

TAXATION LAW I NOTES

TOPIC 1: Jurisdiction to Tax - RIGHT TO TAX

BASIC FORMULA

- s 3-5 ITAA97 provides that income tax is payable for each year by each individual and company and certain other entities.
- How to work out how much income tax **you** must pay: (s 4-10 ITAA97)

$$\text{Income Tax payable} = (\text{Taxable Income} * \text{Tax Rate}) - \text{Tax Offsets}$$
- NB:** Financial Year = 1 July to 30 June (ss 4-10(1) and 955-1 ITAA97)

TAXABLE INCOME

- **Taxable income** (s 4-15 ITAA97) = **Assessable Income less Deductions**
- **Assessable Income** (s 6-1) =
 - Ordinary income (s 6-5); **AND**
 - Statutory income (s 6-10); **BUT NOT**
 - Exempt income (s 6-15)
- **Deductions** =
 - o General deductions (s 8-1); **AND**
 - o Specific deductions (s 8-5)

BASIC TAX RULES FOR RESIDENTS/NON-RESIDENTS

- **AI** includes (s 6-1):
 - **AUSTRALIAN RESIDENT**
 - o All **OI** and **SI** of an '**Australian resident**' taxpayer derived directly or indirectly from **all sources**, whether in or out of Australia, during the income year: s 6-5(2) & s 6-10(4)
 - Australian residents are taxed on income derived from world-wide sources.
 - **FOREIGN RESIDENTS**
 - o All **OI** and **SI** of a '**foreign resident**' taxpayer derived directly or indirectly from all **Australian sources** during the income year **and any other amounts specifically included**: s 6-5(3) & s 6-10(5)
 - Foreign residents are only taxed on Australian-sourced income.

TOPIC 2: RESIDENCY

INDIVIDUALS

- An 'Australian resident' is a person who is a resident of Australia for the purposes of ITAA36: s 995-1
NB: 'Foreign resident' is a person who is not a resident of Australia for the purposes of ITAA36: s 995-1
- An individual is an Australian resident within the meaning of s 6(1) ITAA36 if he or she satisfies at least one of four tests outlined in s 6(1) ITAA36:
 - o **Ordinary resident test** (primary test of residency)
 - o **Domicile test**
 - o **183 day test**
 - o **Superannuation test**

Note:

- o Residency is determined on a year-by-year basis and a taxpayer may be a resident for part of the year only.
- o Only need to satisfy one of the tests to be a resident for tax purposes, if don't satisfy any of the tests, TP is a 'foreign resident'
- o Can look at events after year-end to decide: *Applegate* (1979) [CS 4.4, page 91]
- o Status under migration law not determinative for tax purposes

ORDINARY RESIDENT TEST

INTRO: The ORT ascertains whether the individual is a resident ‘*according to ordinary concepts*’ and is the *primary test* of residency. A TP will be a resident under this test if they are found to ‘*reside*’ in Australia. We derive the meaning of ‘*reside*’ from *Levene* [CS 4.1, page 86] – “to dwell permanently or for considerable time in a particular place”.

Residency is determined on a year-by-year basis and a taxpayer may be a resident for part of the year only.

The following facts, based on guidance provided in *ATO TR 98/17*, suggest that XXX ‘resides’ in Australia from XXX to XXX: *page 87*.

1. Physical presence in Australia (*Joachim* – even though not physically present, still maintained a home in Aus where his family lived) - *TR 98/17*: the Commissioner suggests that *6 months* would be a considerable period.
2. Frequency, regularity and duration of visits (*Lysaght*)
3. Purpose of the visits to Australia and abroad (is it of temporary or permanent nature)
4. Maintenance of a place of abode in Australia during absences: (*Joachim*)
5. Family, business and social ties (*Joachim*)
6. Nationality

On balance, it would appear that XXX ‘resides’ here from the period that she had a lease for the apartment and was in employment in Melbourne.

XXX’s behaviour during that period is consistent with ‘residing’ in Australia.

