Superannuation and residency

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Superannuation contribution and access rules are impacted by residency status.

Table of contents

Introduction

There are some important things to consider in relation to superannuation where an individual is a non-resident, a temporary resident or a working holiday maker. Residency status may impact:

- acceptance of contributions
- eligibility for certain benefits and tax incentives relating to certain types of contributions
- access to superannuation, and
- taxation of benefits received (both in Australia, as well as in the foreign country of which the member is a tax resident).

When providing retirement and superannuation advice to a client, it is important to consider their current residency status. It's also important to contemplate any future changes to their situation which could impact a client's retirement plans and may largely determine the appropriateness of Australian superannuation as an investment.

Contribution rules

The SIS Act and Regulations don't differentiate between a resident and a non-resident in respect of acceptance of contributions.

Provided an individual meets the relevant SIS contribution rules, a fund trustee may accept contributions from a non-resident or a temporary resident. This means that the ordinary contribution caps and rules apply.

However, certain contributions and concessions, such as the Government co-contribution, low income super tax offset (LISTO) or spouse tax offset may not be available to temporary residents or non-residents.

For example, to qualify for the co-contribution or LISTO, an individual must not have held a temporary visa at any time during the relevant financial year. Similarly, to benefit from a spouse tax offset, both spouses must be Australian residents at the time the spouse contribution is made.

Super Guarantee contributions

Non-residents and temporary residents are entitled to Superannuation Guarantee (SG) contributions for work that they perform in Australia, unless they are:

- prescribed employees as defined under regulation 11 of SGAR 2018[1] (ie they hold specific executive class visas), or
- residents of a country with which Australia has a bilateral super agreement and the employer is contributing to a fund in that country on their behalf (SGAR regulation 12).

Personal deductible contributions

Individuals who aren't Australian residents are eligible to make personal deductible contributions (PDC) to super, provided they meet the requirements to make these contributions.

The requirements are the same for Australian residents, temporary residents and non-residents. However, to benefit from making a PDC to super, a non-resident must have sufficient Australian sourced assessable income against which to claim the tax deduction.

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1 Superannuation Administration (Regulations) 2018

If they do not have sufficient Australian sourced assessable income, the ATO will deny a deduction to the extent it would reduce taxable income below zero (ie create a loss). Generally, non-residents pay tax at 32.5% on all income under $90,000 and will thus benefit from a deduction until their taxable income is reduced to zero.

Individuals who are subject to the Departing Australia Superannuation Payment (DASP) rules are, generally, unlikely to obtain a tax benefit from a personal contribution, as the combination of tax on contributions and on cashed out taxable components is equal to 47%.

There may be a benefit in limited circumstances, such as where an insured benefit is being funded (see the DASP section below).

Alternatively, they could consider their eligibility to make a non-concessional contribution to super, which would not be taxable and would form part of the tax-free component.

☑ **Advice tip**

A non-resident's income derived from interest, dividends and royalties is subject to withholding tax in Australia and is excluded from assessable income (ie is not reported on an Australian tax return). Therefore, a tax deduction cannot be claimed against this type of income.

Assessable income against which a deduction can be claimed commonly includes income earned from rental properties and any Australian sourced employment income.

Example 1: Personal deductible contribution

Steve, aged 50, is an Australian citizen who has moved to the UK to work for an indefinite period. He seeks tax advice and is advised that he is considered a non-resident of Australia for tax purposes.

He has an investment property in Sydney which generates net rental income of $40,000 pa. Steve makes a personal contribution of $27,500 to super and claims a $27,500 tax deduction. This reduces his assessable Australian income to $12,500[2] and his personal tax liability to $4,063 ($12,500 @ 32.5%), rather than $13,000. However, contributions tax of $4,125 is payable on the $27,500 PDC and the total tax saved by making PDCs would be approximately $4,812.

Providing a Tax File Number

Regardless of residency status, a Tax File Number (TFN) needs to be provided to the super fund for the trustee to be able to accept a personal contribution.

If the individual makes a personal contribution to super before providing their TFN, the trustee must return the contribution within 30 days of becoming aware that a TFN has not been provided (unless the member provides the trustee with their TFN during this period).[3]

If the individual starts salary sacrificing to super or receives contributions from an employer (mandatory or voluntary) without providing their TFN, additional tax of 32% applies to these contributions (unless the member provides the trustee with their TFN before the end of the relevant income year)[4]. This is in addition to contributions tax of 15% already paid[5] by the member.

Access to super

Unlike the contribution rules, the access rules do differ based on an individual's residency status. This impacts both voluntary access to super and 'compulsory cashing requirements', which stipulate circumstances under which super benefits must be paid out of the fund.

Note: For more information on the conditions of release for Australian residents, see our **'Guide to accessing super'**, in the Technical section of MLC Adviser Online.

