

Advanced Tax Final Exam Scaffold

Introduction to International Tax – Residence and Source

Issue 1: Jurisdiction to tax

- If Aus resident, AI includes IT derived directly or indirectly from all sources, whether in or out of Australia (s 6-5(2)) [statutory income: s 6-10(4)]
- If foreign resident, AI includes OI derived from Aus sources (s 6-5(3)).

NB: Any double taxation issue resolved by:

- (1) exemption mechanism, (2) credit for foreign tax paid overseas (FITO)
- Bilateral treaties (1) allocate taxing rights, (2) facilitate info flows, collection

Issue 2: Residence

'Aus resident' = resident of Australia for purposes of s 6(1) ITAA (s 995-1)

Individual – 4 tests (need to consider all 4, if you meet 1 you are resident)

- Person who resides in Australia – residence test under ordinary concepts
 - Inbound factors in TR 98/17
 - Physical presence in Aus during the year (intended or actual)
 - Intention or purpose of presence in Aus
 - Frequency or duration of visits
 - Behaviour during visits ('fun' = resident, 'work' – non)
 - Social and living arrangements
 - Personal ties – family with you?
 - Maintenance of home – sold or kept, furniture
 - Maintenance of economic ties / professional associations
 - Outbound factors
 - Has <xxx> retained a continuity of association with Australia, is there an intention to return to Aus and attitude Aus still remains home (Hafza v DG of Social Security)
 - (i) Connections retained – prof associations, (ii) Intention – shifted mindset that o/s is home (iii) Physical presence
- Domicile test – domicile is in Aus and person does not have a *permanent place of abode* outside Australia
 - Domicile – where you permanently consider your home to be
 - Permanent place of abode – enquiry is an objective one (Applegate)
 - Fixed and habitual place of abode which is more than temporary or transitory (doesn't have to be permanent truly)
 - CMR = 2 years or more is substantial – likely permanent abode
 - Facts: TP gave up lease in Sydney, leased a house in Vila, admitted in law in V, residence permit, intended to come back to Aus → permanent place of abode is V.
- 183 Day test
 - Rebuttable presumption that TP is resident if >183 days unless (i) *usual place of abode* outside Aus, and (ii) no intention to take up residency
 - Need to point to another place where you usually call home
 - If TP cannot ID another country being usual home, they will be deemed to be Aus resident even w/o intention (Subrahmanyam)
- Consequence: resident (taxed on worldwide income, tax-free threshold)
- Consequence: non-resident (rate of 32.5% since first dollar, no TFT)

Companies: two tests

- *Incorporation test*
- *Carries on business in Australia, and*
 - (i) *its central management and control are in Aus, OR*
 - Formality where directors reside, where meeting held and where decisions to manage company occurred are relevant but not dispositive
 - Look at substance – check who exercise independent decision-making
 - Board did not exercise independence but Mr G who is an Aus resident gave directions - Directors were not Aus residents, meetings outside Aus (*Bywater Investments*)
 - TR 2017/D2 – CMC (control and direction of company's operations – involved high level decision making)
 - Not a 2 part test – company is carrying on business where central management and control is. If company has CMC in Aus, it will automatically carry on business in Australia. Unnecessary to prove Aus trading operations.
 - (ii) *its voting power is controlled by s/h who are Aus resident*

Issue 3: Source

What is the place from which the income is derived?

- Source rules determining whether Australia asserts jurisdiction to tax non-residents
 - Salary / wages = where work performed or where K is entered into
 - Rent of land = where land is situated
 - Business profits = where business is carried on (location of mgmt., factories, customers)
 - Passive income – problematic, as many possibilities (see notes)
 - Interest – could be: where borrower resides, where funds are borrowed, where funds are utilised (*Spotless v FCT*)
 - Solution: WHT → look to residence of payer. If payer resides in Aus, there is an obligation to withhold tax on making payment

Taxation of Resident and Non-Residents

General rule: tax on Aus-sourced income of non-residents include in AI (s 6-5(3))

- Business or services income = Active [taxed on net basis and claim deductions]
- Interest, dividends = Passive [taxed on gross basis – final WHT]
- CGT on assessment basis (like active income)

Issue 1: Inbound (Aus income of non-residents)

Business profits – e.g. business carried on through branch or informal structure

- Prima facie taxable, but under DTAs, Aus will only tax business profits attributable to *permanent establishment*
 - Requires (1) physical and significant presence + (2) degree of continuity [need both for Aus to tax]
 - Check: business through agent, installed substantial equipment
- NB: if carried out through formal Aus subsidiary – no cross-border tax issues (Aus resident payer)