IT 2615 - Income tax: medicare levy - test for Australian residency - payable by Australians living overseas and by visitors to Australia

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TAXATION RULING NO. IT 2615

INCOME TAX: MEDICARE LEVY - TEST FOR AUSTRALIAN RESIDENCY
- PAYABLE BY AUSTRALIANS LIVING OVERSEAS AND BY VISITORS TO AUSTRALIA

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Reference no.:	Subject refs:	Legislative refs:
I 1012383	AUSTRALIANS LIVING OVERSEAS - MEDICARE LEVY	6 251S
	MEDICARE LEVY - RESIDENCY	251T
	PRESCRIBED PERSON - MEDICARE LEVY	251U
	RESIDENCY - MEDICARE LEVY	
	VISITORS TO AUSTRALIA - MEDICARE LEVY	

OTHER RULINGS ON THIS TOPIC: IT 2268, IT 2342, IT 2365, IT 2607

PREAMBLE The Medicare levy is imposed on the taxable incomes of persons residing in Australia. It was introduced as a finance - raising complement to measures designed to implement the Australian universal Medicare scheme which has operated since 1 February 1984. The levy was introduced to offset Commonwealth expenditure on Medicare benefits.

2. Broadly speaking, the Medicare levy is payable by persons who are residents of Australia and Australian residents are entitled to receive Medicare benefits in respect of professional services rendered in Australia. However, the test for residency for Medicare levy purposes differs from the residency test for Medicare benefit entitlement.

3. The purpose of this Ruling is to clarify the appropriate test for residency for Medicare levy purposes and, in the light of that test, to consider the proper Medicare levy treatment of Australians living overseas and visitors to Australia.

Medicare levy
- Liability Provisions

4. The imposition and collection of the Medicare levy is governed by Part VIIB of the Income Tax Assessment Act 1936 ("the Act") and the Medicare Levy Act 1986. A fundamental objective of the legislation is to integrate collection of the levy with the collection of income tax.

5. Section 251S of the Act, broadly speaking, provides that a Medicare levy is levied and shall be paid by an individual who is a resident of Australia at any time during the income year based on his or her taxable income for the year. Whether a person is a resident of Australia is therefore a crucial determinant of whether that person must pay the Medicare levy.

6. By the provisions of sections 251T and 251U of the Act, Medicare levy is not payable by certain classes of persons, referred to as "prescribed persons." An exemption from the levy is conferred by section 251T on a person who is a prescribed person during the whole of the year of income. Where a person qualifies as a prescribed person for part of the income year only, partial exemption is conferred by section 251U (and section 9 of the Medicare Levy Act 1986) i.e. no levy will be payable in respect of the period of the year that the person was a "prescribed person".

7. There are six classes of persons who may be a "prescribed person" entitled to freedom from the levy :

- A person who is entitled to free medical treatment as a member of the Defence Force or as a relative of, or was otherwise associated with, a member of the forces (paragraph 251U(1)(a)).

- A person entitled under the Veterans' Entitlements Act 1986 or the Seamen's War Pensions and Allowances Act 1940 to free medical treatment (paragraph 251U(1)(b)).

- A person entitled to coverage for health care by reason of being entitled to a Health Care Card, a Pensioner Health Benefits Card or a Health Benefits Card on a non-income - tested basis (paragraph 251U(1)(c)).

- A person who is not an Australian resident (paragraph 251U(1)(d)). This covers a person who takes up residence in Australia during an income year and a person who ceases to be an Australian resident during the course of a year. For the period of the year that the person is not an Australian resident, he or she is a "prescribed person".

- Certain foreign government representatives and their staff and families where they are not Australian citizens and are not ordinarily resident in Australia (paragraph 251U(1)(e)).

- A person in respect of whom the Minister for Community Services and Health has certified is ineligible for Medicare benefits (paragraph 251U(1)(f)). The circumstances in which such a certificate is issued, the Department of Community Services and Health has advised, are quite limited (refer to paragraph 19 below for details).

