

# THE NEW ZEALAND DEFINITION OF "RESIDENCE" FOR INDIVIDUALS: LESSONS FOR AUSTRALIA IN A "GLOBAL" ENVIRONMENT\*

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*The definition of "residence" for individuals differs between Australia and New Zealand. This article examines the global context in which individuals now operate and puts forward a "number of days" test as the most appropriate to protect the revenue and attract foreign investment. This may be reinforced by using the "centre of vital interests" definition as a tie-breaker. Using this discussion, the article examines the advantages and disadvantages of each of the New Zealand and Australian definitions and puts forward proposals for the revision of the Australian definition.*

## 1. INTRODUCTION

Residence is a critical concept in the tax legislation of most countries. In its more general meaning it identifies those persons belonging to the country. It is defined more strictly for tax purposes. In most jurisdictions, persons defined as tax residents are taxed on their worldwide income.<sup>1</sup> Non-residents are usually taxed on their domestic

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\* The authors first published a proposal for reform of the definition of residence in Australia in CR Alley and D Bentley, "In Need of Reform? A Trans-Tasman Perspective on the Definition of 'Residence'" (1995) 5 *Revenue Law Journal* 40. The rewrite of the Australian definition remains "imminent". The proposals in the article remain relevant. However, globalisation and electronic commerce have added a new dimension to the analysis. The authors have therefore revisited and updated the original proposals.

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<sup>1</sup> The territorial basis of taxation is seldom used although it can be found in Hong Kong

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income arising within the taxing state. Therefore the definition of residence in domestic legislation is an essential determinant of liability to taxation. It is not the sole determinant. Definitions of residence aim to delineate the taxing rights of a country.<sup>2</sup> Bilateral double tax treaties allocate taxing rights between countries in an attempt to prevent double taxation or double non-taxation.

For most jurisdictions the definition of residence for individuals has been in place and working for a considerable time. A long history of case law and exercise of administrative discretion has helped to clarify the basic concepts, certainly in Australia and New Zealand.<sup>3</sup> Disagreement is usually over interpretation of the rules in their application to particular facts and circumstances. The allocation of taxing rights based on double tax treaty definitions of residence of taxpayers is not particularly controversial. However, residence of individuals is becoming more topical in the context of globalisation and the development of electronic commerce. Australia has been in the process of rewriting its tax laws for some time,<sup>4</sup> and this may include

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special Administrative Region. Peroni argues that the territorial basis of taxation is fundamentally inconsistent with the prevailing concepts of fairness that underlie the traditional residence based system: see RJ Peroni, "Back to the Future: A Path to Progressive Reform of the US International Income Tax Rules" (1997) 51 *University of Miami Law Review* 975, 981. On the fairness issues, see NH Kaufman, "Fairness and the Taxation of International Income" (1998) 29 *Law & Policy in International Business* 145.

<sup>2</sup> The discussion in this article is limited to national definitions of residence for income tax purposes, although the term is also important in determining liability to tax within some federal and other jurisdictions in which taxing rights are divided between states or smaller taxing units. For example, see *Quill v North Dakota* (1992) 504 US 298, which looked at taxing rights between the different states in the United States and the importance of "nexus". See further, M Groves, "Where There's a will, There's a Way: State Sales Tax and Use Taxation of Electronic Commerce" (1998) 74 *Indiana Law Journal* 293.

<sup>3</sup> Leading cases include *Lloyd v Sulley* (1884) 2 TC 37; *Levene v IRC* (1928) 13 TC 486; *Lysaght v IRC* (1928) 13 TC 511; *FC of T v Miller* (1946) 73 CLR 93; *Slater v C of T (NZ)* [1949] NZLR 678; and *FC of T v Applegate* 79 ATC 4307 ("Applegate"). Administrative decisions as expressed in rulings of the tax authorities are discussed in Parts 4 and 5.

<sup>4</sup> This was begun by the Tax Law Improvement Project, which was announced by the

rewriting the definition of residence of individuals. New Zealand rewrote its definition of residence of individuals in 1988.<sup>5</sup> This article explores these three threads.

The aims of the article are:

- to demonstrate the importance of the definition of residence for individuals with increased globalisation and to propose a simpler approach to defining residence than that used in New Zealand or Australia (Parts 2 and 3);
- to identify the characteristics of the New Zealand and Australian statutory definitions of residence for individual taxpayers and to determine the applicability of the above proposal (Parts 4 and 5); and
- to make recommendations as to the content of a revised Australian definition (Part 6).

## 2. RESIDENCE IN CONTEXT

Why is residence for an individual of such great importance in Australia and New Zealand? Australia taxes residents on their worldwide income irrespective of the source of that income and taxes non-residents only on that income which has its source in Australia.<sup>6</sup> A similar basic rule is used in New Zealand. Residents of New Zealand are liable for New Zealand income tax on income derived from any part of the world. This applies whether or not this income is remitted back

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Australian Federal Government on 17 December 1993. The project was to run over three years. The *Income Tax Assessment Act 1997* (Cth) ("ITAA97"), which rewrote approximately half of the *Income Tax Assessment Act 1936* (Cth) ("ITAA36"), was the result before the project was put on hold. ITAA36 remains partly rewritten. It is unlikely that the two Acts will remain in this state indefinitely, but it may take some time before a government decides to remedy the position by either rewriting the remainder of ITAA36 or by starting again completely.

<sup>5</sup> For a discussion of the previous definition and changes, see CR Alley and D Bentley, "In Need of Reform? A Trans-Tasman Perspective on the Definition of 'Residence'" (1995) 5 *Revenue Law Journal* 40.

<sup>6</sup> ITAA36, s 25(1) (to 30 June 1997); ITAA97, ss 6-5, 6-10 and 6-15 (from 1 July 1998).

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to New Zealand. Non-residents are liable for New Zealand income tax only on income derived from New Zealand.<sup>7</sup>

In defining whether a taxpayer is resident, the Australian *Income Tax Assessment Act 1936* (Cth) ("ITAA36") does so using a complex definition of residence. A non-resident is defined as "a person who is not a resident of Australia".<sup>8</sup> The definition therefore includes those taxpayers who do not fall within the resident classification and relies on the latter complex definition for its meaning. The New Zealand legislation defines both a resident and a non-resident, using a simpler definition (see Part 4).

In their definitions, both New Zealand and Australia rely in part on an arbitrary number of days of presence in (and for New Zealand, absence from) the relevant country to determine residence status. Crucial to the definitions, but far less arbitrary and, as a result, more difficult to define, is the concept of "permanent place of abode".<sup>9</sup> The complexity of the Australian definition is further increased by the use of the common law definition of residence and the concept of domicile.

Definitions of residence vary between jurisdictions and Australia and New Zealand are not unusual in their approaches. Using Vann's analysis, there are three general types of definition of residence for individuals.<sup>10</sup> The first depends on the facts and circumstances of the

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<sup>7</sup> *Income Tax Act 1994* (NZ) ("ITA94"), ss AA 2 and BD 1(2)(c).

