TR 2008/9 - Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997

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Taxation Ruling

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

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What this Ruling is about

1. This Ruling sets out the Commissioner's interpretation of the definition of 'Australian superannuation fund' in subsection 295-95(2) of the *Income Tax Assessment Act 1997* (ITAA 1997). The definition of 'Australian superannuation fund' is relevant in determining whether a superannuation fund is a 'complying superannuation fund' for the purposes of the *Superannuation Industry (Supervision) Act 1993* (SISA). Superannuation funds that are complying superannuation funds are eligible for concessional tax treatment. The definition of 'Australian superannuation fund' is applicable from 1 July 2007.

2. There are three tests that a fund must satisfy in order to be treated as an 'Australian superannuation fund' as defined in subsection 295-95(2) of the ITAA 1997. While this Ruling discusses all three tests contained in subsection 295-95(2), a particular focus of the Ruling will be a consideration of the 'central management and control' test.

3. This Ruling applies to funds that are 'superannuation funds' as defined in section 10 of the SISA.[1] It is otherwise beyond the scope of the Ruling to discuss the meaning of 'superannuation fund'.

4. This Ruling will not explore in any detail the meaning of the terms 'superannuation interests',[2] 'Australian resident'[3] and 'foreign resident' which appear in the definition of 'Australian superannuation fund'.

5. The application of the 'central management and control' test in situations where an individual trustee or a director of a corporate trustee of a superannuation fund delegates their duties and powers is considered in this Ruling.[4] However, an in-depth analysis of the nature and scope of the circumstances in which an individual trustee or a director of a corporate trustee can delegate their duties and powers is beyond the scope of this Ruling.

6. Unless otherwise stated, a reference to trustee in this Ruling includes a reference to an individual trustee, a group of individual trustees, or to directors of a body corporate that is the trustee of a fund.

7. All references in this ruling are to the ITAA 1997 unless otherwise stated.

Class of entity/arrangement

8. The class of entities to which this Ruling applies are superannuation funds that seek to be Australian superannuation funds.

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[1] Subsection 995-1(1) of the ITAA 1997 states that 'superannuation fund' has the meaning given by section 10 of the SISA. That is, the fund is an indefinitely continuing fund and is a provident, benefit, superannuation or retirement fund or is otherwise a public sector superannuation scheme.

[2] For further information on the concept of 'superannuation interest', refer to the fact sheet 'How many superannuation interests does a member of a superannuation fund have in their fund?' which is located at www.ato.gov.au/super.

[3] A number of other taxation rulings issued by the Commissioner discuss the meaning of 'Australian resident' in relation to individuals. See Taxation Rulings IT 2615 Income tax: Medicare Levy – test for Australian residency – payable by Australians living overseas and by visitors to Australia; IT 2650 Income tax: Residency – permanent place of abode outside Australia; IT 2681 Income tax: residency status of business migrants and Taxation Ruling TR 98/17 Income tax: residency status of individuals entering Australia.

[4] Refer to paragraphs 24 and 123-127 of this Ruling.

Ruling

9. Subsection 295-95(2) of the ITAA 1997 provides that:

> 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.

10. Subsection 295-95(3) of the ITAA 1997 provides the meaning of 'active member' for the purposes of paragraph 295-95(2)(c) of the ITAA 1997. The concept of 'active member' is further discussed at paragraphs 71 to 75 of this Ruling.

11. Therefore, there are three tests that a superannuation fund must satisfy at the same 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 the 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 the same 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.[5]

First test – fund established in Australia or any asset of the fund is situated in Australia

12. The first test that must be satisfied is that the fund was established in Australia, or any asset of the fund is situated in Australia at the relevant time (paragraph 295-95(2)(a) of the ITAA 1997). The requirements in the first test will be satisfied if either the superannuation fund was established in Australia *or* at a particular time any asset of the fund is situated in Australia.

[5] Note that the test for determining whether a fund is a 'complying superannuation fund' as defined in the SISA requires that the fund satisfy all three tests of the definition in subsection 295-95(2) of the ITAA 1997 simultaneously *at all times* during the income year. There are income tax consequences if a fund ceases to be a complying superannuation fund in an income year – for further discussion, see paragraphs 88 to 92 of this Ruling.

Whether superannuation fund established in Australia

13. The key elements required to bring a superannuation fund into existence are that the trust deed for the fund is signed and executed *and* money or other property is transferred to the trustee of the fund as an initial contribution that is to be held on trust for the beneficiaries (members) of the fund. A superannuation fund is established *in Australia* if the initial contribution made to establish the fund is paid to and accepted by the trustee of the fund in Australia. It is not necessary that the deed for the fund is signed and executed in Australia.

14. 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. The fact that no asset of the fund is situated in Australia does not affect this conclusion.

Whether any asset of the fund is situated in Australia

15. If a superannuation fund was not established in Australia, it will still satisfy the test in paragraph 295-95(2)(a) of the ITAA 1997 if at least one asset of the fund is situated in Australia at the relevant time.

16. The location of an asset is determined by reference to the type of asset and the common law rules established by the courts for determining the location of assets of that kind. These common law rules that apply to determine the location of an asset are discussed at paragraphs 103 to 105 of this Ruling.

17. If a fund that was not established in Australia ceases to have an asset in Australia at a particular time, it will fail the first test and the fund will not be an Australian superannuation fund at that time.

Example 1: location of shares acquired by a superannuation fund

18. *The HB Superannuation Fund, a fund established outside Australia, acquires shares in a company incorporated in Australia. A replaceable rule in the Corporations Act 2001 – section 1072F – makes provision for a transfer of shares to be registered on the register of members before it can be regarded as an effective transfer at law. The register of members is kept in Australia. The shares in the company are therefore located in Australia.*[6]

[6] See paragraph 105 of this Ruling for an explanation of the rules that apply to determine the location of shares in a company.

Second test – central management and control of the fund 'ordinarily' in Australia

19. The second test requires that, at a particular time, the central management and control (CM&C) of the fund is ordinarily in Australia – paragraph 295-95(2)(b) of the ITAA 1997.

What is the nature of CM&C of a superannuation fund?

20. The CM&C of a superannuation fund involves a focus on the who, when and where of the strategic and high level decision making processes and activities of the fund. In the context of the operations of a superannuation fund, the strategic and high level decision making processes 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.

21. The other principal areas of operation of a superannuation fund that form part of the day-to-day or operational side of the fund's activities will not constitute CM&C. These activities do not form part of the CM&C of the fund because they are not of a strategic or high level nature. Rather, these activities are of a more formalistic or administrative nature. Examples of such activities include the acceptance of contributions that are made on a regular basis, the actual investment of the fund's assets, the fulfilment of administrative duties and the preservation, payment and portability of benefits.

Who exercises the CM&C of a superannuation fund?

22. Establishing who is exercising the CM&C of a superannuation fund is a question of fact to be determined with reference to the circumstances of each case. If a superannuation fund has an individual trustee or a group of individual trustees, it is the trustee or trustees of the fund that have the legal responsibility or duty to exercise the CM&C of the fund. If the trustee of the fund is a corporate trustee, it is the director or directors of the corporate trustee that have that legal responsibility or duty.

23. However, the mere duty to exercise CM&C does not, of itself, constitute CM&C. The trustee will only be exercising the CM&C of the fund if the trustee in fact performs the high level duties and activities of the fund in practice.

24. There may be situations where a person other than the trustee is exercising the CM&C of the fund, for example, the trustee may have delegated their duties and powers to that person.[7] If a person other than the trustee of the fund independently and without any influence from the trustee performs those duties and activities that constitute the CM&C of the fund, that person is exercising the CM&C of the fund.

Use of an investment manager

25. If the trustee uses an investment manager to carry out part or all of the investment management function, this does not mean that the investment manager is in any sense exercising the CM&C of the fund. In such cases, the investment manager will be undertaking activities that constitute the day-to-day management and operational side of the fund's activities (refer paragraph 21 of this Ruling).

Trustee acting on external advice

26. The trustee of a fund may seek external advice relating to the performance of their high level duties and activities. Provided that the trustee in fact makes the strategic and high level decisions for the fund, the circumstance that the trustee acts on or is influenced by such advice does not affect the fact that the trustee is exercising the CM&C of the fund.

Location of the CM&C of the fund

27. 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 performed (regardless of where the persons exercising the CM&C of the fund reside).

When is the CM&C of the fund 'ordinarily' in Australia?

28. 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. If the CM&C of the fund is being temporarily exercised outside Australia, this will not prevent the CM&C of the fund being 'ordinarily' in Australia at a particular time.

[7] Individual trustees must ensure that they comply with the trust deed of the fund, the relevant State or Territory trustee legislation and the provisions of the SISA in determining whether they can delegate their duties and powers. Directors of a corporate trustee must have regard to the constitution of the company, the *Corporations Act 2001* and the provisions of the SISA to determine whether they can delegate their duties and powers. See paragraph 123 of the Ruling for further discussion.

CM&C – temporary absences

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.

30. The effect of subsection 295-95(4) is to provide one set of circumstances in which the CM&C of a fund will be taken to be 'ordinarily' in Australia at a time for the purposes of paragraph 295-95(2)(b) of the ITAA 1997 (that is, it operates as a 'safe harbour' rule).

31. Subsection 295-95(4) of the ITAA 1997 does not otherwise restrict the meaning of 'ordinarily' so that the CM&C of the fund can only be outside Australia for a period of 2 years or less. If the CM&C of the fund is outside Australia for a period *greater* than 2 years, the fund will satisfy the CM&C test if it satisfies the 'ordinarily' requirement in paragraph 295-95(2)(b) of the ITAA 1997.

32. While the CM&C of a fund can be outside Australia for a period greater than 2 years, the period of absence of the CM&C must still be *temporary*. Furthermore, if the CM&C of the fund is not temporarily outside Australia, it will not be 'ordinarily' in Australia at a time even if the period of absence of the CM&C is 2 years or less.

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.

Division of CM&C

35. Where there is an equal number of individual trustees or directors of a corporate trustee located in Australia and overseas and each of those trustees/directors substantially and actively participate in the exercise of the CM&C of the fund from those locations, it is accepted that the CM&C of the fund will ordinarily be in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997. This will be the case despite the fact that the CM&C of the fund is also ordinarily being exercised overseas.

Example 2 – nature of CM&C of a superannuation fund

36. *Tim and Toni are the trustees and members of the T&T Superannuation Fund, a self managed superannuation fund (SMSF). The investment strategy of the fund, which was formulated after advice from a superannuation consultant, is expressed via asset allocation ranges with associated benchmarks against which performance may be measured. Tim and Toni also establish a policy for intended actions should an asset or asset class diverge from benchmark expectations. They also consider whether or not investments will be made on a passive (indexed) or an actively managed basis and they review these decisions annually.*

37. *The formulation of the investment strategy for the fund with the associated performance benchmarks, the establishment of a policy for corrective action should the performance of an investment diverge from benchmark expectations, the decision whether investments will be made on a passive or active basis and the annual review of these decisions all constitute strategic or high level decisions and actions. Tim and Toni are exercising the CM&C of the fund when they make these decisions and perform these activities.*

Example 3 – nature of CM&C of a superannuation fund

38. *The E&A Superannuation Fund, which is an SMSF, has a corporate trustee, E&A Pty Ltd. Edmond and his wife Amanda and their son Anthony are the members of the fund and directors of the corporate trustee. In July 2009, Edmond, Amanda and Anthony travel to the USA and remain there for 2.5 years. Whilst they are overseas, the fund's accountant in Australia lodges the income tax and regulatory return for the fund and ensures that the fund's financial statements and accounts and its compliance with the SISA are audited. However, Edmond, Amanda and Anthony review and monitor the performance of the fund's investments as well as review and update the investment strategy for the fund whilst they are overseas.*

39. *Reviewing and updating the investment strategy of the fund and monitoring the performance of the fund's investments are activities which constitute the CM&C of the E&A Superannuation Fund. The directors of the corporate trustee of the fund in performing those activities are exercising the CM&C of the fund. The activities of the accountant in meeting the fund's lodgement and administrative obligations do not constitute CM&C of the fund because those activities are not of a high level or strategic nature.*

40. *Provided Edmond and Amanda were overseas on a temporary basis,*[8] *the CM&C of the fund will 'ordinarily' be in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997.*

[8] Refer to paragraphs 29 to 34 of this Ruling for a discussion of what constitutes a temporary absence.

