INSTITUTE OF PUBLIC ACCOUNTANTS®

2024 Tax Guide

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Client verification guidelines

Registered tax agents and BAS agents must implement client identity verification processes.

In particular, the Tax Practitioners Board (TPB) requires practitioners to take appropriate proof of identity steps to verify the identity of:

- all new clients (including representatives of new clients)
- new representatives of existing clients
- existing clients where there are concerns the client may not be who they say they are.

Failure to do so may result in a breach of various obligations under the Code of Professional Conduct under section 30-10 of the *Tax Agent Services Act 2009* (TASA 2009) and result in a range of disciplinary sanctions being imposed by the TPB.

The TPB has issued Practice Note TPB(PN) 5/2022 – Proof of identity requirements for client verification which sets out the minimum steps that registered tax practitioners should apply in determining the identity of clients.

The ATO has also issued accompanying guidance on such client verification processes especially the range of methods that can be practically applied to establish the proof of identity of an individual or any other entity.

Practitioners are encouraged to read both sets of guidance in conjunction with each other.

Reference

Practice Note TPB(PN) 5/2022 – Proof of identity requirements for client verification

https://www.tpb.gov.au/tpb-practice-note-tpbpn-52022-proof-identity-requirements-client-verification

ATO publication 'Agent client verification methods'

https://www.ato.gov.au/Tax-professionals/Your-practice/Tax-and-BAS-agents/Agent-Client-Verification-methods/

Individuals

2024 individual's income tax return

At the time of writing, the 2024 individual income tax return form was yet to be released.

Residency of individuals

On the front page of the tax return is the question "Are you an Australian resident?".

To address this question, we need to consider the provisions of the ITAA 1997 which assess Australian resident and foreign resident taxpayers for income tax purposes.

Australian resident for tax purposes

Sections 6-5 and 6-10 of ITAA 1997 say that a taxpayer who is a tax resident of Australia is assessable on ordinary and statutory income derived from all sources whether in or out of Australia.

Tip – temporary residents

Special concessional rules apply to residents that are also 'temporary residents' for tax purposes which are discussed further below.

Tax alert

It may be possible to be a resident of more than one country for tax purposes.

Where an individual is also a resident of another country, a Double Tax Agreement (if there is one between Australia and the other country) may provide guidance as to which jurisdiction has taxing rights in respect of that individual.

Importantly, the provisions of a double tax agreement take priority over Australia's domestic tax law.

A list of Australia's double tax treaties can be found at:

https://treasury.gov.au/tax-treaties/income-tax-treaties/

See *FCT v Pike* [2020] FCAFC 158 in which it was held that a taxpayer who resided in Australia under ordinary concepts was not an Australian resident for income tax purposes due to that individual also being a resident of Thailand applying the tie-breaker test in the Double Tax Agreement between Australia and Thailand.

Non-resident for tax purposes

In contrast, a non-resident is liable to Australian tax only on ordinary and statutory income from Australian sources under sections 6-5 and 6-10 of the ITAA 1997 (as their foreign sourced income is not subject to tax here).

In addition to that, non-resident taxpayers:

- are subject to different marginal tax rates the lowest rate of which is currently 32.5%;
- are not entitled to the tax-free threshold of $18,200;

Tax alert – part year residents

Where a person is a resident of Australia for only part of the year, the tax-free threshold that applies to residents is only available on a pro-rata basis.

Where an individual is only resident for part of the year the tax-free threshold will be at least $13,464. The remaining $4,736 of the full tax-free threshold will be pro-rated according to the number of months the individual was an Australian tax resident. This amount will be calculated by the ATO based on the information included in the return.

Part year residents

- are not entitled to most tax offsets (including the franking credit tax offset);
- are not entitled to the 50% CGT discount for the period of their non-residency;
- are not entitled to the main residence exemption (subject to certain exceptions discussed below);
- are not liable to pay the Medicare levy; and
- are liable to a final withholding tax on certain investment income (e.g., interest, unfranked dividends) rather than include such amounts in assessable income.

Tax alert – main residence exemption

The main residence exemption has been removed for non-residents for CGT events happening at or after 7:30 pm AEST on 9 May 2017 (subject to certain exceptions and transitional arrangements).