<sup>8</sup> ITAA36, s 6(1).

<sup>9</sup> In *Applegate* 79 ATC 4307, 4314, Northrop J described the meaning of "permanent place of abode" in the Australian legislation: "What is of importance is whether the taxpayer has abandoned any residence or place of abode he may have had in Australia. Each year of income must be looked at separately. If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income. This is to be contrasted with a temporary or transitory place of abode outside Australia."

<sup>10</sup> R Vann, "International Aspects of Income Tax" in V Thuronyi (ed), *Tax Law Design and Drafting* (Vol 2, 1998) 718, 729 provides a useful analysis of individual residence rules in the international context.

individual to determine their connection with the relevant jurisdiction.<sup>11</sup> The second uses general legal concepts such as domicile and citizenship.<sup>12</sup> The third uses an arbitrary number of days that a person spends in the jurisdiction. The days can be assessed over a calendar year, a tax year, as a cumulative period, or over a combination of years.

The Organisation for Economic Co-operation and Development's ("OECD") *Model Convention on Income and on Capital* ("OECD Model")<sup>13</sup> acknowledges the different types of definition. The OECD Model allocates taxing rights to individuals on the basis of their primary place of residence in Art 4, para 2. There is an ordering of criteria. A permanent home is the first indicator of residence and it is the permanence factor that is emphasised.<sup>14</sup> If there is a permanent home in two states, then the test uses closer personal and economic relations or the centre of vital interests. Where there is no permanent place of abode or if the centre of vital interests is unclear, the place of habitual abode is used. If this test is unclear then nationality is used as the tie-breaker. Failing that the states must settle the issue by mutual agreement. Article 4, which is widely adopted in bilateral double tax treaties, operates as a tie-breaker clause to prevent double taxation where both countries define the individual as tax resident.

An Art 4 tie-breaker clause is needed in double tax treaties. However, an individual is less likely to be in a position to become a dual resident under detailed definitions that look to the facts of each case. Dual residence is more likely where countries use an arbitrary number of days test to determine residence. Some countries, such as Malaysia,<sup>15</sup> simply

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<sup>11</sup> This is the traditional approach in which all the different facts are weighed to determine the closeness of the connection. See the discussion on permanent place of abode in Part 4.2 below.

<sup>12</sup> The United Kingdom and Australia both include domicile in their definitions. The US uses the concept of citizenship. Vann, above n 10, 730 argues that although the US taxes citizens, citizenship is really an aspect of residence.

<sup>13</sup> OECD Committee on Fiscal Affairs, *Model Tax Convention on Income and on Capital* (2000).

<sup>14</sup> *Ibid*, Commentary on Art 4, 4-5.

<sup>15</sup> *Malaysian Income Tax Act, s 7*.

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use the arbitrary number of days test. Others, such as New Zealand and Australia, operate an arbitrary number of days test in conjunction with other more detailed tests. If a country adopts an arbitrary number of days test, it should ensure that either it has comprehensive bilateral tax treaties with its major trading partners, or, like Malaysia, it treats tax residents generously.<sup>16</sup> Otherwise, the double taxation for executives and other expatriate personnel could influence the decision to invest in that state, other factors being equal.<sup>17</sup> Both Australia and New Zealand have substantial tax treaty networks, which makes the arbitrary number of days rule justifiable in an economic environment where both countries have undergone significant economic liberalisation to attract foreign investment.

### 3. RESIDENCE AND GLOBALISATION

The definition of residence is becoming increasingly important to a wide range of individual taxpayers, particularly those who either choose to spend time working overseas, or are required to do so as part of their employment. Most taxpayers realise that it is difficult to avoid taxation by claiming not to be a resident of any jurisdiction. However, taxpayers travelling overseas may wish to be considered non-residents in their home countries as the taxation in the host country may be more favourable, or their home country may not grant full relief or exemption from taxes paid in the host country.<sup>18</sup> Others may wish to argue that they are still residents in their home country although they live overseas, because this may allow them to take advantage of resident rebates, exemptions, lower rates of taxation and other incentives.

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<sup>16</sup> In Malaysia, tax residents are taxed on their worldwide income on a remittance basis and even then, there are concessions to encourage repatriation of much needed foreign currency.

<sup>17</sup> Discussed further in AJ Easson, *Taxation of Foreign Direct Investment: An Introduction* (1999) 17 and 125. As Easson points out, this burden may be ameliorated by specific tax reliefs for expatriate employees.

<sup>18</sup> For example, social security contributions may not be classed as a tax to attract relief, but the contribution may have the effect of a tax. See further, K Messere, *Tax Policy in OECD Countries: Choices and Conflicts* (1993) ch 8.

Bilateral tax treaties protect the host country's revenue base by allowing source taxation of income from employment in that state.<sup>19</sup> The income is taxable in the state where the employment is actually exercised. However, this is generally subject to the individual being present in the host country for over 183 days in a 12-month period where the remuneration is paid to the individual by a non-resident employer, where the employer does not bear the cost of the remuneration through a permanent establishment in the host country.

For the expatriate employee or the global wanderer, the more complex a country's definition of individual tax residence, the more difficult it is to determine their residence status. Business secondments in particular are becoming more common and increasingly short-term. Difficulties in determining tax residence increase the cost of expatriate employment and foreign direct investment. The growing trend towards globalisation adds another dimension to determining residence. Individuals working abroad are likely to have at least one other possible state of residence and sometimes several. From an investor's perspective, it is important that the residence rules are simple and easy to apply, otherwise compliance costs increase. For this reason, foreign investors are likely to prefer residence rules based on an arbitrary number of days.<sup>20</sup>

However, there is another side to the problem. Electronic commerce allows individuals to play the residence rules to their advantage. Australia and New Zealand's residence and source rules are primarily based on physical connection. As such, they do not attempt to protect the revenue base by taxing income that has a substantial economic connection with those jurisdictions, but which is neither derived by residents nor sourced there. The question of how to tax individuals operating across borders in a world of electronic commerce promises to be just as difficult to answer as the question of how to tax companies.

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<sup>19</sup> OECD Model, Art 15.

<sup>20</sup> For a comprehensive explanation of the taxation of expatriates see R Vann, "Improving Policy For the Taxation of Expatriate Employees in Australia" (2001) 7 *New Zealand Journal of Taxation Law and Policy* 70.

