

TAXPAYER RESIDENCE AND SOURCE OF INCOME

Explanation: Knowing if someone is and Australian resident and the source of income is important. If you are an Aus resident you pay for all income, if not only for income sourced in Australia. The questions on the exam ask sometimes only for if X is a resident or where the source of the income is and do not connect these together.

Intro: We must determine whether X is an Australian resident in which case all ordinary income derived directly or indirectly from all sources during the income year is assessable (ITAA97 s6-5(2)).

1. Rule:

- If you are an Australian resident, your assessable income includes the ordinary income you derived directly / indirectly from all sources, whether in or out of Australia, during the income year (ITAA97 s6-5(2))
- If you are a foreign resident, your assessable income includes the ordinary income you derived directly or indirectly from all Australian sources; and income that another provision includes an assessable income other than having an Australia source (ITAA97 s6-5(3)).

2. Is X an Australian / Foreign Resident (same meaning as under ITAA36 per s995-1 ITAA97)

→ If about if Australian tax resident

Intro (individual): If X is an Australian resident depends on them satisfying one of the limbs in s6(1) ITAA36. X would be an Australian resident if X resides in Australia (s6(1)(a) ITAA36). 'Reside' is accorded its ordinary meaning and the question of whether person resides in Australia is a question of degree and fact (*Miller*). Ordinary meaning means somewhere where the person lives for a considerable amount of time, sleeps and lives there. A number of factors will be considered in the evaluation (consider the location, family etc.). [Application]

Alternatively, X can be an Australian resident under s6(1)(a)(i) ITAA36 if their permanent abode is outside of Australia. Permanence is determined objectively on an annual basis because income tax is annual, it means enduring not everlasting (*Applegate*). 18 months has been deemed enough for 'permanence' (*Applegate*). [Application – look for how connected to Australia]

Alternatively, X can be an Australian resident under s6(1)(a)(ii) ITAA36 if they have been in Australia for 183 days or more during the relevant income year. [Application]

Intro (company): If X is an Australian resident depends on the company satisfying s6(1)(b) ITAA36. X would be an Australian resident if it were incorporated in Australia, here Alternatively, X is an Australian resident if it carries on business in Australia and has central management and control in Australia. The business is largely in X and there is business in Australia. The central management is in Y but the control seems to emanate from Y similarly to Malayan shipping. The question is if the real control is in Australia. [Application] Lastly, X is an Australia resident if it carries on business in Australia and is controlled at general meeting by voting shareholders that reside in Australia.

Individuals:

I) **Australian Resident: (s6(1) ITAA36):**

- (a) A person who resides in Australia (first limb)
 - A person's place of residence is a question of degree and fact (*Miller*).
 - Resides is not accorded any special meaning; once an ordinary definition of 'resides' is derived, it is a matter of applying to the facts (*Miller*).
 - Ordinary meaning of 'reside': *Oxford English Dictionary*: to dwell/live at a place permanently or for a considerable period of time; settled or usual abode
 - Where the person sleeps and lives
 - Consideration of the following should be used:

- Time spent at location
- Behaviour whilst at location (like membership of clubs etc.)
- Location of immediate family
- Place of employment
- Subjective intention (where do they intend to reside)
- Immigration status
- Multiple places of residence are possible (i.e. *Applegate*)
- (a)(i) A person whose domicile is in Australia, unless the Commissioner is satisfied that their permanent abode is outside Australia.
 - Generally, most significant for Australian residents who depart Australia for a substantial period of time – they have an established residence in Australia and then move overseas for a period of time. Haven't severed all ties to Australia and may have some intention of returning to Australia.
 - Meaning of permanent place of abode (*Applegate*):
 - Permanence is determined on an objective basis annually because income tax is on an annual basis; it means 'enduring' rather than transitory, for 'fixed and habitual'
 - Place of abode means where a person resides.
 - 18 months is enough to have an enduring place
 - Thus, there needn't be a commitment to reside overseas for an 'everlasting' period before taxpayer is taken to reside overseas.
 - FCT v Jenkins – 3 year assignment from work to Vanuatu, he tried to sell his Australian home but unsuccessful so rented it out while he was away and his permanent place of abode outside of Australia.
 - A person who is domiciled in Australia has a permanent abode outside of Australia so long as they stay outside Australia is indefinite, the permanent place of abode and therefore residency is outside of Australia.
- (a)(ii) A person who has actually been in Australia – continually or intermittently – during more than one-half of the year of income (183 days) unless the Commissioner is satisfied that their abode is outside Australia and that they do not reside in Australia.
 - Ask if the person has been in Australia for 183 days in a year!
 - Intended to capture people without a fixed place of abode is in another jurisdiction who are travelling around the world and happen to be in Australia for more than one-half year of the year.
 - It is possible to reside in Australia for 183 days, spanning two income year, and not satisfy the test, thus not resident for tax purposes.

Companies:

- (b) A company which is incorporated in Australia, or carries on business in Australia and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.
 - A company is a resident of Australia if it satisfies one of the following:
 1. Is the company incorporated in Australia? → Look at the place of incorporation.
 2. Carrying on business and its central management and control in Australia
 - Where company's economic activity carried on & site where activity is controlled.
 - Business carried on where the central management & control is exercised (*Malayan Shipping*). → are they puppets?
 - *Malayan Shipping*: Company incorporated in Singapore and there the directors were under control of an Australian resident (Mr S), all the real business and control of it was in Australia.
 - *Esquire Nominees v FCT*: Directors in Norfolk Island and received draft agendas and followed instructions from a firm of accountants. Malayan was distinguished upon the basis that directors considered that it was in best interests of the company to adopt proposals generated by the accounting firm – the directors were not puppets.
 - If you have directors who have historically done what they were told to do, it does not mean they are puppets of Australian controllers, so all about them acting independently or not.
 3. The company is carrying on business in Australia AND is controlled at general meeting by voting shareholders that reside in Australia

3. Defining 'Source' of income:

Often hard to say unequivocally that income has source in one particular place in international transactions. It is a matter of ensuring that there are sufficient indicators of the source in a particular place to conclude that the proper

Intro: Source of income for the purposes of s6-5 is a question of fact determined according to the ordinary meaning of 'source', which means looking at where the taxpayer becomes entitled to the amount. There is debate in the authorities between the legalistic and substantive approaches to the source of the amount. Legalistic approach approaches the source of income as where the contract is entered into, whereas the substantive approach focuses more on where a service or work has been performed and where the entitlement to the payment crystallises (*Mitchum*).

