International Tax (Part 1)
05/09/2023

CCH Learning:

Hi everyone and welcome to today's webinar regarding International Tax, Part One. I'm Alison Wood from Wolters Kluwer CCH Learning and I'll be your moderator for today. Just a few quick pointers before we get started. If you're looking for your PowerPoint, it is saved in the handout section of the go-to webinar panel. Any sound problems, you can toggle between audio and phone. And shortly after the session, you'll receive an email letting you know the recording is ready to be viewed.

You can ask questions at any point during the session today, simply type them in the questions box. I will collate those questions and ask them at the Q&A at the end of today's presentation. CCH Learning also offers a subscription service which many people have termed Netflix for professionals. It provides members with access to our entire library recordings, as well as live webinars for a very competitive flat fee. That's for over 500 hours of content. And for CPD purposes, your viewing is logged automatically.

Your presenter today is Carlo Di Loreto from Crowe Australasia, an affiliate of Findex. Carlo is a partner and provides taxation advice on a broad range of taxation issues to many Crowe Australasia clients, including privately owned businesses and public companies. Carlo's expertise covers small business relief, capital gains, restructures and GST related advice. He works with individuals, partnerships, trusts, and companies from many industry groups including property investment, manufacturing, mining, technology, engineering, and retail. So without any further ado, I will pass you over to Carlo to commence today's presentation.

Carlo Di Loreto:

Thank you very much Alison. Hi everyone, and welcome to our presentation today which is on International Tax. And today's session is going to really just focus on individuals both coming into and leaving Australia. So we'll call it part one. We will have other international tax webinars to deliver over the coming months with CCH Learning, but today's presentation is very much aimed at really setting some ground rules, really the basics or essentials of international tax.

And in subsequent sessions, we'll probably cover things that are a little bit more complex. But as you will see through today's session, it really is a presentation that is about checklists, I guess. So I would encourage you to use this PowerPoint and this presentation as a way of making sure that when you are faced with a situation, either a client coming to Australia or a client leaving, that you at least are aware of all the different areas of taxation that you need to consider.

Now there are a lot of things as you can see for inbound. You need to consider things like Visas whether they're an Australian or a foreign resident, there are source rules, there's CGT issues and other various things including double taxation and foreign tax credits. And similarly, when you're talking about clients who are leaving Australia, again, you've got to ask the question, are they still an Australian resident or have they become a foreign resident?

And of course, source possible exemption from income, CGT issues on departure and what have you. And you'll see that in the space of one hour. We can't cover all of these things in any detail. So what I've covered are a lot of issues, and at least what that does is it gives us some awareness so that we then know that there's work to be done or that there are matters that need to be resolved.

So when you're talking about say an individual coming to Australia, then the first thing you've got to ask is what is their residence status here? Because if you're an Australian resident, then you're essentially taxed on income from all sources regardless of where it comes from around the world. If you're a foreign resident, your only tax on Australian source income, of course the disadvantage of being a foreign resident is you lose out on the tax-free threshold.

So really, source becomes quite a big issue when you're talking about residency. Now, one of the things I'll cover up front, and I won't mention it again throughout the presentation is those who attended the recent monthly tax update. You'll have heard about this. The consultation is now open on changes to the individual residency rules. So there's a consultation paper, it's called Modernising Individual Tax Residency, came out in July and you've probably heard about this change so many times because it was announced quite a few years ago now in I think a budget paper.

So this is a change to bring the residency test into more modern terms, two-step approach. The first step is what will be called the 183-day test. We call this a bright line test because it's really simple. All you have to do is add up the number of days in an income year that a person is physically in Australia and they will be a resident if that is 183 days or more. Very straightforward, there are no complex issues to interpret.

It really is a very simplistic way of doing it. Now, if you are not a resident under step one, so the 183-day test, then there are some secondary tests. So there's nothing further I need to say about the 183-day test because it will be so simple and it's just simply arithmetic, adding up the number of days. The secondary tests are a little bit more complex. So the first of these is called the commencing residency test.

So you only need to consider this if the individuals are not tax residents in the current year. So they don't satisfy the 183-day test this year, but they did last year. So then you need to consider commencing residency. And this test looks at whether that person has spent 45 days or more in Australia this year or the current year, as well as satisfying two or more connection tests. So you need to meet two out of these four.

So you might have a right to reside here. You might have some Australian accommodation or family or economics interests here. So you need to meet two of those four. So to some extent, yep, there's still a little bit of interpretation required here as to what constitutes Australian accommodation. All of these things are yet to be determined because this is only consultation at the moment.

So if you're not a resident under that test, then there's the other secondary test which is the ceasing residency test. So again, you don't meet the 183-days this year, but you did last year. You then need to consider, "Well, have you ceased residency?" So there are three things here. There's the overseas employment rule, ceasing short-term residency and ceasing long-term residency rule.

So the overseas employment rule looks at people who have taken up a job overseas and that's for over two years and they spend less than 45 days in Australia each year. So if you meet that even though you were a resident last year, you're going to be a non-resident, you're going to cease residency. Then the short-term and the long-term depends on how long people have been residents for. So the short-term one is there've been residents for less than three years and the long-term is there have been residents for three or more years.

So that is the new approach to residency for individuals, but I've got to stress, this is not legislation. We haven't even come close to seeing a draught piece of law. It's only a consultation paper which I'd encourage you to go onto the treasury website and have a look at it. Consultation is currently open. That closes on the 22nd of September. At this stage, what I'm looking forward to seeing is some exposure draught law. So I can't stress enough and I did struggle as to whether I should say anything about these changes at all because you can't really use any of this for planning or what have you because we don't know when this is going to pass and we don't know what the wording of the law even will be.

