FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Addy [2020] FCAFC 135

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| Appeal from: | *Addy v Commissioner of Taxation* [2019] FCA 1768  |
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| File number: |  |
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| Judges: | **DAVIES, DERRINGTON, STEWARD JJ** |
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| Date of judgment: | 6 August 2020 |
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| Catchwords: | **TAXATION** – Australia and United Kingdom double taxation treaty Art 25 – non-discrimination clause – working holiday makers – where respondent a citizen of United Kingdom and holder of a working holiday visa – where respondent taxed at working holiday maker rate in Pt III of Sch 7 of the *Income Tax Rates Act 1986* (Cth) on income earned in Australia – whether working holiday maker rate infringes Art 25 of Australia and United Kingdom double taxation treaty – construction of non‑discrimination clause – whether respondent subjected to more burdensome taxation by reason of her nationality – taxation rate based on visa held rather than nationality – appeal allowed **TAXATION** – whether respondent a resident of Australia for tax purposes – definition of “resident” in s 6 of *Income Tax Assessment Act 1936* (Cth) – respondent not a resident under “ordinary concepts test” – application of “183 day test” – whether Court can substitute own state of satisfaction in place of Commissioner’s state of satisfaction as to “usual place of abode” outside Australia – role of the Court limited to determining whether Commissioner had lawfully attained state of satisfaction – *Kolotex Pty Ltd v Commissioner of Taxation* (1975) 132 CLR 535 considered – on facts of case Commissioner had not reached state of satisfaction – respondent was a resident by application of objective element of 183 day test  |
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| Legislation: | *Australian Citizenship Act 2007* (Cth)*Evidence Act 1995* (Cth) s 175*Federal Court of Australia Act 1976* (Cth) s 22*Gift Duty Assessment Act 1941–1942* (Cth) s 14*Income Tax Assessment Act 1930* (Cth)*Income Tax Assessment Act 1936* (Cth) ss 6, 23AF, 23G(3), 25A(11), 26AF(1)(c), 26AFA(1)(c), 26AG(6)(b), 26BB(3), 46A, 52(2)(b), 52A(3)(f), 80A, 80C, 80D, 109, 136AD, 169A(3), 175, 177F*Income Tax Assessment Act 1997* (Cth)*Income Tax Rates Act 1986* (Cth) ss 3, 3A, 4, 16, 18, 20, Sch 7, Pts I, II, III*Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth) Sch 1, Pt 2, cl 8*International Tax Agreements Act 1953* (Cth) ss 3, 4*Migration Act 1958* (Cth) s 29*Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* (Cth)*Taxation Administration Act 1953* (Cth) ss 8AAG, 14T, 14U, 14ZZ, 14ZZN, 14ZZO, 14ZZP, 14ZZQ, 15B, Sch 1, ss 16-142, 16-148, 18-80, 18-85, 18-135, 133-65, 135-10, 155-35, 350-10*Taxation Administration Act 1996* (NSW) s 101*Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* [2003] ATS 22 Arts 3, 4, 25*Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, [1974] ATS 2 (entered into force on 27 January 1980) Arts 31, 32Explanatory Notes, *Income Tax Assessment Bill 1930* (Cth)Explanatory Memorandum, *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016* (Cth)Explanatory Memorandum, *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013* (Cth)*International Tax Agreements Amendment Bill 2003* |
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| Cases cited: | *Addy v Commissioner of Taxation* [2019] FCA 1768*Amway of Australia Pty Ltd v Federal Commonwealth of Australia* (1999) 41 ATR 443*Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23*Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353*Bankstown Municipal Council v Fripp* (1919) 26 CLR 385*Blues Pty Ltd v Deputy Commissioner of Taxation* [2012] FCA 320*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853*Case 78* (1944) 11 CTBR 232*Coleman v Power* (2004) 220 CLR 1*Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555*Commissioner of Taxation v Jackson* (1990) 27 FCR 1*Commissioner of Taxation v Miller* (1946) 73 CLR 93*ConnectEast Management Ltd v Commissioner of Taxation* (2009) 175 FCR 110*Dempsey v Commissioner of Taxation* (2014) 98 ATR 698*Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32*Duggan v Federal Commissioner of Taxation* (1972) 129 CLR 365*EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681*Enever v The King* (1906) 3 CLR 969*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89*Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation (No 5)* [2019] FCA 2073*Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28*Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614*Ferris v Federal Commissioner of Taxation* (1988) 20 FCR 202*Foley v Padley* (1984) 154 CLR 349French Administrative Court of Appeal Marseille, 98MA01682, 8 February 2000German Federal Fiscal Court IR 20/87, 14 March 1989, Bundessteuerblatt, 1989, 14, II, 649*Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365*Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774*Hafza v Director-General of Social Security* (1985) 6 FCR 444*Harding v Commissioner of Taxation* [2019] FCAFC 29; (2019) 269 FCR 311*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123*Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1077*Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* (1975) 132 CLR 535*Levene v Inland Revenue Commissioners* [1928] AC 217*Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557*MacCormick v Commissioner of Taxation* (1984) 158 CLR 622*MacCormick v Federal Commissioner of Taxation* (1945) 71 CLR 283*Magrath v Commonwealth* (1944) 69 CLR 156*Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610*McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263*McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 134*Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611*Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992*Minister of National Revenue v Wrights’ Canadian Ropes Ltd* [1947] AC 109*Mochkin v Commissioner of Taxation* (2002) ATC 4465*Moreau v Federal Commissioner of Taxation* (1926) 39 CLR 65*Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331*Perpetual Executors Trustees and Agency Co (WA) Ltd (John Turnbull Trust) v Federal Commissioner of Taxation* (1935) 3 ATD 132*Pike v Federal Commissioner of Taxation* [2019] FCA 2185*R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165*Revenue and Customs Commissioners v Anson* [2015] 4 All ER 288*Rio Tinto Ltd v Commissioner of Taxation* [2004] FCA 335; (2004) 55 ATR 321*Risby Forest Industries Pty Ltd v Federal Commissioner of Taxation* (1988) 20 FCR 439*Robinson v Federal Commissioner of Taxation* (1927) 39 CLR 297*Russell v Federal Commissioner of Taxation* [2009] FCA 1224; (2009) 74 ATR 466*Sharp v Wakefield* [1891] AC 173*Stockton v Commissioner of Taxation* [2019] FCA 1679*Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446*Thomson v Federal Commissioner of Taxation* (1923) 33 CLR 73*Tourism Holdings Australia Pty Ltd v Commissioner of Taxation (NT)* (2005) 15 NTLR 80*WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 577*Model Tax Convention on Income and on Capital* (OECD commentaries)*Oxford English Dictionary* (2nd ed, 1989) Vol XIV |
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| Date of hearing: | 11 and 12 May 2020 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| Counsel for the Appellant: | Mr S Lloyd SC with Mr G del Villar QC |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr J Hyde Page |
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| Solicitor for the Respondent: | Harmers Workplace Lawyers |

ORDERS

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|  | QUD 724 of 2019 |
|   |
| BETWEEN: | COMMISSIONER OF TAXATIONAppellant |
| AND: | CATHERINE VICTORIA ADDYRespondent |

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| JUDGES: | DAVIES, DERRINGTON, STEWARD JJ |
| DATE OF ORDER: | 6 August 2020 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The cross-appeal be dismissed.
3. Orders 2 to 6 of the orders made by the learned primary judge on 30 October 2019 be set aside and in lieu thereof the respondent’s appeal from the appellant’s objection decision of 26 February 2018 be dismissed.
4. There be no order as to costs.

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

REASONS FOR JUDGMENT

DAVIES J:

1. I have had the benefit of reading the reasons in draft of each of Derrington and Steward JJ. I agree that the primary judge erred in finding the respondent (**Ms Addy**) was a resident under ordinary concepts but also agree, for reasons which I express below, that the primary judge was correct to conclude that Ms Addy satisfied the test for residency contained in sub-para (a)(ii) of the definition of “resident” in s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**), albeit not for the reasons advanced by the primary judge. I also agree that the cross‑appeal should be dismissed. However, I have reached the opposite conclusion to their Honours on grounds 4 and 5 of the appeal concerning Art 25 of the *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* made at Canberra [2003] ATS 22 (**Australia/United Kingdom Double Tax Agreement**). It is my view that the 15% rate of tax imposed on “working holiday taxable income” under Item 1 of Pt III of Sch 7 of the *Income Tax Rates Act 1986* (Cth) (**Rates Act**) is discriminatory against British nationals resident in Australia who derive such income, and thus an infringement of Art 25 of the Australia/United Kingdom Double Tax Agreement.

# Article 25 of the Australia/United Kingdom Double Tax Agreement (grounds 4 and 5)

1. This appeal has a sad and sorry history, which has deflected from the important question for determination concerning Art 25 of the Australia/United Kingdom Double Tax Agreementfor which Ms Addy received test case funding, being whether Art 25 precluded the Commonwealth of Australia from taxing Ms Addy at the differential rate of 15% up to the first $37,000 of Ms Addy’s “working holiday taxable income” as prescribed in Pt III of Sch 7 to the Rates Act, rather than applying the tax-free threshold that applies to resident taxpayers under Pt I of Sch 7 to the Rates Act.
2. The Australia/United Kingdom Double Tax Agreement is incorporated into Australian law by s 4 of the *International Tax Agreements Act 1953* (Cth). Article 25 of the Australia/United Kingdom Double Tax Agreement is headed “Non-discrimination” and relevantly provides:

1 Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

…

1. The article precludes discriminatory tax treatment of foreign nationals based upon nationality. Article 25(1) is largely in the same terms as Art 24(1) of the Organisation for Economic Co‑operation and Development’s (**OECD**) *Model Tax Convention on Income and on Capital* (**Model Tax Convention**), known as the “non-discrimination” article. As explained in [1] of the OECD commentary on Art 24 of the Model Tax Convention (condensed version, January 2003) (**OECD commentary**) (being the version current at the time the Australia/United Kingdom Double Tax Agreement was signed), the principle embodied in paragraph 1 of the article is that for purposes of taxation, discrimination on the grounds of nationality is forbidden and, subject to reciprocity, the nationals of a contracting state may not be less favourably treated in the other contracting state than nationals of the latter state in the same circumstances. The article precludes a contracting state from subjecting nationals of the other contracting state to a greater tax burden than its own nationals “in the same circumstances”: see also [10] of the OECD commentary. In other words, “in the same circumstances” apart from nationality. The OECD commentary stated at [3]:

The expression “in the same circumstances” refers to taxpayers (individuals, legal persons, partnerships and associations) placed, from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and in fact…

The OECD commentary on Art 24 has not materially altered in subsequent versions.

1. The scope of the article is plainly restricted to disparity in tax treatment based solely on nationality. The article does not prohibit differential treatment by one contracting state of nationals of the other contracting state for tax purposes based on, for example, residence or some other criterion which is not nationality because such persons are not “in the same circumstances” and, consequently, the less favourable taxation treatment is based upon factors other than nationality.
2. Ms Addy was assessed on the basis that she was a resident of Australia for tax purposes during part of the income year ended 30 June 2017. It is undoubted that the tax rates prescribed by Pt III of Sch 7 of the Rates Act that apply to foreign national taxpayers, resident in Australia, who are “working holiday makers”, as that expression is defined in s 3A of the Rates Act, are less favourable than the tax rates applicable to “resident taxpayers”, other than “working holiday makers”, as prescribed in Pt I of Sch 7 of the Rates Act. Relevantly, the rates of tax set out in Pt III of Sch 7 do not provide for a tax‑free threshold, but impose a tax rate of 15% for the part of the taxpayer’s “working holiday taxable income” that does not exceed $37,000, whereas the rates prescribed by Pt I of Sch 7 of the Rates Act, which apply to “resident taxpayers” who are not working holiday makers, allow for a tax‑free threshold up to $18,200.
3. Part III of Sch 7 of the Rates Act was introduced on 2 December 2016 pursuant to the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth) (**Working Holiday Maker Amendment Act**), known as the “backpacker’s tax”. The amendments applied to income derived on or after 1 January 2017: cl 8, Pt 2, Sch 1, Working Holiday Maker Amendment Act. Section 3A of the Rates Act provides as follows:

(1) An individual is a working holiday maker at a particular time if the individual holds at that time:

(a) a Subclass 417 (Working Holiday) visa; or

(b) a Subclass 462 (Work and Holiday) visa; or

(c) a bridging visa permitting the individual to work in Australia if:

(i) the bridging visa was granted under the Migration Act 1958 in relation to an application for a visa of a kind described in paragraph (a) or (b); and

(ii) the Minister administering that Act is still to make a decision in relation to the application; and

(iii) the most recent visa, other than a bridging visa, granted under that Act to the individual was a visa of a kind described in paragraph (a) or (b).

(2) An individual’s working holiday taxable income for a year of income is the individual’s assessable income for the year of income derived:

(a) from sources in Australia; and

(b) while the individual is a working holiday maker;

less so much of any amount the individual can deduct for the year of income as relates to that assessable income.

(3) However, the individual’s working holiday taxable income does not include any superannuation remainder, or employment termination remainder, of the individual’s taxable income for the year of income.

1. The differential tax treatment applying to “working holiday makers” is based upon the visa status of the foreign national, namely a person who holds at the time a working holiday visa, a work and holiday visa or a bridging visa granted pending the outcome of an application for a working holiday visa or work and holiday visa permitting the individual to work in Australia: s 3A(1) of the Rates Act. The rates of tax attaching to “working holiday taxable income” apply by reason of the nature of the income as “working holiday taxable income” derived by an individual who is a “working holiday maker” from sources in Australia: s 3A(2) of the Rates Act. The rates of tax prescribed in Pt III of Sch 7 apply both to resident and non-resident individuals who are “working holiday makers”. That is, the rates are the same regardless of whether the “working holiday maker” is a resident or a non-resident of Australia for tax purposes.
2. It was not disputed that Ms Addy, during the 2017 income year:
	1. was a “national” of the United Kingdom for the purposes of the Australia/United Kingdom Double Tax Agreement; and
	2. was a “working holiday maker”. Ms Addy was a “working holiday maker” because she held at that time a subclass 417 (working holiday) visa: s 3A of the Rates Act; and
	3. earned “working holiday taxable income” as that expression is defined in s 3A(2) of the Rates Act, in that her assessable income for the year of income derived from sources in Australia and while she was a “working holiday maker”.
3. The substantive question for the purposes of Art 25 is whether the visa status of the foreign national, namely a person who holds at the time a working holiday visa, is a matter pertaining to nationality, so that it can be said, in relation to Ms Addy, she was discriminated against for the purposes of taxation on the grounds of nationality. The Australia/United Kingdom Double Tax Agreement defines the term “national” in Art 3(1)(l) as follows:

The term “national” means:

(i) in relation to the United Kingdom, any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom; and any company deriving its status as such from the law in force in the United Kingdom;

(ii) in relation to Australia, an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status; and any company deriving its status as such from the law in force in Australia;

1. In my view the primary judge was correct to hold that the taxation of Ms Addy on the basis she was a resident taxpayer at the rates prescribed in Pt III of Sch 7 infringed Art 25 of the Australia/United Kingdom Double Tax Agreement. The reasons can be stated succinctly.
2. First, the two material distinctions for tax purposes between Ms Addy and a resident national of Australia deriving income from the same activities as Ms Addy during the relevant income year were that:
	1. Ms Addy, being a British citizen and not being a permanent resident of Australia, was a foreign national; and
	2. because of the type of visa she held at the time, she was a “working holiday maker” for Australian tax purposes and because she was a “working holiday maker” for Australian tax purposes, the income she derived from sources in Australia while a working holiday maker was designated as “working holiday taxable income” for the purposes of the Rates Act. In other words, the rates that apply to “working holiday taxable income” depend on the classification of the taxpayer as a “working holiday maker”. What classifies a person as a “working holiday maker” is the holding of a certain class of visa permitting the person to work in Australia. Viewed in that way, the designation of a person as a “working holiday maker” for tax purposes is based upon the taxpayer’s foreign nationality and visa status.
3. Secondly, an Australian national being an individual taxpayer, resident in Australia and deriving income from the same activities as Ms Addy is “in the same circumstances” as Ms Addy for Australian tax purposes, save as to nationality and the requirement to hold a visa permitting the person to work in Australia, which arises directly from – and cannot sensibly be divorced from – their nationality.
4. Thirdly, had Ms Addy been a resident Australian national who was not a working holiday maker deriving the same income from the same activities, she would have paid tax at the rates prescribed in Pt I of Sch 7 to the Rates Act and been entitled to the benefit of the tax-free threshold. The only reason Ms Addy was not taxed at those rates was because she was a “working holiday maker” as defined for Australian tax law purposes, and what made her a “working holiday maker” for Australian tax purposes was her foreign nationality and visa status.
5. Fourthly, as the rates of tax set out in Pt III of Sch 7 of the Rates Act do not allow for a tax‑free threshold, the differential tax treatment of Ms Addy as a “working holiday maker” subject to the rates of tax prescribed in Pt III of Sch 7 of the Rates Act subjected her to a more burdensome tax liability than had she been a resident Australian national deriving the same income from the same activities. It follows that the effect of s 3A of the Rates Act was discrimination against Ms Addy for tax purposes based solely on her nationality.
6. For the sake of completeness, I should add that Art 25 would not apply if Ms Addy was a non‑resident “working holiday maker” because Art 25 permits differential tax treatment on the basis of residency.

