TR 2022/D2 - Income tax: residency tests for individuals

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Status: **draft only – for comment**

Draft Taxation Ruling

Income tax: residency tests for individuals

Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Ruling is about

1. This draft Ruling[1] outlines the residency tests for individuals for tax purposes as set out in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) and the Commissioner's view on when they consider a person will be a resident of Australia.

2. All legislative references in this Ruling are to the ITAA 1936, unless otherwise indicated.

3. This Ruling explains that the definition of 'resident of Australia' has 4 alternative tests. You[2] are a resident if you meet any one (or more) of the tests but a non-resident[3] if you do not meet any of the tests.

[1] All references to 'this Ruling' refer to the Ruling as it will read when finalised. This Ruling will not take effect until finalised.
[2] 'You' means the individual to whom the relevant section applies.
[3] The terms 'non-resident' and 'foreign resident' are used interchangeably within this Ruling and are taken to mean the same thing. 'Non-resident' means a person who is not a resident of Australia as stated in subsection 6(1). Section 995-1 of the *Income Tax Assessment Act 1997* defines 'foreign resident' to mean a person who is not a resident of Australia for the purpose of the ITAA 1936. The *Taxation Administration Act 1953* also refers to 'foreign resident'.

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4. This Ruling further explains that residency under the first 3 tests is determined by considering all of your relevant facts and circumstances. No single fact determines the outcome and the significance of facts varies from case to case. Because of this, there are no 'bright-line rules' or any single factor that can be said to be paramount.

5. This Ruling also explains:

- residency is about your connection to Australia, and
- you can be a resident for tax purposes of more than one country at the same time.

6. This Ruling does not address or discuss in detail:

- the Commonwealth Superannuation fund test (being the fourth residency test for individuals)
- dual residency
- double-tax agreements, and
- the residency of companies.[4]

7. Each residency decision turns on its facts.[5] While Court and Tribunal decisions provide illustrations of how the Court or Tribunal has considered and weighted facts, an outcome in one case does not govern the outcome in a different case, even where the facts are similar.

8. Similarly, the examples in this Ruling are provided to illustrate a point. Having similar facts to those in an example will not always result in the same outcome. Differences in intention, motivations and life circumstances may produce different outcomes.

Previous rulings

9. This Ruling consolidates and replaces the material in Taxation Rulings IT 2650 *Income tax: residency – permanent place of abode outside Australia* and TR 98/17 *Income tax: residency status of individuals entering Australia* on residency for individuals. It also updates the views reflected in those Rulings to take into account developments in case law (including but not limited to *Harding v Commissioner of Taxation* [2019] FCAFC 29 (*Harding*), *Pike v Commissioner of Taxation* [2019] FCA 2185 *(Pike)*[6] and *Addy v Commissioner of Taxation* [2019] FCA 1768 *(Addy)*[7]). IT 2650 and TR 98/17 are withdrawn with effect from the date of issue of this Ruling.

[4] Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency* and Practical Compliance Guideline PCG 2018/9 *Central management and control test of residency: identifying where a company's central management and control is located* provide the ATO's view on the central management and control test of corporate residency.

[5] *Commissioner of Taxation v Miller* [1946] HCA 23 at [101], per Rich J sets out:
> … the question whether a person is a resident … depends not upon the applicability of some definite rule of law, but upon … whether he comes within a field which is very loosely defined. The question is ordinarily one of degree, and therefore of fact.

[6] And, on appeal, *Commissioner of Taxation v Pike* [2020] FCAFC 158 (*Pike appeal*).

[7] And, on appeal, *Commissioner of Taxation v Addy* [2020] FCAFC 135 (*Addy appeal)*.

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Ruling

Statutory definition of residency for tax purposes

10. Residency for tax purposes is a question of fact based on an individual's connection to Australia.

11. The terms 'resident' and 'resident of Australia' are defined in subsection 6(1).[8] These definitions contain 4 alternative tests for residency of individuals. A 'resident' or 'resident of Australia' is:

> (a) a person, other than a company, who resides in Australia [**(ordinary concepts test)**[9]] 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; [**(domicile test)]**
>
> (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 residency in Australia; [**(183-day test)]** 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) … [**(Commonwealth superannuation fund test)]**

12. The ordinary concepts test is generally relevant when you are physically present in Australia and considers residency according to ordinary concepts. The other 3 tests (domicile test, 183-day test and Commonwealth superannuation fund test) expand the definition beyond the ordinary concept of residency.[10]

13. The domicile and Commonwealth superannuation fund tests are generally relevant if you have been living in Australia but are not currently present in Australia, or present only intermittently during the income year in issue. The domicile test considers whether your domicile is Australian and whether your permanent place of abode is outside Australia.

14. The 183-day test is generally relevant if you were not previously a resident and entered Australia during the income year. This test considers your length of stay in Australia, your usual place of abode and your intention to take up residency in Australia. For example, those on an extended holiday in Australia are not treated as residents merely based on the number of days present in Australia.

15. You are a resident if you meet any one of the tests. It does not matter if you do not meet the others. You are not a resident if you do not meet any of the tests. This means that you must consider all applicable tests before concluding you are a non-resident.

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[8] 'Australian resident', as defined in section 995-1 of the *Income Tax Assessment Act 1997*, means a person who is a resident of Australia for the purposes of the ITAA 1936.
[9] Also known as the 'resides test'.
[10] As per Derrington J in *Harding v Commissioner of Taxation* [2018] FCA 837 at [6].

16. To determine your residency status, it is appropriate to look beyond the period you have spent in (or out of) Australia. Factors from the entire income year and surrounding income years[11] provide more information to help determine whether you meet one of the residency tests.

Ordinary concepts test

17. Under the ordinary concepts test, you are a resident if you reside in Australia.

18. The term 'reside' is not defined in the Australian income tax law and has its ordinary meaning.

19. The ordinary meaning has been expressed as 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place'.[12]

20. The ordinary concepts test is asking whether your presence in Australia is usual and settled in contrast to temporary and casual. Because it looks at the nature of a person's presence in and connection to Australia, all the facts and circumstances that relate to that connection are relevant. Factors that commonly inform that connection are:

- period of physical presence in Australia
- intention or purpose of presence
- behaviour while in Australia
- family, and business or employment ties
- maintenance and location of assets, and
- social and living arrangements.

21. No single factor is necessarily decisive. The weight given to each factor varies depending on individual circumstances.

22. Many of the factors outlined in paragraph 20 of this Ruling are interrelated. For example, continued family connections are often also accompanied by assets in Australia (such as a house or furniture) and behaviour consistent with a familiar routine while in Australia. Temporary visitors often have few assets and few social connections.

23. For these reasons, it is important to consider all the relevant connections together to inform the question of whether you reside in Australia. The factors do not stand alone.

