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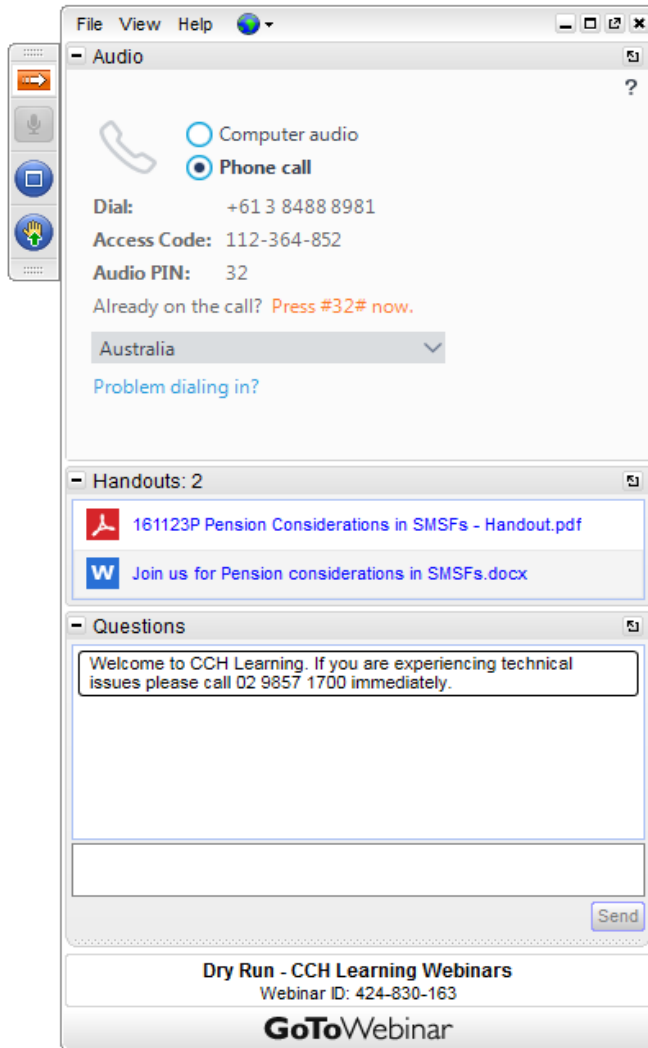
# International Tax – Part 1

Carlo Di Loreto

Tuesday 5 September 2023



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Alison Wood  
Moderator

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# Your Presenter



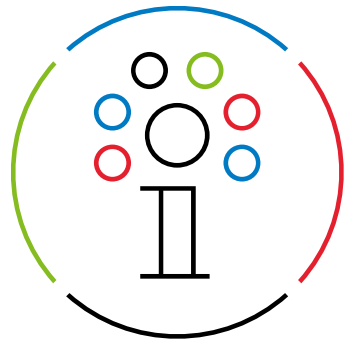
Carlo Di Loreto

Partner - Tax Advisory

*Crowe Australasia, an affiliate of Findex*

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# Today's session will cover



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## International Tax (Part 1)

- Basic principles of international tax
- Individuals coming to Australia
- Individuals leaving Australia



# Introduction

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# Checklist of issues

- For inbound clients, need to consider:
  - visa status
  - whether Australian or foreign resident
  - source of income
  - CGT issues on arrival and departure
  - requirement to attribute income to Australia under CFC rules
  - relief from double taxation and availability of foreign tax credits



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# Checklist of issues

- For outbound clients, need to consider:
  - whether Australian or foreign resident
  - source of income
  - possible exemption for foreign employment income
  - CGT issues on departing Australia
  - relief from double taxation and availability of foreign tax credits

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# Individual coming to Australia

- residence status is central to determining if liable to Australian tax on income
- Australian residents assessed on their gross income derived from all sources - whether derived in or out of Australia
- resident individuals taxed at resident rates, plus Medicare levy – obtain benefit of tax-free threshold
- foreign residents are assessed on Australian sourced income only & taxed at foreign resident rates

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# Consultation on individual residency

- Treasury released *Modernising individual tax residency* Consultation paper in July 2023
- Proposes 2 step approach to determining residency
- Step 1: The 183-day test
  - A primary "bright line" test, under which a person physically present in Australia for 183 days or more in any income year will be a tax resident
  - A "government officials test" will also replace the Commonwealth superannuation test
- Step 2: Secondary tests
  - Range of tests relating to individuals commencing or ceasing residency apply to individuals who are NOT tax residents in the current year under the first step

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## Secondary Test – Commencing Residency Test

- Applies if individuals are NOT tax residents in the current year under the Primary test but was a resident in the previous year – need to consider the Commencing Residency Test to determine if they have commenced being a tax resident in the current year
- Individual spends 45 days or more in Australia in the current year, and satisfies two or more of the following connections with Australia:
  - Right to reside permanently in Australia
  - Australian accommodation
  - Australian family
  - Australian economic interests

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## Secondary Test – Ceasing Residency Test