Accordingly, foreign resident individuals will generally need to recognise any capital gain or loss arising from the disposal of their ownership interest in a main residence where a contract for sale has been entered into on or after 9 May 2017.

However, a main residence exemption will be available to an individual where that individual has been a foreign resident for a continuous period of 6 years or less and certain 'life event' tests are also met under section 118-110(5) of the ITAA 1997.

Such life events include that during the person's period of foreign residency either they, their spouse or child under 18 years of age had a 'terminal medical condition'; the spouse or child died during that period; or a CGT event occurred during that period because of an agreement on a marriage or relationship breakdown which would be subject to CGT rollover relief under section 126-5 of the ITAA 1997.

For the purposes of applying the above rules apply the residency tests for individuals summarised below.

In addition, the main residence exemption will be available to ownership interests in dwellings acquired before 9 May 2017 if the CGT event in respect of that dwelling occurs on or before 30 June 2020, (as long as the property was held continuously by that individual at all times from 9 May 2017 until immediately before the time the CGT event happened).

Rules for determining tax residency

The rules for determining tax residency are not the same as those applied by the Department of Immigration and Citizenship for immigration purposes or by Centrelink for social security purposes.

For tax purposes, there are four tests to determine whether an individual is an Australian resident. Only one of the tests needs to be satisfied.

A resident is defined in section 6(1) of the ITAA 1936 as:

i. "a person (other than a company) who resides in Australia (the '**ordinary concepts test**')

and includes a person –

ii. whose domicile is in Australia, unless the Commissioner is satisfied that his or her permanent place of abode is outside Australia (the '**domicile test**');

iii. 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 or her usual place of abode is outside Australia and that he or she does not intend to take up residence in Australia (the '**183-day test**'); or

iv. who is a member of the Commonwealth Superannuation Scheme established by deed under the *Superannuation Act 1990* or was an eligible employee for the purposes of the *Superannuation Act 1976* (or the spouse or child under 16 of a member (the '**superannuation test**').

Each of these tests is examined further below.

Impact on taxpayers

The following general rules apply to these common scenarios:

Temporary departures

If a taxpayer goes overseas temporarily and does not set up a permanent home in another country, he or she will generally continue to be treated as an Australian resident for tax purposes.

Overseas students

Overseas students who come to Australia to study and are enrolled in a course that is more than six months long are generally treated as Australian residents for tax purposes.

Working holiday makers

Most people who come to Australia for a working holiday or to visit will remain foreign residents for tax purposes (see Tax alert below).

Broadly, the first $45,000 of a working holiday maker's income is taxed at 15%, with the balance taxed according to their residency status. This includes people working on a subclass 417 or 462 visa. See further below for exceptions.

Note that each of the above are general rules only, and the taxpayer's residency should still be determined applying the above residency tests to that individual's particular circumstances.

Proposed legislative changes

The former Morrison Government announced on 11 May 2021 as part of the 2021-22 Federal Budget that it would adopt the recommendations made by the Board of Taxation

concerning changes to the criteria that is applied in determining the residency of an individual for Australian income tax purposes.

Amending legislation was to be enacted applying these changes which was to start the day after Royal Assent of the enabling legislation.

Under the proposed changes, the primary residency test will be a 'bright line' test under which a person who is physically present in Australia for 183 days or more in any income year will be an Australian tax resident for that year.

Individuals who do not meet the primary test because they have been in Australia for less than 183 days will be subject to secondary tests based on a combination of physical presence and measurable objective criteria.

Separate residency tests will apply where the 183 day test is not met on an individual commencing or ceasing residency for tax purposes.

For example, an individual will commence under this secondary test where the individual is in Australia for 45 days or more, and that person satisfies two of four factors in the year in which they commence residency. The four factors being the right to reside permanently in Australia or having Australian accommodation, an Australian family and Australian economic connections.

The Albanese Government have yet to announce whether they will proceed with these changes or the date from which any such proposed changes may apply but did issue a Consultation Paper on 21 July 2023 seeking further feedback on the proposed changes.

Ordinary concepts test

Under the ordinary concepts test, an individual is a resident if that person resides in Australia.

The tax law does not define the word 'reside' – therefore we must rely on the word's ordinary meaning.

