

Taxpayer wins in High Court special leave proceedings to resolve the meaning of “permanent place of abode”

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In brief

On 13 September 2019, the High Court of Australia dismissed the Commissioner of Taxation’s application for special leave to appeal against the decision of the Full Federal Court which had found that the taxpayer, Mr Harding, was not a resident of Australia. PwC Tax Controversy acted on behalf of Mr Harding for the special leave application.

The decision to dismiss this special leave application confirms that, for the purposes of determining whether an individual is a resident of Australia, the phrase “permanent place of abode” should not be determined by reference to a specific house or dwelling, but should be determined more broadly by reference to a particular “country or state”. See our previous insights for a summary of the matter considered by the [Full Court](#) and by the [Federal Court at first instance](#).

Based on documents filed by the Commissioner in support of the special leave application, the decision will now have an impact on over 33,000 tax audits, 340 private binding rulings, over 1,000 tax objections and 54 litigation proceedings in Australia that were identified as matters which involve a person’s tax residency in the period from July 2015 to 31 December 2018.

Both the Full Court and special leave proceedings were funded under the ATO’s Test Case Litigation Program given the broader implications arising from the resolution of the matter.

In detail

Facts

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. It was Mr Harding’s intention to purchase a larger property once his family relocated. 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 furnished apartment in the same building.

The question of Mr Harding’s tax residency was at first instance addressed by a single judge from the Court who found, in the judgment handed down in June 2018, that Mr Harding was a tax resident of

Australia because he did not have a permanent place of abode outside of Australia, i.e. his accommodation in Bahrain was only temporary and transitory.

Mr Harding appealed against the Court's decision where the question of Mr Harding's tax residency was subsequently addressed by the Full Court. The appeal was allowed and Mr Harding was found not to be a tax resident of Australia for the relevant year. For the purposes of the permanent place of abode test, the Full Court found that it should not be determined by reference to whether a person is permanently located at a specific house, flat or dwelling, but the phrase "permanent place" could extend to the identification of a country or state in which the person is living permanently: *"Thus a person might be correctly said to have a permanent place of abode...notwithstanding that during a given period he lived in a number of different establishments occupying each for only a relatively short period"*.

In respect of the "resides test", the Full Court found that the primary judge did not make an error in placing weight on Mr Harding's intention not to return to Australia particularly when the findings of fact were supportive of a conclusion that Mr Harding was not a resident of Australia. The Full Court found that while Harding had a place to live when he was in Australia, he did not treat that place as his home and the quality and nature of those connections either supported a finding that Mr Harding was not a resident or did not sufficiently outweigh Mr Harding's intention to leave Australia indefinitely.

Application for Special Leave to Appeal in the High Court of Australia

In his application for special leave to appeal, the Commissioner sought leave on grounds which challenged the Full Court's determination that a place of abode could be said to be broadly construed as a "state or country". On the issue of residency, the Commissioner argued that a person's subjective intention should not displace the objective facts which support a finding that a taxpayer is a resident of Australia.

Mr Harding responded to the Commissioner's application for special leave by highlighting that the Full Court's construction of the phrase "place of abode" is consistent with longstanding authority established from *Applegate v FCT [1978] 1 NSWLR 126* and later upheld on appeal in *FCT v Applegate (1979) 38 FLR 1*. The Court had done so in an orthodox manner by considering the legislative history and relevant extrinsic materials including the Explanatory Memorandum. On the issue of residency, the findings of fact made by the primary judge, as endorsed by the Full Court, were supportive of the intention of Mr Harding and the conclusion that he was not a resident in Australia.

At the special leave hearing in the High Court, the Commissioner's Counsel suggested that the satisfaction of a permanent place of abode would be met, for example, if a resident had "bought a house in Germany" instead of living in a more temporary form of accommodation. The Court commented that setting the bar at that height was "impractical" given the way that taxpayers now live and not consistent with the purpose of the legislation. Keane and Gordon JJ proceeded to dismiss the Commissioner's application for special leave.

The takeaway

The decision of the Full Federal Court and the comments of the High Court confirm the following key learnings in respect of disputes concerning the residency of individual taxpayers:

- AAT not Federal Court - Taxpayers should lodge appeals through the Administrative Appeals Tribunal (AAT) where the Tribunal member is able to stand in the shoes of the Commissioner. The joint judgment of Davies and Steward JJ confirmed that the determination of whether a permanent place of abode is established to the satisfaction of the Commissioner cannot ordinarily be considered by a court whose role is limited to determining whether there was a legal error in the formation of the Commissioner's state of satisfaction on the issue.
- Expatriate living arrangements – The Full Court explained that it is "relatively commonplace for Australians who seek to make their life in another country to rent accommodation on a temporary basis, sometimes for several years, whilst they seek a more permanent home". Most expatriate arrangements will necessarily involve an individual to rent temporary accommodation before settling

down in a foreign country. The Full Court decision and the special leave proceedings confirm that an expatriate does not need to buy a house to establish a permanent place of abode.

- Demonstrate the mode of living – The primary judge (with Davis and Steward JJ agreeing) determined that, whilst affidavit evidence stating the intention of the taxpayer or contemporaneous statements of intention are relevant, the stronger indicator of residency will be determined by the facts and circumstances surrounding the taxpayer’s mode of living. Mr Harding filed evidence to support that he made his life in Bahrain, formed friendships when he was there, attended local restaurants after work, went to the beaches there and engaged in go karting at the local grand prix track (at [79] of the first instance judgment and [12] of the Full Court judgment).

The High Court’s dismissal provides greater certainty around the meaning of the phrase “permanent place of abode” in the context of the domicile test for the purposes of Australian tax residency. This decision supports that Australian expatriates will not be a resident under the domicile test where a permanent place of abode has been established in a foreign country. This is despite the fact that an expatriate enters into a lease on a temporary basis before they seek a more permanent home.

Let's talk

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