3 CASES TO MENTION:

Levene: in *Levene* the court found that the TP ‘resided’ in the UK even though he was only there for 4 or 5 months each year. It didn’t matter that he only stayed in hotels [CS 4.1, page 86]

Lysaght: the court found that a TP who was in the UK for 1 week every month ‘resided’ there. [CS 4.2, page 86];

Joachim: the taxpayer ‘resided’ in Australia even though he was only present for 49 days of the year. [CS 4.3, page 86]

Levene: UK resident retired and sold his house. Lived in hotels both in UK and abroad for the 7 year following. During this time he spent 4 or 5 months a year in UK to obtain medical advice, visit relatives and attend religious ceremonies. Found to be a **UK resident** until he leased a flat in Monte Carlo (when the nature of time abroad became permanent) as a result of his **family ties** with the UK, and **temporary nature of the time abroad**.

Lysaght: English TP partially retired and moved from England to Ireland. Sold his England home but remained a non-executive director of the family company. Travelled to England one week per month staying in hotels to attend board meetings. TP was **UK resident** due to his **business ties** and the fact that the **residence was not casual and uncertain** but **did so in the ordinary course of life**.

Joachim: TP and family migrated to Australia. He worked in Sri Lankan vessels and was outside of Australia for 316 days. His family, with Australian PR, remained in Australia during the time. TP claimed that he’s not Australian resident as he had a permanent place of abode outside Australia. **TP was Australian resident** as he **maintained a home for his family in Australia**, and his **intention** to treat Australia as his home had not changed.

**If you find someone is a resident under the ORT then they are a resident for the time that they ‘reside’ in Australia.*

DOMICILE TEST

Section 6(1)(a)(i) – usually applies to outgoing individuals.

INTRO: An individual is a resident of Australia for tax purposes if his or her domicile is in Australia unless the Commissioner is satisfied that the taxpayer has a “permanent place of abode overseas” (s6 ITAA36).

2 categories of domicile –

- Domicile of origin (where you were born)
- Domicile of choice - intention to stay **indefinitely** (IT 2650) – e.g. an incoming individual obtaining Australian permanent residency would establish this intention, a working holiday visa would not.

What this means is that if you are an Australian citizen, then you are automatically a resident for taxation purposes unless you can prove that you have a permanent place of abode overseas.

The TP will not be an Australian resident for the period in which they have established a permanent place of abode overseas.

Incoming individual example: someone has come to Australia on a working holiday visa for a year, then on the facts, their domicile is not Australia as Australia is not their domicile of origin or domicile of choice.

PERMANENT PLACE OF ABODE OVERSEAS

S 10 of the Domicile Act 1982 provides that in order to acquire a domicile of choice in a country, an individual must have the intention to make his home indefinitely in that country.

It is the *intention* to remain in that country that is paramount and not necessarily the actual length of the stay: *Jenkins & Applegate*.

You will have a permanent place of abode outside of Australia if you have a home or presence outside Australia: *Applegate* (1979) [CS 4.4]

Ruling IT 2650 stipulates that, as a rule of thumb, a “permanent” stay abroad is 2 years or more.

Though the duration of stay is not in itself conclusive, it is persuasive in the matter and should also be considered along with other factors used as guidance listed in IT 2650.

1. The intended and actual length of the stay in the foreign country (*Jenkins & Applegate*)
2. Duration & continuity of TP’s presence in overseas country
3. Establishment of a home outside Australia (more than temporary accommodation)
4. Abandonment (or lack thereof) of place of abode in Australia
5. The durability of the association with Australia (in particular, family ties, maintenance of bank accounts; education of children; notifying government departments)

On balance, it would appear that XXX does have a permanent place of abode overseas because (insert defining factor/s) and they would thus not satisfy the second limb of the test.

If they are a resident, they are a resident for the period until they establish a permanent place of abode overseas (use facts of case).

2 CASES TO MENTION:

Applegate (1979): TP had the intention to go overseas for a considerable amount of time, sold all his assets and moved with his wife. He became ill and came back after 1.5 years for medical treatment. Court found he DID have a permanent place of abode overseas: TP wasn’t a resident because of his intention to stay overseas indefinitely [CS 4.4, page 91].

