



TD 2012/D3 - Income tax: does a New Zealand citizen who was present in Australia as the holder of a temporary visa granted under section 32 of the Migration Act 1958 (a Special Category Visa) that ceased to be in effect when they departed Australia still hold a temporary visa for the purposes of paragraph (a) in the 'temporary resident' definition in subsection 995-1(1) of the Income Tax Assessment Act 1997 (ITAA 1997)?

 This cover sheet is provided for information only. It does not form part of *TD 2012/D3 - Income tax: does a New Zealand citizen who was present in Australia as the holder of a temporary visa granted under section 32 of the Migration Act 1958 (a Special Category Visa) that ceased to be in effect when they departed Australia still hold a temporary visa for the purposes of paragraph (a) in the 'temporary resident' definition in subsection 995-1(1) of the Income Tax Assessment Act 1997 (ITAA 1997)?*

This document has been finalised by [TD 2012/18](#).

 There is a Compendium for this document: [TD 2012/18EC](#) .



Draft Taxation Determination

Income tax: does a New Zealand citizen who was present in Australia as the holder of a temporary visa granted under section 32 of the *Migration Act 1958* (a Special Category Visa) that ceased to be in effect when they departed Australia still hold a temporary visa for the purposes of paragraph (a) in the ‘temporary resident’ definition in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

ⓘ This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendices) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. Yes. If a New Zealand citizen who was present in Australia as the holder of a Special Category Visa departs Australia they will still ‘hold a temporary visa’ for the purposes of paragraph (a) in the ‘temporary resident’ definition in subsection 995-1(1) of the ITAA 1997.

2. Although a Special Category Visa is a visa to remain in, but not re-enter, Australia, and therefore ceases to be in effect if the holder leaves Australia, a New Zealand citizen with a New Zealand passport has an ongoing right to re-enter Australia on another Special Category Visa. As such, the New Zealand citizen will be treated as holding a temporary visa granted under the *Migration Act 1958* (the Migration Act) for the purposes of paragraph (a) of the ‘temporary resident’ definition in subsection 995-1(1) of the ITAA 1997, provided that they continue to be entitled to re-enter Australia on presentation of their New Zealand passport.

Example

3. Murray is a citizen of New Zealand and holds a current New Zealand passport.
4. In November 2008 he travelled from New Zealand to Australia and became an 'Australian resident' within the meaning of subsection 995-1(1) of the ITAA 1997. However he has never been an Australian resident within the meaning of the *Social Security Act 1991* (a 'Social Security resident') and he does not have a spouse.
5. When Murray entered Australia he was granted a temporary visa known as a 'Special Category Visa' under section 32 of the Migration Act.
6. Provided they are neither a behaviour concern non-citizen nor a health concern non-citizen, Special Category Visas are granted to New Zealand citizens upon presentation of a current New Zealand passport. A Special Category Visa allows the holder to remain in Australia while they are a New Zealand citizen but ceases to be in effect when they leave Australia.
7. In January 2011 Murray travelled back to New Zealand for three weeks and his Special Category Visa thereby ceased to be in effect.
8. However Murray was granted another Special Category Visa when he returned to Australia and re-presented his New Zealand passport.
9. Although his Special Category Visa ceased to be in effect when he travelled back to New Zealand, Murray is still treated as holding a temporary visa during that time for the purposes of paragraph (a) of the 'temporary resident' definition in subsection 995-1(1) of the ITAA 1997. This is because he continued to be entitled to re-enter Australia on presentation of a current New Zealand passport.

Date of effect

10. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraph 75 to 77 of *Taxation Ruling TR 2006/10*).

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.***

Explanation

11. Subdivision 768-R of the ITAA 1997 modifies the general tax rules by providing concessions for people in Australia who are ‘temporary residents’. Broadly speaking the concessions consist of tax relief on most foreign source income and capital gains, and relief from the burden of complying with certain record-keeping obligations and interest withholding tax obligations.¹

12. According to paragraph 1.64 of the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 1) Bill 2006 (the Explanatory Memorandum), the policy objective of the concessions is to attract internationally mobile skilled labour to Australia and to assist in the promotion of Australia as a business location, by reducing the costs to Australian business of bringing skilled persons to work in Australia.

13. Subsection 995-1(1) of the ITAA 1997 provides that you are a ‘temporary resident’ if:

- (a) you hold a temporary visa granted under the *Migration Act 1958*; and
- (b) you are not an Australian resident within the meaning of the *Social Security Act 1991*; and
- (c) your *spouse is not an Australian resident within the meaning of the *Social Security Act 1991*.

