

Residence Individuals

There are three Statutory test and an ordinary concept test according to common law

S6(1) ITAA 1936

- (a) A person, other than a company, who resides in Australia and includes a person
 - (I) Whose **domicile** is in Aust, unless the commissioner is satisfied that his **permanent place of abode is outside Australia**;
 - (II) Who has been in Aust, continuously or intermittently, during more than **one-half of the year of income**, unless the Commissioner is satisfied that his usual place of **abode is outside of Australia** and he does not intend to take up residence in Australia
 - (III) Who is
 - (A) Member of super scheme establish by deed under superannuation Act 1990
 - (B) Eligible spouse for purposes of the Superannuation Act 1976;
 - (C) Spouse, or child under 16 of a person covered by sub-subparagraph (A) or (B)

Domicile (I)

-Can be domicile at birth or domicile of choice

-FCT v Applegate (1997) 9 ATR 889-Employer sent taxpayer to Vanuatu to operate branch. Taxpayer **leases his flat** leaving **no assets** in Aust. and left Sydney with wife. **22 months** after he returned to Sydney because he was ill. He intended to return to Aust **indefinitely**, court held he had a **permanent** place of **abode**. Permanent should be contrasted with temporary or transitory.

-FCT v Jenkins (1982) 12 ATR 745- Similar to above but also had contracted to work in Vanuatu for 3 years. He was moved back in 18 months

-Ruling IT 2650-Inteded and actual length of taxpayer stay in overseas / Taxpayer intended to stay overseas temporarily and then to move to another country or return to Australia at some point / Whether taxpayer has established home outside Australia / Place of abode in Australia exist or has been abandoned because of overseas absence / Duration and continuity of presence in overseas country / Durability of association has with particular place in Australia

-> Rule of thumb is 2 years or longer but should still rely on other factor –pg92/93 cases

183-days test (II)

-Physical presence in Australia for more than one-half of year considered residence; first way to determine is purely mathematical. Second part of the test provides an exception. There are **two limbs** to this exception- Tax payer has a place of **abode outside** Australia or did **not intend** to take **residence** in Aust. TR 98/17(para 37-38)-Individuals not residing in Australia under ordinary concepts, their usual place of abode is outside Australia

Ordinary Concepts

-Physical presence in Australia- Taxpayer spends some physical present time in Aust during yr of income to be considered a resident under this test

-Levene v IRC [1928] AC 217-Retired sold his house and lived in hotels in the UK for about 4-5mths for medical advice, visit relatives & religious ceremonies. Held he was a **residence** until he decided to lease a flat in Monte Carlo. Based on his ties in **UK** and that him going abroad was temporary

-IRC V Lysaght [1928] AC 234-Spent considerable time abroad. Retired moved to Ireland, sold his home in England but returned often as non-executive director of the family. It was held that he was **residence** due to the frequency and regularity of visits.

-Joachim v FCT (2002) 50 ATR 1072 – Taxpayer migrated to Aust and could not find a job so he **worked** in various **Sri Lankan vessels**. It was concluded by AAT he was a **resident** of Aust. As he **maintained a home** for his **family** in Aust despite his **absence** his intention to treat **Aust. as a home** has not changed.

Residence – Companies

Statutory test ITAA 1936 S6(1)

There are 3 Test to determine a company's residence. *Place of **incorporation** test

*Place of **central management** and control test

*Controlling **shareholder** test

-Company incorporated in Aust. automatically a resident regardless of any other factors. A company is incorporated is a question of fact determined by reference to the Corporations Act 2001 (Cth)

Central Management and control test

Under this test a company is resident if it carries on business in Australia and has its central management and control here. Central management and control has a **two limbs** test first company must **carry on business in Aust**, second company **central management and control** must be located in Aust.

-Malayan Shipping Co Ltd v FCT (1946) 71 CLR 156-Business carried o in Singapore for shipping and execution of agreements were to be sent to Singapore to be made.

-Two limbed test Ruling TR 2004/15 to determine residence – Draws distinction between operational activities and one which is more passive in its dealings. A company with **major operational** activities carries on business where those **activities** take **place** eg. Trading, manufacturing, mining. Where company carries on **passive activities** to produce income, where **decisions in respect of activities** are made, business is carried on as the same **location** as **central management** and control (eg. Investment trading). –Held Malayan shipping was resident.

-Taxation Ruling 2004/15 – PG 97 & 98

Controlling Shareholders test

Two limb test. First necessary to demonstrate voting power is controlled by Australian residents.

Control needs to be **more than 50%** at general meetings.

The second test is whether the company is carrying on **business in Australia**.

Temporary Resident

768-R ITAA 1997: Exempt from foreign source of income

S.995.1 (1) ITAA 1997: Definition temporary resident:

(A) Hold temporary visa granted under Migration Act 1958

(B) Not an Australian Resident within Social security ACT 1991

(C) Spouse not Aus Res. Under Social security act 1991