- Test of Residency

8. Subsection 6(1) of the Act defines a "resident" and "resident of Australia" for the purposes of the Act. By that definition, the primary consideration in determining residency status is whether a person "resides" in Australia within the ordinary meaning of that word (refer to paragraph 15 below and paragraphs 6 to 13 of Taxation Ruling IT2607 for an elaboration on residence according to ordinary concepts).

9. A person who does not "reside" in Australia in the ordinary sense may nevertheless be a "resident of Australia" if that person comes within one of the specific inclusions set out in the definition contained in subsection 6(1) of the Act (refer also to paragraphs 14 to 17 of Taxation Ruling IT2607). So far as the definition is relevant to Australians temporarily living overseas, it includes as a "resident" a person:

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

(b) 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.

So far as the definition is relevant to visitors to Australia, it includes as a "resident" a person 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 the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia.

Medicare benefits
- Entitlement Provisions

10. Entitlement to receive Medicare benefits in respect of professional services rendered in Australia is conferred on an "eligible person" by section 10 of the Health Insurance Act 1973. Section 21 of that Act confers an entitlement to Medicare benefits in respect of medical services rendered outside Australia to an Australian resident. An "eligible person" is defined in subsection 3(1) of the Health Insurance Act to mean an Australian resident or an "eligible overseas representative" i.e. certain diplomatic personnel and consular personnel of countries with which Australia has entered into Reciprocal Health Care Agreements, where the Agreement specifically provides eligibility for such personnel. Under subsection 6(1) of the Health Insurance Act the Minister for Community Services and Health may, by order in writing, declare that an ineligible person shall be treated as a person eligible for Medicare benefits. Similarly, the Minister may, by order in writing, declare under subsection 6(2) of the Health Insurance Act that a person who is eligible for Medicare benefits shall be treated as an ineligible person.

11. A person who does not satisfy the eligibility requirements contained in the Health Insurance Act (e.g. because the person is

not an "Australian resident" as defined in that Act) is not entitled to receive Medicare benefits in respect of medical services, or free treatment and care in a public hospital.

- Test of Residency

12. By an amendment made to the Health Insurance Act in 1988 (Act No. 155 of 1988), the definition of the term "Australian resident" in subsection 3(1) of that Act was changed for Medicare benefit purposes. The term "Australian resident" is now defined to mean "a person who resides in Australia" and who satisfies one of several other pre-requisites e.g. is an Australian citizen or a person who has been granted an entry permit (not being a temporary entry permit) in force under the Migration Act 1958.

13. According to the Department of Community Services and Health, illegal immigrants and persons who have overstayed their legal time limit (prohibited non-citizens) would not normally be "Australian residents" and would be ineligible for Medicare benefits. Subject to any declaration that the Minister might make under subsection 6(1) of the Health Insurance Act, temporary residents and persons merely visiting Australia would also not normally be "Australian residents" and would be ineligible for benefits.

RULING

14. Medicare levy liability of individual persons is dependent on the person being a "resident of Australia" as that expression is used in paragraph 251S(1)(a) of the Act. The expression "resident of Australia" is defined in subsection 6(1) of the Act for the purposes of the Income Tax Assessment Act "unless the contrary intention appears". No contrary intention is considered to appear from the context in which the expression is used in paragraph 251S(1)(a) of the Act. The expression "resident of Australia" in paragraph 251S(1)(a) therefore bears the meaning contained in the definition of that expression in subsection 6(1) of the Act.

15. Whether a person "resides" - in the ordinary sense of the word - in Australia is a question of fact which has to be determined having regard to the particular circumstances of each case. In the Shorter Oxford English 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". The term "resident", as it applies to individuals for income tax purposes, has been judicially considered in Australia in such cases as Gregory v. D.F.C of T. (1937) 57 CLR 774; 4 ATD 397; FCT v. Miller (1946) 73 CLR 93; 8 ATD 146; FCT v. Applegate 79 ATC 4307; (1979) 9 ATR 899; FCT v. Jenkins 82 ATC 4098, (1982) 12 ATR 745.

16. For Medicare levy purposes, residents of Norfolk Island and Cocos (Keeling) Islands are not treated as residents of Australia (paragraph 251U(1)(d) and subsection 7A(2) of the Act). However, residents of Christmas Island first became liable for the levy in the income year ended 30 June 1986 (subsection 251U(1A)).