So lots of matters to consider, lots of issues to talk through, and all I can say is we'll continue to watch this particular consultation because it's something that everyone's been waiting for a long time. And the other thing that people have been waiting for is company residency changes and there has been absolutely nothing on those at all. So having said that, let's look at what the law currently says.

So there are four components to the definition of a resident. You are residing here. So that's the ordinary concepts test. Your domicile is here, unless of course your permanent place of abode is overseas. You're more than one-half of the year. So the current 183-day test will make you a resident unless your usual place of abode is overseas. And then there's a very rarely used one which is the eligible employee of a superannuation fund covered by the Super Act '76.

So that generally applies to people like public servants. Not going to worry too much about that today because you don't come across that very often, but if we look at ordinary concepts, you just have to decide, "Well, does a person reside in Australia?" So if you meet that test, you don't worry about the other tests of residency. So what does it mean to reside here? Well, the courts have just gone to the dictionary and they typically use the Oxford, but in recent years, you do tend to see the Macquarie Dictionary being used as well. But it just means to dwell permanently or for a considerable time. It's your settled or usual abode. It's living in a particular place.

So no really specific tax meaning at all. So the problem with that is you have to look to the courts to tell you what this means. So what are the factors that have come out from court decisions and from the ATO? Well, these are the main ones. Things like your physical presence, your nationality and your movements, the nature and location of your family, your business, your social, your economic ties, where they might be.

Do you maintain a home here? And particularly, the residents of certain relatives. And I'll show you shortly through a case how close relatives can have a big bearing on residency. Now, what is each factor worth? Well, there's no set rules, it's just purely circumstantial and you just have to evaluate the facts. So it is very much a question of fact. It's not a question of law that we're dealing with when you're deciding residency.

So the most important ruling that you need to know about is TR 2023/1. It's replace all of the other residency ruling. So there's only one go-to ruling that you have to worry about for residency, as far as individuals are concerned. So that's good because it's consolidated everything that was out there previously. Now in this ruling, the commissioner says that if you spend considerable time in Australia and or you're exhibiting behaviour consistent with the residing here, then you're going to be treated as a resident.

Now, he talks about considerable time being six months, that's a very broad rule of thumb. I would say as important as the timeframe that you're here, it's how you are here. The quality of how you're spending your time in Australia is probably more important than the amount of time you're spending here. So have a look at an example from the ruling. We've got Bjorn comes to Australia for an 18-month work contract. He has accommodation provided for him and his family, rents out his house in Sweden, sells the car, redirects the mail, and enrolls the children in a school in Australia.

However, after four months, his contract is terminated and he returns with the family back to Sweden. So the ATO takes a view that Bjorn was an Australian resident for that four months and that's purely because of the way in which he was present here. So really living here, and that is probably a very good example to demonstrate that particular idea. Another example from the ruling is Giovanna who comes to Australia for an eight-month secondment.

She enters into a lease for six months with the option to extend. She joins a local bushwalking club. And again the ATO have decided, "Well, she's a resident. If you look at her accommodation, her work, her social aspects, her hobbies, et cetera, it really all points to her living here as an Australian resident." So she's a resident under the ordinary concepts test.

A very good case, very interesting case that really demonstrates connection to Australia is Iyengar. So this is going back a few years, but I think it's still a very, very good case because very illustrative of the principles. So the taxpayer here lived with his wife and children in a home in Perth. And in 2007, he took a contract in Dubai for a two-year term and possibly to be extended.

The employer took care of accommodation and his car, et cetera. But the spouse and child remained in Perth in the family home and he intended to return there at the end of his contract. He wanted to go over there basically to earn a good tax-free salary to help with their mortgage commitments in Australia and who could not understand that, but he had his pay paid into an Australian dollar Australian bank accounts. So they're the key facts.

The tribunal found in favour of the commissioner, the commissioner treated the taxpayer as an Australian resident under the ordinary concepts test. Now, even though he was away from Australia for two years and seven months, that wasn't the critical thing. What outweighed that was his connection back to Australia and that was through family, spouse and child still here, home here, payment of salary coming back to an Australian bank account.

So the tribunal took all of these factors into account and what they decided was these are the important things in the Iyengar case, physical presence or lack thereof, and family and business ties are very important. So physical presence or the lack of it in itself doesn't automatically make you a foreign resident. So family and business ties are also very, very important. So they thought or the tribunal thought happily married to his wife so they weren't estranged or separated.

The home in Perth remained the family home, very important, salary paid back to Australia to pay off an Australian mortgage. He took holidays back in Australia at the family home and the contract was for a finite period with an option to extend, which he did. But when you weigh up all of these critical factors, that's how it fell out. So these decisions are not easy to make sometimes. And I guess what comes out of this case very important point is that just because you have a lack of physical presence, that's not going to be decisive.

There are going to be other factors that are just as important, and the thing to watch out for are those factors can lead to the conclusion that you have a continuing association. So this two-year rule of thumb, don't apply it simply and basically it's not that straightforward. You have to weigh up all of the factors in the case. Another case about ordinary concepts is ZKBN back to 2013. So this is an engineer who was born in the UK, became an Australian citizen in '85, and then over a period of years, worked in a number of different countries for varying periods of time.

He had his salary paid back to Australia. In January 2007, he sold his house on the Gold Coast. Then shortly the following year sold his car 2009, then returned to Australia and remained here and worked. So he thought that if he was outside of Australia, he didn't have to pay tax in Australia. He was a foreign resident earning foreign source income. So not taxable here, lodged his returns as if he was a foreign resident. The commissioner disagreed and assessed him as a resident, and this of course was objected to and it ended up in front of the tribunal and the tribunal agreed with the commissioner and held that he was a resident.

