

## Residence

Section 6-5 ITAA97:

**(2): Australian residents** include worldwide ordinary income in assessable income (source irrelevant)

**(3): foreign residents** only include **Australian-sourced ordinary income** in assessable income

	Aus source income	Foreign source income
Aus res	√	√
Foreign res	√	X

Individuals' residence (4 Limbs – only need to satisfy one) – s 6(1) ITAA36

Whether an individual is an Australian resident is defined by s 6(1) ITAA36. Here, none of the three enumerated limbs are enlivened, although the individual would still be an Australian resident if they 'reside' in Australia.

**IF THE 3 ENUMERATED LIMBS AREN'T RELEVANT (PROBS THE CASE), BRIEFLY SAY SO.**

1. 'a person, other than a company, who resides in Australia and includes a person-'
2. 1) Whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;
3. 2) Who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia;
4. 3) Who is an eligible employee for the purposes of the Superannuation Act 1976' NOT ON EXAM

Limb 1: 'resides' in Aus; HIGH YIELD

*Ordinary meaning of 'resides'*

'Resides' is not accorded any special/technical meaning, (*Miller*, per Dixon J, citing *Lysaght*). Regarding its ordinary meaning, the *Oxford English Dictionary* elucidates it as 'to dwell/live at a place permanently or for a considerable period of time'. It may also be useful to understand residence as where the individual sleeps and lives: their settled or usual abode.

Determining where a person 'lives' entails consideration of a basket of residence **indicia**, with **no one being determinative** (NOTE: behaviour after end of relevant FY is relevant but not det've *Applegate*)

- time spent at the location
  - Incl frequency: e.g 10 days per mth in Aus = more likely to be res than 120 days in 1 block
- behaviour while in jurisdiction [ie visitor or 'settled' behaviour such as membership of clubs etc]
  - E.g. staying at friend's place is ambiguous: seems non-permanent, but then again, it's quite common for people to couch-surf, and still be considered residents of wherever they're residing on a day-by-day basis
- location of immediate family
- location of assets
- place of employment
- subjective intention
- immigration status (e.g. citizenship)

**Multiple** places of residence are possible (eg *Applegate*, per Northrop J at 4313, citing authorities)

*Miller*: YES

Facts: Australian citizen was captain of, and residing on, a boat impressed into service by US forces based at Milne Bay during WWII. Under his contract of service with US small ships section – agreed to be master of his boat or any other boat, at any location, as required. Lived solely on boat at Milne Bay (PNG) from Dec 1942 until Oct 1943, in accordance with his contract. His wife remained in Cairns.

Latham CJ:

- **Rejs** FCT's argument that a pers must have INTENTION to dwell permanently or for a considerable time IOT be res;
- Ordinary meaning of 'reside' is to '**dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place**': M lived, ate, and slept on the boat, therefore, he resided on it

Dixon J: **obiter** -> M was not a resident of Milne Bay, as he was on war service (compulsion: he was FORCED TO BE THERE)

*Applegate*

Northrop J: no doubt that Applegate does not 'reside' in Australia – no residence in Australia, no home in Australia, no assets in Australia, no income sourced from Australia, no business/work carried on in Australia

Limb 2: Domicile in Aus (for ppl going out of Aus) *Applegate*

Res if Aus citizen (domicile of origin – *Domicile Act 1982(Cth)*)/PR ('intention to make home indefinitely in country' *Domicile Act* s 10) except for period of time that u've '**permanent place of abode overseas**':

- Place of abode - where a person resides (Northrop J at ATC 4313)
- 'permanence' is determined on an objective basis (Franki J, 4309; Fisher J at 4307)
- 'permanent' must be assessed on an annual basis, given annual basis of income tax (Northrop J at ATC 4314; Franki J at ATC 4309)
- 'permanent' then means 'enduring' rather than transitory (Northrop J at ATC 4314; Fisher J at ATC 4317) or 'fixed and habitual' (Fisher J, at ATC 4317)
- Thus, there need not be a commitment to reside overseas for an 'everlasting' period before the taxpayer will be taken to have a permanent place of abode overseas: here, 2 yr stay was enough to meet this req

Limb 3: 183 day test (for ppl coming into Aus)

Res if been here for >183 days UNLESS person's usual (not necessarily permanent) place of abode is outside Aus AND person doesn't intend to take up res in Aus

- 183 days in 'income year' -> possible to reside in Australia for more than 183 days spanning two income years, but not satisfy the test
- intention to take up residence is subjective, 'usual place of abode' – see *Applegate*

