


***Commissioner of Taxation v Pike -***

# Decision impact statement

## Commissioner of Taxation v Pike

<b>Court citation(s):</b>	[2020] FCAFC 158
<b>Venue:</b>	Full Federal Court: 24 August 2020
<b>Venue reference no:</b>	QUD 35 of 2020 (Full Federal Court)
<b>Judge names:</b>	Davies, White and Steward JJ
<b>Judgment date:</b>	22 September 2020
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Partly favourable to the Commissioner

## Impacted advice

 The ATO has reviewed the impact of this decision on related advice and guidance products.

## Précis

This Decision impact statement outlines the ATO's response to this case which concerns whether an individual was a 'resident' of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) and the application of the 'tiebreaker' test in the double-tax agreement between Australia and Thailand<sup>1</sup> (the DTA).

## Brief summary of facts

Mr Pike was born in 1972 in what became the Republic of Zimbabwe. While in Zimbabwe, Mr Pike developed a career in the tobacco industry and entered a long-standing de facto relationship with Ms Thornicroft. They have two sons, each born in Zimbabwe.

Ms Thornicroft accepted employment in Australia. Mr Pike, Ms Thornicroft and their sons arrived in Australia in March 2005. Mr Pike returned to Zimbabwe to complete his employment contract and dispose of or transport their assets but retained their house in Zimbabwe. He returned to Australia in September 2005.

Between 2005 and 2014, Mr Pike and Ms Thornicroft jointly rented a succession of three homes in Australia. They jointly purchased furniture and household appliances. They also jointly purchased motor vehicles for their use in Australia.

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<sup>1</sup> *Agreement between Australia and the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [1989] ATS 36.

Mr Pike was unable to secure employment in Australia and in March 2006 became aware of work in Thailand. He travelled to Thailand that month and accepted a position.

Mr Pike worked in Thailand for the following eight years. He returned to his family in Australia each year but spent most of his time working and living in Thailand. Mr Pike always returned to the home in Australia where Ms Thornicroft and their sons were. They discussed moving the family to Thailand, but Ms Thornicroft did not agree.

Between 2006 and 2014, Mr Pike occupied rented properties in Thailand. He regarded them as his homes in Thailand. While in Thailand, Mr Pike joined and actively patronised golf, rugby and cricket clubs, and formed enduring friendships.

Mr Pike, Ms Thornicroft and their sons were granted permanent residency in Australia on 16 February 2009. In August 2010 Ms Thornicroft and their sons were granted Australian citizenship. Mr Pike made enquiries about obtaining Australian citizenship.

In September 2010, Mr Pike and Ms Thornicroft purchased vacant land in Australia and sold their house in Zimbabwe. Their intention was to build a family home and provide something tangible in Australia for their sons. Ultimately, they sold the land undeveloped in 2013.

Mr Pike's April 2013 application for Australian citizenship was refused. He made another application in October 2013 which was successful, and he became an Australian citizen in 2014.

In 2014, Mr Pike relocated to Tanzania for employment purposes. He lived in fully-furnished rented accommodation and joined golf and tennis clubs there. In early 2016, Mr Pike accepted a position in Dubai in the United Arab Emirates.

## Issues decided by the Court

At issue was whether Mr Pike, an individual taxpayer, was a 'resident' of Australia for the purposes of subsection 6(1) of the ITAA 1936 for the income years ended 30 June 2009 to 30 June 2016 and the application of the tiebreaker test in the DTA to the years ended 30 June 2009 to 30 June 2014.

The first-instance<sup>2</sup> judge (Logan J) held that Mr Pike was a resident of Australia under the ordinary concepts test for the income years ended 30 June 2009 to 30 June 2016, and that Mr Pike was a resident under the domicile test from April 2014. Regarding the DTA, Logan J held that Mr Pike had a permanent home in neither Australia nor Thailand, had a habitual abode in both, and his closer personal and economic relations were with Thailand, with the result that Mr Pike was a resident solely of Thailand for the purposes of the DTA.<sup>3</sup>

The Commissioner appealed the finding that Mr Pike was solely a resident of Thailand on the basis that his closer personal and economic relations were with Thailand. The Commissioner also appealed the finding that Mr Pike was not a resident of Australia under the domicile test before April 2014. Mr Pike cross-appealed the findings that he was a resident according to ordinary concepts

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<sup>2</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185.

<sup>3</sup> The relevance of the outcome under the tiebreaker test in this case was whether Article 15 of the DTA permitted Australia to tax the income from the employment exercised in Thailand noting that whatever the outcome, Mr Pike would remain a resident of Australia for the purposes of subsection 6(1): see paragraph 66 of Taxation Ruling TR 98/17 *Income tax: residency status of individuals entering Australia*, and paragraph 13 of Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*.

and that he satisfied the domicile test from April 2014. Mr Pike also contended that Logan J erred in holding that he had a habitual abode in both Australia and Thailand. The Full Federal Court on appeal dismissed both the appeal and cross-appeal.

### **Ordinary concepts test**

Davies, White and Steward JJ agreed with the reasoning and conclusions of the first instance judge regarding the ordinary concepts test.