The AATA thought that the engineer retained his continuity with Australia and the fact that Australia continued to be his home in the relevant years from just purely from an attitude point of view, which is a bit harsh, but I think also, again, it's one of these things that you need to weigh up all of the factors of the situation and then when you weigh them up, can you still show a strong connection with Australia? And if you can, that can make you a resident under the ordinary concepts tests.

So really interesting. So that's very briefly the ordinary concept, so the reside test. The next one is the domicile and permanent place of abode. So this really is most applicable when someone leaves Australia and you decide, "Well, they're not a resident under the ordinary meaning." You then have to look at their domicile. So they're not going to be a resident if their domicile is in Australia, but their permanent place of abode is outside Australia.

So you need to consider two things, where is their domicile and where is their permanent place of abode? So most people, if they're Australian citizens and they go overseas, you would expect will retain their domicile of origin, which is really given to you when you're born and it's typically your father's domicile. However, you can change this if you're a legal adult over 18 years of age, you can adopt a domicile of your choice by just changing your country of residence.

So that can often happen, but in many of the cases that we see under this particular test, people have retained their domicile in Australia. Now if that's the case, then you have to look to see, do they have a permanent place of abode outside of Australia because if they do, then they will not be a resident under this particular rule. The whole problem with permanent place of abode is really the meaning of permanent and what is an abode?

So permanent if you look at probably one of the most important cases in residency is Applegate. It's indefinitely continuing, but does not need to be everlasting. It's just something more than temporary. So not a very precise definition. You can have a permanent place of abode outside of Australia even if you intend to return to Australia someday. So this is really interesting. Now, since Applegate, probably Harding has really helped to clarify what this means.

So Harding was successful in arguing that he had a permanent place of abode outside of Australia. So he left Australia in 2009, left a family home, went to work in Saudi Arabia, had an initial 12-month contract which was extended over time. His wife and children stayed in Australia and it was thought that they'd join him, but that didn't happen, and then the taxpayer separated from his wife a couple of years later.

Now when he was in Saudi, he had a two bedroom service apartment in Bahrain, and then he moved to a single bedroom apartment for a while and then he moved yet again to another apartment and each time he moved, all he had to do was pack up a couple of suitcases and that was all of his belongings. So the ATO would've gone in there thinking, "Well, you don't actually have a place of abode because you don't have things, you don't have a place to call home." But the taxpayer disagreed with that.

He argued that he was a foreign resident, but the commissioner assessed him as a resident. This was a case that's gone through three courts and it ended up at the full court. So I must apologise, I've just realised in the heading here, Harding versus FCT, that is the wrong citation. The correct citation is the previous slide, 2019 FCAFC 29. So these comments are all relating to the full federal court decision.

So very important case because it is full federal court and the court decided in favour of the taxpayer. They said he had a permanent place of abode overseas as required under the domicile test. So when you look at permanent place of abode, what the courts said is you really have to look at the town or the country that the person is residing in permanently, not the specific house or flat.

So that's really important. And there was another case, Subramanian, which was from a few years ago actually made similar comments. But I think Harding has now made this quite clear. And because a full federal court decision, I think it carries a lot of weight. So the fact that you might be going around from one accommodation to the other doesn't mean you don't have a permanent place of abode overseas. It's looked at in the context of the broader city or country that you are living in.

So in the next couple of slides, what we've done here is just summarise some of the cases that have been held over the years. We don't have time to go through these cases today, but I just thought if I put them down here and put some of the reasoning just in a simple table, you can always go and search these cases in your own time. There's about six of them there and the various conclusions that the courts have reached.

So when you look at permanent place of abode and the ATO's view in TR 2023, have a look at paragraph 63 to 82. There's a good discussion of this, but what the ATO consider relevant are things like your length of stay, your intentions, and whether or not you return to Australia at a definite time. The nature of your accommodation, whether you have an established home, your durability, whether you've abandoned your residents and your association with Australia, but you can see from Harding's case, the nature of the accommodation is not as important as the length of stay in a town or country and whether you're living in that town or country.

And there's some more cases here really based on tax residence and what those cases were decided under. So many, many cases you can see for example, Harding was decided under the domicile test, but Sneddon, Norden and Pillay, they were all ordinary concepts tests. You can see most of them really don't get past the AAT Harding being one of the rarities that made it to the full federal court, and that's what makes Harding such an important case.

There's an interesting example here in the TR '23/1 about Alicia who takes up an opportunity to go to work in Poland. Takes up a head of school of economics over there, five year contract, her family joins her. Before they leave, they sell their car and some of their belongings, rent out their house. They've given some temporary accommodation but purchase an apartment. Very clearly you can see in this situation that Alicia is not a resin under the ordinary meaning of the word resin and not under the domicile and permanent place of abode test. So that's a pretty simple and straightforward example and unfortunately in practise, we don't actually get such straightforward situations. Okay, Alison, I'll hand over to you to run our first poll question please.

CCH Learning:

Thank you very much, Carlo. First poll question is up on the screen for you all. So the word permanent in the context of place of abode means A, not temporary. B, not everlasting. C, not transitory. D, all of the above or E, none of the above. All right, quick reminder for those people looking how to participate in this poll. Just click on the blue flower icon on the bottom of the screen. That will bring up GoToWebinar in its entirety. And then you can click on one of the five radio buttons for this first poll. And we'll just have two poll questions in the session today. All right, slowly getting up to majority now. I'll just give those last few people a couple more seconds and we will have a look at these results together. All right, we're looking at 58% all of the above range on the others. Thanks Carlo.

