Federal Court of Australia

Quy v Commissioner of Taxation (No 3) [2024] FCA 726

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| Review of: |  |
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| File number: | QUD 162 of 2024 |
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| Judgment of: | **LOGAN J** |
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| Date of judgment: | 28 June 2024 |
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| Catchwords: | **INCOME TAX** – where applicant appeals from a decision of the Administrative Appeals Tribunal (the Tribunal) to affirm an objection decision of the respondent Commissioner of Taxation concerning whether the applicant, for income tax purposes under the *Income Tax Assessment Act 1936* (Cth), was a resident of Australia, had a domicile of choice outside of Australia or a permanent place of abode outside of Australia – where the applicant was employed for five years in Dubai in the United Arab Emirates (UAE) and spent a large majority of each relevant income year in Dubai – where the applicant’s wife and daughters resided in Beldon, Western Australia during the relevant income years – where the Tribunal found that the applicant has a resident of Australia and that he did not have a domicile of choice in the UAE or a permanent place of abode there – whether the Tribunal committed an error of law – whether the Tribunal conflated concepts related to determining domicile with residency according to ordinary concepts – whether the Tribunal considered the wrong intention when assessing both the residency and permanent place of abode of the applicant – appeal allowed  **ADMINISTRATIVE LAW** – where Tribunal has made findings concerning the applicant’s residency and permanent place of abode – whether errors in relation to those concepts involve a question of law – whether, both in its stating of the law and in the course of its consideration, the Tribunal applying the wrong legal test is a question of law – whether proceedings should be remitted back to the Tribunal to be determined according to law – appeal allowed and proceedings remitted |
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| Legislation: | *Constitution* s75  *Administrative Appeals Tribunal Act 1975* (Cth) s 44  *Judiciary Act 1903* (Cth) s 39B  *Income Tax Assessment Act 1936* (Cth) s 6 |
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| Cases cited: | *Allan v Transurban City Link Ltd* (2001) 208 CLR 167  *Applegate v Federal Commissioner of Taxation* [1979] 9 ATR 899  *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353  *Comcare Australia (Defence) v O’Dea* (1998) 87 FCR 451  *Commissioner of Taxation* *v Miller* (1946) 73 CLR 93  *Hafza v Director-General of Social Security* (1985) 6 FCR 444  *Harding v Commissioner of Taxation* (2019) 269 FCR 311  *Harding v Commissioner of Taxation* [2018] FCA 837  *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315  *Inland Revenue Commissioners v* *Lysaght* [1928] AC 234  *Levene v Inland Revenue Commissioners* [1928] AC 217  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Number of paragraphs: | 27 |
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| Date of hearing: | 28 June 2024 |
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| Counsel for the Applicant: | Mr M May |
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| Solicitor for the Applicant: | Cooper Grace Ward |
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| Counsel for the Respondent: | Ms E Luck |
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| Solicitor for the Respondent: | Australian Taxation Office |

ORDERS

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|  | | QUD 162 of 2024 |
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| BETWEEN: | TRONG QUY  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 28 JUNE 2024 |

THE COURT ORDERS THAT:

1. The applicant be given leave to further amend the notice of appeal, in the form annexed to his outline of submissions filed 24 June 2024, on terms that the costs of the respondent thrown away by the amendment be the respondent’s costs in the proceedings.
2. The objection to competency of the appeal be dismissed.
3. The appeal be allowed.
4. The decision of the Administrative Appeals Tribunal (Tribunal) dated 26 February 2024 be quashed.
5. The matter be remitted to the Tribunal for determination according to law.
6. The respondent pay the applicant’s costs of and incidental to the proceedings, to be fixed in a lump sum by a registrar (if not agreed), subject to, in that fixing, the taking into account of the orders made this day and earlier in the proceedings of costs being the respondent’s costs in the proceedings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. Upon an initial perusal of the reasons given by the Administrative Appeals Tribunal (Tribunal) earlier this year for affirming the objection decision of the respondent, the Commissioner of Taxation (Commissioner), I thought this was just one of those cases where the issues were *par excellence* mere matters of fact, albeit involving questions of degree, such that the objection to the competency of the appeal made by the Commissioner had attraction. However, I have come to be persuaded that the Tribunal’s reasons are infected by errors of law.
2. The so-called “appeal” to this Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) is in truth a statutory appeal on a question of law heard in the Court’s original jurisdiction. That jurisdiction is not the same as once exercised in respect of decisions of taxation boards of review in the original jurisdiction of the High Court and later in time State or Territory Supreme Courts, which was predicated upon the appeal “involving” a question of law.
3. Nonetheless, like that earlier jurisdiction, the Court’s original jurisdiction is a peculiar one. The nature of that jurisdiction was explained by a specially constituted Full Court in *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 (*Haritos*), at [62] (the Court). The jurisdiction is quite different to that exercised by the Court under s 39B(1) of the *Judiciary Act 1903* (Cth), the equivalent, subject to exceptions, of that constitutionally entrenched in the High Court’s original jurisdiction by s 75(v) of the *Constitution*. That jurisdiction requires proof by an applicant of jurisdictional error: see *Haritos*, at [135] (the Court), citing *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, at [11] (Gleeson CJ, Gaudron, Gummow Hayne and Callinan JJ). In contrast, the “appeal” under s 44 may succeed even if the demonstrated error of law is non-jurisdictional.
4. The questions of law and related grounds were reformulated once Mr Quy decided to again retain legal advisers. Those questions and related grounds are annexed to Mr Quy’s written submissions. Leave is required to amend further in those terms the notice of appeal. Quite properly, the Commissioner did not oppose the amendment of the notice of appeal as proposed, save in respect of costs thrown away by the amendment. The interests of justice strongly favour the granting of the amendment. I therefore grant leave for the amendment, subject to the rider in respect of costs thrown away by the amendment, whatever they may be.
5. The questions of law, as so identified, are these:
6. Whether the Tribunal erred in law by applying the wrong test when it considered whether the applicant was a person who ‘resides in Australia’ for the purposes of s 6(1)(a) of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**) (‘ordinary concepts residence’) in that the Tribunal equated ordinary concepts residence with domicile, particularly as regards the relevant intention, because it considered that the intention relevant for ordinary concepts residence was ‘the intention of remaining in a place permanently or indefinitely’ rather than the intention to treat a place as home for the time being, not necessarily forever.
7. Whether the Tribunal erred in law by applying the wrong test when it considered whether it was satisfied that the applicant had a ‘permanent place of abode’ outside Australia for the purposes of s 6(1)(a)(i) of ITAA36 because:

(a) it considered whether the Applicant had shown an intention of remaining in Dubai permanently or indefinitely when such an intention is not required in order to have a permanent place of abode in Dubai;

(b) further or in the alternative, it considered whether the Applicant had definitely abandoned Australia rather than whether the Applicant had definitely abandoned residence in Australia; and

(c) further or in the alternative, to the extent that it considered whether the Applicant had definitely abandoned ordinary concepts residence in Australia, its analysis was affected by having equated ordinary concepts residence with domicile in the way identified in question 1.

1. The grounds of appeal are detailed but, in this instance, none the worse for that. Indeed, as will be seen, they nicely highlight why the appeal must succeed and why the objection to competency must be dismissed. The grounds of appeal, as articulated in the annexure to Mr Quy’s written submissions, are:

**Grounds relied on**

1. In considering whether the applicant was a resident of Australia according to ordinary concepts, the Tribunal erred:

(a) by applying the wrong test because:

(i) the Tribunal considered that the relevant intention was ‘the intention of remaining in a place permanently or indefinitely’ (at [16], third dot point; [111]);

(ii) the ‘intention of remaining in a place permanently or indefinitely’ is the intention relevant to determining domicile rather than the intention relevant to determining residence according to ordinary concepts;

(iii) the intention relevant to determining residence according to ordinary concepts is instead an intention treat a place as home for the time being, but not necessarily forever;

(b) further, by finding that:

(i) the intention relevant in determining residency is ‘the intention of remaining in a place permanently or indefinitely’ (at [16], third dot point);

