

## ADVANCED TAXATION LAW

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## 2020 TAX REFORMS

### 2020 Federal Budget Update

Changes are contained in *Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020*

### Changes to Tax Rates for Individuals

2020/21 to 2023/24 Individual Tax Rates					
Residents		Non-Residents		Working Holiday Makers	
Taxable Income	Tax	Taxable Income	Tax	Taxable Income	Tax
0 to \$18,200	0	0 to \$120,000	32.5% on excess over 0	0 to \$45,000	15% on excess over 0
\$18,201 to \$45,000	19% on excess over \$18,200	\$120,001 to \$180,000	\$39,000 plus 37% on excess over \$120,000	\$45,000 to \$120,000	\$6,750 plus 32.5% on excess over \$45,000
\$45,001 to \$120,000	\$5,092 plus 32.5% on excess over \$45,000	\$180,001 and over	\$61,200 plus 45% on excess over \$180,000	\$120,001 to \$180,000	\$31,125 plus 37% on excess over \$120,000
\$120,001 to \$180,000	\$29,467 plus 37% on excess over \$120,000			\$180,000 and over	\$53,325 plus 45% on excess over \$180,000
\$180,001 and over	\$55,667 plus 45% on excess over \$180,000				

LITO for 2020/21 and subsequent years	
Taxable Income	Amount of LITO
Not more than \$37,500	\$700
Exceeds \$37,500 but does not exceed \$45,000	\$700 less 5% of the excess over \$37,500
Exceeds \$45,000 but does not exceed \$66,667	\$325 less 1.5% of the excess over \$45,000

LMITO for 2020/21 and subsequent years	
Taxable Income	Amount of LITO
Not more than \$37,000	\$255
Exceeds \$37,000 but does not exceed \$48,000	\$255 less 7.5% of the excess over \$37,000
Exceeds \$48,000 but does not exceed \$90,000	\$1,080
Exceeds \$90,000 but does not exceed \$126,000	\$1,080 less 3% of the excess over \$90,000

## I RESIDENCE AND SOURCE

Ss 6-5(2), 6-10(4) ITAA97: residents assessed on ordinary income and statutory income from all sources

Ss 6-5(3)(a), 6-10(5)(a) ITAA97: foreign residents assessed on ordinary income and statutory income from Aus sources

### A WHETHER TAXPAYER IS A RESIDENT OR FOREIGN RESIDENT

✓ Resident      ✗ Not a Resident/Foreign Resident

#### INDIVIDUALS

S 6(1)(a) ITAA36: 'Individual Resident' → person who resides in Aus and:

- (i) whose domicile is in Aus, unless Commissioner satisfied permanent place of abode is outside Aus or
- (ii) has actually been in Aus, continuously or intermittently during more than one-half of the year of income, unless Commissioner satisfied usual place of abode is outside Aus and does not intend to take up residence in Aus or
- (iii) is
  - (A) member of superannuation scheme established by deed under Superannuation Act 1990 or
  - (B) eligible employee for purposes of Superannuation Act 1976 or
  - (C) spouse or child under 16 of person covered by (A) or (B)

#### 1 Resides Test (s 6(1)(a) ITAA36)

'Resides' → undefined in the legislation, thus takes its ordinary meaning

Place where person resides is a question of fact and determined by reference to all circumstances of the case (Miller)

#### a Factors in TR98/17

Commissioner will look at the following factors (TR 98/17):

- intention or purpose of presence
- family and business or employment ties
- maintenance and location of assets
- social and living arrangements
- physically present in Aus

#### b Other Factors

##### i Continuity of Association

✓ Employed by Sri Lankan maritime agency and spent 316 days at sea but kept permanent residency and maintained home in Aus for wife and children (Joachim)

- Whether person retained continuity of association with the place, together with intention to return and attitude that the place remains home, not whether physically absent

✓ Worked in Qatar and returned to Aus for 7 weeks but salary paid in AUD into Aus bank account which covered mortgages and car loans, retained personal items, internet and telephone account at residence (Sneddon)

✓ Aus citizen worked as doctor in East Timor 9-11 months each year, returned to Aus for 6-8 weeks to live in property in Sapphire Beach, visited children and grandchildren. Retained continuity of association with Aus, did not treat East Timor as home as connection based almost entirely on employment (Pillay)

##### ii Ordinary Resident

✓ Lived in London, surrendered lease on house, had no fixed abode (lived in hotels) but returned to England 5 months each year to obtain medical advice, visit family, attend to business and religious matters (Levene v IRC)

