TR 98/D1 - Income tax: residency status of individuals entering Australia

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Draft Taxation Ruling
Income tax: residency status of individuals entering Australia

other Rulings on this topic

IT 2574; IT 2615; IT 2638; IT 2650; IT 2681; TD 93/223

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DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

Class of person/arrangement

1. This Ruling considers the circumstances where an individual who enters Australia is considered a resident for income tax purposes.

2. The Ruling has application to most individuals entering Australia including:

- migrants (also refer to Taxation Ruling IT 2681 'Income tax: residency status of business migrants');
- academics teaching or studying in Australia;
- students studying in Australia;
- visitors on holiday; and
- workers with pre-arranged employment contracts.

3. This Ruling does not apply to Australian resident individuals returning to Australia after a temporary stay overseas where those individuals remained Australian residents while they were overseas.

4. This Ruling provides guidance on the ordinary meaning of the word 'resides' within the definition of resident in subsection 6(1) of the *Income Tax Assessment Act 1936* ('the 1936 Act'). The *Income Tax Assessment Act 1997* ('the Act') contains a definition of 'Australian resident' that refers to the 1936 Act.

Date of effect

5. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Previous Rulings

6. Taxation Ruling IT 2607 'Income tax: residency status of visitors and migrants' and Taxation Ruling IT 2268 'Income tax: residency status of overseas students studying in Australia' will be withdrawn on finalisation of this Ruling.

7. Taxation Rulings IT 2574, IT 2615, IT 2638, IT 2650, IT 2681 and Taxation Determination TD 93/223 will be adjusted to reflect the finalised Ruling and to remove references to Taxation Rulings IT 2607 and IT 2268. Addenda will issue on the same day as this finalised Ruling.

Ruling

Residency status for income tax purposes

8. Residency status is a question of fact and is one of the main criteria that determines an individual's liability to Australian income tax. Liability to tax is determined on a year by year basis. Events after the year of income may assist in determining an individual's residency status: *FC of T v. Applegate* 79 ATC 4307; (1979) 9 ATR 899 (*Applegate*).

What is the meaning of the word 'resides'?

Definition of resident

9. 'Australian resident', as defined in section 995-1 of the Act, means a person who is a resident of Australia for the purposes of the 1936 Act.

10. The definition of 'resident' or 'resident of Australia' is in subsection 6(1) of the 1936 Act. The primary test for deciding the residency status of an individual is whether the individual resides in Australia according to the ordinary meaning of the word 'resides'.

11. If an individual resides in Australia the other tests contained in the definition do not require consideration: see *Applegate*. The other tests are explained at paragraphs 33 to 39 of this Ruling.

Ordinary meaning

12. During his analysis of the term 'resides', Latham CJ in *FC of T v. Miller* (1946) 73 CLR 93; (1946) 8 ATD 146 (*Miller*) referred to the three limbs of the *Shorter Oxford English Dictionary* meaning of the word 'reside'. The limbs are 'to dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place'.

13. An individual resides in Australia if any one of the three limbs of the dictionary meaning applies. The third limb is generally the most relevant limb when considering the residency status of individuals entering Australia for short periods. Residing according to ordinary concepts does not require a change of the individual's domicile or that the individual has an intention to permanently reside here: *Case 78* 11 CTBR 232 (*Case 78*).

14. Individuals reside where they live: *Miller*. Living in a country suggests a degree of continuity, routine or habit that is developed over a period of physical presence in the country. It is more than mere presence as a traveller or visitor.

15. The period of physical presence or length of time in Australia is not, by itself, decisive when determining whether individuals live here. However, behaviour over time may reflect a continuity, routine or habit that is in accordance with living their normal mode of life.

16. The duration of time that needs to elapse before the behaviour of the individual has the required continuity, routine or habit is a question of fact, that is, it is dependent on the circumstances of each case. Generally, the Commissioner considers that individuals are residing here when there has been six months of behaviour that is in accordance with their normal mode of life. They are regarded as residents from when that behaviour commences.

17. As residency is a question of fact, individuals who are in Australia for less than six months may establish that they reside here. (See **Examples 1** and **2** at paragraphs 80 to 88.) Conversely, individuals may establish that they do not reside here even if they have been in Australia for a longer time.

