Individual residency and the offshore worker

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The Australian understanding of Australian tax residency for individuals changed significantly in 2014, particularly for Australian domiciled people working outside Australia for significant periods who return to Australia periodically during breaks (offshore workers).

Three cases before the Administrative Appeals Tribunal (the Tribunal), *Dempsey v Commissioner of Taxation (Dempsey)*,[1] *Agius v Commissioner of Taxation (Agius)*[2] and *Engineering Manager v Commissioner of Taxation (Engineering Manager)*,[3] decided in succession, set a new framework for determining individual tax residency.

As a result of the three cases, an individual may potentially establish that he is not a tax resident in Australia, even if he has a house in Australia available to him and even if his children are in Australia, if it is established that he has significant presence in an offshore country due to employment or enterprise and his visits to Australia are casual in nature.

So why the significant change, when there was no change in the underlying legislation? The change as a result of the 2014 cases, it is suggested, turns on a more concise understanding of "resides" and a more natural understanding in turn of "permanent place of abode", discussed below. Naturally, it is suggested that "permanent place of abode" and "resides" are highly related concepts.

The legislative test for residence for Australian domiciled individuals

The legislative test of tax residency in Australia is contained in s 6 of the Income Tax Assessment Act 1936 (ITAA 36) and broadly stipulates that, in the case of individuals whose domicile is in Australia:

> ***resident or resident of Australia*** means:
> (a) a person, other than a company, who resides in Australia and includes a person:
> (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia…

Notably, broadly expressed, nationality is pertinent to the determination of domicile, which is a separate legal concept from residence. Very broadly, if a person is an Australian citizen, they are likely to be domiciled in Australia.[4] This article addresses the broad type of factual pattern where a taxpayer is Australian domiciled but seeking to demonstrate he is not a tax resident in Australia.

Broadly, in a tax litigation context, the evidential burden is on the taxpayer to show that the assessment issued by the Commissioner of Taxation (the Commissioner) is excessive.[5] This means that to succeed in establishing non-residence, a taxpayer domiciled in Australia needs to establish by way of evidence that (a) he does not reside in Australia and that (b) he has a permanent place of abode overseas. It is suggested that residency cases succeed or fail depending on counsel for the taxpayer's ability to present the evidence in such a way that both these points are established. Notably, for the taxpayer who successfully establishes that he is a non-resident, all non-Australian source income (eg foreign employment earnings) during the relevant period will not be assessable income in Australia. However, Australian source income will continue to be assessable.[6]

Pre-2014 case law and administrative guidance

To understand the change resulting from *Dempsey*, *Agius* and *Engineering Manager*, revisiting earlier cases provides a historical context for the residency of offshore workers.

Until *Dempsey*, I would suggest that both the Commissioner and the Tribunal had developed a somewhat unhealthy focus, for Australian domiciled individuals seeking to establish non-residence, to demonstrate that they had "abandoned any residence or place of abode [they] may have had in Australia". This quote is taken from a remark subsequently adopted by the Commissioner, potentially out of context, made by Northrop J in the Full Court decision of *Federal Commissioner of Taxation v Applegate (Applegate)*.[7] Over the years, it is suggested that the focus on giving up one's house and other connections in Australia became a focal point of the Commissioner and the Tribunal for an Australian domiciled taxpayer establishing non-residence. Support for this suggestion is provided by Taxation Ruling No IT 2650 (IT 2650)[8] wherein the Commissioner, on 8 August 1991, set out five factors at para 5 to determine whether an Australian domiciled individual would be considered a tax resident in Australia:

(a) the intended and actual length of the individual's stay in the overseas country;
(b) any intention either to return to Australia at some definite point in time or to travel to another country;
(c) the establishment 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 of association that the individual has with a particular place in Australia.** [Emphasis added.]

First, it is suggested that the third factor set out by the Commissioner in the above ruling, quoted almost verbatim from Northrop J's remark in *Applegate*, was taken arguably out of context by the Commissioner, and as a factor was given far too much relevance.