The ordinary meaning of the term 'reside' has been judicially expressed to mean *'...to dwell permanently, or for a considerable time, to have one's settled or usual abode, to live in a particular place.'*

As the test focuses on whether an individual's presence is usual in Australia as opposed to a temporary or casual presence it is necessary to look at the nature of the person's presence in and connection to Australia.

Factors that commonly inform that connection include:

- the full period of an individual's physical presence in Australia (both in the current year and in expected future years);
- the taxpayer's intention or purpose whilst in Australia (in which case the ATO will have regard to contemporaneous documentation such as passenger cards and visa documents where necessary);
- the individual's behaviour while in Australia (and whether the way the individual lives reflects a degree of continuity, routine or habit consistent with residing in Australia);

- any family, business or employment ties in Australia (e.g. whether a person is engaged in long term employment or has enrolled in a university course in Australia);
- the maintenance and location of the person's assets (e.g. whether and individual lives in an Australian property or has Australian based cars, bank accounts or superannuation investments); and
- the individual's social and living arrangements (e.g. joining clubs or enrolling children in school, redirecting mail to Australia and committing to a residential lease).

Importantly, none of the above factors is decisive in itself and weight must be given to each factor depending on the particular circumstances.

However, many of these factors are in practice interrelated. For example, continued family connections are often also accompanied by having assets in Australia (such as a house or furniture) and behaviour which is consistent with a familiar routine while in Australia. By contrast temporary visitors often have few assets and few social connections.

ATO examples

1. Markus expressly states that he has no intention of staying in Australia. However, the way he has organised his personal life – bank accounts, 12-month lease on rental property – reveals that he is well prepared for a lengthy or ongoing stay. In this case, Markus is likely to be considered an Australian resident for tax purposes.
2. Yusef comes to Australia to work. His wife and four children remained in Iran. This particular aspect of Yusef's behaviour is not generally consistent with the activities associated with residing in a particular place.

   However, the absence of his family does not mean that he will never be regarded as residing here. Other factors, like the state of the marital relationship and other aspects of Yusef's behaviour while in Australia could have a bearing on this.

ATO reference: https://www.ato.gov.au/individuals-and-families/coming-to-australia-or-going-overseas/residency-tests/residency-the-resides-test

Tax alert

There is no specific time threshold after which a person will become an Australian resident.

Tax planning point

Appropriate documentation should be maintained to support your client's residency or non-residency status for tax purposes. For example, where someone has ceased Australian residency, this could be evidenced by proof of:

- updating address for correspondence to an overseas address
- cancellation of memberships with clubs or associations or a private health insurance policy
- assets that have been sold

Reference

Taxation Ruling 2023/1 – 'Income tax: residency tests for individuals'.

Taxation Ruling TR 2023/1 replaced Taxation Ruling TR 98/17 which dealt with inbound individuals and Taxation Ruling IT 2650 which dealt with outbound individuals and both of these rulings have both now been withdrawn.

The updated ruling provides guidance on both inbound and outbound individuals in a single consolidated ruling which applies the current residency rules but which also takes into account important recent judicial decisions which were handed after the issue of the withdrawn rulings.

Taxation Ruling 2023/1 can be downloaded at https://www.ato.gov.au/law/view/document?docid=TXR/TR20231/NAT/ATO/00001

Domicile test

Under this test, a person will be an Australian resident for tax purposes if their domicile is in Australia unless they have a permanent place of abode overseas.

Accordingly, the domicile test has two limbs which must be separately considered being the 'domicile in Australia' and permanent place of abode overseas requirements which are each separately discussed below.

Impact on taxpayers

This test has relevance where an Australian moves overseas for a period.

What is a person's 'domicile'?

A person's domicile is the place that the common law regards as a person's domicile (as modified by the *Domicile Act 1982*).

A person's domicile can be established in three ways:

1	**Domicile of origin**	This is based on the domicile of a person's father other than where the father is deceased or unknown in which case it will be determined by the domicile of the person's mother.
2	**Domicile of dependence**	This will be relevant where a person (such as a minor) lacks capacity to acquire their own domicile, and their domicile is determined by reference to someone else's domicile such as their parents.
3	**Domicile of choice**	This will arise where an individual (who has capacity) has voluntarily decided to acquire a domicile in another country. To acquire a domicile of choice you must have both a lawful presence to be in that country and an intention to make a home indefinitely in that country.

A person can only have one domicile at any point in time.

