COOPER GRACE WARD
LAWYERS

Taxing Executives and Professionals Working Offshore

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1. INTRODUCTION

1.1 Tax residency has become an increasingly contentious area of law for individuals living and working overseas. It has also become a more difficult area for advisers.

1.2 For many years, there was an acceptance that an Australian living and working overseas did not reside in Australia for tax purposes.

1.3 However, the prevalence of Australians working in well-paid employment in low-tax jurisdictions, such as the Middle East, Africa and parts of Asia, has increased the ATO's interest.

1.4 The ATO's data matching capabilities have also increased, allowing auditors to identify information such as:

(a) funds transferred into Australia reported on AUSTRAC;

(b) transactions in Australian bank and credit card accounts;

(c) property interests in Australia; and

(d) funds held in overseas bank accounts – including now in countries that were previously considered to be tax havens.

1.5 However, this information obtained by the ATO from third party sources of an individual's overseas activity generally only translates into a correct amended (or default) tax assessment where the individual is a tax resident of Australia.

1.6 The type of income is not limited to ordinary income. In addition to salary or wages from foreign employment, personal services (often consulting) income derived by a non-resident company, interest, dividends, royalties, trust distributions, capital gains and attributable income derived by controlled foreign companies will all be taxable in Australia for an Australian tax resident.

1.7 Foreign tax credits may be available for tax paid overseas, but care needs to be taken, particularly in an employment context, for individuals accepting offers on the basis that their earnings will be subject to tax at a lower rate than if they had lived in Australia.

2. THE BASIC RULES – INCOME INCLUDED FOR RESIDENTS

Residence

2.1 Section 6-5 of the *Income Tax Assessment Act 1997* (**1997 Act**) states:

> 6-5 Income according to ordinary concepts (*ordinary income*)
>
> (1) Your *assessable income* includes income according to ordinary concepts, which is called *ordinary income*.
>
> Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.
>
> (2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or 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; and

(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.

(4) In working out whether you have *derived* an amount of *ordinary income, and (if so) when you *derived* it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.

2.2 Section 6-10 of the 1997 Act states:

6-10 Other assessable income (statutory income)

(1) Your assessable income also includes some amounts that are not *ordinary income.

Note: These are included by provisions about assessable income.
For a summary list of these provisions, see section 10-5.

(2) Amounts that are not *ordinary income, but are included in your assessable income by provisions about assessable income, are called statutory income.

Note 1: Although an amount is statutory income because it has been included in assessable income under a provision of this Act, it may be made exempt income or non-assessable non-exempt income under another provision: see sections 6-20 and 6-23.

Note 2: Many provisions in the summary list in section 10-5 contain rules about ordinary income. These rules do not change its character as ordinary income.

(3) If an amount would be *statutory income apart from the fact that you have not received it, it becomes statutory income as soon as it is applied or dealt with in any way on your behalf or as you direct.

(4) If you are an Australian resident, your assessable income includes your *statutory income from all sources, whether in or out of Australia.

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

(a) your *statutory income from all *Australian sources; and

(b) other *statutory income that a provision includes in your assessable income on some basis other than having an *Australian source.

2.3 Australian resident is defined in subsection 995-1 of the 1997 Act as 'a person who is a resident of Australia for the purposes of the *Income Tax Assessment Act 1936'*.

Source

2.4 'Source' is not usefully defined in the legislation.

2.5 In *Nathan v Federal Commissioner of Taxation* [1918] HCA 45, the High Court stated:

The Legislature in using the word "source" meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs.

2.6 In *Spotless Services Limited and Spotless Finance Pty Limited v Commissioner of Taxation* [1993] FCA 276, Lockhart J noted that the High Court had subsequently approved the passage in *Nathan*, and added that:

80. What emerges from the authorities is plainly enough that the test to be applied in determining the source of income for the purposes of the Act is to search for "the real source" and to judge the question in a practical way: see *Mitchum* per Barwick CJ at 406; *Federal*

Commissioner of Taxation v Efstathakis [1979] FCA 28; (1978) 38 FLR 276; *Federal Commissioner of Taxation v French* [1957] HCA 73; (1957) 98 CLR 398 at 415, 418 and 421.

81. I agree with the following passage from the judgment of Burchett J in Thorpe at 4896-7:

82. "Practical reality is not a test so much as an attitude of mind in which the Court should approach the task of judgment. Reality, like beauty, is often in the eye of the beholder. (cf. the comments made by J D Jackson in an article in 51 Mod LR 549 at p 557 et seq) What the cases require is that the truth of the matter be sought with an eye focussed on practical business affairs, rather than on nice distinctions of the law. For the word 'source', in this context, has no precise or technical reference. It expresses only a general conception of origin, leading the mind broadly,
by analogy. The true meaning of the word evokes springs in Grottos at Delphi, sooner than the instance of taxes. So the exactness which the lawyer is prone to seek must be consciously set aside; indeed, with respect to a choice between various contributing factors, it cannot be attained. The substance of the matter, metaphorically conveyed when we speak of the source of income, is a large view of the origin of the income - where it came from - as a businessman would perceive it."

83. The cases demonstrate that there is no universal or absolute rule which can be applied to determine the source of income**. It is a matter of judgment and relative weight in each case to determine the various factors to be taken into account in reaching the conclusion as to source of income**. As Bowen CJ said in Efstathakis at 4259:

> "the answer is not to be found in the cases, but in the weighing of the relative importance of the various factors which the cases have shown to be relevant."

(emphasis added)

Foreign tax credits

2.7 Division 770 provides for foreign income tax offsets in certain circumstances. The object is to relieve double taxation by providing a credit equal to the tax paid overseas where the income is also included as assessable in Australia.

2.8 'Foreign income tax' means a tax imposed by a law other than an Australian law to tax income, profits or gains (whether capital or revenue) or anything else covered by a double tax agreement. It will not allow a credit for a shareholder of a company that has paid tax overseas.

2.9 Double tax agreements also generally allow for a foreign tax credit mechanism.

Withholding

2.10 Australian employers continue to have withholding tax obligations for non-resident employees. Tax will need to be withheld at the higher rate for non-resident individuals.

2.11 For this reason, it is important that the correct employer is clearly identified in international secondment arrangements.

2.12 It is also relatively common for companies to have 'tax equalisation' clauses for employees seconded or transferred overseas. If there is uncertainty as to the employee's residency status, the company may want to provision for Australian income tax liabilities, particularly if the net tax liability is higher because the employee has moved to a lower-tax jurisdiction.

2.13 For individuals, it is important to ensure that the 'tax equalisation' clause can be enforced. Privity of contract issues arise where, for example, an individual ceases employment in Australia but is 'seconded' in a manner that involves commencing a new employment agreement with a related overseas company. A 'secondment letter' from the previous employer setting out a 'tax equalisation' arrangement may not be a contract that can be enforced.

3. THE BASIC RULES – FRINGE BENEFITS

Non-resident employers

3.1 The Commissioner in his Taxation Determination TD 2011/1 sets out his view on whether a non-resident entity is subject to obligations under the *Fringe Benefits Tax Assessment Act 1986* (**FBT Act**). He states at paragraph 22:

> Where a non-resident entity has a sufficient connection with Australia to have an obligation to withhold from payments made to an Australian resident for work performed overseas, it will also have obligations under the FBTAA in relation to any benefit provided to that person in respect of the employment of that person.

Non-resident employees

3.2 An employer's FBT obligations extend to non-resident employees. This is because the obligation to pay FBT is on the employer not the employee.

3.3 Section 164 of the FBT Act defines residences for the purposes of that Act as:

> 164 Residence
>
> (1) For the purposes of this Act, a person shall be taken to have been a non‑resident at a particular time if the person was not a resident of Australia at that time.
>
> (2) For the purposes of this Act, a person shall be taken to have been a resident of Australia at a particular time if:
>
> (a) in the case of a natural person:
>
> (i) the person resided in Australia at that time; or
>
> (ii) except in the case where the Commissioner is satisfied that that person's permanent place of residence at that time was outside Australia—the person was domiciled in Australia at that time;

Living away from home allowances (LAFHA)

3.4 Payments made that are genuinely an allowance for the additional costs involved in living away from home is a fringe benefit. However, provided certain conditions are met the taxable value of that benefit can be reduced often to nil.