# 183 day test (grounds 2 and 3)

1. In this case, the question of residency only mattered because of the Art 25 issue, as the rates for taxpayers who are working holiday makers are the same for resident and non-resident taxpayers. The question of residency raised its own peculiar complications because of the circumstances in which residency became an issue in the proceedings.
2. Under Art 4 of the Australia/United Kingdom Double Tax Agreement, residency is defined by reference to the meaning of that term according to the tax laws of each respective contracting state. Section 6 of the 1936 Act defines “resident or resident of Australia” relevantly to mean:

(a) a person…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;

…

1. The criteria in sub-para (a)(i) is known as the “**ordinary concepts test**” and the criteria in sub‑para (a)(ii) is known as the “**183 day test**”.
2. The original assessment for the 2017 income year (which issued on 20 July 2017) assessed Ms Addy on the basis she was a non‑resident during the income year. It would appear that the assessment was based on Ms Addy’s tax return, which indicated that Ms Addy was a non‑resident of Australia for tax purposes. For reasons that were never explained, an amended assessment issued on 13 September 2017 which made no change to Ms Addy’s taxable income or to the tax payable. Ms Addy objected to the amended assessment. On review of the objection, a tax officer advised Ms Addy that the Australian Taxation Office accepted she was a resident for tax purposes and eligible for a tax‑free threshold of 11 months and advised that the Commissioner would issue an amended assessment on that basis. On 20 December 2017, the Commissioner issued a further amended assessment, applying the 15% tax rate provided for in Part III of Sch 7 of the Rates Act to Ms Addy’s assessable income after 1 January 2017. Ms Addy lodged an objection to the further amended assessment raising Art 25(1) of the Australia/United Kingdom Double Tax Agreement and her entitlement to have the benefit of the “tax‑free threshold”. The objection decision records it was accepted that Ms Addy was “an Australian tax resident during the [2017 income year]”. It also recorded that as Ms Addy was a “working holiday maker” earning “working holiday taxable income” pursuant to s 3A of the Rates Act, she was therefore subject to the rates provided for in Pt III of Sch 7, which applied a rate of 15% income tax to earnings up to $37,000 per annum regardless of tax residency status. Ms Addy’s objection to the further amended notice of assessment was disallowed on the basis the imposition of the tax rate of 15% on Ms Addy did not discriminate against her on the basis of her nationality.
3. The question of residency was not in issue in the Part IVC proceedings when commenced, the Commissioner having accepted Ms Addy was an Australian resident for tax purposes during the part of the income year she was still in Australia. The sole question for determination was whether Art 25 applied to preclude Australia from assessing Ms Addy at the rates specified in Pt III of Sch 7 to the Rates Act applicable to “working holiday makers”, and not the rates of tax applying to all other resident taxpayers under Pt I of Sch 7 to the Rates Act. Residency only became an issue about one month before the hearing when Ms Addy sought to amend her appeal statement to contend she was an Australian tax resident for the entirety of the 2017 income year (despite leaving Australia and returning to the United Kingdom in May 2017) and was thus entitled to the tax‑free threshold without the threshold being pro-rated under ss 18 and 20 of the Rates Act. Supporting that ground was the contention that when a person spends more than 183 days in Australia, that person is presumptively an Australian resident and satisfies that test of residency for the entirety of the income year in question, even though the taxpayer may leave Australia before the end of the income year. The primary judge granted provisional leave to Ms Addy to rely on the new ground, subject to objection by the Commissioner. The Commissioner filed an amended appeal statement in which he opposed the grant of leave for reasons that included prejudice, alleging that the Commissioner, in reliance on the limited scope of Ms Addy’s objection to the further amended notice of assessment, had not had an opportunity to consider the 183 day test. On the assumption that leave to amend was granted, it was further alleged that Ms Addy did not satisfy residency according to ordinary concepts for the 2017 income year “nor was it open for [the Commissioner], in relation to the 183 day test, to reach a state of satisfaction that [Ms Addy’s] usual place of abode was not outside Australia, or that she had an intention to take up residence in Australia”.
4. The primary judge granted leave to Ms Addy to amend her appeal statement to add the new ground: *Addy v Commissioner of Taxation* [2019] FCA 1768 (**primary judgment**) at [34]. His Honour’s reasons included that he was satisfied that the Commissioner “had multiple opportunities before the appeal was commenced to turn his mind to the exclusion found” in the 183 day test: primary judgment at [33]. His Honour was also of the view that those opportunities “inferentially must have entailed forming and changing a view as to how to be ‘satisfied’ for the purposes of paragraph (a)(ii) [of the definition of ‘resident’]” and further reasoned that, given that the Commissioner’s original notice of assessment for the 2017 income year in respect of Ms Addy classified her as a non-resident despite the fact that she had been in Australia for well over 183 days, the inference to be drawn from the Commissioner’s finding of residency in the further amended notice of assessment was that the Commissioner “now was satisfied that there was no reason why paragraph (a)(ii) of the definition of ‘resident’ did not, in any event, make her a ‘resident’”: primary judgment at [28], [33]. His Honour then went on to consider whether – and found that – Ms Addy was a resident according to ordinary concepts: primary judgment at [53]–[60]. At [61]–[62], his Honour also considered whether Ms Addy was a resident under the 183 day test. His Honour found that because the assessment issued to Ms Addy before the Full Court’s decision in *Harding v Commissioner of Taxation* [2019] FCAFC 29; 269 FCR 311, it was “inferentially likely” that the Commissioner had acted on an erroneous conception of what constituted a “place of abode” in sub-para (a)(ii) of the definition of “resident” in s 6 of the 1936 Act. By this, his Honour appears to have meant that the Commissioner had assumed that a “place of abode” was a home when it could include a country. It appears also that the primary judge considered that because of this error he could reach his conclusion on whether “the Commissioner should have been satisfied that, during the 2017 income year, Ms Addy’s ‘usual place of abode’ was in Australia and that she did intend to take up residence here”. His Honour’s finding was “yes”.
5. However, it was not the Commissioner’s case that he had considered whether he should be satisfied of the matters directed by the 183 day test. Moreover, with respect to the primary judge, it does not follow that the Commissioner “must, necessarily,” have addressed that question because he re-assessed Ms Addy on the basis that she was a resident: at [28]. Tellingly, there is nothing in the material which indicates that any consideration was given to the 183 day test at the time the further amended assessment issued, let alone that the Commissioner actually formed the positive view that he did not have the requisite state satisfaction. Further, the objection merely asserted that Ms Addy was a resident, without more, and the objection decision contains no analysis or reasoning as to why it was accepted that Ms Addy was a resident.
6. The Commissioner argued the 183 day test operates to make someone a resident only where the Commissioner has addressed the question of satisfaction, one way or the other. It was submitted that the first element of the test (183 days presence) does not determine the residence issue unless and until the second element (satisfaction) is considered. However, there is no textual or contextual reason for construing sub-para (a)(ii) of the definition of “resident” in the 1936 Act other than on its terms. Sub-paragraph (a)(ii) is a standalone test of residency and operates of its own force to make a person a “resident” of Australia for Australian tax purposes where the taxpayer has been in Australia for more than 183 days, continuously or intermittently, in an income year, unless the Commissioner holds the requisite state of opinion. In other words, the test for residency under sub-para (a)(ii) operates on the criterion of actual presence in Australia for at least half of the income year and that test is met in the absence of the Commissioner forming the requisite state of satisfaction. In this case, the Commissioner did not form such a state of satisfaction.
7. This analysis is a complete answer to grounds 2 and 3 of the appeal. On the case presented by the Commissioner, he had not considered whether Ms Addy did, or did not, meet the 183 day residency test. On that footing the primary judge, in my view, should have found that Ms Addy was a resident by reason of sub-para (a)(ii) of the definition of “resident” and not gone on to consider whether or what inference could be drawn and whether or not there was legal error in the view formed. In other words, the fact that the Commissioner had not formed the requisite state of satisfaction directed by the 183 day test meant that Ms Addy was a resident by force of sub-para (a)(ii) of the definition of “resident” in s 6 of the 1936 Act, and thus provided the answer on the question of residency.
8. For completeness, if it were necessary to decide, I would agree with Steward J at [306] to [312] of his reasons that it was not open to the primary judge to determine for himself whether the “carve out” to the 183 day test should apply.

# Conclusion

1. I would accordingly dismiss the appeal.

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

Associate:

Dated: 6 August 2020

REASONS FOR JUDGMENT

DERRINGTON J:

# Introduction

1. This appeal was presented as a test case as to the application and operation of the *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* [2003] ATS 22 (the Double Taxation Agreement). That agreement, entered into by Australia and the United Kingdom in 2003, is one of myriad international taxation agreements that regulate, *inter alia*, taxation in relation to income earned by foreign nationals in Australia. It was given the force of law by the *International Tax Agreements Act 1953* (Cth)(*Agreements Act*), s 4(2) of which ensures that the agreement’s provisions have effect notwithstanding anything inconsistent in domestic taxation legislation. In other words, where it operates in relation to a person, the agreement will override the taxation obligations to which that person would otherwise be subject.
2. In the present proceedings, the taxpayer, Ms Catherine Addy (a UK citizen), claims the Double Taxation Agreement operated in her favour such that she was not liable to pay income tax on the modest amount of income she had earned in the course of her working holiday in Australia. She says that she was entitled to take the benefit of the tax-free threshold as would an Australian citizen in her position. More specifically, she submits that she was not required to pay income tax at the rates specified in Pt III Sch 7 of the *Income Tax Rates Act 1986* (Cth) (*Rates Act*)which, *inter alia*, imposed a tax of 15% on income up to $37,000 in respect of persons who held “working holiday” visas. Colloquially, that tax is referred to as “the Backpacker Tax”.
3. Not inconsiderable difficulty arises in this appeal as a result of both its history and its progress as a supposed “test case”. It appears that Ms Addy’s objection to her assessment was chosen by the parties as an appropriate vehicle to test the operation of the Double Taxation Agreement because of the Commissioner’s initial acceptance that she was an Australian resident for tax purposes even though she was in Australia on a working holiday visa. However, through a series of events which are set out more fully below, the Commissioner has come to contest that residency issue. Consequently, the appeal is no longer confined to consideration of the operation of the Double Taxation Agreement, but extends to Ms Addy’s residency status during her 18 month working holiday in Australia.

# Background facts

1. Ms Addy is a British citizen who, prior to leaving for Australia in 2015, had lived since her birth with her parents at the family home in Bexleyheath, Kent, United Kingdom.
2. She had visited Australia on two occasions prior to 2015. Once in 2000 and once in 2014. It appears that those visits were of brief duration.
3. On 3 July 2015, Ms Addy applied for and subsequently obtained from the Australian Commonwealth’s Department of Immigration and Border Protection, a Working Holiday (Temporary) (class TZ) Working Holiday (subclass 417) visa (working holiday visa). She travelled to Australia on her British passport and entered the country on 20 August 2015 pursuant to the permission granted to her by her visa.
4. By September 2015, she had commenced living in a house at Earlwood, Sydney (the Earlwood house). Those premises were leased by a number of persons including Ms Eastwood, a friend of Ms Addy’s, who allowed her to share her room and to sleep on the floor on a spare mattress. The leasing arrangements in relation to the house are not particularly clear although it appears the house operated as a “share house” where occupants had the use of a bedroom and shared use of the common areas.
5. Ms Addy undertook some travel around Australia. In the latter part of 2015 she travelled to Cairns for two days. She also visited relatives in Brisbane and undertook overnight trips to the Central Coast region of New South Wales.
6. From 2 January 2016 until 8 March 2016, Ms Addy travelled to several countries in South-East Asia, namely Malaysia, Thailand, Cambodia, Vietnam, the Philippines and Indonesia. Shortly after returning to Australia, she moved to Western Australia where she worked on a horse farm. She stayed there from April to June 2016, returning to Sydney on 1 July 2016.
7. On 8 July 2016, she applied for a further working holiday visa, which was granted on 9 July 2016.
8. In the latter part of 2016, Ms Addy commenced working as a waitress in Sydney. She worked at the Menzies Hotel for a period of time and subsequently at the Novotel Hotel.
9. On 1 January 2017, the rates of tax prescribed by Pt III Sch 7 of the *Rates Act* applicable to the holders of working holiday visas came into effect.
10. In early February 2017, Ms Addy determined that she would not stay in Australia until the expiry of her visa and would book a flight back to the United Kingdom. She did that on 14 February 2017.
11. She left Australia on 1 May 2017 and returned to the UK and to her family home in Bexleyheath, Kent. Relevantly, she took her possessions with her and has since remained in the United Kingdom.

## The assessment process

1. On 20 July 2017, the Commissioner of Taxation (the Commissioner) issued Ms Addy with an assessment in respect of the year ended 30 June 2017 in which he assessed the tax payable on her assessable income pursuant to Pt III Sch 7 of the *Rates Act* at the rate of 15%. The notice of assessment stated:

Your return indicates that you are a non-resident of Australia for tax purposes. As a result we have deemed you a non-resident for income tax purposes.

1. On 13 September 2017, the Commissioner issued an amended assessment containing the same statement in relation to Ms Addy’s residency status. It is not clear why this amended assessment was issued, it not being materially different to the original.
2. Ms Addy lodged an objection to the amended assessment which included an assertion that she was a “resident” for tax purposes in the income year ending 30 June 2017. In an email dated 5 December 2017, a representative of the Commissioner informed Ms Addy’s tax agent that she had been assigned to review Ms Addy’s 2017 income tax return, and further stated: “I agree with your assessment that she is a resident for tax purposes and that she is eligible for a tax-free threshold of 11 months”.
3. In a subsequent email dated 11 December 2017, the same representative indicated that Ms Addy “has been deemed a resident for tax purposes” and that the Commissioner was prepared to issue an amended assessment on that basis. As a consequence of that acknowledgement and other matters, Ms Addy withdrew her objection and, on 20 December 2017, the Commissioner issued a further amended assessment. However, in that amended assessment the Commissioner continued to apply the 15% tax provided for in Pt III Sch 7 to Ms Addy’s assessable income. The further amended assessment included the following statement:

Other information relevant to your assessment

The working holiday tax rate has been applied to the income you earned while you were on your working holiday.

Your tax free threshold has been adjusted as you either became or ceased to be a resident during the year.

1. At around this time correspondence passed between the solicitors for Ms Addy, Harmers Workplace Lawyers (Harmers), and the Australian Government Solicitor (AGS) for the Commissioner in relation to the prospect of using Ms Addy’s assessment as a test case as to the application of the Double Taxation Agreement. In furtherance of this, on 12 February 2018, AGS wrote to Harmers advising that the Commissioner had accepted that Ms Addy was a resident for taxation purposes and, on that basis, her objection “would be an appropriate vehicle to agitate questions about the operation of the “Backpacker Tax””. The letter also indicated that if Ms Addy lodged an objection to the further amended assessment it would be dealt with expeditiously and then said, “It would not be necessary to object in respect of residency, since that issue has been determined, but it would be open to her to object in respect of the 15% tax rate applied from 1 January 2017”.
2. By an objection lodged on 14 February 2018 against the further amended assessment, Ms Addy asserted that she was entitled to the benefit of the tax-free threshold on the basis that she was a resident in Australia during the relevant period and the operation of Art 25 of the Double Taxation Agreement had the consequence that she was not subject to the Backpacker Tax as it would impose a liability upon her that was “other or more burdensome” than the taxation levied on an Australian national who was also an Australian tax resident.
3. After considering Ms Addy’s objection to the further amended assessment the Commissioner disallowed it in full and advised her of the same by letter dated 26 February 2018. The Commissioner’s Reasons for Decision identify both that Ms Addy was assessed as a “working holiday maker” on the basis that she held a working holiday visa, but also that she was a resident for taxation purposes during the 2017 financial year. The Commissioner determined that the imposition of the tax rate of 15% on Ms Addy did not discriminate against her on the basis of her nationality. The reason given was that any foreign national who held a working holiday visa would be treated in the same manner.
4. On 27 February 2018, Ms Addy lodged an appeal to the Federal Court pursuant to s 14ZZ of the *Taxation Administration Act 1953* (Cth) (TAA). The substance of the appeal was that the Double Taxation Agreement applied in her circumstances and that she ought not to be treated differently to any other Australian tax resident with the consequence that the tax-free threshold ought to apply in respect of her income.
5. In the materials before the Court was a further letter from Harmers to the AGS dated 28 February 2018. That letter was not written, however, on behalf of Ms Addy but on behalf of Taxback Pty Ltd and Taxback Inc, being two companies which specialise in handling the taxation affairs of foreign nationals who, *inter alia*, work in Australia. It seems, although it is not clear, that Ms Addy was a client of one of the Taxback companies. In the letter, Harmers indicated that their clients were becoming concerned about the ATO’s determinations as to whether persons in Australia on short term visas, including those on working holiday visas, were residents for taxation purposes. They suggested arranging some test cases for the purposes of having the relevant issue determined by a court. Specifically, it was stated that such litigation should not interfere with the resolution of the question arising in Ms Addy’s case as to the interaction between the Backpacker Tax and the Double Taxation Agreement.
6. It is far from clear that the totality of the correspondence passing between the parties was contained in the appeal books, nevertheless, on 31 October 2018, being approximately one month prior to the hearing of Ms Addy’s appeal against the objection decision, Harmers again wrote to the AGS. In this letter, Harmers appeared to have revised its stance as to whether Ms Addy’s proceeding concerning the Double Taxation Agreement ought to involve questions of residency. It asserted that the parties had agreed that Ms Addy’s case was a suitable vehicle for determination of the impact of the Double Taxation Agreement because “Ms Addy satisfies the 183-day test for Australian residency for 2017”. It went on to say, “Notwithstanding this, the Applicant would like the Court to determine whether Ms Addy satisfied the ordinary residency test in respect of 2017.” Given Harmers’ previous assertion that it did not wish to complicate the test case concerning the Double Taxation Agreement with residency issues, the cause of its change of heart is not clear. No explanation was given to the Court.
7. The AGS responded by letter of 5 November 2018, in which it asserted that Ms Addy’s case had been selected as a test case vehicle because the issue of residency had not been in dispute and that the raising of the new ground could substantially change the nature of the hearing. It was further said that if the new issue was raised and an amendment allowed the Commissioner would seek to submit that Ms Addy was *not* an Australian tax resident throughout her working holiday visa. Mr Hyde Page of Counsel, for Ms Addy, submitted in respect of this letter that, as the AGS did not demur to the assertion in Harmers’ previous letter that the parties had agreed that Ms Addy was a resident under the 183 day test, the Commissioner must be taken to have accepted that was so. That should be rejected and any inference to that effect does not arise in the present circumstances. As an aside, it might be observed that in most Australian states, that form of verballing of an opposing party in the course of correspondence passed into desuetude in the last century.

### Leave given to amend Ms Addy’s notice of appeal to raise the 183 day test

1. On the first day of the hearing of the appeal before the learned primary judge, Ms Addy, through her counsel, sought leave to amend her notice of appeal to assert that she satisfied the definition of “resident” in the 183 day test with the result that she was an Australian tax resident throughout the *whole* of the 2017 income year. Pursuant to the 183 day test of residency a person who has been in Australia for more than half of an income year will be treated as a resident for tax purposes unless they come within the proviso. That proviso operates when the Commissioner is satisfied of the existence of two criteria: that the person’s “usual place of abode” is outside Australia and the person has no intention of taking up residency here. For ease of reference, in these reasons those criteria will be referred to by the shorthand expression “the proviso criteria”.
2. Counsel for Ms Addy submitted that the proposed amendment merely made more explicit the issue of Ms Addy’s residency which, so it was said, had already been raised peripherally in the existing grounds of objection. The Commissioner opposed the application for leave to amend on the basis that the applicability of the 183 day test had not been squarely raised prior to the objection decision. In both the written and oral submissions to the primary judge it was submitted that the Commissioner had not had the opportunity to address the test and nor had he formed any view as to whether he was satisfied of the proviso criteria. It was also submitted that the Commissioner had accepted Ms Addy was a resident under the “ordinary concept test” in sub-paragraph (a).
3. Despite the Commissioner’s opposition, the primary judge allowed the amendment, identifying that a number of opportunities had been available to the Commissioner to consider the applicability and operation of the 183 day test. The Commissioner thereupon immediately applied for an adjournment to allow him to consider the application of the 183 day test and, in particular, whether the proviso applied. That application was refused.
4. Despite what had been said by the AGS in its letter of 5 November 2018 as to what might occur if the amendment application were successful, the Commissioner did not seek to amend his appeal statement to assert that Ms Addy was not a resident. In fact, at [17] of the Commissioner’s amended appeal statement, filed on 21 November 2018, it had been said:

Subject to the possible operation of the Australia-UK Convention, if the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth) had not been enacted and all else remained as it was, the applicant, **as a resident taxpayer**, would have paid tax on her ordinary taxable income (excluding her foreign source investment or interest income) at the rates set out in Part I of Schedule 7 to the Rates Act.

(Emphasis added).

1. Conversely, it should not be overlooked that the Commissioner’s amended appeal statement identified that the issues to be considered on appeal included whether Ms Addy should be entitled to raise the issue of whether she was a resident under the 183 day test in the relevant year of income and that the Commissioner had not yet had the opportunity to consider that criteria in the proviso.
2. Ms Addy filed an amended notice of appeal on 4 December 2018 incorporating the amendments in respect of which she had obtained leave. No further amended appeal statement was filed in response by the Commissioner.
3. The Commissioner did not appeal the trial judge’s rulings in relation to the amendment or the adjournment.

## The primary judge’s reasons

1. An important issue in the substantive appeal before the learned primary judge was whether the Commissioner had ever formed the state of mind required by the proviso criteria of the 183 day test. As had been submitted in the course of the amendment application, the Commissioner claimed that no occasion had arisen for him to do so and he had not had the opportunity to turn his mind to those matters. That was rejected by the primary judge who inferred that the Commissioner had, in fact, been satisfied that “that [Ms Addy’s] usual place of abode is outside Australia and that [she] does not intend to take up residence in Australia”. His Honour reasoned at [28]:

As to the original and amended assessments, the Commissioner was not obliged to take at face value, much less to accept, any statement in Ms Addy’s income tax return that she was a non-resident. It was always open to him to reach a contrary conclusion. Given that Ms Addy was present in Australia during the 2017 income year for much more than 183 days, his annotation on these assessments, “we have deemed you a non-resident for income tax purposes”, carries with it conclusions by him both that she was not a resident within the ordinary meaning of that word and that none of the inclusory criteria in the s 6(1) definition of “resident”, materially paragraph (a)(ii) of that definition, were applicable. As to the latter paragraph and given that Ms Addy was present in Australia for more than half of the 2017 income year, the Commissioner must, necessarily, have been satisfied “that [Ms Addy’s] usual place of abode is outside Australia and that [she] does not intend to take up residence in Australia”. The Commissioner’s annotation to the further amended assessment necessarily carries with a conclusion not only that, on reflection, Ms Addy fell within the ordinary meaning of “resident” but also, given his earlier assessing conclusion that she was a non-resident, that he has revisited his earlier satisfaction and now was satisfied that there was no reason why paragraph (a)(ii) of the definition of “resident” did not in any event make her a “resident”.