A person's domicile of origin will continue until a different one is acquired either by choice or by operation of law.

If you have an Australian domicile and you are living outside Australia, you will retain your Australian domicile if you intend to return to Australia on a clearly foreseen and reasonably anticipated contingency such as upon the end of an employment contract.

However, an Australian-domiciled person is not a resident where the Commissioner is satisfied that their 'permanent place of abode' is outside Australia.

What is a 'permanent place of abode'?

A person will have their permanent place of abode overseas where they have retained their Australian domicile but have definitely abandoned their residency in Australia and commenced living permanently overseas.

For the purposes of this test the word 'permanent' does not have the meaning of everlasting or forever, but is used in the sense of being contrasted with the meaning of temporary or transitory.

In addition, the expression 'place of abode' refers to the physical surroundings in which a person lives which extends to the town or country in which they live.

Therefore, it is not necessary to be living in a particular dwelling in a certain way for a place of abode to be considered permanent, provided that the nature of the individual's presence in a town or country is consistent with both abandoning residency in Australia and living in that town or country in a permanent way.

Having a permanent place of abode overseas involves having definitely abandoned residency in Australia.

It is only if your permanent place of abode is overseas that you are not a resident under the domicile test.

Conversely, if you move from country to country or place to place, you will not have a permanent place of abode overseas and will therefore remain a resident of Australia based on your domicile.

When determining whether a person has a permanent place of abode outside of Australia, the following factors are relevant:

- the length of overseas stay. The longer the period a person stays the long and more permanent their place of abode overseas. However, as a rule of thumb two years is a substantial period of time in determining that a person has abandoned their Australian residency and commenced to live in a permanent way overseas;
- the nature of accommodation. The type of accommodation and conditions upon which accommodation is occupied overseas will be relevant in ascertaining whether any place of abode overseas is a permanent place of abode. While it is not necessary to live in a particular dwelling in a permanent way, the accommodation provides a relevant indication of whether your presence overseas is permanent or more temporary in nature. Staying in temporary accommodation (e.g. hotels, barracks or a ship's cabin), or accommodation arranged or owned by an employer on a non-exclusive basis for the duration of the overseas stay, usually indicates the presence overseas is not permanent. By contrast retaining a home in Australia is not a significant factor if it is leased to an

arm's length party whilst overseas but keeping it vacant available for private use may indicate that the overseas stay is more transitory in nature; and

- durability of association. The strength of the connections established and maintained overseas and of those retained in Australia will be relevant. This includes not only the retention of the family home but also the location of family and social ties as well as the location and maintenance of bank accounts and other assets, maintenance of professional registrations and licences and recreational activities.

Reference

Taxation Ruling 2023/1 – 'Income tax: residency tests for individuals'.

As discussed, Taxation Ruling 2023/1 has replaced withdrawn Taxation Ruling IT 2650 which previously dealt with outbound individuals.

Accordingly, reference should now be made to Taxation Ruling 2023/1 in applying the domicile test.

Taxation Ruling 2023/1 can be downloaded at https://www.ato.gov.au/law/view/document?docid=TXR/TR20231/NAT/ATO/00001

ATO example

Bronwyn, an Australian resident, receives a job offer to work overseas for three years, with an option to extend for another three years.

Bronwyn, her husband and three children decide to make the move.

They rent out their home in Australia as they intend to return one day.

Bronwyn is unsure if she will extend the option to stay after three years. She will decide later depending on how the family like life.

While overseas, they will rent a house with an accommodation allowance provided under Bronwyn's contract.

Bronwyn is a foreign resident for tax purposes because she does not satisfy the ordinary concepts test – This is due to:

- the length of her physical absence from Australia; and
- other circumstances not consistent with residing in Australia, even though she has retained the family home in Australia, such as establishing a home overseas with her family and renting out her family home in Australia.

Bronwyn has not satisfied the domicile test as

- her permanent place of abode is outside Australia due to the length of time she has committed to being overseas, the establishment of a home overseas, and her family going with her overseas;
- the fact that she will not be selling the home in Australia, although relevant, is not persuasive enough to overcome the finding on the basis of the other factors; and
- it is arguable that she has abandoned her home in Australia for the duration of her stay, by renting it out.

