

Revisiting the tests of residence for individual taxpayers

John Minas (UTAS)

Norman Hanna (Independent Advisor and
Sessional Lecturer, Griffith)



Overview

- Introduction
- Residence tests for individual taxpayers
(focus of presentation is on: resides test, and domicile test)
- Areas of potential inconsistency
- Conclusion

Introduction

Motivations for the paper

- Are the tests too complex?
- Do the perceived difficulties arise from possible inconsistencies?
- Can an analysis of case law ameliorate complexity?
- Board of Taxation review

Residency tests

Construction of the residency tests

- Text, context and purpose
- ‘Means and includes’ definition
- Annual test

Resides test

- The primary test
- A question of fact
- Intention to reside
- Physical presence (with few exceptions)
- Clear application for most taxpayers

Domicile test

- Requirements for domicile v Permanent Place of Abode (PPA)
- The test is about PPA (Australian domicile usually a fact)
- *Harding (2019)* Full Federal Court (a test case)

Potential inconsistencies

1. Permanent Place of Abode (PPA)
 - The precise meaning of 'place' in PPA in Harding (2019) – country, region etc. (not a particular dwelling)
 - Temporary (as the antonym of permanent) has a specific meaning in the context of PPA. FFC rejected the definition of temporary in the FC judgment
 - However, PPA must be permanent. Presumably a different result if taxpayer lived in a hotel room instead of a serviced apartment

Potential inconsistencies

2. Domicile vs PPA

- Application of domicile test is a two step process:
 - i) Establish that the taxpayer has an Australian domicile
 - ii) Consider whether the exception applies (PPA outside Australia)

When ii) is being considered, factors related to i) are not relevant. In this sense, the steps are distinct.

Potential inconsistencies

4. The residence tests are annual tests
 - It follows that a taxpayer can have established a PPA in relation to one year of income

Potential inconsistencies

5. Continuity of association

- Taxpayers who have established a PPA outside Australia will have, by definition, definitely abandoned **residence in Australia**
- There is no requirement for such a taxpayer to have definitely abandoned **Australia**
- Given that statutory interpretation has regard for text, context and purpose, informal tests such as continuity of association are unhelpful

Conclusions

- The FFC decision in *Harding* can be considered an important development in understanding the application of the tests of residence
- This should be of benefit to taxpayers, tax advisors and tax administrators
- A ‘bright-line’ test appears simple in concept
- The recently proposed days count test accompanied by a ‘secondary test’ is potentially more complex than the existing tests of residence