17. The expression "resident of Australia" in paragraph 251S(1)(a)

of the Act does not bear the meaning contained in the definition of the term "Australian resident" in subsection 3(1) of the Health Insurance Act. While both definitions primarily rely on residence in Australia in the ordinary sense of the word "resides", there are some material differences between the two definitions; the definition in the Income Tax Assessment Act is in some respects broader in its scope than the definition in the Health Insurance Act.

18. It is possible that circumstances may arise where a person will satisfy the requirements of one definition but not the requirements of the other. The different residency tests may lead to cases where eligibility for Medicare benefits exists but no Medicare levy is payable (refer to paragraph 22 below for an example). It is also possible that cases will arise where a person is liable to pay the Medicare levy but is not eligible for Medicare benefits in Australia. These possibilities are further considered at paragraph 23 below.

Medicare Levy Exemption for Persons Certified by the Minister for Community Services and Health

19. As indicated in paragraph 7 of this Ruling, paragraph 251U(1)(f) of the Act provides that a person whom the Minister for Community Services and Health has certified to be ineligible for Medicare benefits in respect of medical services, or free treatment and care in a public hospital, is exempt from the levy. According to the Department of Community Services and Health such certificates will only be issued by the Minister in respect of the following categories of people:

(i) Persons who are declared ineligible for Medicare benefits because they are the subject of an order made by the Minister for Community Services and Health under subsection 6(2) of the Health Insurance Act.

(ii) Persons who are out of Australia for a lengthy period of time and who are not eligible for Medicare benefits because they are declared to be non-residents for purposes of the Health Insurance Act even though they would continue to be treated as residents for income tax purposes.

Australians Temporarily Living Overseas

20. A person temporarily living overseas who retains Australia as his or her permanent place of abode is considered to be a resident for income tax purposes (subparagraph (a)(i) of the definition of "resident" in subsection 6(1) of the Act). For example, employees temporarily transferred to an overseas location to work and Australians on holiday abroad usually retain their Australian residency status while overseas. Commonwealth Government employees posted overseas would also retain their residency status due to the operation of subparagraph (a)(iii) of the definition of "resident" in subsection 6(1) of the Act. As residents of Australia they are liable for the Medicare levy unless they otherwise qualify for exemption, e.g. as defence force members or non-income tested Health Card holders or unless the Minister for Community Services and

Health certifies them ineligible for Medicare benefits.

Visitors to Australia

21. Generally, a person visiting Australia for a short period whose usual place of abode is outside Australia is treated as a non-resident for income tax purposes and is not liable for the levy. However, where a visitor is considered to be residing in Australia and is therefore a resident for taxation purposes, he or she will be liable for the Medicare levy. Such visitors could include persons working in Australia for a limited period.

22. The Department of Community Services and Health has advised this Office that it is not expected that a visitor to Australia will be exempted from the levy under paragraph 251U(1)(f) by the issue of a certificate of exemption from the Minister for Community Services and Health. While visitors to Australia would not normally be eligible for Medicare benefits, there are instances, however, in which the Minister may declare under subsection 6(1) of the Health Insurance Act that such persons may be treated as being eligible for Medicare benefits.

General

23. As indicated in paragraph 18 of this Ruling, cases may arise where, because of the difference in the tests for residency adopted in the Income Tax Assessment Act and the Health Insurance Act, a person is liable to pay the Medicare levy but is not eligible for Medicare benefits. This is considered to be the direct and intended result in many cases of the different legislative policy adopted in each of the relevant Acts as to which persons should be treated as Australian residents. It is unlikely, in the view of this Office, that many cases will arise where the difference in the tests for residency in the two Acts produces what might be regarded as an inappropriate result that could not have been intended by the legislature. Should Deputy Commissioners of Taxation become aware of any of these latter cases, however, full details should be forwarded to this Office to consider what, if any, remedial steps may be taken.

24. Taxation Rulings IT2268 and IT2607 provide further guidelines for determining the residency status for income tax purposes of various classes of individuals who came to Australia, especially visitors and migrants.

COMMISSIONER OF TAXATION
25 October 1990