24. Because the ordinary concepts test asks whether you reside *in Australia*, the factors focus on your connection to Australia. Having connection to, or being a resident of another country does not necessarily diminish any connection to Australia.[13] For this reason, the ordinary concepts test is not about dominance or exclusivity of residence in

[11] *The Commissioner of Taxation of the Commonwealth of Australia v Applegate, Geoffrey David* [1979] FCA 66 (*Applegate*); *Clemens and Commissioner of Taxation* [2015] AATA 124 (*Clemens*)*; Jaczenko and Commissioner of Taxation* [2015] AATA 125 (*Jaczenko*)*; Koustrup and Commissioner of Taxation* [2015] AATA 126 (*Koustrup*).

[12] See *Commissioner of Taxation v Miller* [1946] HCA 23 at [99], per Latham CJ, citing Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] AC 217 at [222], who cited the Oxford English Dictionary. Likewise, *The Macquarie Dictionary* online, accessed 14 September 2022, defines 'reside' as 'to dwell permanently or for a considerable time; have one's abode for a time'.

[13] *Pike* at [57].

one place versus another. Nonetheless, continued connections overseas will inform the nature of your connection to Australia.[14]

Period of physical presence in Australia

25. The period of physical presence or length of time in Australia is an important factor when considering whether you reside here, but it is not a determinative factor.[15] Importantly, there is a distinction between 'staying' in Australia and residing in it.[16] Merely staying in Australia is normally insufficient. You must have some connection to Australia that characterises your presence as 'residing' in it. This will be informed by the other factors described in more detail, as outlined in paragraphs 30 to 38 of this Ruling.

26. Where your physical presence overlaps more than one income year, consider the full period of your physical presence in Australia. If you arrive in Australia on 1 April, for example, you may be regarded as a resident from the day of your arrival despite being in Australia for only 3 months of an income year, if you exhibit the characteristics of a person residing here over the entire period of your physical presence in Australia. This may be the case where, for example, you are a migrant moving to Australia and your behaviour supports your intention to settle in Australia from the day you arrived.[17]

27. Any limitations on your stay in Australia that are imposed by visas are relevant. Shorter visits to Australia will be less consistent with establishing residency, particularly if you hold a short-term visa. The type of visa may also be relevant to the character of your stay (see further details outlined in paragraph 34 of this Ruling).

28. In many cases, a visit to Australia of less than 6 months is not sufficient time to be regarded as residing here. This is because a person does not usually establish a sufficient connection to Australia in this time.

29. This, however, can be contrasted with a situation where a person has previously spent a long time in Australia despite only spending short periods in Australia in the relevant income year. In such a case, the shorter period of physical presence in Australia assumes less relevance if the person has retained a continuity of association with Australia, or a particular place within Australia, together with an intention to return to Australia and an attitude that Australia remains their home.[18]

Intention or purpose of presence

30. Your intention, purpose or reason for being in Australia helps to determine whether you reside here.[19] While you may have multiple reasons, there is usually a main purpose to your presence.

31. A resident will usually have an intention to treat Australia, or a place within Australia, as a home at least for the time being, though not necessarily forever.[20]

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[14] *Addy appeal* at [78], per Derrington J.
[15] *Case 35* 14 TBRD 346 at [350].
[16] *Addy appeal* at [83], per Derrington J.
[17] *Gurney and Commissioner of Taxation* [2020] AATA 3813.
[18] *Addy appeal* at [76], per Derrington J.
[19] *Gregory v Deputy Federal Commissioner of Taxation* (WA) (1937) 57 CLR 774 (Gregory).
[20] Wilcox J in *Hafza, M. v Director-General of Social Security* [1985] FCA 201; (1985) 6 FCR 444 at [449], applying the concept explained by Williams J. in *Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13 (a business residency case for taxation purposes).

32. Thus, a settled purpose, such as pre-arranged long-term employment or a course of education, may support an intention to reside in Australia, particularly when coupled with other connections to Australia that are consistent with residing here.[21]

33. Staying for the purpose of a short period of work is normally insufficient to establish that you are a resident of Australia.[22] This would not normally demonstrate a connection to Australia that is consistent with residing here. Likewise, coming to Australia for a holiday would not normally demonstrate a connection to Australia that is consistent with residing here, even when supplemented by casual or short-term employment, and even when you spend considerable time in Australia.

34. In assessing your intention or purpose for being in Australia, objectively observable factors and behaviours and contemporaneous statements about intent, such as those included on passenger cards[23] and visa documents, are relevant (but not determinative). The type of visa you hold can also be evidence about your purpose for being in Australia.[24]

35. Importantly, subjective intention is not decisive and its significance and weight will depend on the circumstances. Residency is not established merely by asserting an intention to live in Australia permanently. Similarly, residency is not shed when departing Australia, merely asserting an intention to never live in Australia again. We will consider and give weight to objective circumstances surrounding your arrival or departure. This includes what pre-existing arrangements you had, what you take with you and what you leave behind.

36. There may be a transition period. For example, you may hold a longer term intention to ultimately reside overseas with your family but circumstances mean your family will remain living in Australia and you split your time between working overseas and regularly returning to Australia to live with them until those circumstances change.[25] In such a case, you might remain a resident until the relocation is complete.

37. Where your intention changes, and you stay longer in Australia than initially intended, the facts surrounding the entire stay in Australia must be considered, not merely the original intended length of stay. For example, if during your stay in Australia you decide to migrate to Australia, you are regarded as resident from the time that your behaviour becomes consistent with residing here.

38. Similarly, if you stay in Australia because you cannot or do not depart when you initially planned, you may continue to be a resident, or become a resident, while your behaviour is consistent with residing here.[26]

Behaviour while in Australia

39. Your behaviour relevantly includes the way you live as part of the regular order of your life. If the way you live reflects a degree of continuity, routine or habit, coupled with other factors such as intention, it may be consistent with residing in Australia.

40. For example, if you enter Australia and take up long-term accommodation, employment, enrol children in school and take part in regular extracurricular activities, this

[21] *Miesegaes v Commissioners of Inland Revenue* (1957) 37 TC 493 – residency in the United Kingdom was found to be not only a part of but the central and essential feature during that phase of the appellant's life.
[22] *FC of T v Pechey* 75 ATC 4083; (1975) 5 ATR 322.
[23] *Addy appeal* at [82].
[24] Note, however, the criteria for determining residency for tax purposes are not the same as the criteria used to determine whether a person is an Australian resident for social security purposes as per the *Social Security Act 1991* and those used by the Department of Home Affairs.
[25] For example, while children are finishing school.
[26] *Case 104* 10 TBRD 299.

would demonstrate behaviour consistent with residing here, particularly when coupled with other factors such as intention to make your home here.

41. Conversely, if you usually live overseas and, while in Australia, you travel around or display no settled routine or behaviour, or you have only a short period, or short periods, of settled routine or behaviour coupled with an intention to holiday in Australia before returning home to another country, you will likely not be regarded as a resident under the ordinary concepts test.