Second, over time the cases developed, I would suggest, an inappropriate understanding of the word "resides" in Australia to have an extraordinarily wide meaning. In *Executors of the Estate of Subrahmanyam v Commissioner of Taxation* (*Subrahmanyam*),[9] it was "concluded that the widest meaning should be attributed to the word 'reside'", based on a notion of statutory interpretation favouring the revenue:[10]

> There are two reasons why I have concluded that the widest meaning should be attributed to the word ″reside″ as it is used in the opening words of paragraph (a) of the definition. The first is the context of the 1936 Act which is mirrored in the 1997 Act. The context is that of legislation to levy income tax. It provides for the levy of that income tax upon both residents and non-residents. However, given that the income regarded as assessable income under both the 1936 Act and the 1997 Act is more broadly based for a resident than for a non-resident, it can be presumed from the fact that it is income tax legislation that Parliament intended that the word "reside" should be given its broadest ordinary meaning rather than any narrower meaning. That is so because it is its broadest meaning that leads to the greatest pool of assessable income upon which income tax is assessed.

This approach was then followed by the Tribunal in *Iyengar v Commissioner of Taxation* (Iyengar),[11] where the Tribunal concurred with the understanding of "resides" in *Subrahmanyam*, noting that:[12]

> In reaching this conclusion, the Tribunal is mindful of the fact that it has been previously held that the ordinary meaning of "reside" in s 6(1)(a) of the ITAA 1936 should be attributed with the widest possible meaning as that is what Parliament intended: Subrahmanyam.

However, it is arguable that such an approach was always inconsistent with broader principles of statutory interpretation as set out by the High Court; it was said that the approach to "resides" in those cases called for a very wide reading of the tax legislation.[13] Statutory interpretation appropriately focuses upon the actual words used in the legislation.

As was noted by Gleeson CJ in *Carr v Western Australia*,[14] subsequently cited by Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[15] the reading of tax legislation so that it favours the revenue beyond the clear words of the text, as was adopted in *Iyengar* and *Subrahmanyam*, is inappropriate:[16]

> Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia*... when he said:
>
> > [I]t may be said that the underlying purpose of an income tax assessment act is to raise revenue for government. No one would seriously suggest that s 15A of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic material, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

As the 2014 residency cases show, if there is a broad principle which can be expressed here relevant to all tax cases, it is the words of the legislation that are of paramount importance.

Third, cases decided over time before the Tribunal adopted an ever-expanding checklist-approach where an innumerable number of factors would be considered by the decision maker in an attempt to arrive at a result. It is suggested that the Tribunal would search for an ever-growing number of factors to ascertain the simple question of whether an individual "resides" in Australia.

In *Iyengar*, the Tribunal went on to say that ascertaining residency required a detailed consideration of the factors:

> Although the question of whether a person "resides" in a particular country is a question of fact and degree, the courts have referred to and taken into account various factors considered to be relevant to this question. These factors are outlined below.
> The weight to be given to each factor will vary with the individual circumstances and no single factor is necessarily decisive. As acknowledged by the Tribunal in *Shand v Federal Commissioner of Taxation* 2003 ATC 2080 at [35], "questions of residence, domicile, permanent place of abode, have frequently been found by the courts and tribunals to be difficult to assess on a factual level and not easy to define in concrete legal terms."

It is clear that the above approach made Australian residency cases highly complex (because of the extensive consideration of factors), involving comparison of

those factors with previous residency cases and over-complicated the ascertainment of a simple question: did the taxpayer "reside" in Australia?

In *Iyengar*, where the taxpayer worked in Dubai but would return to Australia during breaks and stay in the family home with his wife and young son (who remained in Australia while he worked overseas), the taxpayer was ultimately held to be tax resident in Australia. As noted above, this required the taxpayer to demonstrate that he (a) did not reside in Australia and (b) had a permanent place of abode overseas. As is noted below, "permanent" at the very least means something more than temporary.[17] Notably, in *Iyengar* it was fatal to the taxpayer's case that the evidence was that his overseas work was for the purpose of making enough money to pay off the mortgage on the Australian family home and return. The taxpayer's evidence was that the "whole point of going overseas was to liquidate the mortgage [on the Winthrop home] asap", evidence which was inconsistent with the taxpayer establishing a desire to reside overseas for at least a considerable time and fatal to the taxpayer's case. I note this aspect because it is suggested that even with the different approach adopted by the Tribunal in 2014, the evidence of the taxpayer being on a time-limited mission overseas would have likely resulted in the Tribunal nevertheless finding the taxpayer resident. The case, more than anything else, I would suggest, is a reminder for taxpayer's representatives to interview their clients robustly to ascertain the true facts prior to incurring the expense of running cases in the Tribunal and where in any doubt, to engage counsel.