However, you are not a **temporary resident** if you have been an Australian resident (within the meaning of this Act), and any of paragraphs (a), (b) and (c) are not satisfied, at any time after the commencement of this definition.

[Commencement 6 April 2006]

14. The Explanatory Memorandum elaborates on the definition and describes the underlying policy as follows:

1.19 The first requirement to be a temporary resident for Australian tax purposes is that the individual holds a temporary visa granted under the *Migration Act 1958*. However, an individual who is, or whose spouse is, an ‘Australian resident’ as defined in the *Social Security Act 1991*, will not be entitled to the temporary residents exemptions. In that Act, an ‘Australian resident’ is defined as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or a protected special category visa holder. Leaving aside the limitation on the person’s spouse, this restriction will only exclude those who are in Australia on a protected special category visa (ie, some New Zealanders). They are excluded from its benefits because they are treated more like Australian citizens than temporary visa holders. In this legislation there is no time limit on how long the tax concessions are available, to simplify the rules and reduce the impact of these rules on taxpayer decisions. Nor does it matter if the person has been a temporary resident before.
[Schedule 1, item 2, definition of ‘temporary resident’ in subsection 995-1(1)]

¹ Section 768-905 of the ITAA 1997.

1.20 The policy underlying the definition of ‘temporary resident’ is that a temporary resident’s connection with Australia is more tenuous than for other residents (referred to in this explanatory memorandum as permanent residents) and so a temporary resident should be treated more like a non-resident than a resident for tax purposes. Further, since temporary residents cannot benefit from Australian public spending to the same extent as permanent residents (for instance temporary visa holders are less often entitled to social security payments, Medicare and free public education) they should not have to support that spending to the same extent.

1.21 Where individuals have access to all or most of the benefits that Australian permanent visa holders or Australian citizens have despite being on a temporary visa, it is logical that they should bear the same responsibility as other Australian residents to fund Australian public spending. That greater access to benefits can be obtained by protected special category visa holders and by someone whose spouse is an Australian resident for social security purposes. A person who is an Australian citizen, or whose spouse is one, does not need the inducement of tax concessions to come to, or return to, Australia for short periods. Likewise, those who at some time have the degree of connection with Australia to warrant full residence taxation will not be excused from that obligation in the future (ie, they will be treated as permanent residents) if they again become Australian tax residents. That is, they will not ever be a temporary resident after that time. This approach also removes the need for additional provisions (including deemed disposal rules for CGT purposes) when such persons cease to be permanent residents. If the person who holds the temporary visa does not have a spouse, the condition concerning the person’s spouse is irrelevant. **[Schedule 1, item 2, definition of ‘temporary resident’ in subsection 995-1(1)]**

15. A Special Category Visa is a temporary visa permitting the holder to remain in Australia while the holder is a New Zealand citizen.² Subsection 5(1) of the Migration Act defines ‘holder’, in relation to a visa, to mean, ‘subject to section 77 (visas held during visa period) the person to whom it was granted or a person included in it’. Section 77 of the Migration Act provides that ‘to avoid doubt, for the purposes of this Act, a non citizen holds a visa at all times during the visa period for the visa’. ‘Visa period’ is relevantly defined to mean the period beginning when the visa is granted and ending when the visa ceases to be in effect.³ And subsection 82(8) of the Migration Act states that a ‘visa to remain in, but not re enter, Australia that is granted to a non citizen in Australia ceases to be in effect if the holder leaves Australia’.

16. Therefore, if read literally, the phrase ‘you hold a temporary visa granted under the *Migration Act 1958*’ in paragraph (a) of the ‘temporary resident’ definition would not be satisfied when the holder of a Special Category Visa leaves Australia. This interpretation would lead to the following outcomes:

- if a New Zealand citizen who is present in Australia as the holder of a Special Category Visa departs Australia they would no longer qualify as a temporary resident, and would lose any entitlement to the temporary resident concessions;
- if, after leaving Australia, the New Zealand citizen remains an Australian resident within the meaning of subsection 995-1(1) of the ITAA 1997, then the exclusionary paragraph in the ‘temporary resident’ definition would apply and they would be permanently disqualified from being a temporary resident.

² Section 32 of the Migration Act and Regulation 444.511 of the Migration Regulations 1994.

³ Subsection 5(1) of the Migration Act.