Applies to individuals who are NOT tax residents in current year but were residents in previous year - must consider the Ceasing Residency Test to determine if they have ceased being a tax resident in the current year:

- Overseas Employment Rule – applies to long-term residents who take up an employment opportunity overseas for over two years – spends less than 45 days in Australia each year
- Ceasing Short-Term Residency rule – for individuals who have been tax residents for less than three income years, being the current year and the two immediate prior years
- Ceasing Long-Term Residency rule – for individuals who have been tax residents for three or more income years, being current year and the two or more immediate prior years

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# Consultation on individual residency

- The objective of the consultation is to formulate broad principles that will ensure a modern and robust framework that will mitigate against the need for complex rules requiring adjustment over time to address newly identified issues
- Treasury seeking input on a number of matters
- Framework in the consultation paper is not law – consultation closes 22 September 2023



**Resident of  
Australia**

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# Residence of individuals

- There are 4 components of the definition of a resident individual (s 6 ITAA 1936):
  - whether the person is 'residing' in Australia, according to ordinary concepts
  - the domicile and permanent place of abode of the person
  - the 'more than one-half of the year of income' test & usual place of abode
  - eligible employee for the purposes of the Superannuation Act 1976



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# Residence according to ordinary concepts

- first test of residence is whether a person 'resides' in Australia
- if this test met, other tests of residence need not be considered
- Oxford dictionary defines reside as:
  - dwelling permanently or for a considerable time
  - having one's settled or usual abode
  - or living in a particular place

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# Residence according to ordinary concepts

- Factors relevant in determining whether someone resides in Australia include:
  - physical presence in Australia
  - nationality of the person and frequency of movements
  - the nature and location of the person's family, business and social ties
  - the maintenance of a home in Australia
  - the residence of certain relatives

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# Residence according to ordinary concepts

- weight given to each factor varies according to circumstances & person evaluating facts [*FCT v Miller (1946) 73 CLR 93*]
- whether a person resides in Australia is a question of fact & not law
- Taxation Ruling TR 2023/1 discusses ATO view on residence status of individuals, including individuals entering Australia
- Commissioner considers a person spending ‘considerable time’ in Australia and/or exhibiting behaviour consistent with residing here during that time, will be regarded as a resident
- ‘considerable time’ is taken to be 6 months where the person's behaviour is consistent with residing here

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# Residence according to ordinary concepts | Example 1 - TR 2023/1

- Bjorn comes to Australia on 18-month work contract - accommodation provided for him & family
- he rents out his Swedish house, sells car & redirects mail to Australia & children enrolled in Australian school
- Bjorn's contract terminated after 4 months & he his family return to Sweden

## Decision:

- Bjorn was an Australian resident for the 4-month period when he was in Australia
- despite not being in Australia for more than 6 months, his behaviour whilst in Australia was consistent with him being a resident

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# Residence according to ordinary concepts | Example 2 - TR 2023/1

- Giovanna comes to Australia for an 8-month secondment to an Australian business
- Enters into a 6-month lease with option to extend month by month
- Joins the local bushwalking club

## Decision:

- Resident
- Her accommodation, work, social and hobby arrangements demonstrates that she resides in Australia according to the ordinary concepts test

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# Residence according to ordinary concepts

*Iyengar v FCT* [2011] AATA 856

## Facts

- Mr Iyengar lived with wife & children in their family home in Perth - in April 2007, offered and accepted a 2-year contract in Dubai, possibility of 6-month extension
- employer provided accommodation & car - wife & son remained in Perth family home, to which Mr Iyengar intended to return
- stated purpose was to earn tax free salary to reduce mortgage commitments in Australia – paid in AUD into Australian account

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# Residence according to ordinary concepts

*Iyengar v FCT* [2011] AATA 856

## Decision

- Tribunal found in favour of the Commissioner – Mr Iyengar **Australian tax resident** under the ‘ordinary concepts test’
- in Mr Iyengar’s favour was the fact that he worked overseas for 2 year & 7 months, but this was **outweighed** by the connections maintained in Australia
- Tribunal took a number of factors into account in arriving at their conclusion – most salient of which are:

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# Residence according to ordinary concepts

*Iyengar v FCT [2011] AATA 856*

## Decision

- physical presence in Australia (or lack) & family & business ties in Australia
- despite limited physical presence it did not necessarily follow that he was foreign resident, because of continued association with Australia:
  - happily married to wife
  - Perth home remained ‘family home’
  - salary paid in AUD & repatriated to Australia to reduce mortgage
  - holidays taken in Australia at ‘family home’
  - contract for finite period of 2 years (with option to extend)



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# Residence according to ordinary concepts

*Iyengar v FCT* [2011] AATA 856

## WARNING

- based on this decision, it can be seen that lack of physical presence in Australia is not decisive in applying the 'ordinary concepts test'
- absence from Australia overridden by if sufficient 'continuity of association' maintained
- ATO no longer applies the '2-year rule of thumb' when applying ordinary concepts test

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# Residence according to ordinary concepts

