TR 98/17 - Income tax: residency status of individuals entering Australia

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Taxation Ruling
Income tax: residency status of individuals entering Australia

other Rulings on this topic

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

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Preamble

*The number, subject heading, and the **Class of person/arrangement**, **Ruling** and **Date of effect** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling provides the Commissioner's interpretation of 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.

2. The Ruling applies 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 the individuals remained Australian residents while they were overseas.

Date of effect

4. This Ruling applies to years commencing both before and after its date of issue. However, where individuals have determined their

residency status in accordance with previous advice from the ATO, this Ruling only applies from the 1999-2000 income year. Also, this Ruling does not apply to individuals 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 21 and 22 of Taxation Ruling TR 92/20).

Previous Rulings

5. 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and migrants' and Taxation Ruling IT 2268 'Income tax: residency status of overseas students studying in Australia' are withdrawn.

6. Taxation Rulings IT 2607 and IT 2268 dealt with individuals entering Australia. IT 2607 stated that, as a general rule, an individual who intended to be in Australia for less than six months would not be residing here. IT 2268 stated that an individual who came to Australia to undertake a course of study for a period in excess of six months would generally be considered a resident of Australia.

7. However, IT 2607 provided that being in Australia for six months or more did not automatically mean that an individual was residing here, as all other relevant factors had to be taken into account. It then stated that generally an individual who intended to be in Australia for more than two years would be residing here. IT 2607 did not provide sufficient guidance about the ordinary meaning of residing here when the stay in Australia was between six months and two years.

8. Taxation Rulings IT 2615, IT 2638, IT 2650, IT 2681 and Taxation Determination TD 93/223 have been adjusted to reflect this Ruling and to remove references to Taxation Rulings IT 2607 and IT 2268. Addenda issued on 25 November 1998.

Ruling

Residency status for income tax purposes

9. 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'?

Statutory definition

10. '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.

11. 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'.

12. If an individual resides in Australia according to the ordinary meaning of the word, the other tests in the definition do not require consideration: *Applegate*. However, where an individual does not so reside in Australia, the other tests must be considered in determining the individual's residency status. The other tests are explained at paragraphs 32 to 38 of this Ruling.

Ordinary meaning

13. As there is no definition of the word 'reside' in Australian income tax law, the ordinary meaning of the word needs to be ascertained from a dictionary.

14. For example, *The Macquarie Dictionary* defines 'reside' as 'to dwell permanently or for a considerable time; have one's abode for a time' and the *Shorter Oxford English Dictionary* defines it 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'.

15. The ordinary meaning of the word 'reside' is wide enough to encompass an individual who comes to Australia permanently (e.g., a migrant) and an individual who is dwelling here for a considerable time.

16. A migrant who comes to Australia intending to reside here permanently is a resident from arrival.

17. When an individual arrives in Australia not intending to reside here permanently, all the facts about his or her presence must be considered in determining residency status.

18. The period of physical presence or length of time in Australia is not, by itself, decisive when determining whether an individual resides here. However, an individual's behaviour over the time spent in Australia may reflect a degree of continuity, routine or habit that is consistent with residing here.

Behaviour while in Australia

19. The quality and character of an individual's behaviour while in Australia assist in determining whether the individual resides here.

20. All the facts and circumstances that describe an individual's behaviour in Australia are relevant. In particular, the following factors are useful in describing the quality and character of an individual's behaviour:

- intention or purpose of presence;
- family and business/employment ties;
- maintenance and location of assets; and
- social and living arrangements.

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

Period of physical presence in Australia

22. Whether a considerable time has elapsed to demonstrate that the individual's behaviour has the required continuity, routine or habit is a question of fact; that is, it depends on the circumstances of each case. The Commissioner's view of the law is that six months is a considerable time when deciding whether the individual's behaviour is consistent with residing here.

23. When behaviour consistent with residing here is demonstrated over a considerable time, an individual is regarded as a resident from the time the behaviour commences.

24. As residency is a question of fact, individuals who are in Australia for less than six months may establish they reside here. (See **Example 1** at paragraphs 68 to 72.) Conversely, individuals may establish that they do not reside here, even if they have been in Australia for a longer time. (See **Example 2** at paragraphs 73 to 75.)

25. If individuals enter Australia intending to remain for less than six months but later events extend their stay beyond six months, they are regarded as residents from their arrival, as long as their presence has an habitual and routine character during the entire period.