1. The primary judge then assayed the facts relating to the nature of Ms Addy’s presence in Australia in the 2017 income year with a focus upon the arrangements through which she kept her possessions and slept at the Earlwood house. From that analysis, he determined that Ms Addy was a “resident” within both the ordinary meaning of that word and the 183 day test.
2. In relation to the question of whether Ms Addy was a resident according to ordinary concepts, his Honour opined that Ms Addy had “settled” in Sydney and that there was nothing “itinerant about her life” (at [54]). Although she was the holder of a working holiday visa, his Honour was of the opinion that membership of such a “class” was not determinative of her residency under the definition in s 6(1). He concluded that the Earlwood residence was her “home, the settled centre of her life for work and social purposes” (at [59]), and that her living arrangement there was “hardly idiosyncratic”. It followed that she was a “resident” (although not a permanent one) during the 2017 income year according to the ordinary meaning of that word (at [60]).
3. In relation to the question of whether Ms Addy was a resident under the 183 day test, his Honour’s reasoning adopted the following steps (at [61]):
	1. Because the Commissioner initially deemed Ms Addy to be a “non-resident” in the original assessment, it should be inferred that he was initially satisfied of both of the proviso criteria;
	2. Because the Commissioner later deemed Ms Addy to be a “resident” for taxation purposes it must be inferred that he then revisited that initial conclusion and reversed his satisfaction of one or both of those factual considerations;
	3. The Commissioner’s various conclusions as to the 183 day test involved an error of law because they were formed prior to the Full Court’s decision in *Harding v Commissioner of Taxation* (2019) 269 FCR 311 (*Harding*) and, therefore, it was “inferentially likely that the Commissioner acted on his hitherto erroneous conception of what constituted a “place of abode””; and
	4. Upon the finding of error, it was open for the Court to reach its own conclusion as to whether the proviso criteria were satisfied.
4. The primary judge thereafter determined for himself that the Commissioner should not have been satisfied of each of the proviso criteria and concluded that, for the purposes of the definition, Ms Addy had her permanent place of abode at the Earlwood house and she had intended to take up residence in Australia (at [62]). On the basis of his Honour’s view that the proviso criteria were not met, he held that Ms Addy was a resident under the 183 day test.
5. As to the application of the *Rates Act* his Honour concluded that Pt III Sch 7 imposed a higher tax burden on a working holiday maker who was an Australian tax resident than would be imposed upon an Australian resident earning the same income, at least up to the amount of $18,200 (being the tax-free threshold). He observed that the rate of 15% which applied to working holiday makers was less than the rate applied to other non-resident taxpayers who were assessed at a rate of not less than 32.5%.
6. The primary judge then turned his attention to whether, for the purposes of the Double Taxation Agreement, Pt III Sch 7 imposed taxation on Ms Addy which was “other or more burdensome” than the obligations imposed on Australian nationals in the same circumstances. Here, the essential issue was whether it was possible to postulate a comparator to Ms Addy, that is, an Australian resident who was “in the same circumstances”. The Commissioner had submitted that Art 25 was not applicable as no Australian resident could be in “the same circumstances” as Ms Addy because they could not hold a “working holiday visa and thereby earn working holiday taxable income”. In support of this submission the Commissioner relied upon the decision of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555 (*United Dominions Trust*) where it was held that the cognate provisions of a tax agreement between the United Kingdom and New Zealand did not apply where it was not possible to identify an entity “in the same circumstances” as the foreign national. His Honour rejected that submission holding that the inability of an Australian citizen to hold a working holiday visa was not a relevant point of comparison because Art 25 always envisaged that the nationals of the taxing state could not hold the visas held by foreign nationals (at [90]). He considered that, taken to its logical conclusion, the Commissioner’s submission would be that there could never be an appropriate comparator because no Australian national could or would hold a visa to be in Australia (at [91]). On this basis his Honour observed (at [95]):

… the evident purpose of Art 25 as a whole is the prevention of discrimination based solely on a difference that is prohibited by one of its paragraphs, of which nationality as found in Art 25(1) is one, but only when all factors are equal and the different tax treatment is based on the prohibition.

Subsequently, the primary judge identified (at [102]) that the underlying question was whether two persons who are residents of the same State are treated differently solely by reason of their nationality.

1. From the above his Honour held that Pt III Sch 7 of the *Rates Act* envisaged, in respect of persons who are resident in Australia, that a different rate of tax would apply in respect of income derived in Australia from the same sources depending on whether the individual is within the definition of “working holiday maker” and that only a foreign national could be within that definition. The result was that the discrimination as between taxpayers was based on their nationality and the Double Taxation Agreement applied to exclude operation of Pt III Sch 7.
2. His Honour concluded that Ms Addy was entitled to the benefit of the tax-free threshold and, consequently, allowed the appeal from the Commissioner’s refusal of the objection.

## Appeal to this Court

1. By a Notice of Appeal filed on 25 November 2019, the Commissioner appealed the orders of the primary judge. The grounds of appeal are as follows:

1. The primary judge erred in finding that, for the period 1 July 2016 to 1 May 2017, the Respondent was a tax resident according to ordinary concepts.

2. The primary judge erred in finding that, under the test in paragraph (a)(ii) of the definition of “resident” in s 6(1) of the *Income Tax Assessment 1936* (Cth) (the 183 day test), the Respondent was a tax resident for the period 1 July 2016 to 1 May 2017.

3. The primary judge erred in holding that his Honour could substitute his state of satisfaction for that of the Appellant if the Appellant erred in forming an opinion under paragraph (a)(ii) of the definition of “resident” in s.6(1).

4. The primary judge erred in finding that, by the combined operation of s 4 of the *International Tax Agreements Act 1953* (Cth) and the Article 25 of the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains (the Double Taxation Agreement), the Respondent should not have been assessed at the rates set out in Part III of Schedule 7 to the *Income Tax Rates Act 1986* (Cth) (Rates Act) for the period 1 January 2017 to 1 May 2017.

5. The primary judge should have found that Article 25 did not prevent the Respondent being assessed at the rates set out in Part III of Schedule 7 to the Rates Act for the period 1 January 2017 to 1 May 2017.

6. Alternatively to grounds 4 and 5, the primary judge erred in failing to consider a clearly articulated submission of the Appellant that:

6.1. for the period 6 April 2017 to 1 May 2017 the Respondent was a resident solely of the United Kingdom under the Double Taxation Agreement;

6.2. consequently, Article 25(1) of the Double Taxation Agreement would not have applied to prevent her being assessed at the rates set out in Part III of Schedule 7 to the Rates Act for the period 6 April 2017 to 1 May 2017.

1. A notice of cross appeal was filed on 9 December 2019 on behalf of Ms Addy. It concerned the question of whether a person who satisfied the 183 day test was deemed to be a resident for the whole of the relevant income year regardless of any other circumstances. The articulated grounds were:

The conclusion of the lower court was erroneous because:

1. The court concluded (at [61] – [62]) that the Cross-Appellant satisfied the ‘183 day test’ for residency.

2. The Cross-Appellant, as a person who satisfied the ‘183 day test’ in respect of the period ending 30 April 2017, continued to satisfy this test during the period 1 May – 30 June 2017. The court should not imply a qualification into the statute that causes a taxpayer who satisfies the ‘183 day test’ in respect of a tax year to cease to satisfy the test at the point when the taxpayer departs Australia. The ‘183 day test’ does not require continuous physical presence in Australia.

# Ground 1: Was Ms Addy a resident in accordance with ordinary concepts?

1. The definition of “resident” is provided for under s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) which, so far as is relevant, provides:

***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; …

1. These parts of the definition relevantly yield three tests of residency: the “ordinary concepts” test (derived from the phrase “who resides in Australia”), the “domicile test” (derived from subparagraph (a)(i)), and the “183 day” test (derived from subparagraph (a)(ii)). The first and third are directly relevant to the issues under consideration. The domicile test has some tangential relevance not in the least because, like the 183 day test, the proviso in it operates on the Commissioner reaching a state of satisfaction about an identified matter.

## Test of residency under the ordinary concepts

1. The meaning of the term “reside” is not legislatively defined for the purposes of Australian taxation law. In *Harding*, the plurality of the Full Court (Davies and Steward JJ) opined that the “primary” or first test of residence — the “ordinary concepts” test — is largely directed at the identification of where physically a person ordinarily lives, regardless of citizenship or domicile. Their Honours observed at 335 [57], with reference to the decision of the primary judge in that case, that the ordinary meaning of the word is that identified by Latham CJ in *Commissioner of Taxation v Miller* (1946) 73 CLR 93 (*Miller*) at 99 – 101, namely a person “resides” where they “lived” or where they keep house and do business. As Viscount Cave LC said in *Levene v Inland Revenue Commissioners* [1928] AC 217 at 222 (cited with approval in *Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774 (*Gregory*), 777 – 778 *per* Dixon J; *Miller*,99 – 100 *per* Latham CJ; and *Harding*,335 [57]):

[T]he word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as 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.’ No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word ‘reside.’

1. Intention is also of elemental importance in identifying where a person “resides”. As much was emphasised by Wilcox J in *Hafza v Director-General of Social Security* (1985) 6 FCR 444 (*Hafza*) where his Honour accepted that the concept of residency has two elements: physical presence in a particular place, and the intention to treat that place as home (at least for the time being). As his Honour observed at 449:

Physical presence and intention will coincide for most of the time. But few people are always at home. Once a person has established a home in a particular place - even involuntarily: see *Commissioners of Inland Revenue v Lysaght* [1928] AC 234 at 248; and *Keil v Keil* [1947] VLR 383 - a person does not necessarily cease to be resident there because he or she is physically absent. The test is whether the person has retained a continuity of association with the place - *Levene v Inland Revenue Commissioners* [1928] AC 217 at 225 and *Judd v Judd* (1957) 75 WN (NSW) 147 at 149 - together with an intention to return to that place and an attitude that that place remains “home”: see *Norman v Norman (No 3)* (1969) 16 FLR 231 at 235… [W]here the general concept is applicable, it is obvious that, as residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as “home”, a change of intention may be decisive of the question whether residence in a particular place has been maintained.

1. It follows that the nature, duration and quality of the person’s physical presence in a particular place, as well as their intention, are relevant to determining whether an individual resides there. As acknowledged by the primary judge in this case (at [53]), by reference to his earlier decision in *Stockton v Commissioner of Taxation* [2019] FCA 1679 (*Stockton*), [19] – [30]*,* an elaboration of the “twin features” of physical presence and intention was set out in the reasons of the primary judge in *Harding* at [42] to [45] (expressly approved by the plurality on appeal at [61]):

42. The question of “presence” is relatively straight-forward and that is particularly so when there is evidence of a person’s physical presence in a particular place. However, where a person has more than one residence or the question is whether they remain resident in a particular location given that they spend significant time in other locations, different issues arise. In such situations there needs to be consideration of the connecting factors or the continuity of association between the person and the particular location. Here, the question is whether the connecting factors or the continuity of association are such that they establish that the person retains a “presence” in the community as a resident. Factors such as a home, a family unit, possessions, relationships with people and institutions and the like are all relevant to the determination of whether the person has maintained a presence in the community as a resident despite being physically absent.

43. The determination of whether or not a person has the intention to treat a particular place as their home will involve a consideration of numerous factors. Certainly, the evidence of the taxpayer as to their intention at the relevant time will be significant as would be any contemporaneous statement made by a taxpayer as the location of their residency. However, the objective manifestation of a person’s intention is often a more accurate indicator of their state of mind at a particular time in the past than is an assertion about that alleged prior intent. A person’s present belief about what their intention may have been in the past will necessarily be affected by their sub-conscious and the context in which they called upon to identify that past intention. That is especially so when, at the relevant time, the person did not then consider what their then intention may have been.

44. Even evidence of a person’s contemporaneous statement as to their intention at a particular time in the past should be approached with a degree of care. Whilst that is likely to be more accurate than their present assertion of what their previous intention was, the value of the contemporaneous evidence will be affected by the circumstances of the statement and reasons for the making of the statement.

45. That being so, the more cogent evidence of a person’s prior intention as to where they resided are the objective facts which reflect the person’s then intention. In ascertaining whether a person intended to make a particular place their residence or to terminate their residency in a place, the facts and circumstances surrounding their mode of living will be a strong indicator of their presence in or continued association with a particular place and the intention accompanying that presence.

1. From these authorities the following factors are relevant to the concept of residency:
	1. A person resides where they live and dwell permanently or for a considerable period of time, being the place where they make their home.
	2. A person’s intention to make a particular place “home” either permanently or temporarily is an elemental consideration in the identification of where they reside.
	3. Once a person has a home in a particular place they do not necessarily cease to be a resident there merely because they are physically absent. The determinative question is whether they have retained a continuity of association with the place, together with an intention to return to that place which they consider remains their “home”.
	4. Determining a person’s “continuity of association” in a particular place requires a consideration of all the relevant circumstances, including whether they have retained in that locale a physical home to which they can return, a family unit, possessions and relationships with people and institutions.
	5. The person’s own evidence as to their previously held intention is admissible as are any contemporaneous statements of intention, however the objective manifestations of their state of mind at the time are usually more reliable.
	6. The facts and circumstances surrounding a person’s mode of living will be an indicator of their presence in or continued association with a particular place and the intention accompanying that presence or continued association.
2. Ultimately, the application of the “ordinary concepts” test in the circumstances of the particular case will involve questions of fact (and perhaps degree): *Stockton*, [26]; *Miller*,103 *per* Dixon J; and necessitates a consideration of all the person’s circumstances. Those circumstances include the person’s “habits and conduct within the period” (*Gregory)* and the character of the place where the person is located (*Miller*).

### Did Ms Addy cease to be a “resident” of the United Kingdom according to ordinary concepts?

1. It does not follow from the fact that Ms Addy may not have ceased to be a resident in the United Kingdom that she was not resident here, however, her residency status in her home country is a contextual element of the more direct question. In the circumstances of this case it is difficult to conclude that Ms Addy ceased to be a resident of the United Kingdom and, in particular, at her home in Bexleyheath, Kent:
	1. Her parents’ house at Bexleyheath had been her home since birth and it is from where she left when she travelled to Australia and to where she returned.
	2. The Bexleyheath house was where her parents continued to reside. Ms Addy was a single woman and the closest thing to a family unit was at that house with her parents. As she deposed, she always expected to return to that home after her time in Australia and, further, expected to move back into her own bed-room there, which she did.
	3. Ms Addy kept the substantial portion of her possessions at the Bexleyheath house. As the evidence disclosed these included her personal photos which remained on the walls of her room, her collection of DVDs, her saxophone, her books, her childhood memorabilia and her winter clothes. In other words, apart from one suitcase of clothes which she brought to Australia, her personal possessions remained in her room at the family home.
	4. In her residency questionnaire Ms Addy identified the house at Bexleyheath as being her “permanent place to live outside of Australia”.
	5. Ms Addy retained her British nationality and never relinquished her citizenship.
	6. Ms Addy also retained two British bank accounts which, whilst mostly dormant while she was in Australia, remained ready for use when she returned.
2. The learned primary judge concluded that Ms Addy’s parents were “empty nesters”, suggesting that Ms Addy had ceased residing at the Bexleyheath house. With the greatest respect to his Honour, the evidence assayed above rather more favoured the conclusion that Ms Addy had not “left home” in the sense that she had permanently vacated the house to start life on her own. Given that her holiday in Australia was temporary and for a limited period of time, that she left her valued possessions the Bexleyheath house and that she always intended to return there to live and did, it could not be concluded that her continuity of association had been severed. In the result, at all times she retained her residency in the United Kingdom.