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For both individuals and companies, a permanent establishment or residence is no longer necessary to operate effectively within a jurisdiction.<sup>21</sup>

Electronic commerce makes it much easier for providers of services and intangible products to spend short periods in a country where their income is essentially derived but not sourced. In most jurisdictions they will not exceed 183 days of presence in the host country for their income to be taxed in that country under the dependent personal services articles of the double tax treaties.<sup>22</sup> Nor will they establish the fixed base required for source taxation of independent personal services.<sup>23</sup> These tests were formulated when consultants used to have to spend time, and establish a fixed base, in the same country as their clients in order to provide their services or products. Now an increasing range of services and products can be provided electronically, with a minimal requirement for physical presence. The same consultants can base themselves in a

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<sup>21</sup> Discussions on the taxation of electronic commerce have highlighted, among other things, the importance of jurisdiction in taxing electronic transactions. Jurisdictional issues were raised at the formal level by the OECD in a paper, *Electronic Commerce: The Challenges to Tax Authorities and Taxpayers* (1997), presented at an informal round table discussion between business and government in Turku, Finland. It is available at [[http://www.oecd.org/daf/fa/e\\_com/e\\_com.htm](http://www.oecd.org/daf/fa/e_com/e_com.htm)]. This was followed in 1998 by OECD Committee on Fiscal Affairs ("CFA"), *Electronic Commerce: A Discussion Paper on Taxation Issues* (1998). The paper was presented for discussion at the OECD Government/Business Dialogue on Taxation and Electronic Commerce held in Hull, Quebec, Canada, on 7 October 1998. At the same time, the OECD Ministerial Conference met in Ottawa and produced, among other papers: *A Borderless World – Realising the Potential of Electronic Commerce* (1998) and CFA, *Electronic Commerce: Taxation Framework Conditions* (1998). The OECD set up Technical Advisory Groups to take forward the OECD initiatives on taxation and electronic commerce proposed at the Ottawa conference. Working Party 1 on Tax Convention and Related Questions has since finalised proposals for revisions to Art 5 of the OECD Model, see [<http://www.oecd.org>]. There was no mention of individual residence rules in the various papers and proposals. Various country reports have taken a similar approach when they have examined the issues raised by electronic commerce. In the context of residence, the primary focus is on business transactions and jurisdiction to tax.

<sup>22</sup> OECD Model, Art 15.

<sup>23</sup> Ibid Art 14.



jurisdiction of choice and establish the necessary connections to be deemed resident there.

In establishing residence in a jurisdiction of choice it is necessary to become non-resident in the individual's current home jurisdiction. The consultants would need to ensure that they fell outside the relevant residence definitions and established a necessary connection with their country of choice. This would generally require the disposal of their permanent place of abode in the original home country and establishing a permanent place of abode in the new home country. The consultants would also need to limit the time spent in the original home country, at least in the period immediately after leaving. The advanced international communications infrastructure means that moving to another country is not such a dislocation as it was a generation ago. The consultants could perform the same or similar work as before but be taxed (if tax applies) only in their new place of residence provided they did not establish connections elsewhere subject to source-based taxation.

In both Australia and New Zealand, the rules encourage this new breed of consultant who is prepared to move about the world to not establish residence or a fixed base in Australia or New Zealand, nor remain long enough for dependent personal services income to be taxed there. Why pay relatively high rates of individual tax in Australia or New Zealand when a person can live comfortably in a tax haven or low tax jurisdiction and pay low or no taxes? The domestic residence rules are designed to assist this approach provided individuals are prepared to sever their connections with their previous country of residence, spend less than 183 days per annum there and establish a permanent place of abode (or domicile) elsewhere. The domestic source rules governing income from services generally focus on the place of performance of the services<sup>24</sup> or, in certain circumstances, other factors such as the place of

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<sup>24</sup> This is illustrated in the Australian case of *FC of T v Efstathakis* 79 ATC 4256, which found that where a Greek public servant worked for a press agency of the Greek Government in Australia she derived her income in Australia, as that was where the work for which she was paid was performed.

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contract or the place of payment.<sup>25</sup> If a consultant chooses to live in a jurisdiction with a double tax agreement with Australia or New Zealand, the standard dependent and independent personal services articles follow the OECD Model. They largely restrict taxation in Australia or New Zealand to where work is performed there through a fixed base or where the consultant or employee is present for more than 183 days.

Should the rules change? They are designed to exclude non-residents from tax on income sourced outside Australia and New Zealand. To assist with answering this question assume a consultant leaves Australia and establishes permanent residence in a low tax jurisdiction X, which has no double tax agreement with Australia. The consultant continues to provide services in Australia but ensures that the services are largely performed in X and only provides the product of the services to clients in Australia. The contract is concluded in X and the payments are made to the consultant's bank in X. The consultant would not be taxed in Australia provided he or she is not resident and the income is not sourced in Australia. There is an argument that the consultant in this example has an effective personal and economic connection with Australia, but under the current rules Australia cannot tax such transactions.<sup>26</sup>

It is interesting that although the discussion on electronic commerce and taxation highlights the ease with which services can be provided across jurisdictions, there is little focus on individual residence or extending the scope of the definition of source for dependent personal services.<sup>27</sup> This is because it is far easier to dislocate the presence of an

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<sup>25</sup> The Australian case of *FC of T v Mitchum* (1965) 113 CLR 401 considered the place of contract and the place of payment as relevant where the services could be performed anywhere.

<sup>26</sup> The consultant would have to take care that the services did not attach to goods and fall within the rules to tax non-resident importers and exporters under ITAA36, ss 38-43.

<sup>27</sup> See OECD papers, above n 21. National and international reports have taken a similar approach. See, for example, ATO, *Tax and the Internet* (1997); ATO, *Tax and the Internet: Second Report* (1999); and Inland Revenue and HM Customs and Excise, *Electronic Commerce: The UK's Taxation Agenda* (1999) available at

electronic business than to move as an individual. The focus on individuals is more on tracing their physical location to ensure that revenue authorities can verify individual taxpayers' identities, ascertain their liability to taxation, and collect the relevant amount of taxation.<sup>28</sup> Electronic commerce enables existing residents to avoid tax more easily and it is this that has caught tax administrators' attention.

Residence is an issue in discussions of the rules governing taxing rights in electronic commerce. However, it is in the context of jurisdiction to tax business profits at source.<sup>29</sup> The emphasis by the OECD and other discussion groups has been to determine an appropriate definition of permanent establishment to take account of websites and

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[<http://www.inlandrevenue.gov.uk/e-commerce/index.htm>]. Residence is ignored equally by commentators. See, for example, J Owens, "The Tax Man Cometh to Cyberspace?" [1997] 2 June *Tax Notes International* 1833; L Hinnekens, "The Challenges of Applying VAT and Income Tax Territoriality Concepts and Rules to International Electronic Commerce" (1998) 26 *Intertax* 52; L Hinnekens, "International Taxation of Electronic Commerce: An Emerging Framework" (1999) 27 *Intertax* 440; D Pinto, "Taxation Issues in a World of Electronic Commerce" (1999) 2 *Journal of Australian Taxation* 227; D Bentley, "The ATO, Tax and the Internet: The Emperor's New Clothes?" (1999) 9 *Revenue Law Journal* 99; and the recent book by RA Westin, *International Taxation of Electronic Commerce* (2000).

<sup>28</sup> R Doernberg and L Hinnekens, *Electronic Commerce and International Taxation* (1999). Doernberg and Hinnekens state (at 167) that "the central issue raised by these technological possibilities is determining where the employee is rendering services" and therefore where the employee is liable to tax. Although the authors refer to the concept of "economic allegiance" in determining tax liability, they prefer the source rule to be the location of the person rendering services, so that "disputes between countries is limited to the relatively concrete concept of physical location" (at 173). They do make the point, however, that Art 16 of the OECD Model allows directors' fees and similar payments made to a director in her or his capacity as director of a company which is resident in another contracting state to be taxed in that state even if the services are not rendered in that state.