- Ordinary resident of UK for relevant period based on habits of life, **regularity of visits**, ties with UK and freedom of attachments abroad

✓ Lived in Ireland but appointed as advisory director of English company, visited **England 1 week every month**, stayed in hotels/brother's house (*IRC v Lysaght*)

## 2A Domicile and Permanent Place of Abode Test (s 6(1)(a)(i) ITAA36)

'**Domicile**' → person acquires 'domicile of origin' at birth and retains until acquire 'domicile of choice' elsewhere or by operation of law

'**Place of abode**' → where person lives with family and sleeps at night (*Hammond*)

Will **not have permanent place of abode** outside Aus if have **not abandoned** home in Aus (*Case Q68*)

X Aus lawyer posted in New Hebrides for **substantial indefinite period** and has **no assets in Aus**, **surrendered lease** in Sydney, **took wife** with him (*Applegate*)

- **Permanent** being **more than temporary or transitory**

X Bank officer transferred **with wife and family** to New Hebrides for **3-year term** (*Jenkins*)

X Aus project manager worked in Saudi Arabia under contract of **indefinite duration**, kept house in Gold Coast, returned on holidays, caught up with children in Canberra (*Dempsey*)

X Engineer **worked in Malaysia**, formed relationship with Filipino, moved to Philippines and rented apartment. **Sold home unit** and personal residence even though retained vacant block of land, maintained Aus bank account, visited parents (*Mynott*)

X Moved to Bahrain to work while wife and son remained in Aus, made 4 visits to Aus totalling 91 days, separated and continued to live in a **serviced apartment in Bahrain** (*Harding*)

Factors in **IT 2650**:

- Intended and actual length of individual's stay in overseas country
- Intention to return to Aus
- Establishment of home outside Aus
- Abandonment of residence or place of abode in Aus
- Duration and continuity of presence in overseas country
- Durability of association with Aus

## 2B 183 Days Test (s 6(1)(a)(ii) ITAA36)

X Two-year posting in New Hebrides and left Aus with family on 14/04/1978, **intended to remain abroad** for **indefinite period** (*Case S19*)

## 2C Commonwealth Superannuation Test (s 6(1)(a)(iii) ITAA36)

Covers Commonwealth public servants and their spouses and children under 16 (eg foreign diplomats living abroad)

✓ Aus citizen **took leave** without pay from Dept of Defence in 2009, resided and worked as contractor in Philippines, did not intend to return to Aus, resigned from Dept of Defence in 2011 (*Baker*)

- **Remained member** of Aus superannuation scheme established under *Superannuation Act 1990*

## COMPANIES

S 6(1)(b) ITAA36: company **incorporated in Aus** or which, not being incorporated in Aus, **carries on business** in Aus and has either its **central management and control** in Aus or its **voting power controlled by shareholders** who are **residents** of Aus

### 1 Incorporation Test

✓ Resident if incorporated in Aus even if controlled by foreign shareholders, managed overseas and carries business overseas

If not incorporated in Aus:

## 2 Carries on Business in Aus

### 3A Central Management and Control Test

Location is where **operations** are **controlled** and **directed** (*Koitaki Para Rubber Estates*)

✓ Mining company incorporated with head office and mines in South Africa but central management and control in UK as **directors met for board meetings** in London (*De Beers Consolidated Mines*)

If **subsidiary**, where **parent company** board meetings are held (*Unit Construction*)

✗ Norfolk Island company acted as trustee of trust and directors resided and met in Norfolk Island, **acted in accordance with advice provided by Aus accountants** (*Esquire Nominees*)

✓ Several companies incorporated overseas and directors resided outside Aus. Despite meetings held overseas, companies controlled by accountant in Sydney, boards **followed accountant's directions**, **abrogated decision-making powers** (*Bywater Investments*)

Managing director had **power to remove other directors** and **no resolution** would be **effective without his agreement** (*Malayan Shipping Company*)

Factors in **TR2018/5**:

- Making of high-level decisions
- Those who make decisions do so as matter of fact and substance
- Setting of investment and operational policy, deciding to buy and sell significant assets, appointing company officers, agents and determining how profits are used and dividends are declared
- Control and direction (not day to day conduct and management of operation)
- Not admin matters
- Not necessarily majority shareholder
- Person without legal power/authority can still exercise management and control provided controls directors or people in control

