TR 2008/9EC - Compendium

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Ruling Compendium – TR 2008/9

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2008/D5 – Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the *Income Tax Assessment Act 1997*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	*Roll-over superannuation benefit* Can an example be included in the Ruling which covers the scenario whereby a non-resident member of an SMSF: (a) rolls-over existing Australian superannuation benefits into the SMSF that were obtained during a period of Australian residence; (b) rolls-over existing Australian superannuation benefits into the SMSF that were obtained during a period of non-residence; and (c) rolls-over foreign superannuation benefits into the SMSF that were obtained during a period of non-residence.	*Example not included* It is implied in this question that it may be possible for the exception in paragraph 295-95(3)(b) of the *Income Tax Assessment Act 1997* (ITAA 1997) to apply in circumstances where a member rolls over their existing benefits into an SMSF. It is considered that a roll-over superannuation benefit is a contribution made by the member, not a contribution made on behalf of the member. Since the roll-over is not a contribution made on behalf of the member, the rule in subparagraph 295-95(3)(b)(iii) of the ITAA 1997 has no application. Therefore, an example has not been included to cover this scenario. Further, the active member test must be applied from the point of view of the superannuation fund receiving the roll-over superannuation benefit. Hence, where a member rolls-over a superannuation benefit, the member will be a contributor to the receiving fund within the meaning of paragraph 295-95(3)(a) of the ITAA 1997. Whether or not the member is an Australian resident will not affect this conclusion.
2	*Roll-over superannuation benefit* Where a non-resident member of an SMSF rolls over superannuation benefits which comprise contributions made when the member was a resident, from a complying superannuation fund into the SMSF, does the fact that the roll-over includes earnings derived during the period of the non-residency of the individual taint the roll-over as relating to the period when the member was a resident?	See comment at issue no. 1 above. A roll-over superannuation benefit is a contribution made by the member. Accordingly, subparagraph 295-95(3)(b)(iii) of the ITAA 1997 has no application.

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3	*Taxation of previously complying superannuation funds* Does the formula in section 295-325 of the ITAA 1997 extend to include the tax-free component of a superannuation benefit or is it still restricted to subtracting undeducted/non-concessional contributions?	The formula in section 295-325 of the ITAA 1997 is quite specific. Although the tax-free component is defined to include the entire amount of the contributions segment and the crystallised segment (see section 307-210 of the ITAA 1997), only the sum of *the part of* the crystallised undeducted contributions that relates to the period after 30 June 1983 and the contributions segment for current members at that time so far as they have not been and cannot be deducted are taken into account under 295-325. Those amounts are subtracted from the sum of the market values of the fund's assets just before the start of the income year in which the fund became non-complying. No other component is included within the formula.
4	*Delegation of trustees duties and powers* The ruling should discuss whether a trustee of an SMSF can delegate their duties and powers and the legal methods available to achieve this. This discussion should make reference to the State and Territory trustee legislation to ensure that trustees don't uncritically assume that a delegation is an open-ended arrangement.	*Discussion included* Paragraph 123 has been added to the Ruling to discuss whether individual trustees and directors of a corporate trustee can delegate their duties and powers. In the case of individual trustees, the discussion makes reference to the relevant statutory delegation provisions of the State and Territory trustee legislation whilst in the case of directors of a corporate trustee, the discussion makes reference to the relevant provisions of the C*orporations Act 2001*. However, an in-depth analysis of the nature and scope of the circumstances in which trustees or directors can delegate their duties and powers is beyond the scope of the Ruling. In the case of individual trustees, such an analysis requires an examination of the trust deed of the fund, the provisions of the SISA and the relevant State and Territory Trustee's legislation. In the case of directors of a corporate trustee, such an analysis requires an analysis of the constitution of the company, the provisions of the SISA and the *Corporations Act 2001.* This point has been noted in the Ruling (see footnote 7).

