Decision impact statement

Addy v Commissioner of Taxation

Court citation(s):	[2021] HCA 34 [2020] FCAFC 135 [2019] FCA 1768
Venue:	High Court Full Federal Court Federal Court
Venue reference no:	S25/2021 [2021] HCATrans 17 QUD 724 of 2019 QUD 108 of 2018
Judge name(s):	Kiefel, Gordon, Gageler, Edelman, Gleeson JJ Davies, Derrington, Steward JJ Logan J
Judgment date:	3 November 2021 6 August 2020 30 October 2019
Appeals on foot:	No
Decision outcome:	High Court – unfavourable to the Commissioner Full Federal Court – partly favourable to the Commissioner Federal Court – largely unfavourable to the Commissioner

Impacted advice

The ATO is reviewing the impact of this decision on related advice and guidance products.

Précis

This case decided that a British citizen (the taxpayer) who held a working holiday visa but who was, in unusual circumstances, held to be a resident of Australia was entitled to be taxed at the more favourable rates applicable to her level of income that apply to Australian nationals who are resident of Australia, not the rates normally applicable to individuals who hold working holiday visas. The taxpayer was entitled to be taxed more favourably because of the non-discrimination article (NDA) in the double-tax convention between Australia and the United Kingdom (UK).[1]

[1] *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* [2003] ATS 22 (UK double-tax convention).

Does this decision apply to you?

Most of Australia's tax treaties do not contain an NDA. This decision is only relevant to nationals of the following countries:

- Chile
- Finland
- Germany (from 1 July 2017)
- Israel (from 1 July 2020)
- Japan
- Norway
- Turkey, and
- the UK.[2]

The decision only applies to you if you were a national of one of the above countries, the holder of a working holiday visa (Subclasses 417 or 462, or associated bridging visa) and also a resident of Australia. Most holders of working holiday visas will not be residents of Australia. That is because persons who come to Australia for the purposes of a holiday, even if they work while here, generally do not become residents of Australia. But for unusual circumstances, the taxpayer in this case would not have been a resident of Australia.

In the far less common situation where you held a working holiday visa but subsequently remained in Australia, you may be a resident. If you are also a national of one of the above countries, the decision may be applicable to you. This may apply if you held a working holiday visa and subsequently obtained a different visa for a purpose other than having a holiday. Other cases where you held a working holiday visa and are a resident are theoretically possibly but will be rarely found in practice.

See *Working holiday makers* for how the Commissioner proposes to deal with such cases.

You may have to bring to account income you earned in a foreign country if you are treated like an Australian national resident of Australia.

Brief summary of facts

The taxpayer is a British citizen.

The taxpayer was granted a Subclass 417 (working holiday) visa for one year and entered Australia on 20 August 2015. In July 2016, she was granted a further working holiday visa for another year. The taxpayer stayed in Australia until 1 May 2017, when she returned to the UK.

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[2] While there may be treaties with other countries that have NDAs in the same form as the NDA in the UK double-tax convention, the countries listed are the only ones that are currently participating in Australia's working holiday maker program. Note that while the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes of Income* [1983] ATS No. 16 has an NDA, it has not been incorporated into domestic law. As such, it does not create any private, justiciable rights; see *Addy v Commissioner of Taxation* [2021] HCA 34 (*Addy – High Court*), at [13], subsection 5(2) of the *International Tax Agreements Act 1953*, and pages 6 and 8 of the Explanatory Memorandum to the Income Tax (International Agreements) Amendment Bill 1983.

Before her stay in Australia, the taxpayer lived with her parents at the family home. She left a substantial portion of her possessions at that family home and expected to, and did, return there after her stay in Australia.

By September 2015, the taxpayer had commenced living in a house in Sydney. Those premises were leased by several persons, including a friend of the taxpayer who allowed her to share her room under an informal arrangement.

During her time in Australia, the taxpayer undertook some travel around Australia. From 2 January 2016 to 8 March 2016, she travelled to several countries in Southeast Asia. On her return to Australia, the taxpayer worked on a horse farm in Western Australia for three months in 2016 before returning to Sydney in July 2016, where she worked casually as a waitress in two different hotels.

The taxpayer returned to the UK because she missed the UK and the people she knew there.

The taxpayer's taxable income in the 2016–2017 income year was $26,576, derived from her Australian employment.