Carlo Di Loreto:

Brilliant, thank you Alison. Thanks everyone for having a go at that. And yeah, if you said D, then I think you'd be right. So I guess if you want to go back to some of the commentary in the Applegate case where the court said, "Look, it's not temporary but it doesn't mean everlasting either and it certainly doesn't mean transitory." So it's one of those funny definitions where very difficult to pinpoint a precise definition to all you can say is well what it's not.

So I know that doesn't really help us a lot in terms of practical, but sometimes that's all we get out of the courts in Australia. So thank you very much for having a go at that. So the next test is the 183-day test. And while it doesn't use the words 183 days, it uses more than one half of the year of income. So if someone spends 183 days or more here, they're going to be an Australian resident unless they can show that they have a usual place of abode outside of Australia.

So usual versus permanent. Yeah, it's very odd that the legislation would use a variation to my mind, everything we've just discussed in permanent is relevant in relation to usual place of abode. And the other thing is, and they don't intend to take up residence in Australia. So the key thing here is if you're caught by the 183-day requirement, you must show that you have your usual place of abode outside of Australia. If you can't show that, then you'll be caught by this test if you're here for more than one half, and that is a reference to the income year.

So year of income, so year ending 30th of June each year. There's an interesting migrant example in TR '23/1 and you'll find that at example 13. So Aiko and my apologies to the Japanese people if I've offended your language, my pronunciation is not great with a name like that, but Aiko is granted a five-year business innovation and investment Visa. So she's allowed to come to Australia to set up a new business and her husband and children come with her.

So they arrive in January, they set up a bank account, acquire a car, rent a home for 12 months, and her husband and three children live in it, furniture and belongings are sent over. Now Aiko is an engineer, joins the professional association in Australia, but then has to return to Japan for four months to finish her obligations over there while her husband and children remain in Australia. Now, this is a very common occurrence for business migrants because you can imagine there are affairs that need to be tended to back in the home country, but in this type of situation then, Aiko is a resident of Australia from when she arrives here. And of course, a lot of these hinges on the fact that her family has come with her, they've established their home in Australia.

So that carries a lot of weight, but with business migration, as I said before, very fact dependent. So when you're faced with this sort of situation, make sure you get all of the background before you start considering the problem. So we're not going to cover the last of the tests which is a superannuation act test as I covered at the outset. That's a pretty rare one and it only applies to certain people who have been members of public sector super funds.

So typically, public servants, but don't want to spend time on that today. But just be aware that that other test is out there. So the next thing we want to consider is related to residency, a temporary residence. So 76-R is a subdivision where you'll find these rules. So temporary residents are people who have a temporary Visa that's been granted under the Migration Act and the person is not an Australian resident for social security purposes, nor is their spouse an Australian resident under the Social Security Act either, and I will explain what that means in a moment.

So when you're here on a temporary Visa, you're basically here for a set period of time or it could be an event related. So based on a job or a contract or what have you. And it ends when that period or that event happens very different to permanent Visas which allow you to stay in Australia indefinitely. Temporary Visas will eventually expire. Now, go and have a look at the ATO website. They've got a really good list of Visas that are considered temporary.

So I'm not going to cover those today, but the ATO website has a lot of really good information about this. We covered before that you have to be here on a temporary Visa and you can't be a resident for social security purposes. So what that means is a person who resides in Australia and is either an Australian citizen or holds a permanent residency Visa. So typically, a temporary Visa holder may not fall into that category or you have a protected special category Visa and you were in Australia on or before 26th of February 2001.

So that's what resident for social security purposes means, very different to the tax meaning. If you're a temporary resident, your foreign sourced income is not taxed in Australia. So that includes CFC income and your capital gains or losses made on anything that is not taxable. Australian property is disregarded and we'll talk about what that is in a moment. Interest paid to a temporary resident is not going to be subject to withholding tax and there's no deduction obviously available for any expenses that you incur in producing that non-taxable income which is essentially your foreign source income.

And of course, if there are foreign tax credits available on foreign tax paid for that foreign source income, again, you have no ability to use those in Australia because that foreign source income is never subject to the Australian tax system for temporary residents. ESS, look, I will just say very simply, you could have an employee who's a temporary residence and they get some employee share scheme interests, whether it be shares or rights or what have you, and it could be for employment before or after they come to Australia, then the discount for the employment services performed is taxed under the employee share scheme rules.

So just be aware that there is no exemption per se for temporary residents if they acquire an interest under an employee share scheme. Now, if part of the employment in relation to those interests is performed outside of Australia, then there might be a proportionate amount of the discount only that is taxed here. So under ESS basically that's a provision that says if you receive an employee share scheme interest at a discount to market, then that discount is taxable as income.

So for a temporary resident, it really depends on when they acquired that interest, were they performing employment outside of Australia for part of the period that they held it? And if they have then it could be an apportionment that is needed to be made. So if you've got an employee, temporary resident, they acquire one of these interests before coming to Australia and then they continue their employment or service whilst here, then the ESS rules are probably going to apply to them from the time they begin work in Australia.

So that's only if those interests were acquired before coming to Australia. If they're acquired once they're here, then of course, that any discount is fully subject to Australian tax. So once you've had your discount taxed under the ESS rules, then any future gain or loss is really going to be CGT or some other provision like the trading stock rules. But typically it's going to be CGT and then that gain or loss is only going to happen if a CGT event occurs. So for example, that person sells those employee share scheme interests or they leave Australia.

Now, if they leave Australia, CGT consequences could vary and we'll talk about this a bit later in the presentation, but whether or not a CGT event occurs depends on whether the shares or rights they hold is taxable Australian property, whether you've made the election to include the discount on acquisition or deferred that will have a bearing. And whether you're a resident or foreign resident for tax purposes or whether you've become a permanent resident.

