

# ***Harding v Commissioner of Taxation -***

# Decision impact statement

## Harding v Commissioner of Taxation

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| <b>Court citation(s):</b>  | [2019] FCAFC 29  |
| <b>Venue:</b>              | Full Federal Court   |
| <b>Venue reference no:</b> | QUD 442 of 2018  |
| <b>Judge names:</b>        | Logan, Davies and Steward JJ                                   |
| <b>Judgment date:</b>      | 22 February 2019<br>Special Leave refused on 13 September 2019 |
| <b>Appeals on foot:</b>    | No   |
| <b>Decision outcome:</b>   | Unfavourable to the Commissioner                               |

### Précis

At issue was whether the taxpayer, an individual, was a 'resident' of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* for the 2011 income year under either the ordinary meaning of resides (the 'ordinary concepts test') or under subparagraph 6(1)(a)(i) (the 'domicile test'). The Court at first instance<sup>1</sup> found that Mr Harding was not a resident under the ordinary concepts test but was a resident under the domicile test. Mr Harding appealed on the application of the domicile test (and the ATO put on a notice of contention regarding the ordinary concepts test). The Court on appeal found that Mr Harding was not a resident under either test. The Commissioner's special leave application to the High Court was refused.

### Brief summary of facts

Mr Harding was an Australian citizen. He worked and lived for over 15 years in Saudi Arabia with his then wife and children. Following the worsening of the political and geopolitical situation in Saudi Arabia, Mr and Mrs Harding decided to relocate to Australia. Mrs Harding arrived first with the children in 2004. Mr and Mrs Harding built a house in Queensland. Mr Harding joined his family in Australia in May 2006.

Mr Harding worked in Australia and, dissatisfied with his employment opportunities in Australia, took up an offer to work in Saudi Arabia in February 2009. The Hardings' agreed that that Mr Harding would live in Bahrain and commute each day to Saudi Arabia and that Mrs Harding would join Mr Harding with their youngest son toward the end of 2011 after their middle child completed high school.

When Mr Harding left Australia in March 2009 he took his personal possessions, and those he did not take he sold (including his boat and car) or left for his sons.

Upon his return to the Middle East, Mr Harding started making plans to relocate his wife and youngest son to Bahrain. Mrs Harding and the children visited Mr Harding and they looked for appropriate accommodation and enrolled their youngest son in a school in Bahrain. Mr Harding purchased a car for his wife to use when she joined him in Bahrain. Mr Harding returned to Australia regularly each year to visit his family. In the 2011 income year he spent 91 days in Australia, generally when working conditions permitted, and stayed in the family home.

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<sup>1</sup> *Harding v Commissioner of Taxation* [2018] FCA 837.

From 2011, Mrs Harding indicated her reluctance to return to the Middle East. Mr Harding was not prepared to alter his plans and the pursuit of his employment opportunities in the Middle East. The first instance judge accepted that the purposes of Mr Harding's extended visits in the 2011 income year were to see his family and to encourage Mrs Harding to come to Bahrain.<sup>2</sup> Mr and Mrs Harding separated around October 2011 and ultimately divorced.

In Bahrain, Mr Harding leased and lived in an apartment building and moved between fully furnished apartments within that same building. He initially took a two bedroom apartment and then moved to a one bedroom apartment in June 2011 when he knew his family would not be joining him. In 2014, Mr Harding committed to moving to Oman for work. His relationship at the time ended as his then partner was reluctant to move to Oman. Mr Harding subsequently met and married another person and they commenced living together in Oman.

