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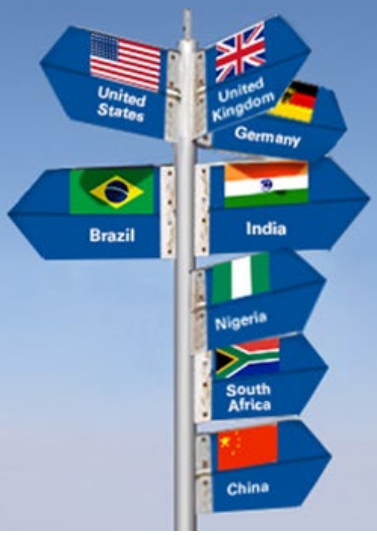

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Australia - New Tax Ruling on Residency

On 7 June 2023, the Australian Taxation Office ("ATO") finalised *Taxation Ruling 2023/1 Income tax: residency tests for individuals* ("TR 2023/1") outlining the Commissioner of Taxation's ("Commissioner") modernised interpretation of Australia's tax residency rules along with contemporaneous examples.

This follows a period of public consultation after the issuance of draft ruling *Draft Taxation Ruling 2022/D2 Income tax: residency tests for individuals* ("TR 2022/D2") released on 6 October 2022 (see *GMS Flash Alert* 2022-188, 18 October 2022).

TR 2023/1 consolidates and replaces the material in withdrawn:

- *Taxation Rulings IT 2650 Income tax: residency – permanent place of abode outside Australia*;
- *IT 2681 Income tax: residency status of business migrants;* and
- *TR 98/17 Income tax: residency status of individuals entering Australia on residency for individuals*.

There are no changes to the current Australian tax legislation in relation to tax residency rules. However, recent case law such as, *Harding*[1]*, Pike*[2]*, and Addy*[3] have been referenced in the ruling.

WHY THIS MATTERS

What the tax ruling seeks to draw out is that Australian tax residency under the existing law is determined with reference to an individual's facts and circumstances and there are no "hard and fast" rules. A holistic review must be considered and no single factor determines the outcome.

Through additional examples and updated commentary, the ATO has sought to provide context and guidance for taxpayers as they self-asses their Australian tax residency position.

There is no mention of the Board of Taxation's recommendations regarding reform of the current residency rules or the potential of a new primary "bright line" test which was originally announced in the Australian Federal Budget in May 2021.

Key Highlights

The finalised ruling goes through three of the four tests of Australian residency as outlined in section 6(1) of the *Income Tax Assessment Act 1936*. A few observations to note in relation to these tests are outlined below.

Ordinary Concepts

- Under the ordinary concepts test, a resident is a person who "resides" in Australia. This test focuses on whether the person's presence in Australia is usual and settled in contrast to temporary or casual. This will be informed by the nature, duration and quality of the person's physical presence and intention to treat Australia as home.

- The ATO confirms the focus of this test is the nature of the taxpayer's connections to Australia to demonstrate whether he or she resides in Australia. Accordingly, even if a taxpayer is resident of or has connections overseas, this does not necessarily diminish any connections to Australia.

- For employees who accept employment abroad, absence from Australia may not mean they are no longer tax residents of Australia, where they continue to maintain a "continuity of association" to Australia. Example 7 draws this out in relation to "Mark," who takes up a two-year secondment overseas to Brazil, but whose family remains in Australia. Mark spends as much time in Australia as his leave arrangements permit with his family and friends. He also returns for short periods to celebrate family birthdays and other milestone events. He is considered to have remained a resident of Australia under ordinary concepts.

Domicile/Permanent Place of Abode Test

- Per *Harding*, it was reaffirmed that a "place of abode" with reference to the domicile/permanent-place-of-abode test refers to physical surroundings (e.g., a town or country) as opposed to a "bricks and mortar" dwelling. Interestingly, the ATO notes that it is only possible to have one permanent place of abode at any point in time. If a person is living both in Australia and overseas, it is unlikely that it could be said that his or her permanent place of abode is overseas.

- While it was reiterated that as a "rule of thumb" an intention to live overseas for two years or more would be considered sufficient to show that the taxpayer has abandoned his or her Australian residence; whether an Australian-domiciled person has established a permanent place of abode outside of Australia is a question of fact.

- A person will have established a permanent place of abode overseas where it can be demonstrated that he or she has definitely abandoned his or her residency in Australia, and commenced living permanently overseas. Examples in the ruling confirm that retaining a dwelling in Australia does not necessarily mean that an individual remains a tax resident, but this will depend on the circumstances and reasons for its retention.

183-Day Test

- The provisos to the 183-day test reveal the purpose of this residency test. That purpose is to allow a certain length of presence to be relied upon to establish residency unless a person is properly regarded as a visitor. A person on an extended holiday would ordinarily be regarded as such a visitor and not treated as a resident of Australia.

- The ATO is of the view that a "working holiday maker" is not usually a resident of Australia under any of the residency tests, as his intention is to enter Australia as a genuine visitor with the principal purpose of having a holiday. Any employment undertaken is to support his holiday, and the working holiday maker's usual place of abode remains outside Australia. Example 18 of "Ryan" indicates that this would be the case even if the individual remains in Australia for two years and works in one place for a considerable period of time.

- However, Example 16 does indicate that where a working holiday maker's intention or behaviour changes and steps are taken to form a more durable connection to Australia, it is at this point that he may become a tax resident of Australia.

Considerations and Next Steps

While the ATO's ruling is a welcome update in helping 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.

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 (see *GMS Flash Alert* 2019-191, 20 December 2019), which seeks to introduce a primary bright-line days test and secondary tests requiring consideration of a specific list of objective factors.

For now, taxpayers need to self-assess their Australian tax residence against a matrix of facts and circumstances which need to be considered holistically.

KPMG INSIGHTS

Employers that are seeking to navigate the associated employer tax obligations with employing employees working temporarily in Australia or abroad (e.g., Pay-As-You-Go ("PAYG") withholding and Fringe Benefits Tax reporting obligations) will need to exercise diligence in ascertaining an employee's Australian tax residency status. Employers can rely on information contained in Tax File Number declarations obtained from their employees including their residency status, unless they have a reason to believe that it is incorrect.

Care must also be undertaken in relation to employing working holiday makers since employers need to register with the ATO and operate PAYG withholding at the relevant working holiday maker rates.

FOOTNOTES:

1 *Harding v Commissioner of Taxation* [2019] FCAFC 29 (Harding).

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

3 *Addy v Commissioner of Taxation* [2019] FCA 1768 (Addy).

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People Services in Australia

Sydney, New South Wales **Ablean Saoud** Partner – People Services Mobile: +61 421 052 596 asaoud@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 **Jackie Shelton** Partner – People Services Mobile: +61 412 291 846 jsshelton@kpmg.com.au	**Sydney, New South Wales** **Mark Wright** Principal Director – People Services Mobile: +61 411 220 354 mwright15@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:

Priscilla Tang (in Sydney)
Tel. +61 2 9455 9021
ptang@kpmg.com.au

Kelly Stephen (in Perth)
Tel. +61 8 9263 7145
kstephen@kpmg.com.au

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