TOPIC 4: RESIDENCE

- Note - Double tax agreements operate to reduce or eliminate double taxation caused by overlapping jurisdictions

Is X an Australian resident?

- Reminder: Australian residents include worldwide OI in assessable income: ITAA97 s 6-5(2)
    - Foreign residents only include Australian-sourced OI in assessable income: ITAA97 s 6-5(3)

INDIVIDUALS

- → There are four limbs in the statutory definition of residence (of Australia) of individuals: **ITAA36 s 6(1)**. Only one limb needs to be satisfied.'

First limb: A person (other than a company) **resides** in Australia: **ITAA36 s 6(1)(a)**

- The concept of residence is one that is not capable of precise definition (see Rich J in *Miller*)

- → **'Determining where a person 'lives' entails consideration of a basket of residence indicia, with none being determinative. It is a question of fact and degree, having regard to the ordinary meaning of 'resides' (see *Miller,* Dixon J citing *Lysaght*).'**
    - Time spent at the location
    - Behaviour while in jurisdiction [i.e. visitor or 'settled' behaviour such as membership of clubs etc.]
    - Location of immediate family
    - Location of assets
    - Place of employment
    - Subjective intention
    - Immigration status
- (Do they look like a resident?)
    - Where they live, eat and sleep (Latham CJ in *Miller*)

- → **'A person can be a resident in more than one jurisdiction**** (i.e. ***Applegate*** per Northrop J, see ***Miller*** per Latham CJ)'

- ☹ ***Miller*** – Held to reside on the boat (not an Australian resident)
    - During WWII, compelled by contract to live solely on boat at Milne Bay from Dec '42 to Oct '43
        - Wife was in Cairns, actual house was still in Australia
    - He ate and slept and worked on the boat for a period over 9 months

Second limb: A person whose **domicile** is in Australia, unless the Commissioner is satisfied that the person's *permanent place of abode* is outside Australia: **ITAA36 s 6(1)(a)(i)**

- Meaning of domicile – Domicile of origin and domicile of choice (intention to make home indefinitely in country – *Domicile Act* s 10)
- **Meaning of 'permanent place of abode':**
    - → A person's place of abode is where they reside (*Applegate* per Northrop J)
    - → Permanence is determined objectively (*Applegate* per Franki J; Fisher J)
    - → Permanence must be assessed on annual basis (*Applegate* per Northrop J; Franki J)
    - → Permanence means 'enduring' rather than transitory (*Applegate* per Northrop J; Fisher J) or 'fixed and habitual' (*Applegate* per Fisher J)
        - No requirement of forever
        - Material factors: Continuity of TP's presence, duration of their presence, durability of their association with the particular place (*Applegate* per Fisher J)

- ☹ ***Applegate:*** Not a resident of Australia
  - **Facts:**
    - Solicitor worked at Sydney law firm. Sent to Vanuatu to open and manage new branch office. Moved with his wife.
    - Assignment was for indefinite period, but substantial period anticipated.
    - They gave up the tenancy of their flat in Sydney. Left no major assets in Australia.
    - Obtained a lease of a house and obtained temporary residence permit in Vanuatu.
  - He retained his Australian domicile (did not sever ties with Australia forever)
  - Intention of the TP (as to the length of his stay) is relevant, but not critical (Franki J)
    - Applegate's subjective intention: He would be in Vanuatu indefinitely
      - He wrote to Commissioner stating that he intended to set up a home with his family when he left and didn't intend to return to Australia
  - Permanent place of abode outside Aus: During that period, he did not reside in Aus, had no home in Aus, did not work in Aus. He received no income from sources within Aus.

Third limb: **183 Day Test -** A person who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the *person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia (subjective)*: **ITAA36 s 6(1)(a)(ii)**

Fourth limb: A person who is an eligible employee for the purposes of the *Superannuation Act*: **ITAA36 s 6(1)(a)(iii)** • E.g. DFAT personnel who live on foreign territory would have a permanent place of abode outside Australia (they will not normally be an Australian resident even though employed by Australian government) • The superannuation test ensures that such personnel *are* treated as Australian residents

COMPANIES

- → The statutory definition of corporate residence incorporates both the classical and conduit approaches.
  - Classical approach: Separation of company and SH
  - Conduit approach: To look through the entity to the 'economic owners' (those who participate in the risk associated with the company venture, as distinct from the legal owners who may not necessarily participate in that risk [ie a trustee]) of the company's profits/losses

→ A company is an Australian resident if it satisfies one of the tests in **ITAA36 s 6(1).**