From 1 January 2017, and for the relevant income year, Part III of Schedule 7 to the *Income Tax Rates Act 1986* (ITRA 1986) prescribed a 15% rate of tax on working holiday taxable income up to $37,000[3] (working holiday maker tax rates).

The taxpayer lodged her 2016–2017 income tax return. The Commissioner issued her a Notice of Assessment, assessing the tax payable on her working holiday taxable income at working holiday maker tax rates.

The taxpayer objected against her assessment, contending that she was a resident and that the NDA meant that her working holiday taxable income had to be assessed at rates applying to residents who were not working holiday makers; that is, under Part I of Schedule 7 to the ITRA 1986, not Part III of Schedule 7 to that Act.

On the basis that the taxpayer's case would be used as a test case to seek judicial views on the effect of the NDA, the taxpayer withdrew her first objection and the Commissioner issued a further amended assessment that was expressed to be made on the basis that the taxpayer was a resident but which did not alter her taxable income or the tax payable thereon. The taxpayer objected to this further amended assessment. The Commissioner disallowed the objection in full.

The taxpayer appealed to the Federal Court. Some weeks before the hearing, the taxpayer applied for, and was ultimately granted, leave to expand her grounds of appeal to include whether she was a resident for the whole of the 2016–2017 income year. The Commissioner opposed this application on the basis that the application of the 183-day test had not been squarely raised before and the Commissioner ought to be given an opportunity to form a view as to whether the Commissioner was satisfied as to the proviso.

Issues decided by the Court

Residency

The first issue was whether the taxpayer was 'a resident' of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) during the income year ended 30 June 2017, under either or both of the ordinary resides and 183-day tests. If the taxpayer was a resident under the 183-day test, a further issue

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[3] For the 2020–21 to 2023–24 income years, Part III of Schedule 7 to the ITRA 1986 prescribes a 15% rate of tax on working holiday taxable income up to $45,000.

arose as to whether the taxpayer was a resident for the entire 2016–2017 income year or only for the 11 months during which she was present. This was relevant to whether the tax-free threshold ought to be prorated.

At first instance in the Federal Court, Logan J found that the taxpayer was a resident under the ordinary resides test and under the 183-day test. Regarding the 183-day test, his Honour held that it was open to the Court to reach its own state of satisfaction and that he was not satisfied that the taxpayer's usual place of abode was overseas and that she did not have an intention to take up residence.

The Full Federal Court found that the taxpayer was not a resident under the ordinary resides test.

Derrington J, with whom Davies and Steward JJ agreed [4], said that presence for an extended period was insufficient to become a resident under ordinary concepts.[5] His Honour found that the taxpayer's actual intention was to have a holiday.[6] This was consistent with her declarations made in obtaining the visa and there was no credible suggestion that her intention had changed.[7] His Honour said that the nature and quality of the taxpayer's stay in Australia and modality of life were consistent with being on an extended holiday.[8] This included her travel while in Australia and the circumstances in which she left lending a 'fluid nature' to her presence.[9] His Honour decided that it was not 'open to conclude' that she was a resident under ordinary concepts.[10]

The Full Federal Court found that the taxpayer was a resident under the 183-day test, though for different reasons to the primary judge.

This outcome rested on two facts that were largely not disputed by the Commissioner:

- that the taxpayer had been in Australia for more than one half of the 2016–2017 income year, and
- the Commissioner did not hold a state of satisfaction that the taxpayer's usual place of abode was outside Australia and that she did not intend to take up residence in Australia (the two matters in the proviso to the 183-day test).

The Full Federal Court:

- held that as Parliament had conditioned the operation of the proviso on the opinion of the Commissioner, it was not open to a court to substitute its own opinion on the matters in the proviso if more than one opinion is open[11]
- in the absence of an actual state of satisfaction, the taxpayer was entitled to succeed before the Court in their contention that they were a resident, and
- concurred with the primary judge's finding that the taxpayer's residency ceased once she departed Australia in May 2017 and that

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[4] *Commissioner of Taxation v Addy* [2020] FCAFC 135 (*Addy – Full Federal Court)* at [1] and [253].
[5] *Addy – Full Federal Court* at [83] 'Visitors and holiday makers require somewhere to "stay" or "live" when in Australia, but it does not follow that they become resident there'.
[6] *Addy – Full Federal Court* at [81]
[7] *Addy – Full Federal Court* at [81].
[8] *Addy – Full Federal Court* at [97].
[9] *Addy – Full Federal Court* at [84].
[10] *Addy – Full Federal Court* at [98].
[11] *Addy – Full Federal Court* at [26], [193] and [306].

the taxpayer was only entitled to a part of, and not the full, tax-free threshold under the ITRA 1986.[12]

The above issues were not further considered by the High Court.

