

client alert

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Travelling overseas and your SMSF (part 2)

In last month's article, we looked at the central management and control test and how it could affect the complying status of your self managed superannuation fund (SMSF) when you spend an extended period of time overseas. This time, we will examine the other test that could affect whether your SMSF is compliant: the active member test.

The active member test is one of three tests which all have to be met at the same time for an SMSF to be an Australian superannuation fund and thus a complying fund. It is a complex area where the outcome is largely dependent on the individual circumstances of each case.

To recap, a complying SMSF must first be an Australian superannuation fund. The three tests a fund must satisfy to be treated as an Australian superannuation fund are the establishment test, the central management and control test, and the active member test. All three tests need to be satisfied at the same time in the same income year for the fund to meet the definition of an Australian superannuation fund. Issues arise in relation to the latter two tests when members/trustees of SMSFs travel overseas.

The active member test is quite complex. Put simply, it requires that the fund either has no active members, or has active members who are Australian residents and hold at least 50% of the fund's assets.

An active member in this context is any member who contributes to the fund or has had contributions made on their behalf. The issue arises when you or other members of your SMSF go overseas and continue to make contributions to the fund, which means that the fund has active members who are not Australian residents. In that instance, the fund would fail the

active member test and become a non-complying fund.

However, note that not all contributions would mean your SMSF would fail this test. For example, consider an SMSF member who works for an employer while in Australia, but the employer fails to make the appropriate superannuation contributions to the SMSF. Subsequently, the SMSF member decides to go on an overseas holiday for an indefinite period, and while they are overseas, the former employer pays superannuation guarantee charge amounts to the ATO, which then distributes the relevant amount to the person's SMSF. In this situation, the contribution to the SMSF is related to work performed while the member was an Australian resident (even though it is paid later, while they are a foreign resident). Hence, the person does not become an active overseas-resident member of the fund, and the fund does not fail the active member test, because of the late employer contribution. The member must also be careful not to make any personal super contributions while they are an overseas resident.

Remember, whether your SMSF will satisfy the active member test largely depends on your individual circumstances. Changes in these circumstances, however small, may mean that your fund loses its complying superannuation fund status, which can have dire consequences. If you intend to continue making contributions to your super while you're overseas, it may be wise to contribute to a retail or an industry super fund. Those contributions will not be affected by the active member test, and contributions can be rolled over into your SMSF when you return as an Australian resident.

Still have questions?

If you have an SMSF and are planning to go overseas, take a moment to consider whether the central management and control test or the active member test may affect the complying status of your fund. Superannuation rules are very complex! If you're still unsure about any aspects of how going overseas can affect your SMSF, speak to us today.

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Super, guaranteed

Paying the right amount of super to your employees can at times be a complex exercise, with the threshold changes in the recent years and the contribution base which changes every year according to indexation factors. With the rise of the gig economy there's also a grey area as to whether a certain person working for you is actually an employee or a genuine contractor. Find out what your super obligations are this year.

Are you paying the right amount of super for your employees? It's that time of the year again, when the Australian Bureau of Statistics (ABS) releases the indexation factors that are critical in determining various superannuation thresholds. While the super guarantee rate is still frozen at 9.5%, the maximum contribution base will increase to \$54,030 per quarter (or \$216,120) for 2018–2019. Employers are not required to provide the minimum super guarantee amount for the part of employees' wages above the maximum contribution base.

Besides the part of your employees' wages above \$216,120, as an employer you are required to make minimum contributions of 9.5% of each employee's ordinary time earnings by quarterly due dates to their nominated superannuation fund if you pay the employee \$450 or more (before tax) in a calendar month. This is irrespective of whether an employee is full-time, part-time, casual, a family member, a company director, a person who receives a super pension or an annuity while still working, or a temporary resident.

You should note that the ATO considers certain contractors that are paid mainly for their labour to be employees for super guarantee purposes. This is the case even if the contractor quotes an Australian Business Number (ABN). According to the ATO, as an employer you must make super guarantee

contributions of 9.5% on what you pay your contractors if they are paid:

- under a verbal or written contract that is wholly or principally for their labour;
- for their personal labour and skills, which may include physical labour, mental effort or artistic effort; or
- to perform the contract work personally.

If you're not paying the right amount of super for your employees and some contractors, beware – the ATO uses sophisticated data analytics to identify employers at high risk of non-compliance.

The ATO also takes a differentiated approach to compliance and penalties depending on the compliance history of the employer and how actively they engage to meet their superannuation obligations. Therefore, it pays to be in the good books of the ATO, as it may take a more accommodating approach should your business have any discrepancies in super guarantee payment to your employees.

However, employers who are unwilling to meet their super guarantee obligations should expect the ATO to take firm compliance action. This can include imposing penalties such as the super guarantee charge, a Part 7 penalty (up to 200%) for late lodgement of the super guarantee statement or failing to provide information when requested, and an administrative penalty (up to 75%) that may apply for an employer who makes a false and misleading statement.

Need help?

If you're having issues with working out the right super amount to pay to your employees, or if you would like to determine whether that person working for you is considered to be an employee or a genuine contractor, we can help.

Important: M Point Superannuation Services Pty Ltd (AFSL: 485840) advise clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.