

Can an SMSF be liable for foreign purchaser surcharge duty?

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John and Mary, a married couple, are members and individual trustees of their SMSF and their benefits in the fund represent 10% (John) and 90% (Mary) of the total value of the fund respectively. John is a foreign person for the purposes of the surcharge duty in NSW. Is the SMSF subject to surcharge duty in NSW?

Property has been a popular investment choice for many SMSFs. Before you commit to such investment, a question worth considering is whether your SMSF can be deemed a “foreign trust” under the relevant Duties Act thereby attracting any surcharge duty on its investment.

Most states now impose surcharge on acquisition of residential land by foreign persons although the rules relating to and the rate of the surcharge vary between each state.

Our fact scenario above deals with the position in NSW. Readers in other states should check with us to see how their local jurisdiction operates.

In NSW, surcharge purchaser duty is charged on foreign persons (or deemed foreign persons) who acquire residential land in NSW. From 1 July 2017, the surcharge rate has increased to 8% on the value of the property which is payable in addition to any normal duty on the purchase.

For the purposes of the surcharge, an individual is a foreign person if the person is not ordinarily resident in Australia (Australian citizens are taken to be ordinarily resident in Australia under the Duties Act 1997 NSW). When trustee(s) of a trust is in concern (i.e. when acquiring residential land as trustee of a trust), the trustee is deemed foreign if:

- (a) a foreign person (alone or with one or more associates) holds a substantial interest in the trust (i.e. entitled to at least 20% of the income or property of the trust); or
- (b) two or more foreign persons (with any one or more associates of any of them) hold an aggregate substantial interest in the trust (i.e. entitled to at least 40% of the income or property of the trust).

In the context of an SMSF, a trustee may be subject to the surcharge if the members are foreign persons. If all members are Australian citizens, the foreign surcharge will not apply as they are taken to be ordinarily resident in Australia under the Duties Act even if they currently reside overseas.

However, it is important to note from the above definition of foreign person that the term 'associate' includes any relatives of a foreign person. Given that in most cases, members of SMSFs are related, having just one foreign person as a member in an SMSF may cause the SMSF to be subject to the surcharge duty when it acquires a residential land in NSW.

Because John (as a foreign person) and Mary (as an associate of the foreign person) are taken to jointly hold a substantial interest in the SMSF the purchase of NSW residential land using their SMSF would be subject to the surcharge duty. **[H2 - sub-heading]**

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.