<sup>29</sup> Based on Art 7 of the OECD Model. See HL Chang, "The Impact of E-Commerce on Allocation of Tax Revenue Between Developed and Developing Countries" [1999] 21 June *Tax Notes International* 2569; and L Hinnekens, "Looking for an Appropriate Jurisdictional Framework for Source-State Taxation of International Electronic Commerce in the 21st Century" (1998) 26 *Intertax* 192. See also the discussion of the effect of electronic commerce on company residence in Doernberg and Hinnekens, above n 28, 332.

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servers.<sup>30</sup> Physical residence of individuals rather than their businesses is not discussed, and it is not a significant issue in terms of volume of cases. Nonetheless, although the existing residence rules can cope, which is an indicator in international discussion that they should be left well alone,<sup>31</sup> they may warrant minor modification. It may be time to provide a clearer statutory definition of residence in an attempt to link tax more closely to personal and economic connection.

The most effective combination is to provide an arbitrary day test together with a focus on effective personal and economic connection. This may only require a change of emphasis. Currently the primary test for determining tax residence is a permanent home. Given the ease with which a permanent home may be established this may no longer be appropriate. The OECD Model Commentary on Art 4 emphasises that the home must be permanent. However, the commentary states that it can be any form of home, whether a "house or apartment belonging to or rented by the individual, [or a] rented furnished room".<sup>32</sup>

To counter the manipulation of the definitions it may be more effective to give priority to the second test in Art 4, which focuses on the closeness of personal or economic relations. This test is also described as the centre of vital interests. The centre of vital interests highlights more clearly an effective personal and economic connection.

As a caveat to this approach, it could be argued that there is no need to change as the economic benefit derived is effectively taxed through other taxes, such as the Goods and Services Tax ("GST"). In Australia, there is no GST on the import of creditable services, because GST is structured so that the value of such services is taxed in the hands of the ultimate consumer.<sup>33</sup> This means that, normally, an enterprise importing

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<sup>30</sup> See note 21 above.

<sup>31</sup> OECD Model and see note 27 above.

<sup>32</sup> OECD Model, C(4)-5.

<sup>33</sup> *A New Tax System (Goods and Services Tax) Act 1999*, Div 84. Section 11-15 states that "You acquire a thing for a creditable purpose to the extent that you acquire it in carrying on your enterprise". A creditable purpose does not include acquisitions of supplies that would be input taxed or of a private or domestic nature.

goods would not pay GST on importation, but would charge GST on sale of its goods or services. Where GST would not be charged otherwise after importation, the importer must pay GST under the reverse-charge rule.<sup>34</sup> GST is therefore paid either at importation or subsequent to importation. Neither of these issues is within the scope of this article.

Nonetheless, the centre of vital interests test is consistent with the "Benefits Principle", which, in broad terms, allocates taxing rights to the country that offers the taxpayer the most benefits. It allows residents to be taxed where they have closest personal and economic ties and business profits to be taxed in the country of source, which has provided the infrastructure to produce those profits. *Avi-Yonah* sets out the traditional approach to residence based taxation:<sup>35</sup>

In the case of individuals, residence-based taxation makes sense. First, residence is relatively easy to define in the case of individuals. Second, because most individuals are part of only one society, distributive concerns can be addressed most effectively in the country of residence. Third, residence overlaps with political allegiance, and in democratic countries, residence taxation is a proxy for taxation with representation.

Where residence is not easy to define, such as for individuals who are part of more than one society, whose political allegiance is not really an issue and who are seeking to avoid connection with a country, a broader test is needed. A mix of the arbitrary number of days and centre of vital interest rules provides a broader approach.

From the perspective of globalisation there are two important issues that derive from the attempt to achieve a balance of import and export neutrality.<sup>36</sup> The first is that countries should design their rules to protect their revenue base and prevent manipulation of tax residence rules. They

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<sup>34</sup> *Ibid.*

<sup>35</sup> The Benefits Principle is a largely US concept. It is discussed extensively in R *Avi-Yonah*, "Symposium: International Taxation of Electronic Commerce" (1997) 52 *Tax Law Review* 507, also cited and discussed in *Westin*, above n 27, 149 and 150.

<sup>36</sup> See *Easson*, above n 17, for an extensive discussion of these issues.

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can achieve this in negotiating bilateral tax treaties. They should consider giving greater prominence in the individual residence tie-breaker clause to the centre of vital interests and close personal and economic relations tests over the permanent place of abode test under its current meaning.

The second issue is that countries should design their rules to attract the expatriates associated with foreign investment. Where it has an effective treaty network, a country should consider using simple definitions of residence, such as an arbitrary day rule, so that foreign investors and visiting expatriates can determine, quickly and simply, the tax implications for expatriate employees.<sup>37</sup>

### 4. RESIDENCE IN NEW ZEALAND

The test for determining whether a taxpayer is a resident in New Zealand is stated in s OE 1 of the *Income Tax Act 1994* ("ITA94"). It is a twofold definition that, unlike the Australian definition, defines when a taxpayer is both resident and non-resident. Until amended in 1988, a natural person was adjudged a resident in New Zealand if that person had a permanent place of abode in New Zealand, or was present in New Zealand for a continuous period of 365 days, with certain permitted absences.<sup>38</sup>

#### 4.1 Defining When A Person Is A New Zealand Resident

Who is and who is not a New Zealand resident for tax purposes is outlined in s OE 1,<sup>39</sup> incorporating the following definitions (in summarised form):

An individual is resident in New Zealand if that person:

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<sup>37</sup> Vann, above n 10.

<sup>38</sup> Under the former ITA76, s 241(1) a "continuous period" allowed a break of not more than 28 intervening days as long as those intervening days did not exceed in aggregate 56 days in the income year.

<sup>39</sup> ITA94, s OE 1.

- (1) has a permanent place of abode in New Zealand or
- (2) has been present in New Zealand for more than 183 days of any 12 month period.

An individual ceases to be a resident in New Zealand if:

- (1) that person is absent from New Zealand for more than 325 days of any 12 month period and
- (2) during that period of absence has at no time a permanent place of abode in New Zealand and
- (3) is not absent in the service of the Government of New Zealand.

A person present for any part of a day is deemed to be in New Zealand for the whole of that day.

Under this legislative provision, the "permanent place of abode" concept overcomes the arbitrariness of a test based solely on the number of days spent in the country. A person is a New Zealand resident if they have a permanent place of abode in New Zealand **or** if they have been personally present in New Zealand for more than 183 days in any 12 month period. It is an either/or situation so that only one of those situations need apply for that person to be adjudged a resident. The reduction in the number of days from 365 to 183 days in any 12 month period reflects the reality of modern travel and the transitory status of many taxpayers. Conversely, to be a non-resident a person must have been out of the country for more than 325 days in any 12 month period and must not have a permanent place of abode in New Zealand. Both criteria must apply. This introduces the permanent place of abode concept into the definition of a non-resident.

