KPMG

GMS Flash Alert

2022-188 | October 18, 2022

Australia – Draft Tax Residency Ruling

On 6 October 2022, the Australian Tax Office (ATO) published a draft taxation ruling on the residency tests for individuals.[1]

In the absence of legislative changes to the Australian individual tax residency tests, the draft ruling seeks to consolidate the views reflected in earlier rulings and consider developments in case law.[2]

The ATO is inviting comments to the proposed draft ruling which are due by 25 November 2022.

There has been no update on the announcements made in May 2021 (by the previous federal government) regarding the reform of Australia's individual tax residency tests and proposed adoption of the Board of Taxation's recommendations in its report.[3] This draft ruling does not discuss any legislative changes and the current law remains. (For prior coverage, see *GMS* *Flash Alert* 2021-142*,* 12 May 2021.)

WHY THIS MATTERS

This ruling can be seen as an interim step to recognise the growing uncertainty taxpayers are facing in self-assessing their individual tax residency as personal situations become more complex. Changes to the individual tax residency rules have the potential to impact all globally-mobile employees, as tax residency is critical in determining an individual's Australian tax position. Employers are also affected as their employer obligations may vary depending on an individual's tax residency.

Who Is a Tax Resident of Australia?

Australia's current tax legislation outlines four tests to determine tax residence. An individual is regarded as a tax resident of Australia if he or she satisfies one or more of these tests.

The draft ruling seeks to provide updated guidance on the Australian Tax Commissioner's views on three of these tests and how they should be applied to an individual's facts and circumstances. As there is no bright-line test, differences in intention, motivations and life circumstances may produce different outcomes. The draft ruling provides that no single fact determines the outcome, and the significance of facts varies from case to case.

We have highlighted below some observations and key take-aways regarding the ATO's updated views on each of the three key tests discussed in the draft ruling.[4]

Resides / Ordinary Concepts Test

An individual will be a tax resident if he or she "resides" in Australia under ordinary concepts. This requires an assessment of the individual's presence and connection to Australia. Factors of note to consider are:

- **Length of time or period of physical presence in Australia –** This is an important factor but not determinative. The draft ruling retains the rule of thumb that a visit to Australia of less than six months is generally not of a sufficient length of time to be regarded as residing in Australia.

- **Intention and purpose of presence –** The draft ruling appears to place significant emphasis on the individual's intention and purpose for being in Australia. Objectively observable factors and behaviour and contemporaneous statements about intent and purpose (such as those included on passenger cards and visa documentation) would be relevant. In addition, when the original intention towards being in Australia changes, this can alter an individual's Australian tax residency status.

- **Behaviour consistent with residing in Australia –** The manner in which the individual lives may demonstrate that the individual is residing in Australia if it reflects a degree of continuity, routine, or habit.

- **Family, and business or employment ties –** Many individuals may be required to work overseas but return to Australia at intervals to resume a pre-existing, established family and social life. This will often indicate that the individual is still residing in Australia. Even though an individual has foreign employment, if there is an ongoing, deliberate connection to Australia, it is likely the individual will remain a tax resident and will not be regarded as a mere visitor to Australia.

Domicile / Permanent Place of Abode Test

- For Australian-domiciled individuals to not be considered a tax resident, the Commissioner must be satisfied that their permanent place of abode is outside of Australia. The focus here is on whether the individual has abandoned residency in Australia and commenced to live in a permanent way overseas (acknowledging that "permanent" does not mean forever).

- It is helpful that the two-year rule remains and has been re-stated. When the intended length of stay overseas is less than 2 years, the individual is unlikely to be able to establish that that his or her permanent place of abode is outside of Australia.[5]

- In line with the *Harding* case,[6] the ATO has confirmed that the expression "place of abode" refers to the physical surroundings in which the individual lives, extending to a town or country, and the focus is not necessarily on a particular bricks-and-mortar dwelling. 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, a permanent place of abode could be established.

- The draft ruling has provided further guidance on more complex outbound individual situations where that individual undertakes employment overseas but maintains ties to Australia, such as family and assets in Australia. Generally, when there appears to be no abandonment of Australia as the place of residence due to maintenance of connections to Australia, an individual will remain a tax resident. This is regardless of whether more time is spent overseas than in Australia in any given income year.

183-Days Test

— The draft ruling focuses primarily on the two provisos to the 183-day test.[7] In certain circumstances, even if an individual's stay in Australia exceeds 183 days in a tax year, he or she can still be regarded as a nonresident if he or she can demonstrate (1) having a usual place of abode overseas and (2) having no intention of taking up residence in Australia.

— As with the domicile test, it is not necessary for a person, while in Australia, to have and maintain a physical dwelling overseas in order for his or her usual place of abode to be outside Australia.

