.

Check your fund is an Australian super fund (QC 23312)

Covid-19 Concessions:

... COVID-19 has resulted in many countries imposing travel bans and restrictions and a high degree of uncertainty around international travel.

If the individual trustees of an SMSF or directors of its corporate trustee are stranded overseas due to COVID-19, in the absence of any other changes in the SMSF or the trustees' circumstances affecting the other conditions, we will not apply compliance resources to determine whether the SMSF meets the relevant residency conditions.

Technically Speaking: Issue 56

SMSFs and residency – the tests for remaining a complying superannuation fund (Extract)

One of the requirements for an SMSF to qualify as a complying superannuation fund is to pass a residency test. To remain a complying fund for the purposes of s45 of the SIS Act, the residency test must be satisfied at all times throughout the year, otherwise the SMSF becomes non-complying from 1 July in that year.

A fund is a 'resident regulated superannuation fund' as defined in ss10(1) SISA at a particular time (the 'relevant time') if it satisfies the definition of an 'Australian superannuation fund' in ITAA97. The definition of an Australian superannuation fund in s295-95 ITAA97 requires the following three tests be met:

- **Test 1:** Either the fund was established in Australia or any asset of the fund at the relevant time is situated in Australia
- **Test 2:** At the relevant time, the central management and control of the fund is ordinarily in Australia
- **Test 3:** If the fund has at least one 'active member' at the relevant time, the total of superannuation interests of resident active members is 50% or more of the total superannuation interests of all active members of the fund at the relevant time.

The full version of this issue of Technically Speaking is available from the SMSF Association [Resource Library](#).

SMSF Association Budget 2021-22 Submission (Extract)

Recommendation 6: Improve SMSF residency rules.

Superannuation residency rules and SMSFs

Currently, the definition of 'Australian Superannuation Fund' in section 295-95 of the ITAA 1997 creates administrative difficulties and red tape for members of SMSFs. This issue also equally applies to small APRA funds.

It involves situations where Australians who are temporary residents overseas are being prevented from making contributions to their SMSF due to the penalties involved and the fund potentially being taxed as a non-complying superannuation fund. The alternative to not being able to make contributions to an SMSF is for the individual to make contributions to a large APRA-regulated superannuation fund and on their return to Australia rollover those contributions back to their SMSF. This is cumbersome as it involves making contributions to a fund which is not the preference of the individual and causes significant additional costs to be incurred by having an extra superannuation fund and subsequently transferring the benefit to their SMSF. This increases fund administration and compliance costs for the individual affected, reducing their superannuation balance, which is something the Productivity Commission has highlighted as a concern.

The fact that the residency rules unfairly affect superannuation members who 'choose' to save for retirement in an SMSF but do not affect those who save in a large APRA-regulated superannuation is inequitable.

Failure for a fund to meet the definition of an Australian superannuation fund means that it is treated as a non-complying fund. A complying superannuation fund that becomes a non-complying superannuation fund is taxed currently at 45 per cent on its taxable income for the financial year and also taxed at 45 per cent on the value of the fund's investments at the commencement of the financial year in which it becomes non-complying, less the amount of broadly any non-deductible contributions (non-concessional contributions).

We believe that the active member test does not provide any additional integrity to the superannuation system as the establishment and central control and management tests already ensure that only Australian based superannuation funds can benefit from the superannuation tax concessions. Instead, the active member test is an unnecessary source of red tape, especially for SMSFs and small APRA funds, adding costs and reducing the efficiency of the superannuation system.

Confusion and complications relating to the active member test is also one of the most popular topic areas for technical questions received from advice professionals through the SMSF Association's Technical Research Service.

Proposed solution: Removing the active member test and provide ATO discretion

It is submitted that the 'active member' test should be removed from the requirement for any superannuation fund to qualify for taxation concessions under the income tax law. Residency of the fund should be determined on the same principles as all other entities for income tax purposes, that is, the place of establishment and the location of the management and control of the entity.

Removing the active member test would ensure that SMSF members who are working overseas can still contribute to their fund where their fund balance exceeds 50 per cent of the fund's assets. This would mean that, as long as the fund was established in Australia and the central control and management ordinarily remains in Australia, then an SMSF member can continue to contribute to a fund of their choice.

Proposed solution: Extend the temporary absent exception for the central management and control test from two to five years

We suggest that the two-year temporary absence exception for the central management and control of a superannuation fund to be in Australia should be extended to a five-year exemption. The existing two-year exemption is too short in the context of modern work arrangements, where executive and other staff are often expected to commit to an overseas placement of greater than two years. Often, what initially starts out as a one or two year overseas assignment also gets extended for greater than the initial period. Extending the central control and management exception will reduce red tape and compliance issues for Australians working overseas while not compromising the integrity of the superannuation or taxation systems.

These proposed amendments will benefit SMSF members who spend time overseas working and wish to still make contributions to their fund to save for their retirement. We do not believe there will be any negatively affected superannuation fund members from the proposed amendments.

In fact, in light of COVID-19 the ATO issued temporary relief if the individual trustees of an SMSF or directors of its corporate trustee are stranded overseas.

This has been a successful introduction of a more practical application of SMSF residency rules that has not resulted in negative outcomes.

We believe that these proposed changes would have a negligible impact on revenue as the changes would simply cause concessional tax contributions to be redirected to an SMSF instead of a large APRA-regulated fund. In other words, it would simply result in a re-direction of contributions rather than creating an increase in concessional tax contributions.

These proposed amendments would remove a source of inefficient red tape in the superannuation system helping SMSF members better save for retirement. It would also support the Government's policy to ensure that all superannuation fund members are able to exercise choice of where their contributions are made. Further, it is consistent with removing the inefficiencies that exist as a result of members having multiple superannuation accounts.

Budget Paper No 2: 2021-22 (May 2021)

Self-managed Superannuation Funds — relaxing residency requirements

The Government will relax residency requirements for self-managed superannuation funds (SMSFs) and small APRA-regulated funds (SAFs) by extending the central control and management test safe harbour from two to five years for SMSFs, and removing the active member test for both fund types. The measure will have effect from the start of the first financial year after Royal Assent of the enabling legislation, which the Government expects to have occurred prior to 1 July 2022.

This measure will allow SMSF and SAF members to continue to contribute to their superannuation fund whilst temporarily overseas, ensuring parity with members of large APRA-regulated funds. This will provide SMSF and SAF members the flexibility to keep and continue to contribute to their preferred fund while undertaking overseas work and education opportunities.

This measure is estimated to have a small but unquantifiable impact on the underlying cash balance over the forward estimates period.

Receipts (\$m)	2021-21	2021-22	2022-23	2023-24	2024-25
Australian Taxation Office	-	-	*	*	*
<i>Related payments (\$m)</i> Department of the Treasury	-	0.2	..	-	-

Source: *Budget Paper No 2: Budget Measures* www.budget.gov.au

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