

**W1 TAX definition** - 'A compulsory exaction of money by a public authority for public purposes... and is not a payment for a service rendered.' (eg Levy or surcharge)

Matthews v Chicory Marketing Board (1938) 60 CLR 263 at 270 - Tax is not a penalty and it cannot be arbitrary.

TAX use – (1) to provide public/social goods. (2) As a redistribution function. (3) Collection mechanism (eg Medicare)

How to tax? (Design of a taxation system) – Efficiency, equitable, simplicity. + structural features (taxpayers, tax base, tax periods, tax rates)

**Constitutional aspects:** (1) Commonwealth govt power to impose taxes from Aus constitution: Section 51(ii) grants the Commonwealth Parliament to “make laws for the peace, order and good government of the Commonwealth with respect to ... taxation”

(2) No discrimination between States or parts of States: Section 51(iii) also provides that laws with respect of taxation cannot discriminate between States or parts of States.

(3) Distribution of taxing rights between Commonwealth and State Govts: eg customs and excise duties only imposable by Commonwealth gov: s 90

**3 types of taxes:** (1) **Income tax** (tax on income receipts + capital gains) (2) **GST** (10% in Australia, imposed on supplier of g/s) (3) **Fringe benefits tax** (liability on employers not employees. Arise when employer provides benefit to employee due to employment relationship. FBT to employee: non-assessable non-exempt income)

**Design of taxation system:** efficiency, equitable, simplicity

**Source of tax law:** main source: Legislation; case law (common law), and to assist (not laws, just guidance) there is taxation rulings and guidelines released by Commissioner of Taxation (ATO)

**Statutes:** Income Tax Assessment Act 1936 (Cth) (“ITAA36”) Income Tax Assessment Act 1997 (Cth) (“ITAA97”)

**(1) Income Tax:** ‘Income tax is payable each year by each individual and company, and certain other entities’: s 3-5 ITAA97

Income tax Payable = (Taxable Income x Rate) – Tax Offsets [s 4-10 ITAA97]

Taxable Income = Assessable income – Deductions [s 4-15 ITAA97. Div 6 – AI / Div 8 - D]

Assessable income = Ordinary income + Statutory income [s 6-1(1) ITAA97. OI – s 6-5 ITAA97 / SI – s 6-10 ITAA97]

*Ordinary income* – assessment of gains that have income character as set out in doctrine developed by courts, ordinary concepts (Wages/salary).

*Statutory income* – assessment of amts by specific provision in IT legislation (capital gain)

Deductions = General deductions + Specific Deductions [GD – s 8-1 and s 8-5(1) / SD – specific provisions – s 11-B]

*General deductions* – losses that may be claimed provided general deduction rule in s 8-1 is satisfied. *Specific deductions* – specific provisions in IT legislation allow particular losses/outgoings to be deducted

**Exempt income:** Non-taxable income (entity is exempt – charitable org, income is exempt – govt scholarship)

Non-assessable non-exempt income: non assessable even though they are not specifically “exempt income”

**Income tax rates:** Companies subject to flat rate 30%; from July 1 2015 is 28.5% for small business entities.

Australian resident individuals are subject to **progressive rates** →

- Foreign residents/working holiday resident progressive rates are different

**Medicare Levy:** Taxable income x 2%.

The universal healthcare scheme that provides Australians with access to healthcare services. Individuals exempt: Foreign residents, certain ppl not entitled to Medicare benefits, certain individuals with low income (threshold amount) earners.

Taxable income	Tax on this income for 2015-16
0 - \$18,200	Nil
\$18,201 - \$37,000	19c for each \$1 over \$18,200
\$37,001 - \$80,000	\$3,572 plus 32.5c for each \$1 over \$37,000
\$80,001 - \$180,000	\$17,547 plus 37c for each \$1 over \$80,000
\$180,001 and over	\$54,547 plus 45c for each \$1 over \$180,000

	Threshold amount	Phase-in limit
Individual entitled to the seniors and pensioners tax offset	\$33,044	\$41,305
All other taxpayers	\$20,896	\$26,120

eg Jacky has taxable income \$22,000. Not entitled to the seniors and pensioners tax offset. Jacky’s Medicare levy is (\$22,000-\$20,896) x \$0.10 = pay Medicare levy of \$110.40.