18. If individuals enter Australia with the intention of remaining for less than six months but later events extend their stay beyond six months, they are regarded as residents from when they arrive, as long as their presence has an habitual and routine character during the

entire period. (Refer to paragraph 16 for the Commissioner's reason for the six months duration of time.) This may apply where individuals are granted an extension to their short term employment contract. They will be regarded as residing here from when they arrive if they live their normal mode of life during the entire period. (See **Example 3** at paragraphs 89 to 92.)

19. Upon entering this country, the behaviour of individuals may demonstrate that they do not intend to live in Australia, that is, they do not intend to act in accordance with their normal mode of life. Where a change in their behaviour indicates an intention to live here, they are regarded as residents from when their behaviour reflects a degree of continuity, routine or habit consistent with their normal mode of life. Intention is to be determined objectively having regard to all relevant facts and circumstances. (See **Example 4** at paragraphs 93 to 98.)

20. Individuals who migrate to Australia are regarded as residents from when they arrive.

21. On the other hand, an intention to leave Australia after a brief stay is of little significance if the individual does not, or is unable to, depart: *Case 104* 10 CTBR 299 (*Case 104*).

22. Where further guidance is needed in determining whether an individual is residing in Australia within the ordinary meaning, the following factors may be considered to determine whether the individual has a mode of life that is consistent with 'living' here.

(a) intention or purpose of presence

23. The individual's intention or purpose for being in Australia assists in determining whether an individual is living here: *Gregory v. DFC of T* (1937) 57 CLR 774; (1937) 4 ATD 397 (*Gregory*). A settled purpose, such as employment or education, may indicate an intention to live in Australia. However, the intention must be more than mere presence as a traveller or visitor who might supplement their savings by obtaining casual employment.

24. Individuals holidaying or travelling are not normally considered to reside in Australia because they are not living here in accordance with their normal mode of life: *The Commissioners of Inland Revenue v. Zorab* (1926) 11 TC 289 (*Zorab*). However, individuals who enter Australia to take up pre-arranged employment opportunities or courses of study may be residing here if their stay is in accordance with their normal mode of life: *Miesegaes v. Commissioners of Inland Revenue* (1957) 37 TC 493 (*Miesegaes*).

(b) frequency and regularity

25. The greater the frequency and regularity of the visits to Australia, the more likely the individual is regarded as residing in Australia: *Cooper (Surveyor of Taxes) v. Cadwalader* (1904) 5 TC 101 (*Cooper*); *Lysaght v. The Commissioners of Inland Revenue* (1928) 13 TC 511 (*Lysaght*); *Kinloch (Mrs M) v. The Commissioners of Inland Revenue* (1929) 14 TC 736 (*Kinloch*).

(c) family and business/employment ties

26. Family and business/employment ties have featured as factors in a number of cases: *Peel v. The Commissioners of Inland Revenue* (1927) 13 TC 443 (*Peel*); *Reid v. The Commissioners of Inland Revenue* (1926) 10 TC 673 (*Reid*); *Levene v. The Commissioners of Inland Revenue* (1928) 13 TC 486; [1928] AC 217 (*Levene*). Family or business/employment ties to Australia assist in determining that individuals reside in Australia where their behaviour is consistent with their normal mode of life.

(d) maintenance and location of assets

27. While individuals may have assets located in a number of countries, the existence of an asset base in Australia, for example housing and bank accounts, that is consistent with their normal mode of life assists in determining that they reside here: *Cooper*; *The Commissioners of Inland Revenue v. F L Brown* (1926) 11 TC 292 (*Brown*).

(e) social and living arrangements

28. Social and living arrangements established in a particular place (e.g., children enrolled in school) usually point to the individual residing in that particular place: *Gregory*.

(f) purpose and frequency of absences

29. For individuals entering Australia, subsequent absences from Australia may point to a lack of an habitual mode of life here: *Zorab*. If, however, on consideration of all the facts, an individual can be regarded as residing in Australia, absences for business or pleasure from time to time do not usually affect the individual's residency status: *Levene*; *Stransky v. Stransky* [1954] 2 All ER 536.

Double taxation agreements

30. It should be noted that an individual may be regarded as a resident of more than one country at any one time: *Levene*.

31. Where an individual is a resident of more than one country at the same time, there may be a double taxation agreement to consider.