ATO reference: https://www.ato.gov.au/individuals-and-families/coming-to-australia-or-going-overseas/your-tax-residency

***Harding v FCT* [2019] FCAFC 29**

The Full Federal Court found notwithstanding the fact that a taxpayer's residence in Bahrain was temporary in nature (i.e. serviced apartments in Bahrain as opposed to a permanent family home), his permanent place of abode was still in Bahrain.

The Court held that the expressions 'place of above' in the above context refers to the physical surroundings in which a person lives which extends to the town or country in which they live rather than to the permanency of any particular dwelling in that town or country.

Accordingly, the taxpayer was found to have abandoned his residency in Australia because he had a permanent place of abode was in Bahrain despite living in serviced apartments rather than a permanent family home.

Note that the High Court refused to grant the Commissioner special leave to appeal against this decision. Accordingly, the decision stands and has been incorporated into the commentary on the domicile test under Taxation Ruling TR 2023/1

Tip

A taxpayer will be treated as an Australian resident based on their domicile of origin where that person cannot establish a permanent place of abode because they spend most of their time in international waters or ports as was found to be the case in *Duff v FCT* [2022] AATA 3675.

183-day test

A person will be a resident under this test if they are in Australia for more than 183 days during the income year unless:

- their usual place of abode is elsewhere;

Tax alert

'Usual place of abode' is not the same as 'permanent place of abode' (for the purposes of the domicile test).

and

- they do not intend to take up residency in Australia.

The purpose of this test is to allow a certain length of presence to be relied upon to establish residency unless the individual is properly regarded as a visitor.

A person on an extended holiday would be such a visitor and not treated as a resident. While this is a separate test to the resides test, it is often the case that if you are not residing in Australia under ordinary concepts, your usual place of abode will be outside Australia.

The 183-day test applies in relation to an income year and does not require the that the duration of time that the individual spent in Australia must be continuous as it is the cumulative number of days spent in Australia which determines whether the 183-day threshold is met.

What is a person's usual place of abode?

A person's usual place of abode is the place at which a person would usually live, (or would usually live but for being absent from it due to, say, a transient lifestyle or other circumstances).

In most cases a person will commonly have an abode being a permanent dwelling that is located overseas.

However, a person who had rented accommodation overseas in a particular town or country that they terminated will have a usual place of abode in that town or country if they, say, intended to resume living in that town or country on their return from Australia.

Relevant factors in considering whether your usual place of abode is outside Australia include:

- where you lived before and after your time in Australia;
- the availability of your overseas dwelling to you (if you have one) while you were in Australia;
- where your possessions and assets are;
- the type of visa you have and the length of your intended stay;
- your purpose of coming to Australia; and
- the travel arrangements you made, including whether you departed from and returned to the same place of abode outside Australia.

▶ ATO example

Lars lives in Munich and is granted a 12 month working holiday maker visa. He plans to return to Munich, and resume his career as a carpenter, after his 12 month working holiday in Australia. He takes 12 months leave from his work. He owns a home in Munich which he does not rent out.

Lars arrives in August 2023 and has five different jobs whilst he travels around Australia, visiting every capital city during his 12 month stay. He stays in no place for longer than two months. Lars only works for seven of the 12 months he is in Australia as he is primarily here to see as much as he can, picking up carpentry work to supplement his funds as he travels. Lars is not an Australian resident under ordinary concepts and although he is in Australia for more than six months in the year ended 30 June 2024, Lars will not satisfy the 183 day test, as his usual place of abode is outside Australia.

ATO reference: https://www.ato.gov.au/individuals-and-families/coming-to-australia-or-going-overseas/residency-tests/residency-the-183-day-test

Reference

Taxation Ruling 2023/1 – 'Income tax: residency tests for individuals'.

Taxation Ruling 2023/1 can be downloaded at https://www.ato.gov.au/law/view/document?docid=TXR/TR20231/NAT/ATO/00001

Superannuation test

An individual will also be an Australian resident if that individual was a member of a superannuation scheme established under the *Superannuation Act 1990* or was an eligible employee for the purposes of the *Superannuation Act 1976*.

Accordingly, a person will be a resident for tax purposes if they are a contributing member of the:

- Public Sector Superannuation Scheme (PSS), or
- Commonwealth Superannuation Scheme (CSS)

(but not a member of the Public Sector Superannuation Accumulation Plan (PSSAP)).