So again, there are so many issues here, all I can do today is really just make you aware of some of the things that you need to consider. Now, you can cease to be a temporary resident if you become an Australian citizen. If you begin to hold a permanent Visa or if you marry or tune into a de facto relationship with a person who is a citizen or permanent resident. Now once that happens, then you've got consequences.

So income from worldwide sources then begin to be taxable in Australia, all your other exemptions ceased and then all your worldwide assets become taxable in Australia as well. And of course, when you become a resident, then you might have to get the market value of your foreign assets because that could be then the basis of your cost base. So important things there. This one here I'll just cover very briefly.

It applies to temporary residents that are New Zealand citizens. All I'd say is have a look at TD 2012/18. That's because New Zealand citizens have a special Visa under section 32 of the Migration Act. It's treated as a temporary visa and ceases when you depart Australia. And the question is whether the temporary Visa still exists for the purposes of being a temporary resident under that definition.

So this TD says that if the New Zealand citizen who was present in Australia as a holder of a special category Visa to departs, they are deemed to still hold a temporary Visa. So that allows them to come and go essentially without losing that temporary resident status. 50% discount well before the 8th of May, foreign residents and temporary residents could use a 50% discount.

This has however been completely removed now, it's been completely repealed. So there's no discount for assets acquired after the 8th of May if you're a foreign or temporary resident. The discounts adjusted if you have a gain from a disposal of an asset that you're acquired after the 8th of May and the taxpayer was a foreign or temporary resident only for some time during the ownership period. So there's some potential apportionment there and there's a apportionment if the gain was from an asset that was held or acquired before 8th of May and then the taxpayer later loses their Australian residency, and then there's rules to deal with the 50% CGT discount for foreign residents and temporary residents that had assets as at the 8th of May.

So there are some calculations that need to be done, won't go into them today, but just be aware that that happens. And just a quick note about living away from home allowances. You're probably already aware of this, but previously, LAFHAs were very concessionally taxed. So the LAFHA component of a LAFHA allowance would generally be paid tax-free. However, a few years ago these rules were really tightened up. So the only way you can get tax-free LAFHA is the person has to maintain a family home in Australia.

They have to incur expenses on accommodation and food or drink for a maximum period of 12 months at a work location while living away from home and they have to provide a declaration. Now because of this requirement to maintain a home in Australia, a lot of foreign and temporary residents are most likely not going to qualify for this concessional treatment anymore. So just the word now on double tax agreements.

So when we are talking about individuals and also companies and trusts, but we'll focus on individuals today. It is possible that you can be a resident of two countries and there are foreign income tax offset rules which can prevent double taxation. And also, DTAs contain a tiebreaker rule to allocate a single place of residents to dual residents under those DTAs. So most DTAs have a tiebreaker and your resident only in typically, it's cascading.

So the first one would be where is your permanent home. If you don't have a permanent home or you have one in both, then you go to the next cascade down. So it looks at areas of vital interests, where they're located, and they can be things like personal and economic relations, et cetera. If you don't have vital interests or you have them in both, then you go down and you look at your habitual abode, and then finally, you look at nationality.

Now if you don't have a DTA in place for your client, so from a country where we haven't entered into an agreement, then you're faced with double taxation and then potentially at least, and then you might rely on the foreign income tax offset rules to get you out of that. Another point under the DTAs is your source. So the DTA deems or has deemed source rules. So depending on the type of income that you earn.

So for example, if you're operating a business through a branch in Australia, the source of the income of that branch is deemed to be in Australia and what have you. So that's called the business profits article. And throughout the legislation or the DTAs, you'll see things about interest, you'll see royalties, you'll see dividends covered. You'll see dependent services and independent services as well. When it comes to dependent personal services, then that's going to apply to salary wages and they'll only be taxed in the country where the employee is resident unless the services are provided in another country. And typically, the income will still be taxed in the country of if you meet some conditions.

So they're in the other country for less than 183 days. The employer is not a resident of the other country and the salary is not deductible to a permanent establishment that the employer has in that other country. Those conditions are often very difficult to meet. So TR 2013/1 looks at who is the employer under these short-term visit exceptions in Australia's double tax agreement. So I'll leave you to have a look at that, but typically, it's the enterprise that individual renders their services to.

So when you look at who is the employer, the commissioner looks at a number of principles and factors from Australian domestic law as to who is the employer and who is the employee, and then the context of that short-term visit exemption. So employment contract could be with a different person, but the effect I think is that if any foreign person is coming to Australia and providing services to a local business or company, they're going to be taxed here even if they're only here for a short period of time because they will be providing their services to that local business.

So sending people or expats overseas, a lot of planning, a lot of care has to be taken. If you're planning that they're going to be here only for a short period of time and you want to use that short-term exception in a number of DTAs that we have. So just moving along, if we become an Australian resident, there are some superannuation issues you need to be aware of. So the key area to go to is Division 305 of the 1997 Act. So these deal with the tax treatment of superannuation benefits received by members of non-compliant plans and there are also provisions in there that deal with lump sum benefits paid from foreign super funds as well as from Australian non-complying funds.

So these rules basically cover benefits that are received by the individual as well as benefits that are transferred from a foreign fund to an Australian complying fund.

So just as you probably are well aware, if you're dealing with a non-compliant super fund, then basically they don't receive any tax concessions. And of course, any income that a member receives from these funds are exempt income, but that's because the non-compliant fund has already paid tax on earnings at the top marginal rate of tax anyway. So taxation benefits that are paid from foreign super funds, well, that will vary depending on whether it's a lump sum or an income stream, and lump sum benefits are taxed on earnings made while the person is an Australian resident.

