

Australian Tax Residency of Peter His Wife and ABC Ltd

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Rule

In general, the income of a person who is an Australian resident from all sources should be taxed, whereas if a person is not an Australian resident, then only income that sources from Australia will be taxed.^[1] The issue of whether the taxpayer is an Australian resident or not can be figured out through four tests for individuals and three tests for companies. On one hand, individuals who belong to Australian residents should satisfy at least one of the four tests of residence, including the resides test, domicile test, 183-day test and superannuation test.^[2] Firstly, regarding the resides test, the behaviors of the taxpayer who is an Australian resident are characterized by several factors, including the time physically spent in Australia, the frequency, regularity and duration of visits, the intention or purpose of presence, the family and business or employment ties, the maintenance and location of assets, the social and living arrangements, and the nationality.^[3] Secondly, in terms of the domicile test, if an individual has a domicile of origin at birth in Australia or intends to establish a home in Australia indefinitely, the individual will be considered as an Australian resident.^[4]

Nevertheless, the domicile test does not apply to individuals who have a permanent dwelling place outside Australia, which includes people who intend to and actually stay in the overseas country permanently, people who establish their home in the overseas country, as well as people who have presented in an overseas country for a long time continuously and do not have solid associations in Australia.^[5] Thirdly, under the 183-day test, a taxpayer will be considered an Australian resident if the taxpayer has presented physically in Australia continuously or regularly for more than one-half of the income year, exclusive of circumstances where such person has a permanent dwelling place outside Australia and does not have the intention to reside in Australia.^[6] Fourthly, from the perspective of the superannuation test, individuals who enjoy Commonwealth superannuation funds are deemed to be Australian residents with their families.^[7] On the other hand, companies who are Australian residents should fulfill at least one of the following three tests, including the place of incorporation test, central management and control test as well as controlling shareholders tests.^[8]

Firstly, under the place of incorporation test, regardless of other factors, a company that is registered in Australia is automatically an Australian resident.^[9] Secondly, under the central management and control test, a company that is an Australian resident has been characterized by two elements, which are carrying on business and exercising central management and control of the company in

Australia.^[10] The latter element can be evaluated by factors including the location in which actual core decision-making processes are developed.^[11] Thirdly, under the controlling shareholder's test, in addition to the element of carrying on business in Australia, a company whose voting power is controlled by shareholders who are Australian residents can also be regarded as an Australian resident.^[12]

Application

Firstly, from the perspective of the resides test, although Peter, who worked for ABC Ltd in Brunei and his wife, who accompanied him in Brunei, have not presented in Australia physically and regularly for 2twoyears, he and his wife can be considered as the tax residents of Australia in terms of other factors under the resides test.^[13] To begin with, if Peter and his wife do not have the intention to live and stay in Australia permanently, they would sell their house in Melbourne and buy a house for a long time living in Brunei instead of just leasing a house.^[14] It can be further proved that Peter and his wife have intended to present permanently in Australia, for Peter rejected to extend his job tenure in Brunei for another year which was offered by ABC Ltd when his two-year contract expired.^[15] In addition, Peter has not only family ties in Australia, as his older married daughter has lived in Australia during his stay in Brunei (the same applies to his wife), but also business ties, which have been developed and maintained when he performed accounting in Australia.

^[16] Besides, Peter and his wife have possessed a place of abode, which is located in Melbourne.^[17] Moreover, when they returned to Australia, Peter restarted his accounting practice in a short term with his wife who acts as the receptionist for social and living arrangements.^[18] Furthermore, it is strongly suggested that they are the tax residents of Australia by the nationality of Peter and his wife, who are Australian citizens.^[19] In terms of the domicile test, although Peter and his wife, who moved overseas for Peter's work needs, have continuously stayed in Brunei for an actual two years, they do not intend to stay in Brunei for a longer time, which can be proven by their temporary dwelling place in Brunei and intention to make their home in Australia indefinitely when Peter's work ended.^[20] Therefore, although Peter and his wife, who have not presented in Australia physically for more than one-half of the income year of 2017, are less likely to be Australian residents on the basis of the 183-day test, through the previous tests, it can be proved that they do belong to the tax residents of Australia.^[21]