**Medicare Levy Surcharge:** Applies to individuals who do not have health cover through registered private health insurance provider for entire income year, and income exceeds certain threshold. Income for surcharge purposes include: (1) Taxable income. (2) Exempt foreign employment income. (3)

Income for Surcharge Purposes		Surcharge Rate
Singles	Families	
0- 90,000	0 – 180,000	0%
90,001 – 105,000	180,001 – 210,000	1%
105,001 – 140,000	210,001 – 280,000	1.25%
140,001 +	280,001 +	1.5%

(4) Reportable fringe benefits amount. (5) Total net investment loss. (5) Reportable super contributions.

Eg Pierre is an Aus resident with taxable income \$150,000 for 2015-16 income year. He is single. He had private health insurance for 90days of the income year. No reportable fringe benefits or any amounts on which family trust distribution tax has been paid. Pierre must pay Medicare levy surcharge because his “income for surcharge purpose” exceeds the threshold and he did not have private health insurance for the entire income year.

\$150,000 x 1.5% x (366 – 90) / 366 = \$1,696.72

**Help debts:** Higher ed students who defer payments who make compulsory repayments through tax system.

Amount of repayment based on taxpayers Repayment Income (RI) and HELP repayment rate (progressive)

Repayment income (RI*)	Repayment Rate
Below \$54,126	Nil
\$54,126-\$60,292	4%
\$60,293-\$66,456	4.5%

\$66,457-\$69,949	5%
\$69,950-\$75,190	5.5%
\$75,191-\$81,432	6%
\$81,433-\$85,718	6.5%
\$85,719-\$94,331	7%
\$94,332-\$100,519	7.5%
\$100,520 and above	8%

**W2** If you are an **Aus resident**, assessable income includes ordinary income derived directly or indirectly from **all sources**, whether in or out of Aus, during the income year. *S 6-2(2); S 6-10(4) ITAA97 (relating to statutory income)*. Also medicare levy and surcharge applies.

If you are **foreign resident**, assessable income includes ordinary income derived from **all Australian sources**. *S 6-5(3)(a); s 6-10(5) ITAA97 (relating to statutory income)*. Medicare levy and surcharge do not apply; limited access to tax offsets; no tax-free threshold

Aus resident tax rates for 2016/17 and 17/18

Foreign resident tax rates for 2016/17 and 17/18

Aus resident tax rates for 2016/17 and 17/18		Foreign resident tax rates for 2016/17 and 17/18	
Taxable income	Tax on this income	Taxable income	Tax on this income
0-\$18,200	Nil (ie. <b>Tax Free Threshold for Australian Tax Residents</b> )		
\$18,201-\$37,000	19c for each \$1 over \$18,200	\$0- \$87,000	32.5c for each \$1 ( <b>no tax free threshold</b> )
\$37,001-\$87,000	\$3,572 plus 32.5c for each \$1 over \$37,000	\$87,001 - \$180,000	\$28,275 plus 37c for each \$1 over \$87,000
\$87,001 - \$180,000	\$19,822 plus 37c for each \$1 over \$87,000	\$180,001 and over	\$62,685 plus 45c for each \$1 over \$180,000
\$180,001 and over	\$54,232 plus 45c for each \$1 over \$180,000		

**Individual - 4 tests of residence:** *s 6(1) ITAA36*. (1) Ordinary Concepts (2) Domicile test (3) 183-day test (4) Superannuation test

**I - ORDINARY CONCEPTS TEST:** (go in or out of Australia.)

Macquarie dictionary "Reside": "to dwell permanently or for a considerable time."

- Intention or purpose of presence (*TR 98/17*) – *sufficient time to demonstrate continuity, routine or habit* → *when behaviour consistent with residing here is demonstrated over a considerable time, an individual is regarded as a resident from the time the behaviour commences.*

- **Joachim v FCT (2002):** *Held: taxpayer + family migrated to Australia in 1994. The taxpayer couldn't find work in Australia so go work at various Sri Lankan vessels = him outside Australia for 316 days. His family, had Australian PR, remained in Australia during this time. The taxpayer claimed he was not a resident of Australia as he had a permanent place of abode outside Aus. The AAT concluded he had a home for his family in Australia and, despite his absence, he had intention to treat Australia as his home.*