### 3B Control of Voting Power Test

'**Shareholder**' → person is registered as shareholder in company's register or entitled to be so registered

## B WHAT IS THE SOURCE OF TAXPAYER'S INCOME

✓ Sourced in Aus      ✗ Not sourced in Aus

'**Source**' → not a legal concept but what a practical man would regard as real source of income (*Nathan*)

### 1 Services Income

Source located at **place where services performed**

✓ Operated fishing trawling business, engaged fishermen to work in coasts of NSW and Vic. Wages determined by reference to **time spent in territorial waters** (*Cam & Sons Ltd*)

✗ Although engineer employed by Aus company and wages **paid into Sydney bank account**, NZ source as **worked** for 2-3 weeks **in NZ** (*French*)

✓ **Greek** employed by government to **work** for Press and Info Service **in Aus** (*Efstathakis*)

Source located at place where **relevant contract entered into** or **relevant payments made**

✗ American actor entered into **agreement with Swiss company**, worked 11 weeks in Aus (*Mitchum*)

## 2 Business Income

Source of income usually **where goods are sold**

✓ UK company exported goods to Aus, carried wholesaling business in various states and made all profits from **sale of goods in WA** (*D & W Murray*)

Source of income usually **where trading activities take place**

✓ Vanuatu company **traded shares in Aus** company listed on ASX (*Picton Finance*)

If trades in land, source is generally **where land is located**

X English company derived profits from **sale of mining claims** in Southern Rhodesia (*Rhodesia Metals Ltd*)

## 3 Interest Income

If loan, usually **where loan agreement is entered into** and **money is lent** (*Spotless Services Ltd*)

X Dutch company entered into **loan with NZ company** to convert trading debt owed by NZ for supply of goods. Source of interest is Holland as **loan made in Holland** (*NV Philips Gloeilampenfabrieken*)

X US car manufacturer **sold cars to NSW company** and **agreement made in US** allowed manufacturer to charge interest on unpaid money owing on cars delivered (*Studebaker Corporation of Australasia*)

## 4 Rental Income

Source of rent from lease of:

- **fixed** property (eg land) ordinarily based on **where property is located**
- **movable** property (eg chattels) based on **where lease agreement entered into** and **goods taken**

✓ Company received compensation payment on account of hire charges for **steam tugs** requisitioned by government for WWI **in Aus waters** but **sent outside** as part of war effort (*James Fenwick & Co*)

## 5 Dividend Income

Source determined according to **source of fund** of profits out of which dividends were paid (*Esquire Nominees*)

**EXAMPLE:** K is PR in Aus, born in Peru and retained Peruvian citizenship. K spends most of the year working off coast of Indo on oil rig for US co. Recruited for job in Aus and signed contract with co in Sydney. For 4 years, K's wife lived in Aus with 2 children, purchased home in Aus 3 years ago. K's wife and K has joint account with Westpac, K's salary paid directly into this account. All family's other investments, including share portfolio generating dividend income remain in Peru. K gets 1 month off from work every 3 months and meets family in Aus or holidays in South America (Peru, where parents live).

Whether K is a resident of Aus for tax purposes?

- Under s 6(1)(a) *ITAA97*, the definition of 'resident' is one of fact and degree
- Reasonable argument K is resident because Aus seems to be the place where K seems to live or has an abode with some degree of permanence (immediate family live in Aus, maintains bank account in Aus, bought a home in Aus)
- These factors outweigh other factors that point to K's connection with:
  - o Peru (maintained Peruvian citizenship, has share portfolio in Peru, spends time in Peru, has family there)
  - o Indonesia, which seems to be based almost entirely on employment (*Pillay v FC of T*)
- K's intention (and his immediate family) is to reside in Aus and make it their home

How salary income is taxed

- Likely source of salary and wage income is overseas (Indonesia) (*FC of T v French*)
- Generally, source of services income is place where services are performed (*Efstathakis, French*)
- However, may be argued that the source is in Aus as contract was made in Aus (*Mitchum*)



How investment income is taxed

- Source of dividend income is source of profits from which dividends were paid (*Esquire Nominees*)
- Dividends earned from share portfolio in Peru most likely paid from profits with foreign source and thus have foreign source

As a resident, K assessable in income from all sources, including salary and wage income from Indonesia and investment income from Peru. Foreign income tax offsets may be available if tax has been applied overseas.

