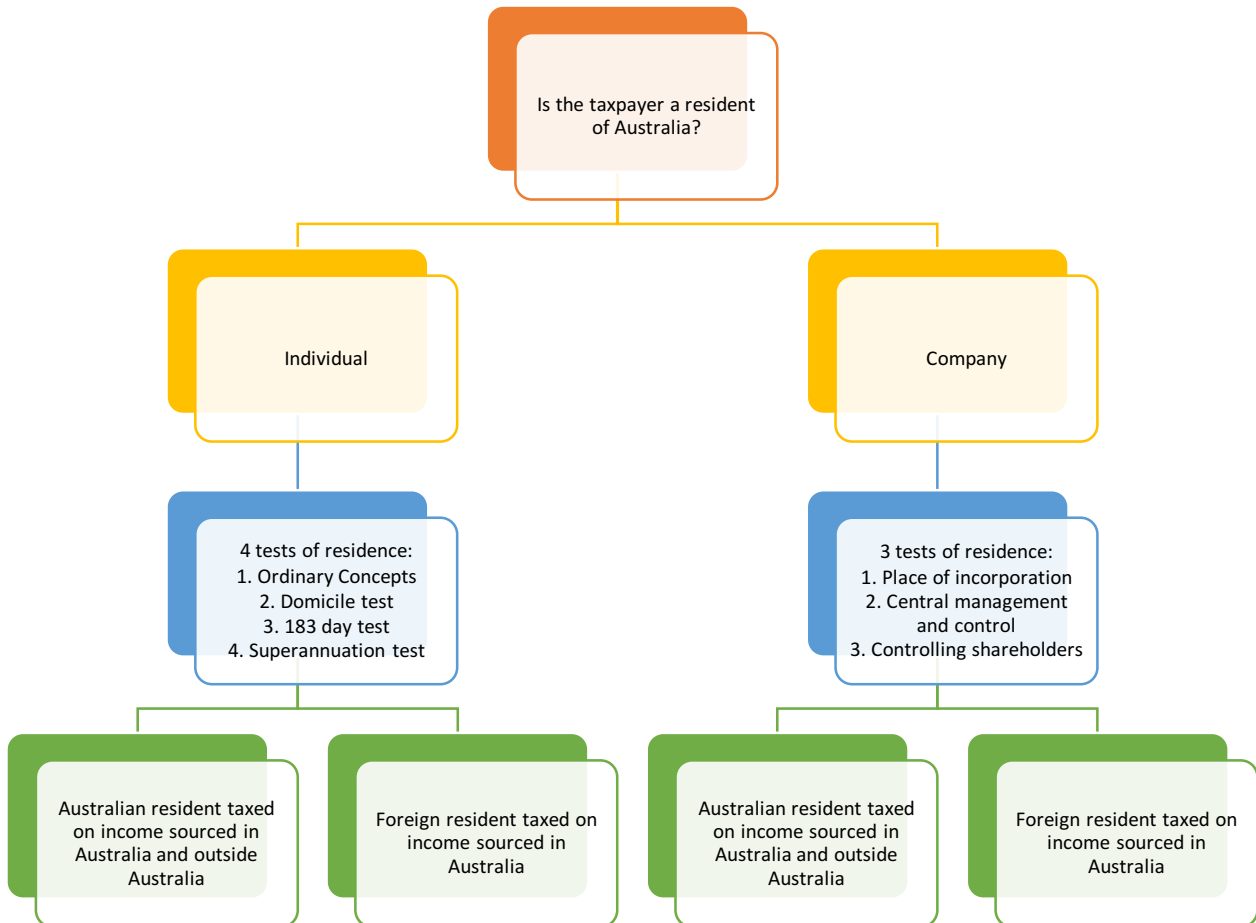


3. Residence and Source

Introduction

- A resident of Australia for tax purposes will be taxed on worldwide income (i.e. income from all sources)
- A foreign resident for tax purposes will be taxed on income sourced in Australia only



- Concepts of source & residence are in Div 6 of ITAA 1997, dealing with ordinary and statutory income

Income Tax Rates for Individuals

- Differences are:
 - Foreign residents do not get the benefit of the tax-free threshold on any Australian sourced income
 - The tax payable on the first bracket of income is at a higher rate
 - Foreign residents do not have access to many personal tax offsets
 - Foreign residents are not liable for Medicare

Residence

- Section 995-1 ITAA 1997 provides that a 'resident' means a person who is a resident of Australia for the purposes of ITAA 1936
- In ITAA 1936 s 6(1) – resident definition
 - A person who is not in the legislative definition of 'Australian resident' is a foreign resident for tax purposes
 - A taxpayer may be a resident of more than 1 country
 - Residency status is considered yearly
 - Events may be examined on year end to determine residency status

- Residence of Australia – Individuals

- s 6(1) ITAA 1936 has 4 separate and exhaustive tests
- Need only satisfy 1 test

1. Residence according to ordinary concepts

- Common law test that requires consideration of where a person resides
- 'resides' takes its ordinary meaning
- **Ruling TR 98/17 para 4:** definition covers migrants, also extends to a person dwelling in Australia for a considerable length of time (6 months). Discusses the facts and circumstances of an individual's behaviour that the commissioner considers relevant.
- Question of whether a person resides in Australia is a question of **fact and degree**: *Miller v FCT 1946*
- **Physical presence in Australia:** spends at least some time in Australia (family home and intention to treat Australia as a home *Joachim v FCT 2002*)
- **If the person is a visitor; frequency, duration, and regularity of visits:** *IRC v Lysaght 1928* – taxpayer living in one jurisdiction but travelling with frequency and regularity to another
- **Purpose of the visits to Australia and abroad:** if a visitor, the purpose of the visits might be considered, or the purpose of the absence
- **Maintenance of a place of abode for the taxpayers use:** *Joachim v FCT* family home in Australia
- **Persons family, business, and social ties:** provides evidence of residence; *Levene v IRC 1928*
- **Persons nationality** – considered if a case is borderline

1. Domicile test

- Generally applies to **outgoing** individuals where that person moves overseas (usually as a work posting) and does not change their domicile
- Legal concept to be determined under the Domicile Act 1982 (Cth) – jurisdiction with which a person has permanent legal ties
- S 10 of Domicile Act 1982 provides that the intention a person has to acquire a domicile is to make their home indefinitely that country – e.g. applying for a permanent residency visa
- Individuals leaving need to demonstrate they have a permanent place of abode outside of Australia
- *FCT v Applegate 1979* – time abroad wasn't temporary or transitional
- *FCT v Jenkins 1982* - permanent place of abode during time abroad (intention/substantial)
- Ruling IT 2650 – factors considered relevant in deciding whether a taxpayer has a permanent place of abode outside Australia
 - Intended and actual length of stay of taxpayer in overseas country
 - Whether taxpayer intended to stay o/s temporarily and move at a definite point of time
 - Whether the taxpayer had established a home outside Australia
 - Whether a residence/abode exists in Australia or has been abandoned
 - Duration and continuity of taxpayer's presence in the overseas country
 - Durability of association that person has with a place in Australia (i.e. bank accounts sustained, informing govt. departments that they are leaving permanently, place of education of tax-payers children)
 - Length of stay – 2 years + = substantial length of stay – but should be considered in context of other factors

2. 183-day test

- Physical presence in Australia for more than ½ of the year
- Continuously or intermittently
- Two limbs – just the maths part, and then the exceptions