26. This may apply when an individual comes to Australia on a short-term employment contract for less than six months. This would not normally be sufficient time to demonstrate behaviour that is consistent with residing here. If the employment is extended past six months, the facts surrounding the entire stay in Australia must be

considered, not merely the original intended length of stay. (See **Examples 3** and **4** at paragraphs 76 to 83.)

27. On entering this country, individuals may demonstrate they do not intend to reside in Australia, e.g., they may be visitors on holiday. When a change in their behaviour indicates an intention to reside here, e.g., they decide to migrate here, they are regarded as residents from the time their behaviour that is consistent with residing here commences. Intention is to be determined objectively, having regard to all relevant facts and circumstances. (See **Example 5** at paragraphs 84 to 89.)

28. 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 TBRD 299.

Double tax agreements

29. Note that an individual can be a resident of more than one country at the same time: *Levene v. The Commissioners of Inland Revenue* (1928) 13 TC 486; [1928] AC 217 (*Levene*).

30. In this circumstance, a double tax agreement may operate to preclude or limit Australia's taxing right over certain classes of income derived by an individual who qualifies as a resident of Australia for domestic law purposes but as solely resident of a treaty partner country for purposes of the relevant double tax agreement.

Explanations

Statutory definition

31. 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); ... '

32. 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.

33. 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 the other three tests in the subsection 6(1) definition need not be considered. These other tests extend the meaning of 'resident' to individuals who may not reside in Australia: *Applegate*.

34. The domicile and superannuation fund tests apply mainly to individuals who are usually residents of Australia but during the income year are not 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'.

35. The 183 day test was introduced into the income tax law in 1930 with the following explanation in the relevant Explanatory Notes:

> ' ... the primary test is actual residence in Australia. If a person is in fact residing in Australia, then irrespective of his nationality, citizenship or domicile, he is to be treated as a resident for the purposes of the Act ... The third test to be applied is, subject to certain conditions, actual presence in Australia for more than half the financial year in which the income the subject of assessment is derived. This test is necessary in order to obviate the great difficulties which occasionally arise in establishing to the satisfaction of a Court that a person is resident in any particular country.'

36. This test enables the Commissioner to consider usual place of abode and intention to take up residence in Australia so that

individuals who are enjoying an extended holiday in Australia are not treated as residents.

37. In most cases, if individuals are not residing in Australia under ordinary concepts, their usual place of abode is outside Australia.

38. 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 income year (perhaps intermittently) and intends to take up residence in Australia. This individual is treated as a resident under the 183 day test.

Ordinary meaning

39. In *FC of T v. Miller* (1946) 73 CLR 93; (1946) 8 ATD 146 (*Miller*), while Latham CJ and Dixon J had different opinions about the Board's conclusion of residency drawn from the facts of the case, Latham CJ provided useful analysis about the ordinary meaning of the word 'reside' at CLR 99; ATD 148:

> '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.'

40. The ordinary meaning of the word 'reside' has been dealt with in British income tax law decisions. These cases have been used in Australian decisions. For example, Latham CJ referred to *Levene* in *Miller*. Dixon J in *Gregory v. DFC of T* (1937) 57 CLR 774; (1937) 4 ATD 397 (*Gregory*) considered that the relevant words in Australian income tax law should be given the same meaning that similar expressions had received in England.

41. In *Reid v. The Commissioners of Inland Revenue* (1926) 10 TC 673 (*Reid*), the meaning of 'reside' was considered. Quality of presence and time are to be considered when determining whether individuals reside in a place where they spend part of their lives.

Behaviour while present in Australia

42. The quality and character of behaviour means the way individuals arrange their domestic and economic affairs as part of the regular order of their lives.

43. Where the day to day behaviour of individuals, considered over time, is relatively similar to their behaviour before entering Australia, they are likely to be regarded as residing here. Even when their

behaviour over time is different from their behaviour before entering Australia, they are likely to be regarded as residing here, when the facts of their presence indicate a routine establishing they are living in Australia. (See **Examples 6** and **7** at paragraphs 90 to 95.)

44. Many 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. (See **Example 8** at paragraphs 96 to 100.)

45. Although these individuals regard themselves as permanently resident in their home country and/or may be regarded as residents of their home country for its tax purposes, their behaviour while temporarily in Australia may mean they are also residing here for Australian income tax purposes.