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		It is also outside the scope of the Ruling to discuss the methods by which a delegation of trustee (or director) duties may be validly effected. However it is noted that under the trustee legislation of each state and territory, a delegation of a trustee's powers and duties pursuant to statute must be effected by way of power of attorney. Reference to the relevant provisions in the State and Territories trustee legislation is included at paragraph 123 of the Ruling in footnote 68.
5	*Dominant individuals* There should be a high level discussion in the Ruling of dominant individuals in the context of SMSFs.	*Further discussion not included* Paragraphs 22-24; 119-122 and 27; 134-139 of the Ruling sets out the principles to determine who actually exercises the central management and control (CM&C) of a fund in practice and the location of that CM&C respectively. As is noted in those paragraphs these issues are questions of fact. In light of the nature of the test, further discussion in the Ruling of 'dominant individuals' was not warranted. If it was in fact established that a 'dominant individual' in an SMSF context was making all the high level decisions for the fund and the other trustee or trustees did not participate in that decision making, it is only the controlling individual trustee who would be exercising the CM&C of the fund and not the other trustees. The Tax Office notes however that refraining from participating in the decision making processes of the fund does not operate to discharge the trustee's obligations under the SISA. In cases where there is a contravention of the SISA all of the trustees of an SMSF could be liable for penalties even if they have not actively participated in the decision making process: *Deputy Commissioner of Taxation (Superannuation) v. Fitzgeralds* [2007] FCA 1602.

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6	*Location of CM&C – artificial or contrived outcome* The Ruling should provide some discussion to clarify whether an arrangement involving a non-resident trustee returning to Australia on an annual basis to make all the high level and strategic decisions for their fund constitutes an artificial or contrived outcome. This question is raised as many non-resident trustees of SMSFs who permanently reside overseas will regularly return to Australia to meet with their financial adviser to review the fund's investment strategy and to make other strategic decisions in relation to the fund. Providing guidance on this issue will assist trustees to understand what their options are when they go overseas and to ensure that their fund does not fail the CM&C test.	*Discussion not included* The Ruling states that the place where the high level decisions are made and other high level duties and activities performed in respect of the fund will determine the location of the fund's CM&C (see paragraphs 27 and 134 to 139). Establishing where the high level decisions and activities are made and carried out is a question of fact to be determined by reference to all the relevant circumstances of each case. It is also stated in the Ruling that the residency status of those who exercise the CM&C of the fund does not determine the location of the CM&C of the fund (see paragraph 139). The principles set out in the Ruling that are applied to determine the location of the CM&C of a fund should assist trustees to determine where the CM&C of their fund is located at a particular point in time. Therefore, if absent trustees of a superannuation fund return to Australia and exercise the CM&C of the fund here, then the CM&C will be in Australia. Evidence of exercising CM&C in Australia during the trustee's visit could include meeting with the financial adviser to review the fund's investment strategy and to make other strategic decisions in relation to the fund.
7	*Location of CM&C – further clarification* Paragraph 30 of TR 2008/D5 specifies that 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. This seems to imply that a fund's CM&C will be related to where the trustees who exercise that control reside, rather than where the high level and strategic decisions of the fund are made. If this is the intention of paragraph 30 it would contradict paragraph 25 which outlines the location of CM&C.	*Changes made* It wasn't the intention of paragraph 30 in TR 2008/D5 to imply that a fund's CM&C will be determined by reference to where the trustees who exercise that control and management reside. Nor was it intended to imply that the CM&C of a fund is automatically outside Australia where the trustees are outside Australia for a relatively short period of time. The statement in paragraph 30 was intended to outline the principle that the location of the CM&C of the fund is determined by reference to where the CM&C of the fund is exercised by the trustees in practice. Hence, if the trustees exercise the CM&C of the fund whilst overseas, the location of the CM&C will be outside of Australia. As such, the Tax Office does not believe that there is a contradiction in the statements made in paragraphs 25 and 30 of the draft Ruling. However, paragraph 30 (which is now paragraph 33 in the final Ruling) and the corresponding paragraph in the Explanation section of the Ruling (paragraph 165) have been adjusted to better reflect the Tax Office position.