The broadening of the definition appears to be driven by a desire to protect the revenue base. It is easier to become a resident and subject to the tax laws than it is to become a non-resident and fall outside the New Zealand tax laws applicable to residents. There does not appear to be any reason for the reduction in the number of days it takes to become a non-resident from 365 to more than 325. However, the fact that it only takes 183 days to become a resident, as compared to the 325 days to become a non-resident, underlines the importance of the additional permanent place of abode test and the need for the tie-breaker provision

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in double tax treaties discussed in Part 2 above.

### 4.2 Permanent Place of Abode

The increased significance of a permanent place of abode in the definition of residence means that it is important to consider what is meant by this concept. The only case under the old definition that throws any light on this is the case of *Geothermal Energy New Zealand Ltd v CIR*.<sup>40</sup> The judgment in this case concluded that "home" was a place around which the taxpayer's domestic life revolved. That is, in the case of a married man (or woman) where his wife (or her husband) and children resided at that particular time, and in the case of a single person the place which is the centre of their interests and affairs.

It follows that an individual's home is not determined by the ownership of any interest in the residence or property, a view previously held by the Commissioner of Inland Revenue ("CIR"). Although it is not defined in the ITA94, the Inland Revenue Department ("IRD") has issued the following list as a guide for determining an individual's permanent place of abode:<sup>41</sup>

- the presence of the person in New Zealand, whether continuous or interrupted;
- accommodation, whether owned or not;
- social ties, family membership of clubs etc;
- economic ties, bank accounts, credit cards, investment, superannuation funds etc;
- employment or business in New Zealand, whether permanent or transient and casual;
- personal property, whether furniture, clothing, car etc has been maintained in New Zealand;
- welfare benefits received in New Zealand;
- intentions, whether the intention is to live in New Zealand or return overseas after a period of time.

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<sup>40</sup> (1979) 4 NZTC 61478.

<sup>41</sup> New Zealand IRD (1995) 7(1) *Tax Information Bulletin* 12.



It is important to note that under domestic law, a taxpayer can maintain similar ties, a residence, a physical home, or a permanent place of abode in other countries but still be a New Zealand resident for tax purposes. If the taxpayer has an enduring relationship in New Zealand that is a permanent place of abode, the taxpayer will always be a resident of New Zealand. This test overrides the provision relating to the number of days the taxpayer is in New Zealand.

In late 1993, the Taxation Review Authority ("TRA") decided a further case dealing with residency. *Case Q55*<sup>42</sup> concerned the residency for tax purposes of a university professor on study leave in Europe. The issue in contention was whether the professor had a permanent place of abode in New Zealand while he was overseas for a period exceeding one year. While overseas the professor received a salary from a New Zealand university and his Auckland home was rented out under a fixed term lease. The professor was absent from New Zealand for 368 days.

This case was decided under the law, stated as it was then, in the *Income Tax Act 1976* (NZ). Therefore the professor was subject to the permanent place of abode test, that as a resident who was absent in excess of 325 days over a 12 month period, he was deemed not to be a New Zealand tax resident if he did not have a permanent place of abode in New Zealand. This meant that if the professor did not have a permanent place of abode in New Zealand he would not have been liable for tax on any income which was not derived in New Zealand for that period. As the professor was working and therefore earning his salary outside New Zealand it could be held that although paid by a New Zealand university, this salary was derived outside New Zealand.

Permanent place of abode has evolved to mean a place where a person normally or habitually lives and a place with which the person has an enduring relationship. These factors were evidenced in this case by the professor's connections to New Zealand through his employment, club memberships, bank accounts, investments, properties owned and his home.

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<sup>42</sup> (1993) 15 NZTC 5313

## “RESIDENCE”: LESSONS FOR AUSTRALIA

Having a permanent place of abode in another country did not affect whether this person also had a permanent place of abode in New Zealand. While in Europe the professor maintained foreign bank accounts and owned a car, but he admitted to the TRA that he did not establish another home and did not have a permanent place of abode overseas.

The contentious issue in this case was the importance that the New Zealand home should be given in determining the existence of a permanent place of abode when the home was unavailable for the period the professor was away. The IRD has stated, along with the list they issued as a guide,<sup>43</sup> that the permanent place of abode test does not focus solely on the ownership or availability for use of a dwelling.

The TRA found in this case that the paramount factor in assessing residency was a person's ties with New Zealand. Despite the professor being unable to return to his home during the time he was overseas, he still had a permanent place of abode in New Zealand. The short-term unavailability of the home for the professor's use was outweighed by his intention to occupy it, and its availability upon his return to New Zealand. Time is obviously important in deciding residency and as the professor was absent from New Zealand for only one year, the connections with New Zealand were given more importance. It was found that he remained a resident of New Zealand and was therefore liable to pay tax on all his worldwide income whether derived in New Zealand or elsewhere.

Determination of the existence of a permanent place of abode is a matter of fact. This is confirmed in the more recent *Case U17*.<sup>44</sup> The taxpayer was a successful New Zealand businessman. After he separated from his wife he accepted a position and moved to Singapore where he leased an apartment, opened a bank account, took out credit cards, leased a car, secured the services of a local doctor and learnt to speak Malay. The taxpayer's wife and children remained in New Zealand in a

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<sup>43</sup> New Zealand IRD, above n 41, 10.

<sup>44</sup> (1999) 19 NZTC 9174.

home provided by the taxpayer. The taxpayer subsequently purchased a dairy farm as an income-earning asset that provided employment for his wife and children and as an asset against which he could borrow to finance his Singaporean business. The taxpayer made frequent trips back to New Zealand and while in New Zealand he generally attended to business relating to a New Zealand company in which he had an interest as a director. The CIR assessed the taxpayer as a resident in both New Zealand and Singapore and as liable for tax at the higher New Zealand rate. The CIR contended that during the relevant income years the taxpayer had maintained a permanent place of abode in New Zealand and that his economic relations were closer to New Zealand than Singapore.

The TRA disagreed. The taxpayer had abandoned his residence in New Zealand and was wholly resident in Singapore between 1990 and 1994. The fact that the taxpayer kept assets, both real and personal, in New Zealand was explained by his desire to provide for his family in New Zealand and to provide an asset base against which he could finance his Singapore business. His frequent visits to New Zealand and involvement with a New Zealand company did not detract from his assertion that he had given up his New Zealand residence and had become wholly resident in Singapore during the relevant period.

In the *Tax Information Bulletin*, answers to questions that people have asked are sometimes published and give an insight into the attitude of the IRD. In the November 1999 edition,<sup>45</sup> a New Zealand resident asked whether he would be a resident for tax purposes during his two-year absence working for an international organisation in the United States. The person did not intend to resign from his New Zealand job, but to take leave of absence. He said that he would consider employment opportunities in the United States and Europe at the end of the two years, as well as the option of returning to his New Zealand job. The person's family was to travel with him, and their Wellington house was to be rented out while they were away. The only investment (other than

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<sup>45</sup> New Zealand IRD (1999) 11(10) *Tax Information Bulletin* 20.