Example 4 – using a financial adviser when determining investment strategy of fund

41. *John and Jacqueline, the trustees of a newly established SMSF, the 'Camelot Superannuation Fund', have been drafting an investment strategy for their fund and have decided they will seek professional advice before finalising the strategy. They meet with a financial adviser and provide the following information:*

- *when they would like to retire;*
- *their ability to make further contributions between now and the time when they would like to retire;*
- *how much they would like to have as their retirement income; and*
- *their own preferences for investments and risk and ideas they have come up with from their own research.*

42. *From this information the financial adviser helps the trustees determine the annual return needed by the fund and suggests alternate asset allocation strategies depending on their flexibility around retirement dates and the level of annual contributions they make.*

43. *The trustees consider the adviser's suggestions and decide to finalise their investment strategy at a meeting of the trustees before putting the strategy into effect.*

44. *John and Jacqueline are exercising the CM&C of the fund when they set the investment strategy for the fund. The fact that they act on advice in formulating the strategy does not affect this conclusion and, in the context of the facts, it cannot be said that the financial adviser is participating in the high level decision making of the fund.*

Example 5(a) – person other than the trustees exercising CM&C of the fund whilst the trustees are overseas (delegation of trustee duties)

45. *Henry and Eleanor are the trustees of their SMSF, the 'Plantagenet Family Superannuation Fund' which was established in New South Wales (NSW). The members of the Plantagenet Family Superannuation Fund are Henry and Eleanor.*

46. *On 29 September 2009, Henry and Eleanor travel to France to take up management of Eleanor's family business interests in Europe. They do not have an expected return date although they do intend to return to Australia at some point in the future. They take their children with them to France, and they move into Eleanor's family home. The children are enrolled in local schools in France. Henry and Eleanor return to Australia permanently on 22 September 2012.*

47. *Prior to moving overseas, Henry and Eleanor validly delegate to Richard, an Australian based resident, their trustees' duties.*[9] *The trust deed of the Plantagenet Family Superannuation Fund permits the delegation of all or any of the duties and powers of the trustee provided that the delegation is consistent with the requirements under the NSW trustee legislation. The activities delegated to Richard include:*

- *monitoring and reviewing the performance of the fund's investments,*
- *re-balancing the investment portfolio and*
- *altering the fund's investment strategy.*[10]

48. *During Henry and Eleanor's absence from Australia, Richard undertakes these activities without reference to Henry and Eleanor. Furthermore, Henry and Eleanor did not participate in any of these high level decision making activities whilst overseas.*

49. *In these circumstances, the CM&C of the Plantagenet Family Superannuation Fund continues to be ordinarily in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 at all times by virtue of Richard exercising the CM&C in Australia during Henry and Eleanor's absence from Australia.*

Example 5(b) – trustees exercising CM&C of the fund whilst the trustees are overseas despite trustees delegating their duties

50. *Assume the same facts as that of Example 5(a), except that Richard is required to obtain Henry and Eleanor's approval before he alters the investment strategy for the fund or re-balances the fund's investment portfolio. He is also required to provide a report every 6 months to Henry and Eleanor regarding the performance of the fund's investments.*

51. *In this situation, the CM&C of the fund is not being exercised by Richard because Henry and Eleanor are in effect exercising the CM&C of the fund whilst they are overseas.*

[9] In delegating their trustee duties and powers to Richard, Henry and Eleanor have complied with all of the requirements of the trust deed, the *Trustees Act 1925* (NSW) and the relevant provisions of the SISA.

[10] It should be noted that as trustees of the fund, Henry and Eleanor may still be held liable for acts undertaken by Richard – for the purposes of this example, see subsection 64(7) of the *Trustee Act 1925* (NSW).

Example 6 – CM&C of the fund is 'ordinarily' in Australia

52. *Simon and his wife Donna are the trustees and members of their SMSF which was established in Australia. They have an established home in Australia but also decide to establish a second home in an overseas country. The couple and their family spend approximately 6 months at the overseas home and the rest of the year at the Australian home. The majority of trustee meetings are held in Australia at which the strategic and high level decisions in respect of the fund are made. The CM&C of the fund is only occasionally exercised in the overseas country.*

53. *In this situation, the CM&C of the fund is regularly, usually or customarily exercised in Australia and is only being casually or intermittently exercised overseas. Therefore, the CM&C of the fund is 'ordinarily' in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 at all times.*

Example 7(a) – trustees of the fund are outside Australia for a period greater than 2 years yet the CM&C of the fund is still 'ordinarily' in Australia

54. *Joseph and his wife Marian are the trustees and members of their SMSF 'The J&M Superannuation Fund'. The J&M Superannuation Fund was established in Australia in August 2006. Joseph and Marian exercise the CM&C of the fund at meetings of the trustees at their home in Sydney.*

55. *Joseph, who is a chartered accountant, was seconded to his employer's London office on 1 July 2008 for a period of 2 years. It was always the intention of both Joseph and his employer that the duration of his secondment would actually be 2 years and that Joseph would return to working in Australia at the expiration of that period. However, due to unforseen business pressures, Joseph was required to remain in London for an extra 12 months.*

56. *His wife accompanied Joseph for the duration of his secondment. They rented out the family home in Australia via their real estate agent and lived in a furnished house in London which was provided by Joseph's employer. Both Joseph and Marian continued to maintain bank accounts and private health insurance cover in Australia during the period of Joseph's secondment. They travelled back to Australia for a holiday during the Christmas 2009 period.*

57. *During the period of Joseph's secondment, the CM&C of the J&M Superannuation Fund was exercised at trustee meetings at the house in London.*

58. *In these circumstances, it is considered that the CM&C of the fund remains ordinarily in Australia during the period of Joseph's secondment as the trustees' absence from Australia was temporary. The factors that support this conclusion include the facts that*

- *Joseph and Marian intended to return to Australia at the expiration of Joseph's 2 year period of secondment and never abandoned that intention,*
- *the entire period of the absence, including the additional 12 months, was related to the fulfilment of a specific purpose,*
- *they did not establish a home outside Australia and*
- *they continued to maintain their home and other assets in Australia which indicates a durability of association with Australia.*

59. *Accordingly, the CM&C of the J&M Superannuation Fund remained ordinarily in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 during the period that the trustees were in London.*

Example 7(b) – change of intention

60. *Assume the same facts as in Example 7(a) except that Joseph abandons his intention to return to Australia at the expiration of the 2 years and continues to work in the London office of his employer on an indefinite basis. The trustees continue to exercise the CM&C of the fund in their London home during this extended period. After 3 months however, Joseph and his wife return to Australia because of the illness of one of Joseph's parents.*

61. *In this situation, the first 2 years of the trustees' absence from Australia is for a defined (temporary) period during which the trustees maintained their intention to return to Australia. However, from the time that the intention of the trustees changed so that they decided to remain overseas indefinitely, that is at the end of the 2 year secondment period, their absence ceased to be temporary. Therefore, it could not be said that the CM&C of the fund was ordinarily in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 during the 3 months prior to the trustees' return to Australia.*

Example 8(a) – trustees are outside Australia for a period greater than 2 years but the CM&C of the fund is not 'ordinarily' in Australia

62. *Luke and Olivia are the members and trustees of an SMSF. On 22 August 2008 they travel to an overseas country for an extended working holiday. They do not have an expected return date although they do intend to return to Australia at some point in the future. They exercise the CM&C of the fund whilst overseas.*

63. *Luke and Olivia have been renting a home in Australia for several years and on leaving Australia, they do not renew this lease. They sell larger items of furniture and give some smaller items they do not wish to take with them to Olivia's parents who have a home in Western Australia. They sell their cars. Apart from personal bank accounts and their interests in the SMSF, they do not have any assets in Australia. Whilst overseas, they live in rented accommodation. They eventually return to Australia 3 years later.*

64. *Because the trustees' absence from Australia is greater than 2 years, subsection 295-95(4) of the ITAA 1997 has no application. However the CM&C of the fund will remain 'ordinarily' in Australia in these circumstances if the trustees' absence from Australia was temporary.*

65. *The test for establishing whether the CM&C of the SMSF is ordinarily in Australia must be applied at the relevant time during the year, that is, the test is a 'real time' test. Hence, the test should be applied at the time Luke and Olivia move overseas. The factors in this case that are relevant in determining whether the trustees' absence from Australia is temporary or not (and hence whether the CM&C of the fund remains ordinarily in Australia) include:*

- *the indefinite nature of Luke and Olivia's absence from Australia,*
- *their length of stay in the overseas country and*
- *the fact that they divested themselves of the majority of their assets in Australia.*

66. *Based on these factors, Luke and Olivia's absence from Australia is not a temporary absence. Further, in the circumstances of this case, the intention of the trustees to find work whilst they are overseas is not of itself sufficient to establish a specific, passing purpose such that the absence is considered to be temporary.*

67. *Since Luke and Olivia exercise the CM&C of the fund whilst overseas, and the fact that their absence is not a temporary absence, the circumstances lead to the conclusion that the CM&C of the fund is not 'ordinarily' in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 at any time during the period of the trustees' absence from Australia.*

Example 8(b) – trustees are outside Australia for a period less than 2 years but the CM&C of the fund is not 'ordinarily' in Australia

68. *Assume the same facts as in Example 8(a) except that Luke and Olivia return to Australia after 18 months due to the ill health of one of Olivia's parents. In view of the fact that Luke and Olivia moved overseas with the intention of remaining there indefinitely, their absence would still not be temporary even though it in fact turned out to be of a relatively limited duration. This is because the CM&C test is not applied in retrospect or, in other words, with the benefit of hindsight. Therefore, even though the trustees' absence from Australia was actually less than 2 years, the CM&C of the fund is not 'ordinarily' in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 at any time as their absence from Australia was not temporary. Further, subsection 295-95(4) of the ITAA 1997 does not apply because on leaving Australia, the trustees could not establish that their absence was temporary.*

Third test – the 'active member' test

69. The third test that must be satisfied for a fund to be an Australian superannuation fund at a particular time is the 'active member' test (paragraph 295-95(2)(c) of the ITAA 1997). The 'active member' test is satisfied 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 (subparagraph 295-95(2)(c)(i) of the ITAA 1997); 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 (subparagraph 295-95(2)(c)(ii) of the ITAA 1997).

70. A fund with an active member can apply either method in subparagraphs 295-95(2)(c)(i) and (ii) of the ITAA 1997 to determine whether it satisfies the active member test.

71. The definition of 'active member' is contained in subsection 295-95(3) of the ITAA 1997. A member is an active member of a superannuation fund at a particular time if the member is a contributor to the fund at that time (paragraph 295-95(3)(a) of the ITAA 1997) or is an individual on whose behalf contributions have been made (paragraph 295-95(3)(b) of the ITAA 1997).

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.[11]

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.

75. A member of a fund will also be an active member if the member's employer is on a 'contributions holiday'. The meaning of 'contributions holiday' is explained at paragraph 195 of this Ruling.

Example 9 – not an active member

76. *Ally, who is the single member of her SMSF goes overseas on a holiday in July 2009 for an indefinite period of time. She ceases being an Australian resident in July 2011. Before travelling overseas, Ally worked as a fitness instructor at the local health & fitness centre. Her employer failed to make any superannuation contributions in respect of the period of work performed by Ally in the quarter prior to her departure (April to June 2009). In August 2012, Ally's former employer pays the superannuation guarantee charge to the Tax Office which then distributes the shortfall component of the charge to Ally's SMSF in September 2012. Ally makes no personal contributions to her SMSF during her absence from Australia.*

[11] See paragraphs 184 to 189 of this Ruling for further discussion on the meaning of 'contributor' and whether an individual is a 'contributor' to the fund at a particular time in the context of subsection 295-95(3) of the ITAA 1997.