It generally covers Commonwealth Government employees, their spouse and children under the age of 16.

Impact on taxpayers

This test has relevance where an Australian moves overseas for a period. However, a retired member cannot be a member of the above funds which require a member to be a permanent or temporary employee of the Australian public service (see ATO Interpretative Decision ATO ID 2002/1064). It should also be noted that the PPS and CCS schemes are now closed to new members which will reduce the relevance of this test over time (see Taxation Ruling TR 2023/1),

ATO examples

- Delphi, an officer of the Department of Foreign Affairs and Trade, is posted to Thailand for a period of three years and is a member of the Commonwealth Superannuation Scheme (CSS). Delphi will remain an Australian resident under this test.
- Peter, a retired public servant in receipt of a superannuation pension from the Public Sector Superannuation Scheme (PSS) – a Commonwealth superannuation fund – moves to South Africa for a period of three years to look after an ailing relative. Peter does not satisfy the superannuation test as he is no longer a contributing member.
- John is not an eligible employee in the CSS or PSS schemes. He has been living in Tokyo for ten years. His spouse is a Commonwealth employee and is an eligible employee of the CSS scheme. John is an Australian resident under this test.

ATO reference: https://www.ato.gov.au/individuals-and-families/coming-to-australia-or-going-overseas/residency-tests/residency-the-superannuation-test

Reference

Taxation Ruling 2023/1 – 'Income tax: residency tests for individuals'.

Taxation Ruling 2023/1 can be downloaded at https://www.ato.gov.au/law/view/document?docid=TXR/TR20231/NAT/ATO/00001

Temporary residents

Special income tax and CGT rules apply to an Australian resident who is also considered to be a temporary resident for tax purposes under Subdivision 768-R of the ITAA 1997.

Who is a temporary resident for tax purposes?

For tax purposes, a temporary resident is defined under section 995-1 of the ITAA 1997 to be a natural person:

- who holds a temporary visa under section 30(2) of the *Migration Act 1958*;

Tip

Temporary visa under section 30(2) of the Migration Act 1958 is a visa to remain in Australia during a specified period, until a specified event occurs or while the holder of the visa has a special status.

Further details of various visas available can be found on the Department of Home Affairs website:

Explore visa options (homeaffairs.gov.au)

- who is not an Australian resident for the purposes of the *Social Security Act 1991*; and
- whose spouse (if applicable) is not an Australian resident for the purposes of the *Social Security Act 1991*.

Tax alert

Generally, an Australian resident for the purposes of the *Social Security Act 1991* includes Australian citizens or those holding a permanent resident visa. However, take care to also consider whether the spouse of a client is an Australian resident for social security purposes as all three limbs of the above definition must be met in order for an individual to be regarded as being a temporary resident. As a corollary an individual will be treated as an Australian resident who is not entitled to any concessional relief if any of the above tests are failed.

Tax alert

There is no time limit on how long an individual may be a temporary resident. However, it is prudent to monitor temporary residency as the terms of a visa may change and result in temporary residency ceasing and an individual becoming an Australian resident for tax purposes.

What are the special concessions for temporary residents for tax purposes?

The income tax and CGT concessions available to individuals who are temporary residents include the following:

- most foreign source income of a temporary resident is treated as non-assessable non-exempt income (NANE) including foreign-source dividends, interest, rental income and pension income (see ATO ID Interpretative Decision 2006/163). However, as a corollary no deductions for costs incurred in deriving such NANE are allowable; and
- capital gains and losses arising from a CGT event which happens in respect of assets that are not classified as 'taxable Australian property' are disregarded (excluding certain gains on shares and rights acquired under employee share schemes); and
- interest paid offshore by the temporary resident to a foreign lender is not subject to withholding tax.

Accordingly, an individual who is a temporary resident is only assessable on the following amounts for Australia income tax purposes:

- Australian sourced income ordinary income and statutory income including remuneration for services provided in Australia whilst the person is a temporary resident;
- foreign sourced employment income to the extent that it relates to employment or services provided whilst the individual was a temporary resident;
- capital gains or losses which arise in respect of taxable Australian property; and
- alienated personal services income which is assessable under Division 86 of the ITAA 1997 where such income has been alienated by a temporary resident to an associated entity.

