

SMSF Trustee Requirements

Summary

A self managed superannuation fund (SMSF) is a fund with less than 5 members which satisfies the basic trustee requirements, such as all members are trustees and all trustees are members.

Single member funds have specific trustee requirements. Another individual must be appointed as trustee or the fund must have a corporate trustee.

A SMSF must be a complying fund to qualify for concessional tax treatment. To be a complying fund, the fund must be a regulated 'Australian superannuation fund' and comply with the regulatory provisions.

Issues arise for non-residents with SMSFs in meeting the definition of 'Australian superannuation fund'. This requires the central management and control of the fund to be in Australia, although a temporary absence of 2 years is allowed.

In addition, if a non-resident member is contributing to the fund then their interests in the fund must be within a specified limit in order to satisfy the definition. In most cases it is prudent for non-residents not to contribute to the fund to avoid triggering this additional requirement.

Definition of a SMSF

A SMSF is a super fund that satisfies the following conditions:

- the fund must have less than 5 members
- all members are trustees (or directors if a corporate trustee) and there are no other trustees, unless the fund is a single member fund
- no member of the fund is an employee of another member of the fund, unless the member is a relative
- no trustee of the fund receives remuneration for duties or services performed in relation to the fund.

Trustees

All members must be trustees and there are generally no other trustees. However, there are a number of exceptions to this rule. They include:

- a member who is a minor (i.e. under 18 years of age). In this circumstance, the minor's parent (even if parent is also a member of the fund) or legal personal representative may act as trustee on the minor's behalf.
- a legal personal representative (LPR) who holds an enduring power of attorney may act as a trustee on the member's behalf.
- an LPR of a deceased member may act as trustee until death benefits commence to be paid from the fund.

Definition of legal personal representative (LPR)

LPR means:

- the executor of the Will or administrator of the estate of a deceased person;
- the trustee of the estate of a person under a legal disability; or
- a person who holds an enduring power of attorney granted by a person.

Single member funds

Special rules apply to single member SMSFs due to laws relating to trusts. Under trust law it is not possible to be the sole beneficiary of a trust and also be the sole trustee. That is, you cannot hold money in trust for yourself. The legislation overcomes this problem by giving single member funds two options:

1. Appoint a corporate trustee.

The member of the superannuation fund must be the sole director of the corporate trustee or one of two directors. If the member is one of two directors of the corporate trustee, the member cannot be an employee of the other director.

2. Appoint two individual trustees, where one is the member of the fund.

The member cannot be an employee of the other trustee.

Disqualified persons

A disqualified person cannot be a trustee of a superannuation fund, nor can the LPR of a disqualified person act as trustee. A disqualified person is an individual who:

- is insolvent (i.e. bankrupt)
- has been convicted of an offence involving dishonest conduct
- has a civil order made against the person. Therefore, a disqualified person cannot be a member of an SMSF. In a situation where a member becomes a disqualified person, that person's interest should be rolled over to another superannuation fund.

Issues for non-residents

Central management and control test

The location of the central management and control 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. These include:

- 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
- formulating a strategy for the fund's reserves
- determining how the assets of the fund are to be used to fund member benefits.

These high level decisions and activities must be carried out in Australia, although a temporary absence of 2 years is allowed. If the trustee(s) moved overseas for an extended period of time the fund could become non-complying.

In situations where there are an equal number of trustees both in Australia and overseas who equally participate in the exercise of the central management and control of the fund, the central control and management of the fund will ordinarily be in Australia.

If a trustee of an SMSF is going overseas for an extended period, someone who remains in Australia can be granted an Enduring Power of Attorney to be a trustee of the fund in his or her place. This allows the central management and control of the SMSF to be in Australia.

Active members

An active member is a member who contributes to the fund or contributions are made to the fund on their behalf. If a non-resident member is contributing (or has contributions made on their behalf) to the fund and their accumulated entitlements exceed 50% (of the amounts stated before), the fund will lose its resident status and tax concessions.

A superannuation fund which does not meet the definition of an Australian super fund is taxed at penalty rates – see below.

Compliance test

As all members are trustees, all members are responsible and actively involved in any breach. There are no innocent members to a breach.

The compliance test will be passed if the superannuation fund did not contravene the SIS Act or Regulations during the year. If the compliance test is passed a notice of compliance is provided.

If the trustee of the superannuation fund has contravened the legislation, the ATO can still issue a notice of compliance after considering the seriousness of the contravention. This means the Commissioner of Taxation has some discretion if a breach of the legislation occurs. The focus of the ATO is to improve the compliance of SMSFs and ensure compliance with the SIS Act and regulations.

If a SMSF is issued with a notice of non-compliance it will lose its tax concessions. The earnings and assets (less the sum of crystallised undeducted contributions and non-concessional contributions) within the fund are taxed at 45%.

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