IT 2650 - Income tax: residency - permanent place of abode outside Australia

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I 1012811	**RESIDENCY PERMANENT PLACE OF ABODE OUTSIDE AUSTRALIA**	**6(1)**

OTHER RULINGS ON THIS TOPIC: IT 2221, 2268, 2607

TITLE: INCOME TAX: RESIDENCY - PERMANENT PLACE OF ABODE OUTSIDE AUSTRALIA

NOTE:
- Income Tax Rulings do not have the force of law.
- Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Ruling.

PREAMBLE

The purpose of this Ruling is to provide guidelines for determining whether individuals who leave Australia temporarily to live overseas, for example, on temporary overseas work assignments or on overseas study leave, cease to be Australian residents for income tax purposes during their overseas stay. This preamble outlines various matters that are relevant to the content of this Ruling, under appropriate headings.

Statutory Definition

2. The terms "resident" and "resident of Australia" are defined in subsection 6(1) of the Income Tax Assessment Act 1936. So far as an individual is concerned, these terms are defined to mean:

"(a) a person, other than a company, who resides in Australia and includes a person-

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(ii) 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 his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(iii) 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; "

3. The above definition, in effect, provides four tests to ascertain whether an individual is a resident:

- residence according to ordinary concepts;
- the domicile and permanent place of abode test;
- the 183 day test; or
- the Commonwealth superannuation fund test.

4. This Ruling focuses on the first two tests referred to in paragraph 3, being the tests most widely applicable to persons who ordinarily reside in Australia but who leave Australia temporarily and are not actually living in Australia during the year of income.

Summary of Ruling

5. The Ruling concludes, bearing in mind the wide, general language used in the first test in the "resident" definition, and the state of satisfaction which must be reached in the second test, that it is not possible to provide conclusive rules for determining the residency status of individuals leaving Australia temporarily. The Ruling says, however, that the following factors need to be taken into account:

(a) the intended and actual length of the individual's stay in the overseas country;

(b) any intention either to return to Australia at some definite point in time or to travel to another country;

(c) the establishment a home outside Australia;

(d) the abandonment of any residence or place of abode the individual may have had in Australia;

(e) the duration and continuity of the individual's presence in the overseas country; and

(f) the durability of association that the individual has with a particular place in Australia.

The weight to be given to each factor will vary with individual circumstances of each case and no single factor is conclusive.

Possibility that person may be resident in two countries

6. This Ruling deals only with the question of residency for the purposes of Australia's income tax laws. However, the fact that a person is a resident of Australia for Australian income tax purposes does not mean that the person may not also be a resident of another country for the purposes of that country's taxation laws. A number of double taxation agreements to which Australia is a party recognise the possibility of a person being a resident of two countries, in other words, a person may have dual residency. Those agreements provide rules for determining the country of which the person is deemed to be a sole resident. Therefore, if a person is considered to be a resident of Australia as well as a resident of another country, regard must be had to the terms of the particular double taxation agreement in determining the person's residency status. A dual resident, who is treated as solely resident of another country for the purposes of the relevant double taxation agreement, remains a resident of Australia for the purposes of the Income Tax Assessment Act (compare paragraph 5 of Taxation Ruling IT 2607).

Definitions

"Reside"

7. The ordinary meaning of the word "reside", according to the Shorter Oxford English Dictionary, is to dwell permanently, or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.

"Domicile"

8. "Domicile" is a legal concept to be determined according to the Domicile Act 1982 and to the common law rules which the courts have developed in the field of private international law. The primary common law rule is that a person acquires at birth a domicile of origin, being the country of his or her father's permanent home. This rule is subject to some exceptions. For example, a child takes the domicile of his or her mother if the father is deceased or his identity is unknown. A person retains the domicile of origin unless and until he or she acquires a domicile of choice in another country, or until he or she acquires another domicile by operation of law (Henderson v. Henderson [1965] 1 All E.R.179; Udny v. Udny [1869] L.R.1 Sc.& Div. 441; Bell v. Kennedy [1868] L.R.1 Sc.& Div. 307 (H.L.)) .

