20 September 2023

Assistant Secretary, Personal and Small Business Tax Branch

Personal and Indirect Tax and Charities Division

The Treasury

Langton Crescent

PARKES ACT 2600

By Email: individualtaxresidency@treasury.gov.au

Dear Sir/Madam,

**Modernising individual tax residency**

As an Australian citizen living overseas, I appreciate the opportunity to comment on the Treasury’s **Modernising Individual Tax Residency** Consultation Paper**.**

Please see attached my comments to the questions that were raised in the consultation paper.

Yours sincerely,

<Insert name>

# Question 1 - 45 Day Threshold

**How many days in an income year should an individual with strong connections to Australia be able to spend in Australia before they are considered a tax resident?**

I believe that for an individual to have developed a strong connection to Australia they must have been in Australia for a period greater than 90 days. As the emphasis in this question is “**strong** **connections”** I believe that a period of 45 days is too short, and it does not prove that enduring ties to Australia have been reestablished.

# Question 2 - 45 Day Threshold

**Do you consider that days spent in Australia under certain circumstances should be disregarded for the purposes of the 45-day count? If so, why should days be excluded in some circumstances and not others. Who would decide?**

There needs to be a more prescriptive process in determining what constitutes a qualifying day when implementing a day count as a threshold.

Australian citizens return to Australia for many reasons and these trips may be categorised for either personal or professional purposes, some of which include:

* **Personal**
  + Holiday
  + Visiting sick family members
  + Attending a family event like a wedding or funeral
* **Professional**
  + Attending conferences
  + Operating an aircraft or vessel to Australia as a natural part of their job
  + Attending company meetings
  + Visiting Australian based clients

As you can see not all of the reasons above are based on an individual’s choice and the majority of them do not relate to the individual reinstating ties to Australia, more so attending to personal of professional requirements.

# Question 3 - Factor tests

**Could any of the four factors be defined differently to better achieve the design goals whilst remaining objective and identifiable?**

The four factor tests recommended by the BoT do provide a reasonable basis for determining residency.

Broadly, I support the rationale behind the **Right to Reside Permanently in Australia, Australian accommodation, and Australian family tests,** however I believe that when it comes ascertaining whether an individual is a resident or not there needs to be a weighting or scoring system applied to the respective factors as it is very hard to argue that all factors remain equally as relevant as the other.

In considering the **Right to Reside Permanently in Australia** as a factor test, an individual who has an Australian passport does not prove they that commenced residency of Australia as equally as an individual whose immediate family resides in Australia (**Australian Family factor test**) or who owns a property in Australia that is untenanted (**Australian Accommodation factor test**).

Considering the **Australian Family** factor test more consideration needs to be considered with respect to Australian citizens who have returned to Australia to attend school, and specifically boarding school.

I would like to see an exclusion applied to the Australian family factor test for individuals under the age of 18 who are attending school where the parents are still resident overseas.

Under the proposed **Australian economic connections** test, this would be satisfied with a basic and very common scenario of a family renting out their family home upon departure.

When considered in conjunction with the tests, under the current proposed changes, a family who are Australian citizens who rent out their family home, but inadvertently spend more than 45 days in the year in Australia would be Australian tax residents.

For many of the reasons mentioned above this appears to low a threshold.

To summarise some suggested changes that would lead to a more appropriate outcome include:

* Taxable Australian property exclude a home that was a taxpayer’s (or immediate family member’s) main residence just before departure when considering the Australian economic connections test;
* Include a threshold (e.g. $1M) of taxable Australian investment property (excluding a property that was a main residence just before departure); or
* Relaxing the days threshold to 90 days as mentioned above

# Question 4 - Factor tests

**Are there other factors better suited to identifying individuals strongly connected to Australia in an objective, simple and certain way?**

Notwithstanding the points made in Question 3 above, the following factors indicate a strong connection to Australia:

* Location of family pets
* Availability of significant personal use assets (cars, boat, caravan, holiday house)

# Question 5 - Factor tests

**How would any additional factors affect the proposed Factor Test, in particular the operation of the two-out-of-four aspect of the rule?**

As currently drafted, the 2 out of 4 tests seems too low a threshold. As mentioned above, certain factors I would consider having a greater weight than others.

It may be more appropriate to split out some of the factors and make the threshold 3 instead of two.

Given some of these would clearly be weighted more heavily than others, a points-based system may be a more equitable outcome.

This could include points for every additional day over 45 days spent in Australia.

# Question 6 - Commencing residency

**Does having three points of connection (i.e., being physical present in Australia for more than 45 days in an income year, together with two factors) strike the right level of connection to commence residency?**

For reasons specified above in Question 5 I believe an additional point of connection, or points factor test is more appropriate.

# Question 9 - Ceasing long-term residency

**Does the Ceasing Long-Term Residency Rule strike an appropriate balance between increasing adhesiveness of residency for individuals with enduring ties to Australia while also providing a clear pathway to non-residency?**

In my view, the level of adhesion to Australian tax residency is excessive. Maintaining a 3-year adhesion to Australian tax residency is a significant departure from the current, longstanding principles.

Under the proposed approach, an individual who departs with their family for the foreseeable future, selling all their belongings, building a life overseas would remain tax resident for 3 years after departure, regardless of their intent and mode of life.

# Question 11 - Overseas employment rule

**The Overseas Employment Rule allows individuals with enduring connections to Australia to immediately cease being a tax resident, thereby reducing the tax and compliance burden for those individuals and their employers. Do the settings strike the appropriate balance between facilitating the skill development of Australians through international experience while maintaining sufficient integrity?**

The Overseas Employment Rule can help simplify residency determination however many Australians are based in the Middle East, and as an industry norm in the region, employment contracts will be for a rolling 12 months, despite the expectation that the contract will be renewed and an intent by the taxpayer to reside outside Australia for what would otherwise be considered a permanent basis.

This simplified Rule will not benefit employers or individuals in such a position.

# Question 12 - Overseas employment rule

**The effect of the Overseas Employment Rule is to cause the individual to become a non-resident (and provide certainty for employees and their employers) rather than to exempt the overseas employment income. Is this the appropriate outcome?**

Whilst having certainty of residency is helpful from the employer’s perspective, it would also be helpful to have some certainty regarding principles for source of income as well, as it uncertain as to whether this income would be exempt from Australian tax, particularly where there is no double tax agreement with the host country.

# Question 13 - Other matters

**There will be a need for transitional rules when moving from the existing residency rules to the new framework. How would you suggest these transitional rules operate? For example, how should the Overseas Employment Rule apply to individuals who are already partway through their overseas employment at the time the new residency rules come into effect?**

One way that the government could deal with this is to have an anti-detriment provision in the new law.

The idea would be that if a person could show to the satisfaction of the Commissioner that they were worse off due to the changes, the law could operate so as to put them in the same place as if the old law were still operative.

This anti-detriment provision could operate for a fixed period – say, three years.