# WEEK 2 – RESIDENCY TESTS

**Levene v IRC** - Until 1919 Mr. Levene had been both resident and ordinarily resident in the UK. Then, for five years he spent about five months (mainly in the summer) each year, staying in hotels in the UK and receiving medical attention or pursuing religious and social activities. He spent the remaining months staying in hotels abroad. The House considered what was the meaning of 'residence'.

**Held**: Until the taxpayer took a lease on a flat in Monte Carlo he was a UK resident. This conclusion was based on the fact that the purposes for going abroad were nothing more than temporary.

**IRC v Laysight** - The taxpayer, who was living in Ireland would come regularly to England for a total of less than three months a year, and would spend a week or so in a hotel for the purpose of board meetings. The House considered the meaning of the requirement of 'ordinarily resident'.

**Held**: He was a resident! There are two principal features of habitual residence; the residence must be adopted voluntarily and for settled purposes. If the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the commissioners to find that in fact he does so reside.

**FCT v Applegate** - Sydney solicitor transferred to firm in Vanuatu (posted oversees indefinitely), gave up flat/furniture in Aus yet kept hospital/life insurance, coming back in the future but unsure when, rented in Vanuatu, stayed for 2 years, got ill so returned to Aus

**Held:** His indefinite intention meant his place of abode was in Vanuatu, 'permanent does not mean forever'

**FCT v Jenkins** - Going to Vila (bank sent him there to work) for 3 years (defined period of time) but got sick, returned after 18 months

**Held:** Although taxpayer's stay overseas was for a fixed term, the taxpayer was a non-resident, as his permanent place of abode was outside of Australia (3 year term was considered significant)•A taxpayer's intention to reside outside of Australia does not have to be for an indefinite period

**Malayan Shipping v IRC** - Malayan Shipping involved a company incorporated and with its registered office in Singapore. The managing director, who resided in Australia, was empowered to appoint and remove the other directors. He had the power of veto of any resolution of the company and had sole authority to affix the seal of the company. The business

of the company was the chartering of a tanker from shipping agents and the sub-chartering of the tanker to the managing director, who provided instructions to the shipping agents, gave instructions for signing the charter party and prepared and executed the relevant documents. He also paid the charterer out of his own funds and did not remit to the company the balance due to it under the voyage charters.

Managing director 'exercised an equally complete management and control over the business operations and internal administration of the company' and found that this degree of control amounted not only to CM&C but also to carrying on of the business. Income in question had an Australian source because of the activities of the managing director in Australia.

**Koitaki Para Rubber Estates v** FCT - It was held that the mare 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.

**Rhodesia Metal Ltd v IRC** - Income from the rental property is sourced where the property is located. The taxpayer was a company incorporated in England with its central management and control in England. The taxpayer was in the business of purchasing and developing immoveable property in Rhodesia and the sale of that property. The taxpayer went into voluntary liquidation and sold its undertaking to another company which had also been incorporated in England. The Privy Council held that the profits were derived from sources in Rhodesia.

**FCT v French** – Services done in New Zeland – Source of the payment was New Zeland

**FCT v Mitchum** – No decision

**FCT v Efstathakis** – Section 23(q) of ITAA 1936 exempted residents from tax on foreign sourced income that had already been subject to tax in the source jurisdiction (e.g. Greece). The court held that any factors supporting a finding that the income was sourced outside Australia were outweighed by the residence of the taxpayer.

**Esquire Nominees** – Guy (non-resident) holds shares in Island company. Island company holds a company in Australia. Even though profits come from the Australian company he is not liable to Australian tax on the dividends paid SINCE HE HOLDS THE SHARES OF THE ISLAND COMPANY.

**TR 98/17** - This Ruling provides the Commissioner's interpretation of the ordinary meaning of the word 'resides' within the definition of resident in subsection 6(1) of the Income Tax Assessment Act 1936 ('the 1936 Act'). This Ruling does not apply to Australian resident