9. The common law test of domicile of choice has now been restated in section 10 of the Domicile Act which provides:

> "The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country."

In addition, that Act abolished the former common law rule whereby a married woman had at all times the domicile of her husband.

10. In determining a person's domicile for the purposes of the definition of "resident" in subsection 6(1), it is necessary to consider the person's intention as to the country in which he or she is to make his or her home indefinitely. Thus, a person with an Australian domicile but living outside Australia will retain that domicile if he or she intends to return to Australia on a clearly foreseen and reasonably anticipated contingency e.g., the end of his or her employment. On the other hand, if that person has in mind only a vague possibility of returning to Australia, such as making a fortune (a modern example might be winning a football pool) or some sentiment about dying in the land of his or her forebears, such a state of mind is consistent with the intention required by law to acquire a domicile of choice in the foreign country - see In the Estate of Fuld (No. 3)(1968) p. 675 per Scarman J at pp. 684-685 and Buswell v. I.R.C (1974) 2 All E.R. 520 at p. 526.

"Permanent place of abode"

11. Having established that a person has his or her domicile in Australia, subparagraph (a)(i) of the definition of "resident" requires the Commissioner to be satisfied that the person's "permanent place of abode" is not outside Australia.

"Place of abode"

12. The expression "place of abode" refers to a person's residence, where one lives with one's family and sleeps at night (R v. Hammond (1852) 117 E.R. 1477 at p. 1488; Levene v. I.R.C.(1928) A.C.217 and I.R.C. v. Lysaght (1928) A.C.234). In essence, a person's "place of abode" is that person's dwelling place or the physical surroundings in which a person lives.

"Permanent"

13. The leading case on whether a permanent place of abode is outside Australia is F.C. of T. v. Applegate (79 ATC 4307;(1979) 9 ATR 899). The taxpayer, whose domicile was in Australia, had been sent by his employer, a firm of solicitors, to establish a branch office in Vila, New Hebrides. His absence was to be for an indefinite period in the sense that the period was not specified or defined but it was expected that it would be of a substantial length. It was also expected that later he would be recalled to Australia. In fact, he returned to Australia after 2 years, his stay being cut short by illness. The taxpayer claimed that the salary he earned in Vila was exempt from Australian tax being income derived by a non-resident from sources wholly out of

Australia. In that case, it was decided that, because the taxpayer could not be considered to have resided in Australia under the ordinary meaning of the word "reside", the extended definition of "resident" contained in paragraph (a)(i) had to be considered. Both the Supreme Court of New South Wales and, on appeal, the Full Court of the Federal Court of Australia held that the taxpayer had a permanent place of abode outside Australia. He was therefore a non-resident in the year of income concerned.

14. The Federal Court rejected the Commissioner's argument that a permanent place of abode outside Australia required an intention to live outside Australia indefinitely without any intention of returning to live in Australia in the foreseeable future, other than at some remote, albeit specific, point of time. The Court said that the term "permanent" must be interpreted in the context in which it appears. The Court said that in its context in the "resident" definition a permanent place of abode does not have to be "everlasting" or "forever". It means something less than a permanent place of abode in which a person intends to live for the rest of his or her life. It should be contrasted with a temporary or transitory place of abode outside Australia. It connotes a more enduring relationship with the particular place of abode than that of a person who is ordinarily resident there or who has there his or her usual place of abode. An intention to return to Australia in the foreseeable future to live does not prevent the taxpayer in the meantime setting up a "permanent place of abode" elsewhere. The Federal Court also found that the taxpayer's intention regarding the duration of his stay overseas was only one relevant factor to be taken into account. Of more importance is the nature and quality of use which the taxpayer makes of a particular place of abode overseas.

15. "Permanent place of abode", according to Fisher J (79 ATC at 4317; 9 ATR at 910-911), is :

> ..."the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with the particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place".

