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Ruling

Subject: Self-managed Superannuation Fund (SMSF) Residency

Question

Does the Fund meet the definition of an Australian superannuation fund under subsection 295-95(2) of the *Income Tax Assessment Act 1997*?

Answer

Yes

This ruling applies for the following period:

Income year ending 30 June 2018

The scheme commences on:

1 July 2017

Relevant facts and circumstances

- The Fund was established in Australia and registered with the ATO.
- The Members completed an enduring Power of Attorneys deed. This enduring power of attorney was restricted solely to the operation of the Fund.
- You advised that the new Trustees will be performing the central management and control activities of the Fund in Australia.
- You advised that there would not be any contributions made to the Fund whilst the Members are overseas,
- You advised via email sent to us that the Members of the Fund had left Australia and that they had not set a return date.

Relevant legislative provisions

Income Tax Assessment Act 1997 Subsection 295-95(2)

Income Tax Assessment Act 1997 Paragraph 295-95(2)(a)

Income Tax Assessment Act 1997 Paragraph 295-95(2)(b)

Income Tax Assessment Act 1997 Paragraph 295-95(2)(c)

Income Tax Assessment Act 1997 Subsection 295-95(3)

Income Tax Assessment Act 1997 Paragraph 295-95(3)(a)

Income Tax Assessment Act 1997 Paragraph 295-95(3)(b)

Income Tax Assessment Act 1997 Subsection 295-95(4)

Summary

The Fund will continue to meet the definition of an 'Australian superannuation fund' under subsection 295-95(2) of the *Income Tax Assessment Act 1997* (ITAA 1997).

Detailed reasoning

In accordance with subsection 295-95(2) of the ITAA 1997, a superannuation fund is an *Australian superannuation fund* at a time, and for an income year in which that time occurs, if:

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.

The Commissioner of Taxation (the Commissioner) has issued Taxation Ruling TR 2008/9 entitled - *Income tax: meaning of Australian superannuation fund in subsection 295-95(2) of the Income Tax Assessment Act 1997* (TR 2008/9) which sets out the Commissioner's interpretation of the definition of *Australian superannuation fund* in subsection 295-95(2) of the ITAA 1997.

The Commissioner considers that there are three tests that a superannuation fund must satisfy at a particular time if it is to be an Australian superannuation fund as defined in subsection 295-95(2) of the ITAA 1997. If a fund fails to satisfy any one of these tests at that particular time, it is not an Australian superannuation fund at that time, even if it satisfies the other two tests.

If the fund has satisfied all three tests at a particular time in the income year then, for income tax purposes, it is an Australian superannuation fund for the entire income year in which that time occurs.

First test – The superannuation fund establishment and assets test

The first test that a superannuation fund must satisfy to be an Australian superannuation fund at that time is that the fund was either established in Australia, or any asset of the fund is situated in Australia at the relevant time. This is a question of fact.

The establishment of the fund requirement in paragraph 295-95(2)(a) of the ITAA 1997 is a once and for all requirement. That is, once it is determined that a fund was established in Australia, it will satisfy the first test at all relevant times.

Paragraph 13 of Taxation Ruling TR 2008/9 *Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997* states that for a fund to be

'established in Australia', the initial contribution made to establish the fund is paid to and accepted by the trustee of the fund in Australia.

Application to your circumstances

In this case, you have advised and Australian Taxation Office records confirm that the Fund was established in Australia; therefore, the requirement in paragraph 295-95(2)(a) of the ITAA 1997 has been satisfied.

Second test – The central management and control (CM&C) test

This test requires that the central management and control (CM&C) of the fund is ordinarily in Australia. This simply means determining whether or not the fund's strategic decisions and high level duties and activities are performed in Australia. The CM&C of a superannuation fund involves the focus on the who, when and where of the strategic and high level decision making processes and activities of the fund.

Paragraph 20 of TR 2008/9 sets out a list of activities which would be classified as strategic and high level decision making processes including:

- formulating the fund's investment strategy;
- reviewing and updating or varying the fund's investment strategy;
- monitoring and reviewing the performance of the fund's investments;
- formulation of a strategy for the prudential management of any reserves (if any); and
- determining how the fund's assets are to be used to fund member benefits.

Paragraph 21 of TR 2008/9 states that CM&C doesn't include the day-to-day operational activities conducted by the fund such as accepting contributions made on a regular basis and related administration duties.

This test can still be satisfied even if the fund's CM&C is outside of Australia. To pass this test, the CM&C of the fund must only have a temporary absence from Australia and satisfy the definition of 'ordinarily' as per subsection 295-95(4) of the ITAA 1997.

Establishing who is exercising the CM&C of the fund is a question of fact to be determined with reference to the circumstances of each case. While it is the trustee of the fund which has the legal responsibility or duty to exercise the CM&C of a superannuation fund, the mere duty to exercise CM&C does not, of itself, constitute CM&C. If the trustee in fact performs the strategic or high level duties and activities of the fund, they will be exercising the CM&C of the fund in practice.