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the house) remaining in New Zealand was to be his interest in the Government Superannuation Scheme, to which he was to continue making contributions for one year.

The IRD stated that counting against a finding of a permanent place of abode were the circumstances of the person's absence - the period of his absence being of significant length, the fact that his family were to go with him, and that they were to take most of their personal property. On the other hand, the person was to retain strong associations with New Zealand throughout his absence. Most importantly, he was to have a job here ready for his return and a house available for him and his family to live in. His intention was that he might come back to New Zealand at the end of his two-year contract. Some property was to be kept here. Although the family's house was to be tenanted in their absence, it could still be seen as being available to family members to live in.

Reference was made to *Case Q55* and the comment by the TRA that:

a "permanent place of abode" does not require that a dwelling be always vacant and available for the person to live in; but that there is a dwelling in New Zealand which will be available to the taxpayer as a home when, and if, that taxpayer needs it, and that the taxpayer intends to retain that connection on a durable basis, with that locality.<sup>46</sup>

The discussion went on to conclude that as the person had a job in New Zealand and a home potentially available to him, he had ongoing associations with New Zealand during his absence of sufficient strength to constitute a permanent place of abode, despite his two-year absence. This meant that he would be potentially subject to tax in New Zealand on his worldwide income. Whether or not he would be subject to tax in New Zealand depended upon the operation of the New Zealand/United States of America double tax agreement.

If the person's leave of absence was for a period of three years, and the other facts were the same, the IRD suggest the conclusion would

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<sup>46</sup> (1993) 15 NZTC 5313, 5320.

probably be that he would not have a permanent place of abode in New Zealand. It should be noted, however, that an absence of three years would not, on its own, be determinative. The facts of each situation must be weighed up. In another situation, a person may have a permanent place of abode in New Zealand, even though working overseas for three years, because of the existence of other ties with New Zealand throughout the period of absence.

### 4.3 Summary

The facts in this item were distinguished from *Case U17*<sup>47</sup> by the IRD, in that the taxpayer in *Case U17* was away from New Zealand for four years, and did not have employment in New Zealand available to him during that time (although he did have a business interest in New Zealand). He had also separated from his wife and his old home was not available to him.

New Zealand operates the traditional permanent place of abode test together with the arbitrary number of days test. The interpretation of permanent place of abode has changed significantly. As shown above, the significance of an interest in, or ownership of, any residence or property is no longer paramount, but rather one of several factors to be taken into account. This accords with the centre of vital interests test, which is being applied as the permanent place of abode test. It would be preferable for the test to be renamed the centre of vital interests test to accord with international understanding and the OECD Model.

## 5. RESIDENCE IN AUSTRALIA

In Australia individuals are resident for tax purposes if they are:<sup>48</sup>

- Australian residents under common law (the common law or

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<sup>47</sup> 47 (1999) 19 NZTC 9174.

<sup>48</sup> ITAA97, s 995-1 defines an Australian resident as a person who is a resident of Australia for the purposes of ITAA36. ITAA36, s 6(1) provides the definition of residence.

## “RESIDENCE”: LESSONS FOR AUSTRALIA

- ordinary meaning test); or
- domiciled in Australia, unless the Commissioner is satisfied that their permanent place of abode is outside Australia (the domicile test); or
- in Australia, continuously or intermittently for more than one half of the year of income, unless the Commissioner is satisfied that their usual place of abode is outside Australia and they do not intend to take up residence in Australia (the 183 day test); or
- a member of certain Commonwealth superannuation schemes (or the spouse or child under 16 of such a member).

The Australian definition is more complex and less clear than the New Zealand definition. This reflects a different drafting style and a tendency towards complexity for which the Australian statute has become infamous.<sup>49</sup> The last statutory test is fact specific and limited in operation and is not considered in this article.

The purpose of this Part is not to provide a comprehensive analysis of the Australian rules. It attempts to draw out the main threads of the law as it is applied to determine the appropriateness of the proposed arbitrary number of days plus centre of vital interests test to Australia. This is not an issue canvassed specifically by the numerous commentaries on the residence provisions.

### 5.1 Common Law Residence Test

This test is not used in New Zealand. There is substantial relevant case law both in Australia and the United Kingdom which attempts to determine the ordinary meaning of residence at common law and it is this ordinary meaning that forms the starting point in determining whether or not a taxpayer is resident.<sup>50</sup> The underlying theme is that a taxpayer resides in the place where he or she has a "home". This is a question of fact, and if a taxpayer is found to have a "home" in

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<sup>49</sup> Discussed at length in D Bentley, "Ten Years of the Revenue Law Journal: A Diary of Tax Reform" (2000) 10 *Revenue Law Journal* 1.

<sup>50</sup> See, for instance, *Applegate* 79 ATC 4307.

Australia, there is no need to proceed further.

The word "reside" was defined by Viscount Cave LC in *Levene v IRC*:<sup>51</sup>

... and is defined in the *Oxford English Dictionary* as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." ... In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

His Honour also cited *Cesna Sulphur Co Ltd v Nicholson*:<sup>52</sup>

There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives.

There may not have been much difficulty in applying such a definition in 1876. However, as discussed in Parts 2 and 3 above, it is often less clear today. Where the application of the ordinary meaning of residence is uncertain, the specific statutory definitions that extend the common law definition become more important. In practice it is often simpler to start with the specific statutory definitions, since if they apply to make a taxpayer resident there may be no need to proceed with the detailed factual analysis necessary using the common law definition. This is consistent with the proposal for an arbitrary number of days test, combined with a centre of vital interests test. The common law meaning of residence most closely relates to the centre of vital interests test.

In an attempt to provide clarification of the Australian Taxation Office ("ATO") interpretation of the ordinary meaning of "resident" for visitors to Australia, the ATO issued *Taxation Ruling TR 98/17*.<sup>53</sup> The

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<sup>51</sup> [1928] AC 217, 222.

<sup>52</sup> [1876] LR 1 Ex D 428.

<sup>53</sup> Some commentators are concerned about the seemingly arbitrary nature of decisions on ordinary residence. See M Wills, "The Income Tax Implications of a Foreign Individual Contracting to do Business in Australia, with Particular Reference to the

## “RESIDENCE”: LESSONS FOR AUSTRALIA

ruling identifies relevant factors to be considered in determining whether an individual entering Australia is resident under the ordinary meaning. The two primary factors are the quality and character of the individual's behaviour while in Australia and their period of physical presence in Australia.

The ruling states that the quality and character of an individual's behaviour are demonstrated by further secondary factors. The first is the main intention or purpose of a person's presence. The ruling distinguishes between coming to Australia for the purpose of employment or education and travelling, albeit while doing casual work. It makes it clear that the visa notation on a person's passport is merely indicative of purpose as the criteria for visa and tax purposes may differ.