46. All the facts and circumstances that describe an individual's behaviour in Australia are relevant. In particular, the following factors are useful in describing the quality and character of an individual's behaviour. No single factor necessarily determines residency and many factors are interrelated.

(a) intention or purpose of presence

47. The individual's intention, purpose or reason for being in Australia assists in determining whether an individual resides here: *Gregory*. While individuals may have multiple reasons, there is usually a main purpose to their presence. (See **Example 9** at paragraphs 101 to 104.)

48. A settled purpose, such as employment or education, may support an intention to reside in Australia. However, the intention must be more than merely being a traveller or visitor who may supplement their savings by obtaining casual employment.

49. Staying for a short period for work purposes is normally 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 a position in 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.

50. However, individuals who enter Australia to take up pre-arranged employment opportunities or courses of study may be residing here if their stay is consistent with living in Australia. *Miesegaes v. Commissioners of Inland Revenue* (1957) 37 TC 493

concerned an individual who was 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 105 and 106.)

51. 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.

(b) family and business/employment ties

52. A factor that may indicate individuals are residing here is the presence of their families. This does not mean that the presence of their families always results in a decision that the individuals are residing here. Also, even if families do not accompany them, the individuals may still be residing here.

53. In *Peel v. The Commissioners of Inland Revenue* (1927) 13 TC 443, the appellant was considered a resident of the United Kingdom. He bought, and kept ready for occupation, a house in Scotland that he and his family occupied at various times during the year.

54. In *Reid*, Lord President Clyde gave weight to the fact that the appellant had her family ties in England.

55. An individual who enters Australia to take up an employment contract or to set up a business usually establishes and maintains behaviour that may indicate the individual is residing here. An individual who is dwelling here for a considerable time while on an employment contract would be residing here, whereas a mere traveller or visitor on holiday would not. (See **Examples 11** and **12** at paragraphs 107 to 117.)

56. The existence of an employment contract in the home country and an intention to resume that employment after leaving Australia is rarely a significant factor in determining whether an individual is residing in Australia.

(c) maintenance and location of assets

57. Occupation of a dwelling in Australia, that the individual owns or is purchasing, suggests establishment of a home in Australia. An individual may have a home and other assets outside Australia and

still be residing here for the duration of the stay. Other assets in Australia, such as motor vehicles and bank accounts, add further weight to the individual having established behaviour consistent with residing here.

58. In *The Commissioners of Inland Revenue v. F L Brown* (1926) 11 TC 292, 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 he was not resident of the United Kingdom and Rowlatt J declined to overturn the decision. The Special Commissioners had placed considerable weight on the break in his habit of life on giving up his house. However, Rowlatt J did express some concern at the decision, based on the existence of a bank account and family connections, but could not find an error in law.

(d) social and living arrangements

59. Social and living arrangements are the way individuals interact with their surroundings during their stay in Australia and may indicate they are residing here. These arrangements may include joining sporting or community organisations, enrolling children in school, redirecting mail to Australia or committing to a residential lease. (See **Example 13** at paragraphs 118 and 119.)

60. 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.'

Period of physical presence in Australia

61. Time is not necessarily determinative of residency but it is an important factor when considering whether an individual resides here. In 14 TBRD 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.'

62. In most cases, the Commissioner accepts that a visit to Australia of less than six months is not sufficient time to be regarded as residing here. When determining whether individuals are residing here, if their visit is for six months or more, the Commissioner considers their behaviour while in Australia. (See **Example 14** at paragraphs 120 to 122.)

63. This six months of behaviour is not confined to one income year. Individuals who enter Australia on 1 April intending to reside here until 31 October, may be regarded as residents from their arrival despite only being in Australia for three months during the earlier income year, as long as they expect to exhibit the characteristics of an individual residing here over the entire period.

Double tax agreements

64. Australia has a foreign tax credit system and certain exemptions to provide relief from double taxation. Australia has also entered into agreements with a number of countries that avoid double taxation by allocating the taxing rights over bilateral income flows between the respective treaty partners. The double tax agreements generally prevail over the domestic law in the case of any inconsistency pursuant to section 4 of the *International Tax Agreements Act 1953* and can therefore operate to restrict the imposition of tax under the domestic law.