77. *At the time the contribution is made to Ally's SMSF, Ally is a foreign resident. The contribution consists of the shortfall component of the superannuation guarantee charge. That payment is made in respect of the work she performed in April-June 2009 – during this period Ally was an Australian resident. Therefore, subparagraph 295-95(3)(b)(iii) of the ITAA 1997 applies and Ally does not become an active member because of the contribution.*

Example 10 – whether member of fund 'contributor' to the fund at a particular time

78. *Isabella, one of two members/trustees of an SMSF, has been making personal contributions to the fund on a monthly basis since the fund was established on 1 July 2007. Isabella makes these regular contributions through an automatic deduction from her bank account. On 1 July 2010, Isabella departs Australia for a 2 year working holiday in Spain. She returns to Australia on 30 June 2012.*

79. *Before her departure from Australia, Isabella decided that she would not make any personal contributions to the SMSF during her period of absence from Australia. She therefore instructs her bank to stop the regular transfer of funds to her SMSF. She makes no further contributions to the SMSF until her return to Australia.*

80. *In these circumstances, Isabella is a 'contributor' to the fund within the meaning of subsection 295-95(3) of the ITAA 1997 throughout the entire period from 1 July 2007 to 30 June 2010. As evidenced by her instruction to her bank to stop the regular transfers, she ceased to be a 'contributor' to the fund from 1 July 2010. Since Isabella made no further contributions until her return to Australia, she ceased to be a 'contributor' to the fund from that time until her return to Australia.*

Example 11 – whether member of fund 'contributor' to the fund at a particular time

81. *Abraham, who is one of two trustee/members of an SMSF, moves overseas on 1 July 2009 with the intention of remaining there indefinitely and as a result becomes a foreign resident. Prior to going overseas and becoming a foreign resident, Abraham makes a one-off personal contribution of $1 000 to the SMSF in order to obtain a co-contribution in respect of the 2008-09 income year. It was always Abraham's intention that he only make that one personal contribution. He had no intention of making any further personal contributions to the SMSF. This intention to not make further contributions was noted in the minutes of a meeting of the trustees of the SMSF. Abraham had not previously made any personal contributions to the SMSF (or any other fund), the only contributions being made on his behalf being employer contributions. Abraham satisfied the conditions for the payment of the co-contribution and it was paid into his account in the SMSF in October 2009.*

82. *When Abraham makes his personal contribution of $1,000 he is a 'contributor' to the SMSF. From an objective consideration of the circumstances surrounding the contribution, including the minutes of the trustees' meeting which evidenced Abraham's intentions, it is considered that Abraham ceased being a 'contributor' to the SMSF within the meaning of subsection 295-95(3) of the ITAA 1997 from the time he formed the intention to cease making contributions.*

83. *The co-contribution made to the SMSF after Abraham became a foreign resident falls within subparagraph 295-95(3)(b)(iii) of the ITAA 1997 as it was a contribution made in respect of a time when Abraham was an Australian resident. This is because Abraham's entitlement to the co-contribution arises at a time when he was an Australian resident.*

Date of effect

84. This Ruling applies both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
10 December 2008

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Legislative context and background

Policy intent of the superannuation fund residency requirement

85. The definition of 'Australian superannuation fund' in subsection 295-95(2) was inserted into the ITAA 1997 by the *Tax Laws Amendment (Simplified Superannuation) Act 2007*. It replaced the definition of 'resident superannuation fund' in former section 6E of the *Income Tax Assessment Act 1936* (ITAA 1936) with application from 1 July 2007. The introduction of the new definition was intended to simplify the scope of the fund residency definition and give effect to a minor policy change in respect of the application of the central management and control test.[12]

86. The policy intent underpinning the introduction of the fund residency test in former section 6E of the ITAA 1936 provides further context in which to consider the definition of 'Australian superannuation fund' in subsection 295-95(2) of the ITAA 1997. Prior to the introduction of former section 6E, a superannuation fund was a complying fund and taxed concessionally if it satisfied certain requirements specified in the SISA. No residency tests were included in these requirements, and so both resident and non-resident superannuation funds could be complying and receive concessional tax treatment.[13] Further, it was considered that the definition of 'foreign superannuation fund' was too narrow and operated to tax a trustee of a foreign fund as a resident merely because the foreign fund was paying a pension to Australian residents.[14]

87. Amongst other things, the purpose of the introduction of the fund residency test in former section 6E of the ITAA 1936 was to:[15]

- clarify the treatment of overseas superannuation funds and payments related to those funds;
- tax non-resident entities on their assessable income (excluding dividend, interest and royalty income) at the tax rate applicable to non-complying superannuation funds;

[12] Paragraph 3.91 of the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006.
[13] See former definition of 'complying superannuation fund' in former subsection 267(1) of the ITAA 1936 as at 1 January 1994 and chapter 7 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 1994.
[14] See former section 272 of the ITAA 1936 as at 1 January 1994.
[15] See chapter 7 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 1994 and the Second Reading Speech to that Bill (Australia, House of Representatives, *House Hansard*, 14 November 1994).

- restrict complying status under the SISA to resident entities;
- ensure tax concessions for superannuation contributions and benefits were limited to retirement benefits which accumulated in superannuation funds that complied with Australian regulations;
- ensure non-resident superannuation funds could not be used to avoid Australian regulations and that Australian tax concessions were not diverted to non-residents; and
- recoup tax concessions given to superannuation funds that changed their status from complying to non-complying and impose tax on funds which changed their status from non-resident to resident.

Relevance of definition of 'Australian superannuation fund'

88. The definition of 'Australian superannuation fund' is relevant to determining, amongst other things:

- whether a superannuation fund is a resident or non-resident for income tax purposes;
- whether a fund is a complying or non-complying fund under the SISA; and
- whether a fund can deduct amounts incurred in obtaining all (assessable and non-assessable) contributions made to the fund.[16]

89. For income tax purposes a superannuation fund qualifies for concessional tax treatment[17] if it is a 'complying superannuation fund' within the meaning of the SISA.[18] To be a complying superannuation fund in relation to a year of income, the fund must, amongst other things, be a 'resident regulated superannuation fund' at all times during the year of income when it was in existence. A 'resident regulated superannuation fund' means a regulated superannuation fund that is an 'Australian superannuation fund' within the meaning of the ITAA 1997.[19]

[16] Subsection 295-95(1) of the ITAA 1997.
[17] Refer to paragraph 92 of this Ruling for further discussion of the tax treatment of superannuation funds.
[18] Non-SMSFs must satisfy the conditions in section 42 of the SISA to be a complying superannuation fund in relation to a year of income while SMSFs must satisfy the conditions in section 42A of the SISA to be a complying superannuation fund in relation to a year of income.
[19] Section 10 of the SISA.

90. To be a 'resident regulated superannuation fund' and therefore a complying superannuation fund within the meaning of SISA, the fund must satisfy the definition of 'Australian superannuation fund' *at all times* in the year of income. This means that the fund must satisfy all three tests in the definition of 'Australian superannuation fund' concurrently at all times.

91. In contrast, for income tax purposes, provided that a fund satisfies the definition of 'Australian superannuation fund' in subsection 295-95(2) of the ITAA 1997 at *any* time during an income year, it will be an Australian superannuation fund for the income year in which that time occurs.

92. For income tax purposes, where a fund is an Australian superannuation fund in relation to an income year, the fund must include in its assessable income the ordinary and statutory income the fund derived from all sources, whether in or outside Australia, during that income year. If the fund is a complying superannuation fund in relation to the year of income, this income will be taxed concessionally, that is at 15%. If the fund is non-complying, the fund's taxable income will be taxed at the highest marginal tax rate.

Superannuation fund established in Australia or any asset of the fund situated in Australia at the relevant time

93. The first test that a superannuation fund must satisfy to be an 'Australian superannuation fund' is that the fund was either established in Australia, or any asset of the fund is situated in Australia at the relevant time – paragraph 295-95(2)(a) of the ITAA 1997.

When will a superannuation fund be established in Australia?

94. To determine when a superannuation fund will be established in Australia, it is first necessary to consider the elements required to bring a superannuation fund into existence. *The Australian Oxford Dictionary* defines 'establish' as '1. set up or consolidate…on a permanent basis…'

95. The key elements required to bring a superannuation fund into existence are that the trust deed for the fund is signed and executed *and* money paid or other property is transferred to the trustee of the fund as an initial contribution that is to be held on trust for the beneficiaries (members) of the fund.

96. Case law provides support for the view that both of those requirements must be satisfied before a superannuation fund will be established. In *JD Mahoney v. FCT*[20] (*JD Mahoney*), a case in which the High Court was required to decide whether the appellant fund was being applied for the purpose for which it was established, that is to benefit employees,[21] Owen J stated:[22]

> In order to succeed the appellants must in the first place show that a fund was established. That, it seems to me, they have done by producing the deed of the trust and proving that £500 was paid by the Company to the trustees to be dealt by them in accordance with the trusts declared in the deed.

97. In *Walstern Pty Ltd v. FCT*[23] (*Walstern*), Hill J took into account Owen J's comments in *JD Mahoney* when considering whether a deduction was allowable to a company for a contribution made to a non-complying superannuation fund under former section 82AAE of the ITAA 1936. In considering whether the relevant fund was a 'provident, benefit, superannuation or retirement fund', Hill J made the following observations:[24]

> There is an argument…that there could be no 'fund' in the year of income unless at the time the contribution was made there was actually money or other property held in trust or otherwise subject to legal requirements of a kind which would make the fund a provident benefit superannuation or retirement fund. In *Scott v. Commissioner of Taxation (No 2)* (1966) 40 ALJR 265 Windeyer J at 351, expressed the view (as what his Honour there referred to as a 'general description' and not a 'definition') that 'fund' in the context of 'superannuation fund' ordinarily meant 'money (or investments) set aside and invested, the surplus income therefrom being capitalized.' For present purposes, the point is the need for 'money' or 'other property' to constitute a fund.
>
> …
>
> Prima facie it may be that where there is what may be referred to as a master fund to which separate contributions are to be made, which contributions are to be kept separate from other contributions, it might suffice if there was any contribution at all made which could bring about the result that there was a fund…The evidence does not permit me to say whether at the time the original contribution was made to the ATC Fund by Walstern the trustees in fact held property upon trust in the master fund. **Mere signature of a trust deed, without assets held in trust would not create a fund**. (emphasis added)

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[20] (1965) 13 ATD 519.
[21] If the fund was being applied for the purpose for which it was established, the fund's income for the relevant year was exempt from income tax.
[22] (1965) 13 ATD 519 at 525.
[23] (2003) 138 FCR 1.
[24] (2003) 138 FCR 1 at 15.

98. In the House of Lords decision in *British Insulated & Helsby Cables v. Atherton*[25] (*British Insulated & Helsby Cables*), where it was held that an initial contribution to establish a superannuation fund to benefit employees was not deductible because it was capital, Viscount Cave LC stated the following:

> The payment of £31,784, which is the subject of dispute, was made, not merely as a gift or bonus to the older servants of the appellant company, but (as the deed shows) to 'form a nucleus' of the pension fund which it was desired to create; and it is a fair inference from the terms of the deed and from the Commissioners' findings that **without this contribution the fund might not have come into existence at all**.
>
> The object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff. (emphasis added)

99. The views expressed in *JD Mahoney, Walstern* and *British Insulated & Helsby Cables* reflect the principles of the general law of trusts as to when a trust will be created.[26] As most superannuation funds are trusts, these principles will be applicable in determining when a superannuation fund will be established.[27]

100. However, there appears to be no case law which provides guidance on the location of the establishment of a superannuation fund. In the absence of such guidance, it is considered that a superannuation fund will be established *in Australia* when the initial contribution that establishes the fund is paid to and accepted by the trustee in Australia.[28] It is not necessary that the deed for the fund is signed and executed in Australia. Whether the initial contribution to establish the fund occurred in Australia is a question of fact which is determined by reference to the circumstances of each case.

101. If there is a situation where the initial contribution to establish the fund occurred *outside* Australia, notwithstanding that one or more of the signatories executed the deed in Australia, the fund will not be established *in Australia*.

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[25] [1926] AC 205.

[26] According to these principles, before a valid trust is created there must be certainty on three matters:
(1) certainty of intention to create a trust;
(2) certainty as to the property that is the subject matter of the trust; and
(3) certainty as to the objects (beneficiaries) of the trust.

[27] The courts have expressed the view that unless the trustee legislation or the rules governing the trust provide to the contrary, the principles of the general law of trusts applies to superannuation funds. See, for example, *Cowan v. Scargill* [1985] Ch 270 at 292; [1984] 2 All ER 750 at 764 and *Lock v. Westpac Banking Corporation* (1991) 25 NSWLR 593 at 609-610.