## *ZKBN and Commissioner of Taxation [2013] AATA 604*

### Facts

- Engineer, born in UK, became Australian Citizen in 1985 - during 2007, 2008 and 2009, worked in Oman, UAE, France, Korea, UK, Bangladesh for varying periods of time
- Salary paid into Australian bank account January 2007 sold House in Gold Coast; September 2008 sold his motor vehicle - 2009 returned to Australia remained here & worked
- Based on professional advice & ATO, that if he was outside of Australia for 183 days, he did not have to pay tax in Australia in that year, he lodged tax returns on the basis he was a foreign resident
- Commissioner disagreed and issued reassessments, which the engineer objected – objection disallowed & the engineer applied to the AATA for a review of the objection decision

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# Residence according to ordinary concepts

*ZKBN and Commissioner of Taxation [2013] AATA 604*

## Decision

- AATA agreed with the Commissioner had held that the engineer was ‘resident in Australia’ for the relevant years.
- The AATA held that the engineer retained a ‘continuity of association with Australia’ as well as an attitude that Australia continued to be his home in the relevant tax years



**Domicile &  
Permanent place of  
abode**

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# Domicile & permanent place of abode tests

- domicile test mainly applies to individuals leaving Australia
- a person is a resident of Australia if their domicile is in Australia
- will not be resident if Commissioner satisfied permanent place of abode outside Australia
- need to consider:
  - what is a person's domicile
  - where is their permanent place of abode

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# Domicile & permanent place of abode tests

- domicile is a person's place of residence, abode, house, home - 2 types of domicile:
  - domicile of origin: acquired at birth, being the domicile of father, generally
  - domicile of choice: acquired if person, being over 18, abandon's domicile of origin by changing country of residence
- person domiciled in Australia treated as resident unless they have a permanent place of abode outside Australia
- 'permanent' (in the context of place of abode) means indefinitely continuing, but does not have to be everlasting - must be more than temporary FCT v Applegate 79 ATC 4307 -
- can have a permanent place of abode outside of Australia, even if he/she has intention to return to Australia some day

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# Domicile & permanent place of abode tests

## *Harding v FCT [2019] FCAFC 29*

- Taxpayer successfully argued that he had a permanent place of abode outside of Australia for the relevant income tax year

### Facts

- June 2009 – taxpayer left family home in Australia to work in Saudi Arabia as an aircraft engineer under an initial 12-month contract which was extended over time.
- His wife and children remained living in the family home in Australia in expectation that they would join him later, but that did not happen - the taxpayer and his wife separated in October 2011.
- While working in Saudi Arabia, the taxpayer resided in a 2-bedroom serviced apartment in Bahrain until 10 June 2011.
- He then moved to single bedroom apartment for 12 months then moved again to yet another apartment. On each occasion on which he moved he was able to pack all of his belongings into a few suitcases.

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# Domicile & permanent place of abode tests

## *Harding v FCT [2019] FCA 837*

### Issues

- Taxpayer argued he was a foreign resident (foreign resident of Australia) in 2011 income year.
- Commissioner audited taxpayer and issued an amended assessment for the 2011 year to include the foreign source income from Saudi Arabia on the basis that the taxpayer was an Australian resident under s 6(1) of the ITAA 1936

### Decision

- Taxpayer had a permanent place of abode overseas as required under the ‘domicile’ test
- Considers the town or country in which a person was physically residing “permanently” and not the specific house or flat
- While taxpayer’s family remained in Australia and he visited them, the quality and nature of those visits supported the conclusion that the taxpayer had abandoned his residence in Australia



# Permanent place of abode: case law history

	Applegate	Jenkins	Q68
1. Occupation	Lawyer	Bank	Bank
2. Anticipated absence	Indefinite	3 yrs	2 yrs
3. Actual absence	22 months	18 months	24 months
4. Visited Australia	Yes	No	No
5. Reason for return	Sick	Sick	Done
6. Australian Dwelling	None	Let	Let
7. Vila Dwelling	Leased	Provided	Provided
8. Australian child endowment continued	Yes	Yes	Yes
9. Taxpayer attempts to shorten assignment at outset	No	No	Yes
10. Before	Full Federal	Qld Sup	2 Bd
<b>DECISION</b>	<b>foreign resident</b>	<b>foreign resident</b>	<b>Resident</b>

# Permanent place of abode: case law history

	S19	Murray	Dempsey
1. Occupation	Bank	N/A	Construction project manager
2. Anticipated absence	2 yrs	Indefinite	Indefinite
3. Actual absence	24 months	3-4 yrs	3 yrs
4. Visited Australia	Yes	Yes	Yes
5. Reason for return	Done	Visiting friends / illegal activities	Done
6. Australian Dwelling	Let	None	Vacant - stored personal possessions
7. Vila Dwelling	Provided	Leased	Provided
8. Australian child endowment continued	No	N/A	N/A
9. Taxpayer attempts to shorten assignment at outset	No	N/A	No
10. Before	1 Bd	AAT	AAT
<b>DECISION</b>	foreign resident	foreign resident	foreign resident

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# Permanent place of abode: ATO view