Explanations

Definition of resident

32. The term 'resident' or 'resident of Australia' is defined in subsection 6(1) of the 1936 Act to mean:

> '(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 his 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 his usual place of abode is outside Australia and that he 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); ... '

33. The definition has four tests for determining whether an individual is a resident for tax purposes. These tests are:

(1) residence according to ordinary concepts;

(2) the domicile and permanent place of abode test;

(3) the 183 day test; and

(4) the Commonwealth superannuation fund test.

34. The definition states that a resident means a person who resides in Australia. If they reside here under ordinary concepts, residency

status is established and subparagraphs (1)(a)(i), (ii) and (iii) of the definition in subsection 6(1) need not be considered. These subparagraphs extend the meaning of 'resident' to individuals who may not reside in Australia: *Applegate*.

35. The domicile and superannuation fund tests apply mainly to individuals who are usually residents of Australia but during the year of income are not actually living in Australia. Domicile and the concept of permanent place of abode are addressed in Taxation Ruling IT 2650 'Income tax: residency - permanent place of abode outside Australia'.

36. 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.'

37. The subparagraph enables the Commissioner to take into consideration usual place of abode and intention to take up residence in Australia so that those individuals who are enjoying an extended holiday in Australia are not treated as residents.

38. If individuals are not residing in Australia under ordinary concepts, their usual place of abode is generally outside Australia.

39. There may be situations where an individual does not reside in Australia during a particular year but is present in Australia for more than one-half of the year of income (perhaps intermittently) and intends to take up residence in Australia. This individual is treated as a resident under the 183 day test.

Ordinary meaning

40. In *Miller*, Latham CJ stated at CLR 99; ATD 148 that the word 'reside' should be given its ordinary meaning:

> '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.'

41. Latham CJ also quoted Viscount Cave LC in *Levene* (at TC 505; AC 222):

> ' ... 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." '

42. In *Case 78* the Board of Review distinguished between the three limbs of the dictionary meaning. At 235, the Board said:

> ' ... it is perhaps a sufficient answer to say that the taxpayer was a resident because the circumstances of his presence in Australia throughout the year under review are described by the last of the three defined meanings.'

43. The guiding cases on the ordinary meaning of the word 'resides' are decisions on British income tax law considering the meaning of 'person residing' and 'ordinarily resident'. These cases have been used in Australian decisions. Dixon J in *Gregory* stated that the term 'resident' should be interpreted and given the same meaning as 'person residing' and 'ordinarily resident' had received in England.

44. Ordinary habits or mode of life means the way individuals normally live, that is, the way they arrange their domestic and economic affairs as part of the regular order of their life.

45. A distinction can therefore be made between individuals who enter Australia on employment contracts rather than on holidays. In the latter situation, the behaviour or daily activities of the individuals would not usually reflect their normal mode of life.

46. Where a stay in Australia is accompanied by a definite change or break in the ordinary habits of an individual's way of life, such as a holiday staying in hotels, the individual is not usually regarded as residing in Australia: *Levene*. (See **Example 5** at paragraphs 99 to 101.)

47. Where the day to day behaviour of individuals considered over a period of time is not different from, or is relatively similar to, how they lived before entering Australia, they are likely to be regarded as residing here. Even when their mode of life over a period of time is different from how they lived before entering Australia, they are likely to be regarded as residing here where the facts surrounding their presence indicate a routine that establishes a normal mode of life. (See **Example 6** at paragraphs 102 to 104.)

48. The appellant's past and present habits of life were considered in *Levene*. Periodical changes of abode were consistent with the way the appellant usually lived.

49. In *Zorab* it was found that while the respondent made numerous lengthy trips to England each year to visit his friends, he was merely a traveller and not a resident of the United Kingdom.

50. In *Reid*, time was considered together with quality, connected with the individual's mode of life, in deciding that an individual was a resident.

51. Except for the 183 day test, time is not necessarily determinative of residency but it can be an important factor. Generally, the Commissioner considers as a practical test that individuals are residing in Australia where their behaviour over a six month period is in accordance with their normal mode of life. (See **Examples 7** and **8** at paragraphs 105 to 109.)

52. This six months of behaviour is not confined to one year of income. Individuals who enter Australia on, say, 1 April intending to live here until 31 October, may be regarded as residents from when they arrive despite only being physically present in Australia for three months during the earlier year of income as long as they expect to exhibit the characteristics of their normal mode of life over the entire period. The factors outlined in paragraphs 23 to 29 may also need to be considered.