3.5 Section 30 of the FBT Act states:

> (1) Where:
>
> (a) at a particular time, in respect of the employment of an employee of an employer, the employer pays an allowance to the employee; and
>
> (b) it would be concluded that the whole or a part of the allowance is in the nature of compensation to the employee for:
>
> (i) additional expenses (not being deductible expenses) incurred by the employee during a period; or
>
> (ii) additional expenses (not being deductible expenses) incurred by the employee, and other additional disadvantages to which the employee is subject, during a period;
>
> by reason that the duties of that employment require the employee to live away from his or her normal residence;

the payment of the whole, or of the part, as the case may be, of the allowance constitutes a benefit provided by the employer to the employee at that time.

3.6 The taxable value is reduced where the employee maintains a home in Australia: sections 31C and 31D. The relevant requirements are that:

(a) The employee maintains a home in Australia.

(i) This is the place where the employee usually resides when in Australia and must be a 'unit of accommodation' in which the employee or his/her spouse has an ownership interest.

(ii) The accommodation must continue to be available for the employee's immediate use and enjoyment while living away from home.

(b) It is reasonable to expect the employee will resume living at that place when the living away from home arrangement ends.

(c) The fringe benefits are only for the first twelve months that the employee is required to live away from home.

(d) The employee makes the relevant declaration.

3.7 The taxable value is also reduced for particular fly-in fly-out arrangements: section 31E. The relevant requirements are generally that:

(a) The employee is on a fly-in fly-out arrangement where it would be unreasonable to expect the employee to travel on a daily basis between home and work.

(b) It is reasonable to expect the employee will resume living at that place when the living away from home arrangement ends.

(c) The employee makes the relevant declaration.

3.8 In both cases, the taxable value is reduced by the exempt accommodation component and exempt food component, subject to further exceptions in the legislation.

4. THE BASIC RULES – SUPERANNUATION

4.1 Employers are required to pay superannuation for their employees otherwise they are liable to superannuation guarantee charge.

4.2 The *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**) works out an employer's superannuation guarantee charge liability based on the 'total salary and wages' payable to that employee.

4.3 'Salary and wages' is defined inclusively in section 11 of the SGA Act and includes ordinary or common types of remuneration unless otherwise excluded.

4.4 Section 27(1)(b) of the SGA Act provides that any salary or wages paid to a non-resident employee for work done outside Australia are excluded from the definition of 'salary and wages' for the purpose of calculating an employer's liability to superannuation guarantee charge.

4.5 The SGA Act adopts the definition of resident of Australia as found in the 1936 Act: section 8 of the SGA Act.

4.6 In ATO ID 2012/75, the Commissioner confirmed that the phrase 'work done outside Australia' is used in a geographical sense and any work done outside of those geographical boundaries is 'work done outside of Australia' for the purposes of the SGA Act.

5. IMPLICATIONS FOR INDIVIDUALS CEASING TO BE AUSTRALIAN RESIDENTS

Deemed disposal of capital assets

5.1 CGT Event I1 occurs when an individual stops being an Australian resident: section104-160 of the 1997 Act.

5.2 This means that, at the date an individual ceases to be a resident of Australia, they will be deemed to have disposed of all CGT assets that they own and that are not taxable Australian property.

5.3 Taxable Australian property is defined to include:

(a) real estate in Australia;

(b) an indirect interest in Australian real estate (e.g. shares in a company which owns Australian real estate); and

(c) a CGT asset used at any time in carrying on a business through a permanent establishment in Australia.

5.4 For assets that are not taxable Australian property, an individual will make a capital gain or loss if the market value of the asset is more or less than its cost base.

5.5 However, an individual may choose to disregard any capital gain or loss as a result of becoming a non-resident: section104-165(2) of the 1997 Act.

5.6 Where an individual makes this choice, each asset will be taken to be taxable Australian property until the earlier of when they dispose of the asset or become an Australian resident again.

5.7 Effectively, this means that an individual will only need to pay tax in Australia on any capital gain made when they actually sell the asset in the future.

Difficulties with SMSFs

5.8 To comply with the requirements of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), an individual's SMSF must continually qualify as an Australian Superannuation Fund within the meaning of the income tax law: section 10(1) of the SIS Act.

5.9 Section 295-95(2) of the 1997 Act requires that an Australian Superannuation Fund must:

(a) be established in Australia;

(b) have its central management and control ordinarily exercised in Australia; and

(c) have at least 50% of the total value of the fund's assets attributable to active members who are Australian residents.

5.10 The Commissioner sets out his view in relation to central management and control in his public ruling TR 2008/9. He states at paragraph 27:

> 27. The location of the [central management and control] of the fund is determined by where the high level and strategic decisions of the fund are made and high level duties and activities are performed (regardless of where the persons exercising the [central management and control] of the fund reside).

5.11 A member is an active member of a fund if they are a contributor to a fund at the relevant time or if contributions have been made on their behalf: section 295-95(3) of the 1997 Act.

5.12 However, a non- resident individual, on whose behalf contributions are made, will not be an active member if:

(a) they are not a contributor themselves at that time; and

(b) the contributions made on their behalf after they became a foreign resident are only payments relating to a time when the individual was an Australian resident: section 295-95(3) of the 1997 Act.

6. TAX RESIDENCE – GENERAL PRINCIPLES

6.1 'Resident' is relevantly defined in section 6(1) of the *Income Tax Assessment Act 1936* (**1936 Act**) as follows:

> resident or resident of Australia means:
>
> (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 that 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 (A) or (B)…

Ordinary meaning of resides

Federal Commissioner of Taxation v Miller (1946) 73 CLR 93

6.2 The leading decision on the ordinary meaning of the word 'resides' is the High Court decision in Miller.

6.3 The Board held that Miller was a resident of the Territories of New Guinea and Papua between 12 December 1942 and 30 September 1943 (a period of only some nine months).

6.4 Miller was employed as master of a vessel impressed for services with the United States Small Ships Section Transportation Service. The agreement listed Cairns as his home port. He arrived in Milne Bay on 12 December 1942. His wife, who previously lived with his on the vessel, subsequently resided with family and friends in Cairns and then Brisbane while her husband was in Milne Bay.

6.5 Latham CJ said that:

> I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word 'reside' by the courts which makes it impossible to apply the ordinary meaning of the word 'reside' in the present case. In *Levene v. Inland Revenue Commissioners*, Viscount Cave L.C. said:

> ... the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.' No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside.' In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

In *Cesena Sulphur Co. Ltd. v. Nicholson* [(1876) LR 1 Ex D 428, at p 452] Huddleston B. said:

> 'There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives.'

In *De Beers Consolidated Mines Ltd. v. Howe* [(1906) AC 455 at page 458], the decision in the *Cesena Sulphur Co. Case* was referred to as a decision which had been acted upon for many years, and in applying the conception of residence to a company by analogy to the case of an individual it was said: 'A company cannot eat or sleep, but it can keep house and do business. We ought therefore to see where it really keeps house and does business.' An individual person can eat and sleep as well as keep house and do business. **In the present case, Papua and New Guinea were the places where the respondent, during the relevant period, ate and slept and worked. In my opinion there is not yet any decision which requires the Board of Review or this Court to hold that he did not reside at the place where he lived for a period of over nine months**.

In my opinion, the decision of the Board was right and the appeal should be dismissed.

(emphasis added)

6.6 Rich and Dixon JJ concluded that there was no question of law on which the Commissioner could ground his appeal.

6.7 The decision in *Miller* establishes a meaning of 'resides' based on where a person 'ate and slept and worked'.

6.8 It also establishes that a residence can be for a relatively short period of time (i.e. nine months) and in circumstances where there was presumably an intention for the taxpayer to return to Australia as soon as hostilities ceased or his vessel was no longer required for the war effort. It is relevant, however, that Mr Miller's vessel, prior to its impressment, was his home: there was no evidence of a house on land used by Mr and Mrs Miller in Australia.