[28] Those superannuation schemes that are established by or under the law of the Commonwealth, or of a State or Territory – see paragraph (a) of the definition of 'public sector superannuation scheme' in section 10 of the SISA – are established in Australia.

102. The establishment of a fund is a once off event. Therefore that requirement in paragraph 295-95(2)(a) of the ITAA 1997 is satisfied at all relevant times once it is determined that a fund was established in Australia. If it is determined that the fund was not established in Australia, then the alternative requirement in paragraph 295-95(2)(a), namely location of the assets of the fund, must be considered.

Location of the assets of the fund

103. If a fund was not established in Australia, it will satisfy paragraph 295-95(2)(a) of the ITAA 1997 if any asset of the fund is situated in Australia at the relevant time. 'Asset' is not defined in the ITAA 1997. According to the *Butterworths Australian Legal Dictionary*, an asset is:

> An item, whether tangible or intangible, having economic value to its owner which, if not already in the form of money, can be converted into money to the owner's benefit.

104. The courts have formulated a number of rules to determine the site or location of a particular asset for various purposes (including for taxation purposes). These rules are most often discussed in a private international law or conflict of laws context.[29] Although many of these rules have been developed in contexts other than income tax it is considered that those rules appropriately apply in determining the location of assets for the purposes of the test in paragraph 295-95(2)(a) of the ITAA 1997.[30] For example, it has been observed that is not possible to argue that land or tangible assets have a location other than their physical location.[31]

105. The application of these common law rules can raise complex questions of fact and law. While it is not possible to deal with every type of asset that may be relevant to superannuation funds, the general rules established by the courts for determining the site or location of particular types of assets are as follows:

- *land* – land and interests in land are situate in the place where the land lies.[32]

[29] See for example, Collins, L 2006, *Dicey, Morris and Collins on The Conflict of Laws*, 14th edn, Sweet & Maxwell, London; Mortensen, RG 2006, *Private International Law in Australia*, LexisNexis Butterworths, Australia; Nygh, PE and Davies, M 2002, *Conflict of Laws in Australia*, 7th edn, LexisNexis Butterworths, Australia.
[30] See comments in Nygh, PE and Davies, M 2002, *Conflict of Laws in Australia*, 7th edn, LexisNexis Butterworths, Australia, p.586.
[31] Nygh, PE and Davies, M 2002, *Conflict of Laws in Australia*, 7th edn, LexisNexis Butterworths, Australia, p.586.
[32] *Haque v. Haque (No 2)* (1965) 114 CLR 98 at 136, per Windeyer J.

- *shares* – the basic principle for identifying the location of shares in a company is that they are situate where, according to the law of the place where the company was incorporated, the shares can be dealt with effectively as between the owner for the time being and the company.[33] The law of the place of incorporation of the company decides how shares in the company may be transferred. If they may be transferred only by registration on a particular register, they will be regarded as situate at the place where the register is kept.[34]
- *beneficial interests under a trust* – if the beneficiary is given a beneficial interest in the trust property then the beneficiary's interest in the trust is located in the country where the trust property is situated.[35] If the beneficiary is merely given a right of action against the trustees then the beneficiary's interest under the trust is located where the action may be brought, that is at the trustees' place of residence.[36]
- *simple contract debts* – the general rule applicable to debts is that they are deemed to be situate where the debtor resides.[37] This will apply irrespective of the location of the documentary evidence recording the debt.[38]
- *specialties* (such as a policy of insurance) – a debt created by deed (a 'specialty') has been held to be located where the deed itself is to be found because, by reason of the deed itself, the debt is taken to have some tangible existence.[39]
- *bank accounts* – a bank account is a debt being a single chose in action.[40] The bank is the relevant debtor in the relationship.[41] The rules that apply to determine the location of debts would therefore apply to bank accounts.

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[33] Collins, L 2006, *Dicey, Morris and Collins on the Conflict of Laws*, 14th edn, Sweet & Maxwell, London, p.1125.
[34] *Attorney-General v. Higgins* (1857) 2 H & N 339; *Brassard v. Smith* [1922] 1 AC 215.
[35] See *Re Berchtold* [1923] 1 Ch 192; *Philipson-Stow v. Inland Revenue Commissioners* [1961] AC 727 at 762.
[36] Collins, L 2006, *Dicey, Morris and Collins on The Conflict of Laws*, 14th edn, Sweet & Maxwell, London, p.1127.
[37] *Attorney-General v. Bouwens* (1838) 4 M & W 171 at 191; 150 ER 1390 at 1398; *English Scottish & Australian Bank Ltd v. IRC* [1932] AC 238; [1931] All ER Rep 212; *Haque v. Haque (No.2)* (1965) 114 CLR 98 at 137, per Windeyer J.
[38] *Sutherland v. Administrator of German Property* [1934] 1 KB 423.
[39] *Shaw v. R* (1895) 21 VLR 338; 1 ALR 122; *Haque v. Haque (No.2)* (1965) 114 CLR 98 at 137, per Windeyer J.
[40] *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110 at 127.
[41] *Foley v. Hill* [1843-1860] All ER 16.

- *negotiable instruments and securities transferable by delivery* – for taxation purposes, bonds, bills of exchange and other securities which can be validly and effectively transferred by delivery with or without endorsement are situate in the country where the paper representing the security is itself from time to time found.[42]
- *leases* – the general rule for land applies to any leasehold interest in land.[43] It is deemed to be situate in the place where the land over which the lease is held, lies.[44]
- *chattels* (such as artwork, jewellery etcetera) – in the same way that land is situate where it lies, so chattels are situate in the place where they happen to be at the relevant time.[45]

The central management and control test

106. The second test and one of the key requirements that a superannuation fund must satisfy to be an 'Australian superannuation fund' at a particular time is that the CM&C of the fund is ordinarily in Australia – paragraph 295-95(2)(b) of the ITAA 1997.

107. To determine the location of the CM&C of a fund at a point in time, it is necessary to consider what constitutes the CM&C of a fund and who it is that exercises the CM&C of the fund.

Meaning of 'central management and control' in the context of a superannuation fund

108. The phrase 'central management and control' is not defined in the ITAA 1997. Therefore, the term takes its meaning from the context in which it appears. In this case, the operations of a superannuation fund form part of that context, using the word 'context' in its widest sense.[46]

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[42] *Attorney-General v. Bouwens* (1838) 4 M & W 171; 150 ER 1390.
[43] Mortensen, RG 2006, *Private International Law in Australia*, LexisNexis Butterworths, Australia, p.449.
[44] *Attorney-General v. Bouwens* (1838) 4 M & W 171 at 191; 150 ER 1390 at 1398.
[45] *Haque v. Haque (No. 2)* (1965) 114 CLR 98 at 136, per Windeyer J.
[46] *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384.

109. The term 'central management and control' was developed by the courts as the common law rule for determining the residence of a company. As Lord Loreburn LC stated in *De Beers Consolidated Mines Ltd v. Howe*[47] (*De Beers*):

> In applying the concept of residence to a company, we ought, I think, to proceed as nearly as we can upon an analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business…a company resides for purposes of income tax where its real business is carried on. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

110. Since the House of Lords decision in *De Beers*, there have been a number of cases, both in the United Kingdom and Australia, which have discussed the application of the CM&C test in relation to companies. In *Koitaki Para Rubber Estates Ltd v. FCT*[48] (*Koitaki*), Williams J stated that in relation to determining the residence of a company:[49]

> the crucial test is to ascertain where the real business of the company is carried on, not in the sense of where it trades but in the sense of from where its operations are **controlled and directed**. It is the place of personal control over and not of the physical operations of the business which counts.[50] (emphasis added)

111. There is currently no case law which has discussed the meaning of CM&C in the context of superannuation funds. In the absence of such guidance, the question arises as to whether the CM&C test that is applied to companies can also be applied to determine the meaning of CM&C as it relates to superannuation funds.[51]

112. Williams J in *Koitaki* stated that the important element in determining the location of CM&C is the place of personal control over, and not the physical operations of, the business. Although this statement was made in the context of a company that carried on an operational business (for example, manufacturing or major trading activities), the CM&C test applied in *Koitaki* has been applied to companies that have as their main activity management of investment assets.[52]

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[47] [1906] AC 455 at 458.
[48] (1941) 64 CLR 241; (1941) 6 ATD 82.
[49] (1941) 64 CLR 241 at 248; (1941) 6 ATD 82 at 89.
[50] Williams J referred to his comments in *Koitaki* in *Waterloo Pastoral Company Limited v. Federal Commissioner of Taxation* (1946) 72 CLR 262 at 266.
[51] For guidance on how the CM&C test is applied to companies refer to Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency*.
[52] See for example *Egyptian Delta Land and Investment Company Limited v. Todd* [1929] AC 1 and *Esquire Nominees Ltd v. FCT* (1973) 129 CLR 177; 72 ATC 4076; (1972) 3 ATR 105.

113. In the context of the activities of a superannuation fund, its income earning outcomes are largely dependent on the investment decisions made in respect of its assets rather than any productive or operational activities. Hence, despite differences between the kinds of activities a company may undertake and those of a superannuation fund, we consider that an analogy can be drawn between the business activities of a company and the activities of a superannuation fund in that the activities of a superannuation fund, like the business activities of a company, require personal control and direction. Accordingly, we consider that the principles established in cases dealing with the operation of the CM&C test in relation to companies are capable of application to determine the meaning of CM&C as it relates to superannuation funds.[53]

114. The cases which have considered the application of the CM&C test in relation to companies have held that the CM&C of a company comprises the high level management and control and strategic decision making.[54] Such an analysis focuses on who makes those high level and strategic decisions and when and where those decisions are made.

115. Like companies, determining the CM&C of a superannuation fund involves a focus on the who, when and where of the strategic and high level decision making of the fund.

116. In the context of the operations of a superannuation fund, the strategic and high level decision making of the fund includes the performance of the following duties and activities:

- formulating the investment strategy for the fund;[55]
- reviewing and updating or altering the investment strategy of the fund as well as monitoring and reviewing the performance of the fund's investments;
- if the fund has reserves[56] – the formulation of a strategy for their prudential management;[57] and
- determining how the assets of the fund are used to fund member benefits, for example the decision to segregate certain fund assets to support superannuation income stream benefits.

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[53] There is nothing in the legislative or historical context of the definition of 'Australian superannuation fund' to indicate that the legislature intended that the term CM&C in the context of superannuation funds was to have a different meaning than that in the context of companies.

[54] *Koitaki Para Rubber Estates Ltd v. FCT* (1941) 64 CLR 241 at 244; (1941) 6 ATD 82 at 83-84.

[55] An investment strategy is a plan or policy adopted by the fund for investing the fund's assets to achieve the fund's investment objectives. A fund can have more than one investment strategy. The duty to formulate an investment strategy is contained in paragraph 52(2)(f) of the SISA.

[56] Where permitted by the trust deed, reserves may be maintained by a fund for the purpose of smoothing investment returns to members.

[57] The requirement to formulate a reserving strategy where a fund maintains reserves is set out in paragraph 52(2)(g) of the SISA.

117. The other principal areas of operation of a superannuation fund that form part of the day-to-day or operational side of the fund's activities will not constitute CM&C. These activities do not form part of the CM&C of the fund because they are not of a strategic or high level nature. Rather, these activities are of a more formalistic or administrative nature. Examples of such activities include the acceptance of contributions that are made on a regular basis, the actual investment of the fund's assets, the fulfilment of administrative duties[58] and the preservation, payment and portability of benefits.

118. Furthermore, in accepting such contributions, paying benefits and in the fulfilment of administrative obligations, the prudential requirements in SISA, the governing rules of the fund and other legislative requirements are merely being complied with. As emphasised by the courts in the context of companies, compliance with statutory requirements is not, of itself, sufficient to constitute CM&C but rather is a matter to be taken into account in determining where the CM&C is located. In *Egyptian Delta Land and Investment Company Ltd v. Todd*,[59] the House of Lords held that a company, which was incorporated in England and did nothing in that country beyond fulfilling its statutory requirements, was not a resident of England as its CM&C was in Egypt.

Who exercises the CM&C of the fund?

