Australia: Did becoming a non-resident just become harder?

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In brief

How permanent is your permanent home?

This was the question asked and answered in a recent decision of the Australian Federal Court. In the matter of *Harding v Commissioner of Taxation [2018] FCA 837*, handed down on 8 June 2018, the Court held that an Australian citizen who had lived outside of Australia for some years, and who had established a home overseas, remained a tax resident of Australia because his fully furnished apartment maintained overseas was not permanent enough.

This decision highlights for Australian expatriates, when it comes to tax residency and when establishing a home overseas, that the type of property and importantly how the property is used, does matter.

In detail

The question of an individual's tax residency was addressed by the Federal Court in *Harding v Commissioner of Taxation [2018] FCA 837* (the Harding case), handed down on 8 June 2018. This case highlights a range of issues that are particularly relevant to Australian expatriates working overseas for an extended period of time.

Tax residency in Australia dictates what income will be subject to Australian taxation. Specifically, an Australian tax resident pays tax on worldwide income while an Australian non-resident only pays tax on Australian sourced income. For individuals that live and work outside of Australia, becoming a tax non-resident often results in lower taxes.

Broadly, a domiciled Australian individual must satisfy the following tests to be regarded as a non-resident of Australia:

1. *Resides test*: the individual does not reside, or live, in Australia; and
2. *Permanent place of abode test*: the individual has established a permanent place of abode outside of Australia.

What happened in Harding?

Mr. Harding had, prior to 2006, worked for approximately 15 to 16 years in the Middle East. Mr. Harding then returned to Australia with his wife and children and stayed until 2009 at which time he took up a position in Saudi Arabia. Upon moving to the Middle East, Mr. Harding occupied a fully furnished two bedroom apartment in Bahrain. The plan was that his wife and children would temporarily remain in the family home in Australia, and move to Bahrain in 2011 once the middle child finished schooling. However, despite Mr. Harding's best efforts, in 2011 his wife chose to remain in Australia and they separated shortly after. Mr. Harding moved to a smaller apartment that was furnished and in the same building.

The issue in question was whether Mr. Harding was a non-resident for the 2011 year, i.e. whether during this year he had ceased to reside in Australia and whether he had established a permanent place of abode outside Australia.

The encouraging bit: the resides test

In this matter, the Federal Court held the taxpayer did not reside in Australia.

The taxpayer's continuing association with Australia was considered under the 'resides test'. Mr. Harding's family remained in Australia during the 2011 year and lived in the family home. Mr. Harding also returned to Australia four times during the year to visit his family and stayed in the family home for 91 days during those visits. This combination of factors would usually indicate a continuing association with Australia that would amount to a determination that he was residing in Australia. However, the Court was satisfied Mr. Harding had a clear intention not to return to Australia following his departure in 2009. Furthermore, the Court considered the 'unusual circumstances' of the case, including the extensive time spent by Mr. Harding in the Middle East, his strong desire to return to the location, and his propensity to put his career and life in the Middle East above personal ties. The Court therefore concluded that Mr. Harding did not reside in Australia from the time of his departure.

The holistic approach taken by the Court in considering the full situation of a taxpayer is encouraging, and continues in the same vein as other recent residency cases decided in the Administrative Appeals Tribunal.

The surprising bit: the permanent place of abode test

In this matter, the maintenance of Mr. Harding's fully furnished apartment overseas was not sufficient to satisfy the 'permanent place of abode test'.

Mr. Harding lived in a two bedroom fully furnished apartment for two years. It was Mr. Harding's intention to purchase a larger property once his family relocated. However, following his separation from his wife in 2011, he moved to a one bedroom apartment in the same building where he spent one year and then moved again to another apartment within the same building. Despite spending six years in the complex, the Court found that he did not establish a permanent place of abode overseas.

The taxpayer's intention to live in the property only until such time as he could buy a larger house was significant. The taxpayer's presence in the apartment complex was therefore considered to be for a temporary period of time. The Court noted that by its character, fully furnished accommodation is a type of premises used for temporary or transitory accommodation (the tenant can pack up and move easily and readily), and importantly, Mr. Harding used it as such.

The Court also placed significant weight on the fact that Mr. Harding did not use the apartment as a mailing address and also was not required to make any substantial acquisitions in relation to the dwelling (everything was provided except linen and towels). These factors, if present, would usually indicate a taxpayer intends to reside in the dwelling for a more permanent period of time.

As it was concluded Mr. Harding did not establish a permanent place of abode overseas, he was found to be a tax resident of Australia for the relevant year.

The takeaway

The analysis by the Court around the maintenance of permanent home could be concerning for many expatriates. Fully furnished accommodation is commonly used amongst expatriate populations in many countries.

Of note, the Court acknowledged that it is possible for fully furnished accommodation to amount to a permanent place of abode. However, in this instance, the Court found that the temporary intended and actual use of the accommodation was critical. Expatriates should therefore carefully consider their overseas accommodation arrangements in the context of the degree of permanence from day one. Other factors relating to the accommodation, including arrangements for the direction of mail, substantial acquisitions of furniture, and utility agreements etc. also remain critical.

Given the complexity in determining tax residency for Australian expatriates, and the focus by the Australian Taxation Office on this area and the potential financial impact, we recommend all expatriates seek tax advice before going overseas.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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