SMSF Residency

SuperGuardian

SMSF's must be 'complying' to ensure they attract the tax concessions they are known for.

An SMSF's complying status relies on it being an 'Australian Super Fund'. There are **three** tests that determine this and this fact sheet explains them further. Failing the tests has serious detrimental consequences for your fund.

All self managed superannuation funds (SMSFs) need to **qualify** as an Australian Superannuation Fund in order to **comply** with legislation and obtain concessional tax treatment.

The SMSF residency rules explained here, could pose a problem when fund members accept job opportunities offshore, or depart the country for an extended period of time.

All SMSFs need to **satisfy** what's known as the 'residency test'. If an SMSF becomes a non-resident fund, the tax concessions will be lost and the market value of the fund assets will be deemed as part of the income of the fund and taxed at the highest marginal rate.

RESIDENCY TESTS

Essentially legislation provides three tests to assess the residency of the fund. The tests are 'conducted' each year – and each year the answer to each of the three questions following must be 'Yes', at all times during the year:

1 **Establishment or assets held in Australia**

2 **Central management and control ordinarily in Australia.**

3 **Majority of active assets are held by Australian residents.**

CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

SMSF Residency

TEST 1

Establishment or assets in Australia
This test is met if the fund was established in Australia, or if at least one asset of the fund is situated in Australia.

Fund establishment is accepted as being the place where the first contribution was received and accepted. The first contribution will often be a roll-over from another Australian superannuation fund.

If establishment has not occurred in Australia, the assets test may be referred to, as stated above. This will be met if at least one asset is situated in Australia. For example the SMSF bank account is with an Australian Financial Institution, or the SMSF holds ASX listed shares or Australian property.

TEST 2

Central management & control ordinarily in Australia
The central management and control (CMC) of the fund must ordinarily be in Australia.

The test looks at where the strategic, investment related and main decisions concerning the SMSF are ordinarily made. This is not a black and white test.

What is central management and control?
CMC involves the strategic and high level decision making processes in relation to the SMSF and 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 in the best interest of the fund members.

Day-to-day activities of the fund do not constitute CMC because they are not of a strategic or high level nature. Examples include the acceptance of contributions that are made on a regular basis, individual investment of the fund's assets, fulfilment of administrative duties and payment of benefits.

On the other hand, an action that would constitute CMC is the decision to start a pension. This is a strategic and high level decision as it sparks a review of the investment strategy, and enters the fund into an ongoing liability to pay the pension minimum each financial year, among other implications.

SMSF Residency

Trustees can engage external advice but cannot delegate its function to make the strategic and high level decisions of the fund to a third party. A trustee acting on the advice of a third party is still seen to be exercising CMC. The actions of a financial adviser located in Australia would constitute the day-to-day management and operational side of the fund's activities and would not be relevant in satisfying the CMC test.

What constitutes 'ordinarily in Australia'?

The physical location of the trustees at the time of making the strategic decisions determines where the CMC is located, but the concept of 'ordinarily in Australia' allows for decisions to be made by someone who is temporarily overseas. An SMSF that has an equal number of trustees in Australia as overseas, making strategic decisions, will satisfy the requirements.

To be 'ordinarily in Australia' whilst being located overseas, the emphasis is placed on the trustees intent and substance of their absence as well as whether or not the duration is 'temporary'. The decision surrounding what is temporary involves consideration of the circumstances of each particular case.

What factors would make my absence not appear temporary?

- You leave Australia for an undetermined time;
- No return flight is booked;
- You sell the family home in Australia;
- Your contract of employment within the foreign country is greater than two years with no predetermined length of time;
- The contract has renewal clauses;
- You purchase a home overseas as your main residence;
- You enter into a long-term lease on a property overseas;
- You relinquish all connection with Australia or denounce Australian citizenship;
- You acquire citizenship of another country in the time you are away*; or*
- Other factors deemed by the Commissioner of Taxation.

SMSF Residency

TEST 3

Majority of active assets are held by Australian tax residents.
If the fund has any active non-resident members, their balance cannot exceed 50% of the fund's total balance. Where non-resident member balances exceed 50%, the fund is deemed to be non-complying.