(ii) the Tribunal’s conclusion that the Applicant had failed to discharge the onus of proving that he was not a resident of Australia according to ordinary concepts during the relevant years was supported or justified by the Tribunal’s findings that:

(1) ‘Given the Applicant was able to live and reside in Dubai only by virtue of his employer-sponsored UAE Residency Permits, his stay in Dubai was, for all intents and purposes, limited.’ (at [104]);

(2) ‘At the Hearing, the Applicant told the Tribunal that he intended to retire in Australia, most likely in New South Wales, rather than in Western Australia as that is where his and Mrs Quy’s family reside.’ (at [105]);

(3) the Applicant’s ‘Intending to retire in Australia, specifically Sydney where his family is located.’ (at [110], third dot point);

(4) the Applicant’s ‘Holding a visa and accommodation tied to the length of his employment assignment which did not allow him to establish a real connection with his residence in Dubai. Particularly where the Applicant did not take furnishings from Australia to Dubai or take the furnishings he purchased in Dubai to his next assignment.’ (at [110], fourth dot point);

(5) ‘the Applicant’s actions throughout the tax years in question identified a long-term plan to keep returning to Australia for family purposes and did not demonstrate behaviour consistent with the formation of any definite plan in any of the tax years in question to abandon Australia completely, either for a period of time or indefinitely’ (at [111]).

*Permanent place of abode*

2. In considering whether it was satisfied that the Applicant was a person whose ‘permanent place of abode is outside Australia’ in the relevant years, the Tribunal erred:

(a) by applying the wrong test because:

(i) the Tribunal considered whether the Applicant had proved he had the intention of remaining in Dubai ‘permanently or indefinitely’ (at [118] adopting [97]-[111] read in light of [16] (third dot point)) when it is not necessary for a taxpayer to prove that they have an intention of remaining in a place outside Australia ‘permanently or indefinitely’ in order to establish that that their permanent place of abode is in that place;

(ii) the Tribunal considered whether the Applicant had definitely abandoned Australia (at [118] adopting [111]) when the relevant question was whether the Applicant had definitely abandoned residence in Australia;

(iii) to the extent that it considered whether the Applicant had definitely abandoned ordinary concepts residence in Australia, its analysis was affected by having equated ordinary concepts residence with domicile as identified in ground 1 above;

(b) further, by finding (at [118]) that its conclusion that the Applicant had failed to discharge the onus of satisfying the Tribunal that he had a permanent place of abode outside Australia during the relevant years was supported or justified by the Tribunal’s findings at [97]- [111].

1. Some recitation of background facts is necessary; subject, of course, to the observation that matters of fact were for the Tribunal, and not for the Court, to determine.
2. Mr Quy was born in Vietnam. He came to Australia in the 1970s, obtaining Australian citizenship in 1978. By profession, he is a mechanical engineer. In following his profession, he came in 1986 to work for an Australian company, CBI Construction Pty Ltd (CBI).
3. On and from 1986, he has worked for CBI either in Australia or on a number of overseas assignments. One of those assignments saw him working and living in Dubai in the United Arab Emirates between 1998 and 2009. At the end of that assignment, he relocated, along with his wife and daughters, to Perth. On 13 September 2015, Mr Quy deployed again overseas with CBI on this occasion, also, to Dubai. It is that deployment and the related deduction of PAYG instalments under the income tax legislation which has given rise to a controversy in respect of the income years ended 30 June 2016 to 30 June 2020.
4. Mr Quy’s wife was also born in Vietnam. She came to Australia in 1982. They married in 1990. They have three daughters. In 2015, the eldest two daughters were studying at university. The youngest was then completing her final year at high school. Mrs Quy was employed as the primary caregiver for the couple’s daughters, and did not pursue employment outside the family.
5. There was a family home at Beldon in Western Australia, purchased in 2010. Mr Quy had other properties in Australia – two in New South Wales and one in East Victoria Park, Western Australia, purchased in 2022 with one of his daughters. Prior to his more recent deployment to Dubai, Mr Quy had lived at the Beldon home. It was to there, in the main, that he returned during those periods in the income years in question when he was not in Dubai.
6. There was considerable variation in the length of time that Mr Quy spent in Australia in the income years in question - as little as 29 days in one instance, but in no instance longer than 183 days. The longest was 119 days. Over that same period, Mrs Quy was in Australia for between 183 and 343 days.
7. Throughout his time living and working in Dubai, Mr Quy held an employer-sponsored permit enabling his lawful presence in Dubai. Mrs Quy also held a permit, but this expired in November 2019.
8. Before the Tribunal, Mr Quy advanced three bases of challenge. They were:
   * 1. that he was not a resident of Australia during the income years in question;
     2. that he was not domiciled in Australia; and
     3. even if he were domiciled in Australia, that the Tribunal should be satisfied that his permanent place of abode was outside Australia.
9. These bases of challenge flowed from the definition of “resident” in s 6 of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936), which provides materially:

“***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;

(ii) who has actually been in Australia, continuously or intermittently, during more than one - half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or

(iii) who is:

(A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) an eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) the spouse, or a child under 16, of a person covered by sub - subparagraph (A) or (B); and

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia.

1. The Tribunal’s reasons are detailed, impressionistically flowing from references to well-known cases concerning the concept of residence and the permanent place of abode provision. The outcome, as I have mentioned, looks at first blush to be but an unremarkable series of conclusions of fact and an unremarkable state of administrative satisfaction. It is always necessary when looking at the reasons of the Tribunal, as with reasons for other administrative decisions, to take to heart observations made in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*Wu Shan Liang*) and to adopt a principled restraint in the scrutiny of those reasons. In short, they are not to be read narrowly and with an eye for error. All that said, if the reasons do expose a misunderstanding of the law to be applied, then what was said in *Wu Shan Liang* is no panacea.
2. In rehearsing, at [16] of the Tribunal’s reasons, authorities concerning residents, such as *Levene v Inland Revenue Commissioners* (1928) AC 217 (*Levene*) and *Hafza v Director-General of Social Security* (1985) 6 FCR 444, the Tribunal also made this statement:

While intention is relevant in determining residency (being “*the intention of remaining in a place permanently or indefinitely*”), it alone is neither sufficient nor decisive.

1. For the parenthetical reference to intention, the Tribunal cited *Comcare Australia (Defence) v O’Dea* (1998) 87 FCR 451 (*O’Dea*), at 455. For the overall proposition found in that sentence, the Tribunal cited *Harding v Commissioner of Taxation* [2018] FCA 837, at [49]. A difficulty about the parenthetical reference to intention is that it entails a misreading of the Full Court’s judgment in *O’Dea*. In *O’Dea*, at 454 – 455, the Full Court stated:

In reliance on *Hafza v Director-General of Social Security*, the Tribunal said that the “test” whether the respondent’s parents’ home remained his place of residence, or one of his places of residence, was whether he retained a continuity of association with it, together with an intention to return there and an attitude that the place remained “home”. The primary judge appears to have accepted this description of the “legal concept of residence”. The appellant submitted that the Tribunal had applied a technical legal test found in matrimonial cases derived from the concept of domicile, and that “residence” in s 6 has its ordinary meaning of “a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration”. That was Lord Scarman’s description of “ordinarily resided” in the provision under consideration in *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309 at 337.

In our view the description of “residence” given in *Hafza* and applied by the Tribunal does not import the “intention” involved in the concept of domicile. One element of domicile is the animus manendi - the intention of remaining in a place permanently or indefinitely. That type of intention is not involved in the *Hafza* formulation.

1. The long and the short of it is, in this particular exposition of its understanding of residence under ordinary concepts, the Tribunal has erroneously incorporated a reference to intention for the purpose of determining a person’s domicile. That particular error was, quite properly, conceded by the Commissioner. Had that error merely been a passing error, passing in the sense that it did not translate into the Tribunal’s application of its understanding of the law to the facts as found, it would have been of no moment.
2. Unfortunately, even allowing for the fair reading demanded by a principled application of *Wu Shan Liang*, the error was not a passing one. The Tribunal’s reasons culminate in a section under the heading, “Consideration”. In fairness to the Tribunal and in deference to the submissions made by the parties, it is necessary to set out all that appears under that heading, from [91] to [119]:

**CONSIDERATION**

91. The Tribunal has reviewed and considered all material placed before it. As a result the Tribunal notes that the Applicant sought to introduce new evidence after the Hearing. A clear disparity is evident between the evidence provided by the Applicant prior to and at the Hearing (as outlined in his response to the Respondent’s Residency Questionnaire, his filed Witness Statement and his oral evidence) to the submissions set out in his Affidavit and Closing Submissions. The contradictions in the Applicant’s evidence and submissions and the Witness Statement and Affidavit provided by Mrs Quy, is readily apparent when considering the explanations of their marital living arrangements during the tax years in question, the care for their adult daughters and the duration of Mrs Quy’s presence in Australia and the associated reasons for it.

92. At the Hearing, the Applicant outlined that he and Mrs Quy were meant to move to Dubai, together, as a family for employment purposes, however he agreed that, that, did not occur. Rather she visited him there. The evidence provided by Mrs Quy and the submissions filed by the Applicant after the Hearing, asserted that she relocated to Dubai with the Applicant, in contradiction to his evidence at the Hearing and the DIAC records.

93. The evidence around community and personal connections the Applicant made in Dubai also differ before and at the Hearing when compared to the submissions provided after the Hearing. Until the filing of the Applicant’s Affidavit and Closing Submissions, he had not made any assertions in relation to attending Church, making new friends or seeing friends he had made during an earlier period residing in Dubai.

94. The Tribunal considers that the Applicant’s evidence at the Hearing and set out in his responses to the Respondent’s Residency Questionnaire are more reliable than the submissions he provided after the Hearing. The Tribunal notes that the Applicant gave his evidence at the Hearing under affirmation, without Mrs Quy being present.

95. In determining whether the Applicant was a resident of Australia for taxation purposes during the tax years in question, save for the 183-Day and Superannuation Tests of which the Tribunal accepts did not apply to the Applicant, the Tribunal has considered the remaining two tests, being the Ordinary Concepts and Domicile Tests. The role of the Tribunal is to consider the reviewable decisions afresh.

96. The Tribunal has considered the legal authorities as outlined and referred to above (as well as those referred to by the parties) together with, the evidence, submissions and contentions before it. As a result, the Tribunal finds that the Applicant was a “resident of Australia” pursuant to the definition in section 6(1)(a) of the ITAA 1936 during the tax years in question. The reasons for the Tribunals findings are set out below.

**Resident according to the Ordinary Concepts Test**

97. As set out above in the discussion of relevant case law, the term “reside” is not defined in the relevant statute. The principles established by case law provide that physical presence or absence from a particular location is not on its own determinative of where a person is taken to reside for taxation purposes. A person’s continuity of association and intention to return to and to continue to treat a place as home are relevant determinative factors.

98. The Applicant resided at his Beldon home before he commenced his work assignment in Dubai, he also resided there (on most occasions) when he returned to Australia throughout the tax years in question. The Applicant’s evidence and submissions regarding his view of his Beldon home were contradictory, particularly where he stated in his Affidavit signed in August 2023 that he resided in Thailand and also resided and owned the property at Beldon. While in Dubai, the Applicant resided in accommodation he sourced but was leased by his host company and paid for, in most parts, by his employer.

99. The Applicant’s evidence was that his Beldon home was not offered for rent or sale during the tax years in question. Further his furniture largely remained in the home, his multiple vehicles remained stored on the property, he maintained all costs associated with the property including all utility costs. The Applicant’s explanation as to why his Beldon home was not offered for rent or sale during the tax years in question was that his daughters continued to reside in the property whist completing their studies and moving on to homes of their own. The Applicant told the Tribunal that two of the vehicles were used by his daughters and the others he kept for sentimental reasons. He said that it was easier to keep them registered than to have to reregister them again later.