6.9 After *Miller*, a multitude of Australian cases have applied this decision to the factual situations presented. We have summarised some of these below as well as relevant English authorities. These cases do not change the authority developed in *Miller* that a person resides where he eat, sleeps and lives, where he has is settled or usual abode.

R v Hammond (1852) 117 ER 1480

6.10 Lord Campbell CJ said that:

> A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full sense of that expression; and, if this be stated to be his place of abode, no doubt nor difficulty can occur.

Levene v Commissioners of Inland Revenue [1927] 2 KB 38

6.11 Levene lived in hotels in the United Kingdom, France and Monaco for a period of five years, after surrendering his lease and selling his furniture in London.

6.12 Levene returned to the United Kingdom in the summer months each year, but never for more than 183 days. He did not establish a permanent home abroad in those five years.

6.13 Viscount Cave L.C. held that he was resident in the United Kingdom. He stated that:

> The word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'.

Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241

6.14 The High Court decision in Koitaki Para Rubber relates to the residence of a company, so the comments of Williams J at page 249, while useful, are likely to be obiter.

> The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but **by reference to where he eats and sleeps and has his settled or usual abode**. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode: See Halsbury's Laws of England, 2nd ed., vol. 17, pp. 376, 377.
>
> (emphasis added)

6.15 The ordinary meaning of the word 'resides' incorporates a concept of 'settled or usual abode', which is a lower threshold than 'permanent place of abode'.

Gregory v. Deputy Federal Commissioner of Taxation (WA) 57 CLR 774

6.16 Mr Gregory was a pearl fisherman. The issue was whether he was a resident of the Northern Territory and therefore entitled to concessional tax treatment for deriving income from primary production in the Northern Territory. He had homes in both Broome and Darwin.

6.17 As a single judge of the High Court, Dixon J stated:

> In the calendar year 1934 the taxpayer was in Darwin for a period which might be 131 days or 113 days. He was in Broome 161 days and he was engaged in travelling for business purposes for some seventy-three days. In 1933 he was about an equally long time in Broome and Darwin. In 1933 he was a less time in Darwin than in Broome. In Darwin he had arranged a place of residence, a dwelling. He arranged with his manager for the reservation of a room in his house and agreed to pay a definite sum of money for it. He kept a motor car in Darwin. He identified himself with the social life of Darwin. He had, of course, permanent and definite arrangements for his business activities in Darwin.
>
> A question of much importance in the present case is whether the word 'resident' in sec. 5A should be interpreted in the same way as similar expressions are interpreted in the British Income Tax Acts. I think that the answer is that the word should receive the same meaning and application as 'person residing' and 'ordinary resident' have been given in England. No technical or artificial meaning has been placed upon these expressions and parallel expressions under the British income tax law. But certain principles have been laid down by judicial decision for interpreting and applying the expressions. The well-settled interpretation of the words includes in their application a man who resides in two or more places. That was first settled in *Attorney-General v. Coote*. The same view has been adopted in *Cooper v. Cadwalader, Thompson v. Bensted, Pickles v. Foulsham* and *Peel v. Inland Revenue Commissioners*. And finally the interpretation has been approved by the House of Lords in *Levene v. Inland Revenue Commissioners* and in *Lysaght's Case*.
>
> In the present case I would not deny that the taxpayer had retained his residence in Broome in Western Australia. He had done nothing that would be enough to divest himself of the character of a resident of Broome which, speaking figuratively, clung to him from long association and usage, an association and usage which he had done nothing to dissolve or destroy. But I think he did most definitely acquire the concurrent character of a resident of Darwin. So far as intention plays a part, I think that his intention developed in the direction of making Darwin his chief and principal place of business activity and social life. Possibly his dwelling or housing arrangements in Darwin were less regular than in Broome, but the difference arose from the fact that he had long owned a house in Broome, and that he was unable to sell it and therefore lived in it. I think I am entitled to take into account the fact that he negotiated for and took a lease of a fiat in Darwin although the lease was after the period with which the appeal is concerned. I take

> little notice of the fact that his daughter paid him visits at Broome and not in Darwin. That, I think, arose from the time at which her school holidays fell.
>
> The matters on which I place most stress in deciding this question of fact are his business interests and the necessity of his presence in Darwin and the fact that in dividing his attention between two businesses he gave as much or more attention to Darwin and the kind of social and living arrangements that he made in Darwin. It is true that the most permanent arrangements were made outside this period. But the English cases show that events which occurred before and after a given period may be considered as throwing light on and disclosing the significance of habits and conduct within the period.

6.18 The decision is relevant for its reflection on:

(a) whether a place is the taxpayer's 'chief and principal place of business activity and social life'; and

(b) how a taxpayer may ordinarily reside in more than one place.

Commissioner of Taxation v Pechey (1975) 5 ATR 322

6.19 Mr Pechey was a public servant appointed to act as an Official Representative on Cocos (Keeling) Island for the month of July 1971. He maintained his home in Canberra and his wife did not accompany him for the period of the appointment.

6.20 Waddell J concluded that the short and temporary nature of Mr Pechey's stay on the island meant that he did not reside there:

> …before a person can be said to have been resident at a particular place it must be possible to say that he had a settled or usual abode there or lived there for a considerable time.

Hafza v Director-General of Social Security (1985) 60 ALR 674

6.21 Our experience is that the Commissioner frequently relies on the decision in *Hafza* to analyse whether a person remains a tax resident based on a 'continuity of association' with Australia.

> 14. Physical presence and intention will coincide for most of the time. But few people are always at home. Once a person has established a home in a particular place -- even involuntarily : see *Commissioners of Inland Revenue v. Lysaght* (1928) AC 234 a p 248 and *Keil v Keil* (1947) VR 383 -- a person does not necessarily cease to be resident there because he or she is physically absent. **The test is whether the person has retained a continuity of association with the place -- *Levene v. Inland Revenue Commissioners* [1928] UKHL 1; (1928) AC 217 at p 225 and *Judd v. Judd* (1957) 75 WN (N.S.W.) 147 at p 149 -- together with an intention to return to that place and an attitude that that place remains 'home'** -- see *Norman v Norman* (1969) 16 F.L.R. 231 at p.236 It is important to observe firstly, that a person may simultaneously be a resident in more than one place -- see the facts of *Lysaght* and the reference by Williams J. to 'a home or homes' -- and, secondly, that the application of the general concept of residence to any particular case must depend upon the wording, and underlying purposes, of the particular statute in relation to which the question arises. But, where the general concept is applicable, it is obvious that, as residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as 'home', a change of intention may be decisive of the question whether residence in a particular place has been maintained.

6.22 Despite the Commissioner's reliance on this decision, *Hafza* is not an income tax case and in our view this decision was an application of the authority in *Miller* to specific facts (see also comments in *Dempsey*).

6.23 The legislation in *Hafza* was also slightly different as it referred to the words 'usual place of residence', which may connote a more enduring connection (closer to domicile) than the ordinary meaning of the word 'resides'.

Marana Holdings Pty Ltd v Federal Commissioner of Taxation (2004) 141 FCR 299

6.24 Marana Holdings was a GST case. Its utility is the collection of contemporary dictionary definitions of the meaning of the word 'reside'.