Tax alert

Even when your client is determined to be a temporary resident for tax purposes, it is still necessary to determine whether your client is a resident or non-resident under the tests discussed above so as to determine whether resident or foreign resident rates will apply.

Tax planning point

A temporary resident who becomes an Australian resident for tax purposes is taken to have acquired assets that are not taxable Australian property as their market value immediately before that individual ceases to be a temporary resident (other than for assets acquired prior to 20 September 1985).

Special rules for working holiday makers

As discussed, the first $45,000 of a working holiday maker's income is taxed at 15% with the balance taxed at marginal rates according to the residency status of that worker. This includes people working on a visa subclass 417 or 462. These rules were previously referred to as the 'backpacker tax' and are punitive in that the working holiday maker is not entitled to any tax free threshold.

Unless the payer is reporting via Single Touch Payroll it is necessary for the payer to issue an income statement or a payment summary to the working holding maker.

In these circumstances all payments made to such a worker should be shown in the gross income section of the payment summary and identified using payment type 'H' in describing the type of gross payment.

The amount of the working holiday maker net income should also be disclosed at Label A4 of the working holiday maker's income tax return, (being the income earned whilst working in Australia on a 417 or 462 working holiday visa less any deductions incurred in deriving such income).

However, following the High Court's decision in *Addy v FCT* [2021] HCA 34 an individual will not be regarded as working holiday maker if that individual is an Australian resident for tax purposes and is also from a country with which Australia has a non-discriminatory clause under a double tax agreement which prevents that individual from having a more burdensome tax liability than other Australian residents.

This is important as individuals who are treated as working holiday makers are not entitled to the tax free threshold that is generally available to Australian resident individuals.

***Addy v FCT* [2021] HCA 34**

In this test case, the taxpayer appealed to the High Court that she should not be subject to the Working Holiday Maker tax on the basis that it breached the non-discrimination provisions of Article 25(1) of the double tax agreement between Australia and the UK given Ms Addy was an Australian resident for tax purposes.

The High Court unanimously held that the application of the 'backpacker tax' contravened Article 25(1) of the above tax treaty as the only reason that Ms Addy had a more onerous tax liability than other Australian resident individuals was because she was a UK citizen.

The decision only has application to working holiday makers from a jurisdiction with which Australia has a double tax treaty which has a similar non-discrimination article to that of Article 25(1) of the Australia and UK double tax agreement.

Further, the decision only affects those individuals who are Australian residents for tax purposes under one of the four Australian tax residency rules for individuals which is unlikely to be usually met as a backpacker will not ordinarily be a resident under either the ordinary concepts or 183-day tests.

However, eligible working holiday makers may be assessed at Australian resident tax rates (including access to the tax free threshold) where they are both:

- an Australian resident for tax purposes, and
- from Chile, Finland, Germany (from 2017–18), Israel (from 2020–21), Japan, Norway, Turkey, the UK or Iceland (from 2022-23) being jurisdictions where there is a non-discrimination clause under the relevant tax treaty.

Tax alert

Generally, employers of working holiday makers on a temporary visa also have to make superannuation guarantee contributions in respect of eligible employees. When those employees leave Australia, they may be able to apply to have their super paid to them as

a Departing Australia Superannuation Payment (DASP). The tax on any DASP made to working holiday makers is 65%.

Interest, dividends and royalties paid to non-residents

When a non-resident receives interest, unfranked dividends or royalties from an Australian payer, the payer is required to deduct PAYG withholding tax.

The rates of withholding tax are:

Interest	10%
Unfranked dividends	30%
Royalties	30%

This non-resident withholding tax is a final tax. That is, once the withholding tax has been paid, the income need not be disclosed in the non-resident's Australian income tax return.

Tip

A dividend is not subject to withholding tax to the extent to which it is franked.

Where the non-resident is a resident of a country with which Australia has a Double Tax Agreement, the rate or withholding tax on such payments may be lower.

Typically, the withholding tax rate that would apply to dividends paid to a non-resident of a treaty country would be 15% but reference should be made to the terms of any double tax agreement of the jurisdiction of the relevant non-resident to check the correct rate of withholding tax.

Similarly, the withholding tax rate on royalties paid to non-residents in treaty countries will differ depending on the terms of the particular double tax agreement of the country in which the recipient is a non-resident, but the rate will ordinarily be in the range of 5% to 15%.