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8	*Delegation of trustees duties and powers* There are several technical issues that would benefit from clarification in the Draft Ruling. An issue of particular concern is the effectiveness of delegated responsibilities in the context of the central management and control test, that is, do the trustees of a fund have to be residents of Australia (in which case non-resident trustees will have to appoint Australian resident holders under enduring powers of attorney) or can non-resident trustees simply delegate decision making to an Australian resident individual(s)?	*Changes made* A discussion of the application of the CM&C test in situations where the trustee or trustees of a fund or directors of a corporate trustee validly delegate their powers and duties has been inserted into the Ruling (paragraph 123). It is stated in paragraph 139 of the Ruling that the residency status of those who exercise the CM&C of a fund does not determine the location of the CM&C of the fund. Accordingly, a fund may satisfy the CM&C test in the definition of Australian superannuation fund even though its trustees or the majority of its trustees are non-resident. This will depend on the particular facts.
9	*Alternative interpretation of CM&C test* The Commissioner has spoken publicly about the need for the Tax Office to use a purposive approach in interpreting tax legislation yet this approach does not seem to have been adopted in constructing the Draft Ruling. For example, there is no discussion around the intention of the relevant provisions to provide context to the interpretations adopted by the Tax Office. It is submitted that the object of any tax ruling that issues regarding superannuation should be to maintain these tax concessions unless the purpose of the concessions is being abused. In this respect, it is our (strongly held) view that someone who: • establishes a fund in Australia; • complies with all aspects of the Australian regulatory requirements; • engages Australian service providers; and • has the intention of returning to Australia, should not be denied tax concessions on a strict technical interpretation when alternative interpretations can just as easily and reasonably be applied.	*Changes made to outline broader policy intent of the provisions; suggested alternative approach not adopted* There is some guidance as to the broader policy intent of the superannuation fund residency test which provides further context in which to interpret the relevant conditions in the definition of Australian superannuation fund. A discussion of that policy intent has been added to the Ruling (see paragraphs 85 to 87 of the Ruling). There is no extrinsic material available that explains the policy intention underlying the intended operation of the 'central management and control' test in the context of a superannuation fund. An approach that has taken into account the broader policy intent articulated in paragraphs 85-87 of the Ruling has been adopted in formulating the Tax Office view on the various tests that a fund must satisfy to be an Australian superannuation fund, including the CM&C test (refer, for example, to paragraph 108 of the Ruling). See also paragraphs 140 to 148 in relation to the discussion of the meaning of 'ordinarily' in the CM&C test in paragraph 295-95(2)(b) of the ITAA 1997 and paragraphs 149 to 154 which contains the analysis of the safe harbour rule contained in subsection 295-95(4) of the ITAA 1997.

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	In our view, a better approach in the context of these tax concessions would be to interpret CM&C on the basis of where the operations of the fund reside – especially as this is a test that can be applied whether a company or individual trustee structure exists. That is, we submit that the test should be to ask where the operations of the fund are undertaken, that is, where are the decisions made and implemented regarding investments, accepting contributions, preparing accounts, paying benefits etc These facts should then be assessed collectively to determine where the CM&C of the fund resides. Where most of the operations are happening in Australia then CM&C would be maintained here resulting in a sensible outcome (that is, adopting the Commissioner's purposive interpretation).	The term 'central management and control' has acquired an established technical meaning in the context of companies. It is considered that an analogy can be drawn between the business activities of a company and the activities of a superannuation fund so that the principles established in the context of the application of the CM&C test in relation to companies can be applied to superannuation funds (see paragraph 111 – 113 of the Ruling for further discussion). Further, 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. In this context, it is considered that the view taken the Ruling is the better interpretative view.
10	*Meaning of 'temporarily'* Many residents who leave Australia for a short time may do so with the intention that this is a temporary absence. Employers often change their arrangements during the period of absence requiring their employees to continue with the current arrangement or to relocate to a new overseas location. This leaves people to rearrange their affairs while relocating often after a short notification period. There is little constructive argument as to why this definition [meaning of 'temporarily' in subsection 295-95(4) of the ITAA 1997] must be interpreted in a narrow manner. There are two considerations when forming this view:	The CM&C test as it appears in the legislation, and the interpretation of the test adopted in the Ruling, provides the flexibility to maintain a superannuation fund's residency whilst its trustees are overseas, even if that period of absence is unexpectedly extended. Refer to example 7(a) in the Ruling.