**Coys' Residence: 3 limbs – only need to satisfy 1 (ITAA36 s 6(1))**

**A company is an Australian resident if it satisfies at least one of the three limbs in s 6(1) ITAA36.**

1. **incorporated** in Australia:
2. **carrying on business** in Australia and having its **central management and control** in Australia;
  - *Malayan*: if central mgmt.& ctrl in aus, can infer that it's carrying on bsns in aus; HERE:
    - puppet nominee shareholders/directors under direction of Australian resident individual Mr S, who 'had the company in a vice'
    - only business of company was to charter ship and sub-charter it to Mr S, who arranged the charters and made payments etc
  - *Esquire*: while there was influence, even strong influence, this didn't equate to control
    - Directors resident on Norfolk Island, received draft agendas, and followed instructions from a firm of accountants located in Australia
    - **BUT distinguished** fm *Malayan* upon basis that directors considered that it was in best interests of the company to adopt proposals generated by the accounting firm (*Esquire*, per Gibbs J at CLR 191)

3. carrying on business in Australia and being controlled at general meeting by voting shareholders resident in Australia [CHECK % SHARE-HOLDING]

## Source

### General Rule

The source of income for purposes of section 6-5 is a question of fact, determined according to ordinary usage of 'source' - *Nathan* (at CLR 189-90); *Mitchum* (per Barwick CJ at CLR 407, Menzies and Owen JJ agreeing at CLR 409). This can be understood as where the payment comes from, and what crystallises the entitlement to the payment (*French*) as a 'hard practical matter of fact' (*Mitchum*). Nonetheless, the legal classification of rights is often an important consideration (*Mitchum*, *French*, *Spotless*). Thus, a legalistic approach is still likely to be highly relevant.

- BUT "In international transactions it is rarely, if ever, possible to say that any particular income unequivocally has its source in a particular place. Generally, it is a matter of ensuring that there are sufficient indicators of the source of a particular type of income as being in a particular place to lead one to conclude, with a high degree of probability, that such a place is the proper source of the income." (letter of advice from Stephen Jaques Stone James to Spotless, see *FCT v Spotless*, 95 ATC 4775, 4780 (Full Fed Crt))

### Considerations

Where the contract under which payment made was entered into

Where property associated with income is located (eg rental income from real property)

Where payment emanates from (eg bank from which funds transferred)

Where economic activity undertaken (eg where services performed, business conducted, property sold)

Where payment controlled from (eg *Malayan Shipping*)

**Subsequent conditions** (e.g. retention bonus that you have to pay back if you leave the coy before a certain time) probs can't seen to be the basis for determining the retention bonus.

- BUT such a bonus could be seen as a pre-payment for services to be performed. Thus, the source of the bonus might be that of the income for the services (e.g. might be apportioned).

**Lottery** prize source is probably where the lottery's drawn, not where the rights were acquired

### Categories/Scenarios

#### Business *Cliffs*

General rule is look to **where business conducted** (eg where contracts negotiated and contractual relationship maintained, rather than where the contract was executed [mere formality] or where headquarters of taxpayer located)

- HERE: contracts executed in perth (cliffs hq), BUT all negotiation work was done overseas; thus, commission income = foreign source

#### Interest Income *Spotless*

Considerable weight given to **where contract is entered into and/or where credit provided**

- Original guarantee in Aus didn't create the right to the interest – rather, it only secured to Spotless EPBCL's performance of the loan agreement that it'd enter into with Spotless in the future. The original guarantee (letter of credit) was the security to the TPs for the loan, but it only took effect

upon the issue of the cert of deposit in the Cook islands – it didn't create entitlement to the interest. The contract that created the entitlement to the interest was the 1 entered into by Spotless & EPBCL in Cook Islands; thus interest income was foreign source.

## Personal Services

**Is TP entitled to pyt whether or not services were utilised?**      Yes: Mitchum                      No: French

### French

Employee based in Sydney, working in NZ for two weeks for his Sydney employer – source of income found to be in NZ, **where services** were **performed** but the judgments in the High Court did not establish this as a rule of law (see discussion of *French* in *Mitchum* per Barwick CJ)

- BUT note that he wasn't entitled to the pyt until he'd performed the services. THUS, if someone performs work across **multiple LOCs**, the pyt should be apportioned across those LOCs. The possibility of apportionment is acknowledged in *Mitchum*, referring to *French*.
  - However, if the work is examined/reviewed/approved from a single LOC, it may not be the case that the TP is providing services on a minute-by-minute basis, but rather delivering an end result, thus making this more of a *Mitchum*-type scenario
  - Moreover, if there are many LOCs, the concept of a 'hard practical matter of fact' may become more relevant, making it arguable that the source would be where the contract was entered into.