-- **The person's family, business and social ties. Levene v IRC (1928):** *Held: until taxpayer took a lease on a flat in Monte Carlo in 1925, he was a UK resident. Concluded because purposes for going abroad was just temporary. Taking into account his ties with the UK, and the short time abroad, the taxpayer was deemed a tax resident of the UK until 1925.*

- **If the person is a visitor, the frequency, regularity and duration of visits. IRC v Lysaght (1928):** *Held: Taxpayer was resident in the UK. "If residence is once established ordinarily resident, means in my opinion no more than that the residence is not casual/uncertain, but that the person held to reside does so in the ordinary course of life."*

- Location of assets: **Commissioner of Inland Revenue v FL Brown (1926)**

- **Factors considered by courts:** (1) Physical presence in Aus. (2) If person is visitor – the frequency, regularity and duration of visit. (3) Purpose of visit to Australia/abroad. (4) Maintenance of place of abode in Aus for taxpayer's use. (5) Person's family, business and social ties. (6) Person's nationality

**II - DOMICILE TEST:** (permanent place of abode outside Australia.)

Individual is Aus resident if domicile is in Aus, unless Commissioner is satisfied that person has permanent place of abode outside Aus. The domicile test generally applies to individuals where that person moves overseas, but does not change his/her domicile.

- **Domicile Act 1982:** (1) Domicile of origin at birth. (2) Domicile of Choice: country where taxpayer intends to make their home indefinitely.

- **Permanent does not mean forever and is assessed each year. FCT v Applegate:** *Held: don't look at 'permanent' context, but by means of whether a person has retained his/her domicile. The Court concluded that the taxpayer had a permanent place of abode outside Australia and was not a tax resident.*

- **Factors considered by courts:** (1) Intended/actual length of stay in overseas country. (2) Intention to stay overseas permanently or return to Aus some time. (3) Whether taxpayer has established home outside Aus. (4) Whether place of abode in Aus has been is empty (intention to return) or sold/rented out (intention to leave). (5) Duration/continuity of taxpayer presence in overseas country. (6) Association that person has with country (bank account, place of children's education, inform gov depts of departure, etc)

**III - 183-DAY TEST:** (time spent in Aus)

Requires physical presence in Aus for at least 183-days. Exceptions if commissioner satisfied that individual's usual place of abode is outside Aus (domicile test) or if individual does not intend to take up residence in Aus.

- **Re Koustrup v FCT (2015).** *Held: Despite taxpayer being in Aus more than 183days, she was held to have a usual place of abode outside Australia and was therefore not entitled to the tax free threshold under the residency tax rates.*

**IV – SUPERANNUATION TEST:** (not examinable)

Relevant individuals (public servants) who generally reside in Aus but leave temporarily and are not actually in Aus in income year.

**Company – 3 tests of residence:** s 6(1)(b). (1) Place of incorporation test (2) Place of central management (3) Control test and the controlling shareholder test

Company incorporated in Aus under Corporations Act 2001 is automatically tax resident of Aus, regardless of other factors.

**I – PLACE OF INCORPORATION TEST:** company incorporated in Aus automatically a resident of Aus

**II – CENTRAL MANAGEMENT AND CONTROL TEST:** (1) Company must carry out business in Aus. (2) Company's central management and control must be in Aus (where high-level decision making is made)

- **Bywater Investments Limited & Ors v Commissioner of Taxation (2017)** - look at true management & control (not simply day to day activities), and not simply where the Board of Directors meet.

- **Malayan Shipping v FCT (1946)**. Held: Company has its central management and control in Australia, it can be inferred that it is carrying on business in Australia on the basis that the acts of control and management equates to carrying on a business.

- **Koitaki Para Rubber Estate v FCT (1940)**. Held: the mere day to day control over the business operations of a company, where that control is subject to monitoring and supervision by a head office, does not amount to central management and control of the company.

**III – CONTROLLING SHAREHOLDERS TEST:** Two limbs test - (1) Company must carry out business in Aus. (2) More than 50% of voting power is controlled by Australian resident shareholders.