42. Some individuals work in a number of countries during their careers. They often maintain a house in their country of domicile. However, for the period of their assignment in Australia, they live and work here. Their family often accompany them, their children attend school here and they may become involved in social activities while present in Australia. Although these individuals regard themselves as permanently resident in their home country or may be regarded as residents of their home country for its tax purposes, their behaviour while in Australia may mean they are also residing here for Australian income tax purposes.

43. When behaviour consistent with residing in Australia is demonstrated over a considerable time, you are regarded as a resident from the time the behaviour commences.

Family, and business or employment ties

44. The presence (or absence) of your family also informs the nature of your connection to Australia.[27] The presence of immediate family in Australia is often accompanied by increased connections to Australia (including period of physical presence, assets such as a family home and motor vehicles, and an intention to return to a place you consider to be your 'home') and a settled routine consistent with residing in Australia.[28]

45. The term and type of employment or business association you may have will also be relevant, particularly as these will usually be accompanied by other factors such as physical presence and assets in Australia. For example, entering Australia to take up an employment contract or to set up a business often results in behaviour that indicates you reside here.

46. Although the test is about whether you reside in Australia, the presence or absence of family, and business or employment ties in the overseas country will be relevant in giving context to your connection to Australia.

47. Generally speaking, working overseas but returning to Australia at intervals to resume a pre-existing, established family and social life will often mean you are still residing in Australia.[29] This is the case even if you spend more time overseas than in Australia in any given income year. Usually, such an arrangement indicates you are residing in Australia and another country. Having an ongoing, deliberate connection to Australia even though you have a connection to another country through your work does not make you a mere visitor to Australia. In such a case, Australia is your home and you are properly regarded as residing here.

48. This can be contrasted with a situation where you leave Australia to work overseas and effectively shift your life overseas. For example, if you, and your family (if you have one), relocate overseas for work for some years establishing a permanent base and a

[27] *Reid v The Commissioners of Inland Revenue* (1926) 10 TC 673, *Peel v The Commissioners of Inland Revenue* (1927) 13 TC 443.
[28] See, for example, the facts in *Pike appeal*.
[29] *Pike appeal*.

routine overseas consistent with 'living' there, returning only occasionally for short stays while taking leave from work, then, depending on other facts and circumstances, you might not be a resident under the ordinary concepts test.

Maintenance and location of assets

49. Living in a property in Australia that you own or are purchasing suggests establishment of a home in Australia consistent with residing here. Other assets in Australia, such as motor vehicles, superannuation investments and bank accounts, add further weight to you having established behaviour consistent with residing here.

50. The relevance and weight given to assets must be considered in your individual context. Both the significance of the assets to you and the reasons why they were acquired or maintained will be relevant. For example, opening a bank account in Australia may be no more than a mere convenience in which to deposit locally acquired earnings to fund a holiday. Australian bank accounts held open while you are located overseas could be consistent with maintaining a continuity of association with Australia but could also be the result of there being no pressing reason to close them.

Social and living arrangements

51. Your social and living arrangements may indicate you are a resident, particularly when coupled with other factors. Social and living arrangements are the way you interact with your surroundings during your stay in Australia. These arrangements may include joining sporting or community organisations, enrolling children in school, redirecting mail to Australia or committing to a residential lease.

52. It is the routine and habit associated with the social and living arrangements[30] that is indicative of residency rather than the existence of hobbies and recreational pursuits themselves.

Domicile test

53. Under the domicile test, you are an Australian resident when your domicile is Australia, unless we are satisfied that your permanent place of abode is outside Australia.

Domicile

54. In Australia, the concept of domicile is governed by common law as modified by the *Domicile Act 1982* (DA 1982).[31]

55. Domicile considers whether there is a legal relationship between a person and Australia. There are 3 types of 'domicile':

- A 'domicile of origin', which is attributed to each individual at birth.[32]

[30] In *Gregory*, Dixon J said at CLR 778:
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.

[31] For example, section 6 of the DA 1982 abolished the former common law rule whereby a married woman had at all times the domicile of her husband.

[32] In many cases, a person's domicile of origin will be uncontroversial. The common law rule is that a person acquires the country of their father's permanent home or their mother's, if the father is deceased or unknown.

- A 'domicile of dependence', which is relevant where a person (such as a minor) lacks capacity to acquire their own domicile and their domicile is determined by reference to someone else's domicile (such as a parent's).
- A 'domicile of choice', which is the domicile a person, with the capacity to do so, acquires voluntarily.

56. You always have a domicile and you can only have one domicile at any point in time. Your particular domicile continues until you acquire a different one, either by choice or operation of the law.[33] You cannot abandon a domicile of origin without replacement.[34]

57. To acquire a domicile of choice you must have both lawful physical presence in a foreign country and an intention to make your home indefinitely in that country.[35]

58. When considering intention, we have regard to objectively observable conduct. While assertions of intention will always be relevant, if there is a difference between that assertion and the conduct, we may rely on the conduct.[36]

59. Obtaining a visa to migrate to a particular country would be consistent with an intention to make your home indefinitely in that country. A working visa, even for a substantial period of time, would usually not be sufficient evidence of an intention to acquire a new domicile of choice.

60. If you have an Australian domicile and you are living outside Australia, you will retain your Australian domicile if you intend to return to Australia on a clearly foreseen and reasonably anticipated contingency; for example, at the end of your employment contract, even if it is for a substantial period. This is because you lack the necessary intention to settle in that country indefinitely. On the other hand, if you only have in mind a vague possibility of returning to Australia, such as making a fortune or some sentiment about dying in the land of your forebears, such a state of mind is consistent with the intention required by law to acquire a domicile of choice in the foreign country.[37]

Permanent place of abode

61. An Australian-domiciled person is not a resident where the Commissioner is satisfied that their 'permanent place of abode' is outside Australia. The courts have described the purpose of this proviso as to exclude, from Australian tax, the foreign-sourced income of people who have retained their Australian identity as reflected in their Australian domicile but who have definitely abandoned their residency in Australia and commenced living permanently overseas.[38]

62. It is not sufficient to have a place of abode outside of Australia; the relevant test is whether your permanent place of abode is outside Australia.

[33] Section 7 of the DA 1982. See also *Henderson v Henderson* [1965] 1 All E.R.179; *Udny v Udny* [1869] L.R.1 Sc.& Div. 441; *Bell v Kennedy* [1868] L.R.1 Sc.& Div. 307 (H.L.).
[34] Section 7 of the DA 1982, which abolished the rule whereby the domicile of origin revives upon the abandonment of a domicile of choice without a new domicile of choice.
[35] Section 10 of the DA 1982 states '[t]he intention that a person must have in order to acquire a domicile of choice in a country is the intention to make [their] home indefinitely in that country'.
[36] *Hyland v Hyland* (1971) 18 FLR 461 at [467].
[37] *In the Estate of Fuld, decd. (No. 3)* [1966] 2 WLR 717, per Scarman J at [675] and [684–685], and *Buswell v I.R.C* (1974) 2 All E.R. 520 at [526].
[38] *Harding* at [40].