The second factor to demonstrate an individual's behaviour is the location of the person's family, whether a place of abode is maintained outside Australia, business ties in Australia and the existence of a contract of employment in the person's home country. The third factor is the maintenance and location of assets in Australia, particularly occupation and purchase of a dwelling that may indicate establishment of a home in Australia. The fourth factor is the extent of social and living arrangements during a stay that may indicate residence, including joining clubs or organizations, educating children and leasing a home. These factors are helpful in that they provide a more comprehensive description of the Commissioner's approach to determining residence. In themselves they simply reflect existing case law. It is always going to be their application in conjunction with the second primary factor, the period of physical presence in Australia, that will be most contentious.

*Taxation Ruling* TR 98/17 takes the view that any visitor staying more than six months will be treated as resident from the time when the visitor begins to demonstrate behaviour consistent with residing in Australia. This approach is not controversial in itself. However, the

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Concepts of 'Residence' and 'Source'" (1997) 9 *Bond Law Review* 35, 39. It is always difficult to determine an outcome based on a mix of subjective and objective factors. It does not mean that the tests are inappropriate, simply that they can be difficult to apply.



examples given in the ruling focus on individuals staying in Australia for just over six months and the application of the factors set out in the ruling to the examples illustrates how open to interpretation the relevant factors (as discussed above) are.

Any attempt to determine at what point the ordinary meaning of residence takes effect depends upon a subjective interpretation of both subjective and objective factors. The fact that the six month test is used by the ATO shows that, from a practical necessity standpoint, arbitrary time tests as at least one limb of a definition, do provide the certainty that both taxpayers and the ATO want from the law. However, the common law test, which reflects the centre of vital interests test, should retain its integrity. It is not appropriate to assume that because a taxpayer has remained in Australia for more than six months that the taxpayer's centre of vital interests has automatically shifted. Objective criteria should be used when a taxpayer states that her or his permanent place of abode is elsewhere. Otherwise, the common law definition of residence/centre of vital interests test loses its validity.

## 5.2 Domicile Test

There are essentially three types of domicile in Australian tax law: domicile of origin, which is the domicile of the father at the date of birth (with special rules for an illegitimate child); domicile of choice, which is established by the *Domicile Act 1982* (Cth) and the intention to select a new permanent place of abode; and domicile by operation of law, which applies when, for example, a child's domicile changes as a result of the child's parents changing domicile.

Although Australian domicile may be established, the individual will still not be treated as a resident if that individual's permanent place of abode is outside Australia. The test of domicile, in effect, becomes superfluous to the "permanent place of abode" test. Irrespective of domicile, the individual will be a resident in Australia if the "permanent place of abode" is established and a non-resident if it is not established.

### 5.3 Permanent Place of Abode

The leading Australian authority on the words "permanent place of abode" is *FC of T v Applegate* ("*Applegate*"). It is also frequently quoted in New Zealand residency case law.<sup>54</sup> In *Applegate*, it was held that "permanent" does not mean "everlasting" and that if a taxpayer has an intention to make a home outside Australia for the time being, then that will be an important element in characterising the home as permanent place of abode. This allows for taxpayers to become non-residents even though they may have the intention to return to Australia at some point in the future. The principle has been applied in subsequent cases.

In *Applegate*, Fisher J stated:

To my mind the proper construction to place upon the phrase "permanent place of abode" is that it is the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with the particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place.<sup>55</sup>

Permanent place of abode is not defined by the legislation in either Australia or New Zealand so case law is very important. As the New Zealand IRD have produced a set of guidelines for taxpayers, so has the ATO issued similar guidelines in *Income Tax Ruling* IT 2650 on residency. The ruling (at para 23) offers a useful checklist of criteria for establishing "permanent place of abode":

- the intended and actual length of an overseas stay;
- whether there is any intention to return to Australia or to travel on to another country;

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<sup>54</sup> Examples in New Zealand residency case law where *Applegate* has been referred to include *TRA Case 93/35*; *TRA Case 87/26*; and *TRA Case 83/225*.

<sup>55</sup> 79 ATC 4307, 4317 (per Fisher J).

- whether the taxpayer has established a home outside Australia;
- whether the taxpayer has abandoned a home in Australia to go overseas;
- the duration and continuity of the taxpayer's presence in the overseas country; and
- the durability of association with a place in Australia, as evidenced by bank accounts, notifications to relevant authorities, and family, social and business ties.

The criteria mentioned in the New Zealand and Australian guidelines are very similar, although none of these factors is decisive. However, it is important to note that the Australian definition focuses on a permanent place of abode outside Australia in contrast with the New Zealand requirement of a permanent place of abode inside New Zealand. From an evidentiary perspective this makes the New Zealand definition easier to administer and control.

Consistent with *FC of T v Jenkins ("Jenkins")*,<sup>56</sup> *Income Tax Ruling* IT 2650 recognises that the existence of a permanent place of abode is a question of fact in each case and that the duration of an individual's stay or intended stay out of Australia is not, of itself, conclusive and must be considered along with all other relevant factors. This is in contrast to the specific time element legislated in the New Zealand rules. However, given the practical advantages of setting down a broad time limit, the Commissioner exercises his discretion in *Income Tax Ruling* IT 2650, as he does in *Income Tax Ruling* IT 2607, and states that as a general rule he will accept that a taxpayer becomes a non-resident after two years spent abroad.

As a result, in order to help them qualify under the ruling for non-resident status, taxpayers seconded overseas have tended to negotiate contracts for periods longer than two years, or open-ended or renewable contracts with a two year minimum period. This is somewhat arbitrary, as is the New Zealand legislation on this issue, but the certainty it gives to taxpayers compensates for this. The downside is that the ATO

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<sup>56</sup> (1982) 12 ATR 745.

## “RESIDENCE”: LESSONS FOR AUSTRALIA

requires compelling reasons to treat someone as non-resident who has been overseas for less than two years. Although it should be noted that in both *Applegate* and *Jenkins*, the individuals were treated as non-resident and in both cases they were actually absent from Australia for less than two years.

A significant practical consequence of the difference between the New Zealand and Australian definitions of residence arises from the New Zealand focus on an individual having a permanent place of abode in New Zealand, as compared with the Australian focus on an individual having a permanent place of abode overseas. Under the New Zealand definition, provided any time requirements are satisfied, residence would only appear to apply to individuals while they are actually in New Zealand. Therefore they would become resident on arrival and cease to be resident on departure.

In Australia, on the other hand, residence continues until a permanent place of abode is established overseas. Non-residence ceases when an individual relinquishes a permanent place of abode overseas. This can lead to complications. For example, expatriates working overseas can be detrimentally affected in that payments made to them in respect of services performed as non-residents or income earned from any source while overseas could in fact be derived by them as residents once they have given up their permanent place of abode overseas, even though they have not physically returned to Australia.<sup>57</sup> It is fairly common for expatriates to take leave overseas after a secondment and prior to returning to Australia. If the domicile test applies they will no longer have a permanent place of abode outside Australia and consequently, any income derived while on leave will be taxed in Australia on the basis that they are resident. This again leads to uncertainty and the need for taxpayers to have high-level professional help to navigate a safe passage through the complexities of the ITAA36 and the ITAA97.