6.25 At paragraph 20, Dowsett, Hely and Conti JJ in the Full Federal Court stated:

> Residence
>
> 20 In commencing this discussion we will first consider the word 'reside'. The Oxford English Dictionary defines the word to mean:
>
> - To settle; to take up one's abode or station.
> - To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place.
> - Of persons having some special status or position. Hence to live (at a place) for the discharge of official duties; to be 'in residence'.
>
> 21 As to the word 'residence' *Oxford English Dictionary* offers the following meanings:
>
> - To have one's usual dwelling place or abode; to reside.
> - To take-up one's residence, to establish oneself; to settle.
> - So to have (etc.) residence.
> - The circumstance or fact of having one's permanent or usual abode in or at a certain place.
> - The fact of residing or being resident.
> - The fact of living or staying regularly at or in some place for the discharge of special duties, or to comply with some regulation; also, the period during which such stay is required of one.
> - The place where one resides one's dwelling place; the abode of a person (especially one of some rank or distinction).
> - A dwelling, abode, house, especially one of a superior kind; a mansion.
>
> 22 *Shorter Oxfor*d defines the term 'reside' relevantly as:
>
> - Settle; take up one's station.
> - Of a person holding an official position: occupy a specified place for the performance of official duties; be in residence.
> - Dwell permanently or for a considerable time, have one's regular home in or at a particular place.
>
> 23 The expression 'residence' is said to mean:
>
> - The circumstance or fact of having one's permanent or usual abode in or at a certain place; the fact of residing or being resident.
> - The fact of living or staying regularly at or in a specified place for the performance of official duties or for work; a period of time required for this.
> - The action of remaining in a place for a limited period of time; lingering; procrastination (said to be obsolete).

- The place where a person resides; the abode of a person.
- A dwelling, a house, especially an impressive, official or superior one; a mansion.

Reid v The Commissioners of Inland Revenue 1926 SC 589

6.26 Miss Reid spent the majority of the year travelling abroad due to ill health and only the summer in the United Kingdom. Although she gave up her home, all her family ties remained in the UK, she maintained bank accounts in the UK, her personal address remained in the UK and her personal belongings not required when she was travelling were kept in a store in London.

6.27 Lord President Clyde said:

> However this may be, and keeping in mind the qualities as well as the durability of the relation between a person and the place (here the United Kingdom) in which he 'resides,' I find myself unable to affirm that the Commissioners were mistaken in law in regarding the circumstances of the appellant's life in the two tax years ended 5th April 1921 as putting her within the category of a person 'ordinarily resident' in the United Kingdom.

6.28 This suggests that peripheral connections (such as bank accounts, location of furniture, family ties) are not sufficient to support a finding that someone continues to 'reside' in their country of domicile.

Peel v The Commissioners of Inland Revenue 1928 SC 205

6.29 Mr Peel moved to Egypt to join a business with his father. He later married and set up and maintained an establishment in Egypt. Mr Peel also maintained an estate in Scotland, which had been occupied by his children, during their education, his wife, during the holidays, and by himself for various periods of time.

6.30 Lord President Clyde referred to his judgment in *Reid* and the Court concluded that because the estate in Scotland was readily at the disposal of Mr Peel, he was a resident. He said:

> In point of fact, in the tax year in question, he lived in the United Kingdom for 166 days. In these circumstances I can see no ground for interfering with the result arrived at by the Commissioners. I think that the question of law put for the opinion of the Court should be answered affirmatively.

Examples of how the AAT has applied the law

6.31 An examination of recent AAT matters is useful in that they reflect recent ATO thinking in relation to the ordinary meaning of the word resides.

6.32 It is important to note that these decisions are merely application of the law to specific facts and as the tribunal commented in *Dempsey v Commissioner of Taxation* at [99]*:*

> there is little purpose served by a rehearsal of these many cases and their outcomes.

Iyengar v Commissioner of Taxation [2011] AATA 856

6.33 Mr Iyengar moved to the Middle East for an employment opportunity. Mrs Iyengar and their son continued to live in the family home.

6.34 Senior Member Walsh listed various factors that must be considered when answering the questions of whether a person resides in a particular country. This reflected the Commissioner's public ruling TR 98/17, which includes:

(a) physical presence;

(b) nationality;

(c) history of residence and movements;

(d) habits and 'mode of life';

(e) frequency, regularity and duration of visits;

(f) purpose of visits or absences from a country;

(g) family and business ties with a country; and

(h) maintenance of a place of abode.

6.35 Senior Member Walsh concluded that Mr Iyengar resided in Australia.

6.36 Our view is Mr Iyengar resided in Australia. He continued to maintain a family home in Australia. His physical absence does not detract from him treating it as 'home'. Viscount Cave LC in *Levene* referred to the Glasgow mariner, who is absent most of the year, but regularly returns to the family home, as residing there.

6.37 Our experience is that the ATO often works through this checklist of factors, which can sometimes distract from the real question of where a person 'resides'.

6.38 In the *Dempsey* decision, the AAT has now explicitly warned against relying on these checklists. The Tribunal state at paragraph 101:

> In *Iyengar v Federal Commissioner of Taxation* Senior Member Walsh developed from earlier cases a non-exhaustive list of criteria which she regarded as relevant to the determination of whether or not an individual was a resident of Australia for the purposes of the definition in s.6 of the ITAA 36. That list has gained some later currency in the Tribunal. However useful such checklist maybe, they are no substitute for the text of a statute and the recollection that ultimate appellant authority dictates that the word 'resides' be construed and applied to the facts according to its ordinary meaning.

Sneddon v Commissioner of Taxation [2012] AATA 516

6.39 Mr Sneddon moved to Qatar to work for Fluor Australia Pty Ltd. Prior to departing for Qatar, Mr Sneddon purchased a property in Western Australia, which he kept vacant whilst in Qatar. He also retained phone and internet services connected to the property.

6.40 In Qatar, Mr Sneddon lived in a fully-furnished apartment leased by Fluor. Besides purchasing a few household items to make the fully-furnished apartment more comfortable, Mr Sneddon's only expenses were his food, phone and fuel.

6.41 Senior Member Walsh found that:

> Specifically, the evidence before the Tribunal establishes that Mr Sneddon maintained a 'continuity of association' with Australia in the income year ended 30 June 2009 despite his physical absence from Australia throughout most of that income year: see also *Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13; (1941) 64 CLR 241.
>
> Further, in reaching the above conclusion, the Tribunal is mindful of the fact that it has been previously said by the Tribunal that the ordinary meaning of 'reside' in section 6(1)(a) of the ITAA 1936 should be given the widest possible meaning, as that is what Parliament intended: *Subrahmanyam v Commissioner of Taxation* 2002 ATC 2303 at [43 – 44].
>
> Having found that Mr Sneddon was an Australian resident according to ordinary concepts for Australian income tax purposes in the income year ended 30 June 2009, it is unnecessary

6.42 The comment of Deputy President Forgie in *Subrahmanyam* is misapplied. Deputy President Forgie said that the defined term of **resident** was expanded beyond the ordinary meaning of

'resides' by the additional statutory tests. She did not accept that the ordinary meaning of the word 'resides' was to be given an expansive construction. There is no rule of interpretation that the provision is to be given the widest possible meaning: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41, per French CJ at paragraph 11:

> The terms are not to be read by reference to some general principle that requires taxing statutes to be construed so as to maximise the recovery of revenue.

Sully v Federal Commissioner of Taxation [2012] AATA 582

6.43 Senior Member McCabe found that Mr Sully did not reside in Australia according to the ordinary meaning of reside. This was despite:

(a) continuing to own a home in Australia and continuing to pay for expenses associated with that home;

(b) the taxpayer's girlfriend continuing to live in his property;

(c) storing his motorbike in Australia;

(d) his salary being paid into an Australian bank account;

(e) not establishing an abode outside of Australia;

(f) having family ties in Australia; and

(g) spending three weeks in Australia visiting family.

6.44 In his decision, Senior Member McCabe stated:

> I am not persuaded these matters, [listed above] taken together, suggest the taxpayer continued to reside in Australia. They certainly indicate there was some residual association with Australia, but I am not persuaded they evidence an intention to return to Australia or suggest the taxpayer continued to regard Australia as his home. The fact he owned real estate in this country is unremarkable, even if it was his former residence.

Pillay v Commissioner of Taxation [2013] AATA 447

6.45 Deputy President Frost stated that:

> What is significant in this matter is the 'continuity of association' that Dr Pillay has retained with Australia. Although he has been working for an extensive period in East Timor, and although he has had an apartment to stay in while he has been working there, he does not seem to have brought himself to regard East Timor as home. Indeed, as set out in the private ruling, he and his wife regard the Bali property as home, despite the fact that they must have precious little time to spend there together.

