

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## 5 | Tax Residency of Individuals & Companies

Tax residency and source are the gateway to the Australian taxation system. If there is no tax residency or source in Australia, there is no Australian tax. So this is why tax residency plays such a vital role.

But how does one become an Australian or foreign resident for tax purposes? What does reside mean? Where is a person's permanent place of abode? What is a domicile of origin versus a domicile of choice? And where is central government and control? Robert Campbell digs deep into Australia's tax residency rules for individuals and companies and uncovers some interesting facts and stories.

If Australia was a low-tax haven, the ATO would probably not have a single residency dispute on their hands. But because Australia has one of the highest tax rates in the world, there are plenty. And almost all of these are about individuals and companies trying to prove that they are not Australian tax residents. And the Commissioner arguing that they are.

### Tax Residency of Individuals

An individual is either an Australian resident or a foreign resident for tax purposes. If somebody is not a resident, they are a foreign resident. Temporary residents are a special class of residents. Working holiday makers are a special class of foreign residents.

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#### Australian Resident

An individual is an Australian resident for tax purposes if they pass one of four distinctive tests:

- 1 – Reside in Australia
- 2 – Domicile in Australia unless a permanent place of abode outside Australia
- 3 – 183 days in Australia unless a usual place of abode outside Australia
- 4 – Member of a Commonwealth superannuation scheme

The residency test is the primary test for residency and is known as the common law test. Common law means case law developed over time through judges' rulings as opposed to statutory law embodied in legislation passed by legislatures or constitutional law embodied in the national constitution of Australia.

So the residency test is known as the common law test because nobody can tell from s 6 (1) ITAA 1936 what reside actually means and so had to refer to case law where judges tried to put some meaning into the word. The Domicile, 183 day and Commonwealth super tests all just extend the ordinary definition of "resident" and "reside".

#### Test 1 – Reside

Reside – so here we are: case law. The crux of case law is that it is constantly changing and doesn't necessarily come to a consistent conclusion. So here is a list of the most important court cases currently referred to:

*Applegate v FCT*: The judge referred to the dictionary meaning of reside as in to dwell permanently or for a considerable time, to have a usual abode, to live in a particular place – see *Applegate* re domicile test

*Iyengar* [2011]: Mr Iyengar was an engineer and took up a 2+ years appointment overseas but kept a home and family ties in Australia to which he returned: Australian tax resident.

*Sneddon* [2012]: Mr Sneddon worked in Qatar for 2.5 years but maintained a residence, car, internet, telephone, bank accounts and super in Australia: Australian tax resident.

*Murray* [2012]: Mr Murray even acquired a residential property overseas: Australian tax resident.

*Dempsey* [2014]: Mr Dempsey worked in the building and construction industry in Saudi Arabia and intended to reside outside of Australia: Foreign resident

*The Engineering Manager v FCT* [2014]: An engineer worked in Oman under an annually reviewed one year contract and returned periodically to visit his wife and children in Australia: Foreign resident

## Test 2 – Domicile

Under s 6 (1) ITAA 36 a person will be a resident of Australia if they have an Australian domicile unless they can prove that they have established a permanent place of abode outside Australia.

We all have a domicile – at all times – but only one at any point in time. Domicile of origin comes with birth and follows the domicile upon whom we are dependent in infancy. But our domicile of choice is in the country where we voluntarily fix our chief residence with the intention of residing indefinitely.

What is a permanent place of abode? It doesn't have to be permanent, the intention to stay permanently is enough.

### ***Applegate v FCT***

Mr Applegate was a solicitor who was asked by his firm to establish and manage a branch office in the New Hebrides (now part of Vanuatu). He gave up a lease on his Australian apartment and moved his family to Vila in the New Hebrides. The stay was for an unspecified period of time. Illness forced Applegate to return to Australia within two years. The Full Federal Court found that although Applegate had retained his Australian domicile, he had established a permanent place of abode elsewhere: Held not to be a resident.

### ***Boer* [2012] and *Sully* [2012]**

Two separate court cases but both were taken to not having established a permanent place of abode outside Australia: Australian tax resident

## IT 2650

IT 2650 discusses when and how a person temporarily leaving Australia to live overseas acquires a permanent place of abode overseas. Factors to consider how long the individual intends and then actually stays in Australia. A period of 2 years is normally a minimum. Whether the individual established a fixed home outside of Australia. And last but not least to what extent there is a continuing association with a place inside Australia.

### Test 3 – 183-Days

A person who is in Australia for 183 days or more becomes an Australian resident for tax purposes unless they can establish that their usual place of abode is outside of Australia with no intention to take up residency in Australia. The 183 days don't have to be consecutive.

So the domicile test refers to permanent place of abode and the 183-days test refers to usual place of abode. What is the difference? No idea.

### Test 4 – Commonwealth Superannuation

This the only objective test that in the mix. The only test that gives a clear Yes or No – unfortunately with very limited application. Anybody who is a member of an Australian government superannuation scheme – even if no longer contributing – is an Australian tax resident.

### Residency For Part of a Year

Under the reside or domicile test a person can be a resident for part of a year – from the day they arrive or until the day they depart. But there is conflicting case law re the 183- days test:

*Gregory v DCT (WA)* [1937]: If resident under the 183-day test, a tax resident for the whole year.

*Case S19*: If resident under the 183-day test, only a tax resident for the period actually in Australia.

### Temporary Resident

Temporary residents are Australian tax residents, just a special subcategory. An individual is a temporary resident if they hold a temporary migration visa like 457, 456, ETA or any visa which does not allow the holder to remain in Australia indefinitely (s995-1 ITAA 97).

### Foreign Resident

An individual is a foreign resident for tax purposes if they are not an Australian tax resident. ITAA 97 uses the term foreign resident – ITAA 36 uses the term non-resident – no difference.

### Working Holiday Makers

Working holiday makers are by definition on a 417 or 462 visa. They are foreign residents, just a special subcategory, regardless of the length of their stay in Australia.

## Tax Residency of Companies

A resident company is a company that either:

- Is incorporated in Australia or
- Carries on business in Australia and has its central management and control in Australia or
- Carries on business in Australia and has its voting power controlled by resident shareholders.

The first test is easy since objective. But things get complicated when a company is not incorporated in Australia. And the central management and control test (cm & c) is the main culprit.

### Central Management and Control

A long time ago in 1946, *Malayan Shipping* determined that central management and control is where the company carries on business. However, the tax world moved on from this premise. TR 2004/15 teated carrying on business as a separate test from the central management and control test (as well as the voting power test). So cm & c could be at the same location as the actual business – as in *Malayan Shipping* – but didn't have to. A company could have its cm & c in Australia but no business activities here and hence still be a foreign resident. *Esquire Nominees* made it even easier allowing overseas cm & c to receive advice and guidance from Australia

and still be a foreign resident.

But Bywater and the subsequent withdrawal of TR 2004/15 and issue of TR 2017/D2 and then TR 2018/5 changed all this.

Now cm & c is always part of a company's business. If a company has its cm & c in Australia, it is taken to be carrying on business in Australia and hence is a tax resident. In the old TR 2004/15 *Malayan Shipping* was an example of cm & c and place of business happening to be located at the same place. Now in TR 2018/5 this is no longer an example but the general concept. If cm & c is in Australia, then this is where the business is by definition – hence the concern.

### **Voting Power**

If Australian tax residents hold more than 50% of a company's voting power, then the company is an Australian resident – if not, the company is a foreign resident. If a company got most of its shareholders in Australia, then this test is straight forward. But we already know that the tax residency of individuals is not a straight forward affair.

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