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GMS Flash Alert

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Australia - ATO Accepts Full Federal Court's Judgement in Tax Residency Case

The Australian Taxation Office (ATO) recently released a Decision impact statement[1] accepting the conclusions reached by the Full Federal Court in *Commissioner of Taxation v Pike*[2] in its decision considering the principles of tax residence and the application of the residence tie-breaker provisions of international double taxation treaties.

The ATO's statement does not suggest this will result in a change to their publicly available guidance.

WHY THIS MATTERS

This should be of particular interest to employers whose employees work overseas while maintaining a family and home in Australia.

An employee's tax residency position, coupled with location of work and payer, will dictate an employer's Australian PAYG withholding and reporting obligations.

It is therefore important that employers have the appropriate processes in place to properly assess the facts and circumstances to identify an employee's Australian tax residence position.

The Decision

- The Full Federal Court upheld the initial decision handed down by Judge Logan J in the lower court in *Pike*,[3] agreeing that the taxpayer should be considered an Australian tax resident during tax years 2009-2016 under the ordinary meaning of the word "resides."

- It was further agreed that the taxpayer should be considered a treaty resident of Thailand during that period, by virtue of the third residence tie-breaker test outlined in the Australia/Thailand tax treaty.

Case Facts

- The taxpayer, his de-facto spouse and their two young children moved to Australia from Zimbabwe in 2005, secured by a 457-visa obtained by the taxpayer's spouse.
- The taxpayer was employed in the tobacco industry, and had difficulty seeking suitable employment in Australia. He and his spouse made the difficult decision that he would seek work abroad, while his family remained in Australia.
- In 2006, the taxpayer took up employment in Thailand. For the next several years he lived in a rental accommodation which he furnished in consultation with his family, and he became an active member of sporting and social clubs in the country.
- The taxpayer's spouse and children remained living in a jointly-held rental accommodation in Brisbane, and the couple had a joint Australian bank account into which the taxpayer made regular transfers in order to support his family.
- The taxpayer returned to visit his family several times each year, spending an average of approximately 20-30 percent of his time in Australia each year.
- The family owned land on which they had originally intended to build a home in Australia, but this never came to fruition.
- The taxpayer's spouse and children were granted Australian permanent residence in 2009, and citizenship in 2010. The taxpayer was granted Australian citizenship in 2014.
- The taxpayer took up successive employments in Tanzania and the UAE in 2014 and 2016.

Maintaining a Family in Australia

The Full Court agreed with the initial judge's findings that the taxpayer was a resident of Australia under the "resides" test according to the ordinary meaning of the word.

Notwithstanding that the taxpayer's employment opportunities in his field required him to find employment overseas, the Full Court placed significant weight on the continued presence of his family and the maintenance of a home in Australia. The Court indicated that:

> [S]ave in the most exceptional circumstances, the existence of a house in Australia maintained by a taxpayer who is working overseas, and the maintenance of a family in that house, has great significance in determining the taxpayer's residency "in that it demonstrates a continuity of association with Australia and an intention to treat that place as 'home."[4]

Harding and Pike – A Consistent Message?

It is worthwhile noting that in the 2019 residence case of *Harding v Commissioner of Taxation*, the Full Court found the taxpayer was not a resident of Australia under Australian domestic legislation. In both cases (*Harding* and *Pike*), the taxpayers were working overseas while their families remained in Australia. (For prior coverage of the *Harding* case, see the following issues of GMS *Flash Alert*: 2019-144 (19 September 2019) and 2018-102 (25 July 2018).)

A key distinction in these cases appears to be the difference in re-establishing tax residence after a period of non-residence (*Harding*), versus breaking Australian tax residence where the family remains in Australia (*Pike*). The dynamics of the family unit also appear to have a strong bearing in relation to outcome of the decisions of both cases.

KPMG NOTE

Based on the outcome in *Pike*, the case suggests that it will be more difficult to demonstrate the break in ties from Australia required to be considered a nonresident when the family remains in Australia and there is a continued connection with Australia. In comparison, when it has already been established that the taxpayer is a nonresident of Australia, despite the family living in or moving back to Australia, it appears the court would be more willing to treat the person as a nonresident of Australia for tax purposes if there was no intention to reside in Australia.

Treaty Considerations

When an individual is considered a tax resident of both Australia and another location by virtue of each country's domestic legislation, the treaty that may exist between these countries can be looked to in order to determine treaty residence. The treaty would normally impose a series of tie-breaker tests, and the first test would be stopped at with a conclusive result. In *Pike*, the Full Court had to consider the application of the tie-breaker tests under the treaty between Australia and Thailand.

The Court first rejected the taxpayer's argument that the initial judge was wrong to hold that the taxpayer had a "habitual abode" in both countries, when the period of time that he spent in Thailand was "considerably more" than the period of time that he spent in Australia. The Full Court held there was no reason to give the expression "habitual abode" a meaning other than ordinary meaning under OECD commentary. The Court agreed with the view that the taxpayer had a habitual abode in both countries.

Most interesting was when the Full Court applied the personal and economic ties test to support the initial decision that the taxpayer's personal and economic relations were, on balance, closer to Thailand in the relevant years.

The primary judge expressly considered and agreed that while the taxpayer's personal relations were closer to Australia, in contrast, his economic relations were closer to Thailand. The taxpayer's ongoing employment was in Thailand, which not only supported his life overseas but also the family in Australia.

KPMG NOTE

The ruling in this case does not unseat the judgement handed down in the *Harding* case. It is clear that a distinction can be made in instances when an individual is considering establishing tax residence after a period of non-residence, versus a situation in which an individual is seeking to break tax residence in the first instance.

The courts have shown they consistently place emphasis on a variety of factors in determining tax residence, including location of a taxpayer's family and family dynamics, as well as the economic or financial aspects of a taxpayer's circumstances.

Specific to tax treaties, it would appear the courts give significant weight to economic factors when applying the personal and economic ties test, while time spent in a location is not of the utmost importance when considering the

habitual abode test.

Taxpayers who live and work overseas should be mindful of the potential that they are remaining an Australian tax resident, albeit they may take comfort that treaty relief could be available to reduce the impact of dual-tax residence.

FOOTNOTES:

1 ATO's Decision impact statement.

2 *Commissioner of Taxation v Pike* [2020] FCAFC 158 (22 September 2020).

3 *Pike v Commissioner of Taxation* [2019] FCA 2185 (December 2019).

4 *Commissioner of Taxation v Pike* [2020] FCAFC 158 (22 September 2020).

RELATED RESOURCES

- "High Court refuses Commissioner's application for special leave," published by the KPMG International member firm in Australia.
- "No satisfaction: Unique application of residency test in Addy case," published by the KPMG International member firm in Australia.

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KPMG Webinar: "Attracting and Retaining Talent: Australia's Global Talent Scheme"
7 December 2020 (12:00pm - 1:00pm AEDT)

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