65. In most cases, an individual who is a resident of one of the countries for purposes of its domestic law is also a resident of that country for purposes of a double tax agreement. Where an individual is a resident of both countries under that primary test, the agreements generally contain certain 'tie-breaker' tests to establish residence solely in one of the countries for purposes of the agreement.

66. Where the tie-breaker tests in an agreement provide that a dual resident be treated solely as a resident of the treaty partner country for the purposes of the agreement, most foreign source income of that individual is not subject to tax in Australia and the extent to which Australia can tax the individual's Australian source income may also be affected. The terms of the relevant double tax agreement should be referred to when determining tax liability. However, Australian resident status is not lost for purposes of the general operation of the domestic law, so that the individual continues to be eligible, for example, for the tax-free threshold in respect of his or her income which remains assessable to Australian tax.

Examples

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

Example 1

68. 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. 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.

69. 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 seek to terminate his contract on the ground of non-performance.

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

71. Bjorn explains to the Commissioner that despite only being in Australia for four months he was residing here during that time and he argues that he is entitled to be taxed as an Australian resident.

Decision: resident

(Refer paragraph 24 for guidance.)

72. As Bjorn established that he intended to live in Australia for eighteen months with his family and his behaviour over the four months is consistent with the intention, Bjorn resided in Australia.

Example 2

73. Michael Desmond is a South African diamond corporation executive. He takes the opportunity to participate in an intensive eight month advanced management development program at an Australian university.

74. Michael's wife and children do not accompany him to Australia and while here he stays in basic accommodation on campus. He spends his time studying or writing reports for his company. He is in

Australia solely to do the course and at the end of eight months he returns home.

Decision: non-resident

(Refer paragraph 24 for guidance.)

75. Michael does not exhibit behaviour that is consistent with residing here. All of the facts lead to a conclusion that he is a non-resident.

Example 3

76. Jane Cierpinski is single and is a Professor of Biology at the University of Warsaw. She comes to Australia to work on a research project. She is contracted to do the research in Australia for five months.

77. A six month lease of a small furnished unit near her work is such an attractive proposition that she enters into the lease despite intending to leave after five months. She also buys an old car. 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 friends and parents.

78. Jane intends to return to Warsaw at the end of the project that actually lasts for seven months. She negotiates an extra month on the lease of her unit. Apart from depositing her salary into an Australian bank account to cover normal living expenses, Jane retains all assets and investments in Poland, her country of domicile.

Decision: resident

(Refer paragraph 26 for guidance.)

79. Jane's behaviour over the seven months in Australia is consistent with residing here. She is regarded as a resident from her arrival.

Example 4

80. Michelle Latour is a viticulturist who comes to Australia to do some research for five months. She actually stays for seven months to complete the Australian phase of her project.

81. Michelle's husband and children do not accompany her to Australia. They stay in their home in Bordeaux. From Australia, she assists her husband in running the family business.

82. While in Australia, Michelle stays in a hostel. She uses credit cards to meet day to day expenses. Her concentration on her research is often interrupted because she has to constantly fax and phone her

husband about their emerging business problems. In fact, she needs to make a quick trip home for a week to sort out a major business dilemma.

Decision: non-resident

(Refer paragraph 26 for guidance.)

83. Michelle was in Australia for a considerable time. However, all of the factors relating to her presence in Australia suggest that the quality and character of her stay reflect that of a visitor who is temporarily in Australia rather than establishing behaviour consistent with residing here.

Example 5

84. 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.

85. 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.

86. In early July, she leases a serviced executive apartment for nine months near her work place in Sydney. 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 two occasions.

87. Although based in Sydney, her commitments require some limited travel. On average, Peta travels at least once a week to meet clients outside Sydney.

Decision: non-resident for year ended 30 June 1998

resident during her stay in the 1999 income year

(Refer paragraph 27 for guidance.)

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

89. From early July, Peta's behaviour alters. The lease of more permanent accommodation, as well as her position in Sydney, indicates a more settled purpose for being in Australia compared to her

first three months in Australia. Peta is regarded as a resident from the time her behaviour changes.

Example 6

90. 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.

91. 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 asks a friend to live in her home in Milan while she spends nine months with her niece in North Queensland recuperating. 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 43 for guidance.)

92. 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 different from her usual life as an engineer, although she would have had to recuperate if she had remained in Italy. However, she came to live in Australia with her niece and, while here, the quality and character of Maria's behaviour establish that she has developed a routine over nine months that indicates she is residing here.