First limb	**A company is an Australian resident if it is incorporated in Australia.**
Second limb	**A company is an Australian resident if it is carrying on a business in Australia AND has its central management and control in Australia.** (Substance approach) ✓ Carrying on business in Australia o Does not need to be active business (***Malayan Shipping***) ▪ ***Malayan Shipping*** – The company was only undertaking a passive activity of renting out the ship, it was not actively carrying on a business, but it is still a business for the purposes of the residency test ✓ Central management and control → Looking to where the significant decisions of the company are effectively being made (***Malayan Shipping***) o Who is exercising the discretion in making the decisions and controlling the company? o E.g. How resources should be allocated, what investments should be made etc. o ☺ ***Malayan Shipping*** – Found to be an Australian resident ▪ Mr S (Australian resident) had the company in vice: • SH were the puppets of Mr S, blindly followed his directions

	• SH did not exercise their own discretion or make their own decisions • Mr S held share transfer certificates signed by the SH so he could take over control of the company at any time • Mr S had a veto of all their operations • Mr S owned vast majority of the shares, other shares were held on trust • Mr S would tell them, in the lead up to board meetings, what they were going to consider and how they were going to decide those matters ▪ Mr S = Central management and control in Australia ○ ☹ Cf. ***Esquire Nominees –*** Not an Australian resident, central management was in Norfolk Island ▪ Directors on Norfolk Island received draft agendas of board meetings and draft resolutions from the accounting firm in Sydney ▪ Directors did <u>not</u> blindly follow the proposals of the accounting firm (per Gibbs J) • They had enough autonomy to make their own decisions (Gibbs J) ▪ Accepted that directors followed accounting firm's instructions as directors considered that it was in the best interests of the company to adopt proposals generated by the accounting firm (Gibbs J) ▪ Gibbs J accepted as a matter of fact, that hypothetically, if the directors were instructed to do something improper, Gibbs J did not believe they would have acted on their instruction
Third Limb	**A company is an Australian resident if it is carrying on a business in Australia <u>and</u> was being controlled at general meetings by voting shareholders resident in Australia.**

TOPIC 4: ORDINARY INCOME OF AN AUSTRALIAN SOURCE?

- Reminder: Australian residents include worldwide OI in assessable income: ITAA97 s 6-5(2)
  - Foreign residents only include Australian-sourced OI in assessable income: ITAA97 s 6-5(3)
- → 'The source of income for the purposes of s 6-5 is a question of fact determined according to the ordinary meaning of 'source': see ***Nathan*** and Barwick CJ in ***Mitchum.***'
- Courts have adopted rules for specific categories of income
- **Ask yourself:** Where does the TP become entitled to payment? ACKNOWLEDGE OTHER ARGUMENTS

1. Income from business services

- → General rule is to look to:
  - Where the business is conducted (i.e. where contracts are negotiated and contractual relationship is *maintained*); **OR**
  - Where the economy activity is being carried on: ***Cliffs International***
- Do not look to where the contract was executed (mere formality) or where HQ of TP is located (more about where you become entitled)

- ☹ ***Cliffs International*** – Source of income outside Australia
  - Real business of TP was the negotiations taken place overseas
    - That is where the right to income was generated

2. Interest Income

- → Weight given to:
  - Where the contract is entered into; **and/or**
  - Where the credit (i.e. loaned funds) is provided: ***Spotless Services***

- ☹ ***Spotless Services –*** Source of interest income was Cook Islands
  - Cooper J looked at the legal operation of the arrangements → The real transaction was the deposit of the money and entrance into the loan agreement which occurred on Cook Islands (Cooper J, Full Federal Court)
    - The deposit certificate is the critical document for the purposes of the contract between the parties
    - Spotless obtained interest income from this agreement
      - Deposit repaid to Spotless (together with the interest) from the Cook Islands

3. Personal Services

- ☹ ***French*** – Source of income was found to be in New Zealand
  - Employment contract here, income became due for work or services actually done or performed
  - → ***French*** is authority where you have an employee generating income, the source of the income is where they perform services (but see ***Mitchum***)
  - *NB: THINK OF APPORTIONMENT*
- → There is no rule of law or general presumption that service income has a source where the services are performed (Barwick CJ in ***Mitchum*** discussing ***French***)
  - One must look to the facts of the case and determine source on a case by case basis (Barwick CJ in ***Mitchum***)
- ☹ ***Mitchum*** – Source of income from services performed in Australia was outside Australia
  - Different set of circumstances → US actor promised to be available
  - As soon as he signed the contract, he was entitled to payment even if he did not actually provide services

Mini Conclusion → 'In my view, on balance, the better view is… because…' [Just make an argument when it comes to source questions]