Tax alert

Residents who pay interest to foreign lenders are normally required to deduct and remit a 10% interest withholding tax to the ATO, subject to some exceptions for US and UK lenders. Temporary residents are exempt from this obligation.

Tax planning point

Where no withholding tax has been deducted (perhaps because the non-resident recipient failed to advise the payer of their non-resident status), the non-resident will still have a liability to withholding tax. The non-resident will need to advise the ATO to allow it to issue a withholding tax assessment. This can be done in one of the following ways:

- by providing the relevant details of income in a 'schedule of additional information' to their relevant income tax return.
- by disclosing the amounts in the relevant income items in the non-resident's tax return.

In both cases, the ATO will issue an assessment of withholding tax (separate to the non-resident's ordinary Notice of Assessment). The withholding tax rates will apply (not non-resident rates of tax).

Example

Maria is a non-resident who lives in Italy. She earned interest from the Royal Bank on funds invested in Australia. Non-resident withholding tax was deducted. She also received a fully franked dividend from PHB Limited and income from a rental property in Perth.

Maria is only required to disclose the rental income and expenses in her Australian tax return.

The non-resident withholding tax paid on the interest income is a final tax. The franking credit on the franked dividend does not provide a tax offset to Maria, but does reduce the with amount of withholding tax payable on the dividend to nil. There are no further obligations in respect of that dividend.

Foreign resident capital gains withholding

Broadly, under Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), purchasers of:

- 'taxable Australian real property' (TARP) with a market value of $750,000 or more;
- an 'indirect Australian real property interest' being a 10% or more interest in an Australian entity whose underlying assets are principally comprised of TARP based on the market value of that entity's assets where the market value of that interest is $750,000 or more; or
- an option or right to acquire TARP or an indirect Australian real property interest

must pay an amount to the ATO if they acquire that asset from one or more foreign vendors in certain circumstances.

The amount payable to the Commissioner is generally 12.5% of the asset's purchase price (unless the Commissioner exercises his discretion under section 14-235 of the TAA 1953).

Warning

The above withholding tax rules are not confined to foreign resident vendors as resident vendors can also be subject to these rules if they fail to comply with the requirements of Subdivision 14-D although exclusions may apply.

Withholding tax relief for Australian resident vendors

Australian resident vendors of TARP will typically prefer to receive all the proceeds of sale of their property rather than having to prepay some amount of their tax liability to the Commissioner.

It will therefore be in their interest to obtain a clearance certificate from the ATO before settlement in the case of TARP which has a market value of $750,000 or more which will effectively ensure that no withholding tax is retained from the vendor's purchase price in respect of the vendor who is listed on the clearance certificate.

In applying for a clearance certificate, the vendor will make a declaration that the vendor is an Australian resident vendor and provide certain other prescribed information.

A copy of the clearance certificate application form can be downloaded from the ATO website at https://www.ato.gov.au/single-page-applications/frwt-certificate

In relation to sale of indirect Australian real property interests the Australian resident vendor will be able to similarly provide a vendor declaration either about their residence status or about the nature of the property.

References

Law Companion Ruling LCR 2016/5 – Foreign resident capital gains withholding regime: the Commissioner's variation power:

https://www.ato.gov.au/law/view/document?DocID=COG/LCR20165/NAT/ATO/00001&PiT=99991231235958

Law Companion Ruling LCR 2016/6 – Foreign resident capital gains withholding regime: amount payable to the Commissioner:

https://www.ato.gov.au/law/view/document?DocID=COG/LCR20166/NAT/ATO/00001&PiT=99991231235958

Law Companion Ruling LCR 2016/7 – Foreign resident capital gains withholding regime: options:

https://www.ato.gov.au/law/view/document?DocID=COG/LCR20167/NAT/ATO/00001&PiT=99991231235958

The ATO will allow a credit to the vendor when the:

- purchaser has paid the withholding tax to the ATO (and the ATO provides the vendor with confirmation that a withholding payment has been paid on their behalf); and
- the vendor has lodged an Australian income tax return claiming the credit in respect of the capital gain arising from the disposal of the asset.

A credit may also be refunded if the vendor did not have to pay capital gain on the relevant asset (which would be the case with, say, the disposal of a main residence).

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