### Was Ms Addy a “resident” of Australia according to ordinary concepts?

1. There is little doubt that while the duration of Ms Addy’s presence in Australia for almost 18 months might tend to evidence residency here, the nature and quality of her occupation at the Earlwood house weighed heavily against that conclusion, as did her modality of life.
2. First, Ms Addy’s actual intention was to holiday in Australia rather than to establish a home here. She sought and obtained a working holiday visa. As the visa’s name suggests, persons who apply for it might be thought to be engaging on an extended holiday in Australia and, whilst doing so, wish to work for the purposes of supporting themselves. In order to obtain such a visa Ms Addy was required to meet the relevant criteria for its grant including that the Minister was satisfied, amongst other things, that she was seeking to enter or remain in Australia as a genuine visitor whose principal purpose was to holiday here. In her application for her initial working holiday visa she made a number of declarations including that she was aware that her visa did not permit her to be employed by any one employer for more than six months, that she had sufficient funds for her initial stay in Australia and for her intended overseas destination on leaving Australia, that any employment was incidental to her holiday in Australia and that the purpose of working was to supplement her holiday funds. She indicated that the information she provided in these declarations were correct. The same declarations were repeated in her second application for a further working holiday visa in July 2016. Under cross-examination, Ms Addy confirmed the statements represented her actual intentions at the time she made the applications and that those intentions did not change. The Commissioner submitted that if Ms Addy truly had these intentions, she had no intention to reside here and to make it her home, even for a temporary purpose. There is much force in that and there was no credible suggestion that she either did not have the stated intentions when granted her visas or that, thereafter, she altered her intention such that she intended to establish a residence here. Her intention to be in Australia for the purpose of an extended holiday was generally antithetical to the claim that she intended to reside here.
3. Similar evidence of Ms Addy’s intention not to become a resident here was manifested by the incoming passenger cards which she completed in August 2015 on her initial entry into Australia and, subsequently, in March 2016 when she returned from her travels in South-East Asia. In particular, she had ticked the boxes marked “visitor or temporary resident” as opposed to those marked “resident returning to Australia” box, and had nominated “England” as her country of residence. Again, she declared her responses were correct. On the outgoing passenger cards which Ms Addy signed in January 2016 and May 2017, she described herself as “Visitor or temporary entrant leaving”, and indicated that her country of residence was “UK” or England. It is occasionally said that courts ought not to give much weight to statements made on incoming or outgoing passenger cards in taxation matters as they are not made with the “law with respect to residency” for taxation purposes in mind: *Dempsey v Commissioner of Taxation* (2014) 98 ATR 698, 712 [80]. However, that analysis not correct. What is being asked of passengers on incoming and outgoing passenger cards is whether, in their own mind, they are residents of Australia or some other place within the ordinary meaning of that word. They are being asked to identify that place where their home is located. Whilst it might be true that their statements may not always accurately reflect the true meaning of the word “residence” or “resident” and less likely the extended definitions of it in s 6, in the first instance they ought be given appropriate evidential weight as a statement reflecting the person’s actual intention of where they then intend to reside and make their home. Whilst the weight to be given to such matters will vary in every case, usually it might not be thought to be inappropriate to start by assuming that the taxpayer’s statements on such documents are true. That is particularly so when, as is the case on incoming/outgoing passenger cards, the person is required to declare the accuracy of their statements.
4. The primary judge identified that on her incoming passenger cards Ms Addy also identified the Earlwood house address as being the place where she intended to live in Australia and responded in the affirmative to the question, “Do you intend to live in Australia for the next twelve months?” That, of course, may well be correct but it is not inconsistent with Ms Addy’s continued residence in England and an absence of residency in Australia. Visitors and holiday makers require somewhere to “stay” or “live” when in Australia, but it does not follow that they become resident there.
5. Ms Addy’s general intention to be in Australia on holiday was also reflected in her decision in late 2015, when she was already present in Australia, to travel to a number of Asian countries. The fact that she had not planned such a trip but decided upon it once she arrived was indicative of the fluid nature of her presence. Similarly, the circumstances of her return to the United Kingdom was indicative of the absence of any settled plan. When it transpired that she missed the company of her family and friends and her home in the United Kingdom, she immediately made plans to leave. She booked a ticket to leave from which time the temporary nature of her presence became more acute.
6. It cannot be overlooked that in her affidavit Ms Addy deposed to Australia being her “home”, however that subjective assessment of a prior intention has little weight in the circumstances given the amount and weight of the evidence to the contrary.
7. From the foregoing it is difficult other than to reach the conclusion that Ms Addy’s actual intention was to visit Australia for a holiday, even if for an extended period during which she intended to work in order to support herself in her travels.
8. Second, Ms Addy’s visa only entitled her to remain in Australia for 12 months, albeit it was possible for her to apply for a second visa which she did. Nevertheless, the nature of her presence here was always temporary and for a finite duration and purpose. That was consistent with her intention to holiday here and return to England rather than to take up residence.
9. Third, at no time did Ms Addy establish any legally enforceable right to occupation of any dwelling in Australia. She did not purchase residential accommodation, nor did she enter into any residential tenancy of any kind. The nature of her accommodation at the Earlwood house was most tenuous. She was not a lessee of the premises, contributed no portion of the bond payable under it, and had no right to actual possession of the house or any part of it. As part of a private arrangement between herself and Ms Eastwood, she contributed a portion towards Ms Eastwood’s rent obligations when she was present there. She did not make any contribution when she toured Asia or worked on a horse farm in the first half of 2016. At best, her right of accommodation was founded upon the statement by her friend, Ms Eastwood, that she would be able to share her bedroom in the Earlwood house and stay for as long as she wanted and that Ms Eastwood enjoyed having her around. The learned primary judge considered that this arrangement had the same “enduring quality” about it as did the friendship. With the greatest respect to his Honour, it may well have been that, as the circumstances transpired, Ms Addy remained at the Earlwood house for the majority of her time in Australia, but that says nothing of the quality of her presence there. Her occupation was founded upon no more than the goodwill of her friend and, it would appear, of the other lessees of the house who must have consented to the arrangement. Ms Addy had no legal right to live there or to share, as she did, the bedroom assigned to Ms Eastwood. That arrangement was subject to change at Ms Eastwood’s whim had the circumstances arose. If, as sometimes happens, the friends fell out, Ms Addy would have had to leave. Similarly, if the relationship between the lessees broke down and one or more of them required all to adhere to the terms of the lease, Ms Eastwood would not have been in a position to offer her friend a place to sleep. Likewise, at any time the lessor may have required Ms Addy to cease living in the Earlwood house. The evidence established that four persons, including Ms Eastwood, had executed the lease which only permitted a maximum of four occupants. There is nothing to suggest the lessor had waived compliance with that requirement. Had the lessor ascertained the lessees were not adhering to that restriction — usually there were five or six and sometimes eight or nine present in the house — they may have been required to comply with the lease’s terms and caused the non‑lessee occupants to leave. There was no assuredness of Ms Addy’s lodgings.
10. It also appeared that the residential mix of the house was variable in that persons tended to come and go as the circumstances suited. This was relied upon by the Commissioner as indicative of the transient nature of the type of accommodation which Ms Addy opted to use, rather than securing for herself a place in which she had an enforceable right to stay.
11. The conclusion to be drawn is that Ms Addy’s presence in the Earlwood home was tenuous at best. Consistently with her intention to holiday in Australia, she did not enter into any legal arrangement to secure for herself any enforceable right of accommodation. She was obviously prepared to accept that her presence at any one place was transitory in nature and that she might move on as and when circumstances required which is, in fact, what occurred when she decided to return home.
12. Fourth, Ms Addy did not have any significant assets in Australia. For emphasis, Counsel for the Commissioner identified that she did not even own the mattress on which she slept. In one of her affidavits Ms Addy deposed to having contributed some money towards an outdoor setting for common use at the Earlwood house. How much was not disclosed and it does not appear that Ms Addy claimed any proprietorial ownership in it. In terms of indicating her modality of living it was not indicative of making a home in Australia. On the contrary, the evidence indicated that any assets which she had acquired as at this early stage of her life and those which held value to her, remained stored in what she described as “her room” in her parents’ house in Bexleyheath, Kent.
13. Fifth, Ms Addy’s employment in Australia was of a casual nature. She worked as waitress at the Menzies Hotel in Sydney from about July 2016 until October 2016. From November 2016 until April 2017, she worked as a waitress at the Novotel Hotel, also located in Sydney. In this latter position her hours were 15 to 20 hours a week. There was no evidence that she had any formal contract of employment which required her to work for any specific period of time. As events transpired, she terminated her employment and returned home to England when, in her words, “I missed the United Kingdom and the people who I knew there.” The casual, part‑time nature of her employment was also indicative of a person who avoided establishing any significant ties to Australia.
14. The primary judge placed reliance on the fact that Ms Addy had opened two bank accounts in Australia on her arrival. Whilst, in the consideration of the factual matrix, a person’s financial arrangements are relevant, on a working holiday there would be obvious benefits in having local accounts into which income from any work might be paid and then withdrawn. Their utility could not be denied, and given that they would seem to be a practical necessity their relevance is not great. That is particularly so given that Ms Addy had retained her bank accounts in the United Kingdom.
15. His Honour relied on the fact that Ms Addy registered at a medical clinic close to the Earlwood house and that she used that address as her address for banking purposes, Medicare contact and government licencing in relation to her obtaining of a Responsible Service of Alcohol “RSA” Card, in concluding that she established a residence there. Undoubtedly, such factors on their own are indications of residency, however, such matters are also consistent with Ms Addy making the Earlwood house her base from which she engaged in her working holiday. So much can be seen from the fact that she left there and went to Asia for an extended period and, subsequently, to Western Australia.
16. It is also true that Ms Addy had relatives in Australia although it is apparent that they were not of such a nature as to make up a family unit or an extended family unit. Ms Addy remained principally in Sydney and her only relatives were over 900 kilometres away in Brisbane.
17. The Commissioner submitted that, in reaching his conclusion, the learned primary judge failed to take into account a number of factors which were advanced at the trial as supporting the conclusion that Ms Addy was not an Australian tax resident. They were that Ms Addy had no significant assets whilst in Australia, no business interests or strong family ties here, that the Earlwood house was occupied by a changing number of people, and that Ms Addy had booked her return ticket on 14 February. To varying degrees these factors were relevant to the question of whether Ms Addy was a resident according to the “ordinary concepts” test and the primary judge’s omission to consider them or some of them, may have led him into error. The import of these factors, save for that concerning the absence of business interests, is obvious from the preceding discussion and they, having been raised, ought to have been considered by the primary judge. Had his Honour not overlooked them, he may have reached a different conclusion.

## Conclusions on residency according to ordinary concepts

1. Ms Addy spent almost 18 months in Australia, and for many of them she stayed at the Earlwood house. Were it her intention to make that location or Australia her home, it may well have been possible that she became a resident here under the ordinary concept test. However, presence for an extended duration is not sufficient and her intention as well as the nature and quality of her modality of living deflected from that conclusion. She was here for an extended holiday, albeit one which would be partially funded by engaging in casual, part-time employment where it could be found. Such a conclusion is consistent with Ms Addy’s own statements in her applications for the working holiday visa. Further, and consistently with that conclusion, is that she neither sought nor obtained any form of security of accommodation. Her loose arrangements with Ms Eastwood afforded an opportunity to share a room at the Earlwood house, but one that was fragile in many respects and was subject to immediate termination, as Ms Addy would undoubtedly have been aware. In short, her circumstances did not reflect the attributes of a person who lived here, either permanently or for a considerable time, and nor do they support a conclusion that she had a settled or usual abode here. She was on an extended holiday albeit one which involved engaging in employment in order to fund its continuance.
2. Although the determination of residency undoubtedly involves questions of fact and degree, in the circumstances of this case it was not open to conclude that Ms Addy was a resident under the ordinary meaning of that concept.

# Ground 2 — The 183 day test and its application

1. Ground 2 concerns the primary judge’s conclusion that the Commissioner erred in his application of the 183 day test. The relevance and application of the 183 day test to Ms Addy’s circumstances was problematic in this case. In her tax return, Ms Addy had asserted that she was a non-resident and that was accepted at face value by the Commissioner, who did not turn his mind to whether Ms Addy was a resident under the 183 day test. It appears that when Ms Addy’s circumstances were identified as the basis for a potential test case, the Commissioner was prepared to “deem” her a resident. As far as he was concerned, the applicability of the 183 day test did not become relevant until Ms Addy’s lawyers asserted that if she was a resident within that test she would have to be treated as a “resident” for the whole year. In turn, that would affect whether Ms Addy would be entitled to the tax-free threshold for the whole or only a prorated portion of the year, assuming that she was entitled to it at all.

## The test of residency under the 183 day test

1. As has been identified above, the 183 day test found in sub-paragraph (a)(ii) provided that a “resident” included a person:

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; …

1. The structure of this definitional clause is relatively straightforward. *Prima facie*, a person who has been present in Australia for 183 days or more during a relevant tax year will be an Australian tax resident unless the proviso operates to exclude them. That proviso is conditioned upon the Commissioner having formed the requisite state of mind; being a state of satisfaction as to the existence of the two proviso criteria. First, that the person’s “usual place of abode is outside Australia” and, second, that they do “not intend to take up residence in Australia”.
2. The word “satisfied” means, “[t]o [be] furnish[ed] *with sufficient proof or information*; to [be] assure[d] … to [be] convince[d]”: *Oxford English Dictionary* (2nd ed, 1989) Vol XIV at 505, 7c (emphasis added). Therefore, if the Commissioner does not reach that state of assuredness or persuasion as to the proviso criteria in the 183 day test, the exclusory effect of the proviso does not operate. For instance, if on the material the Commissioner remains unsure of the person’s usual place of abode the condition is not satisfied. Similarly, if he remains uncertain whether a person intends to take up residency here, the proviso cannot operate.
3. Here the primary judge found that the Commissioner should have been satisfied that “[Ms] Addy’s “usual place of abode” was in Australia and that she did intend to take up residence here”. That approach imposes more stringent conditions on the proviso’s operation than the words of the section permit and attention ought to be given to the actual words used by the definition rather than the product of any judicial exegesis.
4. There is no need in this case to consider the meaning of the expression “usual place of abode” as used in the 183 day test.

## The primary judge’s approach

1. As the facts set out above reveal, there is no direct evidence that the Commissioner actually turned his mind to whether Ms Addy was a resident under the 183 day test. At the very least it formed no part of his objection decision and nor was there any indication in his correspondence that he had done so.
2. In these circumstances the primary judge’s approach was to draw inferences as to what had occurred during the assessment process and he inferred that the Commissioner had, in fact, turned his mind to the 183 day test on three occasions. He concluded (at [28]) that, as in the original and amended assessments the Commissioner had accepted that Ms Addy was a non‑resident, he must have turned his mind to each of the tests for residency in the s 6 definition, including the 183 day test, and concluded that she was not a resident under any of them. His Honour then inferred that the Commissioner must have revised his earlier view as to the applicability of the 183 day test for the purposes of the further amended assessment in which he accepted that Ms Addy was a resident. His Honour said (at [28]):

The Commissioner’s annotation to the further amended assessment [that Ms Addy was a resident for part of the year] necessarily carries with a conclusion not only that, on reflection, Ms Addy fell within the ordinary meaning of “resident” but also, given his earlier assessing conclusion that she was a non-resident, that he has revisited his earlier satisfaction and now was satisfied that there was no reason why paragraph (a)(ii) of the definition of “resident” did not in any event make her a “resident”.

1. The primary judge subsequently noted that the Commissioner “must or must be taken to have reached and then revisited a conclusion” as to the applicability of the 183 day test by reference to the fulfilment of the requirements of the proviso. He then further inferred that the Commissioner’s conclusions as to the location of Ms Addy’s usual place of abode being in the United Kingdom must have been in error because the Full Court’s decision in *Harding* had not been handed down at the time of the assessments with the inference that the Commissioner had “acted on his hitherto erroneous conception of what constituted a “place of abode”. His Honour then said (at [62]):

On this basis and on the whole of the evidence in this proceeding, the Commissioner should have been satisfied that, during the 2017 income year, Ms Addy’s “usual place of abode” was in Australia and that she did intend to take up residence here. For reasons already given above, not only had Australia and more particularly the Earlwood house become her usual place of abode during that income year bit [sic] also that is where she intended to take up residence.

1. The Commissioner submitted the primary judge erred in this approach and, in particular, that some of the inferences accepted by the trial judge were not open.

## Did the Commissioner consider the operation of the 183 day test?

1. Doubtless, the steps of each party in these proceedings were well intended and motivated by a desire to bring before the Court a suitable framework in which to examine the operation of the Double Taxation Agreement. However, that framework, built as it was on massaged facts in relation to Ms Addy’s residency, was fragile and did not withstand the machinations of the parties once their interests diverged. The consequence is that the Court is asked to accord a legal characterisation to circumstances concerning the application of the 183 day test in the absence of any evidence as to when, how or on what material the Commissioner considered the relevant criteria. This is far from optimal.
2. Despite the uncertainty surrounding the manner in which the 183 day test was considered by the Commissioner, if at all, it does not follow that it did not have some operative effect in these unusual circumstances. First, as Ms Addy had been present in Australia for more than 183 days, it may be that if the Commissioner did not turn his mind to the proviso criteria such that the proviso was not enlivened, the test will operate according to its terms and render her a resident. Second, the circumstances may have the result of there being an inference that the Commissioner became relatively satisfied of the proviso criteria or that he is prevented from denying such was the case. The latter approach was, in some respects, adopted by the primary judge.

### The first possibility: The Commissioner did not consider whether the 183 day test applied

1. There is support in the circumstances of this case for the view, strongly advanced to the primary judge by Mr Lloyd SC for the Commissioner, that at no time did the Commissioner actually turn his mind to whether he was satisfied of either of the proviso criteria. There is certainly no direct evidence that he did and, given that it is his well-known practice when making decisions or reaching conclusions of this nature, to record his reasons in writing and provide them to the taxpayer, the absence of any such written indication that he considered the 183 day test is telling. Indeed, there is no written communication from the Commissioner or any internal note recording that such a consideration took place. The conclusion the Commissioner did not turn his mind to the criteria is reinforced by the identification in paragraph 30.3 of his Amended Appeal Statement dated 21 November 2018 that:

to grant leave [to the taxpayer to raise the 183 day test issue] would prejudice the respondent, since the respondent (in reliance on the limited scope of the objection) was not given an opportunity to reach a state of satisfaction about whether the applicant’s usual abode was in Australia or whether she intended to take up residence in Australia.

1. It should not be forgotten however that despite the Commissioner’s opposition to the conclusion that consideration was given to the operation of the proviso, he had nevertheless assessed Ms Addy in the further amended assessment as a resident taxpayer and that assertion remained in his appeal statement. Mr Lloyd SC submitted that the Commissioner had found Ms Addy was a resident under the ordinary concepts, but that was mere speculation.
2. On the material before the Court it is likely that, for the purposes of the original assessment and the amended assessment, the Commissioner had merely accepted the assertions in Ms Addy’s return that she was a non-resident for tax purposes and at no time did he or anyone else turn their mind to the question of whether she was a resident under the 183 day test. That is not an unusual proposition given the self-assessment regime which operates in Australia.
3. Undoubtedly, the context in which the Commissioner undertook the further amended assessment was unusual in that those acting for Ms Addy and for the Commissioner were concerned to identify an appropriate test case vehicle. That would require identifying a person who was a British national who had been in Australia on a visa of a temporary nature, had earned income, and had become an Australian tax resident. Ms Addy’s circumstances had potential as a suitable vehicle given her presence at the Earlwood house for an extended period. This may have prompted the Commissioner to advise in his email of 11 December 2017, that Ms Addy “has been deemed a **resident for tax purposes**”. The emphasis was included in the Commissioner’s email. The qualified nature of that comment is suggestive that the Commissioner was prepared to accept at face value, and without further or deeper consideration, the assertion made by Ms Addy in her objection that she was a resident. That evident lack of conviction is made more apparent by the letter of 5 November 2018 in which the Commissioner asserted that *if* leave to raise the 183 day test was given he would submit that Ms Addy was *not* a resident.
4. Whilst it may have been expedient for the purposes of the proposed test case for the parties to postulate Ms Addy as a resident despite any strong belief as to the accuracy of that assumption, it is a practice which ought not to be encouraged. By engaging in such conduct the parties run the risk of advancing for determination a case which may be seen to be no more than hypothetical and one which the Court will refuse to consider. If a court does conclude that it is being asked to provide an advisory opinion based on hypothetical facts, it is entitled to make its determination based only on the facts which are supported by evidence or to refuse to consider the issues advanced by the parties because they simply do not arise.
5. Here, however, the conclusion that the Commissioner did not consider the 183 day test and, specifically did not turn his mind to the factual matters relevant to the proviso criteria seems likely but it does not render the resulting circumstance devoid of substance. In part, this is because the 183 day test operates regardless of the actions of the Commissioner. If a taxpayer is present in Australia for the required duration, *prima facie*, they will be an Australian tax resident. It is only the exclusory proviso which is dependent upon the Commissioner’s involvement. If he fails to consider the proviso in circumstances where he is not obliged to do so, the test operates according to its terms. If the Court accepts that at no time did the Commissioner consider the 183 day test, Ms Addy would nevertheless be a resident under that test as a consequence of the duration of her presence here.

### The second possibility: inferred or imputed states of satisfaction

1. The alternative approach, favoured by the primary judge, was to infer from the conclusions reached by the Commissioner in each of the three assessments, that he had turned his mind to the proviso criteria and formed a state of mind about them. This approach seeks to ascertain the legally logical inferences which flow from a presumed regularity in the making of the several assessments.
2. In relation to the original and amended assessments in which Ms Addy was identified as a non‑resident, the primary judge inferred that the Commissioner must have turned his mind to the 183 day test and have been satisfied, or be taken to have been satisfied, that her usual place of abode was outside Australia and that she had no intention to take up residence in Australia. Underlying that conclusion was Ms Addy’s presence in Australia for 183 days in the 2017 income year such that, in order for her to be regarded as a non-resident, the Commissioner must have concluded that she met none of the tests of residency in the definition and, in relation to the 183 day test, that he was not satisfied the proviso criteria were met.

### The parties’ submissions

1. Mr Hyde Page for Ms Addy submitted that the Court should adopt the trial judge’s approach in relation to the first two assessments and further should accept, as did the primary judge, that the Commissioner then revisited his views as to his state of satisfaction of the proviso criteria when undertaking the further amended assessment. He submitted that the Commissioner’s determination that Ms Addy was a resident carried with it the necessary inference that he was no longer satisfied that her usual place of abode was outside of Australia, or that she did not intend to take up residence in Australia, or both.
2. An anomaly in Mr Hyde Page’s submission involved his assertion as to the effect of a determination that a person was a resident under the 183 day test. He submitted that if Ms Addy was a resident under the 183 day test she was, effectively, deemed to be a resident for the whole of the income year. However, the Commissioner’s further amended assessment was founded upon Ms Addy being a resident for only 11 months, having ceased to reside in Australia on 1 May 2017. In reliance on this Mr Lloyd SC for the Commissioner submitted that, on Ms Addy’s view of the case, the only inference which could be drawn from the further amended assessment was that the Commissioner had determined that Ms Addy was a resident under the ordinary concepts. Whilst there is some force to that, it is not necessary to deal with this issue because, as appears later in these reasons in relation to the cross-claim, it ought not to be accepted that the 183 day test has the effect suggested by Mr Hyde Page.
3. Mr Lloyd SC submitted that this Court should accept the inference that the Commissioner was satisfied of the proviso criteria for the purposes of the original and amended assessments. Indeed, he submitted that the Court must accept those inferences. That, of course, is not consistent with the submissions made below that the Commissioner had not turned his mind to such matters. That aside, he also submitted that no inference could be drawn from the identification in the further amended assessment that Ms Addy was a resident to the effect the Commissioner had revised his view as to the proviso in the 183 day test. It was submitted that there was no evidence that the Commissioner changed his mind about those matters and he may have merely reached the view that Ms Addy was a resident under the ordinary concepts test. That submission necessitates the conclusion that a person could be an Australian tax resident under the ordinary concepts test, having the necessary intention to live here and make it their home which that entails, but, even if they were present in Australia for more than half of the income year, they may not satisfy the 183 day test because they did not intend to “take up residence in Australia”. It also requires acceptance of the proposition that a person who is a resident of Australia has their usual place of abode outside of it. Unfortunately, very little was submitted by either party about these propositions, both of which need to be considered.

