IT 2681 - Income tax: residency status of business migrants

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Generated on: 22 November 2026, 07:46:53 AM

Taxation Ruling
Income tax: residency status of business migrants

Other Rulings on this topic

IT 2607

IT 2650

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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.

This Ruling incorporates an erratum dated 4 June 1992.

What this Ruling is about

1. This Ruling provides guidelines for determining the residency status for tax purposes of a person who comes to Australia under the Business Migration Program (BMP - effective until November 1991) or under the Business Skills Category (BSC - effective since February 1992).

2. In particular, this Ruling considers whether a business migrant is a resident for income tax purposes under the following tests contained in the definition of 'resident' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA):

(a) residency according to ordinary concepts;

(b) the domicile test; and

(c) the 183 days test.

3. This Ruling also corrects the guidelines concerning residency status of business migrants contained in paragraph 10 of Taxation Ruling IT 2607.

Ruling

4. To determine whether a person coming to Australia under the BMP or BSC is a resident, it is necessary to determine whether the person is a 'resident' under any of the four tests contained in the definition in subsection 6(1):

(a) residency according to ordinary concepts;

(b) domicile test;

(c) the 183 days test; and

(d) the Commonwealth superannuation fund test.

These tests are alternative tests. In other words, even if a person does not 'reside' in Australia according to ordinary concepts, the person might still fall within one of the other three tests of residency contained in the definition of 'resident'.

(a) Residency according to ordinary concepts

5. Whether a person 'resides' in Australia, is a question of fact which has to be determined having regard to the circumstances of each case.

6. To assist in determining for a year of income whether a business migrant is a resident according to ordinary concepts, the following factors need to be taken into account:

(a) If the person returns to the country of origin - the frequency, regularity and duration of those trips and their purpose can be decisive factors. If the only reason for the person's absence from Australia is business, this may not be enough in itself to support a claim that the person is not a resident.

(b) The family and business ties which the person has, in Australia and in the country of origin.

(c) Whether the migrant is accompanied by his or her family to Australia and on return trips to the country of origin.

(d) Whether the person is employed in the country of origin.

(e) Whether a place of abode is still maintained in the country of origin or is available for the person's use while there.

(f) Whether personal effects are kept in Australia or in the country of origin.

(g) The extent to which any assets or bank accounts are acquired or maintained in Australia and in the country of origin.

(h) Whether the migrant has commenced or established a business in Australia.

7. In deciding whether a business migrant is residing in Australia the weight to be given to each of the factors listed in paragraph 6 will, of course, vary with the individual circumstances. No single factor is

necessarily decisive. However, the fact that a person comes to Australia as a successful BMP or BSC applicant is a strong indication in its own right that the person intends to reside in Australia. A successful BMP or BSC applicant is normally given permanent resident status under migration law on arrival in Australia. This fact should therefore be given due weight in taking together all of the factors in paragraph 6 to determine whether a person resides in Australia.

8. The last sentence contained in paragraph 10 of Taxation Ruling IT 2607 states that a migrant who spent the majority of time in the country of origin conducting business activities there, would not usually be regarded as an Australian resident. We no longer consider that view to be correct and the sentence is therefore withdrawn.

(b) The domicile test

9. A business migrant is a resident of Australia under the domicile test if he or she has a domicile in Australia unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia. Under the *Domicile Act 1982*, a person acquires a domicile of choice in Australia if the person intends to make his or her home indefinitely in Australia. The domicile test is discussed in Taxation Ruling IT 2650.

(c) The 183 days test

10. Having regard to the terms of the BMP and BSC, a business migrant who is present in Australia for more than 183 days is, generally speaking, a resident of Australia under the 183 days test.

Possibility that person is resident of two countries and relevance of residency status in other country

11. A business migrant who is regarded as a resident of Australia for taxation purposes is not necessarily a resident of Australia only. The issue of dual residency is addressed in paragraph 5 of Taxation Ruling IT 2607.