The first-instance judge placed significance on the finding that when Mr Pike returned to Australia, he returned not as a visitor but to resume residing in Australia as a husband (de facto) and father who resumed living at the family home.<sup>4</sup>

### **Domicile test**

The first-instance judge found that from April 2014, Mr Pike satisfied the 'domicile' test of residency in subparagraph (a)(i) of the definition of 'resident or resident of Australia' in subsection 6(1) of the ITAA 1936. His Honour found that Mr Pike did not obtain an Australian domicile until then, and further found that Mr Pike's permanent place of abode was Australia as it was not possible to conclude that Mr Pike had definitely abandoned Australia.<sup>5</sup>

The Full Federal Court concluded it was unnecessary to deal with this ground.<sup>6</sup>

### **Permanent home**

The first-instance judge concluded that Mr Pike did not have a permanent home in either Australia or Thailand. His Honour noted that in considering the concept of permanent home '... questions of fact and degree are necessary entailed'.<sup>7</sup> His Honour observed that even if he were wrong, there was nothing to distinguish the rented homes in Australia and Thailand such that one would be permanent and the other not.<sup>8</sup>

### **Habitual abode**

Davies, White and Steward JJ agreed with the first-instance judge that Mr Pike had a habitual abode in both countries<sup>9</sup>, and held that there was no basis for imputing the habitual abode of a person being the place where the individual has spent more days.<sup>10</sup>

The first-instance judge emphasised Mr Pike's life had two aspects; one aspect was working in Thailand and occupying premises there as a home, the other was living in Australia with his family for as long as possible.<sup>11</sup>

### **Personal and economic relations**

The first-instance judge held that Mr Pike's personal relations were closer to Australia and that his economic relations were overwhelmingly closer to Thailand. His Honour then concluded that 'when considered conjunctively, Mr Pike's personal and

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<sup>4</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [60].

<sup>5</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [85].

<sup>6</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [18].

<sup>7</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [96].

<sup>8</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [96].

<sup>9</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [33].

<sup>10</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [29].

<sup>11</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [97].

economic relations were closer to Thailand than Australia, between 2009 and 2014'.<sup>12</sup>

Davies, White and Steward JJ observed that Article 4(3) of the DTA '... does not place greater weight on personal factors over economic factors' but:<sup>13</sup>

... poses a composite test and in each case it will be a matter of fact and degree as to whether a taxpayer's personal and economic relations, viewed as a whole, support ties closer to one contracting state over the other contracting state.

Their Honours were not persuaded that the conclusion was wrong. Their Honours held that:<sup>14</sup>

[a]n appeal court will not overturn the decision of the primary judge merely because it prefers an outcome different from that adopted by the primary judge where both outcomes are equally available or finely balanced.

## **ATO view of decision**

### **Ordinary concepts test**

The Commissioner agrees with the first-instance judge and the Full Federal Court's decision that Mr Pike was a resident under ordinary concepts.

### **Domicile test**

On appeal, the Commissioner contested the first-instance judge's finding that Mr Pike acquired an Australian domicile only from the time he became an Australian citizen in April 2014 as it was only then that His Honour considered there was a requisite intention by Mr Pike to make Australia his home indefinitely. The Commissioner notes that His Honour observed that opinions could differ on this point.<sup>15</sup> This is a factual matter and the Commissioner does not consider it has any material implications for the domicile test.

The Commissioner agrees with the first-instance judge that Mr Pike's permanent place of abode was Australia from April 2014 as he had not definitely abandoned Australia. In the Commissioner's view, Mr Pike's permanent place of abode was Australia throughout the entire period.

### **Permanent home**

The Commissioner notes and agrees with the first-instance judge's observations that a rented accommodation can constitute a permanent home within the meaning of the DTA.<sup>16</sup> On appeal, the Commissioner did not take issue with the finding that on these facts it was open to conclude that Mr Pike did not have a permanent home in either country. The Commissioner observes that whether Mr Pike had a permanent home in neither country or in both countries, this component of the tiebreaker test was not going to resolve the issue of Mr Pike's residency.

### **Habitual abode**

The Commissioner agrees with the findings of the first-instance judge and the Full Federal Court that Mr Pike had a habitual abode in both Thailand and Australia.<sup>17</sup>

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<sup>12</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [104].

<sup>13</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [39].

<sup>14</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [41].

<sup>15</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [79].

<sup>16</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [96].

<sup>17</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [97]-[99] and *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [33].

On the ordinary meaning and consistent with the OECD commentary referred to by the first-instance judge<sup>18</sup>, the Commissioner considers that determining whether a person has a habitual abode requires ascertaining the frequency, duration and regularity of stays that are part of the settled routine of the individual's life. The decisions of the first-instance judge and that of the appeal are consistent with the Commissioner's view that a person's habitual abode cannot be determined just by time spent in each country.<sup>19</sup>

### **Personal and economic relations**

In applying this aspect of the tiebreaker test, the Commissioner notes the OECD commentary that provides that '... considerations based on the personal acts of the individual must receive special attention...'.<sup>20</sup> The Commissioner's view is that where personal and economic factors lay with both countries, the factors of more significance to the taxpayer have greater weight.

The Commissioner accepts the Full Federal Court's decision to not overturn the decision of the first-instance judge.

### **Implications for impacted advice or guidance**

None.

### **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.

<b>Date issued:</b>	13 November 2020
<b>Due date:</b>	11 December 2020
<b>Contact officer:</b>	Contact officer details have been removed as the comments period has expired.

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<sup>18</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [98], referring to OECD (2019), *Commentary on Article 4: Concerning the definition of Resident in Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris.

<sup>19</sup> *Pike v Commissioner of Taxation* [2019] FCA 2185 at [99].

<sup>20</sup> *Commissioner of Taxation v Pike* [2020] FCAFC 158 at [37].

## **Legislative references**

*Income Tax Assessment Act 1936* 6(1)

*Agreement between Australia and the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, [1989] ATS 36, Art 4

## **Case references**

*Pike v Commissioner of Taxation* [2019] FCA 2185

*Commissioner of Taxation v Pike* [2020] FCAFC 158

## **Other references**

TR 98/17

TR 2001/13

OECD (2019), *Commentary on Article 4: Concerning the definition of Resident in Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris

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