



# Murphy Tax

Lawyers and Advisors

**Murphy Tax**

Lawyers and Advisors Pty Ltd

Sydney | Melbourne

6 September 2022

**Commercial in Confidence**

**Subject to Legal Professional Privilege**

**Mr Andrew Rukau**

**By Email:** rukau.andrew@yahoo.com

**Letter of Non-Residency**

Dear Andrew,

Thank you for engaging us to provide you with tax legal advice in relation to your Australian tax residency status.

Our advice is based on the Relevant Facts as we understand them. Should you be aware of any errors in those facts, please notify us as our advice may materially alter.

**General Use Restriction and Third-Party Reliance**

*This advice is prepared solely for the use by you. This advice is not intended and should not be used or relied upon by anyone else and we accept no responsibility or duty of care to any other person or entity. This advice should not be shared with or provided to any other party without our consent.*

All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Yours sincerely

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Encl.



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## Relevant Facts and Circumstances

The relevant facts and circumstances are outlined below:

- You are a citizen of Zimbabwe, and you were born in Zimbabwe.
- Your spouse and 2 dependent children aged 9 and 12 are also citizens of Zimbabwe.
- You have never resided in Australia. You have resided in Saudi Arabia and undertaken your employment in Saudi Arabia since 2013. You have been employed with Sraco Company in Saudi Arabia during the entire 10-year period.
- Your spouse and dependent children have resided in South Africa for the past 13 years.
- On 5 February 2018, you and your family were granted Permanent Residency Visas of Australia.
- On 10 January 2022, your spouse and children relocated to Australia to reside. However, you did not relocate to Australia with them. You will continue to reside in Saudi Arabia and carry out your employment from Saudi Arabia with Scraco Company.
- You do not intend to reside in Australia. You consider that your usual place of abode will continue to be in Saudi Arabia. You will only visit Australia for 36 days per income year during your annual leave.
- You reside in long-term accommodation in Saudi Arabia which is provided by his employer.
- Your personal possessions are stored in Saudi Arabia.
- Your spouse and children have resided in a rental property in Australia since 17 January 2022.
- You do not own property in Australia.
- You will not derive an Australian source income
- You have some cash savings in an Australian bank account.
- You have informed your Australian financial institutions that you reside overseas.
- You have not enrolled to vote in Australia.
- You have Private Health Insurance in Australia.
- You are not eligible to contribute to the PSS or the CSS Commonwealth Superannuation Fund.



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## Analysis

### Australian Tax Residency

Under Australian tax law, the primary test for an individual's tax residency is whether that person resides in Australia according to the ordinary meaning of the word "resides" (the common law test)<sup>1</sup>

If the common law test is not satisfied or is inconclusive, then regard must be had to the three statutory tests:

1. Domicile test: The taxpayer is domiciled in Australia, unless it can be established that the taxpayer's permanent place of abode is outside of Australia;
2. 183-day test: The taxpayer is actually present in Australia for a total period of more than half of the income year (the 183-day test), unless the Commissioner is satisfied that the taxpayer's usual place of abode is outside of Australia or the person has no intention to take up residence here; and
3. Superannuation test: The taxpayer is a contributing member of the superannuation fund for Commonwealth government employees, or is a spouse or child (under 16) of that person (this test is not relevant as you are not a Commonwealth government employee).

### The Resides Test

The meaning of "resides" under the common law is taken to consider the quality of presence and time in determining whether individuals reside in a place where they spend part of their lives.

As the word "reside" is not defined specifically under Australian income tax law, it is taken to have its ordinary meaning. As such, the ordinary meaning of the word 'reside' is quite pervasive and can comprise an individual who comes to Australia permanently, as well as an individual who dwells in Australia for a considerable period of time.<sup>2</sup>

In determining whether an individual "resides" in Australia, no single factor is taken to necessarily determine residency (e.g. the period of physical presence or length of time in Australia). The weight of each factor and an individual's behaviour in their time spent in Australia can shed some light in determining if their actions are consistent with residing in Australia.

Taxation Ruling TR 98/17 and recent case law list a number of factors that are to be considered when determining residency according to ordinary concepts. These factors include:

- Physical presence in Australia;

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<sup>1</sup> See section 6(1) Income Tax Assessment Act 1936 (ITAA 36) and Taxation Ruling TR 98/17 *Income tax: residency status of individuals entering Australia*, Australian Taxation Office, paragraph [11]

<sup>2</sup> TR 98/17 [15]



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- Nationality;
- Frequency, regularity and duration of visits to Australia;
- The intention or purpose of presence;
- Family and business/employment ties;
- Maintenance and location of assets; and
- Social and living arrangements.

A person does not necessarily cease to be a resident because they are physically absent from Australia. However, physical presence in a country for some period during a particular year of income is usually considered necessary for a person to be resident in that country during a particular income year<sup>3</sup>.

As outlined at paragraph 52 of TR 98/17, a factor that may indicate that an individual resides in Australia is the presence of family in Australia. However, this does not mean that the presence of family in Australia will result in the decision that the individual is also residing in Australia. All factors will need to be considered.

## Application to your Circumstances

Based on the Relevant Facts as outlined above, you are a citizen of Zimbabwe and have never resided in Australia.

Since 2013, you have resided and been employed on a full-time basis in Saudi Arabia with Sraco Company. You have retained a Saudi Arabian Residency Permit and Work Permit for the past 10 years. You have established Saudi Arabia as your usual place of abode.

Going forward, you will continue to reside in Saudi Arabia permanently and carry out your full-time employment from Saudi Arabia with the same employer you have had for the past 10 years (Sraco Company). You will continue to hold a Saudi Arabian Residency Permit.

