



# BATES | COSGRAVE

INTERNATIONAL TAX FACTSHEET: AUSTRALIAN TAX RESIDENCY: IT'S WHERE YOU RESIDE

# AUSTRALIAN TAX RESIDENCY: IT'S WHERE YOU RESIDE

## INTERNATIONAL TAX FACTSHEET

### A 'SPOUSE AND A HOUSE' ARE NOT CRITERIA THAT ARE CONSIDERED WHEN IT COMES TO DEFINING RESIDENCY FOR TAX PURPOSES – THERE ARE FOUR TESTS THAT WILL DETERMINE WHETHER YOU ARE A TAX RESIDENT IN AUSTRALIA.

The country you pay tax in is determined by a number of factors and as people increasingly seek work and other opportunities away from their home countries, it's becoming equally important to understand that where you 'reside' is more than simply property ownership or where you work.

Two recent cases before the Australian Administrative Appeals Tribunal (AAT) demonstrate the complexities of residency, particularly when the taxpayer is physically absent from Australia for long periods of time—such as

working overseas—but continues to have a 'continuity of association with the place', such as returning to visit family.

Simply assuming that moving offshore means you won't pay tax is both naïve and potentially costly. However, what is interesting in this case is how the AAT responded with seemingly inconsistent rulings to what looked like quite similar cases.

### A 'SPOUSE AND A HOUSE' DO NOT DETERMINE RESIDENCY

In each case, the taxpayers were deemed Australian residents for tax purposes by the ATO, despite having moved overseas permanently for work and returning to Australia to visit family. Both cases were taken to the Tribunal to appeal the decision: whilst one required

a Federal Court decision to overturn, the second was successful on appeal at the AAT.

In the first case, an Australian taxpayer left Australia with the intention of taking up permanent work in Bahrain in 2009. His wife and son remained in their home on the Sunshine Coast with the intention that once his second son had completed high school, his family would join him in Bahrain. His intent was to live permanently overseas, however he returned home to visit his family regularly.

He was assessed as being an Australian resident for tax purposes in 2011 by the ATO which was challenged but upheld by the Tribunal, a decision that was based on the fact that he had a house and a wife in Australia and had travelled home to visit them. Taking his case to the Australian Federal Court and winning on appeal, he

was found not to be a tax resident under the ordinary meaning of the word 'resides'.

The case law in this instance is clear: A person can reside in more than one place at the same time and may visit Australia without residing here. The critical considerations that lead to the decision included his intention to permanently move to Bahrain, that his family would follow, and no longer consider their former house in Australia to be 'home'.

In the second case, the taxpayer also departed Australia with the intent to move permanently overseas. In this instance, the taxpayer had divorced from his wife and not a primary carer of his family, whom he would visit periodically.

Again, the ATO had formed the view that he was Australian for tax purposes. On appeal to the Tribunal, it found that he did not 'reside' in Australia in part because he was divorced from his wife.

The important distinction here is how the Tribunal evaluated the nature of the relationships: both were considered to be 'absent' parents however it assessed their situations quite differently:

In the first case, the absent parent (working overseas):

- was in a continuing relationship as life partner with the other parent of children living in Australia;
- provided for those children; and
- returned to Australia when possible

In the second case, the absent parent:

- did not have day-to-day care of his children
- was formally separated/divorced from the parent who does; and
- visited Australia from time to time to see his children for milestone events or holidays.

The inconsistencies in the Tribunal decisions point to the importance of the residence tests and how they are applied, and ultimately for the first taxpayer, one of the primary reasons that the decision was overturned by the Federal Court.

## THE APPLICATION OF THE FOUR TESTS

Australian taxpayers who are temporary or permanent residents in any tax jurisdiction face a number of tests to determine where they should be paying tax in addition to being subject to tax treaties designed to ease dual tax liabilities.

An individual who 'resides' in Australia is a tax resident under Australia's domestic tax law. This is commonly referred to as the 'ordinary meaning of the word resides' test.

However, there are four tests that are applied consecutively to determine a taxpayer's residency status:

- 1. The 'resides test'** or 'ordinary concept' tests
- 2. The domicile test** - If the taxpayer's domicile is in Australia, this will likely apply unless the ATO is satisfied that their permanent place of abode is outside Australia;
- 3. The 183-day test** - If they are present in Australia for more than 183 days within a tax year, continuously or with breaks, then the taxpayer might be considered to have a 'constructive' residence in Australia unless it can be shown that they have a usual place of abode outside Australia (and no intention of taking up residence in Australia)
- 4. The superannuation test** - This test is applicable to Government employees working at overseas postings and who are members of specific superannuation schemes.

Clearly, none of these tests relate to either the house or the spouse: These are designed to understand firstly where the taxpayer resides, where their permanent place of abode will be, and how long they are absent from Australia.

## THE DOUBLE TAX AGREEMENT AND THE 'TIE-BREAKER' TEST

Australia has numerous double tax agreements with other tax jurisdictions that may claim a taxpayer under their respective domestic laws. In these cases, a double tax agreement—or DTA—will generally apply tie-breaker tests that determine that the taxpayer is resident in one of those countries.

What is important for taxpayers to understand is that immigration status doesn't always agree with tax residence status: They are generally not the same and it is vital for anyone considering working overseas to understand what—if any—residency rules are likely to apply to their situation.