Dempsey

When *Dempsey* was decided by the Tribunal in May 2014, the Tribunal constituted itself of three members — Justice Logan, Deputy President (DP) Hack SC and Senior Member (SM) Kenny, rather than the usual single member, arguably giving the decision more precedential weight than that of a Tribunal decision decided by a single member. The Tribunal in *Dempsey* quickly went about disposing of the expansive understanding of "resides" as found in para 43 of *Subrahmanyam* above, and adopted in *Iyengar* due to its inconsistency with the High Court's expression of statutory interpretation principles, above.

The question then turned to what the word "resides" truly meant. At this point, the Tribunal in Dempsey identified the High Court case of *Federal Commissioner of Taxation v Miller* (*Miller*)[18] decided after World War II. Notably, in Miller, Latham CJ expressed the understanding of "resides" in a simple, conceptual manner (with whom Rich J and Dixon J in separate judgments expressed not dissimilar sentiments):[19]

> I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word "reside" by the courts which makes it impossible to apply the ordinary meaning of the word "reside" in the present case.

The Tribunal in *Dempsey* seized upon this approach of the High Court in *Miller* to pronounce that a narrow interpretation of "resides" is the correct application of law in Australia:[20]

> *Miller* provides no warrant for adopting some broad meaning of the word "resides" (whatever that may be), much less any broad application of that word. Even were we at liberty to depart from the meaning given to the word in *Miller*, and neither we, nor before us the Commissioner, enjoy any such liberty, neither the text of the definition nor its context lead to any conclusion other than that the word "resides" bears its ordinary meaning, not some broad meaning. Adopting and applying what was said in *Alcan* as to the approach to statutory construction should put any contrary notion firmly and finally to rest.

Notably, the Tribunal acknowledged that it was possible for an individual to reside in two places,[21] but the Tribunal's pronouncement was a structural shift, it is suggested, that the word "resides" was to be interpreted in a way consistent with the ordinary person's understanding of the word, rather than an artificially enlarged legal construct. Reconfirming the importance of the Tribunal's rejection in *Dempsey* of a broader checklist approach, the Tribunal remarked in the case of *Iyengar* discussed above:[22]

> [The Tribunal in Iyengar] developed from earlier cases a non-exhaustive list of criteria… regarded as relevant to the determination of whether or not an individual was a resident of Australia for the purposes of the definition in s 6 of the ITAA 36. That list has gained some later currency in the Tribunal. However useful such checklists may be, they are no substitute for the text of the statute and the recollection that ultimate appellate authority dictates that the word "resides" be construed and applied to the facts according to its ordinary meaning.

As has been noted above, for an Australian domiciled individual to establish non-residence, that individual must establish that he (a) does not reside in Australia and (b) has a permanent place of abode outside of Australia. In terms of permanent place of abode, the Tribunal in *Dempsey* reaffirmed *Applegate* in observing that "permanent place of abode" is arguably similar to the question of "resides" and connotes a connection with a place that is more than temporary. The Tribunal in *Dempsey* quoted Sheppard J in the NSW Supreme Court decision of *Applegate v Federal Commissioner of Taxation*,[23] which was upheld on appeal in *Applegate*:

> "[P]ermanent" is used in the sense of something which is to be contrasted with that which is temporary or transitory. It does not mean everlasting. The question is thus one of fact and degree.