16. The case of F.C. of T. v. Jenkins 82 ATC 4098; (1982) 12 ATR 745, involved a bank officer who had been transferred to the New Hebrides for 3 years. He returned to Australia after only 18 months because of ill health. The taxpayer had tried to sell the family home before going overseas but was unable to find a buyer. The Australian home was eventually leased and the taxpayer retained a bank account in Australia.

17. The Supreme Court of Queensland held that the taxpayer had a permanent place of abode outside Australia during the period he

was overseas even though he had not at any material time formed an intention to remain indefinitely in the New Hebrides in the sense in which the word "indefinitely" is used in Applegate. Sheahan J considered that if a stay of 10 years could not sensibly be regarded as "temporary", neither should a stay of 3 years be so regarded. In giving evidence, the taxpayer had said that, under normal circumstances, he and his wife would have applied for an extension after the 3 years had lapsed. In addition, they had no fixed date on which to return to Australia until the taxpayer fell ill.

RULING

18. Liability to tax arises annually and the question where a taxpayer resides must be determined annually according to the facts applicable to the particular year of income under consideration. However, events which have happened since the end of the tax year may be taken into account in determining that question (Applegate per Franki J 79 ATC at p.4309; 9 ATR at p.902).

19. The first question to be asked in considering the residency status of a person temporarily leaving Australia, is whether he or she can be considered to reside in Australia. If the test of residence according to ordinary concepts is satisfied, there is no need to go any further. The person is a resident of Australia for income tax purposes.

20. The extended definition contained in subparagraph (a)(i) of the definition of "resident" is alternative to the ordinary meaning of the term "resides" (Applegate 79 ATC at p.4314; 9 ATR at p.907). In other words, even if the person is found not to "reside" in Australia within the ordinary meaning of the word, he or she may still fall within the extended definition of "resident". Conversely, if the person does "reside" in Australia within the ordinary meaning of that word, it is not necessary to determine whether the extended definition is satisfied.

Domicile

21. Generally speaking, persons leaving Australia temporarily would be considered to have maintained their Australian domicile unless it is established that they have acquired a different domicile of choice or by operation of law. In order to show that a new domicile of choice in a country outside Australia has been adopted, the person must be able to prove an intention to make his or her home indefinitely in that country e.g., through having obtained a migration visa. A working visa, even for a substantial period of time such as 2 years, would not be sufficient evidence of an intention to acquire a new domicile of choice.

Permanent Place of Abode

22. The word "permanent" in subparagraph (a)(i) of the definition of "resident" does not have the meaning of everlasting or forever but is used in the sense of being contrasted with temporary or transitory (Applegate 79 ATC at p.4314; 9 ATR at p.907).

23. It is clear from Applegate and Jenkins that a person's permanent place of abode cannot be ascertained by the application of any hard and fast rules. It is a question of fact to be determined in the light of all the circumstances of each case. Some of the factors which have been considered relevant by the Courts and Boards of Review/Administrative Appeals Tribunal and which are used by this Office in reaching a state of satisfaction as to a taxpayer's permanent place of abode include :

(a) the intended and actual length of the taxpayer's stay in the overseas country;

(b) whether the taxpayer intended to stay in the overseas country only temporarily and then to move on to another country or to return to Australia at some definite point in time;

(c) whether the taxpayer has established a home (in the sense of dwelling place; a house or other shelter that is the fixed residence of a person, a family, or a household), outside Australia;

(d) whether any residence or place of abode exists in Australia or has been abandoned because of the overseas absence;

(e) the duration and continuity of the taxpayer's presence in the overseas country; and

(f) the durability of association that the person has with a particular place in Australia, i.e. maintaining bank accounts in Australia, informing government departments such as the Department of Social Security that he or she is leaving permanently and that family allowance payments should be stopped, place of education of the taxpayer's children, family ties and so on.