53. In 14 CTBR 346 *Case 35*, R R Gibson stated at 350:

> 'The mere length or brevity of a person's stay in a country might, I think, be such as to establish residence or non-residence, as the case might be, but in the intermediate field wherein the duration of a person's stay in a country is not decisive it might, I think, be open or proper to find, according to other circumstances, *(a)* that a person who lived in a country for only a week or two was a resident of that country while he was there, and *(b)* that a person who lived in a country for several months was not a resident of that country during that period.'

54. The cases indicate that various factors assist in determining whether an individual resides under ordinary concepts. No single factor necessarily determines residency and many factors are interrelated.

(a) intention or purpose of presence

55. An analysis of the intention, purpose or reason for being present in Australia assists in determining whether an individual resides in Australia. While individuals may have multiple reasons, there is usually a dominant purpose to their presence. (See **Example 9** at paragraphs 110 to 113.)

56. The visa notation on the passport is an indicator of the individual's purpose for being in Australia. However, the criteria for determining residency for tax purposes are not the same as the criteria used by the Department of Immigration and Multicultural Affairs. The visa notation is not the only consideration in determining residency for tax purposes, as all the facts surrounding the individual's presence need to be taken into account.

57. In *Zorab* Rowlatt J stated that an individual who was a traveller did not reside in the United Kingdom. At 292 he said:

> 'All that can be said about it is that in the course of his habitual travels he spends a considerable period every year in England.'

58. Similarly, merely staying for a short period for work purposes is insufficient to establish that an individual is a resident. In *FC of T v. Pechey* 75 ATC 4083; (1975) 5 ATR 322 Waddell J found that a public servant who was appointed to the Cocos (Keeling) Islands for an expected period of four weeks was not residing there for the period of his stay. It was also noted his ordinary residence was in Canberra and he was not accompanied by any of his family.

59. *Miesegaes* dealt with being in the United Kingdom for educational purposes. It concluded that residence in the United Kingdom was not only a part of, but the central and essential feature during that phase of the appellant's life. (See **Example 10** at paragraphs 114 to 115.)

(b) frequency and regularity

60. The greater the frequency, regularity and length of the visits to Australia, the more likely the individual is regarded as residing here.

61. In *Cooper* the repeated yearly visits to Scotland for the shooting season were significant in a finding of residency.

62. The frequency and regularity of the work trips was a decisive factor for determining residence in *Lysaght*. The appellant came to England for about one week every month to attend to work matters. Rowlatt J concluded that the regularity distinguished the appellant from a visitor or a commercial traveller.

63. In *Kinloch* Rowlatt J found that the Special Commissioners had not made an error in law by having regard to the continuance of the regular and lengthy visits, when finding that Mrs Kinloch had become a resident of the United Kingdom. The appellant had lived in India. On her husband's death she left India and travelled extensively, staying in hotels. Her son attended boarding school in England and each year she spent time taking him to and from school and attending to his other needs.

(c) family and business/employment ties

64. As long as individuals are not holidaying in Australia, a factor that may indicate individuals are living their normal mode of life is the presence of their families. However, even if families do not accompany them, the individuals may still be living here.

65. In *Peel*, two of the appellant's children were at school in the United Kingdom. A finding of residency was based on the fact that he bought, and kept ready for occupation, a house in Scotland that he, his wife, and children all occupied at various times during the year.

66. In *Reid* Lord President Clyde gave weight to the appellant having her family ties in England.

67. An individual who enters Australia to take up an employment contract or to set up a business usually establishes and maintains a routine or mode of life that is relatively similar to the life enjoyed before entering Australia. This routine may indicate that the individual is residing here. (See **Examples 11** and **12** at paragraphs 116 to 124.)

68. The existence of an employment contract in the home country is rarely a significant factor in determining whether an individual is residing here.

(d) maintenance and location of assets

69. The occupation of a dwelling in Australia, which the individual owns or is purchasing, suggests the establishment of a home in Australia. It is possible for an individual to have a place of abode outside Australia and still be living here for the duration of the stay. Other assets, such as motor vehicles and bank accounts, add further weight to the individual having established an habitual mode of life.

70. In *Cooper* the Lord President emphasised that the appellant occupied a lease for a considerable portion of each year, and that when he was absent the property was kept in readiness for his return.