Following through the earlier argument that the permanent place of abode test should change to a centre of vital interest test, it is interesting

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<sup>57</sup> Vann, above n 10.

to note the approach to interpretation of permanent place of abode taken by the ATO. The rulings seem to have broadened the concept of permanent place of abode to encompass the factors taken into account for the common law residence test and the centre of vital interests test. Practically, the focus on a taxpayer living in a permanent location is no longer sufficient as an objective test of residence. Other factors that are taken into account should be recognized in the law.

#### 5.4 183 Day Test

The half year or 183 day rule is calculated by days and hours in both Australia and New Zealand.<sup>58</sup> In *Wilkie v IRC*,<sup>59</sup> a taxpayer present in the UK (which also has a 183 day residency rule)<sup>60</sup> for 182 days and 20 hours in an income year of 366 days, was held not resident for a period equal to six months.

In Australia, if this test applies a person is treated as resident for the entire income year. This is not the case in New Zealand where the residency applies as from the first day of arrival in New Zealand counted in the 183 days.<sup>61</sup>

The fact that the Australian legislation refers to more than one half of "a year of income" means that a person could be in Australia for just under half of two years of income; that is, for a total of just under a full year, and not become a resident under this test. The New Zealand legislation appears to get around this problem by referring, in both tests, to a number of days in "any twelve month period".

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<sup>58</sup> For a discussion of the options used and their advantages and disadvantages, see OECD, "The 183 Day Rule: Some Problems of Application and Interpretation" in OECD Model Volume II, R(9)-1.

<sup>59</sup> [1952] 1 All ER 92.

<sup>60</sup> External Communications Unit of Inland Revenue UK, *Residents and non-residents Liability to tax in the United Kingdom*, International Series IR20 (1999) 6 states: "You will always be resident if you are here for 183 days or more in the tax year. There is no exception to this."

<sup>61</sup> ITA94, s OE 1(2).

## “RESIDENCE”: LESSONS FOR AUSTRALIA

In New Zealand, the 183 day test stands on its own. If a taxpayer satisfies this test, he or she is a resident. In Australia, taxpayers may be resident unless the Commissioner is satisfied that their usual place of abode is outside Australia and that they do not intend to take up residence in Australia. This test helps to determine when a person takes up residence in Australia but does not help in determining when a person has ceased to be a resident. The term "usual" is used for this test rather than "permanent" place of abode but how these terms differ seems unclear.

### 6. CONCLUSION

Globalisation and electronic commerce present a threat to the revenue base in that high net worth individuals may move their residence to low tax jurisdictions and continue their activities in Australia and New Zealand electronically as though they had not left. Yet the residence and source rules may preclude (or severely restrict) Australian and New Zealand revenue authorities from taxing them. This problem goes beyond the residence rules. It is the overall economic environment (including taxation) that prompts generators of wealth to live elsewhere.<sup>62</sup> Short of reverting to an era of exchange control and limits on freedom of movement, the demands of a relatively free market require policy makers to concentrate on ensuring that their jurisdiction provides the appropriate mix of economic, infrastructure and lifestyle benefits to attract wealthy individuals. The tax residence rules are but a small part of this matrix.

Australia's tax legislation began its current metamorphosis under the auspices of a Tax Law Improvement Project. Its stated aim was "to rewrite the law with a better structure, and make it easier to understand".<sup>63</sup> The definition of residence has not yet been rewritten and

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<sup>62</sup> For a comprehensive discussion, see Easson, above n 17.

<sup>63</sup> Tax Law Improvement Project Team, *Information Paper No 2 - Building the New Tax Law* (1995), found in *CCH Australian Income Tax Bills* (1995) 100,053. Although the Tax Law Improvement Project no longer exists, it is inevitable that the rewrite of the legislation will continue in some form.

is one area where simplification of the definition should include substantive change.<sup>64</sup> This is necessary to overcome the shortcomings of the existing legislation and to give statutory effect to the approach taken in practice by the Commissioner.

If the rules for residence can be postulated in a brief, clear and concise manner yet still cover all the necessary circumstances (as it appears the New Zealand legislation comes close to achieving) this must be a desirable feature. However, the New Zealand and Australian permanent place of abode tests should be recognized as having moved their definition away from the central position of a permanent family home. In this regard, the OECD Model's centre of vital interests test should be used to give the same practical effect.

The New Zealand legislation overcomes several problems identified in the Australian legislation:

- Many of the Australian cases attempt to use legislation and case law to define a non-resident; there being no definition of a non-resident in the Australian tax legislation. New Zealand residence cases have been saved this difficult and often fruitless activity by the inclusion in the legislation of a definition of a non-resident, albeit more restrictive than that of a resident. A taxpayer is a resident if present for more than 183 days and a non-resident if absent for more than 325 days in any 12 month period. Australia should have arbitrary day tests to establish both residence and non-residence. This will provide certainty, particularly for expatriates moving in and out of Australia.<sup>65</sup>
- The New Zealand legislation overcomes the arbitrariness of a test based solely on the number of days present or absent from the country by using the permanent place of abode test in addition to number of days. However, it manages to avoid the complexity of the Australian definition of residence. A similar approach in Australia

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<sup>64</sup> Ibid.

<sup>65</sup> See also Vann, above n 10.

## “RESIDENCE”: LESSONS FOR AUSTRALIA

would give effect to the way the Commissioner has in practice attempted to exercise his discretion, by using a centre of vital interests test rather than the permanent place of abode test.

- Focusing on the existence of a centre of vital interests in Australia rather than outside Australia, following the New Zealand approach with the widely defined permanent place of abode test, eliminates many unnecessary evidentiary and control problems for both the ATO and the taxpayer. It also helps to make the law more certain and less likely to be unwittingly contravened.
- It is better to avoid the multiple tests for residence in Australia in the interests of certainty, simplicity and clarity. The arbitrary number of days test combined with a centre of vital interests test would help to provide certainty and protect the revenue base.
- The definition of residence will need amendment to cope with the growth in electronic commerce. However, any changes should occur in the context of an overall review of the implications for the revenue base of international electronic commerce transactions.

As "permanent place of abode" has become a crucial concept in both Australia and New Zealand its broadening definition should be reflected by it being renamed as the "centre of vital interests". This ties in with international nomenclature and better describes what the test is really for. The legislation could also provide broad guidelines as to the content of the test.

There is always room for improvement in tax legislation. There are problems with the New Zealand statutory definitions, for example, the difference between the 183 day rule and the 325 day rule for an individual to cease to be a resident can lead to some interesting scenarios, but different countries can learn from each other and improvement to the legislation should be a continuing process. The time is right for a revision of the Australian legislative residency laws that reflects the reality of the changing global environment in which it



operates, including the influences of e-commerce and globalisation.