Application of the non-discrimination article

The second issue, that only arose if the taxpayer was a resident, was whether Article 25(1) of the UK double-tax convention was contravened.

At first instance, Logan J held that the Article was contravened. In the Full Federal Court, Steward and Derrington JJ held that the Article was not contravened. Davies J, in dissent, agreed with the primary judge.

The High Court unanimously held that the Article was contravened.

Their Honours held that as working holiday visas are sought by and issued to non-citizens, the 'same circumstances' to be considered could not include being the holder of a working holiday visa.[13]

For that reason, the comparison required was between the tax imposed on the taxpayer and the tax that would be imposed on an Australian resident national deriving the same income from the same source.

Their Honours noted that this was a question of the application of the domestic laws specific to a taxpayer in a specific income year.[14]

Their Honours found that the ordinary taxation laws as they applied to this taxpayer and to an Australian national in the same circumstances were the same but for the rate. An Australian national 'doing the same work, earning the same income, under the same ordinary laws' would pay less tax than the taxpayer.[15] Therefore, the effect of the NDA being contravened for this taxpayer was that the taxpayer should pay tax at the rates applying to resident nationals as set out in Part I of Schedule 7 to the ITRA 1986.

Their Honours found that Article 25(1) enjoins Australia 'to accord the same treatment to a national of the United Kingdom'[16] as that applying to an Australian national in the same circumstances.

ATO view of decision

Ordinary resides test

The Full Federal Court's decision was consistent with the Commissioner's views that the taxpayer was not a resident under ordinary concepts.

183-day test

The Commissioner agrees that the Court is not able to reach its own state of satisfaction and substitute it for that of the Commissioner's. The Commissioner observes that this is different to a review by the Administrative Appeals Tribunal (AAT).[17]

The facts upon which the Full Federal Court held that the taxpayer did not meet the ordinary resides test and the conclusion thereon indicate that, with respect,

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[12] *Addy – Full Federal Court* at [243] and [322].
[13] *Addy – High Court* at [29–30].
[14] *Addy – High Court* at [6].
[15] *Addy – High Court* at [34].
[16] *Addy – High Court* at [33].
[17] The AAT is able to reach the relevant state of satisfaction (see subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*).

Steward J was correct at [312(d)] to suggest that on these facts the Commissioner, had they considered it, may well have been satisfied that the taxpayer's usual place of abode was outside Australia and that she did not have an intention to take up residence in Australia.

In the normal course of events, the Commissioner would have a state of satisfaction by no later than when making an objection decision.[18] Consequently, and in the normal course of events, a taxpayer in similar circumstances as the taxpayer would be a non-resident (and the NDA would have no application to them).

It is not the Commissioner's view that all taxpayers who are present in Australia for more than one half of the year of income must lodge as residents, even though it would be reasonable for the Commissioner to be satisfied that their usual place of abode was outside Australia and they had no intention to take up residence in Australia. For the purposes of self-assessment, a taxpayer is entitled to assume that a discretion will be exercised in a particular way provided that it is reasonably arguable that it would be lawful for the Commissioner to exercise it in that way.[19] If it is exercisable only in one way, taxpayers should assume that it will be exercised in that way. A taxpayer who believes on good grounds that they have a usual place of abode outside Australia and does not have the intention to take up residence here should therefore self-assess on the basis that the Commissioner will be satisfied of the matters mentioned in the proviso.[20]

The decision of the Full Federal Court on this test involved technical questions that only arise when an appeal from a disallowed objection is made directly to the Federal Court and the appeal involves an administrative discretion. This part of the decision impact statement is directed at this (relatively rare) situation.