### Can or should the inferences be drawn?

1. As indicated, both parties submitted that as the first two assessments proceeded on the basis that Ms Addy was a non-resident, it must be inferred that the Commissioner turned his mind to all relevant tests and concluded that she was not a resident under any of them, including the 183 day test. The presumption underlying that is that if Ms Addy satisfied any of the several tests of residency she would be so regarded for tax purposes. Therefore, as the Commissioner determined that she was a non-resident, it must have been because he had considered and discounted each test. Whilst there is force in the parties’ submissions on this point, perhaps the correct interpretation is that where the Commissioner intentionally issues an assessment, made under the self-assessment regime or otherwise, and a necessary precondition to it is the exercise of power or the formation of an opinion by the Commissioner, as between the taxpayer and the Commissioner, the latter is taken to have exercised the power or formed the relevant opinion. However, there may be some tension between that proposition and the general rule which prevents estoppel’s being raised in relation to statutory obligations: *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610. Ultimately, because the issue was not joined in relation to the first two assessments which are not directly in issue and, for reasons which follow, it is not necessary to finally decide the question, it can be accepted that the Commissioner can be taken to have been satisfied of the proviso criteria of the 183 day test in relation to the first two assessments.
2. Greater difficulty arises in relation to what inferences or imputations might arise in relation to the further amended assessment in which the Commissioner “deemed” Ms Addy a resident. Mr Lloyd SC submitted that in concluding that Ms Addy was a resident, there was no requirement for the Commissioner to consider each of the definitional tests such that no necessary inference arose that the Commissioner turned his mind to the proviso criteria of the 183 day test. This should be accepted. Unlike concluding the taxpayer is a non-resident, in determining that a person *is* a resident the Commissioner need not consider each of the tests. Only one needs to be satisfied. Further, the mere fact that a person is a resident within the ordinary concept test does not carry with it the correlative conclusion that they must be a resident under any other test. Indeed, the ground covered by the ordinary concept test and the 183 day test are separate and it is difficult to see there could be any overlap. In particular, the proviso criterion in the 183 day test that, “the person does not intend to take up residency in Australia” cannot be applied to a person who is a resident by ordinary concepts. Any such person cannot have that intention because they have already previously formed it and acted upon it.
3. It follows that the Commissioner’s conclusion in the further amended assessment that Ms Addy was a resident did not carry with it any legally logical imputation that he had turned his mind to the proviso criteria and concluded that either were not satisfied.

### The consequence of there being no consideration of the 183 day test for the purposes of the further amended assessment

1. Mr Lloyd SC for the Commissioner submitted that the consequence of the above was that, despite Ms Addy having been in Australia for more than half the year, she was nevertheless not a resident under the 183 day test for the purposes of the further amended assessment. This was because, for the purposes of the earlier assessments, the Commissioner had previously been satisfied that Ms Addy’s usual place of abode was outside of Australia and that she did not intend to take up residency here. It was submitted that those inferred earlier states of mind remained latent and carried through and attached to the circumstances confronting the Commissioner when the further amended assessment was made.
2. With respect, these submissions were an attempt to “build castles in the air” and ought to be rejected. They pay no attention to the process engaged in by the Commissioner for the purposes of making the further amended assessment. Prior to issuing it on 20 December 2017, the Commissioner had been required to turn his mind to the question of whether Ms Addy was, as he had previously determined, an Australian tax resident. In doing so he was required to consider the relevant information available to him at that time. It is more than likely, indeed it is probable, that the circumstances known to the Commissioner surrounding Ms Addy’s residency had changed since 13 September 2017 when the amended assessment had issued. In fact, it was suggested by Mr Lloyd SC that additional information had come to light to alter the Commissioner’s view of Ms Addy’s residency, although there was no identification of its nature. That there was a change of circumstance is also supported by the Commissioner’s altered view of her status. Whatever may have been the circumstances before him which supported his satisfaction of the proviso criteria in September 2017, it is not possible to assume that they remained constant for the purposes of the further amended assessment. It also cannot be doubted that the issue of Ms Addy’s status as a resident was a relevant issue for the purposes of the further amended assessment. The making of that last assessment necessitated a consideration of the known material as at that time, not reliance on a state of mind formed at an earlier point in time on what must have been different information. Necessarily, any prior state of mind as to the proviso criteria had lapsed or expired, or was irrelevant to the evaluative task which the Commissioner was required to undertake.
3. In the absence of the Commissioner turning his mind to the question of the proviso criteria for the purposes of the further amended assessment, the only conclusion which can be reached is that Ms Addy was a resident pursuant to the 183 day test. Her presence in Australia for the requisite period was undoubted and, as the requirements of the proviso were not fulfilled, she satisfied the test of residency under that test.
4. Mr Lloyd SC sought to counter the above conclusion by submitting that the elements of the 183 day test had to be applied holistically, such that if the Commissioner does not turn his mind to the issues in the proviso, the test was redundant. With respect, such an argument must be rejected. There is nothing in the test to suggest that it cannot apply if the Commissioner omits to consider it. It is self-evident that it initially operates at a factual level. If a person is present in Australia for 183 days they will be an Australian tax resident unless a further fact exists, being that the Commissioner is satisfied of the two proviso criteria. Certainly, in the absence of evidence that a person was present in Australia for the required period, the definition will have no work to do. Nevertheless, where the facts before the Commissioner or before the Court on appeal are only that of the person’s presence in Australia for the required period and there is no evidence of the fact of the Commissioner’s satisfaction, only one conclusion is available.

## Ms Addy was a resident under the 183 day test

1. It follows that the Commissioner’s identification in the further amended assessment of Ms Addy as a resident was not incorrect to the extent to which it was based upon the 183 day test. This arises as a consequence of the Commissioner’s omission to turn his mind to the proviso criteria in circumstances where Ms Addy had been in Australia for more than half of the 2017 income year. It does not arise as a result of the Commissioner revising his opinion as to the proviso criteria. It is not possible, through either inference or imputation, to conclude that occurred.
2. It follows that the Commissioner has not made out Ground 2 of the appeal.

# Ground 3: Can the court substitute its state of satisfaction for that of the Commissioner?

1. The primary judge concluded the Commissioner’s inferred state of satisfaction as to the proviso criteria had been erroneously reached, and that he was entitled to form his own opinion as to whether the matters in the proviso criteria existed. In other words he concluded the definition would operate on his, as opposed to the Commissioner’s, state of mind. His Honour, in reliance on the material which underpinned his conclusion that Ms Addy was a resident under the ordinary concepts test, then determined that Ms Addy’s “usual place of abode” was in Australia and that she did have an intention of residing here with the result that the proviso criteria were not met and the proviso did not apply. Mr Lloyd SC submitted that his Honour erred in this approach and that a court is not entitled to substitute its own opinions for that which the legislature has expressly reposed in the Commissioner. Mr Hyde Page for Ms Addy submitted that such a course was open to the court. This was the substance of the third ground of appeal.

## Reviewing the Commissioner’s state of satisfaction

1. The primary judge’s conclusion (at [62]) that once it had been shown that the Commissioner’s state of satisfaction had been affected by a vitiating error, it was “open to the Court to reach its own conclusion” was apparently founded upon his Honour’s view of the decision in *Kolotex Pty Ltd v Commissioner of Taxation* (1975) 132 CLR 535(*Kolotex*), albeit that decision was not referenced in his Honour’s reasons. The parties’ submissions as to the scope and effect of that decision consumed a significant portion of the appeal and it is necessary to consider them at length.

## Was the Commissioner’s satisfaction vitiated by error?

1. The proposition that *Kolotex* permits the Court to substitute its own conclusion as to a matter vested in the subjective consideration of the Commissioner, presupposes a vitiating error has invalidated the state of mind relied in question. In order to understand the scope of the court’s power which is said to flow from *Kolotex*, it is necessary to identify the gateway through which a litigant must pass before becoming entitled to seek such relief. In other words, what kind of error will vitiate a state of mind formed by the Commissioner which operates as a precondition to the operation of a section or the exercise of a power?

### Grounds on which a subjective jurisdictional fact might be vitiated

1. Where the operation of a provision or the exercise of a power is conditioned upon the formation of a state of mind by the Executive as to the existence of a matter, that state of mind cannot be reviewed merely because a court believes it to be wrong or may not have reached the same conclusion. The grounds on which the state of mind might be invalidated are limited. Indeed, it is a well-established drafting technique so as to limit curial review to incorporate a subjective element as a condition to the operation of a provision or to the enlivening of a power (usually, in the form of a state of mind to be held by the repository of the power): *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385, 403 and acknowledged by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [130] (*Eshetu*) and repeated by Gummow J with McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1175 [54] (*S20/2002*); see also the comments of Barwick CJ in *Kolotex*,541. On review, the courts’ role is not to ascertain whether the matter in respect of which the identified person is required to form an opinion actually existed, but rather whether the person had formed the required state of mind as to its existence.
2. The development of the principles on which such subjective facts will be reviewed by courts in Australia might be traced to the observations of Latham CJ in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 and later the decision of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 (*Avon Downs*), 360. That said, Dixon J’s statement of principle undoubtedly relied heavily upon the authorities of *Minister of National Revenue v Wrights’ Canadian Ropes Ltd* [1947] AC 109, 122 – 123; *Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621 (*Metropolitan Gas*), 631 – 632; *Perpetual Executors Trustees and Agency Co (WA) Ltd (John Turnbull Trust) v Federal Commissioner of Taxation* (1935) 3 ATD 132 and *Sharp v Wakefield* [1891] AC 173, 179. In more recent years these principles have been refined, principally by Gummow J in a number of migration cases: *Eshetu, S20/2002, Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 (*SGLB*), 998 [38] and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (*SZMDS*), 624 - 625 [38] – [39].
3. In *Avon Downs* at 360, Dixon J referred to a number of circumstances which might vitiate a state of satisfaction on which the operation of a legislative provision was conditioned. They were where the repository of power does not address the correct statutory question, where the state of mind is affected by a mistake of law, where an extraneous reason is taken into consideration, or where there has been a failure to consider a relevant factor which would affect the determination. To these may be added grounds centred upon defective fact finding or reasoning as are referred to in *Eshetu, S20/2002, SGLB* and *SZMDS.* The several grounds of review as they have developed have recently been discussed at length in other decisions: *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681 (*EHF17*) and *Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation (No 5)* [2019] FCA 2073 (*Fastbet (No 5)*).

### The ground of review relied upon by the learned primary judge

1. The nature of the error which the learned primary judge inferred had occurred in the formation of the Commissioner’s satisfaction that the proviso criteria of the 183 day test had or had not been met is not immediately apparent. The statement by his Honour, “that it is inferentially likely that the Commissioner acted on his hitherto erroneous conception of what constituted a “place of abode””, suggests an error of law but the identification of Ms Addy’s usual place of abode was one of fact. Her intentions as to where she would reside are also factual issues. It has been well established that whether a person is resident in a particular place is a question of fact: *Miller*, 101 *per* Rich J, 103 *per* Dixon J. The same conclusion must be drawn in relation to the question of where is a person’s usual place of abode. Outside of those exceptional cases where the evidence is all the one way: *Miller*, 101 *per* Rich J; the conclusion on these issues is a question of degree and one of fact only. In the ordinary course, a factual error of this nature does not vitiate the state of mind on which a provision is conditioned.
2. On the other hand, the cases referred to above identify that a court might review a subjective jurisdictional fact on the basis of illogical or irrational fact finding or where a finding or inference of fact is not founded upon probative evidence: see the discussions in *EHF17*, [59] – [92] and *Fastbet (No 5)*,[31] – [47]. However, the scope of each of these grounds is narrow and it would have to be established that the finding of fact was one which no person in the position of the Commissioner acting rationally or logically could have reached, or possibly that no person acting logically or rationally could have adopted the reasoning process used by the Commissioner to reach that finding of fact: *SZMDS*, 648 [131] *per* Crennan and Bell JJ. No such finding was made by the primary judge.
3. An obvious difficulty in this case is the absence of any express consideration by the Commissioner in the course of making any of the assessments of the question of Ms Addy’s “usual place of abode”. At best, it might be inferred that he turned his mind to that issue in relation to the original assessment and the amended assessment, but no such inference operates in relation to the further amended assessment, being the one which is before the Court. It was an error to conclude otherwise.
4. With respect to the learned primary judge, there was no sufficient basis to conclude that the Commissioner’s inferred state of mind as to the proviso criteria suffered from a vitiating error. Those criteria were factual matters not involving questions of law and nothing has been identified to suggest the Commissioner’s inferred state of mind was affected as a consequence of delinquent fact finding.
5. It is necessary to mention that Mr Lloyd SC for the Commissioner submitted that the primary judge had misapplied the decision in *Harding* in concluding that the Commissioner, inferentially, erred when considering the proviso criteria. Whilst there are good reasons for accepting that submission, given the above conclusion there is no need to reach any final conclusion on it.

## Can the court substitute its satisfaction for that of the Commissioner?

1. In any event, even if the Commissioner’s state of satisfaction had been vitiated, it was not open — for the reasons that follow — for the primary judge to substitute his opinion for that of the Commissioner.

### An overview of the parties’ submissions

1. Although both parties made extensive submissions on the scope of the decision in *Kolotex*, it is only necessary at this point to summarise their general effect.
2. Mr Hyde Page for Ms Addy submitted that the course adopted by the primary judge of substituting his opinion for that of the Commissioner was open either:
	1. on the authority of *Kolotex*; and/or
	2. under Part IVC of the TAA and the *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*).
3. In relation to the first proposition Mr Hyde Page cited several authorities (discussed below) which he submitted supported the view that *Kolotex* gives the court “the option” of substituting its own decision if the Commissioner’s subjective satisfaction has been set aside on *Avon Downs* grounds. However, when pressed, Mr Hyde Page could not identify any principled rationale as to why that might be so when the legislation has specifically entrusted the function of being satisfied to the Commissioner and nor could he identify any supporting principle flowing from the reasons in *Kolotex.* The effect of his submission was that, properly construed, the decision in *Kolotex* stands for the proposition for which he contended despite there being no underlying rationale exposed by the members of the High Court. He also referred to a number of single judge authorities and two appellate authorities which he claimed supported his submission.
4. Mr Lloyd SC for the Commissioner submitted that the proviso in the 183 day test operated on the Commissioner being satisfied or not satisfied of the criteria and it was not open to the Court to substitute its own opinion on those matters. He further submitted that *Kolotex* does not support the proposition that once an *Avon Downs* error is established, a court can generally determine for itself whether a criterion dependent on the Commissioner’s satisfaction should be found to exist. His alternative submission was that there was no *ratio* to be found in *Kolotex* on this issue. The Commissioner submitted on either view the primary judge erred in holding that the Court could do anything other than remit the matter to the Commissioner for reconsideration.

### Consideration of the Kolotex issue

1. The submissions of both parties in this regard relied upon generalised approaches to statutory provisions the operation of which are conditioned upon the formation of a state of mind. Whilst it is true that principles have developed in relation to statutory provisions *in pari materia*, it is always necessary to keep in mind the words which the parliament has used. In this respect it is appropriate to repeat the observation of Brennan J in *Foley v Padley* (1984) 154 CLR 349 at 364:

It is hard to overstate the importance of what Knox CJ., Starke and Dixon JJ. said in *Country Roads Board v. Neale Ads Pty. Ltd.*:

“The whole controversy illustrates the danger which attends the formulation of principles and doctrines and all reasoning *a priori* in matters which in the end are governed by the meaning of the language in which the Legislature has expressed its will.”

(Footnotes omitted).

1. In respect of the 183 day test, the Parliament has expressly provided that the proviso is to operate on the Commissioner reaching a state of satisfaction as to the identified criteria. That, of itself, is a clear statement as to how the provision is to operate and is not unique: see for example ITAA 1936 ss 23AF (4) and (11), 23G(3), 25A(11), 26AF(1)(c), 26AFA(1)(c), 26AG(6)(b), 26BB(3), 52(2)(b), 52A(3)(f); TAA ss 8AAG, 14T, 14U, 15B, Sch 1, ss 16-142, 16-148, 18-80, 18-85, 18-135, 133-65, 135-10, 155-35. Necessarily, the Commissioner’s satisfaction is to be formed according to the process of administrative fact finding which includes considering the material which he acquires and weighing and assessing it in a manner which may permit a variety of views: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 282 *per* Brennan CJ, Toohey, McHugh and Gummow JJ; *Eshetu*, 656 [143] *per* Gummow J; *EHF17* [87]. There is nothing in the wording of the 183 day test to suggest that the state of satisfaction was to be formed only on the basis of evidence admissible in court in adversarial proceedings where the facts in issue are determined on the balance of probabilities.

### The historical context in which Kolotex was decided

1. Prior to *Kolotex*, it was seemingly well established that, where the operation of a statutory provision is conditioned upon the state of mind of the Executive or one of its administrative officers as to the existence of particular matters, it was not for the Court on a statutory appeal to substitute its own opinion if it concluded the Executive’s state of mind was invalidly formed: see, eg, *Thomson v Federal Commissioner of Taxation* (1923) 33 CLR 73, 74 (the Court could not substitute its opinion for that of the Commissioner as to whether assets had been transferred); *Moreau v Federal Commissioner of Taxation* (1926) 39 CLR 65, 68 (the Commissioner’s conclusion that there had been fraud or evasion was for him alone); *Robinson v Federal Commissioner of Taxation* (1927) 39 CLR 297, 299 (where the definition of “trading stock” depended in part on an opinion formed by the Commissioner, the Court could not substitute its opinion for that of the Commissioner); *Metropolitan Gas*, 632 (where it was for the Commissioner and not the court to be satisfied whether benefits to employees under a superannuation trust were fully secured); *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23, 37 (again, it was a matter of the Commissioner’s opinion as to fraud or evasion); *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 (*Giris*), 374 *per* Barwick CJ, 376 *per* McTiernan J, 384 – 385 *per* Windeyer J (where the Court would not substitute its opinion for that of the Commissioner as to whether the application of a tax on trust income was unreasonable). To these can be added *Avon Downs* itself where at 360 Dixon J observed that it was for the Commissioner and not he to be satisfied of the matter of opinion on which the clause operated.
2. Of particular importance in the present discussion is the decision in *MacCormick v Federal Commissioner of Taxation* (1945) 71 CLR 283 (*MacCormick*). There, the appellant claimed that a marriage settlement made between him and his wife was exempt from gift duty under s 14 of the *Gift Duty Assessment Act 1941 – 1942* (Cth). That section provided that duty was not payable in respect of any gift which the Commissioner was satisfied was made for the maintenance, education or apprenticeship of any person, and was not excessive in amount. The appellant’s claim was rejected by the Commissioner who applied a general rule that a gift of capital, as distinct from a gift of income, could not fall within the exemption contained in s 14. In separate judgments, Latham CJ, Rich, Dixon, and McTiernan JJ concluded that such a rule could not be justified, with the consequence that the Commissioner did not reach his state of satisfaction under s 14 in accordance with law. The Court considered whether it could decide for itself whether the conditions of which the Commissioner must be satisfied under s 14 had been fulfilled. Consistently with the authorities referred to above, it unanimously answered that question in the negative. Latham CJ observed, at 299:

This Court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and that upon an appeal the Court cannot substitute the discretion or opinion of the Court for that of the Commissioner. But in those cases the Court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law: See *Moreau v. Federal Commissioner of Taxation*; *Australasian Scale Co. Ltd. v. Commissioner of Taxes (Q.); Commissioner of Taxes (Q.) v Ford Motor Co. of Australia Pty. Ltd*. It has uniformly been held that upon an appeal under Acts the provisions of which are indistinguishable in relevant particulars from the present Act it is not for the Court to substitute its opinion for that of the Commissioner.