Example 7

93. Conchita Hernandez 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.

94. During the 1998 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 43 for guidance.)

95. 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 nine months in Australia, she does not exhibit a routine or pattern of habitual behaviour. Her purpose and pattern of living are not to settle here for a period but to be a traveller on a holiday.

Example 8

96. 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 leases a residence in Sydney for twelve months.

97. His wife accompanies him on the trip but his teenage son and daughter, having just commenced college, remain in the family home. Apart from the absence of his children, Jim's daily behaviour is relatively similar to his behaviour before entering Australia. Jim earns interest from substantial investments he has in the United States.

98. Satisfied with the progress of the branch, Jim and his wife return to the United States eleven months after arriving in Australia.

Decision: resident

(Refer paragraph 44 for guidance.)

99. Jim is present in Australia for eleven months. His purpose for being in Australia, accompanied by his wife, leasing the property and establishing business ties, are all factors indicating Jim is residing in Australia.

100. When determining his tax liability in Australia, Jim should refer to relevant provisions in the Australia/United States double tax convention where he will find that the US interest will not be taxable in Australia because of the dual resident 'tie-breaker' tests in the convention operating to treat him as solely resident in the United States for the purposes of the convention.

Example 9

101. 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 enabling her to work for no more than three months with one employer.

102. 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. She spends a month in Adelaide where she works for two weeks and continues her journey to Melbourne.

103. 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 47 for guidance.)

104. Although Janine obtains work, by travelling from place to place she has not established a pattern of habitual behaviour, 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

105. Dipak Neviott is a student from India who comes to Australia to study for a four year bachelor degree in civil engineering. Dipak lives in rental accommodation near the university with fellow students and works part-time at the university social club as a barman. After six months, he has to withdraw from his studies and return to India because his father is ill.

Decision: resident

(Refer paragraph 50 for guidance.)

106. Dipak's routine of study and continuing accommodation on campus establishes a pattern of habitual behaviour over the six months. His employment adds support to the conclusion he is residing here.

Example 11

107. 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 work for twelve months. Steffen arrives in Australia on 1 May 1998.

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

109. Steffen is a golfing fanatic and joins the local golf club. He also becomes actively involved in local charities. During her semester break, his wife visits and they head to Noosa for a short holiday. After twelve months, he returns to Denmark.

110. Steffen seeks clarification of his residency status. He also wishes to know whether the dividends from his Danish investments are taxable here and the rate of tax on his Australian source interest.

Decision: resident

(Refer paragraph 55 for guidance.)

111. Steffen is a resident for the duration of his stay for both the 1998 and 1999 income years. Even though he is physically present in Australia for only two months of the 1998 income year, he intends to live in Australia to fulfil his contract with the hospital.

112. Steffen establishes a pattern of habitual behaviour during his twelve months in Australia. His accommodation arrangements, work, social and sporting commitments demonstrate he resides in Australia during this time and these outweigh the fact that his wife, apart from her holiday with him, remains in Denmark.

113. When determining his tax liability in Australia, Steffen should refer to the Australia/Denmark double tax agreement. Assuming that the dual resident 'tie-breaker' tests in that agreement operate to treat him as solely resident in Denmark for the purposes of the agreement, his Danish dividends will not be subject to tax in Australia and the Australian tax on his Australian source interest will be limited to 10%.

Example 12

114. 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.

115. 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.

116. During his stay, Abdul rents an apartment in Adelaide where the majority of his business is conducted, although he does spend one

month commuting between the Sydney and Brisbane branches of the company.

Decision: resident

(Refer paragraph 55 for guidance.)

117. Abdul is regarded as a resident for the duration of his stay in Australia. Abdul has no particular 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, these factors outweigh the short duration of his stay.

Example 13

118. Alan Johnson is a single Canadian farmhand with a keen interest in agriculture. He successfully applies to participate in the International Agricultural Exchange Association program for seven months. He 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 59 for guidance.)

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

Example 14

120. 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.

121. After three months in Australia with only casual employment as a waitress, Carleene returns to New Zealand, having been unsuccessful in finding suitable employment as a journalist.

Decision: non-resident

(Refer paragraph 62 for guidance.)

122. Carleene's stay is not sufficient to establish a pattern of habitual behaviour. On arrival, she is uncertain about her stay and has no other ties here. This conclusion would be further strengthened if she travelled to various cities in search of employment.

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