Arguably, the above approach to "resides" and "permanent place of abode" set up the concepts upon which the Tribunal in *Dempsey* could then analyse the fact pattern, first by considering the taxpayer's quality of residence overseas (in his case, Saudi Arabia) and second, by considering whether or not the taxpayer resided in Australia. It is important to note the concept of "resides" following *Dempsey* arguably continues to be most affected by physical indicators as well as the taxpayer's intention. As was noted above, the burden is on the taxpayer to satisfy the Tribunal and the need to present a complete and coherent fact pattern supporting the taxpayer's position puts an onerous task on counsel for the taxpayer in these residency cases.

The taxpayer in *Dempsey* was clearly based in Saudi Arabia for work which was of an indefinite duration. His home in Saudi Arabia, consistent with living arrangements in that country, "took the form it did" because it was a "form of home permitted to expatriates in Saudi Arabia". His home in Saudi Arabia was exclusively occupied by him. Having regard to the local culture, the taxpayer had social connections in the immediate region. The Tribunal considered many aspects of the taxpayer's life in Saudi Arabia and his likely intentions. The Tribunal, rejecting the Commissioner's submissions that the taxpayer was somewhat akin to a fly-in-fly-out worker, found that the taxpayer had established a permanent place of abode in Saudi Arabia:[24]

> We readily accept that the facts of this case are not all one way, but the long and the short of it is that, viewing them as a whole, the correct or preferable conclusion is that Mr Dempsey, as a matter of deliberate choice, made Saudi Arabia his home for the duration of the Saudi Kayan project and, so he thought, beyond.

In relation to the taxpayer's connection with Australia, the Tribunal was faced with the situation:

- that the taxpayer had visited Australia periodically (for the period in question);
- that he had available to him an unoccupied house in Queensland;
- that he had children living in a house in Canberra with their mother, all of whom clearly resided in Australia; and
- that the taxpayer had some form of non-intimate relationship with his children's mother during the relevant period.

Nevertheless, the taxpayer's visits to Australia during the period were "casual and fleeting", particularly given that the taxpayer was also spending time holidaying in Thailand. In conclusion, the Tribunal found that the taxpayer's relevant period in connection with Australia was "intentionally, but a casual visitor to Australia, visiting from his usual place of abode, Saudi Arabia".[25] As a result, the Tribunal concluded that the taxpayer did not "reside" in Australia during the relevant period.

Agius

Agius, decided by the Tribunal in November 2014, albeit after submissions had closed in *Engineering Manager*, below, did not deliver an overall win for the taxpayer due to the issues in that case turning on the Australian source nature of the income in dispute, but the remarks of DP Frost for the Tribunal in relation to individual residence are of particular note. DP Frost readily endorsed the finding of the Tribunal in *Dempsey*. In relation to the taxpayer's connection overseas, DP Frost found that the taxpayer "became a resident of Vanuatu at least as long ago as 1981".[26] The evidence was that the taxpayer had clearly established a solid connection in Vanuatu both from a professional and social perspective. But arguably, DP Frost, through analysing *Miller* and *Levene* perhaps more closely than the Tribunal did in *Dempsey*, went further in forming a view that the taxpayer in *Agius* did not *also* reside in Australia. DP Frost observed that the taxpayer had homes available to him in Australia:[27]

> It is certainly the case that Mr Agius spent time in Australia. It is also the case that, when he came to Australia, he would stay (although not always) in the family home in Petersham and later at Douglas Street, or at his mother-in-law's house in Leichhardt, or at friends' houses, or, from 2003 onwards, generally at the Kent Street apartment. But he did not live in any of those locations. They were not his home. They were places where he stayed; they were not places where he lived.

However, DP Frost found that the availability of those homes did mean that the taxpayer could be found to "reside" in Australia:

> Mr Agius' [the taxpayer's] circumstances are simply this: he lived in Vanuatu, and he sometimes — even often — visited Australia. When he visited Australia, he did not live here… of dwelling here permanently or for a considerable time. He did not have his settled or usual abode (or one of his settled or usual abodes) here; the only settled or usual abode he had was in Vanuatu. His connection with Australia, and with particular locations in Australia, during the relevant years lacks the permanent, long-term or non-transient quality that is suggested by the word "reside". Even when he was here for longer periods of some weeks at a time, it is not apt to describe what he did as "dwelling" here. He simply stayed in the Douglas Street home, or in the Kent Street apartment. He did not live in either one of them, or in any other place in Australia.