Weight of factors

24. The weight to be given to each factor will vary with the individual circumstances of each particular case and no single factor will be decisive. Applegate seems to indicate, however, that greater weight should be given to factors (c), (e) and (f) than to the remaining factors, though these are still, of course, relevant. The fact that a taxpayer knows that he or she will return to Australia at a definite point in time (factor (b)) does

not, of itself, mean that he or she does not have a permanent place of abode outside Australia.

Factor (a) - length of overseas stay

25. Clearly, the longer an individual's stay in any one particular place, the more permanent in nature and quality of use is likely to be the stay in that place of abode. An individual's intention regarding the duration of the overseas stay and the length of the actual stay are only relevant factors. Where a taxpayer leaves Australia for an unspecified or a substantial period and establishes a home in another country, that home will represent a permanent place of abode of the taxpayer outside Australia, subject to a consideration of the other factors listed in paragraph 23 above. ***As a broad rule of thumb, a period of about 2 years or more would generally be regarded by this Office as a substantial period for the purposes of a taxpayer's stay in another country. It must be stressed, however, that the duration of the taxpayer's actual or intended stay out of Australia is not, of itself, conclusive and needs to be considered with all of the factors in paragraph 23 above.***

26. If, however, an individual with a usual place of abode in Australia has no fixed or habitual place of abode overseas but moves from one country to another or moves constantly within the same country (for example, from town to town or even from suburb to suburb) any association with a particular place overseas would be purely temporary or transitory and he or she would not be considered to have adopted an alternative domicile of choice or a permanent place of abode outside Australia. In such case, if the person could not be said to have acquired a domicile of choice outside Australia, the taxpayer would be considered to be a resident of Australia under subparagraph (a)(i) of the definition of "resident". On the other hand, a person may be considered to have a permanent place of abode in an overseas country where he or she establishes a home in that country notwithstanding that he or she moves to another home in the same country, subject to a consideration of the other factors listed in paragraph 23.

27. Generally speaking, a taxpayer who leaves Australia with an intention of returning to Australia at the end of a transitory stay overseas would remain a resident of Australia for income tax purposes unless he or she can satisfy the Commissioner that a consideration of the other factors listed in paragraph 23 requires the conclusion that during the year of income his or her permanent place of abode was outside Australia. What constitutes a mere transitory stay overseas for these purposes would vary with the circumstances of each case. ***However, as a general proposition, an overseas stay for a duration of less than 2 years would be considered as being of a transitory nature. It is stressed that the duration of the taxpayer's stay overseas is not of itself conclusive and must be considered with all the other factors listed in paragraph 23.***

Factor (c) - Whether the taxpayer has established a home outside Australia

28. The fact that an individual has established his or her home (in the sense of a dwelling place; a house or other shelter that is the fixed residence of a person, family or household) in an overseas country would tend to show that the place of abode in the overseas country is permanent. Acquisition of a home in the overseas country would be a very relevant though not conclusive factor. On the other hand, individuals or a family group who "make do" in temporary accommodation with limited resources and facilities such as in barracks, singles' quarters, aboard ships, oil rigs, or mining towns, will be less likely to be considered to have established a permanent place of abode overseas.

Factor (f) - Durability of association with a particular place in Australia

29. The relevance of bank accounts maintained in Australia varies depending on the types of accounts. If a taxpayer closes all bank accounts in Australia and transfers all funds (including investment funds) to accounts in the overseas country, this would indicate less durability of association with a place in Australia than if all accounts in Australia were maintained. On the other hand, even if an individual closes all accounts for everyday use (such as cheque and savings accounts) and maintains a long term investment account, it is still possible to establish that, on the basis of other factors, the individual has a permanent place of abode in the overseas country.

30. Similar considerations apply in relation to the place of education of children. For example, an individual may be considered to have a permanent place of abode in an overseas country even though his or her children continue their schooling in Australia due to the absence of adequate educational facilities in the overseas country. However, the fact that the children continue their schooling in Australia despite the presence of adequate educational facilities in the overseas country, would tend to show a more durable association with a place in Australia.