- TR 2023/1 (paras 63 to 82) - factors relevant include:
  - length of overseas stay
  - intention to move to another country & return to Australia at definite time
  - nature of accommodation
  - established home overseas
  - durability of association
  - abandonment of Australian residence
  - association with Australia

# Tax Residence: Case Law

Case	Court	Test	Decision
Sneddon	AAT	Ordinary concepts	Resident
Norden	AAT	Ordinary concepts	Resident
Pillay	AAT	Ordinary concepts	Resident
ZKBN	AAT	Ordinary concepts	Resident
Case 5/2013	AAT	Ordinary concepts	Resident
Ellwood	AAT	Domicile	Resident
Boyd	AAT	Domicile	Resident
Harding	Full Federal Court	Domicile	foreign resident

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## Example 9 – TR 2023/1

- Alicia was born and grew up in Australia
- Takes up an opportunity as the head of the School of Economics at a university in Krakow, Poland on a 5-year contract, starting in September
- Alicia intends to extend the contract if circumstances allow
- Her husband and children join her in Poland in August
- Prior to leaving, they sell their cars and some belongings and rent out their house on a year-by-year tenancy
- They are given one month's temporary accommodation on campus upon moving but soon purchase an apartment near the university which they move into

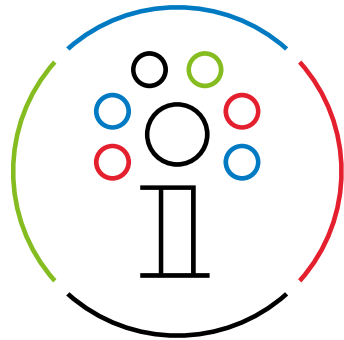
### Decision:

- not a resident under the normal meaning of the word resident, and not a resident under the domicile & permanent place of abode test

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# Poll

## Question 1



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
- e) None of the above



# 183-Day Test

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# 183-day test

- individual will be resident if has been in Australia for more than one half of the year of income, unless the Commissioner is satisfied that :
  - usual place of abode is outside Australia: compare 'usual' -v- 'permanent'
  - does not intend to take up residence in Australia
- to fall outside 183-day test, person must have usual place of abode outside of Australia
- persons with no usual place of abode will fall within 183-day test



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## Business Migrant - Example 13: TR 2023/1

- Aiko is granted a 5-year Business Innovation and Investment (Provisional) visa enabling her to come to Australia to set up a new business. Her husband and children accompany her
- On arrival in Australia in early January, Aiko sets up a bank account, acquires a car and rents an unfurnished home for 12 months for her, her husband and her 3 children to reside in
- Furniture and belongings are sent over from Japan and the children commence school in February - Aiko is an engineer and became a member of a professional association for engineers in Australia
- Aiko returns to Japan in February for 4 months to finish her contract. Her husband and children remain in Australia during this time

### Solution:

- Aiko is a resident of Australia from when she arrives in Australia as she ordinarily resides here



# Temporary Residents

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# Temporary residents [Subdivision 768-R ITAA 1997]

- You are a temporary resident if:
  - hold a temporary visa granted under the Migration Act 1958
  - not an Australian resident under the Social Security Act 1991
  - spouse is not an Australian resident under the Social Security Act 1991

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# Temporary residents

- temporary visas allow a person to travel and to remain in Australia:
  - for a specified period
  - until a specified event happens or
  - while the holder has specified status
- distinguished from permanent visas – can remain in Australia indefinitely [ATO website contains an extensive list of visas that are considered temporary]
- a person is a resident under the Social Security Act 1991 if:
  - resides in Australia and is either an Australian citizen or holds a permanent resident visa; or
  - has a protected special category visa and was in Australia on or before 26 February 2001

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# Temporary residents

- foreign sourced income is non-assessable & non-exempt, including CFC income
- capital gains & losses made on assets that do not have necessary connection with Australia disregarded
- interest paid to foreign residents not subject to WHT
- no deduction available for expenses incurred in producing non-assessable & non-exempt income
- no foreign tax credits available for foreign tax paid on non-assessable & non-exempt income, except where income is assessable in Australia

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## Temporary residents - ESS

- when employee who is temporary resident acquires ESS interests for employment before or after coming to Australia, discount for employment services performed in Australia taxed in accordance with employee share scheme (ESS) rules
- if part of employment under which employee received ESS interests, performed outside Australia, only a portion of the discount is taxed in Australia
- when employee who is temporary resident acquires ESS interests before coming to Australia & continues employment or service connected to ESS interests whilst in Australia, ESS rules may apply from time they begin work in Australia

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# Temporary residents - ESS

- once discount for ESS interest taxed under ESS rules, any future gain or loss is taxed under CGT regime or other rules e.g. the trading stock provisions
- a capital gain or loss will only arise when a CGT event occurs, such as the sale of the ESS interest or your departure from Australia - consequences of CGT event depend on whether:
  - ESS interest is taxable Australian property
  - an election to include discount as income on acquisition (for ESS shares & rights acquired before 1 July 2009) or deferred declaring the discount until a later time
  - you are a resident or foreign resident of Australia for tax purposes or have become a permanent resident