63. The word 'permanent' does not have the meaning of everlasting or forever, but is used in the sense of being contrasted with temporary or transitory.[39]

64. In this test, the expression 'place of abode' refers to the physical surroundings in which you live, extending to a town or country.[40] Therefore, it is not necessary to be living in a particular dwelling in a certain way for your place of abode to be considered permanent, provided that the nature of your presence in a town or country is consistent with both abandoning residency in Australia and living in that town or country in a permanent way.

65. You cannot have your permanent place of abode both in Australia and overseas. Having a permanent place of abode overseas involves having definitely abandoned residency in Australia.[41] Therefore, if you have a place of abode in Australia and overseas, a comparison must be made to ascertain which of the 2 is your permanent place of abode. It is only if your permanent place of abode is overseas that you are not a resident under the domicile test.

66. Conversely, if you move from country to country or place to place, you will not have a permanent place of abode overseas and will remain a resident of Australia. This is regardless of whether or not you have any dwellings in Australia, or whether Australia more generally can be described as your place of abode. While the expression 'place of abode' may extend to a country, the pattern of moving around within a country is likely to indicate that you are travelling or have otherwise not commenced living permanently in that country.

67. Working out your permanent place of abode is a question of fact determined in light of all your circumstances. It does not involve the application of any 'hard and fast' rules.[42]

68. Relevant factors as to whether your permanent place of abode is overseas include:

- length of overseas stay
- nature of accommodation, and
- durability of association.

69. These factors should be considered together. As with the ordinary concepts test, it is only when you consider the entire collection of facts and circumstances together, including intention, conduct, actions and objective connections, you are able to form a view on whether you have a permanent place of abode outside Australia.

Length of overseas stay

70. The longer you stay in any one particular place, the more permanent it is likely to be. This is because of the practical reality that extended periods will usually and naturally lead to the formation of durable connections overseas and loosening of connections with Australia.

71. Generally, a departure from Australia with an intention to return to Australia after a finite period would not result in you having your permanent place of abode overseas. This

[39] *Applegate* 79 ATC at [4314]; 9 ATR at [907]. Note, in this case the Federal Court found that the taxpayer's intention regarding the duration of his stay overseas was only one relevant factor to be taken into account. Of more importance is the nature and quality of use which the taxpayer makes of a particular place of abode overseas.
[40] *Harding* at [40].
[41] *Harding*.
[42] *Applegate* and *Federal Commissioner of Taxation v Jenkins* 82 ATC 4098 (1982); 12 ATR 745.

is consistent with the legislative intent of the definition.[43] However, if some time through the period overseas your intentions changed, all the factors would need to be reconsidered at that point to determine whether you then have a permanent place of abode overseas.

72. Similarly, if you take up an employment opportunity overseas or commence living overseas with no fixed timeframe in mind but as a tentative venture, you are unlikely to have your permanent place of abode overseas. This is because you are likely to retain Australia as your home, for a time at least, maintaining connections that are not consistent with an abandonment of Australia as your place of residency. Again, as intentions and situations evolve, the circumstances may later point to you having your permanent place of abode overseas.

73. On the other hand, if you depart for an unspecified or substantial period, pack up your home in Australia, set up a home in a foreign country and live there with your family returning only occasionally such as at Christmas, you are likely to meet the description of someone who has abandoned Australia as a place of residency and commenced living permanently overseas. This is despite the fact that you may at some point intend to return to Australia.

74. For practical purposes, it is convenient to set some 'rule of thumb' on what substantial means. Broadly, 2 years is considered to be a substantial period of time. What this means is that if your intended length of stay is less than 2 years, you are unlikely to be able to establish that your permanent place of abode is outside of Australia. Whether a stay of precisely 2 years or longer means you fall within the proviso will depend on the circumstances. The critical question is whether a person has in fact abandoned Australian residency and commenced to live in a permanent way overseas.

75. In each case there must be a careful consideration of the facts and circumstances surrounding the stay to assess the durability of the connection overseas, acknowledging that 'permanent' does not mean forever and few people depart Australia with the intention of never returning.

Nature of accommodation

76. The type of accommodation and conditions upon which it is occupied will be relevant in ascertaining whether any place of abode overseas is your permanent place of abode. While it is not necessary to live in a particular dwelling in a permanent way, the accommodation provides a relevant indication of whether your presence overseas is permanent. Temporary accommodation such as hotels, camp sites, barracks, dongas or accommodation arranged or owned by the employer on a non-exclusive basis may indicate the presence overseas is not permanent.

77. Retaining your dwelling in Australia does not necessarily mean that you remain a resident. It will depend on the circumstances and reasons for its retention. To illustrate:

- where you retain your home but lease it out to an arm's length party, its retention will assume less significance
- where you retain your home but only so your family can remain living in it while they make arrangements to join you overseas shortly, it will also assume less significance
- however, where your home in Australia is kept available for your use, you do in fact return to it and the accommodation overseas is consistent with a

[43] *Explanatory Notes on Amendments contained in a Bill for an Act to Amend the Income Tax Assessment Act 1922-1929*, p.10.

transitory stay, the home in Australia will assume more significance in assessing the nature of your presence overseas.

Durability of association

78. The strength of the connections established and maintained overseas and of those retained in Australia will be relevant. As noted in this Ruling, the retention of the family home and a consistent return to it may indicate behaviour inconsistent with abandoning Australia and commencing to live permanently overseas. The location of family and social ties and their significance to you will also be relevant.

79. Other factors such as the location and maintenance of bank accounts, location of other assets, maintenance of professional registrations and licences, and recreational activities will be relevant as forming part of the matrix of circumstances to be considered.

183-day test

80. Under the 183-day test, you are a resident if you have been present in Australia for 183 days or more in an income year[44], unless the Commissioner is satisfied that both:

- your usual place of abode is overseas, and
- you do not have an intention to take up residency in Australia.

81. The proviso to the 183-day test reveals the purpose of this residency test. That purpose is to allow a certain length of presence to be relied upon to establish residency unless you are properly regarded as a visitor. A person on an extended holiday would be such a visitor and not treated as a resident.

82. While this is a separate test to the ordinary concepts test, it is often the case that if you are not residing in Australia under ordinary concepts, your usual place of abode will be outside Australia.