Jenkins (1982): TP moved overseas with the intention of being there for 3 years for work. Only stayed for 18 months and then returned. Court found him not to be a resident of Aus for his time overseas: doesn’t matter how long you’re overseas, it matters what your intention when leaving is. The court suggested if you’re leaving for at least 2 years and you establish a home overseas then that will be a permanent place of abode overseas [CS 4.5, page 91].

183 DAY TEST Section 6(1)(a)(ii)- *generally applies to incoming individuals.*

INTRO: Under s 6(1)(a)(ii), a TP will be treated as a resident if the TP has been physically present in Australia for more than 183 days, whether continuously or intermittently, unless the Commissioner is satisfied that:

- o The person’s **usual** place of abode is outside Australia; **and**
- o The person does not intend to take up residence in Australia.

BOTH of these limbs must be satisfied.

NB: If this test is satisfied, the TP is treated as Australian tax resident for the **whole** of the income year: *Estate of Subrahmanyam* (2002). Note *Groves* exception.

USUAL PLACE OF ABODE

Something less than everlasting but less stringent than domicile test.

In TR 98/17, the Commissioner suggests that 'usual place of abode' is similar to 'reside'. It is not as stringent as 'permanent'. A usual place of abode is where one resides on a habitual daily basis. 6 month rule of thumb in TR[]

DOES NOT INTEND TO TAKE UP RESIDENCE IN AUSTRALIA

If not explicitly stated in the facts, consider the factors listed in the common law test of residence according to ordinary concepts.

It would appear on the facts that XXX satisfies the 183 day test and will thus be treated as an Australian tax resident for the **whole** of the income year: *Estate of Subrahmanyam* (2002).

SUPERANNUATION TEST s6(1)(a)(iii)

XXX was not a member of a relevant superannuation fund during the period, thus he/she does not satisfy the Superannuation test under s 6(1)(a)(iii).

See page 94 for more.

TEMPORARY RESIDENTS & TAXATION CONSEQUENCES

Subdivision 768-R ITAA97. SEE PAGE 95 FOR MORE DETAIL.

Even if a person satisfies one of the tests and is deemed to be an Aus resident, if they are a 'temporary resident' then they will not pay tax on their foreign income (treated as a foreign resident – only taxed on Australian sourced income)

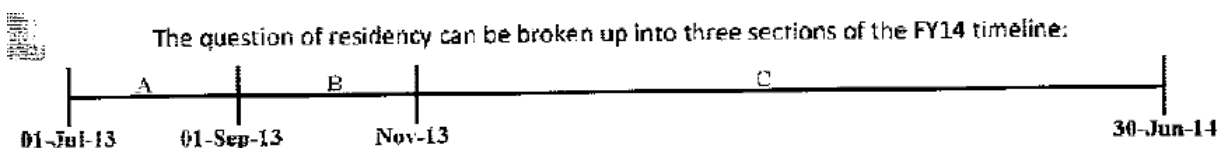
Temporary residents:

- hold a temporary visa granted under the *Migration Act 1958*; and
- they and their spouse must not be Australian residents within the meaning of the *Social Security Act 1991* (generally a person who resides in Australia and is either an Australian citizen or hold a permanent resident visa).

RESIDENCY STRUCTURED ANSWER (for exam):

S995-1 of ITAA97 says that an Australian resident is a person who is a resident of Australia for the purposes of s6 ITAA36. Residency is determined on a year-by-year basis and a TP may be a resident for part of the year only. XXX she needs to satisfy at least one of four tests in s 6(1) to be an Australian resident.

- o **ORT**
- o **Domicile test**
- o **183 day test**
- o **Superannuation test**



ORDINARY RESIDENT TEST

Under the *primary test* of residency, a TP will be a resident if they are found to 'reside' in Australia (s6(1)). We can derive the meaning of 'reside' from *Levene* – "to dwell permanently or for considerable time in a particular place".