12. The fact that a migrant is a non-resident in the country of origin does not indicate that he or she is necessarily a resident of Australia. In other words, in determining whether a business migrant is a resident of Australia, the residency status given to the migrant by government authorities in the country of origin (other than in relation to deeming sole residency of a dual resident under a double tax agreement) is irrelevant.

Date of effect

13. Except for paragraph 8, this Ruling sets out the current practice of the Australian Taxation Office. It applies (except for paragraph8 and subject to any limitations imposed by statute) for years of income commencing both before and after the date on which it is issued.

14. Paragraph 8 applies to business migrants arriving in Australia after the date of issue of this Ruling (and to those who arrived before that date and who request amended assessments in accordance with the principles contained in this Ruling), and after 1 July 1992 to business migrants who arrived in Australia before the date of issue of the Ruling.

15. In other words:

(a) If a person has arrived in Australia under BMP or BSC **before** the date of issue of this Ruling, the person's residency status:

(i) in the 1991-92 and earlier years - depends on the application of the last sentence of paragraph 10 of IT 2607. However, for those income years, taxpayers may seek, if they wish, an amended assessment (subject to any limitations imposed by statute) to reflect residency status in accordance with this Ruling; and

(ii) in 1992-93 and later years - depends on the application of the principles contained in this Ruling.

(b) If the person arrives in Australia under BMP or BSC **after** the date of issue of this Ruling, the person's residency status depends on the application of the principles contained in this Ruling.

Definitions

16. For the purposes of this Ruling:

'Resident' or **'resident of Australia'** is defined in subsection 6(1) as follows:

'a person, other than a company, who resides in Australia and includes a person -

(a) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(b) 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

(c) who is an eligible employee for the purpose of the *Superannuation Act 1976* or is the spouse or a child under 16 years of age of such a person.'

'Non-resident' is defined in subsection 6(1) as a person who is not a resident of Australia.

'Place of abode' refers to the physical surroundings in which a person lives. It is ordinarily a dwelling place.

Explanations

Business Migration Program and Business Skills Category

17. The objective of the Business Migration Program was to attract successful business people to settle permanently in Australia and contribute their expertise and capital to specified types of business ventures. The BMP was abolished in 1991 (applications under the Program being received until November 1991) and replaced by the Business Skills Category in February 1992. The BSC provides for the permanent settlement of people with business skills who will use those skills to actively participate in certain new or existing businesses in Australia.

18. Issues regarding the residency status of business migrants for taxation purposes under the BSC will be similar to those which arose under the BMP.

Residency tests

19. A person who comes to Australia is a resident of Australia if any of the following tests contained in the definition of resident in subsection 6(1) applies:

(a) He or she 'resides' in Australia according to the ordinary meaning of that word (i.e. the ordinary concepts test),

(b) He or she has acquired an Australian domicile unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia (i.e. the domicile test),

(c) He or she is actually in Australia for more than one-half of the year unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia (i.e. the 183 days test),

(d) The Commonwealth Superannuation Fund test is satisfied.

20. The statutory tests of residency are alternative to the ordinary meaning of the word 'resides' (*FC of T v. Applegate* 79 ATC 4307 at 4314; (1979) 9 ATR 899 at 907). In other words, a person may be found to be a 'resident' of Australia under the extended definition of 'resident' even though he or she does not 'reside' in Australia within the ordinary meaning of the word.

Statutory tests of residency

21. The test relating to the Commonwealth Superannuation Fund mainly concerns persons who generally reside in Australia but who leave Australia temporarily and are not actually living in Australia during the year of income. It is not covered by this Ruling. This Ruling focuses on the application of the other three tests of residency to persons who come to Australia under the BMP and the BSC.

(a) Residency according to ordinary concepts

22. Under the Business Migration Program, business migrants had to satisfy the Minister of Immigration, Local Government and Ethnic Affairs of their intention to live permanently in Australia. The question of intention was clearly a subjective one. However, the migration law did not require an applicant to intend to live permanently in Australia from the time of first arrival in Australia. Similarly, under the Business Skills Category, there is no requirement that a business migrant settles in Australia immediately after arrival. However, BSC migrants are required to satisfy the Minister of their genuine and realistic commitment to establish a business in Australia.