Working out the 183 days

83. In applying the 183-day test, it does not matter whether your presence in Australia is continuous or intermittent; rather, the total number of days in Australia are added together.[45]

84. The 183 days applies in relation to an income year (that is, 1 July to 30 June), not a calendar year.

Usual place of abode outside Australia

85. Your usual place of abode is the place you usually live or would live but for being absent from it due to, for example, a transient lifestyle or other circumstances. Despite spending the majority, or even the whole, of the income year in Australia, you may still have your usual place of abode overseas. For example, if you have lived overseas for most of your life, you travel to Australia to spend 18 months experiencing Australia in transient accommodation and employment and then return overseas, you will still have your usual place of abode overseas.

[44] 184 days or more in a leap year.
[45] For administrative ease, presence in Australia for part of a day counts as a whole day.

86. Given the more common situations in which this test applies, a person will usually have an 'abode' in the sense of a dwelling overseas. However, as with the domicile test, it is not necessary for a person, while in Australia, to have and maintain a physical dwelling overseas in order for their usual place of abode to be outside Australia. For example, if you rented accommodation overseas and terminated your rental agreement before coming to Australia, but you intend to return to the same town or country after your stay in Australia, your usual place of abode is likely to be outside Australia. Ultimately, it is a question of fact. In different circumstances, relinquishing a dwelling overseas may indicate an abandonment of the usual place of abode overseas. Therefore, in determining whether you have your usual place of abode outside Australia, examine the nature and quality of the use made of any place of abode you may have overseas[46] and compare it with your living arrangements in Australia in deciding which is your usual place of abode.[47]

87. Relevant factors in considering whether your usual place of abode is outside Australia include:

- where you lived before and after your time in Australia
- the availability of your overseas dwelling to you (if you have one) while you were in Australia
- where your possessions and assets are
- the type of visa you have and the length of your intended stay
- your purpose of coming to Australia, and
- the travel arrangements you made, including whether you departed from and returned to the same place of abode outside Australia.[48]

88. If you come to Australia and sell your home and personal possessions in the country you came from intending to remain in Australia, it is unlikely your usual place of abode remains outside Australia; however, this needs to be considered in conjunction with the other factors outlined in paragraph 87 of this Ruling.[49] Conversely, if you come to Australia for a certain period and have your overseas home available to you upon your return, and you do return to it, you are likely to have your usual place of abode outside Australia.[50]

Intention to take up residence in Australia

89. Even if we are satisfied that your usual place of abode is outside Australia, you will still be a resident under this test unless we are satisfied that you do not intend to take up residence in Australia.

90. The term 'residence' in this part of the provision means tax residency. Therefore, 'intend to take up residence' is a test concerning your future intentions to make Australia your home.

91. It will commonly be the case that if your usual place of abode is overseas, you do not have the necessary intention regarding taking up residency in Australia. This aspect of the 183-day test excludes people who stay in Australia for longer than 6 months but whose

[46] *Commissioner of Taxation v Executors of the Estate of Santha Thevy Subrahmanyam* [2001] FCA 1836 (*Subrahmanyam*); *Applegate.*
[47] *Subrahmanyam.*
[48] *Jaczenko; Koustrup; Clemens.*
[49] *Subrahmanyam.*
[50] *Stockton v Commissioner of Taxation* [2019] FCA 1679.

presence is as a visitor; that is, they do not intend to stay in Australia for a long period or to live in a way that would characterise them as residents.

92. The Full Federal Court in *Harding* observed that even if a person stayed in Australia for a number of years, they may still not be a resident under this test.[51] This illustrates that 'intend to take up residence' does not merely mean intend to stay for a long time. It means intending to live here in such a manner that you would reside here.

Temporary workers and working holiday makers

93. Residency as set out in subsection 6(1) applies in the same way to temporary workers and working holiday makers. While residency turns on its facts, some observations can be made about these groups.

Temporary workers

94. Consistent with the observations outlined in paragraph 20 of this Ruling on the ordinary concepts and 183-day tests, short-term temporary workers (such as those working under the former Seasonal Worker Program (SWP)[52] or the seasonal (short-stay) Pacific Australia Labour Mobility (PALM) scheme) are not usually residents of Australia under any of the residency tests. This is because they only stay in Australia for a short time and they do not establish a connection with Australia consistent with residing here during this time.

95. Temporary workers in Australia working in the former Pacific Labour Scheme (PLS[53] or the long-stay PALM scheme may be resident depending upon each workers individual facts and circumstances.

96. As noted in this Ruling, an extended stay of itself does not necessarily lead to the conclusion that a temporary worker is a resident under the ordinary concepts or 183-day tests. The domicile test would rarely be relevant to temporary workers.

Working holiday makers

97. A working holiday maker is not usually a resident of Australia under any of the residency tests, particularly where they enter and remain in Australia on a working holiday visa, or work and holiday visa, and leave at the end of (or before) that visa expiring.

98. It is not sufficient to merely 'stay' in Australia or even within one location in Australia for a certain period and with a certain routineness to be a resident under either the ordinary concepts or 183-day test. The entirety of their facts and circumstances must be taken into account. Those facts and circumstances include the nature of the visa and the purpose of the stay in Australia. Consistent with the purpose of the visa and the declarations made when applying for it, a working holiday maker's purpose is to have a holiday. They usually have a home overseas to which they intend to return and do return. Their stay in and connection with Australia is usually temporary and associated with a break or a 'gap year' from their normal life overseas. Their accommodation is deliberately flexible, the work necessarily casual and their movements and behaviours are consistent with being a visitor. Because of this, they do not reside here according to the ordinary

[51] *Harding* at [39].
[52] Workers in the SWP can stay in Australia and be employed for up to 9 months under the Temporary Work (Industrial Relations) visa sub-class 403.
[53] Workers in the PLS can stay in Australia and be employed for up to 3 years under the Temporary Work (Industrial Relations) visa sub-class 403.

concepts test and would usually fall within the proviso to the 183-day test.[54] The domicile test would rarely be relevant to a working holiday maker.

Part-year residency

99. If you are a resident under the ordinary concepts test, domicile test or 183-day test, and only spend part of the income year in Australia, you are not necessarily a resident for the entire income year. The commencement and cessation of residency depends on your facts and circumstances.

100. The tax-free threshold will be pro-rated based on your part-year residency period.[55] This means the amount of the tax-free threshold will change but the resident tax rates that apply will stay the same.

101. For example, if you became a resident during August and ceased to be a resident in March in the same income year, for the purposes of the tax-free threshold, your part-year residency period is the period from the beginning of August until the end of March (a period of 8 months).[56]

Dual residency

102. It is possible to be a resident for tax purposes of more than one country at the same time in respect of an income year or part of an income year. A double tax agreement (DTA) may apply to allocate income to one or both countries and it may do this by allocating residency to one country for an income year or part of an income year, but only for that purpose under 'tie-breaker' tests. Even if a DTA allocates your residency to another country, you remain a resident of Australia for Australian tax purposes and will be taxed on that basis to the extent it is not inconsistent with the allocation rules in the DTA.