(Footnotes omitted).

Rich J similarly stated at 300:

[An] express or constructive failure of the officer to give a decision would not justify a court in assuming to take the matter out of his hands and make the decision for him…. [T]he fact of the Commissioner’s satisfaction is intended to be an essential ingredient in the existence of a legal right to exemption. Hence, the most that a court could do would be to treat the matter as still undecided, and require him to proceed to decide it according to law.

Dixon J (with McTiernan J agreeing) similarly noted at 307:

This Court has, I think, adopted the general view, in dealing with Federal legislation *in* *pari materia*, that references to the opinion, judgment, discretion and satisfaction of the Commissioner are intended to make his decision the criterion of the specific matter indicated, subject usually to reconsideration by a Board of Review. The result is that in such cases the Court on appeal does not substitute its decision for that of the Commissioner, but considers only whether he has proceeded according to law and has exercised his judgment or discretion unaffected by extraneous or irrelevant considerations or any misconception or misapplication of the law.

1. However, in that case the assessment was not remitted to the Commissioner as the majority (Latham CJ, Dixon and McTiernan JJ) were of the opinion that the Commissioner could not, upon a proper understanding of the Act, have been satisfied as a matter of law that the settlement was made for or towards the maintenance, education or apprenticeship of any person (at 298 – 299). It is important to note that as the conclusion reached by the Commissioner (albeit on erroneous grounds) was that he was not satisfied of the requisite matters, the Court did not need to remit the proceedings to him to give effect to its decision. Rich J disagreed, concluding that the gift was not “one of those extreme cases in which a court could be justified in holding that, on the material before the officer … only one decision is open to him” (at 301), and opined that the decision would, in the ordinary course, be remitted (at 303).
2. Subsequent to *MacCormick*, the general rule remained that where a criterion for the operation of a provision depended upon the formation of a state of mind by the Commissioner and that state of mind was found by a court to have been vitiated by *Avon Downs* error, the ordinary course was to remit the matter to the Commissioner to re-consider according to law. As Stephen J observed in *Duggan v Federal Commissioner of Taxation* (1972) 129 CLR 365 (*Duggan*) at 368 to 369:

It is not the function of this Court to determine for itself, having regard to all the circumstances surrounding the creation and subsequent administration of the settlements, whether or not it is unreasonable that s. 99A should be applied to these trust estates. So long as it is established, as it is in this case, that income assessed to tax under s. 99A is not income to which s. 97, 98, 99A(1) or 99A(5) applies, the only occasion for intervention by this Court will be if it appears from the evidence that the Commissioner has failed in the duty, cast upon him by s. 99A(2), properly to consider and come to a conclusion concerning the reasonableness or otherwise of the application of s. 99A. In that event the assessment will be set aside and it will then be for the Commissioner to assess in accordance with law.

(Footnotes omitted).

1. The general rule was qualified only by the narrow exception expounded in *MacCormick* which permitted the court to refrain from remitting a matter in “extreme cases” where the Commissioner had only one decision open to him *as a matter of law* being the decision *which was in fact made*. Viewed differently, although the state of mind was affected by error, it was an error, the absence of which could not give rise to the possibility of a different outcome and, as such, was not “material”: cf *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*Hossain*); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445.

### The decision in Kolotex

1. *Kolotex* involved a taxpayer company’s entitlement to deductions for losses which depended on the Commissioner’s satisfaction as to certain matters under s 80A and 80C of the ITAA 1936. Although the Commissioner was ultimately not satisfied of those matters, he had erred in reaching that conclusion because he believed the taxpayer company had made a request under s 80D for the application of that section, rather than under ss 80A and 80C. The taxpayer company had not in fact made such a request, and it was accepted by both parties that the Commissioner was wrong in thinking that s 80D applied. However, after the issue of the assessment and before the hearing of the appeal, the Commissioner discovered alternative and additional grounds upon which to justify his failure to be satisfied. He sought to support his assessment by reference to these considerations despite not having taken them into account at the time when the assessment was made. Before the primary judge, Mason J, the Commissioner submitted that as he had not reached the required state of satisfaction, the taxpayer’s entitlement to a deduction under ss 80A and 80C did not exist and there was no basis in law by which the state of satisfaction could exist.
2. On appeal to the Full Court, the majority (Gibbs and Stephen JJ) upheld the decision of Mason J, that the Commissioner could not lawfully have reached the state of satisfaction required by the relevant sections.
3. Gibbs J identified that none of the sections in question made the entitlement to a deduction dependent upon the existence of a state of facts or of mixed law and fact, determined by the court to which an appeal is brought. The entitlement would only arise if the Commissioner was satisfied of the stipulated matters. His Honour accepted that the Commissioner’s state of mind may be vitiated by reason of one of the grounds identified in *Avon Downs* and that consideration of that question ought to occur on the material before the Commissioner rather than include any additional material which may be before the Court. His Honour went on to say at 568:

However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court.

1. This paragraph is important in the context of the present discussion and is often relied upon to support the existence of a general principle that the Court may form for itself the satisfaction required of the Commissioner under the Act. However, such reliance is misplaced. Gibbs J was not suggesting that the Court was entitled to substitute its own state of satisfaction for that of the Commissioner. In the first instance his Honour was identifying that once an error is shown to exist, it is then appropriate to consider all of the available material relating to the factual matter of which the Commissioner would need to be satisfied if the matter were referred back to him. That material would be relevant to establishing that the assessment was excessive such that there would be utility in remitting the matter to the Commissioner. It would include that which had become available since the making of the assessment as, on remittal, the Commissioner would be required to reassess his opinions on the then available material. Far from suggesting that the Court is able to substitute its satisfaction for the Commissioner’s, this is indicative that what is relevant is the Commissioner’s opinion and not the court’s. The second point is related to and supportive of the first. The last sentence of the above quote, indicates that the approach which his Honour identified was agreed upon by the parties. They had apparently accepted that the Court should decide whether, *if the matter was remitted to the Commissioner*, he could reach the required state of satisfaction under s 80A. As the discussion of Stephen J’s reasons disclose, this was because the Commissioner had advanced an alternative ground which he had not previously considered, and which he claimed would prevent him from reaching the state of satisfaction. It was this circumstance which Gibbs J was considering and not any thought of the Court substituting its opinion for the Commissioner’s. That such was the case is apparent from his Honour’s conclusion when, after considering all of the available material, he said at 574 to 575:

For the reasons I have given, if, in accordance with the principles stated in *Avon Downs Pty. Ltd. v. Federal Commissioner of Taxation*, the Commissioner’s conclusion should be reviewed, upon a reconsideration of the matter the same conclusion must be reached, although for different reasons. The Commissioner was not satisfied, and could not properly be satisfied, of the matters stated in s. 80A in respect of the claim to deduct the losses incurred in the years 1963 to 1966, or of the matters stated in s. 80C in respect of the claim to deduct the losses incurred in the years 1960 to 1962. He therefore correctly refused to allow any deduction.

I would dismiss the appeal.

(Footnotes omitted).

1. The conclusion of Gibbs J was *in effect* that whilst there was an error in the path to the formation of the state of satisfaction, the error did not vitiate that state of satisfaction because it was not material in the sense that no other state of mind could have been reached or could be reached if the matter was returned to the Commissioner. For that reason the appeal was dismissed.
2. The decision of Stephen J has also been relied upon as supporting the contention that the Court may substitute its own opinion for that of the Commissioner. Although his Honour’s reasons do appear to give some support for that proposition, they are not unequivocal. In the first instance, his Honour took care to contextualise his consideration of the issues before the Court. He identified (at 576) that in the usual course of a taxation appeal where the operation of the taxation legislation turned on the existence of the Commissioner’s state of satisfaction which was found to be erroneously formed and the contrary conclusion was the only one open, the assessment would be remitted to the Commissioner for determination according to law. However, as his Honour noted the circumstances of this case were significantly different because, after the issue of the assessment and prior to the hearing of the appeal, the Commissioner advanced alternative grounds as to why, as a matter of law, he would not be able to reach the required state of satisfaction. Consequently, an issue in the case was what ought to be the result where an alternative and apparently conclusive ground for the state of satisfaction, albeit not originally considered, was available to the Commissioner. It was in this context his Honour stated that the first step was to detect an *Avon Downs* error in the Commissioner’s initial state of satisfaction. The second step was identified in the following paragraph at 576 – 577:

But having entered upon a review of the Commissioner’s conclusion the court must form its own opinion of what should have been the Commissioner’s conclusion and must do so unaffected not only by those errors which led the Commissioner to his original conclusion unfavourable to the taxpayer but also unaffected by any other errors or oversights, whether or not favourable to the taxpayer, which may have affected the Commissioner’s original conclusion. The court will therefore necessarily have to consider any new grounds urged by the Commissioner as justifying the assessment, not because they may support the Commissioner’s already vitiated state of dissatisfaction of mind, but rather because they **may assist the court in determining whether either a contrary conclusion should be substituted for the Commissioner’s original failure to be satisfied**, founded as it was upon reviewable error, the appeal therefore being allowed, or whether, on the contrary, the assessment should stand unaffected and the appeal be dismissed because, once all errors and oversights are rectified, the case is not seen to be one in which the Commissioner should have been satisfied in terms of the Act.

(Emphasis added).

1. His Honour’s subsequent observations at 578 to 579 were to a not dissimilar effect:

It is with the discharge by the Commissioner “of his exact function according to law” that the court is concerned - per Dixon J. in the *Avon Downs Case*, and see *Federal Commissioner of Taxation v. Brian Hatch Timber Co. (Sales) Pty. Ltd*., per Walsh J., per Menzies J. and per Owen J.. Consideration is, in the first instance, to be confined to material which was before the Commissioner when he made his assessment, as is made plain by the judgments in this latter case; but once it is established that the Commissioner has, in this case through error of law, failed properly to perform his statutory function the court will then determine what state of mind concerning the matters in s. 80A(1) and s. 80C(1) will amount to a discharge of that function and will do so having regard to the facts then before it, viewed in the light of what the court regards as the true effect of the legislation.

(Footnotes omitted).

1. The correct interpretation of his Honour’s reasons requires the context in which the decision was made to be kept steadily in mind. It was an appeal from Mason J at first instance who had determined that the statutory requirements regulating the availability of the deductions which the taxpayer claimed could not, *as a matter of law*, be satisfied. His Honour had concluded the new grounds relied upon by the Commissioner were a complete answer to the taxpayer’s claims such that it was not able to demonstrate that the assessment was excessive and the appeal was dismissed. On appeal to the Full Bench one of the issues raised was the relevance of the new ground relied upon by the Commissioner. In this setting, Stephen J’s reasons can be taken as merely indicating that in cases where the Commissioner advances an alternative reason to support the lack of satisfaction, the evidence in support of it needs to be examined to ascertain whether, the case is not one where the Commissioner could have been satisfied. To put it another way, the evidence needs to be considered to assess whether if the matter was remitted to the Commissioner, there existed the possibility of a different outcome.
2. There is little doubt that his Honour’s reference to the court “determining whether … a contrary conclusion should be substituted for the Commissioner’s original failure to be satisfied”, might tend towards a suggestion that it is open to the Court to substitute its state of satisfaction for that of the Commissioner. However, given the context referred to above, it might more properly be taken as indicating that if the Court concluded that a different conclusion should be substituted, the matter would be remitted to the Commissioner to reach that substitutive state of mind. The words used by his Honour neither necessarily or self-evidently have to be taken as implying that it is the Court’s conclusion which is to be substituted. Such a view is reinforced by his Honour’s earlier reference to the process of allowing an appeal and remitting the appeal to the Commissioner for further consideration.
3. Barwick CJ (albeit in dissent) at 541 observed that the conditioning of the provision’s operation on the Commissioner’s state of satisfaction had the undesirable consequence “of removing the processes of assessment to a significant extent from the objective scrutiny of the courts”. In this respect his Honour found at 541 to 542, that it was the Commissioner’s state of mind at the date of the assessment which was determinative and the court could not substitute its view for that of the Commissioner. He opined that the permissible extent of the court’s examination of the Commissioner’s state of mind was as indicated in *Avon Downs* at 360 *per* Sir Owen Dixon. The Chief Justice then stated at 542:

Quite clearly the court cannot in any event substitute its view of any of the matters as to which the Act says the Commissioner is to be satisfied. It can of course decide that because of established facts or because of legal considerations the Commissioner could not have failed to have been satisfied. But if he is satisfied, it matters not in my opinion that he ought not to have been satisfied.

1. In so concluding, his Honour was particularly cognisant that “the Commissioner’s satisfaction or lack of it… is made a critical element of the process of assessment” (at 541).
2. Mr Hyde Page submitted that the above remarks of Stephen J, and to a lesser extent of Gibbs J, are to the effect that, on an appeal from an assessment which was dependent upon the operation of a provision which, itself, was conditioned upon the Commissioner forming a particular state of mind, the Court may substitute its own state of mind for that of the Commissioner. However, even if that is the meaning to be taken from Stephen J’s reasons (which must be doubted), such a view was *obiter dictum* at best. The same can be said of the similar views of Gibbs J. Their Honours’ observations in this respect did not form any part of the essential reasoning of the Court: *Enever v The King* (1906) 3 CLR 969; *Magrath v Commonwealth* (1944) 69 CLR 156. On the view taken by the majority, the Commissioner was correct not to be satisfied of the matters which might have caused the proviso in s 80A(1) or 80C(1) to operate in the taxpayer’s favour. As a consequence no question of substituting any state of mind arose. Moreover, to the extent it was *obiter* it was not agreed to by other members of the Court such as to be “seriously considered obiter” uttered by a majority of the High Court: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.
3. A further difficulty with Mr Hyde Page’s proffered interpretation of Stephen J’s reasons is that it involves accepting that his Honour intended to overturn by the gentlest of side winds the long established principles referred to by the Court in *MacCormick* and to depart from his own reasons in *Duggan* delivered only two years and two months earlier, without mentioning either of them. Indeed, it would be also necessary to conclude that Stephen J intended to overrule those earlier authorities without providing any principled basis for doing so. With respect, it is most unlikely that his Honour’s reasons were given *per incuriam* and that is particularly so given that his references to *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 in the passage at 578 to 579 of his reasons which identify that the essential issue is whether the Commissioner has been satisfied of the relevant matter.
4. On the face of the reasons given by the majority in *Kolotex*, no discernible principle emerges that where a provision relevant to an assessment is conditioned upon the Commissioner’s state of mind, the court may substitute its own opinion or state of satisfaction where it has detected error in the Commissioner’s. The respondent’s submissions to the contrary must be rejected. The Court did not, and did not intend to, overturn its earlier decision in *MacCormick*, nor the long line of authorities preceding it which were to the same effect. In this respect it might be thought that the initial paragraph in the headnote of the Commonwealth Law Reports purporting to state the effect of the decision is apt to mislead. Whilst it may have been accurate in the sense that it was for the Court to ascertain whether the Commissioner could ever possibly be satisfied of the matters in issue, that is a far cry from suggesting that the Court held that it could substitute its own opinion for that of the Commissioner. If it were accepted that Stephen J’s decision supported the principle for which Ms Addy contends, it would be necessary to conclude that it would be inconsistent with established authority of the Court and *per incuriam*. Contrary to Mr Hyde Page’s submission the conclusions of his Honour were not supported by Gibbs J.
5. Mr Lloyd SC submitted that *Kolotex* stood for the proposition that the court may uphold a decision of the Commissioner, even if it was reached erroneously, if the only lawful result is consistent with the decision which was reached. If that submission was intended to mean that an error committed by the Commissioner does not vitiate a relevant state of mind if it was not “material” because, in the circumstances no other conclusion could lawfully be reached, then it should be accepted. Where the Parliament conditions the operation of a legislative provision exclusively on the state of mind of the Executive or a person in its administration, a state of mind purportedly formed for that purpose will be valid if it is not infected by a recognised ground of review: *Avon Downs; Eshetu*; *S20/2002*; *SGLB*; *SZMDS*. However, an apparent error of one of those recognised types will not invalidate the putative state of mind if it was not “material” in the sense that its omission would not have given rise to the possibility of a different outcome: *Fastbet (No 5)*, [188] to [191]; *SZMDS*. It is not self-evident that the Parliament intended, or should be taken as intending, that provisions of the type under consideration are not to have operative effect because an immaterial error has occurred in the formation of a state of mind on which their operation is conditioned.
6. It might further be observed that acceptance of Mr Hyde Page’s submissions would be productive of some dissonance between the *Avon Downs* principles and the decision in *Kolotex*. As mentioned, the errors which vitiate the state of mind on which a statutory provision or power is conditioned are of limited scope: *EHF17*, [65] – [70]; and it is well recognised that curial review of these subjective conditions is restricted when compared to review of an objective condition or objective jurisdictional fact: *Eshetu*, 651 [130] *per* Gummow J. The errors described in *Avon Downs* and those which have subsequently developed, define the limits of review and are intended to confine curial review to its appropriate boundary. This being so, it would be somewhat incongruent if the grounds for identifying an error are limited, but that the Court may then substitute its own state of mind free from any limitation. It might be considered to be unusual that a court could not invalidate a state of mind even if it vehemently disagreed with it but, once having found a vitiating error, may then substitute its own opinion as to whether the state of mind ought to have been formed.

### Authorities subsequent to Kolotex

#### Cases adopting a broad interpretation of Kolotex

1. Several decisions of this court have interpreted *Kolotex* as authority for a general proposition that, where an error of the kind described in *Avon Downs* is identified, the court may substitute its own state of satisfaction for that of the Commissioner: see, eg, *Risby Forest Industries Pty Ltd v Federal Commissioner of Taxation* (1988) 20 FCR 439, 453 *per* Lockhart J (“the Court may reach its own conclusion on the material before it without referring the matter back to the Commissioner”, although the point was not argued there and the parties had agreed that the Court take this approach); *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557, 586 *per* Drummond J (where his Honour referred to the court’s “special jurisdiction” to stand in the shoes of an administrative decision maker); *Mochkin v Commissioner of Taxation* (2002) ATC 4465, [84] *per* Ryan J (where his Honour paraphrased the first paragraph of the CLR headnote “where the Commissioner ha[s] failed to attain the requisite satisfaction because of some error, the court should reach its own conclusion… whether the Commissioner ought to have been satisfied”). In none of these cases was the true effect of *Kolotex* an issue for the court on which opposing submissions were received.
2. The broad view of the effect of *Kolotex* has also been adopted by the primary judge in a number of decisions: *Russell v Federal Commissioner of Taxation* (2009) 74 ATR 466, 505 [198] (“the Commissioner’s decision is exposed as one founded on premises which were wrong in law. It thus falls to the court to reach its own conclusion as to how the Commissioner ought to have exercised his remission discretion”); *Blues Pty Ltd v Deputy Commissioner of Taxation* [2012] FCA 320, [13] (“the appellate court may exercise its own discretion in substitution for… the Commissioner’s, if it has the materials for doing so”); *Harding*, 313 to 314; *Pike v Federal Commissioner of Taxation* [2019] FCA 2185, [83] (“it is presently open to the Court to reach its own conclusions on the whole of the evidence as to how the Commissioner should have been satisfied…”); *Stockton*,[44] (“it falls to me to decide how, on the whole of the evidence, the Commissioner ought to have been satisfied…”).
3. With the greatest respect to these authorities, they are based on an unfounded view of the scope of the decision in *Kolotex* and again, it does not appear that the issue was fully ventilated in the course of argument.