6.46 The decision relies heavily on the 'continuity of association' analysis, as raised in the decision in *Hafza*.

6.47 The decision also reflects in detail on Dr Pillay's intention, which was to spend his time, at the conclusion of his contract in East Timor, between a house in Bali and his 'family home' at Sapphire Beach (Australia).

6.48 *Pillay* was decided based on the scheme that was described in the private ruling. The scheme described the beach house in Australia as their 'family home' and the evidence of Dr and Mrs Pillay suggested a property in Bali was their 'home'. The representatives of Dr Pillay suggested that the test was where you spend your time is where you live, and therefore where you reside. The Tribunal criticised this approach as being an incorrect interpretation of the test.

Mynott v Commissioner of Taxation [2011] AATA 539

6.49 Mr Mynott travelled overseas for employment in various locations. Prior to leaving he sold all his Australian properties besides a vacant block of land that had diminished in value and was not worth selling. While overseas, Mr Mynott met and formed a domestic relationship with a lady in the Philippines. Mr Mynott would stay with his parents any time he was in Australia during the relevant income years. Mr Mynott maintained an Australian bank account into which his overseas earnings were paid, and local accounts in countries in which he worked. The Tribunal gave little weight to the fact that Mr Mynott ticked the 'resident' box on incoming and outgoing passenger cards and attributed this to the fact that Mr Mynott believed that it was not for income tax purposes.

6.50 Senior Member Dunne said:

> When I balance up all of the above considerations, I am of the view that Mr Mynott did not 'reside' in Australia during the relevant tax years. More particularly, I am satisfied that, for the 1999, 2000 and 2001 tax years, Mr Mynott was not a resident or a resident of Australia under the residence according to ordinary concepts test in s 6(1) of the 1936 Act, and I so find.

Case 5/2013 [2013] AATA 394

6.51 The Taxpayer left Australia to commence employment in Singapore where he resided in a serviced apartment. After 11 months in Singapore, the Taxpayer's employment ceased and he commenced new employment in India where he lived in fully-furnished quarters which were provided by his Indian employer.

6.52 At all times while the Taxpayer was overseas his wife and two children remained at their family home in Western Australia. On all incoming and outgoing passenger cards the Taxpayer identified himself as an Australian resident departing temporarily or returning to Australia with Western Australia as his address. Also on the Taxpayer's 2011 Tax Return he stated that he was an 'Australian resident'.

6.53 Having regard to the above circumstances, Senior Member Walsh stated:

> In the Tribunal's view, the above facts and evidence indicate that the Taxpayer retained a 'continuity of association' with Australia, together with an intention to return to Australia and an attitude that Australia remains 'home': see *Joachim v Federal Commissioner of Taxation* 2002 ATC 2088.

6.54 This decision relied heavily on the Taxpayer's continued maintenance of the family home which his wife and two children occupied at all times as well as the Taxpayer's own acknowledgment on incoming and outgoing passenger cards, and his 2011 return where he stated he was in fact an Australian tax resident.

Murray v Commissioner of Taxation [2013] AATA 780

6.55 Mr Murray left Australia in 2006, living in Thailand before subsequently moving to Bali in early 2008.

6.56 Mr Murray made a number of trips back to Australia. When returning to Australia, Mr Murray completed the section on his immigration card saying that he was an Australian resident departing temporarily.

6.57 Mr Murray also received Medicare benefits on 30 occasions between August 2008 and May 2010.

6.58 The Tribunal held that Mr Murray was not a resident of Australia for tax purposes.

6.59 Deputy President Hack in his reasons for decision said:

> I do not regard the information on the immigration cards or the claiming of Medicare benefits as having any great weight at all. Mr Murray was not, in completing the immigration cards, turning his mind to the notion of residence according to ordinary concepts. He said that he did not give any real thought to the answers he gave on the cards; he answered more out of habit. I accept that to be so.

6.60 Deputy President Hack also stated:

> In this context it is authoritatively settled that a 'permanent place of abode' may be something less than a place where the taxpayer intends to reside for the rest of his life.

Nordern v Federal Commissioner of Taxation [2013] AATA 271

6.61 Mr Nordern worked overseas in the relevant income year for the following periods:

(a) Singapore and China, for approximately 32 days;

(b) Papua New Guinea, for approximately 149 days; and

(c) Malaysia, for approximately 26 days.

6.62 During the period overseas Mr Nordern's accommodation, meals, and other living expenses were covered by his employer at the relevant time. Mr Nordern's salary was paid into an Australian bank account and on his income tax returns for the relevant years he stated that he was an Australian resident.

6.63 At all times that Mr Nordern was overseas, his wife and children continued to reside at the family home in Western Australia.

6.64 Senior Member Walsh said:

> Consequently, based on the facts and evidence before it, the Tribunal considers that throughout the 2011 year, Mr Nordern retained a 'continuity of association' with Australia, had an intention to return to Australia, and had an attitude that Australia remained home: see *Subrahmanyam* 2002 ATC 2303 at [23] per Forgie DP and the case law referred to therein.

6.65 We think *Nordern* was correctly decided, but not for the correct reasons. Nordern was the equivalent of the Glasgow mariner referred to in *Levene*, who did not have a 'usual or settled place of abode' outside Australia but returned to the family home after periods of absence.

Factors likely to be relied on by the Commissioner

6.66 The Commissioner is likely to rely on the following factors, extracted from his public ruling TR 98/17.

(a) Behaviour while present in Australia:

(i) intention or purpose of presence;

(ii) family and business/employment ties;

(iii) maintenance and location of assets; and

(iv) social and living arrangements;

(b) Period of physical presence in Australia.

6.67 Significantly, parts of the ruling are aimed at assessing whether non-residents coming to Australia, for example for work or study, reside in Australia under the ordinary meaning of the word resides.

Domicile

6.68 A person asserting a domicile of choice has the onus of proving that the change has occurred: *Smith v Smith* [1975] 1 NSWLR 725.

6.69 The person must show they have an intention of permanently or indefinitely staying in the country of the new domicile having abandoned their previous domicile: *Bell v Kennedy* (1868) LR1Sc&Div 307*; Udny v Udny* (1869) LR1Sc&Div 441.

6.70 The ultimate question to be determined is, what is the proper conclusion to be drawn from all the circumstances: *Re Cartier* [1952] SASR 280 at 291.

6.71 The following factors have been considered relevant.

(a) Statements made by the individual regarding their intention.

(i) Contemporaneous statements are far more cogent than a statement made for the purposes of proving intention after the fact: *Smith v Smith* [1975] 1 NSWLR 725.

(ii) The conduct of the individual must be consistent with any statements made: *Fremlin v Fremlin* (1913) 16 CLR 212 at 234.

(b) Long established residence in a country suggests an individual's domicile may of changed (*Hyland v Hyland* (1971) 18 FLR 461), however it is not conclusive: *Smith v Smith* [1975] 1 NSWLR 725.

(i) This is especially the case if the matrimonial residence is established there: *Brabender v Brabender* [1949] VLR 69; *Armstead v Armstead* [1954] VLR 733.

(ii) The fact that an individual does not have a fixed abode in a country may suggest they have not established a domicile of choice (*Bradford v Bradford* [1943] SASR 123) however, this depends upon the circumstances of each individual: *Brabender v Brabender* [1949] VLR 69.

(c) Whether an individual acquires citizenship of a country may indicate domicile (*Terrassin v Terrassin* [1968] 3 NSWR 600) however, this is not conclusive: *Smith v Smith* [1975] 1 NSWLR 725; *Hyland v Hyland* (1971) 18 FLR 461 at 484.

(d) Employment with a resident employer in a country: *Russell v Russell* [1935] SASR 85.

(e) If the individual integrates into the society of a country it may indicate domicile (*Hyland v Hyland* (1971) 18 FLR 461) and conversely a failure to adapt to its language, culture or customs may suggest an individual has not changed domicile: *Haque v Haque* (1962) 108 CLR 230 at 247.