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# Temporary residents - cessation

- the following cause a person to cease being a temporary resident:
  - becoming an Australian citizen
  - holding a permanent visa
  - marrying or establishing de-facto relationship a person who is a permanent resident or Australian citizen
- impact is that income from worldwide sources begins to be taxable in Australia & all other exemptions also cease & worldwide assets become taxable
- MV of foreign assets needs to be determined at time of cessation of temporary residence



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# Temporary residents – New Zealand citizens

- ATO released Taxation Determination TD 2012/18
- determination deals with New Zealand citizens granted visa under s 32 of Migration Act 1958 (a Special Category Visa)
- treated as temporary visa, that ceases to be in effect when you depart Australia
- question of whether temporary visa still exists for purposes of paragraph (a) in 'temporary resident' definition in s 995-1(1) ITAA 1997

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# Temporary residents – New Zealand citizens

- if NZ citizen who was present in Australia as holder of a Special Category Visa departs Australia they will still 'hold a temporary visa'
- a Special Category Visa is a visa to remain in, but not re-enter Australia - therefore ceases to be in effect if holder leaves Australia
- a NZ citizen with a NZ passport has an ongoing right to re-enter Australia on another Special Category Visa
- NZ citizen treated as holding a temporary visa for temporary residence rules provided they continue to be entitled to re-enter Australia on presentation of their NZ passport

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# Foreign residents & temporary residents: 50% CGT discount

- prior to 8 May 2012, foreign residents & temporary residents eligible to 50% discount on any capital gains made on taxable Australian property
- 50% CGT discount for foreign residents and temporary residents removed & the rules now stipulate:
  - no discount for assets acquired by foreign residents/temporary residents after 8 May 2012
  - discount adjusted if gain derived from disposal of asset acquired after 8 May 2012 & taxpayer foreign residents/temporary resident sometime during ownership period
  - apportioned if gain derived from disposal of asset held as at 8 May 2012 & taxpayer later loses Australian residency
- there are specific rules to deal with 50% CGT foreign residents/temporary residents that held assets at 8 May 2012

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# LAFH Allowances - Foreign residents/temporary residents

- LAFHAs previously received concessional tax treatment, so generally could be paid tax free
- concessional tax treatment that applies to LAFHA is limited to employees who:
  - maintain a family home in Australia (at which they usually reside) for their immediate personal use and enjoyment while working away from home;
  - incur expenses for accommodation and food or drink for a maximum period of 12 months at a particular work location while living away from home; and
  - have provided their employer with a declaration about living away from home.
- due to requirement to maintain a home in Australia, foreign residents and temporary residents unlikely to qualify for the concessional tax treatment



# Double Taxation Agreements (DTAs)

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# Dual residence

- an individual or company can be resident in two or more places simultaneously, depending on the residence rules in each country:
  - an individual resides in one country and has a permanent abode or domicile in another
  - a company is incorporated in Australia, but has its central management in another country
- foreign income tax offset (FITO) rules may be sufficient to prevent double taxation
- DTA's contain 'tiebreaker' rules to allocate a single place of residence to dual residents

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# Residence & DTA's

- most DTA's provide for 'tiebreaker' rules as follows:
  - resident only in the State where a permanent home is available
  - if a permanent home is available in both states or no permanent home in either state:
- resident only where centre of vital interests are located (i.e. where personal and economic relations are closer)
- if residence cannot be determined by centre of vital interests test, then need to consider habitual abode & then nationality
- where no DTA exists and an individual is a resident of both countries - will be subject to tax laws of Australia & foreign country [rely only on domestic exemptions - if not exempt – FITO]

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# Source of income - DTA

- Australian residents are taxed on income from all sources – the rules on the question of source are a mixture of statutory rules & common law principles
- different rules apply to different types of income - DTA's may also apply to determine the source of certain income
- all DTA's contain source rules for various types of income covered by the DTA:
  - business profits articles allocate taxing rights between countries for business profits
  - profits taxed only in country where business resident, unless business has PE in other country

## Note:

- There have been a number of cases where an overseas tax authorities & ATO disagreed on whether a company had a PE in Australia, resulting in double taxation.



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## Source of income - DTA

- dependent personal services article:
  - generally, salaries and wages will be taxed only in the country where the employee is resident, unless the services are provided in another country
- income will still be taxed in the country where the employee is a resident if all of the following are satisfied:
  - the employee is present in the other country for < 183 days
  - the employer is not a resident of the other country; and
  - the salary is not deductible to a PE the employer has in the other country

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## Source of income - DTA

- TR 2013/1 - explains the term 'employer' for purposes of short-term visit exception in most DTA's
- this is the enterprise to which foreign resident individual renders his or her services in what would be considered an employment relationship
- in determining who employer is for the short-term visit exception - Commissioner will consider
  - the principles & factors below that arise from Australian domestic law; and
  - the context, object & purpose of the short-term visit exception
- employment contract may be with a different person / company - consistent with OECD model - most countries impose a time frame (UK) for administrative ease
- effect is that any foreign person coming to Australia & providing services to a local company will be taxed in Australia, even if only here for a week or less - requirement to obtain a TFN & lodge tax returns



