IT 2607 - Income Tax: Residency Status of Visitors and Migrants

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TAXATION RULING IT 2607

THIS RULING INCORPORATES THE ADDENDUM DATED 14 MAY 1992

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FOI INDEX DETAIL

Reference no.:	Subject refs:	Legislative refs:
I 1012286	DEFINITION OF RESIDENT RESIDENCY OF VISITORS AND MIGRANTS	6(1)

OTHER RULINGS ON THIS TOPIC: IT 2268

TITLE: INCOME TAX: RESIDENCY STATUS OF VISITORS AND MIGRANTS

NOTE: . Income Tax Rulings do not have the force of law.

. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Ruling.

PREAMBLE

The purpose of this Ruling is to establish guidelines for determining the residency status for income tax purposes of various categories of individuals who come to Australia. These categories include:

. overseas visitors working in Australia for a limited time;
. migrants;
. visiting academics;
. people on working holidays.

2. The terms "resident", "resident of Australia" and "non-resident" are defined in subsection 6(1) of the Income Tax Assessment Act 1936. A "non-resident" is defined as a person who is not a resident of Australia. So far as an individual is concerned, a "resident" or "resident of Australia" is defined to mean:

"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 an eligible employee for the purposes of the Superannuation Act 1976 or is the spouse or a child under 16 years of age of such a person;...".

3. The above definition in effect prescribes four tests in ascertaining whether an individual is a resident. Those tests are as follows:

- residence according to ordinary concepts;
- the domicile test;
- the 183 day test; or
- the Commonwealth superannuation fund test.

4. The tests relating to domicile and the superannuation fund mainly concern persons who ordinarily reside in Australia but who are not actually living in Australia during the year of income. They are therefore not dealt with in this Ruling. This Ruling focuses on the determination of residence according to ordinary concepts and the 183 day test, being the tests which are relevant to visitors and migrants.

5. Although this Ruling deals solely with the question of residency for the purposes of Australia's income tax law, it should be noted that the fact that a person may be regarded as a resident of Australia for Australian income tax purposes does not mean that the person may not also be a resident of another country for the purposes of that country's taxation laws. A number of double taxation agreements to which Australia is a party specifically recognise the existence of dual residency. In a case of dual residency, regard must be had to the terms of the particular double taxation agreement when determining liability for Australian income tax. A dual resident, who is treated as solely resident of another country for the purposes of the relevant double taxation agreement, remains a resident of Australia for the purposes of the Income Tax Assessment Act. He or she is therefore liable to Australian tax on any assessable income which is not covered by the particular double taxation agreement.

RULING

Residence according to ordinary concepts

6. The primary test in deciding whether a person is a resident is whether the person "resides" in Australia. Where that test is satisfied, there is no need to go any further. The person is a "resident of Australia" for income tax purposes.

7. Subparagraphs (1)(a)(i),(ii) and (iii) of the definition in section 6 extend the meaning of "resident" to persons who may not reside in Australia (F.C. of T. v. Applegate 79 ATC 4307, 9 ATR 899 per Northrop J, at ATC p.4314, ATR p.907). If a person resides in Australia , it does not matter that one or more of the tests prescribed in s.6(1)(a)(i),(ii) and (iii) of the definition are not met.

8. Whether a person resides in Australia is a question of fact which has to be determined having regard to the circumstances of each case. The word "reside" has a very wide meaning (see Applegate per Northrop J, at ATC p.4313, ATR p.905; F.C. of T. v. Miller (1946) 73 CLR 93). In the Shorter Oxford Dictionary the word "reside" is defined to mean "to dwell permanently, or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.".

9. Although each case will need to be determined in the light of its own facts, an overseas visitor who comes to Australia on a working holiday and travels around the country living in hotels, hostels etc., would not usually be regarded as residing in Australia under the ordinary concepts test. Such visitors will generally be on a restricted visa which limits the time they can spend in Australia to 12 months and limits the period they can work in any one employment to 3 months. In such circumstances, the transitory nature of the working holiday would, in the absence of special factors, lead to a conclusion that the person is not residing in Australia.