DP Frost's finding, that the taxpayer visited Australia often but he was not "dwelling" there, was arguably a slightly different approach to that which was taken in *Dempsey* where the Tribunal described the taxpayer as being a "casual visitor". The *Agius* decision arguably focuses more on the requirement that to reside in

Australia, particularly where a taxpayer is clearly residing outside Australia, they must be "settled". This arguably more closely follows the sentiment of Latham CJ in *Miller* where he remarked in conclusion, that eating, sleeping and working are key aspects of "resides", indicating that a finding of "resides" in Australia must accord with an ordinary person's understanding.[28]

Engineering Manager

Engineering Manager was the third residency case decided by the Tribunal in 2014, published just prior to the end of the year in December 2014. SM Lazanas for the Tribunal found that the taxpayer did not reside in Australia during the relevant period. I appeared as counsel for the taxpayer in *Engineering Manager*.

SM Lazanas readily adopted what was said by the Tribunal in *Dempsey* and then analysed the factual pattern pertaining to the taxpayer. In *Engineering Manager*, the taxpayer was a senior engineer who had spent around six years working overseas in various places including Thailand, Japan and Qatar, but during the relevant period under consideration, was based in Oman. It is suggested that the sheer period of time the taxpayer had spent overseas in *Engineering Manager* would have been influential as establishing non-residence in its own right. Notwithstanding this, the evidence was that the taxpayer had his exclusive residence in Oman, occupied a senior position of employment and that he maintained an active social life in Oman.

Most notably, in *Engineering Manager*, the taxpayer would return to Australia during breaks and stay in the family home with his four children and his wife. It is worth noting that for any taxpayer who works overseas for an extended period of time, their marital relationship is likely to be different from that where the husband and wife live under one roof day-to-day. Nevertheless, in *Engineering Manager*, the clear evidence was that the "marital relationship was fractured". SM Lazanas rejected the Commissioner's contentions that the taxpayer's physical, emotional and financial ties to Australia were significant:[29]

> … For the most part, Mr M [the taxpayer] was not physically present in Australia nor did he intend to live in Australia, in the Relevant Year. He spent 62 days in Australia and 240 days in Oman in the period up to 29 April 2011. Mr M worked and lived in Oman and it was Mr M's intention to continue to work and live in Oman, dependent on the renewal of his employment contract. Mr M's priority was his work, and his career. Mr M's attachment to his work in Oman is a very significant factor in my conclusion that he was not a resident of Australia, when weighed with the other considerations… He used his leave to travel back to Perth to spend time with his four children, but his connection with his children is not in my view determinative of the question of whether he was a resident of Australia. That it was a significant factor is supported by the fact that it ultimately led to Mr M's change of mind to return permanently to live with his family in April 2011. But that only reinforced my conclusion that for the period up to 29 April 2011, he was not a resident of Australia as he was living in Oman, pursuing his career. In the circumstances, Mr M's work ties outweighed his family ties, even though he financially supported his family by sending the bulk of his income to the joint bank account held with his wife in Australia. Mr M ordered his lifestyle around his work commitments.
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> I have taken into account the fact that Mr M's marital relationship was far from harmonious and I consider that to be a very significant factor. While I reached no conclusion as to whether Mr M had left Australia in 2004 to work overseas due to "marital issues", the circumstances pertaining to the Relevant Year were clear… The reality is that Mr M was still living overseas and was being paid overseas throughout most of the Relevant Year.

The above short quote cannot fully take into account the rich tapestry of evidence that was brought out before the Tribunal and the submissions made applying the evidence to the law adopted in *Dempsey* and previous Australian and UK cases, which formed the basis of the Tribunal adopting its own detailed reasoning. However, as a general statement, it can be said that the Tribunal in *Engineering Manager* applied *Dempsey* to find, for the first time in Australia, that a taxpayer who worked overseas but nevertheless returned to stay in the family home with his children was not a resident during the relevant period.