### C IF TEMPORARY RESIDENTS

**S 995-1 ITAA97:** 'Temporary resident' → person who:

- (a) Holds a temporary visa and
- (b) Not an Aus resident under *Social Security Act 1991* and
- (c) Does not have Aus resident spouse

**Subdiv 768-R ITAA97:** temporary residents taxed as if they were foreign residents

**S 768-910 ITAA97:** foreign source income treated as non-assessable non-exempt income

**S 768-915 ITAA97:** entitled to disregard capital gains/losses made from GST events in relation to CGT assets not 'taxable Aus property'

**EXAMPLE:** JC is temp resident who derives both Aus and foreign source income, how is his income taxed?

- JC subject to subdiv 768-R ITAA97 which aims to tax temp residents in the same way as foreign residents
- JC's foreign source income generally taxed as non-assessable non-exempt income unless it is salary or wages earned while JC was a temporary resident (s 768-910 ITAA97)
  - o Dividends or capital gains without Aus source will not be assessable in Aus
- JC's Aus source income will be taxed (such as if JC makes a capital gain on sale of land, it will be assessable)

### D PERMANENT ESTABLISHMENTS

**S 6(1) ITAA36:** 'Permanent establishments' → place at or through which person carries on any business (ie branch) and includes a place:

- (a) where person is carrying on business through agent
- (b) where person has, or is using or installing substantial equipment or machinery
- (c) where person is engaged in construction project
- (d) where goods manufactured, assembled, processed, packed or distributed

Excludes a place:

- (e) where person is engaged in business dealings through bona fide commission agent/broker who:
  - o acts in ordinary course of business as commission agent/broker and
  - o does not receive remuneration otherwise than at rate customary in relation to dealings of that kind, not being place where person otherwise carries on business
- (f) where person is carrying on business through agent:
  - (i) who does not have or habitually exercise general authority to negotiate and conclude contracts on behalf of person or
  - (ii) whose authority extends to filling orders on behalf of person from stock of goods or merchandise situated in country where place is located but does not regularly exercise that authority

not being a place where person otherwise carries on business

- (g) of business maintained by person solely for purpose of purchasing goods or merchandise

**S 128B(3E) ITAA36:** special assessment and withholding tax rules where dividends are paid to non-residents that carry on business through Aus PE

**S 23AH /TAA36:** special income tax and capital gains tax exemption that apply to resident companies that derive foreign income from carrying on business through foreign PE

## II CAPITAL GAINS TAX

### A REVIEW (/TAA97)

*See Baby Tax Notes*

#### 1 Capital Gain/Loss

**S 102-5:** net capital gain for income year is **included** in taxpayer's **assessable income**

**S 102-10:** while taxpayers not entitled to deductions for net capital losses, can be **carried forward** to reduce net capital gain in future years

#### 2 CGT Event

**S 102-20:** **capital gains/losses** only **arise** if CGT event occurred

##### a CGT Event A1 (Disposal)

**S 104-10:** CGT event happens when taxpayer **disposes of CGT asset** arising when **change of ownership**

'Asset' → any form of property

**S 104-10(3):** time of event → when contract entered into or change of ownership occurs

**S 104-10(4):** gain/loss →

- gain where capital proceeds > cost base
- loss where capital proceeds < reduced cost base

**S 104-10(5):** gain/loss disregarded if before 20 Sept 1985

##### b CGT Event C2 (Cancellation or Surrender)

**S 104-25(1):** CGT event happens when taxpayer's ownership of **intangible CGT asset** ends because **redeemed, released, expired** etc

- Ex: share being redeemed, debt discharged, contract expiring

**S 104-25(2):** time of event → when contract entered into or when asset ends occurs

**S 104-25(3):** gain/loss →

- gain where capital proceeds > cost base
- loss where capital proceeds < reduced cost base

**S 104-25(4):** lease → expired even if extended or renewed

**S 104-25(5):** gain/loss disregarded if before 20 Sept 1985

##### c CGT Event G1 (Capital Payment for Shares)

**S 104-135(1):** CGT event happens when company **makes payment** in respect of share owned (**not dividend** as must not be assessable income)

**S 104-135(2):** time of event → when company makes payment

**S 104-135(3):** gain where non-assessable part > cost base and share's cost base reduced to 0

**S 104-135(4):** loss where non-assessable part < cost base and cost base reduced by non-assessable part

**S 104-135(5):** gain/loss disregarded if before 20 Sept 1985