EXAMPLES

31. An Australian resident employee of a mining company was transferred overseas for a temporary work assignment for a period of 2 years and intended to return to Australia at the end of that period. The purpose of the assignment was for the employee to gain wider work experience. The employee was initially accompanied by his wife and children but the children returned to Australia to continue their schooling. The employee spent his annual holiday in Australia. During his absence from Australia he rented out his home and maintained bank accounts in Australia. He made no investments in the overseas country and remitted all money in excess of living requirements to Australia for investment. In those circumstances the taxpayer was not considered to be a resident of Australia under the ordinary

meaning of the word "resident" but was considered to be a resident under the extended definition of that term.

Result: resident.

32. A person who had just completed tertiary studies decided to leave Australia for an unspecified period of time to work in one overseas country to gain work experience. Before leaving she closed all bank accounts except for a 5-year interest bearing deposit. She had no established home in Australia and no spouse or children in Australia. While she was forced to return to Australia within 18 months due to an illness, she was considered to be a non-resident as it was her original intention to remain outside Australia for an unspecified period of time and she was considered to have a permanent place of abode in the overseas country.

Result: non-resident.

The opposite conclusion would have been reached if she had intended to (and did) spend one year each in 2 countries and then had travelled for a further period of one year, making do in temporary or transitory accommodation in each country as she went. In that case she would not have a permanent place of abode in any of the overseas countries and would continue to be a resident of Australia.

Result: resident during the 3-year overseas stay.

33. A bank manager was posted to the New Hebrides for 2 years. During that time he and his family lived in a furnished house provided by the bank. The taxpayer's home in Australia was let. On leaving Australia, the taxpayer expected a further overseas posting after his 2-year period. He advised the Department of Social Security that the family was leaving Australia permanently and child endowment payments should cease. The taxpayer was considered to have abandoned his place of residence in Australia and to have formed the intention to, and in fact did, reside outside Australia. His place of abode in Vila was not merely temporary or transitory; rather, it was intended to be and was in fact his home for the time being (Case S19 85 ATC 225; 28 CTBR (NS) Case 29).

Result: non-resident.

34. A bank officer was posted from Australia to the New Hebrides for 2 years only and never intended to stay any longer. During his overseas posting he maintained bank accounts in Australia, into one of which family allowance payments continued to be made, and let his Australian home unfurnished. He was accompanied by his wife and children. His place of abode in the New Hebrides was considered to be temporary or transitory for two reasons. Firstly, he lived, by the bank's continuing permission, in a house leased by the bank in the New Hebrides. Secondly,

having regard to the 2-year period of his appointment, the taxpayer's relationship with his place of abode in Port Vila lacked " a more enduring relationship" (see Applegate per Fisher J 79 ATC at p.4317; 9 ATR at pp 910-911) with the particular place of abode than that expected to exist where a person ordinarily resides there or has there his usual place of abode (Case Q68 83 ATC 343; Case 132 26 CTBR(NS) 913).

Result : resident.

35. An engineer was sent by his Australian employer to the Philippines on a project assignment for a minimum period of 3 to 4 years and he decided to relocate his family in the Philippines. In fact, the assignment was terminated after 2 years and the taxpayer returned to Australia. It was always his intention to return to Australia at the completion of the project. He retained his Australian home and rented it out. On arriving in the Philippines, the taxpayer and his family initially resided for short periods at a hotel and in an apartment. Later, he sub-leased a house which the family occupied until their return to Australia. Having regard to the nature and quality of his use of the place of abode in the Philippines, the taxpayer was considered to have established a permanent place of abode outside Australia (Case R92 84 ATC 615; Case 145 27 CTBR(NS) 1131).

Result : non-resident.