23. The immigration authorities recognise that for some time an applicant may be required to attend to business interests in the country of origin. Furthermore, from an immigration point of view, there is no requirement under either BMP or BSC that a specified period of time be spent in Australia, nor is the applicant required to commence living in Australia permanently by a specified date. However, under BSC, the Minister may cancel a visa and entry permit within 3 years if the business migrant does not become an active participant in a business or does not make genuine efforts to do so.

24. The fact that a successful BMP or BSC applicant is given permanent resident status on arrival in Australia for immigration purposes is not conclusive evidence that the person is an Australian resident for taxation purposes.

25. A strong inference may be drawn from the fact that a successful BMP or BSC applicant migrates to Australia (especially given the terms and conditions of the programs) that the applicant intends to take up residence in Australia. However, such an inference is not conclusive of whether the applicant is a resident of Australia for taxation purposes under ordinary concepts. It is possible, for instance, that a person who has been granted entry into Australia under BMP or BSC may decide to postpone final settlement in Australia for a number of years. This can be done by utilising the re-entry facility built into the migrant visa and aimed at allowing freedom of return to Australia for 3 years from first entry. In this situation, the person might not (depending on a consideration of all the factors identified in paragraph 6) be a resident of Australia, for taxation purposes, according to ordinary concepts.

26. In some cases, business migrants may be able to obtain a 5-year return visa by demonstrating that they have established a certain type of business in Australia and that they are required to travel outside Australia in the interests of that business. In those cases, the establishment of a business in Australia would outweigh the importance of the amount of time spent outside Australia and, taking into account all other relevant factors identified in paragraph 6, might lead to a conclusion that the business migrant is a resident of Australia.

27. Whether a person resides in Australia is a question of fact which has to be determined, having regard to all of the circumstances of each case. The word 'resides' has a very wide meaning (see *Applegate* per Northrop J at ATC p. 4313, ATR p.905). 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'.

28. The place of residence of the migrant's family is not conclusive of the residency status of the business migrant. The Court said in *Lysaght v. The Commissioners of Inland Revenue* (1928) 13 TC 511:

> 'A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be

regarded as constituting residence, it is open...to find that in fact he does so reside...'

29. The factors identified in paragraph 6 which need to be taken into account in determining whether a business migrant is a resident according to ordinary concepts have been dealt with in several cases. These include: *Lysaght v. IRC* (1928) 13 TC 511; *Levene v. IRC* (1928) 13 TC 486; *Miesegaes v. IRC* (1957) 37 TC 493; and *Peel v. IRC* (1928) 13 TC 443.

30. The last sentence in paragraph 10 of IT 2607 suggests that the time factor may be determinative of the residency status of a business migrant. That view is now considered to be incorrect because the duration of a taxpayer's presence in Australia and overseas within a year of income is just one factor to be considered. It cannot be, of itself, conclusive. The issue is a question of fact to be decided after considering all of the circumstances of each case. It is only after considering all the circumstances that one can determine, as a matter of degree and impression, whether a taxpayer is a resident.

31. Therefore, the last sentence of paragraph 10 of IT 2607 is withdrawn.

(b) The domicile test

32. A business migrant is a resident of Australia under the domicile test if he or she has a domicile in Australia unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia.

33. Under s.10 of the *Domicile Act* a person acquires a domicile of choice in Australia if he or she intends to make his or her home indefinitely in Australia. Whether a person has the requisite intention to adopt a new domicile of choice in Australia depends on all the facts of each individual case. We do not consider that entry in Australia under BMP or BSC is, of itself, conclusive evidence of the person having a domicile of choice in Australia. Whether the person has a permanent place of abode outside Australia depends on the application of the principles discussed in Taxation Ruling IT 2650.