10. On the other hand, a migrant who settles with his family in Australia would usually be regarded as residing in Australia from the date of his arrival, notwithstanding that his business or personal interests may require him to be absent from Australia for extended periods (see Macrae v. Macrae [1949] 2 All ER 34; Stransky v. Stransky [1954] 2 All ER 536). For example, a person migrates to Australia with his wife and children and purchases a home here. He retains an interest in a business in his country of origin.
He returns to that country to carry out business activities for a few days each month or for 2 to 3 months a year. Ordinarily he would be considered to be residing in Australia despite his overseas absences. However, if such a person spent the majority of his time in his country of origin conducting his business activities, he would not usually be regarded as residing in Australia under the ordinary concepts test. **[The preceeding sentence has been deleted - reference should be made to Taxation Ruling IT 2681 for details of the date of effect of the withdrawal]**

11. Where a person comes to Australia for a limited time, e.g., persons employed in Australia for a limited period (as distinct from a working holiday) or visiting academics coming to Australia

to pursue a course of study or research project, it is recognised that there may be difficulties in deciding whether that person resides in Australia. The particular circumstances of each case would of course need to be taken into account. Relevant factors to be considered would include whether the person is accompanied by his or her family, whether a place of abode is maintained outside Australia, the extent to which any assets or bank accounts are acquired or maintained in Australia, the existence of a contract of employment in the visitor's home country and the expected length of the person's visit.

12. Although the length of the visit is not itself determinative of residency status, as a general rule, a person whose intended visit to Australia was less than 6 months would not be regarded as "residing" in Australia during that visit. This does not mean that all visitors to Australia for 6 months or more should be treated as residing in Australia. All relevant factors must be taken into account. However, a person whose intended visit to Australia was greater than 2 years would generally be regarded as residing in Australia during that person's stay.

13. In deciding whether a person is residing in Australia the weight to be given to each factor will, of course, vary with the individual circumstances. No single factor is necessarily decisive. Rather, the factors, taken together, are pointers which help to determine whether a person resides in Australia. The following examples illustrate how these factors may be considered:

(a) An academic research officer comes to Australia for the purpose of conducting research. The intended duration of the visit is 5 months, but the research officer, in fact, stays for 7 months. During her stay in Australia, she maintains a place of abode in her country of origin and her husband and children remain there for the full period. Whilst in Australia, the research officer acquires no assets in Australia. The research officer would not be considered to be "residing" in Australia for the seven month period because she is unaccompanied by her family, maintains a place of abode outside Australia, has no Australian assets and only intended to remain in Australia for a short period of time;

(b) A person comes to Australia, accompanied by his wife and children, intending to work for a 2 year period. He lets the house he owns in his country of origin, takes out a lease on a rental property in Australia and transfers money to an Australian bank account. Three months after his arrival in Australia, he decides to return to his country of origin. He surrenders the lease on the Australian rental property, closes his Australian bank account and departs with his family. The person would be considered to have been "residing" in Australia for the three month period because he was

accompanied by his family, transferred money to an Australian bank account and, on arrival, intended to remain in Australia for 2 years. Maintaining a place of abode outside Australia would not outweigh the other factors which point to a conclusion that the person was residing in Australia.

183 day test

14. The background to and basis of the 183 day test (subparagraph(a)(ii) of the definition) is set out in paragraph 8 of Taxation Ruling IT 2268. As that Ruling indicates, subparagraph (a)(ii) does not classify persons as non-residents. On the contrary it characterises certain persons as residents of Australia. Where a person does not reside in Australia within the ordinary concepts test, he or she will nevertheless be a resident if present in Australia for six months during a year of income unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and he or she does not intend to take up residence in Australia.

15. The expression "place of abode" refers to "the physical surroundings in which a person lives"(see Applegate per Fisher J, at ATC p.4317, ATR p.910). The expression is often used as being synonymous with the word "residence" (see Applegate per Northrop J, at ATC p.4313, ATR p.906). A person would be regarded as having his or her usual place of abode outside Australia if the person has an intention or expectation of returning to live outside Australia on cessation of his or her visit to Australia. As a general rule, if a person is not regarded as residing in Australia under the ordinary concepts test it would be expected that his or her usual place of abode is outside Australia.

16. In the case of the overseas visitor in Australia on a holiday for more than 6 months of the year of income (see paragraph 9 of this Ruling), subparagraph (a)(ii) would not usually operate to treat the visitor as a resident of Australia because it would be expected that the visitor's usual place of abode is outside Australia and he or she would not intend to take up residence in Australia. The same position would apply for overseas visitors working in Australia and visiting academics who are not residing in Australia during their stay and have no intention of taking up residence in Australia.

17. There may be situations, however, where a person does not reside in Australia during a particular year but is present in Australia for more than 6 months (perhaps intermittently) and intends to take up residence in Australia in the future. For example, an intending migrant who is present in Australia intermittently, unaccompanied by his or her family, for a period in excess of 6 months of an income year may not be "residing" in Australia but would be treated as a resident under the 183 day test in subparagraph (a)(ii) of the definition.

COMMISSIONER OF TAXATION
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