### Cases adopting a narrower interpretation of Kolotex

1. In *Ferris v Federal Commissioner of Taxation* (1988) 20 FCR 202 (*Ferris*), the Commissioner included in the taxpayer’s assessable income part of an amount paid to him as a retirement allowance by a company of which he was a director on the basis that the amount so included was a dividend paid out of profits. The ability to treat the amount so paid as a dividend only arose on the Commissioner forming the opinion that the amount was in excess of what was reasonable in the nature of a retirement allowance: s 109 of the ITAA 1936. In the course of the appeal from the disallowance of the taxpayer’s objection, the taxpayer invited the court to reconsider the correctness of the opinion formed by the Commissioner for the purposes of s 109. Davies J observed (at 212) that where the issue on appeal concerns the exercise of a discretion by the Commissioner, the function of the Court is limited to ascertaining whether, on the material which was or ought to have been before the Commissioner, an error of the nature referred to in *Avon Downs* had occurred. Although his Honour ascribed to this process the nomenclature of “judicial review”, it might more accurately be identified as “subjective jurisdictional fact review”: see *Eshetu*, *SZMDS*, *EHF17* and *Fastbet (No 5)*. Nevertheless, in relation to the application of the decision in *Kolotex* his Honour said at 216:

Mr D A Staff QC, with whom Mr K E Lindgren of counsel appeared for Mr Ferris, adduced evidence at the hearing additional to that which was before Miss Wong and her seniors when the decisions were made. Mr Staff submitted that the Court should set aside the assessment without remitting the matter for reconsideration and that on the evidence before the Court it should do so. Mr Staff referred to *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (supra) and *Henry Comber Pty Ltd v Commissioner of Taxation (Cth)* (supra). However, the Court would so act only if it were satisfied that the result contended for was the only one to which a decision maker, properly instructed and not acting unreasonably, could come. It is not for the Court itself to exercise the discretion which is conferred upon the Commissioner. The function of the Court is a function in the nature of judicial review. Unless the Court is satisfied that there is no room for the exercise of the subject discretion, the Court must remit the matter for reconsideration.

1. His Honour’s observations correctly focused on the existence of the Commissioner’s state of mind as the condition on which the provision operates. As his Honour’s discussion of *Kolotex* reveals, that decision supports the narrow proposition that a matter will not be remitted where error has been detected solely in those circumstances where the state of mind actually formed was the only one which the repository of power could have reached. In that sense the error is not material.
2. Recently, in *Harding* at 321 to 322 [18] – [20] a majority (Davies and Steward JJ) considered whether, on a Part IVC appeal in relation to the domicile test for residence, this Court might substitute its satisfaction that a person’s permanent place of abode was outside of Australia in lieu of that of the Commissioner. Their Honours succinctly identified that the role of the Court is concerned with whether the Commissioner’s state of mind complied with the statutory requirements; being in effect one which was devoid of vitiating errors of the *Avon Downs* type. They also identified that the question of whether the Parliament intended to vest the function of the formation of a state of mind on which a provision was conditioned exclusively in the Executive or one of its administrative officers was a matter of construction: *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 577. It was held that the proper construction of the domicile test for residence in s 6(a)(i) was that it was solely for the Commissioner and not for the Court, to be satisfied that the person’s permanent place of abode is outside Australia. Their Honours’ reasoning applies *mutatis mutandis* to the 183 day test and is entirely consistent with the established line of authorities of which *MacCormick* is an exemplar. Moreover, although the decision in *Kolotex* was not referred to in this part of their Honours’ reasons, it was mentioned in other places, and the conclusions reached eschew any suggestion of the broad interpretation of that case on which Ms Addy relies. With respect, their Honours’ identification of the relevant principle was entirely correct and there is no reason not to apply it in the present case.

### Other matters relating to the Kolotex issue

1. In *Harding,* Logan J proposed a rationale for the wide interpretation of *Kolotex*, founded on the well-established principle that the constitutional validity of a law with respect to taxation is dependent on a right of recourse to an exercise of the judicial power of the Commonwealth so as to prevent invalid arbitrary exaction: *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 40; *Giris* at 378–9; *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, [9] – [10]. His Honour opined that this feature, although not expressly referred to in *Kolotex,* explained why Gibbs J concluded at 568 that “it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court”. His Honour suggested at [4] that “the court’s so doing prevents arbitrary exaction by the Commissioner, who is an officer of the Executive”.
2. The Commissioner, by Mr Lloyd SC, submitted that this explanation of the decision in *Kolotex* is untenable and it overlooks the important distinction between an incontestable tax on the one hand, and a tax that is merely difficult to contest because it turns on the subjective satisfaction of the Commissioner, on the other. That submission ought to be accepted and is supported by the explication of Owen J in *Giris* at 388 to 389:

[There is a] distinction between a provision which purports to prevent a taxpayer from invoking the aid of the courts to determine whether or not his liability to tax has been lawfully and correctly assessed, and one which may, in some circumstances, make it difficult or impossible to exercise the right of appeal successfully because the facts necessary to success cannot be established. There is, I think, a line to be drawn between purporting to prevent appeal to the judicial power, on the one hand, and, on the other, making the application to a particular case of one taxing provision rather than another dependent upon the existence of a fact - in the present case the opinion of the Commissioner - which the taxpayer may be unable, for lack of evidence, to show was formed after taking into consideration inadmissible matters.

1. The High Court in that case unanimously concluded that the latter type of provision — the kind which was the subject of the court’s consideration in *Kolotex* — does not lead to constitutional invalidity. In any event, should a legislative provision allow for an arbitrary exaction by the Commissioner, the cure would be to strike down the provision as unconstitutional, not to give the court an un-legislated remedial power to re-make the decision according to its own state of satisfaction.
2. In the course of submissions, Mr Hyde Page referred the court to two appellate authorities: *Tourism Holdings Australia Pty Ltd v Commissioner of Taxation (NT)* (2005) 15 NTLR 80 (*Tourism Holdings*) and *Amway of Australia Pty Ltd v Federal Commonwealth of Australia* (1999) 41 ATR 443 (*Amway*); which he claimed supported the broad interpretation of the decision in *Kolotex.*  However, neither of those authorities lend any great support for the respondent’s argument.
3. The decision in *Amway* is of minimal assistance in this case. It only considered the possibility of the Court receiving new material after an error had been detected in the Commissioner’s assessment. In *Tourism Holdings*,the Full Court of the Northern Territory Supreme Court considered the nature of the statutory right of appeal from that Territory’s Commissioner of Taxes and, especially, the Court’s entitlement to receive material which was not before the Commissioner at the time of the assessment. A consideration of the Court’s reasons discloses that the issue of whether the Court might stand in the shoes of the Commissioner and substitute its opinion or state of mind for that of the Commissioner did not squarely arise. Although Martin CJ accurately identified that the observations of Gibbs and Stephen JJ in *Kolotex* concerning the reformulation of the required state of mind were *obiter* (at 109 [67]), it is difficult to agree with the proposition that their Honours’ comments were “not ambiguous”. As the discussion in this case and in the authorities which have considered *Kolotex* reveal, the *dicta* of their Honours is open to interpretation. Neither of these two cases advance the issue which arises on this appeal.

### The impact of the post Kolotex authorities

1. The above authorities do not necessitate any alteration to the conclusion reached above as to the effect of the decision in *Kolotex*. Indeed, the reasoning of Davies and Steward JJ in *Harding* adopted the correct approach by focusing on the clear words of the definition and their Honours’ reasoning applies equally to the 183 day test. The observations of Davies J in *Ferris* are to the same effect. It follows that *Kolotex* does not support the proposition that, in the present case, the court may substitute its opinion for that of the Commissioner and the learned primary judge erred in holding to the contrary.

## A statutory power to substitute

1. Mr Hyde Page alternatively submitted that the entitlement of this Court to substitute its state of mind for that of the Commissioner arose from the nature of its power to review the Commissioner’s assessment under Part IVC of the TAA. The relevant provisions at the time of the making of the objection decision and of the appeal to the Court were:

**14ZZN Time limit for appeals**

An appeal to the Federal Court against an objection decision must be lodged with the Court within 60 days after the person appealing is served with notice of the decision.

**14ZZO Grounds of objection and burden of proof**

In proceedings on an appeal under section 14ZZ to a court against an objection decision:

(a) the appellant is, unless the court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and

(b) the appellant has the burden of proving:

(i) if the taxation decision concerned is an assessment — that the assessment is excessive or otherwise incorrect and what the assessment should have been; or

(ii) in any other case — that the taxation decision should not have been made or should have been made differently.

**14ZZP Order of court on objection decision**

Where a court hears an appeal against an objection decision under section 14ZZ, the court may make such order in relation to the decision as it thinks fit, including an order confirming or varying the decision.

**14ZZQ Implementation of court order in respect of objection decision**

(1) When the order of the court in relation to the decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision.

(2) For the purposes of subsection (1):

(a) if the order is made by the court constituted by a single Judge and no appeal is lodged against the order within the period for lodging an appeal—the order becomes final at the end of the period; and

(b) if the order is made by the court constituted other than as mentioned in paragraph (a) and no application for special leave to appeal to the High Court against the order is made within the period of 30 days after the order is made—the order becomes final at the end of the period.

1. Reliance was also placed upon the operation of s 22 of the *Federal Court of Australia Act 1976* (Cth) which accords to this Court certain powers for the disposal of appeals before it:

**22  Determination of matter completely and finally**

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

1. In reliance on the statutory scheme in Part IVC, Mr Hyde Page submitted, in effect, that in the hearing and disposal of tax appeals, this Court had wide powers to resolve all issues between the parties and that would extend to exercising any statutory power or function of the Commissioner. In particular, he referred to the power in s 14ZZP that the court may make such order in relation to the assessment decision “as it thinks fit” which, so the submission went, granted power to re-exercise any powers and discretions of the Commissioner. This was said to be confirmed by the power to vary the Commissioner’s objection decision. Mr Hyde Page also emphasised the amendment introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* (Cth) to include in s 14ZZO(b)(i) the phrase “and what the assessment should have been”. He submitted, at least in his written submissions, that this additional burden on the taxpayer effected a substantive change to the nature of the statutory right of appeal and that, in order for it to have its desired application it necessarily permitted the Court to substitute its state of satisfaction for that of the Commissioner.
2. Despite the earnestness with which the respondent’s submissions were advanced on this issue they ought not to be accepted.
3. The introduction of the words into s 14ZZO, “what the assessment should have been”, relates to the appellant’s burden of proof rather than to the scope of the Court’s powers on the hearing of the appeal. The dispositive powers are expressly conferred by s 14ZZP and not by implication from s 14ZZO. Further, as was submitted by Mr Lloyd SC, the extrinsic material to the amending act identified the purpose of the amendments was to make express the requirements imposed upon a taxpayer on an appeal as had been identified by the High Court’s decision in *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614. There, it was held that the purpose of the procedure of assessment, objection and appeal “is to ascertain the true tax liability of the tax payer under the substantive provisions of the Act”, and that the ultimate question for the court hearing the appeal is not whether the grounds of objection have been made out, but whether the amount assessed as taxable income is excessive in the sense that it exceeded his actual substantive liability (at 621 and 623 *per* Brennan J, Mason CJ and Dawson J agreeing). For this reason it is necessary for the taxpayer to prove what the assessment should have been because the Court may not always know all the material facts to determine whether the amount assessed is wrong, or merely whether the assessment process is infected by error. In so holding, the High Court rejected the contrary view that if some step in the process of assessment lacked the authority of the Act, the assessment would necessarily be “excessive”.
4. Mr Lloyd SC sought to support the above by reference to the explanatory memorandum to the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013*,where it stated:

7.36 A taxpayer who is dissatisfied with a decision the Commissioner makes on their objection can take their dispute to the Administrative Appeals Tribunal or the Federal Court. A taxpayer who does that has the burden of proving that the Commissioner’s decision was ‘excessive’. As a result of the High Court’s decision in *FCT v Dalco* (1990) 168 CLR 614, the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment is.

7.37 This causes a difficulty to arise if a taxpayer wants to show that the assessment is not high enough, as will usually be the case with assessments of the amount of a refund arising from refundable tax offsets. Therefore, the amendments change the ‘burden of proof’ rules so that the taxpayer must prove that:

* in the normal case — the assessment is excessive; or
* where the taxpayer contends that the assessment should be higher — the assessment is incorrect.

7.38 In either case, the taxpayer must also prove what the correct amount of the assessment is, preserving the effect of the *Dalco* decision.

1. Mr Lloyd SC further submitted that these passages make clear that the amendment to s 14ZZO(1)(b) was not intended to create a *de novo* appeal and, if that had been intended, the Court would exercise a jurisdiction akin to that of the Administrative Appeals Tribunal. That submission ought to be accepted. There is nothing in the explanatory memorandum which suggests that the inserted words were intended to effect a radical departure from the established practice in tax appeals. Even less is there any evidence that the legislature intended that where the operation of a provision is conditioned upon the Commissioner’s formation of a particular state of mind, the Federal Court might henceforth substitute its own state of mind.
2. Even if the above is not correct, at best, the impact of the amendment to s 14ZZO(1)(b)(i) would be limited to establishing the entitlement of the taxpayer to have the Commissioner reconsider their objection once it is shown that an assessment was actually excessive.
3. The obligation of the taxpayer to demonstrate “what the assessment should have been” is not inconsistent with the inability of the court to substitute its state of mind for that of the Commissioner. In any appeal where the amount of the assessment turns on the operation of a provision which is conditioned on the Commissioner’s state of mind, the appellant is able to adduce facts which would demonstrate what the position would be had the converse state of mind existed. They may advance a case that, on the basis that, had the Commissioner formed the state of mind for which they contend, the assessment was excessive and by a particular amount. That may necessitate adducing facts to demonstrate why the state of mind should have been as contended. Alternatively, it may be that once it is demonstrated that the Commissioner’s state of mind is vitiated, a provision previously thought to operate no longer did, with the consequence that the amount by which the assessment was excessive will be revealed. The appropriate consequential remedy will depend on the circumstances. However, that is substantially different to the Court substituting its state of mind for the Commissioner’s and purporting to effect an assessment based on the enlivening of a provision. Where, in such circumstances the appellant establishes what the amount assessed “should have been”, the appeal may need to be remitted to the Commissioner for the making of the assessment. That will require the Commissioner performing the statutory function of ascertaining whether he has the state of mind on which the provision in question is conditioned. Whether he does will depend upon the material before him at that time.
4. Similarly, the wording of s 14ZZP provides that the Court may make the “decision it thinks fit” or make an order “varying the decision”. Such powers do not suggest that it may also substitute its state of mind for that of the Commissioner in order to trigger the operation of substantive provisions in the taxation legislation. Where an objection decision appeal involves a power or provision which is conditioned on the Commissioner’s state of mind but no question arises as to whether that state of mind was correctly formed, the Court can act on the existence of the state of mind as an identified fact. If error is otherwise demonstrated in the Commissioner’s assessment, the wide powers of the Court are available to remediate any detrimental consequences. Where, however, the taxpayer identifies and establishes that the Commissioner’s state of mind was vitiated because it was affected by an accepted ground of review, the result may be that the matter is remitted to the Commissioner to undertake the assessment accordingly to law.
5. The respondent’s submissions, that on appeal the Court may exercise all of the powers of the Commissioner, if accepted, would suffer from the same incongruity referred to above; namely that the Commissioner’s satisfaction could only be vitiated on limited grounds but, once that has happened, the Court may substitute any opinion it likes. The conclusion that this would give rise to a lack of coherence is supported by the decision of the High Court in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446. That case concerned the powers of the Supreme Court of New South Wales on appeal from an assessment by the Chief Commissioner under the *Taxation Administration Act 1996* (NSW). Section 101 of that Act explicitly provided that the powers of the Court on appeal extended to confirming or revoking the assessments and making an assessment or other decision in place of the original assessment. The consequence of the wide powers of review being expressly vested in the Supreme Court, was that on an “appeal” the giving of relief to the taxpayer was not dependent upon the existence of an error of the type referred to in *Avon Downs* in the exercise of a discretion or the formation of a state of mind by the Commissioner. The Court’s obligation was to undertake an assessment in lieu of the Commissioner’s if it disagreed with it. This result in this case sits uncomfortably with the submissions made on behalf of Ms Addy that, on the one hand, *Avon Downs* principles apply to the detection of error in the Commissioner’s state of satisfaction but, on the other, relief may be given by effectively making a new assessment.

### The statutory rights of appeal do not permit substitution of the Commissioner’s state of mind

1. It follows that there is nothing in the nature or scope of the appeal provisions under Part IVC of the TAA which empowers a court to substitute its state of mind for that of the Commissioner in respect of the proviso criteria in the 183 day test. The primary judge erred when he accepted the submissions made on behalf of Ms Addy to the effect that he was entitled to do so. He further erred in purporting to substitute his opinion for that of the Commissioner.
2. It follows that the Commissioner is entitled to succeed on Ground 3 of the Notice of Appeal.

# Grounds 4 and 5 — The impact of the Double Taxation Agreement

1. Having reached the conclusion that Ms Addy was a resident during the 2017 income year by reason of the 183 day test, the next issue is whether the Double Taxation Agreement prevented Pt III Sch 7 of the *Rates Act* applying to the assessment of her income.

## The introduction of the “Backpacker Tax”

1. The *Rates Act* prescribes the rates of tax imposed on the taxable income of persons paying tax in Australia. Part I provides the rates of tax for a resident taxpayer, Pt II provides the rates of tax for a non-resident taxpayer, and Pt III sets out the applicable rates of tax applicable to “working holiday taxable income” which has been earned by a “working holiday maker”. Relevant to the 2017 income year, s 3A provided:

**3A *Working holiday makers and working holiday taxable income***

(1) An individual is a ***working holiday maker*** at a particular time if the individual holds at that time:

(a) a Subclass 417 (Working Holiday) visa; or

(b) a Subclass 462 (Work and Holiday) visa; or

(c) a bridging visa permitting the individual to work in Australia if:

(i) the bridging visa was granted under the *Migration Act 1958* in relation to an application for a visa of a kind described in paragraph (a) or (b); and

(ii) the Minister administering that Act is still to make a decision in relation to the application; and

(iii) the most recent visa, other than a bridging visa, granted under that Act to the individual was a visa of a kind described in paragraph (a) or (b).

(2) An individual’s ***working holiday taxable income*** for a year of income is the individual’s assessable income for the year of income derived:

(a) from sources in Australia; and

(b) while the individual is a working holiday maker;

less so much of any amount the individual can deduct for the year of income as relates to that assessable income.

(3) However, the individual’s ***working holiday taxable income***does not include any superannuation remainder, or employment termination remainder, of the individual’s taxable income for the year of income.

1. Part III was inserted into the *Rates Act* by the *Income Tax Rates Amendments (Working Holiday Maker Reform) Act 2016* (Cth). Prior to these reforms, working holiday makers were required to self-assess their residency status for tax purposes; those that were residents received the benefit of the tax-free threshold, while those who were non-residents were taxed pursuant to Pt II at 32.5% from their first dollar of assessable income. The explanatory memoranda to the Bill explained that the purpose of the reforms by which the rate of tax would be decreased was “to increase Australia’s attractiveness as a destination of choice for working holiday makers”. This aim was also stressed in the second reading speech for the Bill, where Mr Scott Morrison MP, the then Treasurer, stated:

Taxing working holiday-makers at 15 per cent tax from the first dollar of income up to $37,000 is internationally competitive in terms of after-tax income. Even after taking cost-of-living differences into account, this change will mean that after-tax incomes for working holiday-makers in Australia are considerably higher than key competitor countries, such as New Zealand, Canada and the UK.

