

## SMSFs, super & international issues

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[DBA dbalawyers.com.au/ato/smsfs-super-international-issues](https://www.dbalawyers.com.au/ato/smsfs-super-international-issues)

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In today's increasingly globalised world, it is not uncommon for many family groups (ie, fund members and their children) to have overseas-based investments, working/living arrangements and other entanglements over their lifetime.

Accordingly, it is not surprising that in recent years DBA Lawyers has seen an increase in the number of matters we provide assistance on in relation to SMSFs, superannuation and related tax matters with international dimensions. This article provides a brief outline of some of the key services we offer in this regard.



### Services

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Though DBA Lawyers does not provide overseas tax or legal advice, we are often engaged to provide guidance on how to navigate the Australian superannuation and tax rules where clients are seeking to:

- relocate overseas and maintain their SMSF as a (resident) Australian superannuation fund;
- use their SMSF to invest in overseas property/assets;
- transfer foreign super to Australia without adverse tax consequences;
- establish an SMSF that satisfies the UK rules for a Qualifying Recognised Overseas Pension Scheme ('QROPS'); and
- obtain advice on the tax treatment of overseas super benefits and pensions received by an resident in Australia.

We elaborate on certain popular services below.

### SMSF residency

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Where one or more SMSF members relocate overseas there may be significant tax consequences for the fund. In particular, if a fund has overseas members and careful consideration has not been given to the structure of the fund, trustee-level decision-making and contribution planning, the fund may automatically lose its complying status.

Broadly, if an SMSF becomes non-resident almost half of the value of the SMSF can be lost. This is because a 45% tax can be imposed on an SMSF's assets apart from a certain tax free amount.

To ensure this does not happen, it is critical that the SMSFs satisfy all of the residency rules that apply under the definition of an 'Australian superannuation fund'. Broadly, this requires, among other things, that the fund must have been established in Australia and that the central management and control of the fund is ordinarily in Australia. There is also an 'active member' test that may need to be satisfied.

Though many advisers are broadly aware of these rules, the devil is often in the detail — as we continue to come across cases where arrangements have not been appropriately implemented or documented.

DBA Lawyers can assist SMSF trustees and advisers in navigating the complex SMSF residency rules. We can provide advice and documentation. Moreover, click [here](#) for an article on SMSF residency and click [here](#) for further information on DBA Lawyers' SMSF Residency Kit.

## Advice on foreign fund roll-overs

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The starting point is that a transfer of money from a foreign superannuation fund ('FSF') to Australia (eg, to an Australian SMSF) will be subject to Australian income tax on any growth in the FSF that has accrued in that foreign fund in respect of a member since the date of the member's Australian tax residency commenced, unless the transfer occurred within six months of residency or cessation of foreign employment.

This is subject to certain adjustments for:

- periods of non-Australian tax residency;
- contributions made to the FSF post-Australian tax residency; or
- transfers into the FSF from another FSF post-Australian tax residency.

The other key hurdle is determining whether a foreign pension, superannuation or retirement arrangement will qualify as a FSF as the concessions in sub-div 305-B of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') do not apply in relation to many overseas jurisdictions.

Accordingly, where a sum of money is transferred from a FSF to Australia, the law broadly distinguishes between the (vested) amount in the FSF at the time of Australian tax residency and any residual amount (ie, the growth amount) that has accrued since that time.

In broad terms, the principal amount may be treated as non-assessable non-exempt income for the individual taxpayer, and counted towards a member's non-concessional contributions caps on transfer to an Australian superannuation fund. Naturally, this is subject to the member's eligibility to contribute, and if the already member holds more than AUD \$1.6 million in Australian superannuation funds (ie, on the 30 June prior to the roll-over), excess contribution issues will arise that will require careful consideration.

In contrast, the growth amount (applicable fund earnings or 'AFE') is included in the member's personal assessable income, unless certain conditions are satisfied for the AFE to be taxed to an Australian superannuation fund as part of a FSF roll-over.

More specifically it may be possible for the AFE amount to be taxed to an SMSF at a 15% tax rate. Naturally, AFE being taxed to a fund at 15% may provide a better tax outcome than being taxed at the usual marginal tax rates plus the Medicare levy.

The legislation here is complex and there is little ATO guidance on how the provisions in the ITAA 1997 operate in a number of circumstances. Accordingly, we are often engaged to prepare advice and prepare private ruling applications to the ATO. For more information, please click [here](#).

## QROPS documents

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For individuals with money tied up in a UK-based pension scheme that they would like to repatriate to Australia, we offer a suite of SMSF documents that satisfy the QROPS standards set out by Her Majesty's Revenue and Customs ('HMRC') both in relation to new SMSFs and existing SMSFs.

Broadly, HMRC do not accept that Australia's superannuation law payment standards align with the UK's standards unless membership of the fund is restricted to persons aged 55 years or over. Thus, the suite of documents prepared by DBA Lawyers is on the basis that all of the members of the fund are over 55. Our QROPS documents include:

- a deed to allow the fund to comply with the UK regulations;
- trustee resolutions;
- a covering letter to be sent to HMRC;
- a letter detailing what is to be provided to HMRC;
- detailed guidance on completing APSS251 (the notification form that must be submitted to HMRC).

If you would like more information on our QROPS services, or would like a quote, please contact us [here](#).

### **Related articles:**

- [Ensure an SMSF meets the residency tests](#)
- [International issues facing SMSFs today](#)
- [Transferring foreign superannuation fund amounts to an Australian resident](#)

- SMSFs buying overseas property – tips & traps

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

Note: DBA Lawyers hold SMSF CPD training at venues all around Australia and online. For more details or to register, visit [www.dbanetwork.com.au](http://www.dbanetwork.com.au) or call Marie on 03 9092 9400.

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