71. In *Brown* the taxpayer gave up his house in the United Kingdom and, after the First World War, commenced staying abroad for nine months in each year. The Special Commissioners held that he was not resident and Rowlatt J declined to overturn the decision. The Special Commissioners had placed considerable weight on the break in his habit of life as a result of giving up his house. However, Rowlatt J did express some concern at the judgment based on the existence of a bank account and family connections, but could not find an error in law.

(e) social and living arrangements

72. Social and living arrangements refer to the way individuals interact with their surroundings during their stay in Australia. These arrangements may include joining sporting or community organisations, enrolling family members in school or committing to a residential lease and indicate they are living here. (See **Example 6** at paragraphs 102 to 104.)

73. In *Gregory* Dixon J said (at CLR 778; ATD 399):

> '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.'

(f) purpose and frequency of absences

74. An analysis of the reasons for and number of an individual's absences from Australia assists in determining whether the individual is residing in Australia.

75. In *Levene* it was said that the appellant went abroad for a number of reasons. However, in finding that he was a resident, the purposes were held to be temporary purposes. When considering the meaning of 'ordinary residence' Viscount Cave LC stated at TC 507; AC 225:

> ' ... and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.'

76. In *Stransky v. Stransky* Mrs Stransky's prolonged absences abroad were found to be dictated by her husband's work. She had gone to considerable lengths to ensure her flat would be ready for occupation upon return to London and she had no intention of making her home elsewhere. Consequently, she was found to be ordinarily resident in England.

Double tax agreements

77. Australia has a foreign tax credit system to provide relief from double taxation. Australia has also entered into agreements with a number of countries so that double taxation is avoided by allocating the taxing rights on income to one of the countries. Generally, each

agreement defines when an individual is a resident of one of the countries for the purposes of the double tax agreement.

78. Where individuals are residents of more than one country at the same time, they do not lose their Australian residency status even though they may be treated as a resident of another country for the purposes of the relevant double tax agreement.

Examples

79. The following examples illustrate the principles discussed in this Ruling.

Example 1

80. Bjorn Anderson, a promising half-back from Sweden, is offered an eighteen month contract to play soccer in Australia for a club in the National Soccer League. The club provides accommodation for Bjorn and his family.

81. However, Bjorn is having trouble acclimatising to the 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 seek to terminate his contract on the ground of non-performance.

82. Bjorn's contract is paid out for an agreed sum. Four months after arriving in Australia, Bjorn and his family return to Sweden.

Decision: resident

(Refer paragraph 17 for guidance.)

83. Bjorn's stay in Australia for a period of four months is not of sufficient duration to establish an habitual mode of life. However, upon arrival, it was Bjorn's intention to live in Australia for eighteen months. This intention is also evidenced by Bjorn being accompanied by his family, and from the start Bjorn and his family commenced a routine and habitual lifestyle.

Example 2

84. Jim Olsen, an executive of a US corporation specialising in management consultancy, comes to Australia to set up a branch of his company. Although the length of his stay is not certain, he expects to be in the country for at least twelve months.

85. His wife accompanies him on the trip but his teenage son and daughter, having just commenced college, remain in the family home.

86. Jim acquires a twelve month working visa from the Department of Immigration and Multicultural Affairs and leases a residence in Sydney.

87. After three months, Jim, sensing that his wife is homesick, decides that he has 'done enough' to establish the branch and returns to USA.

Decision: resident

(Refer paragraph 17 for guidance.)

88. On first consideration, three months is not sufficient time to indicate that Jim's behaviour has the required continuity, routine or habit. However, Jim establishes to the Commissioner's satisfaction that he lived in Australia for the three months. His purpose for being in Australia, accompanied by his wife, leasing the property and establishing business ties, were all factors that indicated Jim was living in Australia. Apart from the absence of his children, the ordinary mode of Jim's life during the three months is relatively similar to the life he had prior to entering Australia.

Example 3

89. Jane Cierpinski, a Professor of Biology at the University of Warsaw, comes to Australia to work on a research project with the University of NSW. Initially, she intends to do the research in Australia for five months. She in fact stays on the project for seven months.

90. During her stay she rents a small furnished flat near the university to cut down on commuting time. Her husband and two children remain in Warsaw for economic reasons. She relaxes at the end of her long days by going to the movies, occasionally attending dinner parties hosted by her colleagues, reading novels or writing letters to her family.

