

RESIDENCY (7m) – 12 mins

- According to s995-1 ITAA36, XXX will be a resident if she/he satisfies any one of the four residency tests in s6(1) ITAA36.

1) ORT (Ordinary Resident Test) - S6(1)(a)

The ordinary resident test is the primary test of residence, and essentially, a taxpayer is resident if she resides in Australia. The Court have in Levene held that to reside is to “dwell permanently or for a considerable time in a particular place, and this is a question of fact based on each taxpayer’s individual circumstances: Miller.

The ATO’s guidance in TR 98/17 suggests consideration of following factors:

- **Physical presence:** The Commissioner suggests that 6 months is generally a sufficient period. XXX was in Melbourne for a duration of 10 months during the income year, which can be considered a sufficient period under Levene’s case. (< 6 months) However, as seen in Joachim, the lack of physical presence in Australia is not in itself determinative and other factors need to be considered.
- **Frequency, regularity, duration of visit**
- **Purpose of visit to AUS :** XXX was in Melbourne for employment purposes. She intends to stay in Australia till the end of contract and does not plan on returning. Thus, the fact remains that she intends to reside in AUS for the year ending XXX, suggesting residence.
- **Maintenance of a place abroad:** XXX maintains a place of abode in XX, which is not consistent with residence. XXX lived in accommodation provided by employer. This is of a temporary nature and is inconsistent with residence.
- **Family, Biz, Social Ties:** She has opened a business in Melbourne and an Australian bank account, which are consistent with residing here; Her family ties (partner and sister) are in Australia, which suggests she resides here; She has made many friends in Melbourne and joined a local netball group which is consistent with residing here; XXX has significant assets in XX, which suggests she does not reside here;
- **Nationality:** She is a XX citizen, which suggests she does not reside here but status under migration law is not determinative for tax purposes.
- **Intention to take up residency:** Would like to stay in Aus after visa expired, suggest residence.
- **Maintenance and location of asset:** Bought apartment, open bank acc, maintain Aus share portfolio, suggesting residence.

Evaluating all of the factors and XXX’s circumstances, it would appear that XXX does/does not ‘reside’ in Australia for the year ended XXX (Taxing period). Although XX is only physically in Aus for X months, it would appear that he ‘resides’ in Aus for the whole income year as his absences are only temporary. As such, XX is a resident of Aus for tax purposes under this test for the entire income year.

Income from Personal Services & Employment (use s15-2 for non-cash convertible)

*Check whether it is a fringe benefit. S23L(1) states that income that are fringe benefits are NANE

Ordinary income

1. Salary and wages

While it is a benefit provided by the employer to employee in respect of the employment, salary and wages do not constitute a fringe benefit, as it is excluded under s136(1)FBTAA86 and defined as being dealt with under income tax system.

The Court in Hayes held that an amount that is product or incident of employment or a reward for services rendered would be ordinary income. Hence, XX's salary of \$X is ordinary income under s6-5 ITAA97.

*Amount paid to his relative is part of XX's AI under the constructive receipt rule s6-5(4).

This amount is also captured in s15-2ITAA97. However, under s15-2(3)(d) ITAA97, this is a residual taxing provision, hence it will be classified as OI under s6-5 ITAA97.

2. Reimbursement

Reimbursement is a compensation for the exact amount of expense incurred. Since there is no real gain as demonstrated in Eisner v Macomber, it is not classified as OI but FB.

3. Allowance

Allowance is a predetermined amount made to cover an estimated expense and paid regardless of whether expense is incurred. Since allowance is covered by salary and wages, it is excluded from FB s136(1) FBTAA. As XX receives this amount regardless of his actual expenditure, this is an allowance RTA TR92/15. \$X is assessable as OI under s6-5 as it meets the prerequisites for OI and is connected with her provision of service. (Hayes)

This amount is also captured in s15-2ITAA97. However, under s15-2(3)(d) ITAA97, this is a residual taxing provision, hence it will be classified as OI under s6-5 ITAA97.