This is a complex area of tax and while there are checklists that can be used to determine residency, it is as one of the elements heavily criticised in the case of the taxpayer whose AAT ruling was overturned by the Federal Court. Ultimately, while there were a lot of

factors taken into account that were not necessarily aligned with tax law.

## SEEK GUIDANCE BEFORE YOU GO

Generally speaking if you are intending to permanently leave Australia to live and work overseas, it is good advice to speak to an international tax specialist before you go.

Not only can they ensure that your tax situation is reviewed, but they can also provide insights into the implications for you as either an Australian tax resident or a foreign resident with Australian interest as well as a clear strategy on how to manage cross-border dealings.

For more information, contact Matt Zhou on 02 9957 4033 or email us at [enquiry@batescosgrave.com.au](mailto:enquiry@batescosgrave.com.au).

Last updated October 2019. This factsheet is provided for information purposes only and is correct at the time of publishing. It should not be used in place of advice from your accountant. Please contact us on 02 9957 4033 to discuss your specific circumstances.

# ABOUT US

## Our Expertise

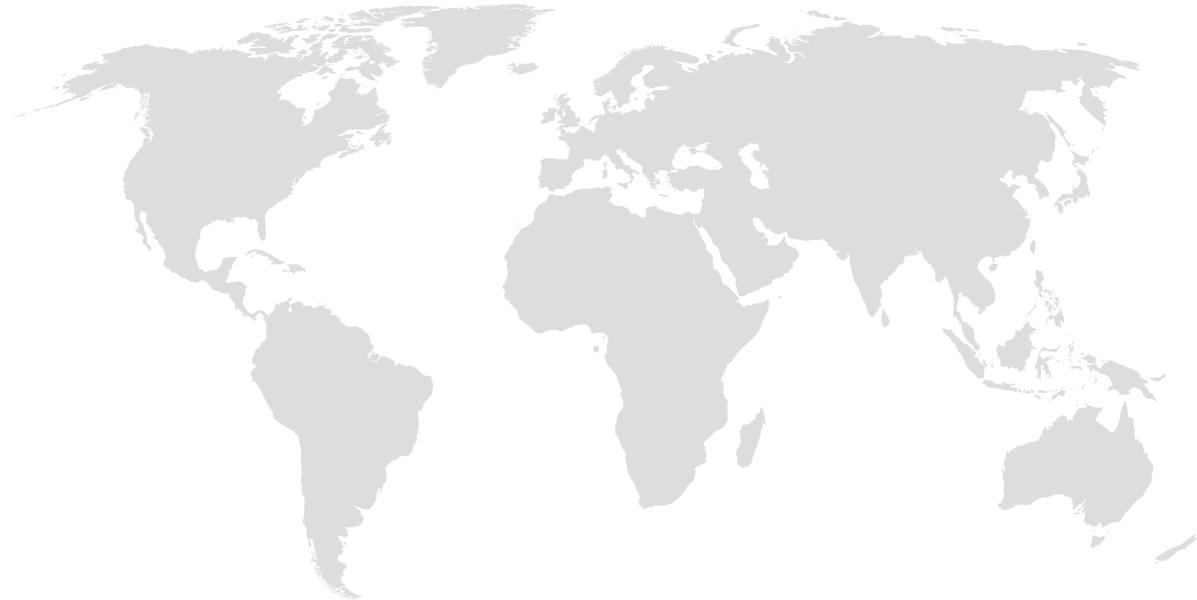
### Domestically

Bates Cosgrave advises domestic and international businesses.

We provide highly personalised services across a wide range of industries with in-depth knowledge in real estate, renewable energy, import and distribution, health professionals, inbound and outbound investments, and innovative/start-up businesses.

### Internationally

Although we are a boutique firm based in Sydney, we have access to a strong global network and specialise in advising cross-border transactions and global structuring.



# OUR TEAM

## Directors



MATT ZHOU

DIRECTOR

CA, B. COMM, M. ACC, M  
TAX, MINTAX, CTA

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Matt joined Bates Cosgrave in April of 2007 as a manager and was promoted to Director from 1 July 2009. Matt has a reputation for his technical expertise and experience in specialist advice to professionals including medical doctors, professional investors and family offices, multinational companies.

His diverse knowledge on International tax, expatriates tax, employee share schemes, business structuring including cross border issues, CGT and GST is formidable.

His industry knowledge is broad and includes medical services, real estate, pharmaceuticals and technology companies. As tax advisors, we must think ahead and consider not just the current situation but the future.

Good advice reflects not simply value now, but lasting value.



GLENN COSGRAVE

DIRECTOR

CA, B.COMM, FTIA

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Glenn is passionate about business improvement and works with our clients to get the fundamentals of their business right, serving as a mentor through their business journey of establishment, growth and exiting when the time is right. His approach has helped many businesses evolve from start-up to commercialisation and ultimately setting up their business in the best possible position for sale. He also specialises in tax-efficient structuring. Glenn's extensive experience as a strategic advisor ensures his clients have a clear focus for their personal and business goals, including a roadmap for future success and alignment of multidisciplinary advice to achieve best outcomes. Glenn is also a professional adviser to engineers, valuers, project managers, accountants, lawyers and high net worth individuals, with a strong portfolio of clients in import and distribution, professional advisory and innovative businesses.



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