Here the legal entitlement to the amount is sourced in the Y contract. X becomes entitled to the amount at Z time. [Consider if the legalistic or the substantive is a better reflection of income as a hard, practical matter of fact; consider if they would really be entitled without any work or not].

- The source of income, for the purposes of s6-5, is a question of fact, determined according to the ordinary meaning of the term source.
- The key: Where the entitlement crystallises.
- Ordinary usage of 'source': When and where the taxpayer becomes entitled to the amount in question.
- Potential sources of an amount: (*Spotless*)
 - Where the contract under which payment made was entered into
 - Where the property associated with income is located (rental income from property?)
 - Where payment emanates from (the bank from which fund originate, for example)
 - Where economic activity is undertaken (where services performed, business conducted, etc.)
 - Where payment is controlled from (*Malayan Shipping*)
 - Royalties include any amount paid or credited – however described or computed; and whether the payment or credit is periodical or not – to the extent to which it is paid or credited, as the case may be, as consideration for a lot of stuff (s6(1) ITAA36)
 - S6C ITAA36 guides the rules for derivation for non-residents.
- Look at where the legal entitlement for payment arises – so where it comes into existence:
 - *Mitchum's case*: Actor came to Australia to perform acting services - the court rejected the concept that it is where the services are performed.
- Types of income:
 - Wages salary and contractual payments → Generally where the work is done rather than where the contract is executed. (*French*) (*Mitchum*)
 - Income from trading activities → Determined by the place of the sale contract.
 - Interest → Where credit is provided usually.
 - Dividends → The origin of the profit from which the dividends are paid.
 - Business services – *Cliffs International* – General rule is to look to where business is conducted and the contracts negotiated and contractual relationship maintained, rather than where the contract was executed [mere formality] or where headquarters of the taxpayer are located.
 - Here contract was signed in Australia, but they looked for where business was carried out – Mark finds this strange, more likely where contract signed. It was Barwick era so may be different now.
 - Interest income – Considerable weight given to where contract is entered into and/or where credit is provided.
 - Personal services –
 - *French*: employee based in Sydney, working in NZ for two weeks for his Sydney employer, source of income found to be NZ where services performed but the judgments of the HCA did not establish a rule by this – *Mitchum* did not follow this.
 - *Mitchum*: Partied adopted contract of employment nomenclature but was *Mitchum* an independent contractor? M was entitled to payment even without delivering the services.

Barwick CJ emphasised that source of income is a question of fact and no rule of law for this.

Miller: Skipper of fishing boat, entered agreement requiring him to work in New Guinea. CoT argued that he remained Aus resident. Court decided he lived and thus resided on his boat despite compulsion by contract, and that his wife remained in Cairns. He lived solely on the boat from December 1942 – October 1943) Thus, he was resident in New Guinea not Australia.

Applegate: Solicitor in Vanuatu for work. Assignment for an indefinite, but 'substantial' period. Always had intention to return to Australia. Took all assets to Vanuatu, and rented in Vanuatu. Had a temporary residence permit and professional registration as a lawyer in Vanuatu. Illness forced him to return to Australia for some time. Court held that he was not resident of Aus: no residence, home, assets, income or work in Aus.

Malayan Shipping: Company incorporated in Singapore. Puppet shareholders & directors under direction of Australian resident, who had company in vice. Central management and control of company was in Aus, and company thus carried on at least some business in Aus. Business 'resides' where central management and control is exercised – thus resident of Aus.

Esquire Nominees: Company incorporated in Norfolk Island. Acted as a trustee for Trust. Directors and shareholders live on NI, business conducted on NI. However, received agendas & followed instructions from accountants in Aus for managing Trust. Distinguished from *Malayan* - directors thought it in best interests of company to listen to accountants; not because they had to. Accountants had no power to control the directors.

Spotless: Spotless invested surplus \$40m in Cook Islands. When investment matured, received interest of \$2.96m minus Cook Islands tax. Argued that it was exempt from Aus tax, due to foreign source and foreign tax. CoT argued it was sourced in Aus, because contract signed in Aus. Spotless proved that contract was signed in Cook Islands not Aus. Court placed weigh on where contract entered into, and credit provided.

Cliffs International: Incorporated in USA, global rep for WA ore project in international joint venture sold mainly in Europe. CI claimed commission from sales exempt from Aus tax because its derived by non-resident from outside Aus. Court upheld this: commission was paid for work performed in negotiating contracts with overseas mills; negotiations took place overseas; nearly all info used came from USA; WA office played minimal role globally; that contracts were executed in Aus was mere formality.

Mitchum: Mitchum was an actor and US resident, contracted to act in & consult on film in Aus with Swiss Company. Completed work in Aus for 11 weeks. CoT claimed it was sourced from Aus. Mitchum claimed it was not as contract not signed in Aus. Court held there were no presumptions / rules that dictate how the question of source be resolved. Held that location where work is done is not necessarily determinative factor.