What does it mean to be an active member?
An active member of an SMSF is one who makes contributions to the fund or has contributions made to the fund on their behalf.

SMSF trustees must consider the impact of any contributions into the fund while a member is a foreign resident.

'Contributions' for the purposes of the residency test includes, but is not limited to:

- Cash payments made by an employer, including the Super Guarantee and salary sacrifice amounts;
- Cash payments made by a member (regardless if a tax deduction is being claimed);
- A transfer of shares (or other asset) to the fund 'in-specie' by an employer or individual;
- Spouse contributions;
- Government co-contributions;
- Superannuation guarantee shortfall amounts;
- A roll-over from another superannuation fund;
- A superannuation lump sum that is paid from a foreign superannuation fund or an amount transferred to the superannuation fund from a foreign superannuation scheme; or
- Any other transaction or transfer that is deemed to be a contribution or roll-over by the Commissioner of Taxation.

  Note: The Commissioner of Taxation has provided further guidance on what constitutes a contribution in Taxation Ruling 2010/1.

If you roll-over funds, or contributions are made on your behalf into an SMSF whilst you are a non-resident – you become an Active Member and risk failing Test 3. If you fail Test 3 the fund risks losing the tax concessions available to resident SMSFs. Contributions made whilst you are a non-resident that relate to a period when you were a resident are ok. Examples of this include a Government Co-contribution received that related to a personal contribution made before departing Australia or an employer contribution received 28 days following the end of the quarter in which the member departed.

Making contributions after ceasing to be an Australian resident

Single member SMSF
If you cease to be an Australian resident, any contribution made by you, or on behalf of you to an SMSF, will mean that your fund will not meet the definition of an Australian superannuation fund.

More than one member in the SMSF
Non-residents will not be able to contribute to their SMSF if their member balance represents more than 50% of the super fund's assets that belong to active, contributing members.

Non-residents may be able to contribute if they hold less than 50% of the total active assets. The fund will pass Test 3 if the other member(s) are Australian residents, they are active members and the value attributable to the other member(s) is at least 50% of the total fund assets.

Examples of multiple member funds and Test 3:
Each member holds exactly 50% of the funds' assets.

A. One of the members is a non-resident. Contributions are being made for both members and they are both Active Members. As the non-resident member does not own more than 50% of the assets, the fund would satisfy Test 3.

B. The non-resident member makes greater contributions than the resident member to the point where their balance now exceeds 50% of the total balance. The fund will fail Test 3 and risks losing its Australian resident super fund status.

C. Both members become non-residents. A single contribution by either member will cause the fund to fail Test 3 and lose its Australian status. There may also be issues with satisfying Test 2 in these circumstances.

Consequence of being made a non-resident fund

What tax rate will the fund pay if it is not an Australian Super Fund? If the fund fails one of the residency tests the tax rate increases from 15% to the highest marginal rate (currently 45%).

A self-managed super fund will be deemed non-complying if it does not satisfy the tests involved in meeting the definition of an 'Australian superannuation fund'.

If non-complying, an amount equal to the market value of the fund's total assets (less non-concessional contributions) will be included in the fund's assessable income.

For every year that the fund remains non-complying, the assessable income is taxed at the highest marginal tax rate.

Salary sacrificed contributions are treated as employer contributions. If salary sacrificed super contributions are made to a non-complying super fund, the contributions will be a fringe benefit. The employer will:

- Be subject to FBT on the sacrificed amount; and
- Need to record the sacrificed amount on the employee's payment summary as a reportable fringe benefit.

Trustees can consider making super contributions outside of the SMSF and roll-over these contributions once they return.

How can a trustee plan for overseas travel?

