

# CLAW 3201: TAXATION LAW

## WEEK 1:

Sources: Always quotes to these three sources in order

1. Statute law: legislation ITAA 1936 and ITAA 1997
2. Case law: Common law
3. ATO rulings

Individual Income Tax Rates: Issues

### 1. What is Tax??

*Tax Arbitrage – Tax rates:*

- Between individual and corporate tax rates
  - Anti-avoidance rules
    - Personal services income regime
    - Constructive dividends of private company
- Between countries
  - Tax havens
  - Low tax countries

What makes a 'good' tax system?

- **Simplicity** – A tax is simple if for each dollar raised by it the cost of the official administration is small and if the compliance costs, the costs in money and effort of all kinds to the taxpayer are also small.
  - Certainty
  - Lower compliance cost
- **Fairness: 'Ability to pay' principle [Equity]**
  - “Horizontal’ equity: persons in the same situation → tax equally
  - ‘Vertical’ equity: persons in different situations → tax differently
- **Efficiency** – Efficiency requires that the resources available to the public use be as nearly as possible equal to the resources withdrawn from the private sector. The cost of administering and complying with the tax law is a “dead weight” cost to the community and should be minimized.
  - Definition: tax system should be neutral, not affecting taxpayers’ behaviour.

## Week 2: Residence and Source

**-Resident** is defined in ITAA 1936 s6, as

**(a) a person, other than a company, who resides in Australia and includes a person:**

i. whose **domicile** is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;

ii. 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 the person does not intend to take up residence in Australia; or

iii. who is

A. a member of the superannuation scheme established by deed under the superannuation act 1990; or

B. an eligible employee for the purposes of the superannuation act 1976; or

C. the spouse, or a child under 16, of a person covered by sub-subparagraph

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, 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.

***Residents are assessable on their derived worldwide ordinary income (ITAA s6-5 (4)) and statutory income (ITAA s6-10 (3)).***

**-Assessable Income:  $A.I = O.I + S.I$**

➤ **Income Tax Assessment Tax Act 1997, s 6-5**

(1) Your assessable income includes income according to ordinary concepts, which is called ordinary income

(2) If you are an Australian resident, your assessable income includes the ordinary income you derived directly and indirectly from all sources, whether in or out of Australia during the income year.

(3) If you are a foreign resident, your assessable income includes:

a. The ordinary income you derived directly or indirectly from all Australian sources during the income year

b. Other ordinary income that a provision includes in your assessable income for the income year on some basis other than having an Australian source

## Individual Residence

**Foreign Resident** is defined in *ITAA 1997 s995-1* as:

A person who is not a resident of Australia for the purposes of the Income Tax Assessment Act 1936.

Foreign residents are assessable only on their Australian sourced income under ITAA 1997 s6-5 (3) and ITAA 1997 s6-10 (5).

**Australian Resident** is defined in *ITAA 1997 s995-1* as:

A person who is a resident of Australia for the purposes of the *ITAA 1936*. Resident is defined in *ITAA 1936 in s6(1)* as is written above.

Residence comes with two issues; The issues of either gaining or losing residence.

The tests for individual residence may be summarized as follows:

- *Reside test*
- *Domicile test*
- *183 day test*
- *Commonwealth superannuation fund test*

### Primary test: 'Reside'

**Source 1:** Under the law legislation *ITAA 1936 in s6(1)* said: 'You are resident if you reside in Australia'

### **Source 2:**

Cited: *Levene v IRC [1928] AC 217*

Based on the case law, there are number of factors we need to consider

1. Where is your home? Permanent home
2. Family tie, social tie (friend and society) and business tie (Are you employee in Australia? Are you having a business in Australia?)
3. Physical presence: the longer the more likely
4. Residency history
5. Frequency & regularity of movement
6. Purpose of presence

### **Source 3:** *ATO rulings –TR98/17*

- Migrant: Come to Australia permanently → resident
- Rule of thumb [para.22]
  - Live continuously here > 6 months and behaviour consistent with residency → resident

Issues:

- Temporary resident?
- Treaty implication

TR 98/17 –Expatriate –Temporary Resident-Student Visa

### Supplementary tests:

#### Domicile Test:

A person is a resident of Australia if domiciled in Australia, unless it can be established that the permanent place of abode is outside Australia. The concept of “**domicile**” comprises physical residence and an intention to remain permanently or indefinitely in the place of residence. Domicile of origin is the domicile acquired at birth. If domicile is then changed, it is known as a “**domicile of choice**”.

*Factors to consider when determining domicile are:*

- the length of absence from Australia
- Whether a dwelling was maintained in Australia while the taxpayer was absent
- Whether the taxpayer took out long-term accommodation outside Australia
- The location of the taxpayer's economic interests
- The location of the taxpayer's social connections

-‘**domicile**’: the place where a person is deemed by law to have his/her permanent home [Take up from your father when you were born → can change by taking action and intention]

-‘**domicile**’ vs ‘**residence**’: distinct concepts in legal nature and purpose

- X can have 2 residences, but only one domicile
- Equally, X may have no residence, but must have a domicile

#### Case mentioned:

##### **FCT v Applegate (1979) 9 ATR 899**

The taxpayer was not held to be a resident, and to not hold a permanent place of abode for the year ended June 1972. The taxpayer went to Vila in 8 November 1971, retaining no assets in Australia, giving up tenancy of his Sydney flat. His family accompanied him. He took up a lease for 12 months in Vila with an option to renew for another 12 months.

##### **Jenkins v FCT (1982) 12 ATR 745**

Court regarded the period of three years as significant and held that the taxpayer had a permanent place of abode outside of Australia. This has basis of 183 day rule, and since the taxpayer was outside of Australia for more than 183 days, it was held that the tax payer, for that year, had a permanent place of abode outside of Australia.

Ruling IT 2650 deals with the interpretation of 'permanent place of abode outside Australia'. As a rule of thumb under IT 2650, if a taxpayer is overseas for two or more years, they are said to have a permanent place of abode outside Australia.

### **183 days test**

A person will be a resident of Australia if he or she has actually been in Australia, continuously or intermittently, during more than one half of the year of income, unless the Commissioner is satisfied that their usual place of abode is outside Australia and that they do not intend to take up residence in Australia.

Under s6-(1) of the ITAA 1936, the taxpayer needs to have presence in Australia of more than half the year, so exactly half the year does not qualify. Under the 183 tests, the taxpayer will be considered to be a resident for the whole year.

### **SOURCE:**

**Source 1:** No general rule in tax law – specific provision for limited number of items

- Natural resource for limited number of items

**Source 2:** Case Law

#### ***CT (NSW) v Cam & Sons Ltd (1936) 36 SR (NSW) 544***

Some of the men's income was derived in New South Wales and some was derived outside New South Wales according to the working time spent in and out of the jurisdiction. The men were employed in NSW at dockside, and were paid in NSW when their ships returned, but bulk of the services were done outside NSW water

#### ***FCT v Mitchum (1965) 113 CLR 401***

Mitchum's income was said to not be from an Australian source as the most important factor was the actor, rather than the place of service. This is saying that French does not say income from personal services is always sourced from where it is performed.