So the tax treatment of lump sums depends on whether they're received within six months after Australian residency or termination of foreign employment occurs. Income streams from foreign funds are just taxed at marginal rates under existing provisions. Section 305-60 looks at super lump sums from foreign funds. Now they're non-assessable and non-exempt if they're received within six months, and it only relates to a period when the taxpayer was not an Australian resident or starting after they became a resident and ending before they received the payment and the payment doesn't exceed the amount that was in that scheme that was vested with them when the payment is received.

So this is really important for planning for people moving to Australia to try and get their foreign super fund entitlements transferred in a tax effective way. There's also another provision in 305-65, again from lump sums received from foreign funds, but in order, this only applies in very limited circumstances and you can see that it's aimed where the individual had foreign remuneration that was exempt under either 23AF or 23AG. Now they're very, very difficult to satisfy. 23AG was amended quite a long time ago to make it very limited.

Previously, if you're an Australian resident and you went overseas and you worked for 91 days or more, you could have that foreign income exempted from tax. In Australia, that's no longer the case. It's really difficult to now claim the 23AG exemption and 23AF is very specific to specific projects. So in terms of becoming an Australian resident, if you have a foreign super fund, really what you're looking at is it's either going to be tax-free and if it's not, there may be some taxation there.

So 305-70 is the area you want to look for, and then the taxable amount is just the fund earnings calculated under the legislation, less any amounts covered by a specific election you can make in 305-80. Now, can't cover these today because I just don't have the time or the capacity in this session, but have a look at those provisions if you've got clients who are coming to Australia with a foreign fund entitlement. In terms of becoming an Australian resident, just be aware for CGT purposes. If you become a resident and the cost base of assets that you hold overseas are taken to be acquired at their market value.

So that sets your cost base. So very important to get those valuations as soon as possible. As soon as the client moves to Australia, don't leave it too late. That's going to be really important for future capital gains calculations, similar rules for trusts and companies as well. You don't have to worry about it for pre-CGT assets or taxable Australian property and that's because taxable Australian property is already in the CGT net in Australia anyway. Okay Alison, I'll hand over to you to run our next poll question please.

CCH Learning:

Thank you very much Carlo. I'll quickly read this then launch it up for you all. So the CGT discount percentage for an individual who acquires a CGT asset after the 8th of May 2012 and remains a temporary resident throughout the ownership period is launching it up for you now. A, 50%. B, 25%. C, 12.5%, or D, 0%. Perfect. Everyone is underway voting on this one and thank you for all the questions coming in today. There is quite a few so we will have a Q&A at the end and run through hopefully all of those answers for you. All right, couple more seconds on this poll. We will have a look at these results. All right, 77% voted D, 0%. Thanks Carlo.

Carlo Di Loreto:

Brilliant. No, that's great. Everyone's been paying attention. That is actually correct. So foreign and temporary residents for CGT assets after that date yeah, would not qualify for the 50% general discount. So we've touched briefly on coming to Australia. I guess for individuals leaving, we should cover some of the implications for them.

When someone leaves Australia, they could actually qualify for the departing Australia superannuation payment. So typically, that's only for certain temporary resident visa holders. So an Australian citizen or resident New Zealand citizen for example wouldn't be able to claim that, but you can only get that once you've permanently left Australia and your temporary visa basically either expires or is cancelled. Just be aware, there are some fairly hefty withholding tax rates that can apply there.

You're fine for the tax-free component of that, but taxed and untaxed these 35 and 45 respectively. But you'll see unfortunately for working holiday makers, the withholding taxes is exceptionally high at 65%. So not good for working holiday makers who have paid super. So when you leave Australia, the CGT event you've got to worry about is I1, that's for individuals and there's I2 for companies and trusts, but I1 happens when you cease to be an Australian resident and there are some exceptions which we'll cover.

But essentially, if you have an asset which is taxable Australian property, then there are no consequences. And the reason for that is taxable Australian property always stays within the tax net and we'll discuss what that means in a moment. Now, if you have an asset and it's not taxable Australian property but it's pre, then there are no CGT consequences. For anything else, a capital gain or loss can be made, but there is a deferral mechanism and you can make a choice which allows you to disregard the making of that gain or loss until a later time which is either the CGT event happens to that asset.

So you sell it for example, or you become an Australian resident again. So there is a deferral available for individuals, but you'll see, that taxable Australian property, you don't have the problem. So it's good to know what this term actually means. So there's five aspects to this. So it's taxable Australian real property. So in other words, real estate that you hold directly, it's indirect Australian real property interests.

So that is you might hold shares in a company or units in a trust and that company or trust owns property in Australia, business assets used in an Australian permanent establishment that a foreign resident has here that they might be conducting business through that. Options over any of one, two, or three above. And assets where a gain or loss is deferred when an entity ceases to be an Australian resident which is the deferral available under I1 that we talked about a moment ago.

So these five categories comprise taxable Australian property. So taxable Australian real property as I covered is real estate in Australia, but it also includes things like mining type assets as well. And it's not just gold or iron ore or what have you, it's petroleum, it's quarrying as well, as long as that mine or quarry is in Australia. Now an indirect Australian real property interest has to meet two additional tests. You must meet the non-portfolio interest test and you must also meet the principal asset test.

So indirect Australian real properties category two from the previous slide. So the non-portfolio test means that you have to have an interest in the entity that's at least 10%, and that's essentially a voting interest is what that refers to. And you have to have that at the time of the CGT event or you could have that 10% interest in a 12-month period in the previous 24 months before the CGT event occurs.

So if at the time of the event you don't hold 10%, just be careful, go back and have a look at the ownership over the previous two years. And when we talk about a direct participation interest, what that means is your direct holding. So that means you might be a holder of at least 10% of the ordinary shares in a company that holds real property. So that's the non-portfolio test.