Secondly, in accordance with the place of incorporation test, as the company is not registered in Australia but in Hong Kong, the ABC Ltd can not be considered as an Australian resident.^[22] In addition, from the perspective of the central management and control test, although all the members of the Board of Director of the ABC Ltd reside in Australia, the main business behaviors are carried out in Brunei where the majority of the company's plantations are located.^[23] On the other hand, as the board of directors in Australia of the ABC Ltd had adopted the form of decision making in July 2016 which was some of the decisions made by the board of director would be tentative and the final decisions which have significant impacts on the overall corporate policy of the company would be

made by Peter and a representative of the board of directors in Brunei during Peter's job tenure, it can be inferred that the actual high level decision-making processes of the company were made in Brunei rather than in Australia.^[24] Therefore, it can be concluded that the ABC Ltd should not be treated as an Australian resident.^[25] Moreover, in terms of the controlling shareholders test, because the ABC Ltd has mainly carried on business in Brunei where the majority of the company's plantations are located and the residence of the majority of its shareholders who have controlled the voting power of the ABC Ltd is located in Hong Kong, the ABC Ltd should not be deemed as an Australian resident.^[26]

Conclusion

Therefore, Peter and his wife should be treated as Australian residents, whereas the ABC Ltd can not be deemed as an Australia resident.

Second Issue

Issue

What the nature of Peter's behavior to carry out accounting practice solely when returning to Australia? is it a business? Or just a hobby?

Rule

To evaluate whether the behavior is a business or merely a hobby, there are several factors can be utilized.^[27] Firstly, individuals and organizations who adopt business-like manner such as record keeping are doing business.^[28] Secondly, individuals and organizations who have the intention to gain profits are also considered to do business whether they actually get the profits or not.^[29] Thirdly, the scale of activities should also be considered, that is, a behavior is more likely to be a business if the turnover/profit/capital/number of employees are larger than that can be obtained by a hobby.^[30] Fourthly, the repetition or regularity of business behaviors is also a influential factor to identify the nature of a behavior.^[31]

Application

According to the above rules, it can be asserted that the behavior of Peter to carry out accounting practice solely can be regarded as a business.^[32] Despite the fact that Peter had billed only one client for the year ended 30 June 2017 from which it can be deducted that the scale and regularity of business activities are not in line with the above rules, Peter has not only adopted business-like manner such as having his wife as the receptionist and billing the client for \$8,000, but also showed

the intention to get profits as he charged the client for fees of \$8,000.^[33]

Conclusion

Consequently, the behavior of Peter to carry out accounting practice solely when returning to Australia can be regarded as business.

Third Issue

Issue

Are Peter's salary, the two houses which are located in Melbourne and Brunei respectively, the income of Peter's wife by teaching English casually in Brunei, the dividends from the investment company in Singapore and the fees paid by Peter's client for the accounting practice the ordinary income (OI) and should these income be assessed?

Rule

The OI which refers to 'the income according to ordinary concepts' includes wages, rents, dividends, earnings from business and so on.^[34] A gain which can be considered as the OI should satisfy the following conditions, which are cash or cash convertible, a real gain instead of compensation for loss, regular payment, flowing from a source ('fruit and tree' concept), expectation and dependence of the taxpayer.^[35] In addition, the OI has usually come from three sources, which are the rewards for personal services and employment such as salary, gifts, prizes, payment for services and giving up a capital right, and salary sacrifice, the income from business, and the income from property such as interest, rents and dividends.^[36]

Application

Based on the above rules, Peter's salary fulfills most of the conditions such as cash convertible, a real gain, regular payment and the expectation and dependence of Peter.^[37] Therefore, the salary of Peter which was paid by the ABC Ltd for employing him as their manager in Brunei belongs to the OI that sources from the rewards for personal services and employment.^[38] In addition, the two houses which are located in Melbourne and Brunei respectively as well as the dividends from the investment company in Singapore which satisfy all of the mentioned conditions, including cash convertible, a real gain, regular payment, flowing from a source, and the expectation and dependence of Peter are clearly the OI which are driven from property.^[39] Besides, the income of Peter's wife by teaching English casually in Brunei which was a real gain that could be converted into cash and was paid regularly, and expected and depended by his wife also belongs to the OI which sources from the

rewards for personal services and employment.^[40] Moreover, according to the above rules, the payment from Peter's client for his services seems to be the OI which comes from Peter's business through providing accounting services.^[41] However, although Peter charged his client for the accounting practice of \$8,000 on 28 June 2017 and received the payment in cash from his client for these services in August 2017, the \$8,000 can not be considered as the OI in the financial year of 2017 which ended at 30 June for the income couldn't be converted into cash during this period of time.^[42] Furthermore, reviewing from the above analysis, it can be obtained that as Peter and his wife are Australian residents, therefore, exclusive of the cash payment that Peter received from his client in August 2017, all the other income that Peter and his wife gained within the financial year of 2017 which ended at 30 June should be assessable.^[43]