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	• the member is otherwise able to receive the tax concessions available on superannuation investments by investing in another sector of the superannuation industry. The need to realise assets to transfer benefits to the larger fund can lead to the fire sale of assets and the realisation of gains and losses which can have a negative impact on the member's future retirement benefits; and • the Tax Office is able to regulate compliance against the existing SIS legislation using current methods. The Tax Office is then able to disqualify a trustee or remove the fund's complying status where there is evidence that the fund is not being operated in accordance with SIS.	
11	*Roll-over superannuation benefit* The Tax Office has included in the definition of contributions a rollover from another superannuation fund. The impact of this is to impede the free movement of monies accrued in the superannuation system. This is contrary to government policy which is advocating and encouraging consumer choice in superannuation. It is recommended that the Tax Office allow monies accumulated in Australia to be rolled over to an SMSF without triggering the active member rule. This is particularly applicable to rollovers of benefits resulting from contributions made while the member is an Australian resident as noted in paragraph 178 of the Draft Ruling.	From the context in which the term 'contribution' appears in the active member test, it is clear that a 'contribution' includes a 'roll-over superannuation benefit' (see, for example, section 290-5 of the ITAA 1997). Where a superannuation benefit is rolled-over from one superannuation fund to another, the entire amount of the roll-over constitutes the relevant 'contribution'. The relevant components of a superannuation benefit are determined by an application of the proportioning rule in section 307-125 of the ITAA 1997. There is no legislative basis for a further apportionment of a member benefit that is a superannuation roll-over benefit into components that were derived during a period of residency and components that were derived during a period of non-residency. The Tax Office does not believe that including roll-overs within the meaning of contributions under the active member test impedes the free movement of monies accrued in the superannuation system. It is open to individuals who are planning to be absent from Australia for an extended period of time to roll-over their superannuation benefits from one fund to another during a time whilst they are still Australian resident members.

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12	*Meaning of 'contributor' – one-off or ad hoc contributions* The draft ruling (paragraph 66) requires greater clarity around the active member test in relation to the term 'contributor' with particular reference to irregular or ad hoc contributions made by individuals residing outside Australia. In some cases, the contribution may be a one-off non-concessional contribution. Does this contribution make the member a contributor for that day, for the entire financial year or until the fund receives notification that they intend to cease further contributions?	*Changes made* Example 11 (paragraphs 81-83) has been inserted into the Ruling which covers the situation of contributions being made irregularly or on an ad hoc basis by a member of a superannuation fund.
13	*Complying superannuation fund conditions* It is noted that a superannuation fund only has to satisfy the three tests [in subsection 295-95(2) of the ITAA 1997] simultaneously at any one point of time in the income year and the fund will be a complying superannuation fund for the entire year of income.	The Tax Office does not agree with this interpretation of the interaction between the definition of 'Australian superannuation fund' in subsection 295-95(2) of the ITAA 1997 and the requirements in the SISA for a fund to be a 'complying superannuation fund' in relation to a year of income. If a fund satisfies the three tests to be an 'Australian superannuation fund' simultaneously at any one point of time in the income year, it will be an 'Australian superannuation fund' for the income year for *income tax purposes*. However, to be a complying superannuation fund in relation to the year of income for *SISA purposes* the fund must, amongst other requirements, be a 'resident regulated superannuation fund' at all times during the year of income when the fund was in existence. To be a 'resident regulated superannuation fund' at all times during the year of income, the fund must be an 'Australian superannuation fund' *at all times*. Accordingly, the fund must satisfy all three tests in the definition of 'Australian superannuation fund' simultaneously at all times. Paragraphs 90 to 91 of the Ruling further clarify this issue.
14	*Contents of Ruling agreed to* We have considered the contents of TR 2008/D5 and agree with its contents.	Noted.

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15	*Example 7(b) – whether CM&C of fund 'ordinarily' in Australia* Does the conclusion in Example 7(b) depend on whether the CM&C has been actually exercised during the 3 month period? For example, if there was no exercise of the CM&C prior to the actual return [of the trustees] to Australia, is the conclusion different? This needs to be clarified in the example.	*Change made* Paragraph 60 of the final Ruling has been adjusted to clarify the fact that the trustees continued to exercise the CM&C of the fund in London during the additional 3 months.
16	*Establishment of fund in Australia* Does the discussion on the establishment of a superannuation fund requirement in the 'Ruling' section of the Ruling reflect the discussion in the 'Explanation' part?	*Change made* Changes have been made to the discussion of the establishment of a superannuation fund requirement in the Ruling section to better reflect the discussion in the Explanation section.
17	*Establishment of fund requirements* The Ruling refers to a requirement to have certainty on three matters before a trust can be created. In addition, I would have thought you also need certainty of trustee prepared to undertake the personal obligations. My understanding is that most texts on trusts refer to 4. For example, *Jacobs' Law of Trusts in Australia* states that there are 4 essential elements present in every form of trust: the trustee, the trust property, the beneficiary and the personal obligation annexed to the property. This is a slightly different approach to the above which is focussing on the 'creation' point and what is required to get you to that point. Is the point that this is focussing around that without trust property you do not have a trust? Or is there another point that is the focus here?	The superannuation fund residency definition requires a superannuation fund to be established in Australia. Therefore, the Ruling focuses on what requirements are needed to 'create' or bring a superannuation fund into existence. For the purposes of determining what brings a superannuation fund into existence, the Tax Office considers that the discussion of the three certainties is the more relevant analysis and approach.
18	*Meaning attributed from other legislation* In the draft Ruling, it is stated that 'Asset is not defined in the ITAA 1997 and hence it should be given its ordinary meaning in the context in which appears'.	*Change made* The footnote has been deleted.