Conclusion

A question arises: are similar results likely to follow? It is suggested that whether a taxpayer can establish that he or she is a non-resident depends on the full circumstances of facts pertaining to their case and questions of fact and degree.

Individual residency cases by their nature have rich fact patterns and questions of physical connection and intention across a number of countries. It cannot be said that *Engineering Manager* sets a precedent that offshore workers who maintain a home in Australia and whose dependent children remain in Australia will be held non-resident. Notwithstanding, *Dempsey, Agius* and *Engineering Manager* now clearly establish a pattern that where individuals have residences available to them in Australia and close family connections, that the Tribunal will not per se hold them to be tax resident but will instead consider whether the taxpayer "resides" in Australia in accordance with the more narrow, ordinary understanding of "resides" as set out above.

Additionally, prior to *Dempsey, Agius* and *Engineering Manager*, the administrative practice of the Commissioner arguably involved a strong focus on taxpayers abandoning their connection to Australia, giving up their homes (or renting them out), closing bank accounts and

relocating their children. In other words, the Commissioner was basically saying, it is suggested, "if you want to establish non-residence then you need to break your ties to Australia". The following extract from IT 2650 supports this suggestion:[30]

> The relevance of bank accounts maintained in Australia varies depending on the types of accounts. If a taxpayer closes all bank accounts in Australia and transfers all funds (including investment funds) to accounts in the overseas country, this would indicate less durability of association with a place in Australia than if all accounts in Australia were maintained. On the other hand, even if an individual closes all accounts for everyday use (such as cheque and savings accounts) and maintains a long term investment account, it is still possible to establish that, on the basis of other factors, the individual has a permanent place of abode in the overseas country.
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> Similar considerations apply in relation to the place of education of children. For example, an individual may be considered to have a permanent place of abode in an overseas country even though his or her children continue their schooling in Australia due to the absence of adequate educational facilities in the overseas country. However, the fact that the children continue their schooling in Australia despite the presence of adequate educational facilities in the overseas country, would tend to show a more durable association with a place in Australia.

The Commissioner would say that these factors are not determinative but are merely some of the factors that need to be considered. Notwithstanding this, taxpayers in *Dempsey* and *Engineering Manager* did not close their bank accounts, did not sell or rent their homes and did not relocate their children to the foreign country. Relevantly, in presenting the taxpayer's case in *Engineering Manager*, we were able to also draw the Tribunal's attention to earlier Australian and UK cases where similar fact patterns did not preclude the courts and tribunals also finding that the taxpayers were not resident.

Notably in each of the three cases, the Commissioner has declined to exercise his right to appeal the adverse result to the Federal Court. The ATO issued a decision impact statement for *Dempsey* saying:[31]

> The approach taken by the AAT [in Dempsey] in reaching its decision is consistent with the ATO's approach to issues of residency, including the ATO view expressed in IT 2650. This approach is that the question requires a weighing of all the relevant facts and circumstances and an application of the statute and authorities to those facts. We consider the outcome of the case is confined to its facts and creates no new law in this area.

With respect, for the reasons set out in this article, I would respectively disagree with the ATO's view as to *Dempsey* being "confined to its facts"; I would question whether IT 2650 does indeed require revision and I would suggest that after the subsequent decisions of *Agius* and *Engineering Manager*, that *Dempsey* has very much set in place a structural shift in the way individual residency cases are decided in Australia.

It is important to note that broadly, up until 12 May 2009, s 23AG of ITAA 36 provided an exemption for Australian income tax for income earned in overseas employment by Australian resident individuals where the earnings related to a continuous period of service of 91 days or more (the s 23AG exemption). This exemption was removed by the first Rudd Government to "ensure that workers who earn income overseas do not have an unfair advantage over workers who earn income and pay tax in Australia" as a result of the May 2009 budget.[32] It is suggested that the removal of the s 23AJ exemption gave rise to a large number of residency disputes, which included *Dempsey* and *Engineering Manager*, residency disputes in which the Commissioner has largely been unsuccessful before the Tribunal.

