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# AUSTRALIAN TAX ADVISER

2210: JUNE 2022

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## SECTION 1 – PROFESSIONAL DEVELOPMENTS

### TAX RESIDENCY: THE LATEST DEVELOPMENTS

#### ¶10.1 Residency: why does it matter?

The law treats residents and non-residents differently:

- Residents are taxed on all of their worldwide income
- Non-residents are taxed only on Australian sourced income
- Tax rates are different for residents compared to non-residents
- Non-residents do not get the tax free threshold (\$18,200)
- Non-residents pay tax at 32.5% from the first dollar of income up to \$120,000
- Residents pay the Medicare levy, non-residents don't (generally) pay Medicare levy (but also can't claim Medicare benefits)
- Non-residents pay withholding tax on bank interest at a flat rate of 10%
- Non-residents are liable for CGT only on 'real property' (e.g. Australian land/houses), not on publically listed shares and other investments

Given this, how then do we determine a taxpayer's residence?

#### ¶10.2 The 'primary' test

The first – or primary test – is the 'resides' test. The definition of 'resides' is not included in the tax legislation, therefore it is given its ordinary meaning. The Shorter Oxford Dictionary, for example, says that to reside means 'to dwell permanently, or for a considerable period of time, to have one's settled or usual abode, to live in or at a particular place'.

That requires a degree of judgement in deciding where a taxpayer's usual place of abode actually is. Fortunately, the ATO gives us a list of factors to take into account (TR 98/17) when determining that question, including:

- The intention and purpose of the taxpayer's stay
- Family and business/employment ties
- Maintenance and location of assets
- Social and living arrangements
- Physical presence in Australia

If the taxpayer passes the 'resides' test, they are resident and no further tests need be considered. If, on the other hand, the taxpayer fails the 'resides' test, we need to consider the other three 'statutory' tests. If any ONE of these tests is passed, the taxpayer is resident.