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	The associated footnote then states: Relevantly, the word 'asset' is defined in section 10 of the SISA to mean any form of property including money. There is no explanation of why this is seen as relevant, not what implication/consequences it leads to.	
19	*CM&C in more than one location simultaneously* The draft Ruling addresses equal numbers of trustees in Australia and outside Australia. However, based on the decided cases mentioned in the Ruling, it is clearly possible to have a situation where there is one trustee in Australia, one trustee in the United Kingdom and one trustee in the USA and that each of the trustees participates equally in the CM&C of the fund by telephone meetings. In that case, it would follow that the CM&C would be located in each of those 3 jurisdictions. But there would be more trustees outside Australia than within Australia.	This scenario is covered by the principles discussed in paragraph 137 of the Ruling. As stated in that paragraph, where meetings of trustees (or directors of a corporate trustee) are conducted via electronic facilities and the majority of trustees/directors regularly participate in the CM&C of the fund from a jurisdiction other than Australia, the CM&C of the fund would not be located in Australia. Such a scenario must be distinguished from those situations where there is an *equal* number of trustees/directors both in Australia and overseas and each of those trustees/directors *substantially* and *actively* participate in the CM&C of the fund. In those situations, the Tax Office considers that the CM&C of the fund will 'ordinarily' be in Australia, even though the CM&C of the fund is also 'ordinarily' being exercised overseas (see paragraph 175 of the Ruling).
20	*Status as a contributor #1* It seems to follow that a person in respect of whom contributions have been made would not be regarded as a contributor?	Agree, the superannuation fund residency definition makes a distinction between a 'contributor' (paragraph 295-95(3)(a) of the ITAA 1997) and an individual on whose behalf contributions have been made (paragraph 295-95(3)(b) of the ITAA 1997).
21	*Status as a contributor #2* Reading the Ruling's analysis of the meaning of 'contributor', it would seem to follow that someone who has contributed in the past and has an intention to contribute further amounts to the fund would not be regarded as a 'contributor' unless that intention was framed around a regular or periodic basis of contribution. Is this correct?	The Tax Office's approach to determining whether a member of a superannuation fund is a 'contributor' to the fund at a particular point in time for the purposes of the superannuation fund residency definition is contained in paragraphs 184 to 189 of the Ruling. Whether a member is a 'contributor' to the fund is to be determined objectively by reference to the circumstances of the member, including their intentions and pattern of conduct in making contributions.

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	For example, if a person has an actual intention to make contributions as and when they have surplus funds available and that happens every couple of years or so would they be regarded as a contributor? This may, for example, be the situation of an SMSF where the parents (aged 52) have 'retired' out of the business and are living in Greece for the time being but still making small contributions to the SMSF on an annual basis and the 2 sons are running the business in Australia and making contributions to the fund when they can afford it.	
22	*High level decision making – consistency of approach* While I do not believe that the CM&C [of a superannuation fund] extends past high level decision making (and there will always be factual situations around what is within that formulation in particular situations), is the approach being adopted in the Ruling consistent with the approach being taken in relation to the residency of companies for other purposes of the income tax legislation?	The Tax Office has ensured that its approach to the construction of the CM&C test in relation to superannuation funds is consistent with the Tax Office's approach to the construction of the CM&C test in relation to companies (which is outlined in Taxation Ruling TR 2004/15). Many of the cases cited in TR 2004/15 which have considered the operation of the CM&C test in relation to companies are also cited in the Ruling on superannuation fund residency and the principles expressed in those cases have been applied to determine the application of the CM&C test in relation to superannuation funds.