119. As mentioned above, the majority of superannuation funds operate under a trust structure. According to the general law of trusts, a trust is not a legal person but rather is a collection of rights, duties and powers arising from the relationship to property held by the trustee for the benefit of beneficiaries.[60] Therefore, the trustee is the legal person to that relationship.[61] Since the legal responsibility for operating and managing the fund, including the responsibility for performing the high level duties and actions mentioned in paragraph 116 of this Ruling rests solely with the trustee, it is the trustee of the fund who has the legal obligation for exercising the CM&C of a fund.

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[58] Such as lodging the regulatory and income tax return for the fund, the preparation of financial statements, the audit of the fund and record-keeping.
[59] [1929] AC 1.
[60] Trusts and superannuation funds are given statutory status as entities in themselves under subsection 960-100(1) of the ITAA 1997. See also the definition of 'superannuation entity' in section 10 of the SISA.
[61] To be a regulated superannuation fund within the meaning of the SISA, a superannuation fund must have a trustee – subsection 19(2) of the SISA. The trustee of the fund can be an individual, a group of individuals or a corporate trustee. A 'trustee' for the purposes of the SISA is defined in section 10 of that Act.

120. In the context of companies, the courts have held that the 'bare possession' of the legal right or power to exercise CM&C is not equivalent to taking part in the CM&C of the company.[62] Rather, the focus has been on whether that right or power has been exercised in practice. This is a question of fact. This point was emphasised by Lord Loreburn LC in *De Beers*:[63]

> This is a pure question of fact, to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business or trading.

121. In *Unit Construction Co Ltd v. Bullock (Inspector of Taxes)*[64] (*Unit Construction*), the House of Lords held that the CM&C of three African subsidiaries of a United Kingdom parent company was not exercised by the subsidiary companies' boards even though the boards possessed the legal power to exercise CM&C under each company's constitution. Rather, the court concluded that it was in fact the board of directors of the parent company in London that had exercised the real management and control of the African subsidiaries.[65] In reaching this conclusion, the House of Lords followed the approach laid down in *De Beers*. In the context of the facts in *Unit Construction*, Viscount Simonds stated:[66]

> Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that, in greater or less degree, they are irregular or unauthorised or unlawful. The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution however imperative.

122. In the context of superannuation funds, this same principle applies in that the trustee's duty or responsibility to carry out or perform those activities that constitute CM&C does not, of itself, amount to CM&C. It is only by performing those high level duties and activities that the trustee will be exercising the CM&C in practice.[67] There also may be situations where a person other than the trustee is exercising the CM&C of the fund.

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[62] *Mitchell v. Egyptian Hotels Ltd* [1915] AC 1022 at 1041, per Lord Sumner. See also *Egyptian Delta Land and Investment Company Ltd v. Todd* [1929] AC 1 where it was considered that the mere existence of the capacity for ultimate control was not sufficient to constitute CM&C where the control was not exercised in practice.
[63] [1906] AC 455 at 458.
[64] [1959] 3 All ER 831.
[65] In that case, the directors of the African subsidiaries 'stood aside' from their directorial duties and never purported to function as a board of management.
[66] [1959] 3 All ER 831 at 834.
[67] Since duties are imperative, that is, they compel or prohibit a trustee from acting in a certain way, the failure to fulfil a duty prima facie renders the trustee liable for breach of trust.

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.[68] 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.[69]

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*[70] (*BW Noble*) illustrates this principle.

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[68] The relevant provisions of the trustee legislation are – subsection 64(1) of the *Trustee Act 1925* (ACT); subsection 64(1) of the *Trustee Act 1925* (NSW); subsection 56(1) of the *Trusts Act 1973* (QLD); subsections 25AA(1) and (2) of the *Trustee Act 1898* (TAS); subsection 30(1) of the *Trustee Act 1958* (VIC); subsection 54(1) of the *Trustees Act 1962* (WA); subsection 17(1) of the *Trustee Act 1936* (SA); subsection 3(1) of the *Trustee Act 1907* (SA) as applies in the Northern Territory. The Queensland provision applies notwithstanding anything to the contrary in the trust instrument. In the Northern Territory, South Australia and Tasmania, the ability to delegate applies except where the delegation is expressly prohibited by the trust instrument. In the remaining jurisdictions the ability to delegate applies if and so far as a contrary intention is not expressed in the trust instrument.

[69] Section 198D of the *Corporations Act 2001* states that the directors may, unless the company's constitution provides otherwise, delegate any of their powers to:
- a committee of directors;
- a director;
- an employee of the company; or
- any other person.

[70] (1926) 11 TC 372.

126. In *BW Noble*, full management and control of the business of the company registered in England was vested in the board of directors in London by the company's articles of association, with powers of delegation. The board of directors exercised that power by executing a power of attorney granting one of the directors of the board full power to carry on the company's business in France. The French attorney sent some reports on the progress of the business to the directors in London, and on one or two occasions received the agreement of the board to his proposals. It was held that the CM&C of the company remained with the board of directors in London and had not been shifted to France under the power of attorney. Relevantly, Rowlatt J stated:[71]

> …in my judgment that power of attorney did not and could not, consistently with the Articles, and did not by its tenor, divest the Board in London of their authority; it did not make an independent plenipotentiary who could do what he liked until the power of attorney was determined. It seems to me that although he held the power of attorney, the Directors at any moment could have said to him: 'Well, we do not think under your power you ought to do this; we decide that it shall not be done, although you might have done it under your power of attorney if we had not told you to the contrary'.

127. Similarly, despite the intention to delegate the trustee's duties, the trustee may continue to make the high level decisions in respect of the fund and instruct the delegate to implement those decisions. Or alternatively, the trustee may continue to make those decisions and perform those duties and activities that constitute CM&C themselves. In these situations, the CM&C of the fund would remain with the trustee and would be located where the trustee makes those decisions.

Delegation of the investment management function

128. The trustee of a superannuation fund will often appoint an investment manager to invest the assets of the fund, consistent with the investment strategy of the fund, on behalf of the trustee. Importantly, the investment manager is subject to a prudential requirement under SISA to periodically provide information to the trustee of the fund regarding the making of, and return on those investments and to provide such information as is necessary to enable the trustee to assess the capability of the investment manager to manage the investments of the fund.[72]

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[71] (1926) 11 TC 372 at 410.
[72] Section 102 of the SISA.

129. The delegation of the investment management function to an investment manager does not mean however that the investment manager is exercising the CM&C of the fund in any sense. This is because the trustee is still controlling the operations of the fund by ensuring that the investments of the fund are consistent with the investment strategy of the fund and by monitoring and evaluating the performance of the investment manager. Further, the actions of the investment manager in investing the assets of the fund in accordance with the fund's investment strategy comprise part of the day-to-day or 'operational' side of the operations of the fund rather than the strategic or high level decision making activities of the fund.

130. This view is consistent with the decision of Dixon J at first instance in *Koitaki.*[73] The company in *Koitaki*, which was incorporated in Sydney, owned rubber plantations in Papua. The plantations were managed by an officer of the company who acted under a power of attorney by which the company authorised him to manage, carry on and conduct the company's property, affairs and business. The officer sent weekly reports of the working of the plantations to the chairman of directors in Sydney which is where the directors of the company resided and met. He also periodically sent to the manager of the company in Sydney for presentation to the directors, reports concerning the running of the plantations and the yield of rubber.

131. Dixon J's decision, which was affirmed by the Full High Court on appeal,[74] was that the company was not a resident of Papua as the company's central management and control was not there exercised, despite the responsibilities of the attorney. His Honour stated that the responsibility of the attorney was confined to the production and shipment of rubber and did not extend to the control of the general or corporate affairs of the company or to matters of policy and finance.[75] The matters of policy and finance were matters which in fact formed part of the CM&C of the company as distinct from the day to day management of the production and shipment of rubber. The fact that the performance of the attorney was being monitored from Sydney was also an important consideration in the decision of Dixon J.

Trustee acting on external advice

132. The trustee of a fund may seek external advice relating to the performance of their high level duties and activities in relation to the fund. Provided that the trustee makes the actual decisions for the fund, the circumstance that the trustee acts on or is influenced by such advice does not affect the fact that the trustee is exercising the CM&C of the fund. This view is supported by the decision of Gibbs J at first instance in *Esquire Nominees Ltd v. FC of T* (*Esquire Nominees*).[76]

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[73] *Koitaki Parra Rubber Estates Ltd v. FCT* (1940) CLR 15; (1940) 6 ATD 42.
[74] *Koitaki Parra Rubber Estates Ltd v. FCT* (1941) 64 CLR 241; (1941) 6 ATD 82.
[75] (1940) CLR 15 at 18; (1940) 6 ATD 42 at 45.
[76] (1973) 129 CLR 177; 72 ATC 4076; (1972) 3 ATR 105.

133. In *Esquire Nominees*, his Honour stated that even if it was accepted that the decision makers of the appellant company did what the company's advisers told them to do, it did not necessarily follow that the control and management of the company's affairs lay with the advisers. He acknowledged the possibility that the advisers in *Esquire Nominees* exerted strong influence on the company directors but found that even though the advisers had power to exert influence on the company directors, that power of itself did not amount to the advisers exercising control and management of the company. He also considered that had the advisers instructed the company's directors to 'do something which they considered improper or inadvisable' that he did not believe that the directors would have acted on the instruction. He decided, on the facts of *Esquire Nominees*, that the company directors were the high level decision makers.[77]

Location of the CM&C of the fund

134. The place where the CM&C of the fund is exercised is a question of fact[78] to be determined in light of all the relevant facts and circumstances. The location of the CM&C of the fund is intertwined with identifying who it is that is exercising the CM&C of the fund. This is because the place where the person(s) exercise the CM&C of the fund determines the location of the CM&C of the fund. Hence, in the case of a fund with an individual trustee who exercises the CM&C of the fund, the place where the trustee performs the high level duties and activities that constitute CM&C will determine the location of the CM&C of the fund.

135. Equally, in the case of a fund with a group of individual trustees or a corporate trustee, the place where the trustees (or directors of the corporate trustee) meet will determine where the CM&C of the fund is located, provided that the CM&C of the fund is exercised at those meetings.[79] If the CM&C of the fund is not exercised at the meeting of trustees, it will be located where the strategic and high level decisions and activities are in fact made and carried out.

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[77] In the context of companies, there are a number of other cases which have stated the principle that influence is not the same thing as control and that a board of directors may act under the influence of another person or persons but that does not necessarily mean that the directors have ceased to exercise central management and control. For example, see *Re Little Olympian Each Ways Ltd* [1995] 1 WLR 560; *New Zealand Forest Products Finance NV v. Commissioner of Inland Revenue* [1995] 2 NZLR 357; *Untelrab v. McGregor* [1996] STC (SCD) 1; *Wood and another v. Holden (Inspector of Taxes)* [2006] 1 WLR 1393.

[78] *Unit Construction Co Ltd (Inspector of Taxes) v. Bullock* (1959) 3 All ER 831 at 839, per Lord Radcliffe.

[79] In determining where the CM&C of a company is located, the common law places significant weight on the place where the board of directors meet. For example, *De Beers* and *Koitaki*. However, the courts have also held that the place where the board meets is not necessarily conclusive of the location of CM&C: Lord Radcliffe in *Unit Construction*.

136. If the CM&C of the fund is being exercised by a person or persons other than the trustee, the place where the person(s) performs the strategic and high level duties and activities in relation to the fund will determine the location of the CM&C of the fund (subject to the principles set out in paragraphs 125 to 127 of this Ruling).

137. Where individual trustees or directors of a corporate trustee participate in the CM&C of the fund via electronic facilities[80] (rather than physical attendance), the focus is on where the participants contributing to the high level decisions and activities are located rather than where the electronic facilities are based. This view applies in situations where the trustees or directors conduct a meeting via electronic facilities and in situations where the strategic and high level decisions are facilitated through electronic facilities without the need for an actual meeting (for example, decisions made via email).

138. In these situations, the fact that a majority of the individual trustees or directors of a corporate trustee regularly participate in the CM&C of the fund from a jurisdiction other than Australia would support a conclusion that the CM&C of the fund is not located in Australia (and vice versa where the majority of trustees/directors are located in Australia).

