

RESIDENCY and SOURCE

Tax Payable = (Taxable income * Tax Rate) – Tax Offsets (s4-10 ITAA1997)

Taxable income = Assessable Income less Deductions (s 4-15 ITAA)

Assessable Income (s6-1) = Ordinary income (s6-5) and Statutory income (s6-10) but not Exempt income (s6-15).

Assessable Income (s6-1):

Residents: All OI and SI of an “Australian resident” taxpayer derived directly or indirectly from **all sources**, whether in or out of Australia, during the income year **s6-5(2) and 6-10(4)**

Foreign residents: All OI and SI of a “foreign resident” taxpayer derived directly or indirectly from **all Australian sources** during the income year and any other amounts specifically included **s6-5(3) and s6-10(5)**

*If you are an Australian resident sources is irrelevant. *

The determination of a taxpayer’s ordinary income depends on whether the taxpayer is an Australian or foreign resident and the source of the income. The income tax rate applied for individuals differs between Australian and foreign residents.

Residence of individuals

‘Australian resident’ is a person who is a resident of Australia for the purposes of the ITAA36 s995-1.

‘Foreign resident’ is a person who is not a resident of Australia for the purposes of the ITAA36 s995-1

4 residency tests to determine whether an individual is a resident of Australia for taxation purposes

1. Ordinary resident test: primary test of residency
2. Domicile test
3. 183 day test
4. Superannuation test
 - Can look at **events after year- end** to decide: **Applegate(1979)**
 - Can be a dual resident- look at tax treaty.
 - Status under migration law not determinative for tax purposes.

*Taxpayer will be a resident if they satisfy any of the residency tests in s6(1) ITAA36. Residency is determined on a year-by-year basis and a taxpayer may be a resident for part of the year.

1. Ordinary resident test - Primary test. Common law test.

Taxpayer is a resident if he *resides* in Australia:

- **Dwell permanently or for considerable time in a particular place:**
Levene (1928): purposes of going abroad were nothing more than temporary and had ties in UK – resident.
- Based on individual circumstances - Question of fact;
Lysaght (1928): house in Ireland irrelevant, visit UK one week per month - resident due to frequency and regularity of visits to the UK
Joachim (2002): physical presence was not determinative. He was a resident due to his home and family ties in Australia. Intention to treat Australia his home had not changed.

Factors considered by courts: **TR 98/17**

- Physical presence in Australia – at least some physical presence in Australia (6 months - ATO)
- Frequency, regularity and duration of visits- *Lysaght*
- Purpose of the visits to Australia and abroad
- Maintenance of a place of abode in Australia during absences – Home available for use - *Joachim*
- Family, business and social ties - *Levene*
- Nationality - not an important factor

Where a person is a resident under the ORT, the person is only considered a resident from the date he/she first resides in Australia. Where a person is a resident for part of the year only, the tax-free threshold will be pro-rated.

2. Domicile test - Section 6(1)(a)(i) – Generally for outgoing people

Australian resident includes a person whose **domicile** is in Australia **unless** Commissioner is satisfied that the taxpayer has a **permanent place of abode overseas**.

Domicile – the status of being a permanent resident in particular jurisdiction.

2 categories of domicile

- Domicile of origin (born in Australia or parents are Australian citizens)
- Domicile of choice (choose particular country to be domicile):
Intention to stay **indefinitely** (IT 2650) E.g. migrating to Aus., permanent residence.

Permanent place of abode overseas

- Place of abode: home or presence outside Australia: **Applegate(1979)**- intended to go for a substantial amount of time. Had a permanent place of abode outside Australia, and hence not resident.
- Permanent: need not be *everlasting* just more than *temporary* or *transitory* - **Applegate(1979)**
Jenkins(1982): sent away for fixed period, applying Applegate court concluded permanent place of abode outside Australia.

Factors to be ascertain whether TP has a permanent place of abode outside Australia - IT 2650.

- The intended and actual stay in the foreign country
- Duration and continuity of TP's presence in overseas country (as rule of thumb ≥ 2 yrs considered substantial period but should not be automatically relied upon)
- Establishment of a home outside Australia (more than temporary accommodation) – Not hotels.
- Whether residence or place of abode in Australia exists.
- The durability of the association with Australia (in particular maintenance of bank accounts, education of children, family ties, notifying government departments)

Considered to be a foreign resident for the actual period they are out of Australia and a resident while in Australia.

3. 183 day test - Section 6(1)(a)(ii) – Generally for incoming individuals

Taxpayer will be treated as a resident if the TP has been physically present in Australia for 183 days or more (**does not have to be continuous**, may even count the number of hours) **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.
Usual vs. permanent place of abode – place you live on a day-to-day basis. In TR 98/17, the Commissioner suggests that 'usual place of abode' is similar to 'reside'. If you do not reside in Aust. under ORT, usual place of abode is outside Aust.

If a person is a resident under 183 day test, he/she considered resident for the WHOLE of the income year - *Executors of the Estate of Subrahmanyam (2002)*

4. Superannuation test - Section 6(1)(a)(iii)

Members of certain Commonwealth funds are deemed to be Australian residents.

Temporary Resident - Subdivision 768-R

- Person who:
 - Holds a temporary visa granted under the *Migration Act 1958*; and
 - They and their spouse not Australian residents within the meaning of the *Social Security Act 1991*.
- Treated as a foreign resident for tax purposes **EVEN** though they satisfy the residency tests
→only taxed in Australia on Australian sourced income at resident's rates