In discussing CM&C, TR 2008/9 states at paragraphs 123, 124 and 125 states:

Delegation of trustee's duties and powers

123. Where permitted by the trust deed of the fund or in the circumstances prescribed in the trustee legislation of the relevant State or Territory, and consistent with the provisions of the SISA, the individual trustee or trustees of a superannuation fund may delegate all or any of their duties and powers. For example, in all jurisdictions, the trustee legislation permits a trustee to delegate the execution of the trust where he or she is absent from the jurisdiction or about to depart from it. In accordance with the *Corporations Act 2001*, the directors of a corporate trustee may also delegate their duties and powers.

124. Where the trustee of a fund delegates their duties to another person, the delegate will be exercising the CM&C of the fund if they independently and without influence from the trustee, perform those duties and activities that constitute CM&C of the superannuation fund.

125. However, if the trustee continues to participate in the strategic and high level decision making and activities of the fund then it cannot be said that the delegate is exercising the CM&C of the fund. The trustee may continue to participate in such activities by reviewing or considering the decisions and actions of the delegate before deciding whether any further action is required. The decision in *BW Noble Ltd v. Mitchell (BW Noble)* illustrates this principle.

From the above, it can be seen that if a person performs the duties and activities that constitute the CM&C of the fund without any influence from the trustee, that person is exercising the CM&C of the fund.

The location of the CM&C of the fund is determined by where the high level and strategic decisions of the fund are made and high level duties and activities are in fact performed. Thus, if the trustees of the fund ordinarily reside overseas (notwithstanding that they may be Australian residents for income tax purposes) then, unless there is evidence to the contrary, the conclusion would be that the CM&C of the fund is overseas.

Whether the CM&C of a fund is ordinarily in Australia at a particular time is to be determined by the relevant facts and circumstances of each case. It involves determining whether, in the ordinary course of events, the CM&C of the fund is regularly, usually or customarily exercised in Australia. There must be some element of continuity or permanence if the CM&C of the fund is to be regarded as being 'ordinarily' in Australia.

Paragraph 31 of TR 2008/9 states that subsection 295-95(4) does not restrict the meaning of 'ordinarily' to the point that the CM&C of the fund can only be outside of Australia for a period of 2 years or less. According to paragraph 31 and 32 of TR 2008/9, if the CM&C of the fund was outside of Australia for a period of *greater* than 2 years, the absence of the CM&C must still be *temporary* and the fund must satisfy the 'ordinarily' requirement in paragraph 295-95(b) of the ITAA 1997.

Application to your circumstances

In this case, the Members of the Fund have left Australia and have completed enduring Power of Attorney deeds. This enduring power of attorney was restricted solely to the operation of the Fund.

You advised that the new Trustees will be performing the central management and control activities of the Fund in Australia and the Members will not be participating in any strategic and high level decision making and activities of the Fund by reviewing or considering the actions of the holders of the enduring power of Attorney.

The holders of the enduring power of Attorney will independently perform the duties and activities that constitute the CM&C of the Fund therefore exercising the high level decision making activities, whilst the Members are overseas.

Therefore it is determined that the CM&C activities are being exercised 'ordinarily' in Australia; hence the Fund will satisfy the CM&C test mentioned in paragraph 295-95(2)(b) of the ITAA 1997.

Third test - The 'active member' test

Paragraph 69 of TR 2008/9 expresses that this test can be satisfied by a superannuation fund at a particular time if, at the relevant time:

- the fund has no 'active member'; or
- at least 50% of the total market value of the fund's assets attributable to superannuation interests held by active members is attributable to superannuation interests held by active members who are Australian residents; or
- 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 is attributable to superannuation interests held by active members who are Australian residents.

According to subsection 295-95(3) of the ITAA 1997, a member of a superannuation fund, at a particular time, is deemed to be an *active member* if they are:

- an individual who is a contributor to the fund; or

- an individual on whose behalf contributions have been made.

However, paragraph 72 of TR 2008/9 mentions that a member of a fund is not deemed to be 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; and
- the member is not a contributor at that time; 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.

Application to your circumstances

In your application, you have stated that the Members of the Fund will not make any concessional or non-concessional contributions into to the Fund whilst they are overseas and that the fund will be in pension phase while the Members are overseas.

Therefore it is considered that the Members and the new Trustees won't satisfy any of the definitions of an 'active member' provided in paragraphs 295-95(3)(a) and 295-95(3)(b) of the ITAA 1997.

Conclusion

For the Fund to be considered an Australian superannuation fund all the conditions for the purposes of subsection 295-95(2) of the ITAA 1997 need to be satisfied.

As all of the tests mentioned above have been satisfied it is considered that the Fund is, and will remain, an Australian superannuation fund for the purposes of subsection 295-95(2) of the ITAA 1997.

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