Self-assessment

103. The structure of both the domicile and 183-day tests is such that a person is a resident unless the Commissioner is satisfied as to certain matters in the relevant provisos within the tests. While this reserves to the Commissioner the role of reaching the relevant state of satisfaction, in self-assessing your residency status, you should consider how the provisos would apply to you.

104. You should take a reasonable view of how the Commissioner will regard the matters in the proviso in accordance with the guidance provided in this Ruling.[57] Where, for example, you have been in Australia for more than 183 days in an income year but you are on a holiday, you should self-assess as a non-resident. Where you are domiciled in

[54] This is consistent with the Full Federal Court's view in *Addy* and the Federal Court's view in *Stockton v Commissioner of Taxation* [2019] FCA 1679. They are also consistent with a number of other Administrative Appeals Tribunal cases which held that a person on a working holiday visa was not a resident. This includes *Dapper Coelho and Commissioner of Taxation* [2020] AATA 2474, where 4 separate applications were heard together; *MacKinnon and Commissioner of Taxation* [2020] AATA 1647; *Schiele and Commissioner of Taxation* [2020] AATA 286; *Clemens*; *Jaczenko*; and *Koustrup*.

[55] Division 4 of the *Income Tax Rates Act 1986.*

[56] Apportionment of the tax-free threshold occurs on a monthly basis.

[57] Subsection 284-15(2) in Schedule 1 of the *Taxation Administration Act 1953* provides that where the application of the law involves the exercise of a discretion of the Commissioner, the taxpayer has a reasonably arguable position if it is about as likely as not that the Court will decide that the discretion could be exercised in the way contemplated by the taxpayer. Taking this view will protect the taxpayer from penalty. This provision and its predecessor (the former subsection 222C(2) of the ITAA 1936) were introduced as a result of self-assessment.

Australia but consistent with the views expressed in this Ruling, it is likely that the Commissioner would consider that you definitely abandoned your Australian residency and commenced living in a permanent way in an overseas town or country, you should self-assess as a non-resident.

Examples

Example 1 – person in Australia for 4 months – resident under ordinary concepts

105. *Bjorn, a promising mid-fielder from Sweden, is offered an 18-month contract to play soccer in Australia for a club in the National Soccer League. The club provides accommodation for Bjorn and his family. As Bjorn intends to remain in Australia for the full term of his contract, he leases his house in Sweden, sells his car and redirects the family mail to Australia. His children attend an Australian school and his wife and children become involved in sporting activities.*

106. *However, Bjorn is having trouble acclimatising to Australian conditions. After withdrawing from yet another torrid session, Bjorn is put on notice to perform 'or else'. Bjorn's form continues to slide to the point that management seeks to terminate his contract on the grounds of non-performance. Bjorn's contract is paid out for an agreed sum. Four months after arriving in Australia, Bjorn and his family return to Sweden.*

107. *As Bjorn established that he intended to live in Australia for 18 months with his family and his behaviour over the 4 months is consistent with that intention, Bjorn resided in Australia from the day he arrived in Australia until the day he left.*

Example 2 – person in Australia for 12 months –resident

108. *Michael is a South African orchestral conductor. He takes up the opportunity of a 12-month contract with a professional orchestra in Adelaide. Michael's wife and children do not accompany him to Australia but stay at the family home in South Africa. Michael brings his clothes, personal effects and a keyboard with him to Adelaide. While in Australia, Michael enters into a 12-month tenancy of a townhouse in the city. He spends his days rehearsing with the orchestra and going to the gym, and weekends performing concerts and playing the organ at a local church. His wife and children visit him over Christmas and they go on a short holiday to a beachside town. At the end of the 12 months, Michael returns to his family home in South Africa as he intended.*

109. *Michael exhibits behaviour that is consistent with residing here. He establishes a connection to Australia during his 12 months in Adelaide. His accommodation arrangements, work, social and sporting commitments demonstrate he resides in Australia according to the ordinary concepts test despite the fact that his wife and children stay in South Africa.*

Example 3 – person in Australia for 12 months – non-resident for the first 3 months; resident for a further 9 months under ordinary concepts

110. *Peta is an accountant in Hong Kong. Her work does not involve travel. She is single and lives in Hong Kong with her parents. She accepts an offer from her employer to travel for 3 months to Australia to provide business advice to large numbers of former Hong Kong residents setting up businesses in Melbourne, Sydney and Brisbane.*

111. *Peta enters Australia on 5 April, intending to spend 3 months travelling between the 3 cities, staying in various motels. Toward the end of the 3 months, Peta's employer asks her to take up a position in Sydney for a further 9 months.*

112. *Peta accepts and, in early July, she leases a serviced executive apartment (near her workplace in Sydney) for 9 months. The apartment is her home base during her stay here. She freights more clothing and some personal effects to Australia. Her parents visit her on 2 occasions. Although based in Sydney, her commitments require some limited travel. On average, Peta travels at least once a week to meet clients outside of Sydney.*

113. *From 5 April until early July, Peta has not established a connection with Australia that is consistent with residing here under the ordinary concepts test.*

114. *From early July, Peta's connection to Australia alters. The lease of more permanent accommodation, as well as her new position in Sydney, indicates a more settled purpose for being in Australia compared to her first 3 months in Australia. Peta is regarded as a resident under the ordinary concepts test from the time her connection to Australia changes.*

Example 4 – person in Australia for 9 months – non-resident

115. *Conchita is a wealthy businesswoman domiciled and living in Mexico. Each year she travels to Australia to inspect her numerous properties on the Gold Coast and to have a holiday. Depending on other business commitments, her stay varies from one month to 3 months. During her recent visit, she decides to stay in Australia for 9 months at various resorts around the Gold Coast and the Great Barrier Reef. Her family does not accompany her and remains in their family home in Mexico. She uses the stay as an opportunity to recharge her batteries after experiencing an extended period of family problems. In addition, she is contemplating making some major investments and wants some preparation time.*

116. *The main purpose of Conchita's stay is to relax by having a holiday at various resorts around Queensland. This is a definite change or break in the ordinary habits of Conchita's way of life. During her 9 months in Australia, she does not establish a connection with Australia consistent with residing in Australia under the ordinary concepts test. Her purpose and pattern of living are not to settle here for a period but to be a traveller on a holiday. She therefore is not a resident under the ordinary concepts test.*

117. *Conchita's domicile is Mexico, so the domicile test does not apply.*

118. *While Conchita is in Australia for more than 183 days, her usual place of abode is in Mexico and she has no intention to take up residency in Australia, so she is not a resident under the 183-days test.*

Example 5 – person out of Australia for 2 years – resident under ordinary concepts and domicile test

119. *Mark, an Australian-resident employee of a mining company, is transferred overseas to Brazil for a temporary work assignment for a period of 2 years and intends to return to Australia at the end of that period. The purpose of the assignment is for Mark to gain wider work experience. Mark is initially accompanied by his wife and children but they return to the family home in Australia so the children can continue their schooling. Mark spends his annual holiday in Australia with his family and friends. He also returns for short periods to celebrate family birthdays and other milestone events. During his absence from Australia, he stays in a serviced apartment provided by his employer, maintains bank*

accounts in Australia and continues to contribute to his Australian superannuation. He makes no investments in the overseas country and remits all money in excess of living requirements to Australia for his family to use or for investment.