### Mitchum

Distinguished fm *French*: while parties adopted contract of employment nomenclature, **reality** was that Mitchum was actually **independent contractor** (Barwick CJ; Menzies and Owen JJ agreeing)

➔ The court held that the most important factor in this case was where the contract was signed. The taxpayer was entitled to payment whether or not his services were utilised. The actual location of where the film was shot was not relevant. The court held that acquiring the actor's creativity and special skills far outweighed the location of where the services were rendered. It was the place of the contract that held the greatest weight, thus foreign source (was paid by American Coy).

## Ordinary Income 'Derived'

### Interp

The ordinary meaning of 'derived' (s 6-5(1)), modified marginally by s 6-5(4), is to be used. It is not defined in ITAA97 s 995-1. The general principle is as follows: (*Carden* per Dixon J; Menzies and McTiernan JJ agreeing; Latham CJ dissenting)

- This concept entails employing an approach that produces a "substantially correct reflex of the taxpayer's true income"
- This requires considering the question 'what gains have come home in a realised or immediately realisable form?'
- Selecting the most appropriate accounting method must depend upon each case's circumstances and context, especially the nature of the income's source, since there is no clear statutory direction on this matter
- Debt's face value is to be recognised, not its present value (i.e. ignore contingencies and/or time value of money when quantifying amount derived)

Commercial and/or accounting concepts may be relevant but are not determinative in selection of the most appropriate accounting method (*Arthur Murray*, at CLR 318).

- Note, for example, departure from accounting principles with respect to work in progress (*Henderson*)

- Note the more legalistic approach to 'incurred' for the purposes of ITAA97 s 8-1 (see *James Flood*, considered later in relation to section 8-1)

Commercial/accounting concepts acknowledge appropriateness of:

- Cash receipts basis of accounting;
- Accruals basis of accounting;
- Specific profit accounting (*Whitfords Beach*);
- Ad hoc treatment of long term contracts under which receipts are not closely correlated with expenditure, with a view to best measuring the profit in the relevant annual period.

## Choosing appropriate method – *Henderson*

### Annual Basis

The 'true reflex' test is to be applied upon an annual basis (having regard to the periodisation of a lifetime into annual periods under the income tax framework). *Henderson*

### Method (*Carden*)

There can only be a single correct approach to determination of when a particular item of income is derived, depending on the circumstances of the taxpayer

Determining whether accruals or cash receipts approach is the more appropriate method for measuring 'true income' requires considering the nature of the profession concerned, as well as the actual mode in which it is practised.

**Non-trading income** entails something coming in – 'receivability without receipt is nothing'; non-trading income arises, and hence **CASH BASIS APPROPRIATE**, where: ([apply test for each amt](#))

1. There is **nothing analogous** to a stock of vendible articles to be acquired/produced by TP;
  - If there is, accrual basis would be appropriate wrt the trading stock only
  - If you receive pyt regardless of whether or not you deliver goods, not analogous (i.e. use cash basis)
2. **Outstandings on the expenditure** side do not correspond to, and are not naturally connected with, outstandings on the earnings side; and
  - Usually relates to financing type arrangements (borrowing/lending money)
3. There is **no fund of circulating capital** from which income or profit must be detached for it to be enjoyed, but rather the receipts are attributable to personal skill and expenses only contribute to those receipts in a subsidiary way;
  - E.g. UNLIKE a BIG law firm
  - If TP only directly contributes to a small part of the bsns's income, more likely: accruals
4. There is **continuity** in practice of the profession, cf last year of trading/practice
  - ➔ HERE: for all but last yr of Dr's practice, didn't meet any of the 3 limbs. Furthermore, it wasn't appropriate to recognise amount when earned but not received, **given uncertainty of receipt**. THUS, cash basis appropriate for all yrs except last yr (limb 4).
  - ➔ Cf *Henderson*: firm had 295 employees, 150 pro staff, gross fees for 64/65 were \$1.1M, very low bad debts; accruals basis appropriate

There cannot be alternative figures for amounts of income derived; the correct figure may be based upon estimation, opinion or be the outcome of 'an exercise of judgment' (*Henderson*)

## Constructive Receipt Rule (CRR): applies to both A/R and cash

ITAA97 s 6-5(4): you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct. [E.g. when TP issued invoice]