(f) If the individual continues to maintain a residence in the country of the former domicile or if they abandon it, it may suggest they have or have not, changed domicile: *Perkins v Perkins* (1934) 51 WN (NSW) 175; *Re Enright* [1939] QWN 12). However, maintaining a former residence does not prevent the acquisition of a new domicile: *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at 329-32.

(g) If an individual changes residence due to their health it may indicate a change in domicile: *Brown v Brown* (1933) 50 WN (NSW) 33).

Permanent place of abode

6.72 The leading authorities on the meaning of 'permanent place of abode' are *Applegate* and *Jenkins*.

Federal Commissioner of Taxation v Applegate (1979) 9 ATR 899

6.73 Mr Applegate was a solicitor, who moved to Vila on 8 November 1971 for the purpose of establishing his firm's branch office there. He leased a house in Vila for twelve months, with options for renewal. He obtained a residency permit for 12 months. Mr Applegate returned permanently to Australia in July 1973, due to medical reasons, having spent some 20 months living in Vila. It was always intended that Mr Applegate would return to the Sydney office after establishing the branch in Vila. There was no definite time period set. His written evidence was that he would 'reside outside Australia permanently but not indefinitely', which he then clarified in cross-examination to mean 'not forever'.

6.74 Franki J stated:

> The phrase "permanent place of abode outside Australia" is to be read as something less than a permanent place of abode in which the taxpayer intends to live for the rest of his life.

6.75 Northrop J stated that:

> The word "permanent" as used in para (a)(i) of the extended definition of "resident", must be construed as having a shade of meaning applicable to the particular year of income under consideration. In this context it is unreal to consider whether a taxpayer has formed the intention to live or reside or to have a place of abode outside of Australia indefinitely, without any definite intention of ever returning to Australia in the foreseeable future. The Act is not concerned with domicile except to the extent necessary to show whether a taxpayer has an Australian domicile. What is of importance is whether the taxpayer has abandoned any residence or place of abode he may have had in Australia. Each year of income must be looked at separately. If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income. **This is to be contrasted with a temporary or transitory place of abode outside Australia**.
>
> (emphasis added)

6.76 Fisher J stated:

> To my mind the proper construction to place upon the phrase 'permanent place of abode' is that it is the taxpayer's **fixed and habitual place of abode**. It is his home, but not his permanent home.
>
> (emphasis added)

6.77 Fisher J draws a distinction between 'permanent home' (a domicile concept, focused primarily on the taxpayer's intention to return to Australia at some stage) and 'permanent place of abode' may be useful. Fisher J stated:

> To my mind it is significant that the word "permanent" is used to qualify the expression "place of abode" i.e. the physical surroundings in which a person lives, and to describe that place. It does not necessarily direct attention to the taxpayer's state of mind in respect of that or any other place. **Such a state of mind is crucial to the determination of his domicile i.e. his permanent "home", and if he retains his Australian domicile he is considered a resident of Australia until he acquires a place of abode of a particular character elsewhere**. Such a place of abode may be his "home" for the time being but it is not his permanent home if he proposes ultimately making his home elsewhere. Should he, whilst living in his permanent place of abode, abandon his intention ultimately to make his home elsewhere, his permanent place of abode will become his permanent home. He will in consequence be held to have abandoned his Australian domicile and to have acquired a domicile of choice in the country of his home.
>
> It follows that it is, in my view, proper to pay greater regard to the nature and quality of the use which a taxpayer makes of a particular place of abode for the purpose of determining whether it qualifies as his permanent place of abode. His intentions with respect to the duration of his residence is just one of the factors which has relevance. Obviously if his stay is purely temporary and he intends to move on or return to Australia at some definite point of time this denies the place of abode an essential characteristic of a home, namely durability. Moreover it

> seems appropriate to view objectively the nature and quality of the use which the taxpayer makes of the place of abode to determine whether it has the characteristics of his fixed place of abode, his home. It is to my mind perfectly consistent with the establishing of a home in a particular place that the taxpayer is aware that the duration of his enjoyment of the home, although indefinite in length, will be only for a limited period. **The knowledge that eventually he will return to the country of his domicile does not in my opinion deny him a capacity to make his home outside of his country domicile**. Such a conclusion is particularly open in the present circumstances where the taxpayer was not a completely free agent in the choice of when to return, it being a matter for negotiation between him and his employers.
>
> To my mind the proper construction to place upon the phrase "permanent place of abode" is that it is the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with the particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the **continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place**. (at p17)
>
> It follows then that in my opinion th**e intention of the taxpayer as far as returning to Australia is concerned is just one of the factors for consideration. But it is a factor which I consider has less significance than the taxpayer's intention in relation to his place of abode outside Australia. Intention to return to Australia is a crucial feature in considering whether the taxpayer has retained an Australian domicile. Intention to make his home <u>for the time being</u> in his place of abode outside Australia is an important element in characterizing that place of abode as his "permanent" place of abode**.
>
> (emphasis added)

6.78 This reasoning appears to have been applied in *Mynott v Federal Commissioner of Taxation* [2011] AATA 539, where Senior Member Dunne stated:

> In my view, Mr Mynott had established his home in the Philippines and was aware that the duration of his enjoyment of the home, although indefinite in length, might be only for a limited period. The knowledge that eventually he would return to Australia does not deny him a capacity to make his home outside Australia.

Commissioner of Taxation v Jenkins 12 ATR 745

6.79 Mr Jenkins was a bank employee of ANZ. He applied for a move to the Vila branch, for a period of three years.

6.80 His evidence was that he intended to stay for the duration of the contract – three years – and then seek an extension if he and his wife liked it there. He returned after 18 months, for medical reasons.

6.81 He attempted to sell his house in Queensland, but after not being able to achieve a sale, decided to lease it to tenants on a 12 month lease. His furniture was stored. He continued to have a bank account in Australia.

6.82 The Court accepted Mr Jenkins and his wife 'entered fully into the social and recreational activities in Vila'.

6.83 After referring to the tests in *Applegate*, Sheahan J concluded:

> I regard the taxpayer as having then a permanent place of abode outside Australia. He was then in anticipation that until February 1980 he would be living in Vila and nowhere else.

6.84 With respect to the interaction between the ordinary meaning of the word 'resides' test and the domicile/permanent place of abode test, there is authority for the proposition that if a taxpayer resides outside Australia, he is likely to have established a permanent place of abode outside Australia. Northrop J stated in *Applegate*:

> If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income. This is to be contrasted with a temporary or transitory place of abode outside Australia.

6.85 We have seen examples, in an audit and objection context, of the Commissioner conceding the taxpayer resides overseas based on the ordinary meaning of the word 'resides' but then asserting that the taxpayer's place of abode overseas was not 'permanent'.

Examples of application in AAT

Boer v Commissioner of Taxation [2012] AATA 574

6.86 Mr Boer worked in southern Oman on a 35 days on and 35 days off rotation. He subsequently entered into a new contract at the completion of the old one, this time working 28 days on and 28 days off.

6.87 While living in Oman, Mr Boer occupied a single room apartment with an attached ensuite however, there were no kitchen facilities besides a small refrigerator and a microwave oven. Mr Boer ate all his meals at the dining facility. He shared the apartment with another employee who worked a complementary roster.

6.88 After Mr Boer's first 35 day rotation he returned to Australia and arranged for his personal effects to be put into storage and for his property to be rented out. Mr Boer garaged his motor vehicle at a friend's house. Generally, when Mr Boer was rostered off he did not remain in Oman during these periods.