100. The Applicant’s written evidence and submissions, which supported his arrangements with his employer, set out that his wife had relocated with him to Dubai. The records outlining the time Mrs Quy spent in Australia during the tax years in question however, reflected that the reality of the situation was quite different. During the tax years in question Mrs Quy was in Australia for at least half of each year, and, other than in the income year ended 30 June 2017, for substantially more than half the year. At the Hearing, the Applicant gave evidence that while he and Mrs Quy were meant to have moved to Dubai as a family, what really occurred was that Mrs Quy continued to reside in the Beldon home with their daughters and visited him in Dubai. The Tribunal prefers the Applicant’s evidence provided at the Hearing as it is more consistent with the objective evidence before it.

101. Throughout her evidence, Mrs Quy maintained that her home was with her husband. Her actions however, demonstrated that she was not physically present with the Applicant for most of the tax years in question. The evidence before the Tribunal shows that Mrs Quy continued to live her life in Australia providing care to her adult daughters, her mother and community members. The Tribunal notes that Mrs Quy gave evidence that she was unable to leave Australia due to COVID-19 travel restrictions. The Tribunal does not accept that evidence in circumstances where the ban on Australians travelling overseas did not commence until 24 March 2020. Mrs Quy could have returned to Dubai well before travel was restricted if she had of, in fact, been residing there with the Applicant. The Tribunal further notes that Mrs Quy’s spouse sponsored UAE-Residency Permit expired on 21 November 2019 and as such from that date she was not entitled to reside in Dubai with the Applicant. The expiry date of Mrs Quy’s residency permit was prior to mid-January 2020 when the Australian Government started to put COVID-19 emergency health mechanisms in place.

102. While the actions of Mrs Quy and where she resided is not determinative of the Applicant’s residency status, it goes to strengthening the Applicant’s tie to Australia during the tax years in question. The Applicant had not simply provided a place for his daughters to live while they completed their study, he maintained the family home. The Applicant maintained the family home for his wife and children and returned to it on almost all occasions he had leave from work. The Applicant’s evidence was that he supported his wife and daughters financially throughout the tax years in question. Mrs Quy’s evidence was that she did not work during the tax years in question and that the Applicant was an excellent provider for their family.

103. The Applicant’s employment and assignment contracts set out that the assignment to Dubai was for a period of 24 months which could be extended or terminated earlier with notice provided by either party. The Applicant’s work history indicated that he maintained his employment with CB&I Australia and worked in which ever location they assigned him to. There was no indication that the Applicant had sought alternative employment outside of his Australian employer, in fact the evidence before the Tribunal is that he continues to work for CB&I Australia on a further international assignment.

104. Given the Applicant was able to live and reside in Dubai only by virtue of his employer-sponsored UAE Residency Permits, his stay in Dubai was, for all intents and purposes, limited. The Tribunal notes that Mrs Quy’s spouse-sponsored UAE Residency Permits ended on 21 November 2019. There was no suggestion that the Applicant ever intended to reside in Dubai beyond his international work assignment.

105. At the Hearing, the Applicant told the Tribunal that he intended to retire in Australia, most likely in New South Wales, rather than in Western Australia as that is where his and Mrs Quy’s family reside. The Tribunal notes that, the Applicant’s position in this regard changed by virtue of the submissions made in his Affidavit and Closing Submissions, stating that he had no intention of returning to Australia to live, rather he planned to retire in Thailand. While the Applicant may now in fact intend to retire in Thailand, the Tribunal considers that his evidence at the Hearing is more likely a reflection of his intentions during the tax years in question.

106. The Applicant maintained investment properties and bank accounts in Australia throughout the tax years in question.

107. The Applicant’s evidence was that he maintained his Australia private health insurance, stating that it covered his daughters and both himself and Mrs Quy during times that they were visiting Australia or when they needed urgent medical treatment. The Tribunal notes however that both the Applicant and Mrs Quy’s medical treatment was covered by CB&I whilst on assignment in Dubai. As such had the Applicant intended not to be an Australian resident, it would have been open to him to seek travel insurance for periods he returned to Australia. The Tribunal has no evidence before it that the Applicant’s private health insurance provided him and Mrs Quy with only intermittent cover whilst in Australia and for emergencies.