The next test is the principal asset test. So this looks at the market values of that entity. So your entity might be a company and you might own 20% of it and you're a foreign resident. Then you have to look to see are the assets of that company principally attributable to real property in Australia. And the principally attributed basically is a 50% test. So if more than 50% of the market value of that company's total assets is based in Australian real property or real estate, then you've passed that test.

So two things you have to consider when you have indirect interests in Australian real property held by a foreign resident. In terms of foreign residence, there's also CGT withholding we have to worry about. So this has been in place for some time now. The withholding tax rate is 12.5%, it was previously 10 and it applies where you've got the sale of real estate where the contract price is at least $750,000. So just be aware of that, and in terms of the main residence exemption, just please be aware that foreign residents from now on aren't entitled to the main residence exemption at all unless they satisfy the life events tests.

So any disposals after 30th of June 2020 now attract CGT and that will apply to the full capital gain and be taxed at foreign resident marginal tax rates. So of course, this doesn't apply if you satisfy the life events test. So that applies if you were a foreign resident and for a continuous period of six years or less. And during that time, one of these things would've had to happen to you. So the foreign resident or a spouse or a child had a terminal illness, the spouse or child died and a CGT event happened because of a breakdown of marriage or a relationship.

In terms of superannuation, just a quick word here. Be very careful with super funds and the residency of those funds. So if you're leaving Australia and you have a self-managed super fund, you could cause a fund to be a non-resident. Just be aware that there is a temporary absence rule of up to two years and in the budget last year, there was a proposal put forward to extend this to five, but I haven't seen any progress made on that particular change. And just to finalise a couple of quick points, there's some notes here on 23AG, I'm not going to stress over this one.

All I'd like to say is that this is now very, very limited and I've set out here all of the requirements that you now need to meet for 23AG. So for the most part, a lot of people no longer get to use this. So with a deliberate change several years ago now to limit this application of the 23AG exemption. Now, where that exemption no longer applies, just bear in mind there's going to be PAYG obligations that arise.

If you've got a person working overseas paying tax overseas, just be aware that there is a mechanism to adjust PAYG withholding in Australia and it means you would have to provide that person with a special kind of payment summary, which is called a foreign employment payment summary. And that's because without that 23AG exemption, the employer, if it's an Australian employer, still has and making that payment still has a PAYG obligation in Australia.

So this is a mechanism that prevents excessive amounts of PAYG withholding being removed. And of course, with that exemption not applying, there's a flow on effect for FBT because you're no longer earning exempt income, which means there may be FBT then on benefits provided to that person working overseas, and that's all I have for you today. So Alison, I'll hand over to you to run through those questions and to close the session.

CCH Learning:

Thank you very much Carlo. Okay, as mentioned, quite a few questions today so we will definitely get through as many as we can for you and I will quickly mention our upcoming webinars in the interim. So tomorrow two sessions, one, ATO Update on Property Development, then looking at AI for Accountants, then Residential Aged Care. Also looking at Working Effectively with Introverts and Extroverts. Then a session on How to close an initial Conversation Gracefully and then Property Structuring for SMSFs. All right, so we'll jump into these questions here Carlo. So first one is from Jonathan. How do the tie breakers for DTA apply? So general salary, if a worker's wages are greater than 183 days place where he works has taxing rights.

Carlo Di Loreto:

Okay, so there's a couple of concepts that's been raised there, Alison. So talking about the tiebreakers that I talked about in the presentation today were really around residency. So I think there's enough in the slides to answer that particular question. But the key thing which is the second part of that question, Alison, I think relates to really the short-term employment. So that is when a person goes overseas and under the treaty, we seek to apply the short-term exception because typically, what happens when you earn salary and wage income, the source of that income is where you're performing the services.

So if we can use that short-term exemption, it means that potentially, that salary and wage won't be taxable in that foreign country. But there are a few things that ... There's three conditions that have to be met, which we covered in the presentation. So one is you have to be present typically for 183 days. But look, whenever you are faced with this situation, please go back to the relevant DTA because these are not standard provisions, but today in the presentation I'm talking about the most common ones is 183 days.

And the other key thing is the payment of that salary of wage is not deductible to the PE in that particular country. And the point I tried to make in the presentation today is, and this is where the ATO will look very closely if the person is coming to Australia, is that, well, who are you providing the services to? So when you're looking at employment, you really want to be careful and have a look at who has the control and direction of that individual in that foreign country because if it's a local entity in that foreign country, then that might be one situation.

The other thing is the Australian employer may actually trigger a PE by having that individual present in that country as well. So if you've got a PE there, then you may have deductions available to you in respect of that PE. So unfortunately, it can't really be too detailed on this one because in my experience, and I've looked at a few of these situations over the years, it is just highly fact dependent. But I think if you go back to the content in the slides, there's probably enough there to get you started. And then the next thing I would do is in your situation, just go and have a look at the specific wording of the double tax agreement that you have in place. So thank you Alison. That was a really good question.

CCH Learning:

Thank you Carlo. And Amanda has a situation where she's wondering if we can confidently say that the client is an Australian resident. So the client's gone overseas to take care of sick parents, uncertain when he will return. His wife and sons remain in Australia. They jointly own an investment property and an SMSF in Australia. His job in Australia is still open for him when he returns and he's not employed overseas.

Carlo Di Loreto:

Yeah. Can I just say that, Alison, that's a very loaded question, but I'll do my best. I'd say based on what you've told me, there seems to be quite a strong connection back to Australia. So I think if you go back to the early part of this presentation today and those slides there, I think you'll find that that fits in very strongly with the Iyengar case that we've covered and there's probably a couple of others out there which probably, yeah, if I was a betting person on the limited facts that I know, I'd probably be leaning towards remaining a resident.