36. An Australian chartered accountant was seconded to his employer's London office for a period of 2 years or "such longer period as mutually agreed upon". After arriving in London the taxpayer and his wife bought an apartment and lived there for one year and later used rented accommodation, all the time renting out his Australian home. In the event, the taxpayer did not accept the offer to stay on with the firm after his initial period of employment largely due to the fact that his wife wished to return to Australia. After an extended holiday in Europe, he returned to Australia. In view of his decision to purchase the matrimonial home in London and not to stay overseas solely for the basic period of the 2-year secondment, the taxpayer was considered to have a permanent place of abode outside Australia (Case T28 86 ATC 276; 29 CTBR (NS) Case 31).

Result : non-resident.

37. An Australian missionary went overseas for a period of 4 to 6 years with the probability of again being posted overseas for a similar period after completion of her furlough leave in Australia. She and her husband owned a house in Australia which they rented out during their absence. They intended to return to Australia at the end of their missionary work. She was considered to be a non-resident during the period of her absence overseas (Case Q95 83 ATC 472; 27 CTBR (NS) Case 18). However, during the period of furlough in Australia and while she was in Australia awaiting reappointment to another overseas post, she was not

considered to have a permanent place of abode outside Australia and was a resident of Australia.

Result: non-resident during the overseas absence.

38. An airline company employee took a 2 to 3 year posting to an overseas country expecting to return to Australia at the end of that period. She was accompanied by her spouse and children and purchased a home in the overseas country while renting out the family home in Australia. She was considered to have remained a resident of Australia. However, if she decided to stay in the overseas country for a further period of, say, 2 years, she was to be treated as a non-resident during the additional 2 year period.

Result: resident during her posting.

39. An engineer went to a developing country to manage an aid project. He received a salary supplement paid under an Australian Government assistance scheme. He expected to remain in the overseas country for 18 months and then to obtain a posting to manage a similar project in another developing country. He was considered to have a permanent place of abode in the overseas country and to be a non-resident of Australia. A different conclusion may have been reached if it had been his intention to return to Australia at the end of the first posting.

Result: non-resident.

40. An advertising executive secured a position with a U.K. firm and undertook to work in London for 20 months. She sold her home in Australia and purchased a home in the U.K. She enrolled her two children in a secondary school near the new home which they attended for 2 years. She had no other close family ties in Australia. At the end of the 20 months, she decided to extend her stay by 1 year. She was considered to have a permanent place of abode in the U.K. and not to be a resident of Australia.

Result: non-resident.

40. A person who went to the U.K. to work for 3 years and established a place of abode there was not considered to be an Australian resident during that period. At the end of the 3-year period, before returning to Australia she travelled around France for one year and Spain for another year, combining travel and casual employment. During the additional two years, she was not considered to have a permanent place of abode in either Spain or France and was therefore a resident of Australia.

Result: non-resident during the first three years but a resident for the next two years.

41. A taxpayer with an Australian domicile and an established home in Australia established a second home in an overseas country. The taxpayer and his family spent just over 6 months at the

overseas home and the rest of each year in his Australian home. Because of the length of the taxpayer's stays in Australia, the duration of his presence overseas and the lack of continuity of his presence overseas led to the conclusion that he had not established a permanent place of abode in the overseas country. This conclusion was supported by the extent of his durability of association with his home in Australia.

Result: resident.

42. A businessman operating an import/export business spends over 6 months every year in the overseas country with which most of the business is carried out. His wife travels with him during the 6-month stay overseas. Their children, aged between 20 and 32, live in Australia. The businessman owns a home in Australia where he lives for just under 6 months each year and a home in the other country where he lives the rest of the time. He holds investments and other accounts in both countries. Because of the length of his stays in Australia, the conclusion was reached, having regard to the duration of his presence overseas and the lack of continuity of his presence overseas, that he had not established a permanent place of abode in the overseas country. This conclusion was supported by the extent of the durability of his association with Australia. In the absence of evidence that he had adopted a domicile of choice in the other country (for example, a migration visa to the other country), he was considered to be a resident of Australia and therefore subject to Australian income tax on all income derived by him.

Result: resident.

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