108. The Tribunal notes that the incoming and outgoing passenger cards and the Applicant’s and Mrs Quy’s evidence and submissions in relation to them are contradictory in nature. As such the Tribunal puts no weight on those documents and does not consider them to be determinative of the issues before it.

109. After considering the totality of the evidence and submissions before it objectively, the Tribunal places little weight on the Applicant’s evidence and submissions set out in his Witness Statement, Affidavit and Closing Submissions to the extent it is inconsistent to that he provided at the Hearing or in response to the Respondent’s Residency Questionnaire.

110. As such the Tribunal considers that the Applicant, despite being absent from Australia for the majority of the tax years in question, maintained an intention to return to Australia and an attitude that Australia remained his home during the tax years in question. The Tribunal considers that such an intention, attitude and continued connection to Australia was evidenced by the Applicant:

* Leaving his wife and children in his family home while he worked in Dubai, continuing to fully support his family financially and choosing to spend each of his leave periods back with his family in Australia (other than one occasion where the family holidayed outside of Australia), staying in the family home.
* Maintaining his vehicle registrations and Australian drivers licence allowing him to seamlessly use the vehicles upon his return to Australia.
* Intending to retire in Australia, specifically Sydney where his family is located. The Applicant expressed the importance of family which is consistent with an intention to return to live close to family when his employment ceases.
* Holding a visa and accommodation tied to the length of his employment assignment which did not allow him to establish a real connection with his residence in Dubai. Particularly where the Applicant did not take furnishings from Australia to Dubai or take the furnishings he purchased in Dubai to his next assignment.
* Failing to demonstrate any connection with Dubai outside of his employment.
* Maintaining his private health insurance despite potentially the option to cancel the cover with his insurer and seek a refund of premiums paid but not used.

111. Based on the evidence before it, the Tribunal considers that the Applicant’s actions throughout the tax years in question identified a long-term plan to keep returning to Australia for family purposes and did not demonstrate behaviour consistent with the formation of any definite plan in any of the tax years in question to abandon Australia completely, either for a period of time or indefinitely.

112. The Tribunal finds that the for the purposes of the Ordinary Concepts Test the Applicant was a resident of Australia for the tax years in question.

**Resident according to the Domicile Test**

113. The Domicile Test requires firstly the consideration of whether during the tax years in question the Applicant was domiciled in Australia and then if so whether the Tribunal is satisfied that his permanent place of abode was outside Australia.

114. In relation to the first component, the Applicant’s Closing Submissions were confusing as to whether he maintained a position that he had not continued to be domiciled in Australia throughout the tax years in question. The evidence however, as set out above establishes that the Applicant’s domicile of choice is Australia. There is no evidence before the Tribunal to suggest otherwise. As such the Tribunal considers it necessary to consider whether the Applicant’s permanent place of abode was outside Australia for the tax years in question.

115. As established by the case law set out above, to establish a permanent place of abode, a person does not need to intend for it to be so indefinitely, however what they need to establish is that it is their permanent place of abode rather than their temporary place of abode. Consideration is given to the continuity or otherwise of the persons presence, the duration of their presence and the durability of their association with the particular place. Further, a person’s intention to make their home a place of abode outside of Australia is relevant, particularly to whether they can be said to have abandoned their residence in Australia and had commenced living in another country in a permanent way.

116. The Applicant’s contentions set out in his Closing Submissions are contradictory in nature and do little to support his position that his permanent place of abode during the tax years in question was in Dubai. This is particularly the case in circumstances where submissions are made that are contrary to evidence previously provided.

117. Having reviewed the submissions and contentions of the Applicant and having considered the evidence before it, the Tribunal agrees with the contentions made by the Respondent set out in paragraphs 89-90 above.

118. In objectively considering the evidence before it, as outlined above, and specifically discussed in paragraphs 91 to 94 and 97 to 111 above, the Tribunal considers that the Applicant had not abandoned his residence in Australia during the tax years in question, nor had he established a permanent place of abode in Dubai or anywhere else outside of Australia.

119. The Tribunal finds that the for the purposes of the Domicile Test the Applicant was a resident of Australia for taxation purposes for the tax years in question.