The Commissioner must make an assessment of the amount of the taxable income and the tax payable thereon 'from the returns or any other information in his possession'.[21] If the application of the 183-day test affects the taxable income or tax payable thereon in the circumstances of the taxpayer being assessed (which will not be the case if the taxpayer is resident regardless of that test), and the Commissioner has material before them that is relevant to the matters in the proviso, the Commissioner does not consider themself free to disregard that material (that is, so as to make a person resident whether or not they would have been satisfied of the matters in the proviso). The holding of a working holiday maker visa is relevant to both usual place of abode and intention to take up residence. Consequently, the Commissioner believes that where such information is in the Commissioner's possession, omission to consider it in applying the 183-day test involves making an assessment infected with an error of law.[22] The Commissioner also considers that the outcome of a consideration turning on the Commissioner's state of satisfaction that they as Commissioner are obliged to consider is a material fact necessary for the assessment.

The question of whether, in the absence of that fact, the Court can know all the material facts and can find that the assessed amount is wrong without remitting the matter to be considered by the Commissioner is one that, in a suitable case

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[18] The Commissioner is entitled to reach a state of satisfaction for the first time at objection; *Addy – Full Federal Court* at [313]. Note also that subsection 169A(3) of the ITAA 1936 means that any state of satisfaction reached as part of the objection decision will be taken to have been reached when making the assessment.

[19] See subsection 284-15(2) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

[20] The Commissioner is entitled to accept statements made by taxpayers in their returns (subsection 169A(1) of the ITAA 1936).

[21] Section 166 of the ITAA 1936.

[22] Albeit an assessment that is still a valid assessment (table item 2 in subsection 350-10(1) of Schedule 1 to the TAA).

unencumbered with the unusual history attending this case, and provided that the Commissioner is advised that it is proper to do so consistently with the principles outlined in advices received by the Solicitor-General, the Commissioner would invite the courts to consider further. However, cases where this question arises are likely to be rare.

The Commissioner agrees with the Full Federal Court that the taxpayer's residency ceased upon her departing Australia and that she was therefore only entitled to a part of, and not the full, tax-free threshold under the ITRA 1986.

Application of the non-discrimination article

The Commissioner considers that the effect of the decision is to tax the resident working holiday maker visa holder on the same basis as if they were an Australian national deriving the same income from the same sources in the same circumstances.

Where the resident working holiday visa holder derives working holiday maker taxable income as well as other income, they are taxed as an Australian resident national deriving that same income.[23] This may mean that they include in their assessable income any foreign income that an Australian resident national in the same circumstances would include.

Where the resident working holiday visa holder is a resident for part of an income year, the tax-free threshold will need to be pro-rated.

The Commissioner notes the High Court's comments on *Commissioner of Inland Revenue v United Dominions Trust Ltd* in relation to when a company is resident.[24] The Commissioner agrees that where the basis for the more burdensome treatment is residence, the NDA is not engaged. Specifically, the definition of when a company is resident does not engage the NDA.

Implications

To be entitled to any protection under the treaty, the working holiday visa holder must be both a national of a country with which Australia has a treaty with a NDA in the same form as the NDA in the UK double-tax convention and a resident of Australia.

Regarding any other working holiday maker visa holder, the working holiday maker rates apply unchanged and they continue to be taxed at those rates.

A person who is a national from one of the relevant countries must consider if they are likely to be residents of Australia. In the Commissioner's view, most people in Australia on a working holiday visa will, consistently with their visa conditions[25] and declarations made to obtain it, be on a holiday and will not be a resident. As was observed by Derrington J, an intention to be in Australia for an extended holiday is 'generally antithetical' to an intention to reside in Australia.[26]

The Commissioner considers that, on a consideration of their facts and circumstances, it will usually be the case that people visiting Australia on a working holiday visa who leave at the end of (or before) that visa are genuine visitors and not resident of Australia under ordinary concepts. For most people, their purpose is to have a holiday. They usually have a home overseas to which they return and neither

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[23] Noting that an Australian resident national will not have the benefit of Subdivision 768-R of the ITAA 1997.
[24] [1973] 2 NZLR 555; *Addy – High* Court at [26–27].
[25] Cl 417.211(4) and cl 462.217 of Schedule 2 to the *Migration Regulations 1994*.
[26] *Addy – Full Federal Court* at [81].

make and nor retain material connections with Australia once this purpose is at an end. Their work and accommodation habits are usually transient and deliberately flexible.

Most will not answer the description of a person who 'dwell[s] permanently or for a considerable time' in Australia or who has their 'settled or usual abode' in Australia.[27] While they may 'live', in the sense of 'stay' at a particular place even for extended durations, this is insufficient.[28] The association most working holiday visa holders have with Australia will be temporary and casual. Most are visitors.

