**TAXATION LAW & PRACTICE**

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**Introduction**

Taxation laws are the most important laws that govern the area of income tax which is the prime source of revenue generation for the Australian Government. The study aims to analyse the cases of ***Harding v Commissioner of Taxation [2018] FCA 837*** and ***Harding v Commissioner of Taxation [2019] FCAFC 29*** for identifying the residents of Australia based on their taxation. The study would also identify the impact of taxation policies and the responsibility held by Australians living as expats in different countries. This would be identified by analysing the concepts tests that define the taxation liabilities of individuals living as expats.

**a) Tax implications for Australians living as expats in other countries**

An expat is an individual who lives outside of their native country. In this context, as per the case study on ***Harding v Commissioner of Taxation [2018] FCA 837*** it was identified Mr Harding claimed to have no intentions of returning to Australia and wanted to live as an expat in the Middle East. He objected to the judgment prepared by the Representative of Taxation that Mr Harding was liable to pay revenue tax in the year of 2011. He possessed a passport of both Australia and Britain and was working overseas in the Middle East. As per the Income Tax Assessment Act 1936 (Cth) any dweller of the country is taxed upon their worldwide income and are required to state their sources of overseas income in their income tax return (Jade.io, 2018). It has been identified that the Australia government has a separate provision for individuals whose foreign income is taxed in a different nation making them unconstrained to an Australian foreign income tax offset (Ato.gov.au, 2018).

According to the case study, the Commissioner reviewed and identified that Mr Harding was a normal resident of Australia as his family was residing in the country and he also owned property here. It was also brought into notice that his children were studying in Australia. Further, he claimed that he had sold all his personal belongings which included his car as well as his car in the year 2009 and took all other personal items with him to the Middle East. His wife was supposed to join him there in 2011 after the completion of their middle child’s secondary school.

His wife, however, did not intend to shift to Saudi Arabia in 2011 and thus his family continued living in the property at Warana, Australia. As per the Income Tax Assessment Act, 1997 an entity who is a domiciled occupant of Australia is liable to pay taxes unless the taxation Commissioner is satisfied with their reasons and believes that they have permanently taken residence in another country (Hlb.com.au, 2019).

As identified by the case study, although Mr Harding did not have any intentions of coming back to Australia to become a permanent dweller and wanted to become a resident of Saudi Arabia due to his work, his joint ownership of property in Warana and his family members which included his wife and three children living in Australia were reasons for which the Commissioner found him liable to pay his income tax returns in 2011. According to the case study, ***Harding v Commissioner of Taxation [2019] FCAFC 29*** the appeal made by Mr Harding was allowed as the jurisdiction allows the appeal against the respondent’s objection to the initial hearing. This meant that the Commissioner of Taxation was willing to review the case pertaining to the liability of payment of taxes for the year 2011 and determine whether he was a dweller of Australia in that year this led to another amended assessment of the scenario to identify the liability of Mr Harding.

**b) Implications for the application of ordinary concepts test**

The concepts tests help the Government of Australia to recognize if an entity is a resident of the country or not and if so what type. As per the study conducted by Moon (2019), there are different types of tests which help in determining whether an individual is tax payable or not when they do not satisfy the original test and include the domicile, 183-day test along with the superannuation test.

**Ordinary concepts test**

The chief test conducted to establish if a person lives in Australia and is tax payable is called the ordinary concepts test. According to Hardie (2016), the ordinary concepts test defines that if an individual is found to be residing in Australia; the person would be considered to be a resident of the country for the purpose of taxation and is not required to apply for any other form of residency tests.

According to the study ***Harding v Commissioner of Taxation [2018] FCA 837,*** he claimed that he was not a dweller of Australia below either of the notion tests making him not liable to pay income tax.

**Domicile concepts test**

According to Kenny, Blissenden & Villios (2015), the domicile test is regarded as the first statutory test conducted by the Australian Taxation Office which determines whether a resident is a domicile or not. As per the Domicile Concept Act 1982, a resident is determined by identifying whether the individual has sufficient proof and reasons that convince the Taxation Commissioner that the individual has a permanent area of residence exterior to the country (Legislation.gov.au, 2019). This is required to be a fixed residential area and could be domicile by choice. The test is applicable when an Australian citizen works in a foreign country for a long span of time. Significant factors that are considered for the determination of a domiciled resident include having family and financial ties in the country. As per the study ***Harding v Commissioner of Taxation [2018] FCA 837*** it was identified that Mr Harding was a domiciled resident as his wife and kids were living in the country and he co-owned the property with his wife where they were residing. Since he was working overseas during the financial year of 2011, therefore, his family was residing in the country the Taxation Commissioner considered him as a domicile resident. In the case ***Harding v Commissioner of Taxation [2019] FCAFC 29*** highlighted that the taxation commissioner was willing to broaden the definition and considered the circumstances Mr Harding was in. This involved his wife’s refusal to join him in Saudi Arabia along with their kids and their separation. Since Mr Harding was already residing in Saudi Arabia and did not intend to return to Australia as an inhabitant, the Commissioner of Taxation was willing to remit the charges declaring that he was no more an inhabitant of Australia in the discussed period.