91. Jane intends to return to Warsaw at the end of the project and, apart from opening a bank account in Australia to cover normal living expenses, retains all assets and investments in Poland, her country of domicile.

Decision: resident

(Refer paragraph 18 for guidance.)

92. Jane establishes a work routine that is relatively similar to her work life before entering Australia. Seven months of living in one

place while doing her research project is sufficient to establish an habitual mode of life. She is regarded as a resident from when she arrived in Australia. The facts that she is not accompanied by her family and that her assets remain in Warsaw do not alter the conclusion that Jane resided in Australia for the seven months.

Example 4

93. Peta Chu is an accountant who works 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 temporarily to Australia to provide business advice to large numbers of former Hong Kong residents setting up businesses in Melbourne, Sydney and Brisbane.

94. Peta enters Australia on 5 April 1998, intending to spend three months travelling between the three cities staying in various motels. Her employer asks her towards the end of her three months to take up a position in Sydney for a further nine months. She applies for and receives an extension to her working visa for another nine months.

95. In early July, she leases a serviced executive apartment for nine months near her place of work in Sydney. She freights more clothing and some personal effects to Australia. Her parents visit her on two occasions.

96. Although based in Sydney, her commitments require some limited travel. On average, Peta travels once a fortnight to meet clients outside Sydney.

Decision: non-resident for year ended 30 June 1998

resident for the duration of her stay in the 1999 year of income

(Refer paragraph 19 for guidance.)

97. While Peta is on a working trip, the duration and nature of her stay in temporary accommodation during the 1998 year of income do not establish an habitual mode of life and she is regarded as a non-resident.

98. On 5 July 1998, Peta receives approval for the extension to her visa for an additional nine months. Peta now intends to live here as evidenced by the extension on her visa to continue her daily work for her company as well as the lease of more permanent accommodation. Peta is regarded as a resident from the time her intention changes.

Example 5

99. Conchita Martinez is a wealthy businesswoman from 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 three months.

100. During the 1997 year, she decides to stay in Australia for nine months at various resorts around the Gold Coast and the Great Barrier Reef. Her family do not accompany her. Predominantly, 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.

Decision: non-resident

(Refer paragraph 46 for guidance.)

101. As the main purpose of Conchita's stay is for relaxation she is regarded as a non-resident, despite the regularity and frequency of her previous stays. Relaxing by having a holiday at various resorts around Queensland is a definite change or break in the ordinary habits of Conchita's way of life. During her nine months in Australia, she did not exhibit a routine or habitual mode of life. Her purpose and life pattern was not to settle here but to be a traveller on a holiday.

Example 6

102. Maria Congiunto is a single Italian woman who has a number of relatives living in North Queensland. She is employed as an engineer in Milan. Through her family in Australia, Maria has accumulated a portfolio of Australian investments. She usually visits Australia every second year to see her relatives and to check on her investments.

103. As a result of a serious illness, Maria has been advised by her doctor to give up work until she fully regains her health. She decides to spend nine months living with her niece in North Queensland while she recuperates. In Australia, she lives at a particular place and has regular appointments at the hospital, she opens an Australian bank account and as soon as she is able, she leases a car and joins the local Italian club. As planned, she returns to work in Italy after nine months.

Decision: resident

(Refer paragraph 47 for guidance.)

104. An extended stay in itself does not necessarily lead to the conclusion that Maria resides in Australia. Staying here to recuperate from her illness is a different mode of life from her usual life as an

engineer, although she would have had to recuperate if she remained in Italy. However, she came to live in Australia with her niece and while here she has developed a routine or mode of life over nine months that indicates she is living with her niece.

Example 7

105. Alan Johnson is a Canadian farmhand with a keen interest in agriculture. He successfully applies to participate in the International Agricultural Exchange Association program for seven months. He acquires an educational visa and receives a letter confirming his participation on the program. He is placed with a family for the duration of his stay and gains a wide range of experience by undertaking the normal activities on an Australian farm including practical training and attending agricultural shows.

Decision: resident

(Refer paragraph 51 for guidance.)

106. Alan lives in a settled environment as a member of the Australian family. His day to day activities in Australia reflect a similar way of life to that he enjoys in Canada. He has established an habitual mode of life during the seven months and is a resident of Australia during his stay.