Regarding the 183-day test and for similar reasons, the Commissioner considers that for most people entering and remaining in Australia on a working holiday visa their usual place of abode will remain outside Australia and they will not have an intention to take up residence in Australia. The latter is not shown by merely holding an intention to stay in Australia for a length of time much less by having some intention to stay for an undetermined period. [29] Credible evidence will be needed to show that the taxpayer is not a temporary visitor. The securing of a different type of longer-term visa may be such credible evidence.

The above views are consistent with the Full Federal Court's views in *Addy – Full Federal Court* and the Federal Court's view in *Stockton v Commissioner of Taxation* [2019] FCA 1679. They are also consistent with a number of other recent AAT cases which held that a person on a working holiday visa was not a resident.[30]

The Commissioner is not required to accept assertions regarding residency. Should a taxpayer wish to contend that they are a resident under either of those tests, the Commissioner will expect an explanation as to why they consider that they are a resident and may ask for supporting evidence (whether or not the taxpayer self-assessed as a resident or a non-resident).

The Commissioner will consider appropriate compliance strategies to ensure that working holiday maker visa holders are not self-assessing as residents when a consideration of the facts and circumstances would show that they are not resident.

Implications for impacted advice or guidance

The ATO will review working holiday maker related website guidance to reflect the view of the High Court.

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[27] See the ordinary meaning given to the word 'resides' in *Levene v IRC* [1928] AC 217 at [222] as cited by Derrington J in *Addy – Full Federal Court* at [73].

[28] *Addy – Full Federal Court* at [83].

[29] See *Harding v Commissioner of Taxation* [2019] FCAFC 29, at [36] where Davies and Steward JJ observed that a person may be a temporary visitor, and hence within the proviso to the 183-day test, despite staying in Australia for a number of years.

[30] *Dapper Coelho and Commissioner of Taxation* [2020] AATA 2474 where four separate applications were heard together; *MacKinnon and Commissioner of Taxation* [2020] AATA 1647; *Schiele and Commissioner of Taxation* [2020] AATA 286; *Clemens and Commissioner of Taxation* [2015] AATA 124; *Jaczenko and Commissioner of Taxation* [2015] AATA 125; *Koustrup and Commissioner of Taxation* [2015] AATA 126; *Gurney and Commissioner of Taxation* [2020] AATA 3813.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	17 December 2021
Due date:	11 February 2022
Contact officer:	Simon Weiss
Email address:	simon.weiss@ato.gov.au
Phone:	(02) 6216 1943
Contact officer:	Danielle Ellershaw
Email address:	danielle.ellershaw@ato.gov.au
Phone:	(08) 8208 1907

Legislative references

ITAA 1936
6(1)
166
169A(1)
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ITAA 1997
Subdiv 768-R

ITRA 1986
Sch 7 Pt I
Sch 7 Pt III

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5(2)

TAA 1953
Sch 1 284-15(2)
Sch 1 350-10(1)

Administrative Appeals Tribunal Act 1975
43(1)

Migration Regulations 1994
Sch 2 cl 417.211(4)
Sch 2 cl 462.217

Case references

Addy v Federal Commissioner of Taxation [2019] FCA 1768; 2019 ATC 20-719; 2019 110 ATR 839

Addy v Federal Commissioner of Taxation [2021] HCA 34; 2021 ATC 20-803

Clemens and Commissioner of Taxation [2015] AATA 124

Commissioner of Inland Revenue v United Dominions Trust Ltd [1973] 2 NZLR 555

Dapper Coelho and Commissioner of Taxation [2020] AATA 2474

Federal Commissioner of Taxation v Addy [2020] FCAFC 135; 382 ALR 68; 280 FCR 46; 171 ALD 44

Gurney and Commissioner of Taxation [2020] AATA 3813

Harding v Commissioner of Taxation [2019] FCAFC 29; 269 FCR 211; 365 ALR 286

Jaczenko and Commissioner of Taxation [2015] AATA 125

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Levene v IRC [1928] AC 217

MacKinnon and Commissioner of Taxation [2020] AATA 1647

Schiele and Commissioner of Taxation [2020] AATA 286

Stockton v Commissioner of Taxation [2019] FCA 1679; 110 ATR 772; 2019 ATC 20-713

Other references

Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains [2003] ATS 22

Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes of Income [1983] ATS 16

Explanatory Memorandum to the Income Tax (International Agreements) Amendment Bill 1983

Working holiday makers