120. *Mark is considered to be a resident of Australia under the ordinary concepts test as he has maintained a connection with Australia consistent with residing here, albeit being absent for a substantial period.*

121. *Mark is also considered to be a resident under the domicile test because he has a domicile in Australia and his permanent place of abode is not outside Australia.*

Example 6 – person out of Australia for 2 years – non-resident

122. *Matthew, an Australian-resident employee of the same mining company as Mark, is also transferred to Brazil in January for a temporary work assignment for a period of 2 years, intending to return to Australia at the end. He is not accompanied by his wife as they have been having marriage difficulties and they have decided to spend some time apart. One month after Matthew's departure, the marriage breaks down. Matthew is attracted to the culture and lifestyle of Brazil and decides to start a new life there, with no immediate plans to return to Australia to live. He starts exploring opportunities to gain a permanent position in Brazil and, in July, obtains a promotion to a permanent role in Rio de Janeiro. The role requires some regional travel but he spends the majority of his time at the office in Rio de Janeiro. In July he also sells his car in Australia and starts the process to sell the family home in Australia that he owned with his wife. This takes 12 months to resolve. He remains in employer-provided accommodation until his Australian home sells and then uses his proceeds to purchase an apartment in Brazil, which he lives in. Matthew joins a Latin dance class in the evenings. He returns to Australia twice in 2 years – the first time is 3 months after his initial departure to collect his belongings after the separation from his wife. He takes most of these with him to Brazil but leaves a few keepsakes at his parents' house. The second time, he returns for his father's funeral, 2 years after his initial departure. His father leaves behind a family business and Matthew stays in a hotel in Australia while deciding what to do with the business. He works for his Brazilian employer remotely from the hotel. After a month in Australia, Matthew decides to resign from his job in Brazil and stay permanently in Australia to run the business.*

123. *Matthew ceased to be a resident of Australia according to ordinary concepts once his intention regarding returning to Australia changed and his connections to Australia were severed. He then resumed Australian residency a month after his return to Australia following his father's death.*

124. *Matthew has an Australian domicile. Once his intentions changed and he purchased an apartment in Rio de Janeiro, he had definitely abandoned residency in Australia and commenced living in Brazil in a permanent way. He was therefore a non-resident under the domicile test from July until a month after his return to Australia following his father's death.*

Example 7 – person out of Australia for 5 years – non-resident

125. *Alicia was born and grew up in Australia and is a professor at a university in Sydney. She takes up an opportunity as the head of the School of Economics at a university in Krakow, Poland on a 5-year contract, starting in September. Alicia intends to extend the contract if circumstances allow. Her husband and children join her in Poland in August. Prior to leaving, they sell their cars and some belongings and rent out their house on a year-by-year tenancy. They are given one month's temporary accommodation on*

campus upon moving but soon purchase an apartment near the university which they move into.

126. *Alicia's husband finds work at an accounting firm in Krakow and her children attend the local International School. Alicia and her family return to Australia each Christmas for one month to escape the cold weather in Krakow and visit extended family in Sydney, with whom they stay.*

127. *Alicia is not a resident according to ordinary concepts from the time she leaves in August, as she severs her connection to Australia by making a long-term move overseas with her family.*

128. *She is also not resident under the domicile test. Despite having an Australian domicile, she has definitely abandoned residency in Australia and her permanent place of abode is in Krakow. Although she has retained her house in Sydney, she has rented it out long-term and has no access to it. Her trips to Australia are holidays to visit extended family rather than a resumption of living in her house in Australia.*

Example 8 – person out of Australia indefinitely – non-resident

129. *Brian, an Australian resident, is unhappy with his current lifestyle and wants to move overseas, closer to his extended family in Vietnam. In July, he applies for and is successful in gaining a permanent full-time position in Nha Trang, Vietnam. Brian's family agrees to follow Brian to Vietnam in December when the children finish the school year, after which they will attend the International School in Nha Trang. Brian sells his car and other belongings and leaves his house for his wife and children to use until they move to Vietnam in December, after which he puts it on the market. In Vietnam, Brian rents an apartment that will accommodate his family when they move over to Vietnam. In the first 6 months away, Brian returns twice to visit his wife and children and help get the house ready for sale. During these visits he resides with the family at their family home.*

130. *Brian is not considered to be a resident of Australia under the ordinary concepts test as he is not residing here and intended to leave Australia indefinitely. Brian's remaining connection with Australia are remnants of prior residency and not consistent with ongoing residency.*

131. *Brian is not a resident under the domicile test because, although domiciled in Australia, he has abandoned residency in Australia and commenced living permanently in Vietnam.*

132. *Brian is not in Australia for 183 days so the 183-day test does not apply.*

Example 9 – person out of Australia indefinitely – resident under domicile test

133. *Stuart was born and raised in Australia. He separated from his spouse and moved out of the family home, leaving his 4 children in the care of his former spouse. He met and formed a relationship with a Chinese national and visited her in China on many occasions. In time, he resigned from his employment in Australia and moved to Nanning, China to take up a short-term employment contract and advance his new relationship. When the first contract ended, Stuart took up further short to medium-term employment contracts in various countries in Asia and moved apartments as needed to fulfil these roles. Sometimes his partner visited him and sometimes he visited her or spent time with her in between contracts. From time to time, Stuart returned to Australia, usually for his children's birthdays or special events. When in Australia, he stayed with his parents or friends as he no longer has any assets in Australia.*

134. *Stuart is not considered to be a resident of Australia under the ordinary concepts test as he is not residing here and intended to leave Australia indefinitely. Stuart has not maintained a significant connection to Australia and has worked and lived outside of Australia for most of the income year.*

135. *Stuart is domiciled in Australia so he will still be a resident of Australia unless his permanent place of abode is outside Australia. Even though Stuart has abandoned his residency in Australia, he has not established his permanent place of abode outside of Australia, as evidenced by his shifting between a number of countries and apartments for employment purposes. Therefore, he is an Australian resident under the domicile test.*

136. *Stuart is not in Australia for 183 days so the 183-day test does not apply.*

Example 10 – person out of Australia for 6 months every year – resident

137. *Corey has an Australian domicile and an established home in Noosa, when he establishes a second home in Valencia, Spain. Corey and his family spend just over 6 months at the Spanish home and the rest of each year in his Australian home.*

138. *Corey is a resident of Australia under the ordinary concepts test despite being absent for a large part of each year. This is because his intention and presence in Australia demonstrate a continued connection to Australia consistent with the regular order of his life.*

