

5 December 2022

Ruth Geary
Individuals and Intermediaries
Australian Taxation Office

By email: IAIPAG@ato.gov.au

Dear Ms Geary

Draft Taxation Ruling TR 2022/D2: Income tax: residency tests for individuals

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to draft Taxation Ruling TR 2022/D2: *Income tax: residency tests for individuals* (**draft Ruling**).

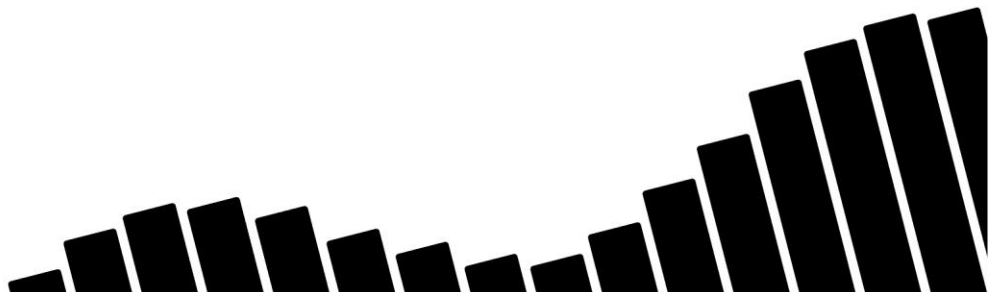
In the development of this submission, we have closely consulted with our National Taxation of Individuals Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

We have also had the opportunity to review the submission prepared by Business Law Section of the Law Council of Australia (**LCA**) in relation to the draft Ruling. Subject to our comments below, we endorse the views and concerns raised by the LCA in their submission.

Residency is an important issue that is pertinent to all residents and visitors of Australia and can significantly impact a taxpayer's obligations. Taxpayers often face difficulty when applying the legislation to their circumstances, given the complex factual enquiry required. This difficulty is multiplied by recent changes in case law and the evolving nature of the world we live in.

The Tax Institute supports the release of guidance materials that better assists taxpayers and tax practitioners in determining their residency status. Subject to the comments below, and the concerns raised in the LCA's submission, we broadly consider that the draft Ruling provides a detailed analysis of the legislative requirements and key changes in recent case law that an individual needs to understand and apply when determining their tax residency status.

However, The Tax Institute is of the view that the draft Ruling could be better supported with additional guidance and examples to assist taxpayers and tax practitioners. Our comments are set out below for your consideration.



Relevant guidance for individuals

Channels through which guidance is provided

We recommend supporting the release of the draft Ruling with updated guidance that is easier to understand and in a format that is more accessible to taxpayers. Feedback from our members indicates that taxpayers may struggle to understand and apply formal guidance. Including the relevant information in other formats, such as videos and short case studies, may assist in this regard and better allow taxpayers to appreciate the complexities of the residency issue. This approach would be of particular benefit to those who are not familiar with, or otherwise deterred by the perceived complexity in, taxation legislation and formal guidance.

Our members have also suggested that taxpayers would benefit from the supporting information being circulated through more accessible channels, such as social media. This may assist in creating greater public visibility on the issue of tax residency, alerting those impacted by the issue at an earlier stage. This would be of particular benefit for taxpayers who are new to Australia and our taxation system, such as new migrants and visitors under temporary visas such as the working holiday maker (**WHM**) program.

We note that the ATO has made considerable efforts in providing information to taxpayers in formats and through channels similar to what we have described above. To the extent that the requested guidance is already available, it would be beneficial for continued efforts aimed at increasing the awareness of these products, such as decision tools and videos.

Reliance on website guidance

In distributing further guidance materials, it is important for taxpayers and tax practitioners to understand the role and limitations of web guidance, particularly that it does not protect taxpayers from shortfalls of tax that may arise from relying on this guidance. This may require the need for clear and understandable disclaimers regarding the role of, and protections offered by, website guidance on any supporting materials.

Further, the ATO does not provide historical versions of web guidance. Instead, web pages are time stamped to show the date they were last updated. Noting the potential for frequent changes to web guidance without notice, taxpayers may find themselves in a position where they are unable to locate the ATO's available guidance at the point in time that they relied upon the guidance.

The transitory nature of website guidance practically requires taxpayers to regularly check and retain records of any changes to the relevant website guidance pages they relied upon. This imposes an unfair burden on taxpayers who often rely on available guidance in good faith at a specific point in time. Given the importance of this topic to a large population of taxpayers, we consider that any supporting guidance maintains historical records, with details about the previous versions and date of modification being made readily accessible. It would also assist if superseding web guidance contained an explanation of the changes and how it will impact taxpayers who have relied on the previous version of the guidance. This will provide taxpayers with greater certainty of their tax position and allow them to refer back to the relevant web guidance at a specific point of time in the event of a dispute.

Relatable examples

Feedback from our members suggests that the inclusion of a more diverse range of examples in the draft Ruling that involves contemporary circumstances, or difficult but common fact patterns, will better assist taxpayers and tax practitioners understand and apply the law. This includes examples concerning:

- new migrants to Australia who still retain significant connections to their home country (for example, they may still have significant assets, family or business connections);
- individuals displaced by war or other circumstances beyond their control and seeking to establish a new home;
- visitors under the WHM program, seasonal labour mobility program, or other temporary visas that may meet the residency requirements or otherwise be treated as residents for tax purposes;¹ and
- examples working through common treaty tie-breaker clauses.

Interaction between tax residency and visa requirements

Feedback from our members highlights that taxpayers often misunderstand the impact of their visa on their tax residency status, incorrectly relying on their immigration status to determine their tax residency. We recommend that the draft Ruling include further guidance with examples concerning the role a person's visa status has on their tax residency.

Supporting tax practitioners

Determining a taxpayer's residency can be a difficult topic for tax practitioners to advise their clients on. This determination may require the analysis of factors and circumstances that may not be apparent in a client environment. We consider that the provisions of tools and fact sheets to tax practitioners will assist during this enquiry. Examples of tips and fact sheets include:

- a checklist of information and evidence that tax practitioners should review to assist in the making of the determination;
- webinars and other training outlining the ATO's approach to determining the residency of a taxpayer, with case studies based on real examples and case law; and
- increasing awareness of emerging issues or trends resulting in the incorrect determination of a taxpayer's residency.

¹ For example, taxpayers who may still be eligible to use resident tax rates due to a non-discrimination clause similar to the facts in *Addy v Commissioner of Taxation* [2021] HCA 34.

Potential legislative change

We note the announcement in the [Federal Budget 2021–22](#) that proposes to introduce legislative changes to the residency requirements for individuals. Currently, a start date for the proposed new rules has not been announced. We consider that if the proposed measure is intended to take effect from 2023, the ATO should not finalise the draft Ruling. Once legislated, the proposed measure is likely to require the development and release of new guidance materials and tools that will be notably different from the existing guidance and the draft Ruling. The finalisation of the draft Ruling around the time the new measure is likely to take effect will cause significant confusion for taxpayers and likely result in them applying incorrect tests to their circumstances.

We would be pleased to work with the ATO to ensure that the draft Ruling best assists taxpayers and tax practitioners. If you would like to discuss any of the above, please contact The Tax Institute's Tax Counsel, Julie Abdalla, on (02) 8223 0058.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix A** for more about The Tax Institute.

Yours faithfully,



Scott Treatt

General Manager,
Tax Policy and Advocacy



Jerome Tse

President

APPENDIX A

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.