17. Applying this interpretation to the facts given in the example at paragraphs 3 to 8 of this draft Determination, Murray would cease to be a temporary resident when he travels back to New Zealand and he would be excluded from being a temporary resident when he re-enters Australia on another Special Category Visa. Had Murray instead held a temporary visa to enter and remain in Australia (known as a 'multiple entry visa'), he would not have failed paragraph (a) when he departed Australia, because he would have continued to have held a temporary visa after departing Australia.

18. This interpretation creates inconsistency and may lead to results that do not accord with the underlying policy intent of the definition. 'Temporary resident' status is afforded where a temporary resident's 'connection with Australia is more tenuous than for other residents' and that a temporary resident 'cannot benefit from Australian public spending to the same extent as permanent residents'. The exclusions in the definition are designed to deny an individual the temporary resident concessions where they develop a certain degree of connection with Australia such that they do not 'need the inducement of tax concessions to come to, or return to, Australia'.

19. It is improbable that the legislature intended to distinguish between persons who have a right of re-entry under a multiple entry visa and those who have a similar right of re-entry on presentation of a New Zealand passport. It is also improbable that the legislature intended those latter persons would be considered to have a stronger connection with Australia when absent from Australia than when they are present in Australia on a temporary visa.

20. A departure from the literal meaning of a provision is to be preferred if the literal construction results in a provision operating in a way that is absurd, irrational or contrary to the intention of the legislation. As Brennan CJ, Dawson, Toohey and Gummow JJ stated in *CIC Insurance v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 [footnotes omitted]:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v. Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

21. Similarly in *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 384, McHugh, Gummow, Kirby and Hayne JJ said:

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

22. Paragraph (a) in the ‘temporary resident’ definition should be construed by reference to its purpose. Relevantly, the requirement in paragraph (a) of the ‘temporary resident’ definition is that you hold a temporary visa granted under the Migration Act. Visas under that Act grant non-citizens permission to travel to and enter Australia and/or to remain in Australia.⁴

23. New Zealand citizens (who are entitled to a section 32 visa on presentation of their New Zealand passport) have an ongoing right to enter Australia in a manner similar to those who hold multiple entry visas. The holder of a multiple entry visa does not lose their entitlement to ‘temporary resident’ status merely as a result of departing Australia.

24. In both cases, provided they also meet the requirements in paragraphs (b) and (c) of the temporary resident definition, they have a more tenuous connection with Australia and cannot benefit from Australian public spending to the same extent as permanent residents as contemplated in paragraph 1.21 of the Explanatory Memorandum.

25. To facilitate consistency of treatment in accordance with the purpose of paragraph (a), the better interpretation is to treat a Special Category Visa holder’s departure as equivalent to the departure of a multiple entry visa holder. For the purposes of paragraph (a) of the ‘temporary resident’ definition in subsection 995-1(1) of the ITAA 1997, a New Zealand citizen will be treated as holding a temporary visa granted under the Migration Act if they continue to be entitled to re-enter Australia on presentation of their New Zealand passport.

26. Therefore a New Zealand citizen will not be disqualified from being a ‘temporary resident’ under subsection 995-1(1) of the ITAA 1997 merely because they held a Special Category Visa that ceased to be in effect when they departed Australia.

⁴ Subsection 29(1) of the Migration Act

Appendix 2 – Your comments

27. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

28. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Australian Taxation Office website at www.ato.gov.au

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

Due date: 27 April 2012
Contact officer: Andrew Phlorides
Email address: andrew.phlorides@ato.gov.au
Telephone: (03) 9285 1180
Facsimile: (03) 9285 1763
Address: 2 Lonsdale Street Casselden Place Melbourne 3000

References

Previous draft:

Not previously issued as a draft

Subject references:

- international tax
- residence in Australia
- temporary resident

Legislative references:

- ITAA 1997 Subdiv 768-R
- ITAA 1997 768-905
- ITAA 1997 995-1(1)
- Migration Act 1958 5(1)
- Migration Act 1958 29(1)
- Migration Act 1958 32

- Migration Act 1958 77
- Migration Act 1958 82(8)
- Social Security Act 1991
- Migration Regulations 1994 444-511

Case references:

- CIC Insurance v. Bankstown Football Club Ltd (1997) 187 CLR 384
- Project Blue Sky Inc v. Australian Broadcasting Authority (1998) 194 CLR 355

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 1) Bill 2006

ATO references

NO: 1-3PH0A9I

ISSN: 1038-8982

ATOlaw topic: Income Tax ~~ International ~~ residency of taxpayer
Income Tax ~~ Residency