## Issues decided by the Court

### Ordinary concepts test

Davies and Steward JJ, with Logan J agreeing, agreed with the reasoning and conclusion of the first instance judge regarding the ordinary concepts test. The first instance judge placed substantial significance on the finding that Mr Harding held a strong and fixed intent<sup>3</sup> to resume his previous lifestyle<sup>4</sup> in the Middle East irrespective of whether his family ultimately joined him there.<sup>5</sup> The first instance judge noted that the objective circumstances surrounding Mr Harding's departure were consistent with this intent<sup>6</sup> and that his conduct prior to and after the 2011 income year were also consistent with that intent.<sup>7</sup> His connections to Australia in the relevant year were 'remnants of his prior residency' and not consistent with ongoing residency.<sup>8</sup>

The first instance judge observed that the maintenance of a house in Australia where a spouse and children lived and the maintenance of a house as a family home would usually be important indicators of residency.<sup>9</sup> However, his Honour considered that in the 'unusual'<sup>10</sup> circumstances of this case, those factors assumed less significance and concluded that the nature and quality of Mr Harding's continued presence in Australia was not consistent with residing in Australia.

The Full Federal Court observed that Mr Harding's connections with Australia either supported the finding that Mr Harding was not a resident, or were insufficient to overcome the significance of Mr Harding's intention to leave indefinitely.<sup>11</sup>

### Permanent place of abode

Davies and Steward JJ, with Logan J agreeing, found that the expression 'place of abode', in the specific legislative context, referred not only to a specific house or flat or other dwelling but also referred to a town or country.<sup>12</sup>

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<sup>2</sup> *ibid* at [81].

<sup>3</sup> *ibid* at [81].

<sup>4</sup> *ibid* at [51].

<sup>5</sup> *ibid* at [54].

<sup>6</sup> *ibid* at [55] and [56].

<sup>7</sup> *ibid* at [55] and [77].

<sup>8</sup> *ibid* at [84].

<sup>9</sup> *ibid* at [59] and [80].

<sup>10</sup> *ibid* at [51].

<sup>11</sup> [2019] FCAFC 29 at [54].

The Full Federal Court referred to the Explanatory Notes accompanying the *Income Tax Assessment Act 1930* that inserted the current definition of resident and said<sup>13</sup>:

...Where it can be shown to the Commissioner's satisfaction that that person has "definitely abandoned" their Australian residence, Parliament's intention is that that person should not be subject to federal income tax. A person who ceases permanently to live in Australia, but who nonetheless considers themselves still to be an Australian might fall within this category.

The phrase 'permanent place of abode' directed attention to the place, extending to a town or country, where the person was living in a permanent way and required identification of a single country where the person could be said to be living permanently.<sup>14</sup>

### **Commissioner's satisfaction**

Davies and Steward JJ noted that the criterion in subparagraph (a)(i) of the definition of 'resident' in subsection 6(1) of the *Income Tax Assessment Act 1936*, namely whether the person's permanent place of abode was outside Australia, turns upon the Commissioner's satisfaction. Their Honours observed that this was not merely a procedural step, but reserves to the Commissioner a function that forms part of the criteria of residence.<sup>15</sup>

## **ATO view of decision**

### **Ordinary concepts test**

The Commissioner considers that, regarding the ordinary concepts test, the first instance judge followed the familiar process of applying the ordinary meaning of 'resides' to the circumstances of the individual. The descriptions in the case law of what it means to 'reside' in a location include:

- to dwell permanently<sup>16</sup>
- to have a settled or usual abode<sup>17</sup>
- to establish a home<sup>18</sup>
- to habitually live.<sup>19</sup>

These all direct attention to the nature, duration and quality of a person's presence, and their association with a place including a consideration of their intention. The question of whether a person resides in Australia is always one of fact and degree and, as noted by the first instance judge, one where reasonable minds may differ. The process engaged in by the primary judge is the same process followed by the Commissioner, albeit a different conclusion was reached.

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<sup>12</sup> Ibid at [26] and [40].

<sup>13</sup> Ibid at [36].

<sup>14</sup> At [40].

<sup>15</sup> At [20].

<sup>16</sup> *Levene v Commissioners of Inland Revenue* [1928] AC 217, page. 222, per Viscount Cave LC.

<sup>17</sup> *Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13; (1941) 64 CLR 241, page 249, per Williams J.

<sup>18</sup> *Hafza, M. v Director-General of Social Security* [1985] FCA 201.