2 Non-residents do not receive the tax free threshold (and are not liable for the Medicare Levy).

3 SIS Reg 7.04 (2), (4).

4 ITAA 1997 s295-610

5 ITRA 1986 s29

Temporary residents

A temporary resident is defined in SIS reg. 6.01 as a holder of a 'temporary visa' under the ***Migration Act 1958***.

Conditions of release

A temporary resident can only access super benefits under certain conditions of release[6]. These are:

- departing Australia
- death
- terminal medical condition
- permanent incapacity
- temporary incapacity, or
- to make release authority payments.

Where super benefits are paid under one of the above conditions, the usual Australian tax rules apply, except where the DASP rules apply (see below). The client should seek specialist tax advice to fully understand any tax which may be payable on the benefit in a foreign jurisdiction.

> ☑ **Advice tip**
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> All other conditions of release such as retirement, reaching age 65 and commencing a TTR pension at preservation age are not available to temporary residents unless they met these conditions of release prior to 1 April 2009. Therefore, before investing in an Australian superannuation fund, it is important to understand the conditions under which access may be granted to superannuation, as well as the tax payable upon release.

Accessing super upon departure – DASP

Temporary residents must cash out their super as a Departing Australian Superannuation Payment (DASP)[7] if:

- they have departed Australia
- their visa is no longer in effect
- they are not an Australian citizen, New Zealand citizen or permanent resident of Australia, or
- they are not a holder of a Subclass 405 (Investor Retirement) visa or a Subclass 410 (Retirement) visa as described in Schedule 2 to the *Migration Regulations 1994*.

If a DASP is not claimed by the individual within six months of their visa expiring or departure (whichever happens last), the super provider must transfer the super interest to the ATO as unclaimed money.

Note: A person who is a citizen of NZ may be able to transfer their superannuation under the **Trans-Tasman portability scheme.**

Claiming DASP directly from a super fund

Claims for money held by a super fund as a DASP can be submitted in a number of ways, including:

- via the **DASP application system**, or
- by lodging a paper application directly to the fund.[8]

A super fund trustee must pay the benefit within 28 days of receiving a completed application, once all associated evidence is provided.

6 **SIS Reg 6.01B**

7 **SIS Reg 6.20A**

8 In the case where unclaimed funds have been transferred to the ATO, a paper form will need to be sent to the ATO. Alternatively, a claim may be made via ATO online services, or through MyGov.

Depending on the options provided by the fund, payment may be made via electronic funds transfer, cheque or international money transfer. Some funds may require funds to be paid into an Australian bank account.

> ☑ **Advice tip**
>
> Although a claim cannot be made before the person has departed Australia, it may be useful to consider prior to departure, what evidence will be required to submit the DASP application. The temporary resident may need to have certain documents appropriately witnessed in Australia before their departure.

Transfer of unclaimed super to the ATO

A super fund must transfer a former temporary resident's super money to the ATO if requested. This may occur if:

- the member has left Australia
- at least six months has passed since the member departed Australia or their visa has ceased to be effective (whichever is later)
- the member does not hold a temporary visa
- the member does not hold a permanent visa, nor has lodged an application for a permanent visa which has not yet been determined, and
- they are not a citizen of Australia or New Zealand.

The ATO holds such benefits of a former temporary resident until they are claimed. Since 1 July 2013, interest is payable on unclaimed super at the rate of the Consumer Price Index. When claimed, the benefit is paid as a DASP and is subject to withholding tax rates.

If a temporary resident subsequently returns to Australia as a permanent resident, the unclaimed amount held by the ATO can either be rolled over to an Australian super fund, or paid to the individual directly. In either case, the benefit is still subject to the DASP withholding tax rates[9].

If transferred to an Australian super fund, the benefit is preserved until one of the SIS conditions of release is met to access the preserved benefit. The DASP condition of release no longer applies.

Taxation of DASP

A DASP is not assessable income and is not included in the individuals' Australian tax return. The rate of tax payable depends on the underlying tax components of the interest (refer to Table 1 below).

An increased rate of DASP tax[10] applies to the taxable portion of the payment if an individual was a working holiday maker (includes Subclass 417 and Subclass 462 work and holiday visas). This extends to individuals claiming a DASP, where that person previously held a working holiday maker (WHM) visa and the funds being claimed include any amount attributable to a super contribution made while the WHM visa was held. This applies regardless of the visa class held at the time of claiming the DASP.

Table 1 – DASP tax table

Component	DASP ordinary rate	WHM rate (incl. visa subclasses 417 and 462)
Tax-free	Nil	Nil
Taxed element	35%	65%
Untaxed element	45%	65%

9 Superannuation (Unclaimed and Lost Members) Act 1999 s20H
10 Superannuation (Departing Australia Super Payments Tax) Act 2007 s5

Non-residents

Apart from the restricted conditions of release that apply to temporary residents, non-residents are subject to the same SIS conditions of release as an ordinary Australian resident.