[footnote references omitted]

1. The errors of law in relation to the conclusion reached as to ordinary residence are those identified in the related grounds of appeal. The symmetry between the error exposed in [16] and the Tribunal’s consideration of the ordinary resident subject is most stark in [111].
2. Indeed, a case referred to in *O’Dea* in the passage quoted, *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309 (*Shah*), entailed an uncanny similarity of error by the local authorities concerned in relation to the subject of residence to that evident in the Tribunal’s reasons. The leading speech is that of Lord Scarman. In many ways, what his Lordship observed in that case could be applied almost verbatim to the present. As in that case, it is evident, for the reasons set out in the grounds of appeal but particularly in [111] of the Tribunal’s reasons, that the Tribunal has, notwithstanding its reference to *Levene*, discarded the guidance which is offered in that case, and its parallel case *Inland Revenue Commissioners v* *Lysaght* [1928] AC 234. As in *Shah*, there is an evident “confusion of thought”: see 348F. As Lord Scarman observed in that case, at 348:

The notion of a permanent or indefinitely enduring purpose as an element in ordinary residence derives not from the natural and ordinary meaning of the words “ordinarily resident” but from a confusion of it with domicile.

1. Mr Quy has, therefore, demonstrated the error of law for which he contends in relation to the Tribunal’s understanding and application of the residence under ordinary concepts aspect of the definition of resident.
2. The grounds of appeal also highlight, and by reference to the paragraphs concerned in the Tribunal’s reasons, why the Tribunal’s approach to the satisfaction-based criterion in the definition with respect to permanent place of abode is in error. As Dixon J (as his Honour then was) observed of such satisfaction based criteria, they are not unexaminable: see *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, at 360. One basis for examination of them is if the Commissioner or, in his place, the Tribunal, misunderstands the meaning of the provision concerned. Materially, the Tribunal’s reasons exhibit a misunderstanding of the meaning of the word “permanent” in the phrase “permanent place of abode” as given by Northrop J in *Applegate v Federal Commissioner of Taxation* [1979] 9 ATR 899, at 906 – 907 (*Applegate*). The relevant passage was cited by approval by Davies and Steward JJ, with whom in this regard I agreed, in *Harding v Commissioner of Taxation* (2019) 269 FCR 311 (*Harding*), at [45]:

45 In his judgment Northrop J also explained the meaning of the word “permanent” in the phrase “permanent place of abode” at 12 as follows:

The word “permanent” as used in par. (a)(i) of the extended definition of “resident”, must be construed as having a shade of meaning applicable to the particular year of income under consideration. In this context it is unreal to consider whether a taxpayer has formed the intention to live or reside or to have a place of abode outside of Australia indefinitely, without any definite intention of ever returning to Australia in the foreseeable future. The Act is not concerned with domicile except to the extent necessary to show whether a taxpayer has an Australian domicile. *What is of importance is whether the taxpayer has abandoned any residence or place of abode he may have had in Australia.* Each year of income must be looked at separately. If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income. This is to be contrasted with a temporary or transitory place of abode outside Australia.

(Emphasis added)

We respectfully agree with these observations of Northrop J.

1. The Tribunal’s statement in [118], particularly in its adoption of [97] to [111] of its own reasons, exhibits a misunderstanding of “permanent” as explained by Northrop J in *Applegate*. *Harding* is noteworthy for the exposition in the joint judgment as to the origins and meaning of the test now found in s 6(a)(i) of the ITAA 1936.
2. The consequence then is that both as to that test as well as ordinary residents and for reasons which are succinctly given in the grounds of appeal, as expanded upon by me, this appeal must succeed.
3. The parties are agreed and, in my view, rightly so, that it is not open to the Court, under s 44(7) of the AAT Act, to make particular findings of fact in relation to the controversial parts of the residence test. That position might be contrasted with the earlier prevailing position at large at the time when, for example, *Commissioner of Taxation* *v Miller* (1946) 73 CLR 93 was decided. Under that earlier regime, if there were a question of law involved and the question of law exposed error of law by a board of review, it was open to a court, in the exercise of original jurisdiction, to decide the case afresh on the facts. That is not so under the regime under present consideration.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 4 July 2024