

## **Residency**

Taxpayer' is an Australian resident for taxation purpose if she satisfies one of the resident tests under s6(1) of ITAA 1936, which is ....

If 'taxpayer do not satisfy any tests, 'taxpayer' is foreign resident.

### **1. Ordinary resident test (Primary test) s6(1)(a)**

Under the primary test of residency, taxpayer is resident if they reside in Australia.

In Levene cases, the court suggested that 'resides' means to dwell permanently or for a considerable period of time.

This is a question of fact (Lysaght; Joachim) to be determined based on the taxpayer's individual circumstances. The ATO's guidance in TR 98/17 suggests consideration of the following factors and factors are:

- a) Physical presence in Australia
  - Taxpayer spends at least some time physically present in Australia during the income year. 6 months would be a considerable period
  - Stays at the house which appears to be temporary in nature and suggests that she does not 'reside' here;
- b) Frequency, regularity and duration of visit (Lysaght 1928)
- c) Purpose of the visits to Australia and abroad
- d) Maintenance of a place of abode in Australia during absences
  - Opened a business and bank account here which are consistent with residing here;
  - Has significant assets in France which suggests she does not reside here;
- e) Family, business and social ties (Levene 1928)
  - Family ties (partner and sister) are in Australia which suggests she resides here;
  - Has made many friends in here and joined a local netball group which is consistent with residing here;
- f) Nationality
  - She is a French citizen, which suggests she does not reside here but is certainly not decisive.

By evaluating all of the factors, we can conclude that she reside or not reside in Australia for the year ended 30 June. ATO should tax the taxpayer from the time he become resident

### **2. Domicile test s6(1)(a)(i)**

Apply for Australian resident leaving Australia.

Not apply if the taxpayer is not an Australian citizen or permanent resident

#### **2 categories of domicile**

Domicile of origin

- born here, Australian citizen because parent are Australian citizen

Domicile of choice

- Migrate to here
- Intention to stay indefinitely (IT2650)

- Take Australian PR or citizen. Investment visa/ working visa, any visa other than PR/ citizen is not satisfied.

A person is a resident of Australia if his or her domicile is in Australia, unless the commissioner is satisfied that the person has a permanent place of abode outside Australia.

*Applegate (1979)*

- Place of abode means home or presence outside Australia
- Permanent does not mean forever, it meant something less than everlasting or lasting forever
- Decision: Not resident as taxpayer had permanent place of abode outside Australia

Factors to be taken into account (Ruling IT2650), whether a taxpayer has a permanent place of abode outside Australia:

1. The intended and actual stay in the foreign country (more than 2 years)
2. Duration and continuity of taxpayer presence in overseas country
3. Establishment of a home outside Australia (more than temporary accommodation)
4. Residence of place of abode in Australia
5. The durability of the association with Australia (in particular, maintenance of bank accounts, education of children, family ties, notifying government departments)

For example:

- Transferred overseas for 2 years for a temporary work assignment to gain wider work experience
- Intends to return to Australia
- Wife and children go with him at first but children return to Australia to go back to school
- Spend annual holiday in Australia
- Rent out his Australian home, maintain bank accounts in Australia, spend his money in Australia for investment except for living expenses

Not Australian resident under the ordinary meaning of resident but is an Australian resident under domicile test

### 3. 183 day test s6(1)(ii)

Taxpayer is treated as a resident if the taxpayer has been here for at least 183 days for the year ended 30 June unless:

1. Usual place of abode is outside Australia and
2. She does not intend to take up Australian residence: s 6(1)(a)(ii).

If usual place of abode is Australia and got intention to reside in Australia, exception not satisfied.

*Subrahmanyam case*: treated as Australian tax resident for the whole of the income year.

*Groves case*: treated as Australian tax resident for period of residency.

### 4. Superannuation test

s 6(1)(a)(iii): Member of a certain commonwealth funds are deemed to be Australian residents

Not satisfied the test if the taxpayer is not a member of a relevant superannuation fund.

**Conclusion:** Taxpayer is a resident of Australia for the whole of the year ended 30 June 2015 under the ...