139. The residency status of those who exercise the CM&C of the fund is not relevant in determining the location of the CM&C of the fund.[81]

When is the central management and control of a superannuation fund 'ordinarily' in Australia?

140. Paragraph 295-95(2)(b) of the ITAA 1997 requires the CM&C of the superannuation fund to be 'ordinarily' in Australia at the relevant time. The word 'ordinarily' is not defined. Therefore, consistent with modern principles of statutory interpretation,[82] it is to be given a meaning which reflects the context in which it appears and the purpose or object underlying paragraph 295-95(2)(b).

141. A number of authorities, both in Australia and the United Kingdom, have considered the meaning of the phrase 'ordinarily resident' in statutory contexts such as bankruptcy and income tax. These cases are relevant in determining where the CM&C of a superannuation fund is ordinarily located because they provide an explanation of the meaning of the term 'ordinarily' in resolving questions relating to residency.

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[80] For example, by teleconference or videoconference.

[81] *John Hood and Company Ltd v. Magee* (1918) 7 TC 327. See also comments of Dixon J in *North Australian Pastoral Co Ltd v. Federal Commissioner of Taxation* (1946) 71 CLR 623 at 628.

[82] For example, as expressed in section 15AA of the *Acts Interpretation Act 1901* and in such cases as *CIC Insurance Ltd v. Bankstown Football Club* (1997) 187 CLR 384; *Newcastle City Council v. GIO General Ltd* (1997) 191 CLR 85 and *HP Mercantile Pty Ltd v. Commissioner of Taxation* (2005) 143 FCR 553.

142. In *Re Vassis; Ex parte Leung*[83] (*Re Vassis*), one of the questions under consideration was whether the debtor, who had departed Australia to Greece for two years before returning, was 'ordinarily resident' in Australia within the meaning of subparagraph 43(1)(b)(i) of the *Bankruptcy Act 1966* (Bankruptcy Act) during a period after his departure. Burchett J made the following comment in relation to the meaning of the expression 'ordinarily resident':[84]

> The question where a person is ordinarily resident is a question of fact...It is obviously not to be answered, in respect of any particular time, by asking where that person was then *resident*. Otherwise, the word 'ordinarily' would have no meaning. But even the unqualified concept of residence is not tied to the accidents of a day; for, as Viscount Sumner said in *IRC v. Lysaght* [1928] AC 234 at 245: 'One thinks of a man's settled and usual place of abode as his residence'. At the same time, His Lordship pointed out that 'in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question'. In s 43 of the Bankruptcy Act, the phrase is not 'resident in Australia', but 'ordinarily resident in Australia'…In such a context, it must convey the former of the meanings which I have quoted from Viscount Sumner's speech rather than the latter**. If a man's home is in Australia, a mere temporary absence will not prevent his being 'ordinarily resident in Australia'** It is a question of fact and degree at what point a temporary absence might, if sufficiently prolonged, prevent its being proper to continue to regard him as ordinarily resident in Australia. (emphasis added)

143. On the basis of the evidence, His Honour held that the debtor was 'ordinarily resident' in Australia, both at the time that he departed from Australia, and throughout the period of his departure until his return. Therefore, the journey overseas was no more than a temporary interruption of his ordinary residence in Australia.

144. In *Re Taylor; Ex parte Natwest Australia Bank Limited* (*Re Taylor*)[85] Lockhart J also considered the meaning of the expression 'ordinarily resident' in the context of subparagraph 43(1)(b)(i) of the Bankruptcy Act. The issue in that case was whether the debtor was 'ordinarily resident' in Australia at the time when he committed an act of bankruptcy.

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[83] (1986) 9 FCR 518.
[84] (1986) 9 FCR 518 at 524-525.
[85] (1992) 37 FCR 194.

145. In the three years prior to committing the act of bankruptcy, the debtor travelled frequently from Australia to various countries throughout the world for business reasons and the duration of each absence from Australia ranged from 30 days to 5 months. Subject to one exception, the debtor described himself as an Australian resident either leaving or returning to Australia as the case may be. In considering whether the debtor was 'ordinarily resident' in Australia at the time of committing the act of bankruptcy, Lockhart J stated:[86]

> I shall not attempt to give any comprehensive definition of the word 'resident'. It has no technical or special meaning for the purposes of the Act. Nor do the words 'ordinarily resident' have any such technical or special meaning. They are ordinary English words. Whether a debtor is ordinarily resident in Australia is a question of fact and degree.
>
> …
>
> To say that a person is ordinarily resident in Australia must mean something more than he is resident of Australia. **The word 'ordinarily' connotes a comparison, a measure of degree.** A person may have more than one residence, but he is not ordinarily resident in each of them. The question must be determined for the purposes of s.43 of the Act at a particular time. One must ask the question whether at that time the person was ordinarily resident in Australia. The concept of 'ordinary residence' for the purposes of the Act, in my opinion, connotes a place where in the ordinary course of a person's life he regularly or customarily lives. There must be some element of permanence, to be contrasted with a place where he stays only casually or intermittently. The expression 'ordinarily resident in' connotes some habit of life, and is to be contrasted with temporary or occasional residence…The concept of ordinarily resident cannot be stated in definite terms; each case must be determined on its facts and after taking into account all relevant matters…(emphasis added)

On the basis of the facts of the case, Lockhart J concluded that the debtor was ordinarily resident in Australia at the time he committed the act of bankruptcy.[87]

[86] (1992) 37 FCR 194 at 197-198.
[87] The decision of Lockhart J was affirmed by the Full Federal Court on appeal in *Taylor v. Natwest Australia Bank Ltd* (Unreported, Full Federal Court, Wilcox, Burchett and Foster JJ, 16 October 1992).

146. In both *Re Taylor* and *Re Vassis*, reference was made to the House of Lords decision in *Levene v. IRC*[88] (*Levene*). One of the questions raised in *Levene* was whether the appellant was entitled to an exemption from income tax on War Loan interest under the *Income Tax Act 1918 (UK)* as a person not 'ordinarily resident' in the United Kingdom. In finding that the appellant was 'ordinarily resident' in the United Kingdom for the purposes of the Act, Viscount Cave L.C. stated:[89]

> The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression 'ordinary residence' is found in the *Income Tax Act of 1806* and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; **and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences**. (emphasis added)

147. Accordingly, in terms of paragraph 295-95(2)(b) of the ITAA 1997, establishing whether the CM&C of a superannuation fund is 'ordinarily' in Australia at a particular time is a question of fact and degree. 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. If the CM&C of the fund is only casually or intermittently exercised in Australia, then the CM&C of the fund will not 'ordinarily' be in Australia.

148. However, if the CM&C of the fund is being temporarily exercised outside Australia, this will not prevent the CM&C of the fund being 'ordinarily' in Australia at a particular time, provided that the CM&C of the fund is regularly or usually exercised in Australia.

Central management and control – temporary absences

149. 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.

[88] [1928] All ER Rep 746.
[89] [1928] All ER Rep 746 at 750.

150. The meaning of subsection 295-95(4) is to be determined having regard to the context in which it appears and its underlying purpose or object. Subsection 295-95(4) was inserted into the ITAA 1997 by the *Superannuation Legislation Amendment (Simplification) Act 2007*. Its purpose is to operate as a 'safe harbour' provision for funds (mainly SMSFs) whose trustees are temporarily outside Australia for 2 years or less and who exercise the CM&C of the fund outside Australia during that period. As outlined in the Explanatory Memorandum (EM) to the Superannuation Legislation Amendment (Simplification) Bill 2007 at paragraph 3.8:

> To provide certainty to trustees of superannuation funds, especially trustees of self-managed superannuation funds (for whom the old 'two-year temporary absence rule' was mainly directed), a provision is inserted into the definition of 'Australian superannuation fund', which explains that a superannuation fund is considered ordinarily in Australia even if the central management and control is temporarily outside Australia, where it is for a period of less than two years.

151. The effect of subsection 295-95(4) of the ITAA 1997 is to provide one set of circumstances in which the CM&C of the fund will be taken to be ordinarily in Australia at a time for the purposes of paragraph 295-95(2)(b) of the ITAA 1997. However, the provision is not of itself an exhaustive list or set of circumstances which would satisfy the requirements of paragraph 295-95(2)(b). Apart from operating as a 'safe harbour rule', it does not otherwise restrict or limit the meaning of 'ordinarily' in paragraph 295-95(2)(b) so that the CM&C of the fund can only be outside Australia for a period of 2 years or less. As noted in paragraph 147 of this Ruling, whether the CM&C of the fund is 'ordinarily' in Australia at a particular time is a question of fact and degree.

152. Absences of more than 2 years will need to be taken into account in the context of determining if, as a matter of fact and degree, the CM&C of the fund is still 'ordinarily' located in Australia. Put another way, if the CM&C of the fund is outside Australia for a period greater than 2 years, the fund will satisfy paragraph 295-95(2)(b) of the ITAA 1997 if it satisfies the 'ordinarily' requirement. An example of such a situation was provided in the EM to the Tax Laws Amendment (Simplified Superannuation) Bill 2006:

> **Example 3.1**
>
> A married couple are trustees of their self-managed superannuation fund that was established in 2001. In July 2007 the husband accepts a two year employment contract to work for an overseas government, intending to return to Australia after the contract is fulfilled. His wife joins him for the term of his contract. They make no contributions to the fund after leaving Australia.
>
> In these circumstances it is accepted that the central management and control of the self-managed superannuation fund is ordinarily in Australia and the self-managed superannuation fund will be treated as an Australian superannuation fund. If the husband's employment contract was continually extended so that the couple remained overseas for a period considerably in excess of two years, central management and control of the self-managed superannuation fund would not ordinarily be in Australia and the self-managed superannuation fund would not be treated as an Australian superannuation fund.

153. While the CM&C of the fund can be outside Australia for a period greater than 2 years such that subsection 295-95(4) of the ITAA 1997 does not apply, it is clear from the context in which the term 'ordinarily' appears that the period of absence of the CM&C from Australia must be 'temporary'. This view is also supported by the purpose or object underlying paragraph 295-95(2)(b) of the ITAA 1997 as disclosed in the EM to the Tax Laws Amendment (Simplified Superannuation) Bill 2006. In explaining the changes to the operation of the CM&C test from the way it previously operated, the EM states:[90]

> The definition of Australian superannuation fund does not use this alternative test [the two-year temporary absence rule]. It deals with **temporary absences of trustees** by requiring that the central management and control of the fund *ordinarily* be in Australia. Satisfying the current two-year temporary absence rule described above…would normally satisfy the *ordinarily* requirement. (emphasis added)

154. From this, it follows that if the CM&C of a fund is only being exercised overseas and the absence from Australia is not temporary, then the CM&C will also not be ordinarily in Australia at a time within the meaning of paragraph 295-95(2)(b) of the ITAA 1997 even if the period of absence is 2 years or less.

When is the central management and control of a fund 'temporarily' outside of Australia for the purposes of subsection 295-95(4)?

155. The word 'temporarily' in subsection 295-95(4) of the ITAA 1997 is not defined in the ITAA 1997. Therefore, it takes its meaning from the context in which it appears.

156. While there is no case law which has considered the meaning of 'temporarily' in subsection 295-95(4) of the ITAA 1997, a number of cases have considered whether a person's absence from Australia was 'temporary' for the purposes of social security legislation. These cases are relevant in the context of subsection 295-95(4), particularly in cases involving SMSFs, because it is the individual trustee or trustees or directors of the corporate trustee of the fund that normally exercises the CM&C of the fund. The cases are also relevant because they consider the meaning of 'temporary' in the context of residence.

157. In *Hafza v. Director-General of Social Security* (*Hafza*),[91] Wilcox J considered whether the taxpayer's absence from Australia was 'temporary' for the purposes of subsection 103(1) of the *Social Services Act 1947*. That section provided that child endowment was not payable to a person outside Australia unless that person's usual place of residence was in Australia or the person's absence from Australia was temporary only.

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[90] At paragraph 3.93.
[91] (1985) 60 ALR 674.

158. The taxpayer in *Hafza* travelled from Australia to Lebanon with her husband and children in April 1978 for a visit which was intended to last for three months. The family however did not return to Australia until June 1982. Upon her return, the taxpayer sought payment of child endowment for the period of absence from Australia on the basis that her absence was temporary only and that she did not cease to have her usual place of residence in Australia.