But of course, I'd want to see all of the facts and the circumstances. And typically, these are the sorts of questions that really challenge us because when you sit down and you jot down all the facts, the first thing we tend to do is, "Oh, let's categorise these, let's rank them." And our accounting brains turn on. But it's not that straightforward. You have to look at all of the circumstances and have to weigh them all up and know one factor overrides another. But I'd say just we can see in recent years, the mere fact that you're physically not here is not in itself going to make you a foreign resident, it's gone beyond that now. And it's all the other connection that you might have here.

And I think we've seen, if it's close family, spouse, and children and they're still here, yeah, I think you'll find that the ATO will want to deal with them as residents of Australia. So yeah, great question, but a loaded one at that. So thank you. So don't read too much into my comments on that one because it is not that straightforward, but thank you for that question.

CCH Learning:

Thank you Carlo. And Betsy has asked, "Is it possible for a non-resident to account for CGT on ESS interests on paper? I.e. shares not actually sold, but reported in the tax return as sold for an Australian resident prior to leaving Australia and becoming a non-resident?"

Carlo Di Loreto:

Yeah. Look, I haven't come across that sort of situation, but it sounds to me, the only way that that would happen. So you would report something in the tax return as being sold if you were a resident and you ceased to be one because then that would trigger a CGT event I1. And if it's shares, then it's very unlikely that it's taxable Australian property. And that just depends on the shares of course. But typically, provided the company that the employee has shares in doesn't hold substantial real estate in Australia, it's probably not going to be taxable Australian property.

So that is possible, but can't really answer your question specifically because again, that one is just a highly factual type of situation. So look, thank you for the question. It's a really good one. And I guess the fundamental principle of ESS is that there is no exemption for a person who acquired those as a foreign resident, but then comes here temporarily to work here. So it's one of the areas for temporary residents where exemptions or non-assessable, non-exempt treatment is not available. So thanks for that question. Thanks Alison.

CCH Learning:

Thank you, Carlo. Junie has asked if an individual is holding a student Visa and living in Australia, I believe that they'll be treated as a tax resident in accordance with the ATO. What happens if the visa changes to a temporary Visa? Will their tax residence change to a temporary tax resident? And if so, how is the tax? What are the tax implications on shares held which are not taxable Australian property?

Carlo Di Loreto:

Yeah, so I guess the main implication of going from being an Australian resident to being a temporary resident is the fact that temporary residents are only essentially taxed on their Australian source income. So look at the outset, I've never come across this situation, so I don't have firsthand experience with a student in this situation, but if you're going from resident to temporary resident and you own assets, if they're Australian assets, then I don't believe there's any adverse consequence there.

The concern is with, and I don't know this, I don't know the answer to this, but the concern is any foreign assets that they may hold. So unfortunately, I don't really have an answer for you on that one. That is, yeah, it's one of those ones that I've never really come across in practice myself, but if any others have, be great to get any feedback. Thank you for that Alison.

CCH Learning:

Thank you Carlo. Interesting one from Paul. So the female soccer players in the recent soccer tournament, so basically how will they be taxed whereas FIFA is paid for their performance in Australia?

Carlo Di Loreto:

That has to be dealt with specifically under the respective DTA. So yeah, again, highly factually dependent. I guess some of the principles to apply there, most of them are going to be, a lot of the players are going to be foreign residents for starters. And yeah, it depends on how you categorise their earnings, but I would've thought that anything, winnings or payments arising from their efforts here in Australia are most likely going to have an Australian source, but there are probably going to be provisions under the DTAs of the various countries as to how that's going to be going to be taxed. But yeah, that's a really tricky one because you've got players from all over the world, from different countries, some of which have double tax agreements, others which haven't.

You're going to have some Australian players who have become foreign residents because they're going to play for a team in England or in America or somewhere else in Europe or Asia. So yeah, that's a really interesting question. But all I can say to that one is yeah, you just have to apply it to each individual player because each one's circumstances are going to be very different. But yeah, very good question, but thank you for that. Thanks Alison.

CCH Learning:

Thank you Carlo, and let me know how many more questions you can fit in.

Carlo Di Loreto:

I think we can do one more, Alison.

CCH Learning:

Yep, that's what I was thinking. All right, so lucky last Emma, short and sweet question. Are temporary residents entitled to CGT main residence exemption?

Carlo Di Loreto:

No, I think actually, we've covered that in the presentation. So foreign and temporary residents unfortunately lost that ability. So from disposals after 30th of June 2020. So that was a really harsh move, if I can just offer my own thoughts on that one, that was a really harsh move. And look, while the government gave people a certain amount of time to get their affairs in order, yeah, I thought that one is harsh in the sense that unlike other law changes we often has, there's usually some kind of phasing in period or some protection of unrealized gains to the point of the law change. But fortunately, yeah, it was very harsh in the way that particular change was dealt. But no, thank you for that question, Emma, just to clarify. But I think we've covered that in the body of the presentation today. So thank you very much Alison.

CCH Learning:

Thank you Carlo, I do appreciate you getting through all of those questions and thank you to everyone and for the audience sending those through. All right, we will jump to our next steps now. So I will just let everyone know that a feedback survey will pop up at the end. Please take a moment to complete that and within 24 hours, you will receive an email letting you know that the recording is ready so you can jump into the platform and also access the PowerPoint, transcript and your CPD certificate as well. So thank you very much to Carlo for the session today, and thank you to everyone in the audience. We hope to see you back online for another CCH Learning webinar very soon.

Carlo Di Loreto:

Thanks very much Alison.