In the case study ***SMITH v. SMITH [1975] 1 NSWLR 725*** it was found the judgement passed on defining a domicile resident as per the Domicile Act 1982 (Cth) included if a person has the intention of residing in indefinitely in a country, he is required to acquire a domicile residency of that country (Jade.io, 2019). The judgement passed for this case did not require further proof of materiality of witnesses in Japan. This case shows that Mr Harding’s intentions of not residing in Australia were affirmative however, he did not have any intention of making Saudi Arabia specifically Bahrain his home for an indefinite period.

According to the study ***Harding v Commissioner of Taxation [2018] FCA 837,*** intentions that Mr Harding had were the main area of passing such judgements as the Taxation Commissioner was convinced that he was a domicile resident as well as an ordinary resident of Australia in 2011 and was legally responsible for taxation according to the Income Tax Assessment Act 1936 (Cth). This meant his earnings were to be assessed by the ATO which led to the issue of the Notice of Amended Assessment.

**c) Implications for what constitutes “a permanent place of abode” and its importance**

According to the Taxation Ruling IT 2650, a permanent place of abode outside Australia is defined by factors involved in determining the span of the person’s intended reside in an abroad country as well as the establishment of a home outside the country (Ato.gov.au, 2019). It also includes considering the existence of a family in Australia while the individual is living overseas as well as financial ties. As per the Domicile Act 1982, if a person has recognized a permanent area of dwelling external of the country, the individual has lost their “domicile” here. A person would not be measured to possess permanent area of dwelling external to the country if there is no fixed or habitual place for the person. He would not be considered the same if he moves from one country to the other or shifts within the country continuously.

As identified by the case study ***Harding v Commissioner of Taxation [2019] FCAFC 29,*** the Taxation Commissioner agreed to the previous ruling and stated that the term requires to be expanded as the situation that Mr Harding was in could be considered. The judge explained that in this case, the style of accommodation in which Mr Harding was residing was not found as a suitable abode by the primary judge. However, the circumstances indicated that his actions relied upon his family moving with him in Bahrain which would then lead to him choosing a permanent form of accommodation. Thus, the primary judge identified that the reasons associated with his residential choice being a temporary form was sufficient to rule that his permanent area of dwelling was external of the country as permanent habitat did not necessarily mean a residential area but the country in which the individual has been living and working.

**Importance of having a permanent residence outside the country**

A person may be recognized a taxpayer and domicile inhabitant if the individual fails to provide proof of having a permanent residence external the country making the individual liable to pay the Government of Australia their income tax. As per the case studies, it has already been established that Mr Harding failed to possess a permanent dwelling and kept changing his accommodation due to his circumstances. The Federal Court’s decision in 2019 was based on the area open for interpretation of the explanation of the term and extended it to include the identification of a country where the taxpayer has been living permanently.

As identified in the case ***Handsley v Commissioner of Taxation [2019] AATA 917***, although Handsley had sold his residence in Australia, he had not established a permanent residency in any other country making him liable for payment of taxes (Iknow.cch.com.au, 2019). Australian residents who wish to move to another country should ensure that they have appropriately discussed the tax issues that could arise due to their salary package being subjected to taxes in Australia. The residents should be aware of the circumstances that define a domicile resident and take necessary actions to avoid being liable if their intentions are to leave the country. According to Kenny, Blissenden & Villios (2015), such individuals are also required to ensure that they have established a permanent home out of Australia as per the legislation for avoiding paying hefty taxes.

**Conclusion**

From this study, it can be concluded that income tax is the chief source for proceeds generation for Government of Australia. It can also be concluded that a dweller of Australia can be considered to be a taxpayer even though they do not reside in the country for a long time. The Government of Australia has multiple tests such as the ordinary residents' test and domicile concepts test that help in the identification of the residents of Australia making them taxpayers. The concept of domicile resident ensures that individuals are liable to pay taxes to the Australian Government if they have a family as well as financial ties in the country. It can also be concluded that in order for an individual to claim that they have no intentions of going back to the country and being a domicile resident of the country, he is required to create a permanent dwelling outside the country.

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