You do not intend to reside in Australia. You consider that your usual place of abode will continue to be in Saudi Arabia. You will only visit your family in Australia for 36 days per income year during your annual leave period.

You reside in long-term accommodation in Saudi Arabia which is provided by your employer. Your personal possessions are stored in Saudi Arabia.

You do not own assets in Australia and you do not have Australian sourced income.

In 2018, you and your family were granted Permanent Residency Visas in Australia. Your family relocated to Australia to reside in January 2022 and entered into a rental lease in Australia. Your children attend school in Australia.

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<sup>3</sup> *Iyengar v. Federal Commissioner of Taxation* 2011 ATC 10-222, (2011) AATA.



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You intend to spend limited time in Australia and you intend to spend less than 36 days per income year physically in Australia. You do not intend to relocate to Australia, except for short visits to see family.

You are not enrolled to vote in Australia.

You have informed your Australian financial institutions that you reside overseas.

Therefore, it is reasonably arguable that you have established a permanent place of abode in Saudi Arabia for the past 13 years and you will continue to do so going forward. Your behaviour and intention reflects continuity, routine and habit that is consistent with you not residing in Australia.

## Domicile Test

An individual is a tax resident of Australia if his or her domicile is Australia, unless his or her permanent place of abode is outside of Australia.

It is unlikely that you have an Australian domicile as you are a citizen of Zimbabwe and have never resided in Australia.

However, for completeness, we have examined if you have a permanent place of abode outside of Australia.

## *Permanent Place of Abode Outside of Australia*

In order to have established a permanent place of abode outside of Australia, one must be considered to have a “fixed and habitual place of abode” outside of Australia.

A permanent place of abode does not have to be 'everlasting' or 'forever'. It does not mean an abode in which a person intends to live for the rest of their life. An intention to return to Australia in the foreseeable future does not prevent a person in the meantime setting up a permanent place of abode elsewhere.

It is clear from the case law that a person's permanent place of abode cannot be ascertained by the application of any hard and fast rules. It is a question of fact to be determined in the light of all the circumstances of each case.

In *Harding's* case<sup>4</sup> it was held that a “permanent place of abode” requires the identification of a country or state in which the person is living permanently. “Place of abode” may mean the house in which a person lives or the country, city or town in which he is for the time being to be found. Therefore, a person can have a “permanent place of abode” notwithstanding that he lived in a number of different accommodations for a relatively short period of time.

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<sup>4</sup> *Harding v Commissioner of Taxation* [2019] FCAFC 29



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IT 2650 states that the following factors should be taken into account (with factors (c) (e) and (f) ordinarily given more weight):

- (a) the intended and actual length of the individual's stay in the overseas country (noting that typically a duration of less than two years would be considered as being of a transitory nature);
- (b) any intention either to return to Australia at some definite point in time or to travel to another country;
- (c) the establishment of a home outside Australia;
- (d) the abandonment of any residence or place of abode the individual may have had in Australia;
- (e) the duration and continuity of the individual's presence in the overseas country; and
- (f) the durability or association that the individual has with a particular place in Australia (including assets maintained here, family ties, etc).

As a broad rule of thumb, a period of about two years or more would generally be regarded as a substantial period for the purposes of a taxpayer's stay in another country. It must be stressed, however, that the duration of the taxpayer's actual or intended stay out of Australia is not, of itself, conclusive and needs to be considered with all of the factors.

#### *Indicators of permanent place of abode in Saudi Arabia:*

The following factors indicate that you have established a permanent place of abode in Saudi Arabia:

- You are a citizen of Zimbabwe.
- You have never lived or worked in Australia, and you have worked in Saudi Arabia since 2013.
- For the past 13 years, you have resided and been employed on a full-time basis in Saudi Arabia with Sraco Company. You have retained a Saudi Arabian Residency Permit and Work Permit for the past 10 years. Going forward, you will continue to reside in Saudi Arabia permanently and carry out your full-time employment from Saudi Arabia with the same employer that you have had for the past 10 years (Sraco Company).
- You do not intend to reside in Australia. You consider that your usual place of abode will continue to be in Saudi Arabia. You will only visit your family in Australia for 36 days per income year during your annual leave.
- You reside in long-term accommodation in Saudi Arabia which is provided by your employer. Your personal possessions are stored in Saudi Arabia.
- You do not own assets in Australia and you do not have Australian sourced income.
- You intend to spend limited time in Australia and you intend to spend less than 36 days a year physically in Australia. You do not intend to relocate to Australia, except for short visits to see family.

It is acknowledged that you and your family were granted Permanent Residency Visas in Australia in 2018. In particular, your family relocated to Australia to reside in January 2022 and entered into a rental lease in Australia. Your children attend school in Australia.



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However, despite the relocation of your family to live in Australia, you will only visit your family in Australia and continue to retain Saudi Arabia as your permanent place of abode.

It is therefore reasonably arguable that you have established a permanent place of abode in Saudi Arabia for the past 10 years and will continue to do so going forward, despite your family relocating to Australia on permanent residency visas. Your behaviour and intention reflects continuity, routine and habit that is consistent with your permanent place of abode to be in Saudi Arabia.

## 183 Day Test

The 183-day test applies to establish an individual's tax residency in Australia if the individual is actually present in Australia for more than half the income year whether continuously or intermittently, unless the Commissioner is satisfied of the following:

- That at all relevant times throughout the test period, the individual's usual place of abode was outside Australia; and
- That at all relevant times throughout the test period, the individual did not intend to take up residence in Australia.

You do not intend to spend 183 days or more in Australia. Accordingly, this test should not apply.

Please do not hesitate to contact me if you have any further questions on +61 435647942 or at [Bradley@murphytax.com.au](mailto:Bradley@murphytax.com.au)

Yours sincerely

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