

# GMS Flash Alert



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## Australia - Outside Australia "Permanent Place of Abode": Taxpayer Wins in Court Decision

On 25 February the full bench of the Federal Court of Australia published its decision in *Harding v Commissioner of Taxation*.<sup>1</sup> The full bench overturned last year's decision by the single judge, and found that the taxpayer was a nonresident of Australia by virtue of having established a permanent place of abode in Bahrain.

In *Harding*, the taxpayer accepted that he was an Australian-domiciled person. On that basis, he could only cease Australian tax residence if he had ceased to reside in Australia under ordinary concepts, and had also established a permanent place of abode outside the country.

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### WHY THIS MATTERS

It is important that employers and their expatriates carefully assess the tax residency position based on all facts and circumstances, to help ensure that the tax implications of the assignment are understood, and the appropriate tax reporting is undertaken through payroll and in personal tax returns.

This decision by the Full Court is an indication that taking a less narrow position on what constitutes a "permanent place of abode" could mean a taxpayer who can demonstrate that he or she is living in a foreign country for an extended period can break Australian tax residency.

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### Case Details in Brief

The taxpayer was an Australian citizen living and working in the Middle East for more than six years. During this period, Mr. Harding stayed in a number of fully furnished apartments within one apartment complex in Bahrain.

The case concerned only one of the years of income during which Mr Harding lived in Bahrain. The single judge had found that for this year, the taxpayer had ceased to reside in Australia under ordinary concepts. However, in forming the view that the taxpayer had not established a permanent place of abode in Bahrain, His Honour placed emphasis on

the taxpayer's occupancy of a series of apartments in Bahrain, rather than just one on an ongoing basis. Factors in the analysis of "permanence" included Mr. Harding having purchased his own television and linen, but not having to pay for utilities.

In the joint judgment<sup>2</sup> of Davies and Steward JJ, with which Logan J concurred, a broader interpretation of "place of abode" was taken:

*"In our view, for the reasons given below, the 'place' of abode, in the specific legislative context here, also refers to a town or a country. In 2011, Mr Harding's permanent place of abode was Bahrain. That was the 'place' where he was living. For that reason he was not a resident of Australia."*

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## KPMG NOTE

This more holistic approach to the concept of a "place of abode" is welcome in the context of a piece of legislation that has been in place for decades, and makes room for appropriate recognition of the variety of accommodation circumstances that may exist for expatriates working in different parts of the world.

The judgment also aligns with the objectives set out in the Board of Taxation's review of individual residency rules, which included a streamlining of the factors that should be considered in determining tax residence, so as to require a less "forensic" examination of a taxpayer's circumstances.

While the Commissioner of Taxation may yet seek leave to appeal to the High Court, the fact that a decision fit for the 21<sup>st</sup> century has been reached in relation to the application of 20<sup>th</sup> century legislation is welcomed. It is hoped that the Board of Taxation's review may in the near future be turned into genuine 21<sup>st</sup> century legislation.

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## FOOTNOTES:

- 1 Harding v Commissioner of Taxation [2019] FCAFC 29.
- 2 See the [Court Order](#) dated 22 February 2019 in Harding v Commissioner of Taxation [2019] FCAFC 29.

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