(c) The 183 days test

34. A business migrant is an Australian resident if he or she satisfies the 183 days test under paragraph (b) of the definition of 'resident' in subsection 6(1). Under that test, if a business migrant has actually been in Australia continuously or intermittently for more than one-half of the year of income, the person is a resident of Australia unless the Commissioner is satisfied that the person's usual place of abode is

outside Australia and that the person does not intend to take up residence in Australia. The 183 days test is discussed further in Taxation Ruling IT 2607.

35. Having regard to the terms and conditions of the BMP and BSC (refer to paragraphs 23 and 24 above), there is a strong inference that a business migrant arriving in Australia intends to take up residence in Australia. Therefore, a business migrant who is present in Australia for more than 183 days is a resident of Australia under the 183 days test unless the person satisfies the Commissioner that, despite the requirements of the BMP and BSC having been met, he or she does not intend to take up residence in Australia. This view is consistent with that contained in paragraph 17 of Taxation Ruling IT 2607.

Examples

Example 1

36. **Facts:** Mr Lee and his family are granted resident visas to migrate to Australia under the Business Migration Program. After his arrival in Australia, Mr Lee purchases a house to provide accommodation for his family. Mr Lee's wife and children reside in Australia for the full financial year, where the children are currently attending secondary school.

Mr Lee remains an active partner in a firm based in Hong Kong even after migrating to Australia, and is required to return to Hong Kong for considerable lengths of time. During his periods of absence from Australia, Mr Lee resides in a second family home in Hong Kong.

He has substantial investments in Hong Kong and maintains close contact with his relatives and friends there and with sporting and cultural interests there. He makes regular visits to Australia to see his family. During the 1990-91 year of income, Mr Lee spent 150 days in Australia.

At the end of the year of income, he had still not commenced establishing a business in Australia.

Mr Lee has not formed an opinion whether he wishes to reside and settle permanently in Australia.

Result: On the basis of these facts, Mr Lee for the 1990-91 income year is not a resident of Australia for taxation purposes.

The residency status of Mrs Lee and the children is an independent and separate matter. It would appear that they are Australian residents.

Example 2

37. **Facts:** Mrs Sheridan and her husband migrate to Australia under the Business Skills Category. Soon after arriving in Australia, they purchase a house which they occupy.

During the year, Mrs Sheridan returned many times to the United States in an attempt to sell the family home and to finalise business. She was in the United States for a total period of 73 days, and was present in Australia for the remaining time.

While in Australia, Mrs Sheridan commenced establishing her own business.

Result: By examining these and all other relevant facts, it is possible to conclude that Mrs Sheridan is a resident of Australia for taxation purposes.

Example 3

38. **Facts:** At the beginning of the financial year, Mr Farriss migrated to Australia with his wife from the United Kingdom under the Business Migration Program with the intention to establish his own manufacturing business in Australia. On his arrival in Australia, he and his wife purchased a home in a State capital city.

He is an engineer and became a member of an Australian professional engineers' association and of relevant manufacturing and business associations.

To finalise his business dealings, he was required to return to the United Kingdom for approximately seven months. While in the United Kingdom, he stayed with his two children who attend university there.

Mr Farriss' main bank account is maintained in Australia, where he has money transferred. He has still many relatives and friends living in the United Kingdom.

On returning to Australia, he commenced his own manufacturing business.

Result: Even though Mr Farriss was present in Australia for less than 183 days, he would still be regarded as an Australian resident for taxation purposes.

14 May 1992

ISSN 0813 - 3662

ATO references
NO 91/6467-7
BO

Not previously released to the public in draft form

Price $1.10

FOI index detail
reference number
I 1013212

subject references
- business migrants
- residency

legislative references
- ITAA 6(1)

case references -
- F C of T v. Applegate 79 ATC 4307
- Levene v. The Commissioners of Inland Revenue (1928) 13 TC 486
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- Peel v. The Commissioners of Inland Revenue (1928) 13 TC 443