# Becoming an Australian resident

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# Becoming an Australian resident [Division 305 ITAA 1997]

- specific provisions deal with tax treatment of superannuation benefits received by members of non-complying plans [s305-5]
- further provisions deal with lump sum benefits paid from foreign superannuation funds [s305-55 to 65] as well as Australian non-complying funds
- rules cover benefits received directly by an individual as well as benefits transferred from a foreign superannuation fund to an Australian complying fund
- ‘non-complying Australian superannuation funds’ do not receive tax concessions & income from these funds are exempt income

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# Becoming an Australian resident [Division 305 ITAA 1997]

- taxation of benefits paid from 'foreign superannuation funds' differs depending on whether the benefits are lump sums or income streams
- lump sum benefits taxed on earnings made while person was an Australian resident
- tax treatment of the superannuation lump sum depends on whether it is received within, or later than, six months after Australian residency or termination of foreign employment
- income streams paid from foreign superannuation funds continue to be taxed at marginal rates under existing provisions

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# Becoming an Australian resident [Division 305 ITAA 1997]

- s 305-60 provides that a superannuation lump sum received from a foreign superannuation fund not assessable income & not exempt income if:
  - the taxpayer receives it within six months of becoming an Australian resident; and
  - it relates only to a period:
    - when taxpayer was not an Australian resident; or
    - starting after taxpayer became an Australian resident & ending before he or she received payment; and
  - payment does not exceed amount in the fund or scheme that was vested in the taxpayer when the payment is received

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# Becoming an Australian resident [Division 305 ITAA 1997]

- s 305-65 provides that superannuation lump sum received from a foreign superannuation fund is not assessable income & not exempt income if:
- the lump sum is paid in consequence of the termination of the taxpayer's:
  - employment as an employee, or as the holder of an office, in a foreign country, or
  - engagement on qualifying service on an approved project in relation to a foreign country within six months of the termination
- the lump sum relates only to the period of that employment, office or engagement
- the taxpayer was an Australian resident during that period
- the lump sum is not exempt from taxation under the law of the foreign country
- the taxpayer's eligible foreign remuneration or foreign earnings is exempt from income tax under s 23AF or s 23AG

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## Becoming an Australian resident [Division 305 ITAA 1997]

- if lump sum received from foreign superannuation fund is not tax-free, it is partially taxed
- under s 305-70 a portion of lump sum received from foreign superannuation fund included in recipient's assessable income & taxed at marginal rates
- taxable amount is equal to the applicable fund earnings calculated under the legislation less any amount covered by an election under s 305-80
- allows a person, whose benefit in foreign superannuation scheme transferred directly to an Australian complying fund, to choose to have some or all of applicable fund earnings included in Australian fund's assessable income instead of his or her personal assessable income



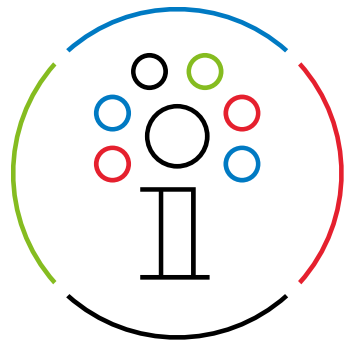
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# Becoming an Australian resident - CGT

- where individual or company becomes an Australian resident, cost base of assets held taken to be MV of the asset at that time
- where a trust becomes a resident trust, the cost base of assets owned by the trustee taken to be MV of assets at that time
- rule does not apply to pre-CGT assets, or taxable Australian property (as these would already fall within the CGT net)

# Poll

## Question 2



The CGT discount percentage for an individual who acquires a CGT asset after 8 May 2012 and remains a temporary resident throughout the ownership period is:

- a) 50%
- b) 25%
- c) 12.5%
- d) 0%



# Leaving Australia

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# Individuals leaving Australia - superannuation

- departing Australia superannuation payment applies to eligible temporary resident visa holders
- claim any payments made by employer into a superannuation fund or RSA once permanently leave Australia & temporary visa has expired/is cancelled
- Australian or NZ citizen can not claim
- WHT rates apply:
  - 0% for the tax free component
  - 35% for a taxed element (65% for Working Holiday Maker)
  - 45% for an untaxed element (65% for Working Holiday Maker)

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# Individuals leaving Australia - CGT

- CGT event I1 triggered when individual ceases to be Australian resident & subject to certain exceptions, the following consequences arise:
  - for any asset which is 'taxable Australian property' there are no CGT consequences, subject to certain exceptions
  - for an asset which is not taxable Australian property - but was acquired before 20 September 1985 - there are no CGT consequences
  - for any asset not covered above - a capital gain or loss may be made, calculated by reference to the cost base & its MV at time of the event
  - includes a deferral mechanism that allows you to disregard making gain or loss until the earlier of:
    - a CGT event happening in relation to the asset; or
    - when you become Australian resident again

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# Foreign residents & CGT [Division 855 ITAA 1997]