Non-residents who consider they may not be residents of Australia at the time of benefit payment also need to consider the tax treatment of an Australian superannuation benefit in their country of residence. Therefore, it is important for them to seek specific tax advice from a specialist tax agent.

Role of Double Tax Agreements

Double tax agreements (DTAs) can both complement and modify the tax law of the countries that are party to the agreement. For example, most Australian DTAs reserve the power to tax pension benefits to the country in which the person is a resident. In such cases Australian tax law becomes largely irrelevant and concepts such as tax-free components, being an Australian tax law construct, may have no bearing on the tax outcome. Conversely, DTAs do not usually deal with superannuation lump sums. The Australian tax treatment may be relevant, particularly in regard to death benefits.

The agreement with New Zealand (NZ), at Article 18, does provide that Australian superannuation pension payments, that are exempt income in Australia, are also exempt in NZ for NZ residents. Lump sum payments fall under Australian tax law and are not taxed in NZ.

Taxation of lump sums

If a non-resident cashes out a lump sum from an Australian super fund, the taxable component of the amount being withdrawn may be subject to lump sum tax[11] in Australia. This is likely to occur if the non-resident is below preservation age or if have reached the preservation age and amount withdrawn from the taxable component exceeds the low rate cap (LRC[12]).

If Australia has a DTA with the country of residence, any Australian tax on the lump sum would generally be a credit against any tax on the amount levied in their country of residence. This may also occur where there is no DTA

If both the country of residence and Australia (the source country) tax an amount of income, the DTA generally require the country of residence to grant a credit against its tax for the tax paid in Australia.

☑ Advice tips

Countries with income tax treaty

A **full list of countries** that have an income tax treaty with Australia, along with the accompanying DTAs, can be found on the Treasury website.

Tax advice is required

Where the individual is aged at least 60, proceeds received from a taxed Australian super fund are non-assessable non-exempt income for Australian tax purposes. However, the terms of most DTAs don't exempt the amount from taxation in the country of residence, just because the amount is exempt from tax in Australia. Care must be taken to ensure the client seeks specialised tax advice, to understand their overall tax implications.

Super income streams

If a non-resident satisfies a relevant condition of release, they can commence a retirement income stream and the tax treatment of the income payments depends on whether or not they are a resident of a country that has a DTA with Australia.

If DTA does not apply, then the pension income would be assessable income in Australia if the member is below age 60 or the pension is being paid from an untaxed source. The member may also be entitled to the 15% tax offset (or 10% for income payments from an untaxed source).

If DTA applies, then the pension income is generally only taxable in the country of residence.

11 Taxation of the super lump sum is capped at ordinary lump sum super tax rates. Medicare levy is not payable by non-residents.

12 A non-resident aged preservation age to 59 is also entitled to the LRC, which is $225,000 in 2021/22.

☑ **Advice tip**

For non-residents aged 60 and over, although no tax is payable on pension income if the pension income is from a taxed Australian super fund, the amount may still be assessable income in the country of residence unless the DTA exempts the amount. Clients should also ensure that residency status and country of residence is given to their superannuation provider.

Example 2: Retirement income stream

Jennifer, age 58, is an Australian citizen who has been living in Japan for a few years and is advised by her registered tax agent that she is a non-resident for tax purposes. She recently met a retirement condition of release and is able to access her preserved super benefit of $250,000 (assume 100% taxable component). Australia has a DTA with Japan and if she starts a retirement income stream, the pension income will only be taxable in Japan (as per the agreement).

Transferring Australian super to a foreign fund

The superannuation legislation does not allow direct transfer of retirement benefits from an Australian super fund to a foreign super fund, except for transfers to New Zealand under the

Trans-Tasman portability scheme.

If certain requirements are met, an individual who permanently moves to New Zealand may be able to transfer their preserved super benefits from Australia to a New Zealand KiwiSaver scheme. Broadly, there are no limits on how much can be transferred and the amount transferred is not subject to tax. However, partial transfers may not be available. The full balance of Australian super must be transferred once the individual is able to find a KiwiSaver scheme in New Zealand that is able to accept the transfer. Fees may be charged by the KiwiSaver scheme in relation to the transfer.

Further information on transferring retirement benefits from Australia to New Zealand can be found at **ato.gov.au**.

SMSF considerations

There are residency requirements for SMSFs and strategies that can be used to meet the relevant tests when a member goes overseas. A super fund, including SMSFs is an Australian super fund if all three of the following conditions apply:

1. The fund was established in Australia, or at least one of the fund's assets is located in Australia.
2. The central management and control of the fund is 'ordinarily' in Australia.
3. The 'active member' test[13] is met.

A full explanation of these conditions and strategies that can be used are explained in our adviser article, **SMSFs and overseas residency**, located in the **Technical** section of MLC AdviserOnline.

Contact details

For further information, please contact MLC Technical Services on **1800 645 597**.

13 The 2021 Federal Budget proposed to remove the active member test. This proposal is not law at date of publication.