— In response to the case of *Addy*,[8] the ATO also provides commentary in relation to short-term visa holders (such as those on working holiday maker visas). The Commissioner takes the view that, consistent with the purpose of the visa (which is for a holiday) and the expected transitory nature of lifestyle, these individuals generally do not intend to live in Australia in the manner consistent with residing in Australia and hence fall within the provisos of the 183-day test.

— The Commissioner includes an example whereby an individual arrives in Australia on a working holiday maker visa and then decides to remain in Australia more permanently supported by applying for a permanent skilled work visa. The draft ruling places emphasis on the importance of a "change of intention" in this scenario which triggers the change in tax residency status.

KPMG NOTE

Determining an individual's Australian tax residency status continues to require consideration and weighing of the facts and circumstances.

Whilst the ATO's draft ruling is a welcomed update in assisting individuals to self-assess their Australian tax residency position, many individuals may still feel there is a lack of certainty in relation to their tax residence position in modern-day scenarios, especially for outbound residency cases, in which travel back to Australia during periods of overseas employment is becoming more common.

At this stage, there is no further news in relation to whether the current government will adopt any of the recommendations proposed by the Board of Taxation in its 2019 report, which had sought to provide more clarity and certainty in the law by introducing a primary bright-line days test and secondary tests requiring consideration of a specific list of objective factors. For prior coverage, see the following issues of *GMS Flash Alert:* 2021-142 (12 May 2021) and 2019-191 (20 December 2019). It will be interesting to see if there are any further updates to this on 25 October 2022, when the newly-appointed Labour government hands down its updated 2022-23 Federal Budget.

FOOTNOTES:

1 Australian Taxation Office, TR 2022/D2, Income tax: residency tests for individuals.

2 Once finalized, TR 2022/D2 will replace rulings IT 2650 and TR 98/17. In particular, the cases considered in the draft ruling include *Harding v Commissioner of Taxation* [2019] FCAFC 29; *Pike v Commissioner of Taxation* [2019] FCA 2185; and *Addy v Commissioner of Taxation* [2019] FCA 1768).

3 The previous federal government in the 2021/2022 Federal Budget proposed to consider the recommendations of the Board of Taxation in reforming Australia's tax residency rules as contained in its report released in 2019, *Reforming Individual Tax Residency Rules – a model for modernisation*.

4 The ruling does not discuss in detail the fourth test of Australian tax residence, the Commonwealth Superannuation Fund test.

5 TR 2022/02, footnote 1.

6 *Harding v Commissioner of Taxation* [2019] FCAFC 29.

7 An individual who is present in Australia for 183 days or more in an income tax year would be resident, unless the Commissioner is satisfied that both his usual place of abode is outside of Australia, and he does not have the intention of residing in Australia.

8 *Addy v Commissioner of Taxation* [2019] FCA 1768.

* * * *

People Services in Australia

Sydney, New South Wales **Mardi Heinrich** Partner – Deals, Tax & Legal People Services Mobile: +61 410 602 993 meheinrich@kpmg.com.au	**Perth, Western Australia** **Dan Hodgson** Partner – People Services Mobile: +61 416 017 131 dghodgson@kpmg.com.au
Melbourne, Victoria **Ursula Lepporoli** Partner – People Services Tel.: +61 3 8626 0967 udlepporoli@kpmg.com.au	**Brisbane, Queensland** **Hayley Lock** Partner – People Services Mobile: +61 477 764 638 hlock@kpmg.com.au
Sydney, New South Wales **Ablean Saoud** Partner – Deals, Tax & Legal People Services Mobile: +61 421 052 596 asaoud@kpmg.com.au	**Sydney, New South Wales** **Jackie Shelton** Partner – Deals, Tax & Legal People Services Mobile: +61 412 291 846 jsshelton@kpmg.com.au

Contact us

For additional information or assistance, please contact your local GMS or People Services professional or one of the following professionals with the KPMG International member firm Australia:

Mardi Heinrich (in Sydney)
Tel. + 61 3 9838 4348
meheinrich@kpmg.com.au

Jackie Shelton (in Sydney)
Tel. +61 2 9335 8511
jsshelton@kpmg.com.au

Priscilla Tang
Tel. +61 2 9455 9021
ptang@kpmg.com.au

Special contributors: Priscilla Tang, Shayla Fichera and Zachary Thomas.

The information contained in this newsletter was submitted by the KPMG International member firm in Australia.

www.kpmg.com

kpmg.com/socialmedia

Flash Alert is a GMS publication of KPMG LLP's Washington National Tax practice. To view this publication or recent prior issues online, please click here. To learn more about our GMS practice, please visit us on the Internet: click here or go to http://www.kpmg.com.