- A person who is a foreign resident just before a CGT event happens, can disregard a capital gain or capital loss if it relates to a CGT asset that is not 'taxable Australian property', defined to include:
  1. Taxable Australian real property (directly held);
  2. Indirect Australian real property interests (other than interests in category 5);
  3. Business assets used in an Australian PE a foreign resident (other than assets in category 1, 2 or 5);
  4. Options or rights over category 1-3 assets; and
  5. Assets where a CGT gain or loss is deferred when an entity ceases to be an Australian resident

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# Foreign residents & CGT [Division 855 ITAA 1997]

- The term ‘taxable Australian real property’ (TARP) is defined in the legislation as:
  1. real property situated in Australia; and
  2. mining, quarrying or prospecting rights where minerals, petroleum or quarry materials are situated in Australia
- The statutory provisions stipulate that for an interest to be an indirect Australian real property interest, it must meet the following two tests:
  - the non-portfolio interest test
  - the principal asset test

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# Foreign residents & CGT [Division 855 ITAA 1997]

- the 'non-portfolio interest test' means the interest in an entity (whether foreign or Australia) must be at least 10%
- the non-portfolio interest test is satisfied if a foreign entity (together with its associates) holds a 'direct participation interest' of at least 10% at:
  - the time of CGT Event; or
  - throughout a 12 month period beginning no earlier than 24 months before the time of the CGT Event & ending no later than the time of CGT Event
- a 'direct participation interest' is the total interest an entity directly holds in another entity & is defined according to the type of entity in which an interest is held



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## Foreign residents & CGT [Division 855 ITAA 1997]

- the principal assets test involves the MV of the entity's assets being 'principally attributable' to Australian real property
- the principal asset test uses the MV of an entity's assets in which a membership interest is held
- if more than 50% of the MV the entity's total assets is attributable to Australian real property then the membership interest is an indirect Australian real property interest
- where there is more than one interposed entity, the value of each interposed entity's taxable & non-taxable assets determines whether membership interest passes principal asset test

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# Foreign resident capital gains withholding

- the foreign resident capital gains withholding (FRCGW) apply to vendors disposing of certain taxable property under contracts entered into from 1 July 2016
- the FRCGW withholding tax rate will be 12.5% (previously 10%)
- applies to real property disposals where the contract price is \$750,000 and above

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# Foreign residents: CGT main residence exemption

- foreign resident is not entitled to the main residence exemption from capital gains tax (CGT) for property sold after 30 June 2020, unless satisfies the requirements of the life events test
- disposal of a foreign resident's Australian main residence will attract CGT, which will apply to the full capital gain & be taxed at the foreign resident marginal tax rates
- Life events test:
  - you were a foreign resident for tax purposes for a continuous period of 6 years or less
  - during that period, one of the following occurred
    - Foreign resident or spouse or child under 18 had a terminal medical condition
    - spouse or child under 18 died
    - the CGT event happened because of a formal agreement following the breakdown of marriage or relationship

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# Individual leaving Australia - superannuation funds

- For a superannuation fund to be a resident fund:
  - at least one of the trustees is a resident of Australia; or
  - central management and control of the funds is in Australia; and
  - at least 50% of accumulated benefits are for resident active members.

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# Individual leaving Australia - superannuation funds

- where all of the trustees of a SMSF become foreign resident individuals - central management & control will be outside of Australia
- failure to be complying superannuation fund results
- assets of the SMSF subject to tax at 45% at the time it becomes a foreign resident

## Note:

- SMSF can retain residency while trustees are temporarily absent for a period of up to 2 years. An additional trustee who is a member of the fund & who resides in Australia can be appointed to undertake management and control of the fund.

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## Foreign service exemption – s 23AG ITAA 1936

- Foreign service exemption applies in very limited situations – main conditions for exemption are:
  1. taxpayer must be an individual who is a resident of Australia;
  2. taxpayer must have been engaged in foreign service as an employee for a continuous period of 91 days or more
  3. for earnings derived from foreign service performed on or after that date, the period of foreign service must be directly attributable to:

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## Foreign service exemption – s 23AG ITAA 1936

- delivery of Australia's overseas aid program by individual's employer activities of individual's employer in operating a developing country relief fund or a public disaster relief fund
- activities of individual's employer as a prescribed exempt charitable or religious institution either located outside Australia or has a physical presence in Australia, but incurs its expenditure and pursues its objectives principally outside Australia
- individual's deployment outside Australia by Australian Government or authority as member of Australian 'disciplined force'
- an activity of a kind specified in the regulations
  4. the foreign earnings must have been derived from that foreign service; and
  5. in general, subject to various exceptions, the earnings must be assessable in the foreign country

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## Foreign service exemption – s 23AG ITAA 1936

- the exemption generally applies only if the income is assessable in the foreign country
- exemption does not apply if the income is tax-exempt in the foreign country solely because of:
  - a DTA or a law of the country giving effect to a DTA
  - a law dealing with diplomatic privileges
  - an international agreement dealing with privileges & immunities
  - the country provides an exemption for employment income in general



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# Foreign service exemption – PAYG