I have now also been made aware of some anecdotal evidence that the Commissioner is seeking to settle individual residency cases rather than allowing those cases to proceed to the Tribunal. As a result, it is suggested that taxpayers with similar factual circumstances to these decisions who have been adversely affected by being treated as tax residents by the Commissioner may consider, in consultation with their advisors, objecting against assessments or appealing to the Tribunal. Taxpayers and their advisors who are out of time for such an objection or appeal may wish to seek advice from specialist counsel as to invoking the relevant out of time provisions.

In conclusion, future results will ultimately be based on the facts. But it can be said that where the overall factual circumstances are in the taxpayer's favour and supported by evidence, and appropriately presented to the Commissioner or the Tribunal, the same result may follow. It is notable that in the residency cases of *Dempsey, Agius* and *Engineering Manager*, specialist counsel were instructed for the taxpayers from the Queensland, NSW and Western Australian bars respectively, which would be well advised for taxpayers facing similar issues in arguing objections before the Commissioner and in cases before the Tribunal due to the complexity of evidence in individual residency cases.

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Footnotes

1. *Dempsey v Commissioner of Taxation* [2014] AATA 335; BC201481302.

2. *Agius and Commissioner of Taxation* [2014] AATA 854; BC201481790.
3. *Engineering Manager v Commissioner of Taxation* [2014] AATA 969.
4. See, for example, *Henderson v Henderson* [1967] P 77; [1965] 1 All ER 179 at 180–1; [1965] 2 WLR 218.
5. Taxation Administration Act 1953 (Cth), s 14ZZR.
6. Income Tax Assessment Act 1997, s 6-5.
7. *Federal Commissioner of Taxation v Applegate* (1978) 9 ATR 899.
8. Taxation Ruling No IT 2650 "Income tax: residency — permanent place of abode outside Australia" (8 August 1991).
9. *Executors of the Estate of Subrahmanyam v Commissioner of Taxation* [2002] ATC 2303; (2002) 51 ATR 1173; [2002] AATA 1298.
10. Above, n 9, at [43].
11. *Iyengar v Commissioner of Taxation* (2011) 85 ATR 924; [2011] AATA 856; BC201109255.
12. Above, n 11, at [86].
13. As quoted from *Subrahmanyam*, above n 9, at [46].
14. *Carr v Western Australia* (2007) 232 CLR 138; 239 ALR 415; [2007] HCA 47; BC200708991.
15. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41; BC200908882.
16. Above, n 14, at [51].
17. Sheppard J in the NSW Supreme Court decision of *Applegate v Federal Commissioner of Taxation* [1978] 1 NSWLR 126; (1978) 18 ALR 459; 78 ATC 4054; 8 ATR 372 at 134.
18. *Federal Commissioner of Taxation v Miller* (1946) 73 CLR 93; 20 ALJR 285; 3 AITR 333; BC4615298.
19. Above, n 1 at [90]. Notably, Latham CJ in *Miller* was influenced strongly by the *English House of Lords decision of Levene v Inland Revenue Commissioners* [1928] UKHL 1 (*Levene*) where Viscount Cave LC, broadly, remarked that "reside" was of the meaning *"to dwell permanently or for a considerable time,* ***to have one's settled or usual abode, to live in or at a particular place.****"* (emphasis added).
20. Above, n 1, at [94].
21. *Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774.
22. Above, n 1, at [101].
23. Above, n 7, at 134.
24. Above, n 1, at [122].
25. Above, n 1, at [121].
26. Above, n 2, at [53].
27. Above, n 2, at [55].
28. See Latham CJ in *Miller*: "In the present case, Papua and New Guinea were the places where the respondent, during the relevant period, **ate and slept and worked**. In my opinion there is not yet any decision which requires the Board of Review or this Court to hold that he did not reside at the place where he lived for a period of over nine months." [Emphasis added].
29. Above, n 3, at [55]–[56].
30. Above, n 8, at [29]–[30].
31. See Decision Impact Statement Demsey (2013/4861; 2013/4862) law.ato.gov.au.
32. See Treasurer's Press Release No 66, (12 May 2009).