Example 8

107. Carleene Brooks is a twenty-two year old New Zealand resident who has graduated from university with a major in journalism. She decides to travel to Australia in the hope of finding suitable work. Although she has no firm intentions on arrival, she would like to stay in the country for 'a while', particularly if the right job comes along.

108. After three months in Australia using her own savings for living expenses, Carleene returns to New Zealand, having been unsuccessful in finding suitable employment.

Decision: non-resident

(Refer paragraph 51 for guidance.)

109. Carleene's length of stay is not sufficient to establish an habitual mode of life. She has no real intention to live in Australia when she arrives and has no other ties to this country. This conclusion would be further strengthened if she travelled to various cities in search of employment.

Example 9

110. Janine Edgerton is a British national who has longed to spend twelve months 'down under'. After saving for years, she takes twelve months leave from her work and departs for Australia on her twenty-fourth birthday. Although she travels with considerable savings, her intention is to spend at least part of her time working. She has obtained a restricted working visa that enables her to work for no more than three months at one place.

111. Through a contact in Australia she is assured of work in Perth for the first three months. After that period, she decides to travel to the east coast via Adelaide. After spending a month in Adelaide where she was able to work for two weeks, she continues her journey to Melbourne.

112. Once there, she meets some friends from back home. After working for a further three months, she decides to spend the balance of her time in Melbourne and uses her savings for living expenses. To keep costs down, she leases a house with two other friends. At the end of her twelve months in Australia, she returns to the United Kingdom.

Decision: non-resident

(Refer paragraph 55 for guidance.)

113. Although Janine obtains work, by travelling from place to place she has not established an habitual mode of life, even though she is physically present in Australia for twelve months and she co-leases a house. Janine's main purpose for being here is to have a holiday and she is merely supplementing her savings by working.

Example 10

114. Dipak Neviott is a student from India who comes to Australia to undertake a course of studies for six months. During that period, Dipak lives at the University campus and works part-time at the University Social Club as a barman.

Decision: resident

(Refer paragraph 59 for guidance.)

115. Dipak's routine of study and continuing accommodation on campus establish an habitual mode of life over the six months. His employment adds support to the conclusion that he is residing here.

Example 11

116. Steffen Magnussen is a medical doctor domiciled in Denmark. He signs a contract with, and is brought to Australia by, a Brisbane based hospital to undertake work for twelve months. Steffen arrives in Australia on 1 May 1998.

117. Steffen is provided with an apartment by the hospital. Although married, Steffen elects to travel to Australia alone because his wife is undertaking post-graduate studies in Denmark.

118. Steffen is a golfing fanatic and joins the local golf club. He also becomes actively involved in local charities. At the end of twelve months, he returns to Denmark.

Decision: resident

(Refer paragraph 67 for guidance.)

119. Steffen is a resident for the duration of his stay for both the 1998 and 1999 years of income. Even though he is physically present in Australia for only two months of the 1998 year of income, his intention is to live in Australia to fulfil his responsibilities to the hospital from the time of his arrival.

120. Steffen establishes an habitual mode of life during his twelve months in Australia. The routine of his accommodation arrangements, work, social and sporting commitments demonstrate that he resides in Australia during this time and these outweigh the fact that his wife remains in Denmark.

Example 12

121. Abdul Farouk is a talented self-employed computer programmer who is able to obtain contract work with different multinational corporations around the world. Abdul is single and has no particular social or economic ties to any country. He is a successful businessman with investments scattered around the world.

122. Abdul spends five months in Australia working as a computer programmer with a large multinational manufacturing company. Before arriving in Australia, he spent four months in Singapore working with a pharmaceutical company, and when he leaves Australia he plans to spend five months working in Japan.

123. During his stay, Abdul rents an expensive apartment in Adelaide where the majority of his business is conducted, although he does spend one month commuting between Sydney and Brisbane branches of the company.

Decision: resident

(Refer paragraph 67 for guidance.)

124. Abdul is regarded as a resident for the duration of his stay in Australia. Abdul has no ties to any other country and his stay in Australia is within the ordinary habits of his lifestyle as a worldwide travelling computer programmer. In this instance, the above factors outweigh the short duration of his physical presence.

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Your comments

126. If you wish to comment on this Draft Ruling, please send your comments by: 27 February 1998

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