Trustees can ask themselves several questions:

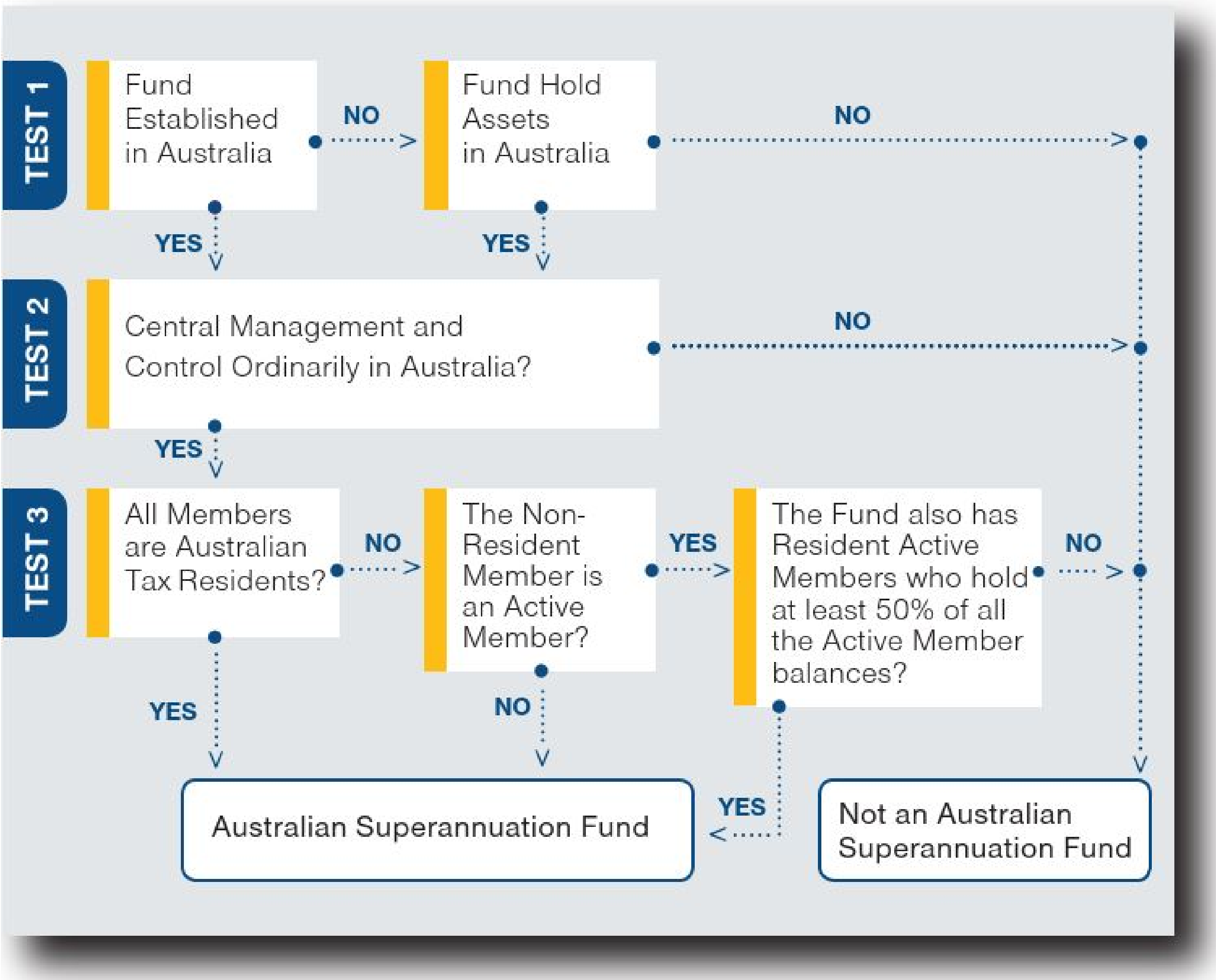
- Is the travel intended and scheduled to be less than two years, or predefined?
- Can the fund continue to meet the CMC test?
- Are at least 50% of the active assets with Australian tax resident active members?

If the answer to any of the questions is NO you will need to consider what options are available to you as a trustee and which one best suits your needs. There may be alternatives accessible to you to overcome some of the issues, such as appointing an Enduring Power Of Attorney.

While the rules seem strict and hefty penalties will apply if the rules are violated, they should not be seen as a prohibition on overseas travel. Rather a clear understanding of the rules is necessary prior to considering extended travel. As a trustee you should seek professional advice relating to your particular circumstances.

SMSF Residency

The below table will help you determine whether you meet the Residency tests



For further information on the Residency tests, please contact us on **1300 787 576 or info@superguardian.com.au**