OUTGOING INDIVIDUAL: XXX is only here for 2 months, which does not seem like a considerable period of time. However in *Lysaght* the TP was only present for 12 weeks of the year and in *Joachim* the TP was only present for 49 days of the year yet both still 'resided' there. The difference though is that XXX left for what would be considered more than a temporary amount of time (**insert years here**) and, from XXX onwards, had their wife with them in a more-than-temporary abode (**INSERT DEFINING FACTOR**).

The factors:

The following facts, based on guidance provided in *TR 98/17*, suggest that XXX 'resides' in Australia from XXX to XXX: *page 87*.

7. Physical presence in Australia (*Joachim* – even though not physically present, still maintained a home in Aus where his family lived) - **TR 98/17**: the Commissioner suggests that *6 months* would be a considerable period when deciding whether the individual's behaviour is consistent with residing here.
8. Frequency, regularity and duration of visits (*Lysaght*)
9. Purpose of the visits to Australia and abroad (is it of temporary or permanent nature)
10. Maintenance of a place of abode in Australia during absences: (*Joachim*)-
11. Family, business and social ties (*Joachim*)
12. Nationality

On balance, the above facts would indicate that XXX resides here from XXX to XXX as his behavior is consistent with 'residing' here.

EXAMPLE OF OUTGOING INDIVIDUAL:

The following facts based on guidance in *TR 98/17* also suggest that Tamrin 'resides' in Australia from July-November:

- Tamrin was physically present in Australia during Part A of FY14.
- Moved to Dubai on 1 Sep for period of 3-5 years.
- In line with *Joachim*, he maintained a home in Australia (where his wife lived) from July-November even though he was not physically present, and he consequently had a home available for use in Australia during this time
- He lived in a serviced apartment provided by his employer from September-November (indicative of the temporary nature of the stay)
- His wife quit her job and joined him in November (evidence of the transition from a temporary to a permanent nature)
- He rented out his Melbourne home from November-June (home no longer available for use)
- They rented an apartment in Dubai (evidence of permanent nature of stay)
- Only visited family and friends for 2 weeks, staying in hotels (not frequent/regular as per *Lysaght*)

The above facts would indicate that Tamrin "resides" here from July until his wife joins him in November, and a that he is a foreign resident from November-June.

INCOMING INDIVIDUAL EXAMPLE:

XXX is only here for 9-10 months, which does not seem like a considerable period of time. However in *Lysaght* the TP was only present for 12 weeks of the year and in *Joachim* the TP was only present for 49 days of the year yet both still 'resided' there. The difference though is that EM's stay in Australia is for a set period of 9-10 months while in those cases, there was no set end to the taxpayer's arrangements. *TR 98/17* suggests that 6 months would be a considerable period so it is possible that EM could 'reside' here even though she is only in Australia for a period of 9-10 months.

EXAMPLE OF FACTORS:

The following facts, based on guidance provided in *TR 98/17*, suggest that XXX 'resides' in Australia from XXX to XXX: *page 87*.

- o EM is physically present in Australia during the tax year;
- o She came to Australia for a period of 9-10 months and on the facts, was here for that time;
- o She leased a flat;
- o She had ongoing employment in Melbourne;
- o She made many friends in Melbourne; and
- o She joined a netball team.

On balance, it would appear that XXX 'resides' here from the period that she had a lease for the apartment and was in employment in Melbourne. XXX's behaviour during that period is consistent with 'residing' in Australia. The period when she stayed on her friend's couch and when she was travelling around is 'temporary' and not consistent with residing here.

Under the ORT, XXX is a resident from XXX to XXX (the time they resided in Australia).

DOMICILE TEST

[Incoming individual example: someone has come to Australia on a working holiday visa for a year, then on the facts, their domicile is not Australia as Australia is not their domicile of origin or domicile of choice. Therefore, the domicile test does not apply.]

XXX will be a resident of Australia for tax purposes if his or her domicile is in Australia unless the Commissioner is satisfied that the taxpayer has a “permanent place of abode overseas”: s6(1)(a)(i).