**Dual tax residency:** Double tax agreements (DTAs). Possible for individuals/companies to be tax residents of 1+ countries

Category	Source principle
Sale of goods	Generally, the place where the trading activities take place.
Sale of property other than trading stock	For real property, the place where the property is located.
Services	Generally, the place where the performance of services occurs: <i>FCT v French</i> (1957); <i>FCT v Efsthakis</i> (1979). Is there an exception?
Interest	Emphasis on the place where the contract for the loan was made and where the money was advanced: <i>Spotless Services v FCT</i> (1993).
Dividends	The place where the company derived its profits: <i>Esquire Nominees Ltd v FCT</i> (1973).
Royalties	The place where the location of the industrial or intellectual property from which the royalty flows.

**Source of income:** If taxpayer is foreign resident, taxpayer taxed on ordinary/statutory income sourced in Aus, unless deemed assessable income on some other basis. Source → "something which a practical man would regard as a real source of income" and a "practical, hard matter of fact": *Nathan v FCT (1918)*.

### W3 ORDINARY INCOME

**Flow concept** (*Eisner v Macomber 252 US 189 (1920)* by *Pitney J*):

Tree → source; represents capital.

Fruit → severable from source; represents income.

- Income from labour/personal services/personal exertion/ employment and Property

- A receipt that has **income characteristics** (eg periodic, expected/used for

ordinary living expenses) could also be **considered ordinary income** in some circumstances, even when not easily categorized as receipt from "personal exertion, property or business"

**Constructive receipt rule** – taxpayer who's entitled to receive income is person assessable on it, even if actual gain is directed to someone else.

**Mutuality principle** – if taxpayer makes payment to himself, no gain and payment will not be income, applies to clubs/associations. (*Bohemians Club v Acting FCT (1918)*) (Will not apply if the members receive income from other sources eg. Interest on club investments, fees collected from non-members etc)

### INCOME FROM PERSONAL SERVICES:

Amts earned directly/indirectly as a consequence of taxpayer's personal services/exertion will be ordinary income. (*Brown v FCT (2002)*)

- Cash/cash convertible 'receipts'/benefits that show a **NEXUS** with the service are ordinary income (even if receipts are unexpected/voluntary). If receipt/benefit is not cash/cash convertible, it could be statutory income under s15-2 ITAA97 3 requirements (see below section) or could be subject to fringe benefits tax.

**NEXUS:** identify connection. Eg Wages (clear nexus with activity: OI). Gifts (no nexus with activity, not OI)

- **CLEAR NEXUS** *Brent v FCT (1971)* nexus not impacted by lump-sum or one-off receipts for the performance of a specific task. = **STILL NEXUS** *Kelly v FCT (1985)* It is irrelevant who pays or when it is paid. (Once shown there is nexus between benefit-activity = OI)

- **UNEXPECTED/VOLUNTARY AMOUNTS** *Laidler v Perry (1965)* – Christmas bonus paid to employees as redeemable gift vouchers = **NEXUS**

*Calvert v Wainwright (1947)* – Tips received by taxi driver = **NEXUS**

*FCT v Dixon (1952)* – additional periodic payments as substitute for wages that were relied upon by taxpayer → (Possible to be OI based on nature of payment/income characteristics, rather than nexus)

- **UNCERTAIN NEXUS:** (for personal qualities, not OI. For ability to work/employment contract is OI.)

*Scott v FCT (1966)* – importance of personal relationship btwn parties

*Scott v FCT (1966)* – expectation of the gif/motive of the donor/personal relationship/fully paid for services?

*FCT v Blake (1984)* – lumpsum or regular payments

*Hayes v FCT (1956)* – whether recipient has been fully paid for services provided/personal relationship

Case 37 (1966) Ruling IT 167 – winnings of casual participant on TV show = NOT ASSESSABLE if derived by luck

*Kelly v FCT (1985)* – requires degree of skill → professional sporting people = OI. Irrelevant that payment is not from employer.

- "Skill" v "Luck" – (1) degree of professionalism. (2) reward for services rather than personal qualities. (3) paid before or after service? (4) related to taxpayer's contract?

**INCOME receipts/gains** – reward for service (OI) vs **CAPITAL receipts/gains** – giving up valuable right (not OI but may be SI)

**CHANGES TO ENTITLEMENTS** *Bennett v FCT (1947)* - Relinquishing employment rights (eg right to control company as managing director)

*AAT Case 7 (1992)* – loss of employee entitlements

*Higgs v Olivier (1952); FCT v Woite (1982)* – separate agreement to give up valuable rights = giving up right = capital → not assessable

*Hepples v FCT (1991)* – no nexus with earning activity (payment made at end of contract)