

Super advice - For your information

Our Reference: 5010090929674

Dear Zoe,

We received your correspondence on 18 January 2023 regarding auditing self-managed superannuation funds. We apologise for the delay in responding to your correspondence.

This guidance is general in nature and is not binding on the Commissioner.

You have asked for clarification in the case that a fund doesn't meet the residency test during the income year and:

- › Which section of the Audit report should the auditor qualify and based on which regulations and
- › Is an Auditor Contravention Report required to be lodged for the income year.

A. Specific vs general advice

The questions you have asked are specific ones. I am not able to provide specific advice through the SMSF Auditor P2P service. While I can (and will) provide you with some general guidance that is relevant to your circumstances, the trustee should consider whether a request for [Specific advice](#) would better suit their needs. Alternatively, if the trustee believes that their fund has breached a superannuation law or regulation, they may choose to make a voluntary disclosure to the ATO through our [SMSF early engagement and voluntary disclosure service](#).

The 'Australian Superannuation Fund' definition is the subject of Taxation Ruling TR 2008/9 *Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997*. TR 2008/9 provides the most comprehensive guidance on the topic.

The trustees of an SMSF that is not an Australian superannuation fund must disclose this to the ATO in the SMSF annual return at question [8 Status of SMSF](#).

An SMSF that is not an 'Australian superannuation fund' cannot satisfy the definitions of:

- › a 'resident regulated superannuation fund' in section 10 of the SISA and
- › a 'complying superannuation fund' in section 42A of the SISA.

Failing to meet the definition of a complying superannuation fund is a significant risk for an SMSF since the we may issue the fund with a [Notice of Non-compliance](#). If we issue a notice of non-compliance to the fund then:

- › for every year the fund remains non-complying, its assessable income is taxed at the highest marginal tax rate
- › in the year it becomes non-complying, it includes in its assessable income an amount equal to the market value of the fund's total assets less any contributions the fund has received that are not part of the taxable income of the fund.

You can check whether an SMSF has been issued with a *Notice of Non-compliance* at any time by searching for it on the [Super Fund Lookup](#) website.

An SMSF that is not an Australian superannuation fund should disclose their status to us through our [SMSF early engagement and voluntary disclosure service](#). By making us aware of the issue through this service (rather than waiting for us to find out in another way) the trustees will be able to make us aware of mitigating circumstances before we decide how to respond.

Contraventions of section 17A of the SISA and regulation 7.04 of the SISR

The definition of an SMSF in section 17A of the SISA requires a fund to be a 'superannuation fund' (defined in section 10 of the SISA).

Regulation 7.04 of the SISR provides rules for regulated superannuation funds when accepting contributions from their members.

Neither section 17A of the SISA nor regulation 7.04 of the SISR require the SMSF to be:

- › an Australian superannuation fund
- › a resident regulated superannuation fund, or
- › a complying superannuation fund.

Therefore you are not required to lodge an ACR to report a breach of either section 17A of the SISA or regulation 7.04 of the SISR because your audit client has ceased to be an Australian superannuation fund (unless one is required for another reason).

Financial audit

Section 45 of the SISA directs SMSFs that have previously received a *Notice of Compliance* from the ATO to continue to self-assess their income tax as if they were a complying fund until they are issued with *Notice of Non-compliance*. This is true even if the fund has ceased to satisfy the definition of a 'complying superannuation fund' in section 42A of the SISA.

Therefore, an SMSF that does not satisfy the 'complying superannuation fund' definition but is listed as a 'complying superannuation fund' on [Super Fund Lookup](#) has not made an error / misstatement because they continued to calculate their tax liabilities as if they were a complying

superannuation fund. As such you would not need to modify your audit opinion for a fund in this situation (unless you identified another significant misstatement)

However, where an SMSF has ceased to satisfy the definition of a 'complying superannuation fund' there is a significant risk that the ATO will issue a *Notice of Non-compliance* in the future and that the notice will be backdated to the year in which the fund became non-complying. As such, the changed status of the SMSF is a 'key audit matter' as defined in paragraph 9 of Auditing Standard 701 *Communicating Key Auditing Matters in the Independent Auditor's Report*. Key audit matters must be described in the *Independent Auditor's Report*. You may also provide additional detail in a management letter to the trustees.

You can find further information on auditing SMSFs on our website www.ato.gov.au by typing QC 45561 into the search engine.

Yours sincerely,

Emma Rosenzweig
Deputy Commissioner of Taxation

**If you have any questions, you can
reply to this email, or phone us on**

13 10 20

Between 8.00am and 6.00pm, Monday to Friday. It will help if you quote 'Our Reference' which you will find at the top of this letter, so that we can quickly access your details.

Don't get scammed

The ATO never asks for your confidential details by email.
To learn more about staying safe online, go to ato.gov.au/onlinesecurity

Look suspicious?

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