Ruling IT 2650 stipulates that, as a rule of thumb, a “permanent” stay abroad is 2 years or more. XXX has stayed/intention to stay in XXX for XXX years which may be considered permanent and though the duration of stay is not in itself conclusive, it is persuasive in the matter and should also be considered along with other factors used as guidance listed in IT 2650 (issued in response to Jenkins & Applegate).

6. The intended and actual length of the stay in the foreign country (*Jenkins & Applegate*)
7. Duration & continuity of TP’s presence in overseas country
8. Establishment of a non-temporary (permanent) home outside Australia (similar to those in *Jenkins & Applegate*)
9. Abandonment (or lack thereof) of place of abode in Australia (renting/selling home)
10. The durability of the association with Australia (in particular, family ties, maintenance of bank accounts; education of children; notifying government departments)

On balance, it would appear that XXX does have a permanent place of abode overseas because/when (insert defining factor/s) and they would therefore satisfy the test. Before this time, XXX does not have what would be considered a ‘permanent’ place of abode outside Australia, using the facts from Applegate and Jenkins, but more a temporary one. Thus, XXX will likely be considered a resident from XXX to XXX (for the period until they establish a permanent place of abode overseas) (use facts of case).

183 DAY TEST *Section 6(1)(a)(ii)- generally applies to incoming individuals.*

INTRO: Under s 6(1)(a)(ii), a TP will be treated as a resident if the TP has been physically present in Australia for more than 183 days, whether continuously or intermittently, unless the Commissioner is satisfied that:

- o The person’s **usual** place of abode is outside Australia; **and**
- o The person does not intend to take up residence in Australia.

USUAL PLACE OF ABODE

In TR 98/17, the Commissioner suggests that ‘usual place of abode’ is similar to ‘reside’ - it is where one resides on a habitual basis. On the facts, it appears that XXX’s usual place of abode is Australia.

DOES NOT INTEND TO TAKE UP RESIDENCE IN AUSTRALIA

If not explicitly stated in the facts, consider the factors listed in the common law test of residence according to ordinary concepts.

EXAMPLE OF SATISFYING 183 DAY TEST:

- EM has been in Australia since 1 September 2011 which means that she has been in Australia for more than 183 days in the tax year. Under the 183-day test EM is deemed to be a resident unless the Commissioner is satisfied that her usual place of abode is outside Australia and she does not intend to take up residence in Australia.

- It would appear on the facts that the first requirement is met as EM does not intend to take up residence in Australia – the facts state that she only intends to return to Australia for short holidays.

In TR 98/17, the Commissioner suggests that ‘usual place of abode’ is similar to ‘reside’. Based on the above discussion and facts of the case, EM’s usual place of abode is in Australia as it is where she resides on a habitual basis and therefore she does not qualify for the exception and satisfies the 183-day test.

It would appear on the facts that XXX satisfies the 183 day test and will thus be treated as an Australian tax resident for the **whole** of the income year: *Estate of Subrahmanyam* (2002).

EXAMPLE OF NOT SATISFYING 183 DAY TEST:

Tamrin was not physically present in Australia for half of the financial year ended 30 June 2014. Therefore, Tamrin does not satisfy the 183-day test.

SUPERANNUATION TEST s6(1)(a)(iii)

XXX was not a member of a relevant superannuation fund during the period, thus he/she does not satisfy the Superannuation test under s 6(1)(a)(iii).

See page 94 for more.

OVERALL CONCLUSION

Since both the ORT and domicile/183 day test apply, we look to the former as the primary test of residency.

Based on the above analysis, it would appear that XXX is a resident of Australia under ORT from XXX to XXX (the period he 'resides' here).

If for any reason EM is taken not to be a resident under the ORT, she is also a resident under the 183-day test, as established above. In that case, she will be a resident for the whole income year: Estate of Subrahmanyam. If for any reason she is not a resident under the ORT, she is also a resident under the domicile test and will therefore be a resident from XXX to XXX (until she established a permanent place of abode overseas).