6.89 Deputy President Hack distinguished the circumstances in this decision with that in *Applegate* on the basis that Mr Boer's accommodation in Oman was bare and only for the period of time he was rostered on to work as Mr Boer had a pattern of behaviour of leaving Oman when he was rostered off. Deputy President Hack said in relation to Mr Boer's accommodation:

> It could not be described as a permanent base, a place that Mr Boer might call home, where he could have friends visit or stay over. He acquired no furnishings or fittings but simply availed himself of that which was provided by his employer. He had mail sent to Australia rather than Oman. He left Oman as soon as he was able after the completion of his roster and returned immediately prior to the start of the next. In short, he had no apparent ties to Oman beyond the fact that his employment required him to live, sleep and eat there for a number of consecutive days.

Mayhew v Commissioner of Taxation [2013] AATA 130

6.90 Mr Mayhew commenced working in Abu Dhabi however his wife did not move with him initially. Mr Mayhew leased his primary residence to his son in consideration for his overseeing Mr Mayhew's various investment properties. Mr Mayhew opened a local account in which his salary was paid into. Although Mr Mayhew initially maintained an Australian health insurance policy, the purpose of this was so his youngest son could continue to have the benefit of the policy. My Mayhew subsequently cancelled this policy.

6.91 In Abu Dhabi, Mr Mayhew initially resided in an apartment leased by his employer but subsequently found more permanent accommodation. Mr Mayhew only made two trips to Australia during the relevant income year, both trips were work-related and he stayed in hotels.

6.92 Mr Mayhew continues to work with the same employer however he later moved to Kuwait and then to Dubai. Both times his wife moved with him.

6.93 Member Hughes said:

> The Tribunal concludes that the applicant handled his departure from Australia, and his relocation to the Middle East, in a manner consistent with a person who had resolved to permanently leave Australia. He had to make arrangements in relation to his children and the assets he was leaving behind. And this he did in his own way and in his own time, according to the priorities which would have been confronting him during this phase of his career.

Factors the Commissioner is likely to apply

6.94 In IT 2650 the Commissioner lists a number of factors he considers important when determining the **permanency** of a place of abode. These are:

(a) the intended and actual length of the taxpayer's stay in the overseas country;

(b) whether the taxpayer intended to stay in the overseas country only temporarily and then to move on to another country or to return to Australia at some definite point in time;

(c) whether the taxpayer has established a home (in the sense of dwelling place; a house or other shelter that is the fixed residence of a person, a family, or a household), outside Australia;

(d) whether any residence or place of abode exists in Australia or has been abandoned because of the overseas absence;

(e) the duration and continuity of the taxpayer's presence in the overseas country; and

(f) the durability of association that the person has with a particular place in Australia, i.e. maintaining bank accounts in Australia, informing government departments such as the Department of Social Security 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.

183 day test

6.95 In TR 98/17 the Commissioner says in relation to the 183 day test:

> 35. The 183 day test was introduced into the income tax law in 1930 with the following explanation in the relevant Explanatory Notes:
>
> > ... the primary test is actual residence in Australia. If a person is in fact residing in Australia, then irrespective of his nationality, citizenship or domicile, he is to be treated as a resident for the purposes of the Act ... The third test to be applied is, subject to certain conditions, actual presence in Australia for more than half the financial year in which the income the subject of assessment is derived. This test is necessary in order to obviate the great difficulties which occasionally arise in establishing to the satisfaction of a Court that a person is resident in any particular country.
>
> 36. This test enables the Commissioner to consider usual place of abode and intention to take up residence in Australia so that individuals who are enjoying an extended holiday in Australia are not treated as residents.

6.96 The language of the provision along with the Commissioner's views in TR 98/17 indicates that this test is only relevant to visitors and migrants than to an Australian resident travelling overseas. Member Roach in *Case S19*, 85 ATC 225 at page 232 stated:

> In my view the second statutory test is in aid of determining whether a person has commenced residing in Australia and plays no part in determining whether a person has ceased to be a resident of Australia. I am fortified in that view when I consider how inappropriate it would be to test the status of a person domiciled in Australia and resident here from birth by reference to whether "his usual place of abode (immediately following departure) is outside Australia"; and

> by reference to the test "does not intend to take up residence in Australia" — phrases surely more appropriate to the visitor or migrant than to a person who has been an Australian resident travelling overseas with a view to a short or prolonged absence.

6.97 In *Case S19*, 85 ATC 225 the taxpayer departed Australia for the New Hebrides on 14 April 1978 for two years. The Commissioner contended that the taxpayer should be deemed to be a resident for the whole of the income year simply because more than six months of the income year had passed prior to his departure from Australia in April 1978. The Board rejected the Commissioner's argument and held that the 183 day test did not apply as the taxpayer had abandoned his residence in Australia and formed an intention to reside outside Australia. Consequently, the taxpayer was not a resident after he departed for the New Hebrides.

Commonwealth superannuation fund test

6.98 The Commonwealth superannuation fund test will only apply to specific circumstances that arise as a member of certain Commonwealth Government superannuation schemes. These schemes are now no longer available to people joining the public sector and this test is becoming more and more limited in its use.

Baker v Federal Commissioner of Taxation [2012] AATA 168

6.99 Mr Baker was employed by the Department of Defence. On 15 June 2009, he moved to live and work in the Philippines. On 21 June 2009, Mr Baker was granted leave without pay initially for one year however, this was extended for a second year. During this time Mr Baker took up a contract of employment with the Australian Embassy in Manilla. Mr Baker resigned from the Department of Defence on 18 May 2011.

6.100 Mr Baker did not make any superannuation contributions to his Public Sector Superannuation Scheme account between 21 June 2009 and 18 May 2011.

6.101 Mr Baker sought a private ruling on whether he was a resident of Australia for tax purposes. The Commissioner ruled that he was a resident of Australia for tax purposes while he remained a member of a superannuation scheme. Mr Baker then objected to the private ruling however, this was affirmed in the objection decision.

6.102 Member Webb at paragraph 27 stated:

> 27. To my mind, the fact that Mr Baker made no superannuation contributions during the period of approved leave without pay does not mean that he was not an active member of the PSS Scheme at that time. Even though he made no contributions, his employment as a full-time ongoing Commonwealth employee continued to qualify his membership of the PSS Scheme and his PSS Scheme benefits had not been preserved. Prior to commencing his leave without pay period, Mr Baker had not elected to cease his membership of the PSS Scheme under section 6B of the 1990 Superannuation Act and Rule 2.1.8 of the PSS Scheme Trust Deed. Under that Act and the PSS Scheme Rules, Mr Baker continued to be a member during the period of his approved leave without pay. So long as he continued to be a permanent or ongoing employee of the Department of Defence until his resignation on 18 May 2011 his membership of the PSS Scheme was active, even though he was not obligated to make contributions during this period under Rule 4.1.1.

7. THE DECISION IN *DEMPSEY*

'Resides' does not have an expansive meaning

7.1 In *Dempsey v Commissioner of Taxation* [2014] AATA 335, the Tribunal rejected the Commissioner's argument that the definition of 'resident' should be given a wide meaning on the basis that it is used in revenue legislation for the purposes of the imposition of tax. The Commissioner relied on the comments made by Deputy President Forgie in *Subrahmanyam v Commissioner of Taxation* [2002] ATC 2303 at [43]:

> [G]iven that the income regarded as assessable income under both the ITAA 1936 and the ITAA 1997 is more broadly based for a resident than for a non-resident, it can be presumed from the fact that it is income tax legislation that Parliament intended that the word "reside" should be given its broadest ordinary meaning rather than any narrower meaning. That is so because it is its broadest meaning that leads to the greatest pool of assessable income upon which income tax is assessed.

7.2 The Tribunal relied on the subsequent High Court authority of *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, where it was said at [51]:

> Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in Carr v Western Australia … when he said:
>
> > [I]t may be said that the underlying purpose of an income tax assessment act is to raise revenue for government. No one would seriously suggest that s 15A of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic material, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.
>
> (emphasis added)

7.3 The Tribunal held that to attribute the widest possible meaning to the definition of 'resides' is incorrect. They stated at paragraph 11:

> 11. It does not, with respect, at all follow from this that the broadest possible meaning of defined terms such as "resident" is to be preferred. To view each of these statutes through such a prism is apt to distract attention from their text and the context in which that text is found. These are the primary reference points for the construction of any statute.