<sup>19</sup> *Koitaki ParaRubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13, (1941) 64 CLR 241, page 249.

The Commissioner accepts that, in the particular circumstances of Mr Harding, described by the first instance judge as ‘unusual’<sup>20</sup>, rare<sup>21</sup> and extraordinary<sup>22</sup>, it was reasonable to conclude that Mr Harding’s presence in Australia during the 2011 income year did not amount to residing in Australia under the ordinary concepts test. We note that the circumstances in which the first instance judge made this finding included Mr Harding’s history of living in the Middle East and the importance he placed on his return there.

The Commissioner agrees with Logan J’s comments where his Honour said<sup>23</sup>:

...In the answering of that question, it is of cardinal importance not to elevate into matters of principle in a later case particular facts found decisive in the different circumstances of an earlier case.

Any pattern of working overseas and returning to Australia at intervals must be examined against the individual circumstances. This case stands for no higher proposition than that Mr Harding, when his circumstances were examined, was found not to reside in Australia.

Regarding intention, we agree with the first instance judge’s observation that ‘the objective manifestation of a person’s intention is often a more accurate indicator of their state of mind at a particular time in the past than is an assertion about that alleged prior intent’.<sup>24</sup>

### **Permanent place of abode**

Regarding the domicile test, the Commissioner will apply the Full Federal Court’s construction and, in determining whether the Commissioner is satisfied that a person’s permanent place of abode is outside Australia, will consider whether the person has:

- definitely abandoned residence in Australia, and
- commenced living permanently in a specific country overseas.

In deciding whether the person’s permanent place of abode is outside Australia, the Commissioner will consider the facts and circumstances surrounding the person’s departure from Australia, their arrangements in relation to the overseas country and nature of their presence there.

The Commissioner notes that the definition given to ‘place of abode’ was inclusive. We consider that the nature of the dwelling, or dwellings, and the particular use made of it, or them, will form part of the relevant facts and circumstances taken into account as to whether a person has definitely abandoned residence in Australia and commenced living permanently in a country overseas. In this respect, we note that the factors listed in paragraph 23 of Taxation Ruling IT 2650 *Income tax: residency – permanent place of abode outside Australia* remain relevant.

Each case will turn on its facts. The facts in this case provide an illustration of where a person’s permanent place of abode is outside Australia and are an application of the law to the specific facts of that case.

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<sup>20</sup> *Harding v Commissioner of Taxation* [2018] FCA 837 at [51].

<sup>21</sup> *Ibid* at [86].

<sup>22</sup> *Ibid* at [86].

<sup>23</sup> [2019] FCAFC 29 at [8].

<sup>24</sup> *Harding v Commissioner of Taxation* [2018] FCA 837 at [43].

### **Commissioner's satisfaction**

The significance of the discretion afforded to the Commissioner in determining whether a person's permanent place of abode is outside Australia is that in a case where the facts are such that reasonable minds could differ, the Commissioner's opinion, or on review, that of the Administrative Appeals Tribunal, will be determinative.

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

The ATO will review IT 2650 to reflect the view of the Full Federal Court and in particular the interpretation that 'place of abode' refers not only to a dwelling but can also refer to a country.

### **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.

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| <b>Date issued:</b>     | 2 December 2019   |
| <b>Due date:</b>        | 22 January 2020   |
| <b>Contact officer:</b> | Contact officer details have been removed as the comments period has expired. |

### ***Legislative references***

Income Tax Assessment Act 1930 Explanatory Notes

### ***Case references***

Harding v Commissioner of Taxation [2018] FCA 837; (2018) 108 ATR 137; 2018 ATC 20-660

Hafza, M. v Director-General of Social Security [1985] FCA 201; (1985) 6 FCR 444; 60 ALR 674

Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation [1941] HCA 13; 64 CLR 241; (1941) 6 ATD 82; [1941] ALR 125

Levene v Commissioners of Inland Revenue [1928] AC 217

### ***Other references***

IT 2650

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