Conclusion

As a result, Peter's salary, the rents of the two houses which are located in Melbourne and Brunei respectively, the income of Peter's wife by teaching English casually in Brunei and the dividends from the investment company in Singapore are the OI and should be assessed. While the fees paid by Peter's client in cash in August 2017 is not the OI and can not be assessed in the financial year of 2017 which ended at 30 June.

Bibliography

Textbook

Stephen Barkoczy 2014, *Foundation of Taxation Law*, 6th ed., CCH, Sydney, NSW

Cases

IRC v Lysaght (1928) AC 234

Levene v IRC (1928) AC 217

FCT v Jenkins (1982) 82 ATC 4098

Malayan Shipping Co Ltd v FCT (1946) 71 CLR 156

Ferguson v FCT (1979) 79 ATC 4261

FCT v Walker (1985) 85 ATC 4179

FCT v Cooke & Sherden (1980) 80 ATC 4140

Hochstrasser v Mayes (1960) AC 376

Eisner v. Macomber 252 U.S. 189 (1920)

Hayes v FCT (1956) 96 CLR 47

Lomax v Peter Dixon & Son Ltd (1943) 25 TC 353

Adelaide Fruit v DCT (1932) SASR 116

Legislation

ITAA97 s6-5(2)

ITAA97 s6-5(3)

ITAA36 s6(1)

Domicile Act 1982

Taxation Ruling Income Tax 2650

Corporation Act 2001

Tax Ruling 98/17

Tax Ruling 2004/15

1. *ITAA97* s6-5(2) & s6-5(3) ↑
2. *ITAA36* s6(1) ↑
3. *IRC v Lysaght* (1928) AC 234 & Stephen Barkoczy 2014, *Foundation of Taxation Law*, 6th ed., CCH, Sydney, NSW. ↑
4. *Domicile Act 1982* ↑
5. *Taxation Ruling Income Tax 2650* ↑
6. Stephen Barkoczy 2014, *Foundation of Taxation Law*, 6th ed., CCH, Sydney, NSW ↑
7. Ibid ↑
8. Above 2 ↑
9. *Corporation Act 2001* ↑
10. Above 6 ↑
11. Ibid ↑
12. Ibid ↑
13. Above 3 ↑
14. *Tax Ruling 98/17* ↑
15. Ibid ↑
16. *Levene v IRC* (1928) AC 217 ↑
17. Above 14 ↑

18. Ibid ↑
19. Above 6 ↑
20. *FCT v Jenkins* (1982) 82 ATC 4098 ↑
21. Above 6 ↑
22. Above 9 ↑
23. *Tax Ruling* 2004/15 ↑
24. *Malayan Shipping Co Ltd v FCT* (1946) 71 CLR 156 ↑
25. Above 6 ↑
26. Ibid ↑
27. Ibid ↑
28. *Ferguson v FCT* (1979) 79 ATC 4261 ↑
29. Ibid ↑
30. *FCT v Walker* (1985) 85 ATC 4179 ↑
31. Ibid ↑
32. Above 28 & above 30 ↑
33. Ibid ↑
34. Above 6 ↑
35. *FCT v Cooke & Sherden* (1980) 80 ATC 4140, *Hochstrasser v Mayes* (1960) AC 376 & *Eisner v. Macomber* 252 U.S. 189 (1920) ↑
36. *Hayes v FCT* (1956) 96 CLR 47, *Ferguson v FCT* (1979) 79 ATC 4261, *Lomax v Peter Dixon & Son Ltd* (1943) 25 TC 353 & *Adelaide Fruit v DCT* (1932) SASR 116 ↑
37. Above 35 ↑
38. *Hayes v FCT* (1956) 96 CLR 47 ↑
39. *Adelaide Fruit v DCT* (1932) SASR 116 & above 35 ↑
40. Above 35 & above 38 ↑
41. Above 28 ↑
42. *FCT v Cooke & Sherden* (1980) 80 ATC 4140 ↑
43. Above 1 ↑