

CLAW 3201 CASES

RESIDENCE

INDIVIDUALS

S6 (1):

Residence of means:

A person, other than a company, who resides in and includes a person:

Whose domicile is in , unless the commissioner is satisfied that his permanent place of abode is outside

Who has actually been in , 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 and he does not intend to take up residence in

v Ordinary concept tests: (reside test)

v Levene v IRC

- Facts: the tax payer left England on medical advice, but returned for about five months per year for medical treatment, to take part in religious ceremonies and to attend to his tax affairs. He had no fixed place of abode, either in England or abroad and lived in hotels. The taxpayer was held to be a resident of the UK until he took a lease on a flat in Monte Carlo

- Principles:

- ü The location of a person's family, business and social ties will provide evidence of residence

- ü The purposes for going abroad were nothing more than temporary

- Conclusion: he was a resident

v IRC v Lysaght

- Facts: a taxpayer who spent considerable time abroad. In this case the taxpayer partially retired and moved from England to an inherited estate in Ireland. He sold his home in England but remained a non-executive director of the family company. He travelled to England for approximately one week per month, staying in hotels, to attend board meetings.

- Principles:

- ü a person maybe a resident on ordinary concepts if physically present for less than half years, for the reason that his visiting to another place with frequency and regularity

- ü a taxpayer living in one jurisdiction but visiting another with frequency and regularity

- conclusion: he was a residence

v TR98/17

- ü Residence status is a question of fact and is one of the main criteria that determines an individual's liability to n income tax

- ü The primary test for deciding the residency status of an individual is whether the individual resides in according to the ordinary meaning of the word "resides"

- ü If an individual resides in according to the ordinary meaning of the word, the other tests in the definition do not require consideration
 - ü Definition: to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place
 - ü The ordinary meaning of the word "reside" is wide enough to encompass an individual who comes to permanently and an individual who is dwelling here for a considerable time
 - ü The quality and character of an individual's behaviour while in assist in determining whether the individual resides here
 - o Intention or purpose of presence
 - o Family and business/ employment ties
 - o Maintenance and location of assets; and
 - o Social and living arrangement
- DOES THE PERSON EXHIBIT BEHAVIOUR CONSISTENT WITH RESIDING IN ???
WHETHER THERE IS HABITUAL BEHAVIOUR???

v Domicile test:

v FCT v Applegate:

- Facts: the taxpayer was a solicitor in Sydney who had been sent by his employer to Vanuatu to open and operate a branch. The taxpayer gave up the lease on his flat and, leaving no assets in , left Sydney with his wife in November 1971. A lease was obtained on a house and the taxpayer, who obtained residency status, was admitted to practice in Vanuatu. In June 1973 the taxpayer became ill and returned to Sydney for medical treatment. After returning to Vanuatu for a short period he came back to eventually. While on time frame was specified, it was intended to be substantial.
- Issue: whether during his time in Vanuatu, the taxpayer had a permanent place of abode outside .
- Principles:
 - ü Permanent means less than everlasting or lasting forever
 - ü Permanent should be contrasted with temporary or transitory
 - ü If an individual resides in according to the ordinary meaning of the word, the other tests in the definition do not require consideration (also in TR98/17)
- Conclusion: he was not a resident

v FCT v Jenkins

- Facts: the taxpayer was a bank employee, was transferred to Vanuatu for a fixed three-year period. Prior to leaving the taxpayer attempted to sell the family home but was unsuccessful. He maintained a bank account in but cancelled his health insurance policy. Due to the taxpayer's inability to efficiently perform his duties, he was repatriated back to by his employer at the end of 18 months.
- Conclusion: the taxpayer had a permanent place of abode outside , thus he was not an resident

v IT2650: setting out various factors which will be taken into account in ascertaining whether a taxpayer has a permanent place of abode outside .

Factors to be considered:

- The intended and actual length of the taxpayer's stay in the overseas country
- Whether the taxpayer intended to stay in the overseas country only temporarily and then to move to another country or to return to at some definite point in time.
- Whether the taxpayer has established a home outside .
- Whether any residence of place of abode exists in or has been abandoned because of the overseas absence
- The duration and continuity of the taxpayer's presence in the overseas country; and
- The durability of association that the person has with a particular place in ie maintaining bank account in , information government departments such as centerlink that he or she is leaving permanently and that family allowance payments should be stopped, place of education of the taxpayer's children, family ties and so on.

A rule of thumb, a period of two years or longer will be considered a substantial period for the purpose of a taxpayer's stay in another country.

v 183DAYS test: requires physical presence in for more than one-half of the year.

CORPORATE

S6(1): a company is a resident of where it is incorporated in , or, not being incorporated in , where it carries on business in and has either its central management and control in or its voting power controlled by shareholders who are residents in .

v Incorporation test

v Central management and control test: where the real control of the company is located

- o Decisions on broad company policy
- o Financing policy
- o Business strategy made at directors meetings

v Koitaki Para Rubber Estates Ltd v FCT

• Facts: the taxpayer company was incorporated in NSW, but had its office registered as a foreign company in Papua. It owned and worked rubber plantations in Papua which were managed by an officer of the company there, acting under a power of attorney. The board of directors resided in Sydney and always met there.

• Principles:

ü The central management and control test will not be satisfied when there is