159. Wilcox J stated the following in relation to the meaning of the word 'temporary':[92]

> …I think that the adjective 'temporary' was used to denote an absence that was, **both in intention and in fact,** limited to the fulfillment of a passing purpose. The purpose might be of a business or professional nature; it might be for a holiday or for compassionate or family reasons. But, whatever the purpose, it seems to me to be implied in the concept of 'temporary' absence that the absence will be relatively short and that its duration will be either defined in advance or be related to the fulfillment of a specific, passing purpose. If, for example, a businessman travels overseas for a period of three months to engage in sales discussions, intending always to return to his usual home in Australia and in fact returning at the end of that period, there is no difficulty about describing his absence as 'temporary'. If that same person moves himself and his family to an overseas location, intending to remain there indefinitely in pursuit of business orders, his absence would not properly be described as 'temporary'; and I think that this is so even if, after two months for family or personal reasons, he decides to abandon his overseas home and return to Australia. Under such circumstances the absence from Australia would have turned out to be of limited duration, but it would not have been in fulfillment of a passing need.
>
> The intention to return to Australia at the expiration of a particular time -- being, in recognition of the word 'passing', relatively short – will normally be a feature of an absence which…may properly be described as temporary. There may, however, be exceptions. A person may travel overseas to fulfill a particular purpose which is expected to occupy a relatively short time, the exact extent of which is not known in advance and with the intention thereafter of returning to Australia. An example would be to undertake a particular journey or to attend the bed of a sick relative. I see no problem about describing such an absence as a 'temporary' absence from Australia because it is a short term absence to fulfill a particular purpose.
>
> I think that it follows from my view as to the meaning of the word 'temporary' that the intention of the absentee is of considerable importance; indeed, it will often be decisive. If the businessman on his world sales tour should decide to abandon his plan to return to Australia at the expiration of three months and to remain indefinitely in New York, his absence from Australia will cease to be a temporary absence. It will become an indefinite absence, notwithstanding that it may turn out not to be a permanent absence. Similarly, if an endowee, who has left Australia upon a compassionate visit to a sick relative, should decide indefinitely to stay on at the relative's home after the completion of that purpose, the absence will cease to be temporary notwithstanding an intention eventually to return to Australia. (emphasis added)

[92] (1985) 60 ALR 674 at 682-683.

160. On the basis of the facts of the case, His Honour held that the taxpayer's absence, from the time her husband commenced employment in Lebanon (which was sometime in 1979) was not a temporary absence. Some of the important factors that supported this conclusion included the facts that the taxpayer and her husband had no assets in Australia, did not hold return air tickets, that they resided with the taxpayer's husband's family in Lebanon, that the children attended the local school in Lebanon and that the taxpayer's husband engaged in paid employment involving his travelling to a number of other countries.

161. Wilcox J's view as to the meaning of 'temporary' in *Hafza* is consistent with the views of the Administrative Appeals Tribunal in *Re Houchar and Director-General of Social Security*[93] (*Re Houchar*) in relation to whether an absence was temporary for the purposes of the same provision of the *Social Services Act 1947*. In this case, the taxpayer and her children departed Australia in March 1977 to the village in Lebanon in which the taxpayer was born. The taxpayer was joined by her husband in October 1977. It was intended that they would be returning to Australia after about 12 months from the date of the husband leaving Australia. The taxpayer and her family returned to Australia in March 1982.

162. In determining whether the taxpayer's absence from Australia was temporary, the Tribunal stated:[94]

> …The question whether a person's absence from Australia is temporary must be resolved by the application of objective criteria. Most important among them must be his intentions from time to time, as ascertained objectively from all the evidence available to the decision-maker…For a person's absence from Australia to be 'temporary only' for the purposes of sections 103 and 104 it must be intended not to last indefinitely. The intention may change during the period of absence…
>
> Probably, if a person intends that the period of his absence should be related to a certain event (for example the completion of a certain task or the exhaustion of his funds), he should be taken to intend not to be absent indefinitely. There is, however, also another element in the concept of temporariness: that is transience. For an absence to be temporary, not only must it be intended not to last indefinitely but the time for which it is intended to last must not be of great length. That involves considerations of questions of degree which must be decided by reference to all the circumstances of the particular case. Once a person's absence has come to an end by his return to Australia, it obviously has not lasted indefinitely. It may not have lasted as long as another person's absence which has been accepted as temporary. However, the question whether it was 'temporary only' has to be decided not by viewing it in retrospect but by reference to the person's intention during his absence, or rather to his intention at different stages of the absence.

[93] (1984) 5 ALN No 308.
[94] (1984) 5 ALN No 308 at N452.

163. On the basis of the facts of the case, the Tribunal held that the taxpayer was not eligible for child endowment for any part of the period she was absent from Australia as she ceased to have her usual place of residence in Australia and her absence from Australia was not 'temporary only'.

164. Taking into account the context in which the term 'temporarily' appears in subsection 295-95(2) of the ITAA 1997 and the purpose underlying subsection 295-95(4) of the ITAA 1997 as discussed at paragraph 150 of this Ruling, the views expressed in *Hafza* and *Re Houchar* as to whether an absence is temporary are applicable in determining whether a fund's CM&C is 'temporarily' outside Australia.

165. Accordingly, 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 in fact) to the fulfilment of a specific, passing purpose. Whether a period of absence is considered to be relatively short involves considerations of questions of degree which must be decided by reference to the circumstances of each particular case. The intention to return to Australia at the expiration of a particular time will normally be a feature of a temporary absence.

166. Whether an absence is temporary must be established on a 'real time' basis. It cannot be established in retrospect. Further, the test must be applied at all relevant times because the intention of the relevant persons may change during the relevant period of absence from Australia.

167. Ultimately, whether a fund's CM&C is temporarily outside Australia in a particular situation is a question of fact to be determined in light of all the circumstances of each case.

168. Notwithstanding this, the following factors have been considered relevant by the Courts and the Administrative Appeals Tribunal when determining whether an absence is temporary for the purposes of social security legislation. For the reasons stated above, these factors are also relevant in considering whether the CM&C of a fund is temporarily outside Australia:

(a) the intended and actual length of stay in the overseas country of the person or persons who exercise the CM&C of the fund;

(b) any intention of the person or persons exercising the CM&C of the fund to return to Australia at some definite point in time or to travel to another country;

(c) whether the person or persons exercising the CM&C of the fund have established a home (in the sense of a dwelling place; a house or other shelter that is a fixed residence) outside Australia;

(d) whether any residence or place of abode exists in Australia or has been abandoned because of the overseas absence; and

(e) the durability of association that the person or persons exercising CM&C have with a particular place in Australia, for example maintaining bank accounts in Australia, place of education of children and so on.

169. While the weight to be given to each factor will vary with the individual circumstances of each case, it is clear from *Hafza* and *Re Houchar* that the intention of the person or persons exercising the CM&C of the fund, as ascertained objectively from the facts of the case, will be of considerable importance and will often be decisive in determining whether the CM&C of the fund is temporarily outside Australia. The duration of an individual's stay or intended stay outside Australia is not of itself conclusive and must be considered with all other relevant factors. The fact that the person or persons exercising the CM&C of the fund know that they will be returning to Australia at a definite point in time does not, of itself, mean that the CM&C is temporarily outside Australia.

170. The factors mentioned in paragraph 168 of the Ruling are equally relevant in determining whether the CM&C of the fund is 'ordinarily' in Australia for the purposes of paragraph 295-95(2)(b) of the ITAA 1997. As mentioned in paragraph 154 of this Ruling, if the CM&C of a fund is outside of Australia, but not on a temporary basis, then the conditions of paragraph 295-95(2)(b) will not be satisfied.

Can the CM&C of a fund be 'ordinarily' in Australia and another country at the same time?

171. In the context of superannuation funds, particularly SMSFs with 2 or 4 individual trustees or directors of a corporate trustee that is trustee of the fund, there may be situations where there is an equal number of trustees/directors both in Australia and overseas who participate in the CM&C of the fund.[95] The question therefore arises as to whether the CM&C of the fund is 'ordinarily' in Australia in these situations. There is no case law which has dealt with such a question.

[95] When the definition of an SMSF was inserted into the SISA, it was stated that the purpose or object of requiring all members of SMSFs to be trustees was to ensure that each member is fully involved and has the opportunity to participate equally in the decision making processes of the fund – see the Explanatory Memorandum to the Bill which became the *Superannuation Legislation Amendment Act (No.3) 1999*. Therefore, it is possible that situations will occur where there is an equal number of trustees both in and outside Australia who participate in the CM&C of a superannuation fund.

172. In the context of companies, the courts have acknowledged the possibility that the company's CM&C could be divided between two or more places.[96] This is where control of the company's general affairs (that is, 'the superior or directing authority by means of which the affairs of the company are controlled'[97]) is located in several places, and the control of the company's general affairs is divided between the places in such a way that on the facts it is not 'centred' in one place in particular.

173. The courts have also expressed the view that a person can be 'ordinarily resident' in more than one place or country at the same time. For example, in *Re Taylor*, Lockhart J made the following observations:[98]

> At first blush it may seem strange to say that a person can be ordinarily resident in more than one country at the same time; but on closer analysis it is not. Plainly you cannot be physically present in more than one place at the same time. But the lifestyles of people vary greatly. Some people in the ordinary pursuit of their lives regularly or customarily live in more than one place, each of which has an element of permanence about it and is not merely a place of casual or intermittent resort.
>
> …It may, depending on the circumstances, be permissible to say that at a particular time they are ordinarily resident in each of the places…

174. In light of the case law authority for both the proposition that the CM&C of a company can be divided between two or more places and the proposition that a person can be ordinarily resident in more than one place at the same time, it is considered that, by analogy, the CM&C of a superannuation fund can 'ordinarily' be in more than one place at the same time. Whether this is the case is a question of fact and degree and will depend on the circumstances of each particular case.

175. Accordingly, in those situations where there is an equal number of individual trustees or directors of a corporate trustee of a superannuation fund both in Australia and overseas and each of those trustees/directors *substantially and actively* participate in the CM&C of the fund, the CM&C of the fund will 'ordinarily' be in Australia within the meaning of paragraph 295-95(2)(b) of the ITAA 1997, even though the CM&C of the fund is also ordinarily being exercised overseas.

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[96] *The Swedish Central Railway Company Ltd v. Thompson* (1925) 9 TC 342; *Egyptian Delta Land and Investments Company Ltd v. Todd* [1929] AC 1; *Koitaki Parra Rubber Estates Ltd v. FCT* (1940) 64 CLR 15 at 19; (1940) 6 ATD 42 at 45, per Dixon J; (1941) 64 CLR 241 (Full High Court).

[97] *Koitaki Parra Rubber Estates Ltd v. FCT* (1940) 64 CLR 15 at 19; (1940) 6 ATD 42 at 45, per Dixon J.

[98] (1992) 37 FCR 194 at 198.

176. In determining whether the relevant trustees or directors had substantially and actively participated in the CM&C of the fund, regard must be had to the types of activities undertaken by each of the trustees/directors and whether those activities in fact did form part of the strategic and high level decision making functions of the fund. In cases where the trustees/directors in one location passively accept the decisions made by the trustees/directors in another location, it cannot be said that the passive trustees/directors are participating in the CM&C of the fund.[99]

The 'active member' test

177. The third test that a fund is required to satisfy to be an Australian superannuation fund is the 'active member' test in paragraph 295-95(2)(c) of the ITAA 1997. The 'active member' test is satisfied if, at the relevant time, either the fund has no member covered by subsection 295-95(3) of the ITAA 1997 (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.

178. The terms of paragraph 295-95(2)(c) of the ITAA 1997 therefore contemplate two situations:

- the first situation is that the fund has no active members at a particular time. In this case, paragraph 295-95(2)(c) is satisfied at that time; and
- the second situation is where the superannuation fund does have an active member (as defined in subsection 295-95(3) of the ITAA 1997 and further discussed in paragraphs 183 to 195 of this Ruling). In such a situation, the conditions in subparagraphs 295-95(2)(c)(i) and (ii) of the ITAA 1997 must be considered to determine whether the fund satisfies the active member test.