'Permanent' is not a high threshold

7.4 In *Dempsey* the Tribunal relied on *Applegate v Federal Commissioner of Taxation* [1978] 1 NSWLR 126 where Sheppard J stated at 134:

> "permanent" is used in the sense of something which is to be contrasted with that which is temporary or transitory. It does not mean everlasting. The question is thus one of fact and degree.

7.5 The Tribunal did not adopt a high threshold establishing whether Mr Dempsey's abode was permanent. Rather, the Tribunal relied upon Mr Dempsey's 'settled employment, lifestyle and residence choice for the indefinite future' as being sufficient to establish a permanent place of abode outside Australia.

ATO Decision Impact Statement

7.6 The ATO in its decision impact statement accepted that the approach taken by the AAT is consistent with the ATO's approach to residency matters which is ultimately a question requiring weighing of all the relevant facts and circumstances and an application of the statute and authorities to those facts. Consequently the ATO considers the case is confined to its particular facts and no new law was created.

7.7 This statement by the ATO does not acknowledge that 'resides' does not have an expansive meaning and consequently the meaning attributed in *Subrahmanyam* is plainly incorrect. If the ATO continue the same approach they have been adopting in other residency matters they may continue to apply an expansive meaning.

8. DOUBLE TAX AGREEMENTS - RESIDENCY TIE BREAKER

8.1 Australia has entered into Double Tax Agreements (**DTAs**) with most of its major trading partners and there has been a recent push to expand Australia's network of DTAs.

8.2 DTAs regulate the taxing right of the two nations that are party to the agreement in relation to its residents and income sourced in each country.

8.3 If, for example, an individual was a resident under the domestic laws of both countries, the DTA would provide a tie breaker test to determine which country has taxing rights.

8.4 Most DTAs that Australia enters into are based on the *OECD Model Tax Convention on Income and on Capital* and provisions in each treaty are similar.

8.5 As an example, Article 3 paragraph 2 of the *Singapore-Australia Double Tax Agreement* provides the tie breaker provision should an individual be a resident of both Australia and Singapore. It states:

> 2. Where by reason of the provisions of paragraph 1 of this Article an individual is both a Singapore resident and an Australian resident-
>
> (a) he shall be treated solely as a Singapore resident:
>
> (i) if he has a permanent home available to him in Singapore and has not a permanent home available to him in Australia;
>
> (ii) if sub-paragraph (a)(i) of this paragraph is not applicable but he has an habitual abode in Singapore and has not an habitual abode in Australia;
>
> (iii) if neither sub-paragraph (a)(i) nor sub-paragraph (a)(ii) of this paragraph is applicable but the Contracting State with which his personal and economic relations are closest is Singapore;
>
> (b) he shall be treated solely as an Australian resident-
>
> (i) if he has a permanent home available to him in Australia and has not a permanent home available to him in Singapore;
>
> (ii) if sub-paragraph (b)(i) of this paragraph is not applicable but he has an habitual abode in Australia and has not an habitual abode in Singapore;
>
> (iii) if neither sub-paragraph (b)(i) nor sub-paragraph (b)(ii) of this paragraph is applicable but the Contracting State with which his personal and economic relations are closest is Australia.

8.6 As Article 3 of the Singapore DTA is modelled on Article 4 of the *OECD Model Tax Convention on Income and on Capital*, commentary published by the OECD is often used to interpret this provision.

8.7 Paragraph 8.6 of the commentary states:

> Paragraph 1 refers to person who are 'liable to tax' in a Contracting State under its laws by reasons of various criteria. In many states, a person is considered liable to comprehensive taxation **even if the Contracting State does not in fact impose tax**. For example, pension funds, charities and other organisations may be exempted from tax, but they are exempt only if they meet all of the requirements for exemption specified in the tax laws. They are, thus, subject to the tax laws of a Contracting State. Furthermore, if they do not meet the standards specified, they are also required to pay tax. Most states would use such entities as residents for the purposes of the convention.
>
> (emphasis added)

Permanent home

8.8 In relation to whether a permanent home is available to a taxpayer, paragraph 12 and 13 of the commentary state:

> 12. Sub-paragraph (a) means, therefore, in the application of the convention (that is, where there is a conflict between the laws of the two states) it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.
>
> 13. As regards to the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; **this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily a short duration (travel for pleasure, business travel, education travel, attending a course at a school, etc**).
>
> (emphasis added)

Habitual abode

8.9 Paragraph 17 of the commentary on the OECD model tax convention, in relation to the habitual abode test, states:

> 17. In the first situation, the case where the individual has a permanent home available to him in both states, the fact of having a habitual abode in one state rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, **tips the balance towards the State where he stays more frequently. For this purpose, regard must be had to stays had by the individual not only at the permanent home in the state in question but also at any other place in the same state**.

8.10 This is consistent with the Canadian case of *Lingle v R* 2009 TCC 435, where the issue was whether Mr Lingle had an habitual abode in the United States as well as Canada. Throughout the relevant period, Mr Lingle had a United States residence and a Canadian residence. Mr Lingle's spouse and children resided at the US residence and he returned to it approximately one weekend per month.

8.11 In concluding Mr Lingle did not have an habitual abode in the United States, Campbell J stated that:

> [28] I agree that the interpretation of habitual abode embodies more than simply a determination of which State an individual stayed more frequently. However, I do not agree that frequency is irrelevant to an interpretation of habitual abode.
>
> …
>
> [30] It follows that the proper approach to determining whether the Appellant had an habitual abode in the United States is to enquire whether he resided there habitually, in the sense that he regularly, customarily or usually lived in the United States… the Appellant consistently and repeatedly returned to his home in Canada for the majority of the days in this period. In the settled routine of his life he regularly, normally and customarily lived in Canada. He did not have any other contracts clients or business in the USA. In addition, he spent only 69 days out of 623 days in the relevant period at his home in the United States… The Appellant's stays at the [US residence] were in the nature of periodic visits with his normal place of residence being in Canada throughout the period. He did not have an habitual abode in the United States for the purposes of the Treaty because he did not regularly, customarily or normally live in the United States. Considering all the facts before me, his connections with the United States were weak when compared to his settled routine in Canada. Accordingly, the Appellant was a resident in Canada during this period and as such he is taxable on his business income earned as a consultant.

8.12 In *Allchin v R* 2005 TCC 711, the taxpayer stayed with his family every weekend in the same place over the course of a year (approximately 100 days). This was held to be insufficient to establish an habitual abode.

8.13 In *Trieste v R* 2012 TCC 91, the taxpayer stayed with his family once a month and for holidays. This was not sufficient to establish an habitual abode but rather his habitual abode was where his settled routine was.

Personal and economic relations/centre of vital interests

8.14 Paragraph 15 of the commentary on the OECD model tax convention, in relation to the centre of vital interests test, states:

> 15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to **his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc**. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.
>
> (emphasis added)

9. CONCLUSION

9.1 We expect residency disputes will continue. This is particularly the case in light of the Commissioner's Decision Impact Statement in *Dempsey* and well-established data-matching processes.

9.2 In a number of cases, the Commissioner has relied on administrative details as evidence of a taxpayer's intention that there has been no permanent break with Australia. Taxpayers need to ensure that these details are attended to promptly before or shortly after departing on a permanent basis.

9.3 When a taxpayer relocates overseas permanently, there are a number of steps that may be taken to manage the risk. One option is to apply for a private ruling, although there are significant drawbacks with seeking a private ruling from the Commissioner in the context of a residency dispute. Another option is to take reasonable care in self-assessing as a non-resident to remove the risk of administrative penalties.

9.4 The most appropriate option will depend on the client's circumstances and attitude to risk. However, given the increased audit activity, it is important to ensure the issue is considered when the taxpayer is considering moving overseas (or otherwise as soon as possible) rather than if and when the taxpayer returns to Australia.

This paper is only intended as a general overview of issues relevant to the topic and is not legal advice. If there are any matters you would like us to advise you on in relation to this paper, please let us know.

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