



### Tax concessions

Tax concessions for superannuation are generally only available to Australian resident funds and Australian resident individuals, so when looking at whether you can live in the Greek Islands but still make contributions or retain superannuation in Australia you must look at the residence of both the fund and the individual. One of the consequences of a fund becoming non-resident is that the income tax rate increases from 15% to 45%. Residence is therefore a critical issue.

### Residence of a super fund

SIS legislation uses the definition of residence in Section 6E of the Income Tax Assessment Act 1936 (please refer to the Act for the full definition). To be resident the fund must satisfy all the following tests:

1. Qualify to be a fund (under SIS)
2. Either have been established in Australia **or** have assets in Australia
3. Either have its central management and control ordinarily in Australia **or** satisfy an alternative control test (see below)
4. If there is an active member at least 50% of the accumulated assets of the fund held for active members must be held for resident active members

### Central management and control

Whether a fund has its central, management and control in Australia can be difficult to determine. One relevant factor will be where the trustees are located. For instance, if a majority of the trustees (or directors of the corporate trustee) are located outside Australia then it is possible that the central management and control will also be outside Australia. Conversely, if a majority of the trustees (or directors of the corporate trustee) are located in Australia then it is possible that the central management and control will also be in Australia.

### Alternative control test

If the central management and control test can't be met then it may be possible to satisfy the alternative control test. This test will be met if the following conditions can be met:

1. One or more of the trustees (or directors of the corporate trustee) are temporarily absent from Australia
2. The central management and control of the fund would be in Australia if the trustee(s) or director(s) were in Australia
3. The trustee(s) or director(s) have not been continuously outside Australia for more than 2 years

There are no exceptions to the "no more than 2 year" rule. If the trustees are overseas for more than 2 years the fund will be treated as non-resident and will hence lose its concessional tax status.

### Active membership test

The last test in determining the residence of a fund only applies if there are active members. Where the test applies the fund must show that 50% of the funds held for active members are held for resident active members. Active members do not include members who have ceased being resident in Australia, if no contributions have been made by the member, or on behalf of the member, since the member ceased being resident in Australia. Given the unfavourable tax treatment afforded to contributions made by, or on behalf of, non-resident members (see below), it is unlikely that a fund would have any non-resident active members. As such, it is considered most funds would satisfy this requirement.

### Residence and contributions

Taxation concessions for contributions made to super funds are only available if made by, or on behalf of, Australian residents. You must therefore be careful that your fund only accepts contributions from or on behalf of members while they are residents or from periods when they were residents eg if a rollover is made to the fund after they become non-resident but that rollover was created from contributions that were made while the member was a resident.

## Residence of the trustee company

Under the Corporations Act, trustee companies must have at least one director that “ordinarily resides” in Australia, and if it has a secretary/secretaries, at least one secretary who “ordinarily reside” in Australia. Unfortunately, there is no definition in the Corporations Act of the term “ordinarily resides”. The term therefore takes its ordinary meaning. There is a substantial amount of case law on when a person is ordinarily resident in a particular place. Without going into details, it is possible that a director(s) of a trustee company is not ordinarily resident in Australia (even though the fund may be resident through satisfying the alternative control test referred to above). In such a case, it might be appropriate to admit a resident member to the fund and appoint that member a director and secretary of the corporate trustee in order to comply with the Corporations Act.

## What if I’m going to be overseas indefinitely (or at least for more than 2 years)?

To maintain the resident status of the fund you must ensure that you return to Australia within the 2 year period. If you cannot do this you should either:

1. Appoint an Approved Trustee (ie convert your fund to a Small APRA Fund) as they are certainly resident in Australia and have their central management and control in Australia; or
2. Appoint individuals with enduring powers of attorney for the members to act as trustees

While appointing individuals with enduring powers of attorney (option 2) as trustees is acceptable under the SIS act, you need to be able to demonstrate that central management and control still resides in Australia for purposes of the Tax Act ie those persons are controlling the direction of the fund and not just acting on the instructions of non-residents. To be safe it is probably best to appoint a corporate trustee with at least one resident director.

If you have a company as trustee we recommend that you appoint or maintain at least one member/director who “ordinarily resides” in Australia before you are overseas for more than 183 days to be on the safe side as far as ASIC is concerned. Appointing a director(s) with enduring power(s) of attorney could satisfy this requirement as well.

If less than 50% of the members/trustees are living overseas and have less than 50% of the fund assets you could probably argue that the fund was resident even if the particular members/trustees do not return to Australia as the central management and control would still be in Australia thereby satisfying the first part of test 3. in the fund residency section above.

## Conclusion

The whole area of residence as far as a super fund is concerned is critical as any mistakes can render the fund non-complying which means it will be taxed at penalty rates instead of the 15% concessional rate. Because of this we recommend you seek professional advice before travelling overseas for any substantial length of time.