179. A fund with an active member can apply either method in subparagraphs 295-95(2)(c)(i) and (ii) of the ITAA 1997 to determine whether it satisfies the active member test.

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[99] See for example *Malayan Shipping Company Ltd v. Commissioner of Taxation* (1946) 71 CLR 156; (1946) 8 ATD 75. Note that trustees that passively accept the decisions made by other trustees are still liable for those decisions: *Deputy Commissioner of Taxation (Superannuation) v. Fitzgeralds* [2007] FCA 1602.

Superannuation interests

180. 'Superannuation interest' is defined, relevantly, as 'an interest in a superannuation fund'.[100] It is beyond the scope of this Ruling to discuss the meaning of 'superannuation interests'. The Commissioner's view as to what constitutes a 'superannuation interest' in a superannuation fund is set out in a fact sheet titled 'How many superannuation interests does a member of a superannuation fund have in their fund?'[101]

Australian resident

181. 'Australian resident' in paragraph 295-95(2)(c) of the ITAA 1997 means a person who is a resident of Australia for the purposes of the ITAA 1936.[102] The term 'resident of Australia' is defined in subsection 6(1) of the ITAA 1936 in relation to both individuals and companies. It is outside the scope of this Ruling to discuss the meaning of resident of Australia so far as an individual is concerned. A number of other rulings issued by the Tax Office discuss the issue of residency in relation to individuals.[103] For present purposes, it is sufficient to note that the definition, in effect, provides four tests to ascertain whether an individual is a resident of Australia, satisfaction of any one being sufficient to render an individual an Australian resident:

- residence according to ordinary concepts;
- the domicile and permanent place of abode test;
- the 183 day test; or
- the Commonwealth superannuation fund test.

182. A 'foreign resident' is a person who is not a resident of Australia for the purposes of the ITAA 1936.[104]

Definition of 'active member'

183. Subsection 295-95(3) of the ITAA 1997 sets out the definition of 'active member' for the purposes of the 'active member' test in paragraph 295-95(2)(c) of the ITAA 1997. Subsection 295-95(3) states:

> A member is covered by this subsection at a time if the member is:
>
> (a) a contributor to the fund at that time; or

---

[100] See the definition of 'superannuation interest' in subsection 995-1(1) of the ITAA 1997.
[101] This fact sheet is available at www.ato.gov.au/super.
[102] Subsection 995-1(1) of the ITAA 1997.
[103] Taxation Rulings IT 2615 Income tax: Medicare Levy – test for Australian residency – payable by Australians living overseas and by visitors to Australia; IT 2650 Income tax: Residency – permanent place of abode outside Australia; IT 2681 Income tax: residency status of business migrants and Taxation Ruling TR 98/17 Income tax: residency status of individuals entering Australia.
[104] Subsection 995-1(1) of the ITAA 1997.

(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.

Contributor to the fund at that time

184. The term 'contributor' in subsection 295-95(3) of the ITAA 1997 is not defined. Therefore, it takes its meaning from the context in which it appears.

185. In the case of a superannuation fund, a 'contributor' is an individual who makes a contribution for the purpose of providing for future retirement or superannuation benefits (see paragraphs 196 to 198 of this Ruling for a discussion on the meaning of 'contribution'). It appears from the context of the provisions that the focus of the test is on the *status* of the member as a contributor at a particular point in time, and not actually on the specific act of contributing. Further, the amount of the contribution that is made by the member is irrelevant for the purposes of determining whether the member is a contributor.

186. Whether a member of a superannuation fund is a contributor to the fund at a particular time is to be objectively determined with reference to all of the relevant circumstances of the member. Particular regard should be had to the member's intention established by reference to objective evidence. Relevant 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.

187. For example, the member may intend to and actually make personal contributions on a regular or periodic basis.[105] In such a situation, the member would be a contributor for the purposes of subsection 295-95(3) of the ITAA 1997, not only at the actual point in time the contribution is made to the fund but also for the period of time between the making of the contributions.

188. If it is established on the facts of the case that a member that had been making contributions to the fund over a period of time intends to and in fact ceases to make any further contributions, then the member would no longer be a 'contributor' from the time they formed that intention. If that member later intends to and actually makes any further contributions, then the member's status as a 'contributor' is reinstated.

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[105] In some superannuation funds, mostly public sector superannuation schemes, the members of those schemes are under an obligation to make personal contributions on a periodic basis, for example, fortnightly. In other types of funds, such as an SMSF, the members may make contributions over an extended period of time although not on a regular or periodic basis such as that described in respect of public sector superannuation schemes.

189. If the member is a contributor to the fund at a particular time, they will be an active member within the meaning of subsection 295-95(3) of the ITAA 1997, irrespective of whether the member is an Australian resident or foreign resident.

An individual on whose behalf contributions have been made

190. Subject to the exception relating to foreign residents (which is discussed in paragraphs 191 to 194 of this Ruling), an individual on whose behalf contributions have been made will be an active member (paragraph 295-95(3)(b) of the ITAA 1997).

191. If the member is a foreign resident and a contribution is made on their behalf after they became a foreign resident, they will only be an active member at the relevant time if the contribution is made in respect of the time when the individual was a foreign resident. If the contribution to the fund is in respect of a period of time when the individual was an Australian resident, they will not be an active member at the relevant time (subparagraph 295-95(3)(b)(iii) of the ITAA 1997).

192. The phrase 'in respect of' in subparagraph 295-95(3)(b)(iii) of the ITAA 1997 conveys or contemplates some nexus or connection between one thing and another. The meaning of the expression, and hence the nature of the connection that is to be established between the two things, depends on the context in which the words are found.[106] The context in this situation includes having regard to the purpose or object underpinning the predecessor provision to paragraph 295-95(3)(b) of the ITAA 1997.[107]

193. Subsection 295-95(3)(b) of the ITAA 1997 substantially reflects the terms of former subsection 6E(4B) of the ITAA 1936. Subsection 6E(4B) of the ITAA 1936 was enacted by the *Taxation Laws Amendment Act (No. 6) 2001*. In the EM to the Taxation Laws Amendment Bill (No. 6) 2001, it was stated that:

> 4.6 The amendment provisions will … enable a non-resident member to receive superannuation contributions in respect of a period in which they were a resident member without them subsequently becoming a non-resident active member.
>
> …

[106] See comments by Wilson and Gaudron JJ in *The Workers' Compensation Board of Queensland v. Technical Products Pty Ltd* (1988) 165 CLR 642 at 646-7.

[107] In *Newcastle City Council v. GIO General Limited* (1997) 191 CLR 85 at 112, McHugh J stated that it was permissible to have regard to the words used by the legislature in their legal and historical context so as to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.

Example 4.2

Mark, John and Harry are members of the MJH Superannuation Fund and are all Australian residents. Harry's employer makes a superannuation contribution for Harry in July. Harry ceases to be a resident of Australia in August. From that time on Harry is not a contributor to the fund and does not have any contributions made to the fund on his behalf. He is therefore not an active member at any stage during that time. In October a further contribution is made for Harry by the employer in relation to work carried out by him in July. As Harry is not a resident and both the July and October contributions relate to a period when Harry was a resident, he does not become a non-resident active member because of the contributions.

194. Having regard to the policy rationale underpinning former subsection 6E(4B) of the ITAA 1936, the requisite connection in subparagraph 295-95(3)(b)(iii) of the ITAA 1997 must be established between the contribution and a period of time during which the member was an Australian resident. It is considered that a contribution will be made 'in respect of' a time when an individual was an Australian resident within the meaning of subparagraph 295-95(3)(b)(iii) of the ITAA 1997 if the entitlement to that payment arises at that time. In the example from the EM outlined above, Harry's entitlement to the further contribution that is made on his behalf in October arises at the time he carried out the work in July. At that time, Harry was a resident of Australia.

'Contributions' holiday

195. A member of a fund will also be an active member at a particular time if the member's employer is on a 'contributions holiday'. In broad terms, a 'contributions holiday' exists where a defined benefit superannuation scheme is in surplus (that is, broadly, that the assets of the scheme exceeds its liabilities) and the employer is not required to make contributions until that surplus is reduced.

Meaning of 'contribution'

196. The term 'contributions' in subsection 295-95(3) of the ITAA 1997 is not defined. Therefore, its meaning is to be derived from its context. For the purposes of subsection 295-95(3) of the ITAA 1997, the context in which the meaning of the word 'contribution' is relevant is Part 3-30 of the ITAA 1997.

197. Part 3-30, which was inserted into the ITAA 1997 by the *Tax Laws Amendment (Simplified Superannuation) Act 2007*, provides the legislative scheme for the taxation of superannuation in all phases of the superannuation cycle, that is the contributions phase, investments phase and the benefits phase. There are a number of provisions within Part 3-30 which contain a reference to contribution. Relevantly, they include:

- section 290-5 of the ITAA 1997 – which states that the rules in Division 290 of the ITAA 1997 for deductions and tax offsets for superannuation contributions do not apply to the contributions mentioned in section 290-5;
- sections 292-25 and 292-90 of the ITAA 1997 – which sets out an individual's 'concessional' and 'non-concessional' contributions for a financial year;
- section 292-465 of the ITAA 1997 – which provides for the Commissioner's discretion to disregard or allocate to another financial year, an individual's concessional and non-concessional contributions;
- sections 295-155 and 295-160 of the ITAA 1997 – which explains the types of contributions that are assessable to a superannuation entity; and
- section 295-610 of the ITAA 1997 – which explains the amounts that are 'no-TFN contributions income'.

198. When these provisions are analysed, it is clear that the term 'contribution' has a very broad meaning. Accordingly, when interpreted in the context of the aforementioned provisions in Part 3-30 of the ITAA 1997, 'contributions' in subsection 295-95(3) of the ITAA 1997 would include such amounts as:

- direct cash payments made by an employer or an individual to the fund;
- a transfer of property (or other asset) to the fund 'in-specie' by an employer or individual;[108]
- spouse contributions;
- Government co-contributions;
- superannuation guarantee shortfall amounts – these amounts form part of the superannuation guarantee charge collected by the Commissioner and paid to a superannuation fund under the *Superannuation Guarantee (Administration) Act 1992* when an employer fails to make sufficient superannuation contributions to a complying superannuation fund or Retirement Savings Account;

[108] Section 285-5 of the ITAA 1997 states that a contribution can be or include a transfer of property.

- transfers from the Superannuation Holdings Account Special Account – this occurs when an individual's account balance in the SHASA is transferred to a superannuation fund;[109]
- a roll-over superannuation benefit – in relation to superannuation funds, this is a superannuation lump benefit paid from one complying fund to another complying fund at the direction of the member;[110]
- a directed termination payment – these are transitional 'employment termination payments' that an employee directs the employer to pay to a superannuation fund on behalf of the employee;[111] and
- 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.

What are the consequences of a fund ceasing to be a complying fund because it fails to satisfy the residency test?

199. A fund that ceases to be a complying superannuation fund in a particular year of income because it fails to satisfy the definition of Australian superannuation fund at a particular time faces a number of taxation consequences. In the income year that it becomes non-complying, it must include in its assessable income an amount equal to the total of the market values of the fund's assets (as calculated just before the start of the income year), less any crystallised undeducted contributions made between 30 June 1983 and 30 June 2007 and any non-concessional contributions made from 1 July 2007.[112] This amount is taxed at the highest marginal tax rate.

200. Furthermore, the fund is not eligible for the tax concessions available to a complying superannuation fund. For example, for every income year that the fund remains non-complying, its income is taxed at the highest marginal tax rate.

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[109] Under section 61 or 61A of the *Small Superannuation Accounts Act 1995*.
[110] The definition of 'roll-over superannuation benefit' is contained in section 306-10 of the ITAA 1997.
[111] Section 82-10F of the *Income Tax (Transitional Provisions) Act 1997*. Since transitional termination payments cannot be received on or after 1 July 2012, such payments cannot be directed to a superannuation fund from that date.
[112] Item 2 of the table in section 295-320 of the ITAA 1997 and section 295-325 of the ITAA 1997.

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Previous draft:

Previously released as TR 2008/D5

Related Rulings/Determinations:

IT 2615; IT 2650; IT 2681;
TR 98/17; TR 2006/10;
TR 2018/5

Subject references:

- complying superannuation funds
- self managed superannuation funds
- superannuation fund residency

Legislative references:

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