- where exemption does not apply, employers must make PAYG deductions from earnings of resident employees
- a special rule applies to avoid the double deduction that could otherwise arise if both Australia & overseas country withheld from the employee's income
- effect of rule is that Australian PAYG deduction is reduced by amount of tax withheld by overseas country
- employer should also provide the employee with a PAYG Payment Summary (Foreign Employment)

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## Foreign service exemption – FBT

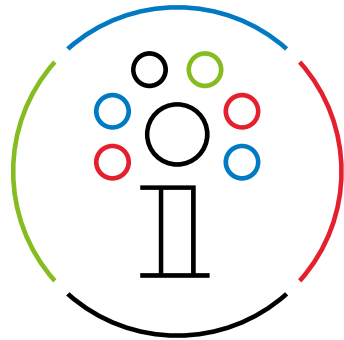
- where 23 AG exemption does not apply, fringe benefits provided to employee may also be liable to FBT
- possibility of double taxation arising if overseas country also taxes those benefits
- relief from double taxation may be available under certain DTA's (e.g. New Zealand & UK)
- more important to consider following restrictions placed on availability of exemption
- consequent increase in the number of cases that will be exposed to FBT

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# Questions?

You can type them in the “Questions” box now, to be answered by:

- Carlo Di Loreto
- Partner – Tax Advisory
- Crowe Australasia – an affiliate of Findex

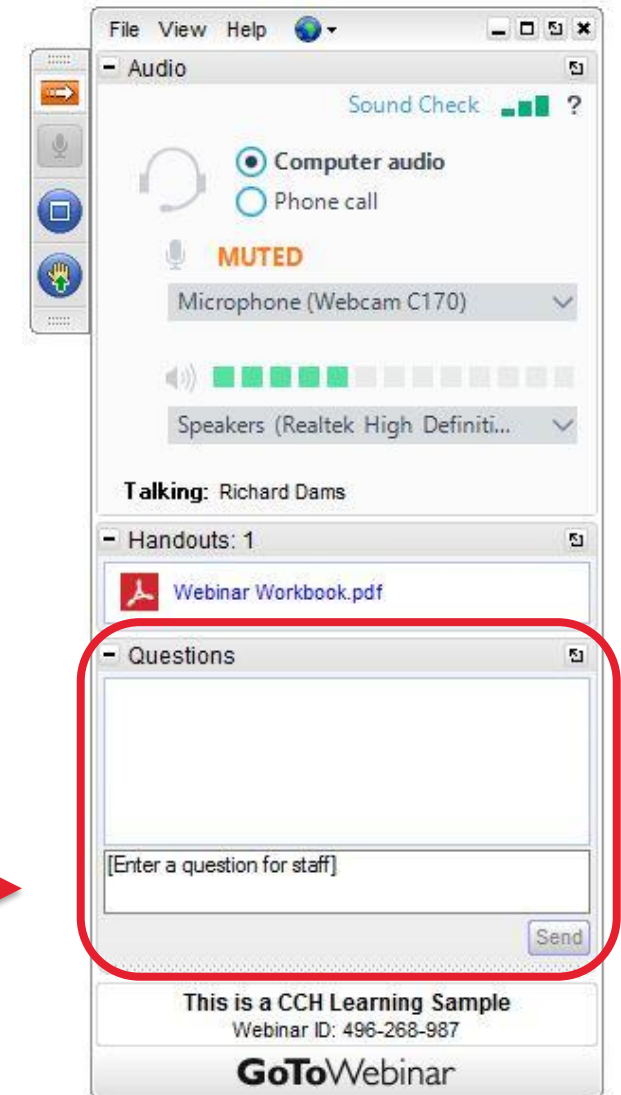


# Questions?



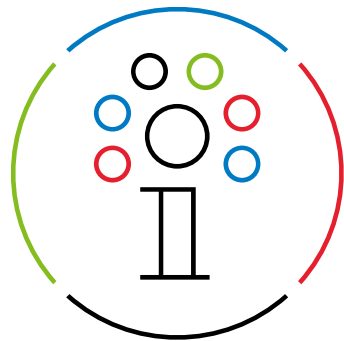
Alison Wood  
Moderator

Type your  
question and hit  
**Send**



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# Upcoming Webinars



- 6 September – ATO update on Property Development
- 6 September – AI for Accountants – Delivering enhanced advisory with Large Language Models
- 7 September – Residential Aged Care Market Payers or Low Means Residents
- 12 September – Working Effectively with Introverts and Extroverts
- 12 September – Discovery Sessions - How to close an Initial Conversation Gracefully
- 13 September - Build on the Rock - Property Structuring in an SMSF

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# Questions?



## **Carlo Di Loreto**

Partner - Tax Advisory

*Crowe Australasia, an affiliate of Findex*

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# Next steps

Please complete the Feedback Survey when the webinar ends

Within 24-48 hours you will be enrolled into the E-Learning which includes:



- a PDF of the PowerPoint
- a verbatim Transcript
- any supporting documentation
- a CPD Certificate

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Thank you for  
attending



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