139. *Under the domicile test, Corey is also a resident of Australia. He has an Australian domicile and it is not possible to say that his permanent place of abode is outside Australia as he has not abandoned his residence in Australia.*

Example 11 – person in Australia for 9 months – non-resident

140. *Alani comes to Australia from Papua New Guinea on a short-term visa to undertake seasonal work for 9 months. Under the terms of her visa, she will work picking fruit for short periods with a number of employers. Her employer provides her with accommodation. Alani's family is not able to come to Australia with her and she does not establish social connections or routines while in Australia. When her visa expires, Alani intends to, and does, return to Papua New Guinea.*

141. *Alani is not a resident for the period she is in Australia. She does not satisfy the ordinary concepts test as she does not form a sufficient connection with Australia consistent with residing here. She does not have an Australian domicile and although she is in Australia for more than 183 days, her usual place of abode is outside Australia and she does not intend to take up residency in Australia.*

Example 12 – working holiday maker in Australia for 12 months – non-resident

142. *Grace comes to Australia from the United Kingdom (UK) on a working holiday visa for 12 months. Under the terms of her visa, Grace can do short-term work to subsidise her holiday while in Australia. During her time in Australia, Grace takes up part-time positions at local cafés and pubs for 2 to 3 weeks at a time before moving to a different town to explore Australia. Grace intends to, and does, return to her home in the UK at the end of her working holiday.*

143. *Grace is not a resident for the period she is in Australia. She does not satisfy the ordinary concepts test. Her behaviour is itinerant and consistent with being a visitor. She does not have an Australian domicile and although she is in Australia for more than 183*

days, her usual place of abode is in the UK and she does not intend to take up residency in Australia.

Example 13 – working holiday maker planning to live in Australia – resident

144. *Megan is a nurse who comes to Australia from Germany in July on a working holiday visa. Once in Australia, Megan bases herself in Melbourne where she joins a share house and gains casual employment in hospitality. Megan meets a partner in Melbourne who is an Australian citizen and, in December, she decides she wants to remain in Australia permanently to pursue the relationship. Megan takes steps to satisfy the requirements to apply for a permanent skilled worker visa on the basis of her nursing skills so that she can live and work permanently in Australia. She also enters into a long-term lease of a townhouse with her partner and purchases furnishings for the home.*

145. *Megan is a resident under the ordinary concepts test from December because her intention changes and from that date she forms a connection with Australia that is consistent with residing here supported by objective factors. She also satisfies the 183-day test from December because she is in Australia for more than 183 days in the income year, does not have a usual place of abode overseas and from December intends to take up residency in Australia.*

Example 14 – working holiday maker stays in Australia – non-resident

146. *Ryan is a construction worker and comes to Australia from Ireland on a working holiday visa for 12 months. Under the terms of his visa, Ryan can do short-term work in Australia to subsidise the holiday. Prior to coming to Australia, Ryan was renting a home close to his work and parents. When his lease expired, he packed up his things, put them in storage and took 12 months unpaid leave from work. When he arrived in Australia, he stayed in a hostel in Sydney for 2 weeks. Ryan moved into a house with work colleagues and had his name put on the lease agreement. Ryan quickly obtained employment as a labourer on a construction site where he worked on a casual basis for 6 months. After this, Ryan travelled to regional South Australia where he obtained work picking fruit for 3 months. He then spent the remaining 3 months of the year back in Sydney, working on-and-off for different construction companies. Nearing the end of his visa, Ryan decided to stay another year and was successful in applying for a second working holiday visa. Ryan keeps his belongings in storage but cannot get any further leave from his previous employment in Ireland so resigns from his job in Ireland.*

147. *In his second year, Ryan bases himself in the South Australian riverland in a share house, which he rents with a friend on a 12-month lease and purchases the necessary items to furnish and live in a house. He works picking fruit and doing various other casual jobs, exploring the riverland and the coast in his time off. Ryan contemplates staying in Australia from time to time and makes some enquiries but does not apply for any other type of visa or otherwise seek to make his stay more permanent. At the end of the second visa, he decides to return to Ireland because he misses his family and friends.*

148. *Ryan is not a resident of Australia under the ordinary concepts test. He does not establish a connection with Australia consistent with residing here as his purpose of being in Australia is not to settle here for a period but to be a traveller on a holiday albeit for an extended period of time. His pattern of living is consistent with being on an extended holiday.*

149. *Ryan does not have an Australian domicile so this test does not apply.*

Status: **draft only – for comment**

150. *Although Ryan is in Australia for more than 183 days, his usual place of abode is Ireland and he does not intend to take up residency in Australia. Although Ryan has not maintained a physical dwelling overseas, he intends to return to the same town as evidenced by storing his belongings there and taking unpaid leave from his employment (while he could).*

Date of effect

151. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
6 October 2022

Appendix – Your comments

152. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

153. A compendium of comments is prepared when finalising this Ruling and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 25 November 2022

Contact officer details have been removed following publication of the final ruling.

Status: **draft only – for comment**

References

Related Rulings/Determinations:
IT 2650; TR 98/17; TR 2006/10; TR 2018/5

Previous Rulings/Determinations:
IT 2650; TR 98/17

Legislative references:
- ITAA 1936 6(1)
- ITAA 1936 6(1)(a)(ii)
- ITAA 1936 6(1)(a)(iii)
- ITAA 1997 995-1
- TAA 1953 Sch 1 Subdiv 14-D
- Domicile Act 1982 6
- Domicile Act 1982 7
- Domicile Act 1982 10
- Income Tax Rates Act 1986 Div 4
- Social Security Act 1991

Cases relied on:
- Addy v Commissioner of Taxation [2019] FCA 1768; 2019 ATC 20-719; 110 ATR 839
- Bell v Kennedy (1868) 1 LR (NSW) 1Sc
- Case 35 14 TRDB 346
- Case 104 10 TBRD 299
- Clemens and Commissioner of Taxation [2015] AATA 124
- Commissioner of Taxation v Addy [2020] FCAFC 135; 280 FCR 46; 382 ALR 68; 171 ALD 144; 2020 ATC 20-756
- Commissioner of Taxation v Executors of the Estate of Santha Thevy Subrahmanyam [2001] FCA 1836; (2001) 116 FCR 180; 189 ALR 666; 49 ATR 29; 2002 ATC 4001
- Commissioner of Taxation v Miller [1946] HCA 23; (1946) 73 CLR 93; (1946) 8 ATD 146
- Commissioner of Taxation v Pike [2020] FCAFC 158; 2020 ATC 20-764
- Dapper Coelho and Commissioner of Taxation [2020] AATA 2474; 2020 ATC 10-543; 111 ATR 926
- FC of T v Pechey 75 ATC 4083; (1975) 5 ATR 322
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