This bill gives both working holiday-makers and employers certainty about the tax arrangements that will apply. The Turnbull government’s package of reforms to working holiday-maker arrangements addresses stakeholder concerns about the taxation of working holiday-makers and makes other changes to increase Australia’s attractiveness as a destination for backpackers, while being conscious of its impact on the budget.

1. The explanatory memoranda indicated that the rates specified in Pt III Sch 7 were intended to apply to all “working holiday makers”, regardless of residency. Ironically, this meant that those working holiday makers who were “residents” for tax purposes under the previous scheme were now subject to higher rates of taxation due to their inability under the new regime to take advantage of the tax-free threshold. In Ms Addy’s case, under the erstwhile scheme, if she were taxed at the rate applicable to resident taxpayers under Pt I Sch 7, she would have paid no tax on the first $18,200 of that amount (being the tax-free threshold), and then 19% for the part of her taxable income that exceeded that threshold. Had she been taxed at the rate applicable to a non-resident taxpayer under Pt II Sch 7, she would have been assessed at 32.5% on the whole of her taxable income. Under the new regime, her income was assessed at the lower rate of 15% applicable to a “working holiday maker” under Pt III Sch 7.

### The relevant legislative provisions

1. Article 25 of the Double Taxation Agreement relevantly provides:

1 Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

…

5 Nothing contained in this Article shall be construed as obliging a Contracting State to grant to individuals who are residents of the other Contracting State any of the personal allowances, reliefs and reductions for tax purposes which are granted to individuals so resident.

1. The expression “national” as it is used in Art 25 is defined in Art 3(1)(l) in the following terms:

(l) the term “national” means:

(i) in relation to the United Kingdom, any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom; and any company deriving its status as such from the law in force in the United Kingdom;

(ii) in relation to Australia, an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status; and any company deriving its status as such from the law in force in Australia;

1. The word “citizen” is not defined in the agreement. It might be thought that as the agreement was intended to be and was incorporated into Australian domestic law, the term would refer to “citizen” as that expression is defined by the Australian Parliament from time-to-time in legislation pertaining to the creation and nature of citizenship. Presently, that is found in the *Australian Citizenship Act 2007* (Cth)*.* In very general terms the nature of citizenship under that Act implies residence and or presence in Australia as a member of the Australian society and body politic. Despite the centrality of the concept of “citizenship” to the operation of Art 25, neither party addressed the issue and nothing further needs be said of it save to acknowledge that it is not as wide as the commonly understood concept of “national”.
2. By reason of s 4 of the *Agreements Act* the provisions of the Double Taxation Agreement are accorded paramountcy over a provision in an “Assessment Act” or a law imposing taxation to the extent of any inconsistency. That section provides:

**Incorporation of Assessment Act**

1. Subject to subsection (2), the Assessment Act is incorporated and shall be read as one with this Act.

…

(2) The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than Part IVA of the *Income Tax Assessment Act 1936*) or in an Act imposing Australian tax.

1. Section 3 of the *Agreements Act*, defines “Assessment Act” as being theITAA 1936 or the *Income Tax Assessment Act 1997* (Cth).

## Principles for interpreting the Double Taxation Agreement

1. There did not appear to be any substantive dispute between the parties as to the general principles applicable to the interpretation of international agreements such as the one presently under consideration. Relevantly, they are those identified by the Full Court in *McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 134 (*McDermott Industries*), 143 [38] where the following propositions were identified:
* Regard should be had to the “four corners of the actual text”. The text must be given primacy in the interpretation process. The ordinary meaning of the words used are presumed to be “the authentic representation of the parties’ intentions”: *Applicant A* at 252-253.
* The courts must, however, in addition to having regard to the text, have regard as well to the context, object and purpose of the treaty provisions. The approach to interpretation involves a holistic approach.
* International agreements should be interpreted “liberally”.
* Treaties often fail to demonstrate the precision of domestic legislation and should thus not be applied with “taut logical precision”.
1. The learned primary judge also referred to the principles for the construction of treaties contained in Articles 31(1) and 32 of the *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, [1974] ATS 2 (entered into force on 27 January 1980), which provide:

*Article 31*

*General Rule of Interpretation*

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…

*Article 32*

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

1. Reference should also be made to the observations of the United Kingdom Supreme Court’s decision in *Revenue and Customs Commissioners v Anson* [2015] 4 All ER 288, which concerned the interpretation of a Double Taxation Agreement between the United Kingdom and the United States of America. The precise issue in question in that case is not relevant here, but Lord Reed (with whom the other members of the Court agreed) identified the approach which the Court should adopt to the interpretation and application of international tax agreements. After referring to articles 31 and 32 of the Vienna Convention his Lordship said at [56]:

Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty’s object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

1. His Honour’s observations are consistent with the principles referred to above and ought to be accepted and applied.

## The alleged more burdensome tax treatment

1. At all relevant times, Ms Addy was a British national. She was not an Australian national because she was neither an Australian citizen nor a non-citizen with a right to permanent residency. In the relevant tax year she was present in Australia pursuant to her “working holiday visa” as a “working holiday maker” earning income within the definition of “working holiday taxable income” as that phrase is used in Pt III Sch 7. Her income was assessed as “working holiday taxable income” under the *Rates Act* and taxed at a rate of 15%. She claimed that, by comparison, an Australian national who was resident here and earning the same income would be entitled to the tax-free threshold and pay no tax on income up to $18,200.
2. On this basis it was submitted that Ms Addy was relevantly “in the same circumstances” as the notional Australian national tax payer but was subjected to other or more burdensome taxation treatment. This, so the submission went, had the consequence that the *Agreements Act* applied such that Pt III Sch 7 did not apply to her and she ought to be taxed in the same way as an Australian national under Pt I Sch 7. If that were so, the assessment of her income would include the application of the tax-free threshold.

## Can a relevant comparison be made?

1. The operation of Art 25 is dependent upon two matters. First, the identification of the British national who is “in the same circumstances, in particular with respect to residence” as an Australian national. Second, that the tax treatment of the British national is “other or more burdensome” than that imposed on the Australian national. The appeal focused on the first matter, it being generally accepted that the incidence of taxation on Ms Addy would be more burdensome if her income was assessed under Pt III Sch 7 as opposed to Pt I.
2. The “test case” as originally framed was advanced on the basis that Ms Addy was resident in Australia, from at least 1 January 2017 until she departed on 1 May 2017, and it was on that basis that the arguments concerning the application of Art 25 were mostly made. As has been determined above, Ms Addy was, in fact, at the relevant time a “resident” by reason of the 183 day test and there is no need to directly consider the application of Art 25 on any alternative basis.

### Was the holding of a working holiday visa a legitimate discrimen?

1. The Commissioner submitted that even if it were found that Ms Addy was an Australian tax resident in the 2017 income year, the tax treatment of her by the application of Pt III Sch 7 did not enliven the operation of Art 25. It was submitted that it was not possible for a comparison to be made between her and an Australian national for the purposes of Art 25, because Ms Addy relevantly had the tax-related characteristic of a holder of a “working holiday visa”, being a characteristic that an Australian national could not have. Of course, if that distinguishing, tax‑related circumstance had been a mere proxy for nationality, the normative purpose of Art 25 would be offended so as to enliven its operation.
2. In support of these submissions the Commissioner relied upon the decision of the New Zealand Court of Appeal in *United Dominions Trust*. There, a company incorporated in the United Kingdom and carrying on business there, had shares in a New Zealand subsidiary to which it had lent money. The UK company had received interest on that loan from its subsidiary and the Commissioner of Inland Revenue assessed tax on that income at the non-resident company rate, which was 5% higher than that which a resident company would pay. The UK company relied upon the cognate provision to Art 25 in the United Kingdom and New Zealand tax agreement to assert that its income ought to be assessed at the resident company rate. Under the relevant taxing legislation, a company which was incorporated in New Zealand was deemed to be resident there and under the Tax Agreement it was deemed to be a national of New Zealand. It followed that because no New Zealand company could be a non-resident, it could not be taxed at non-resident rates. The impossibility of placing a New Zealand company into “the same circumstances” or “substantially identical circumstances” as the UK company, had the result that the cognate article to Art 25 could have no application because no relevant comparison could be made. White J observed that residence was a fundamental factor in considering whether parties were in “the same circumstances” and, with that in mind, said (at 573):

Therefore, the taxpayer claiming relief must be able to find by way of comparison a notional national of the other territory “in the same circumstances”. Once it is accepted that “same circumstances” includes “residence” the objector, in my opinion, cannot point to a notional New Zealand company which is “in the same circumstances”.

1. In essence, the Court of Appeal determined that as the discriminator for tax purposes was residency (at 561 – 562 *per* McCarthy P; at 566 *per* Richmond J; at 573 – 374 *per* White J) there could be no relevant comparison between a company which was a New Zealand national and, therefore, a New Zealand resident on the one hand, and a foreign non-resident company on the other, with the result that the anti-discrimination provision of the Double Taxation Agreement could not apply.
2. Before this Court the Commissioner submitted that the conclusion in *United Dominions Trust* was consistent with the Commentary on Article 24 of the *Model Tax Convention on Income and on Capital* (OECD commentaries), being the provision on which Article 25 is modelled. There, the essence of the anti-discrimination article was identified in the following terms:

In applying paragraph 1 [of Article 24], therefore, the underlying question is whether two persons who are residents of the same State are being treated differently solely by reason of having a different nationality.

1. Ms Addy submitted that this Court should not treat the visa that allowed her to be physically present in Australia as something that prevented her from being “in the same circumstances” as an Australian national who is resident here. The reasons given were twofold. First, it was submitted that Art 25 does not require the circumstances of a foreign national and an Australian comparator to be identical, only “substantially identical”, and therefore the possession of a visa may be omitted from the class of circumstances that must be the same. Second, it was submitted that foreign nationals who come to Australia invariably possess a visa, and that for this reason, acceptance of the Commissioner’s submissions would mean that only illegal immigrations who enter Australia with no visa can ever benefit from Art 25. It was said that for this reason accepting the Commissioner’s submissions would therefore render Art 25 “self defeating”.
2. For the following reasons these submissions should be rejected. The ordinary meaning of Art 25 is that UK nationals are not to be treated less favourably in relation to the burden of taxation than Australian nationals where the tax-related circumstances of each are same and, particularly, in relation to their residence. This construction is coherent with statements made in the Explanatory Memorandum to the *International Tax Agreements Amendment Bill 2003* (Cth) which identified a number of aspects of Art 25, including:
	1. That it “prevents discrimination on the grounds of nationality by providing that nationals of one country may not be less favourably treated than nationals of the other country in the same circumstances”.
	2. The expression “in the same circumstances” in Art 25“refers to persons who, from the point of the application of the ordinary taxation laws and regulations, are in substantially similar circumstances both in law and in fact.”
	3. The specific reference to “in particular with respect to residence” emphasises that the residency status of a taxpayer is a relevant factor in determining which taxpayers are in similar circumstances. No discrimination occurs if the taxpayers are treated differently by reason of their residency. Conversely, if UK and Australian nationals are both Australian residents and undertaking relevantly similar income producing activities, it might be thought that any unequal treatment of them in relation to the imposition of tax may be due to discrimination on the grounds of nationality.
3. Whilst the reasoning of the decision in *United Dominions Trust* might be accepted as far as it goes, the conclusion that the imposition of tax was founded upon the appellant being a non‑resident had the necessary consequence that the anti-discrimination article of the tax agreement was not enlivened. In this case, if Ms Addy was not an Australian resident, it would have been axiomatic that she was not, for the purposes of Art 25, “in the same circumstances” as the notional Australian national. The article contemplates that residency can be a pivotal, but legitimate, discriminator for the imposition of tax. Indeed, it underpins much of the application of Australian taxation laws for both nationals and non-nationals. As has been identified above, Pt I Sch 7 imposes rates of tax on resident taxpayers and Pt II imposes rates on non-resident taxpayers and they apply equally to Australian nationals and foreign nationals.
4. However, Ms Addy was a resident, albeit not a permanent one. If she were a permanent resident she would have been within the definition of an Australian national under the agreement. The Commissioner nevertheless submitted that no sufficient comparison could be made for the purposes of Art 25 because one of Ms Addy’s tax-related characteristics was that she was the holder of a working holiday visa who had earned working holiday taxable income and that this could not be replicated as part of the circumstances of the notional Australian national. Despite some hesitation by the Commissioner, there was ultimately no dispute that it was not possible for an Australian national to hold a “working holiday visa” and to earn “working holiday taxable income”. Section 29 of the *Migration Act 1958* (Cth) (*Migration Act*) only permits the Minister for Immigration to grant visas to non-citizens and Art 3 of the Double Taxation Agreement defines Australian nationals as being Australian citizens or permanent residents.
5. The resulting question then is whether the imposition of tax on a resident British national based on their holding of a particular visa, is a legitimate discriminator for the purposes of Art 25. If it is such that by reason of that difference it is not possible to undertake the necessary comparison for the purposes of Art 25, the normative standards of the Double Taxation Agreement will not be offended.
6. The Commissioner’s submissions regarding the impossibility of comparison were considered by the learned primary judge at [90] of his reasons. His Honour concluded that, putting aside other criteria, the comparison must be between a UK citizen in Australia who does not hold a permanent resident visa on the one hand and, on the other, an Australian national or other non‑national who does hold a permanent resident visa. His Honour then said (at [90]):

Where his or her presence is lawful (and that is the case here) the “national” of the “Contracting State” will only ever be “in” the “other State” if he or she holds whatever the law of the “other State” requires to permit that individual to enter that “other State”. It seems to me to follow from these features of the text of Art 25(1) that the inability of a national of the “other State” to hold a particular visa of that “other State” authorising him or her to be “in” that “other State” must be taken to have been regarded as nothing to the point in relation to what might constitute “the same circumstances” for comparative purposes. The Commissioner’s submission based on an inability of an Australian citizen to hold a working holiday visa (or any other Australian visa) is, for this reason, flawed.

1. Save for the last sentence, there is force in his Honour’s observations as expressed in that paragraph. If Art 25 were not offended by the imposition of more onerous taxation liabilities on *all* visa holders, it would be rendered substantially inutile. As indicated by the primary judge, it is implicit in the Double Taxation Agreement that it will apply to nationals of the contracting state who are, *inter alia*, resident in the “other state” and earning income. The residency (short of permanent residency) in the “other state” will only lawfully occur as the result of the granting of a visa. If the holding of a visa by a British national had the consequence that no relevant comparison could be made for the purposes of the article, British nationals who were resident in Australia (other than permanent residents) might suffer more burdensome tax treatment for no other reason than that they are not Australian nationals. The *Migration Act* provides for myriad visas which might be obtained by British nationals and which permit them to earn income here and become a resident here (short of permanent residents) and the imposition of a more onerous tax burden on them merely because they hold a visa is contrary to the intention of Art 25.
2. However, that inconsistency only arises where the foundation for the imposition of tax is nationality or a proxy for nationality; being something that is necessarily bound to nationality. In the exemplar postulated by the trial judge it was the holding of a visa. However, that is not the present case. Pt III Sch 7 does not impose tax at differential rates on persons merely because they hold “a visa”. It imposes tax on the income of a person because they hold a particular type of visa. Although, it is true that British nationals require the authority of a visa to enter Australia and remain here, they are not required to obtain a “working holiday visa”. They may apply for and obtain one of the wide range of available visas which would permit them entry into Australia and for a period of time during which they might earn income and, at least temporarily, attain the status of a resident. Such visas may include:
* Regional Sponsor Migration Scheme visa (subclass 187)
* Employer Nomination Scheme visa (subclass 186)
* Skilled Independent visa (subclass 189)
* Skilled Nominated visa (subclass 190)
* Skilled Regional visa (subclass 887)
* Business Owner visa (subclass 890)
* State or Territory Sponsored Business Owner visa (subclass 892).
1. A British national on any one of those visas will not be subject to the operation of the Backpacker Tax in Pt III Sch 7. If, for a relevant tax year, they have acquired residency in Australia, their income will be taxed according to Pt I Sch 7 as an Australian resident. That, of itself, must indicate that the rates in Pt III Sch 7 are not imposed on the basis of nationality. If, on the other hand, they do not acquire residency in Australia then tax is assessed in accordance with Pt II Sch 7.
2. It follows that, in this case, the relevant circumstance which prevents any comparison being made for the purposes of Art 25 of the Double Taxation Agreement is the holding of a “working holiday visa”. Although Ms Addy is a British national and holds such a visa, she does not hold it *because* she is a British national. The holding of that visa was a matter of choice and not a necessary concomitant of her being a British national. There is, therefore, no necessary causal nexus between her nationality and her liability to pay the rates of tax imposed by Pt III Sch 7 (the Backpacker Tax). This conclusion is consistent with the observations made by Richmond J in *United Dominions Trust* at 566 in relation to a similar article:

In this context there can be no doubt that the sole purpose of Article XIX(1) is to prevent discrimination against “nationals” *as such*. Clearly it is for this very reason that the phrase “in the same circumstances” has been used in Article XIX(1). If those words are to achieve their intended effect they should be construed in the sense of “in substantially identical circumstances” – that is, identical as regards all matters (except nationality) which are relevant from a taxation point of view to the notional comparison which Article XIX(1) requires to be made. If the Article is not so construed, then the result can easily be to make it apply in terms to a situation which is not really a case of discrimination on the grounds of nationality, but is in truth a case of discrimination based on some other ground such, in particular, as non-residence.

1. Although it was faintly submitted that the holding of a working holiday visa was not a circumstance which prevented Ms Addy and a notional Australian taxpayer from being “in the same circumstances”, that should be rejected. Far from being irrelevant, holding that visa was an important and distinguishing tax-related characteristic. Indeed, it was the essence of the imposition of tax and could not be excluded when attempting to make the required comparison.
2. In the circumstances, the imposition of tax consequent upon the holding of a “working holiday visa” did not offend the terms of Art 25, nor its normative purpose.

## Other matters raised by the primary judge

1. The learned primary judge adopted a much wider view of the operation of Art 25. At [94] of his reasons he seemed to suggest that if the incidence of taxation is in any way related to nationality, the tax would be discriminatory and offend the article. This approach was connected to his Honour’s conclusion that the taxation of Ms Addy’s income was a form of indirect discrimination. In that respect he relied upon the OECD commentaries where it was said:

This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, the Article should not be unduly extended to cover so-called “indirect” discrimination. For example, whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality such as a different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State, it could not be argued that non‑residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality for purposes of that paragraph.

1. From this his Honour concluded that it was appropriate to construe Art 25 as extending to the prohibition of “disguised or covert burdensome tax discrimination”. He concluded (at [103]):

The Rates Act expressly envisages that, in respect of persons who are resident in Australia, a different rate of tax will apply in respect of income derived in Australia from the same source, depending on whether the individual deriving that income is or is not a “working holiday maker” (as defined). On examination, the definition of “working holiday maker” in s 3A(1) of the Rates Act necessarily extends only to particular individuals who are not nationals of Australia. Likewise by reference to s 3A(2) of the Rates Act, it is only such persons who may derive “working holiday taxable income”. These are what *Vogel* terms the “actual circumstances which are decisive in connection with the taxation procedure”. In my view, this means that the discrimination between resident derived income from the same source in Australia is based on nationality. It is disguised by the reference to “working holiday maker” but the definition of that term makes it plain that what the disguise covers is nationality. A resident “national” of Australia undertaking the same work as did Ms Addy, in other words “in the same circumstances”, would not be taxed by reference to the rates specified in Pt III of Sch 7 to the Rates Act. Such a person would have the benefit of the tax free threshold.

1. With respect to the learned primary judge, his conclusion was not open. Art 25 is offended where the discrimination against the foreign national occurs *solely* by reason of having a different nationality. Whilst such discrimination may arise explicitly or covertly, it must nevertheless be discrimination which is singularly based on nationality. The OECD commentaries referred to by the primary judge provided such an example being where the tax treatment of individuals was based on whether or not they hold, or are entitled to, a passport issued by the State. The inability to hold a passport of the other State is a necessary concomitant of being a foreign national. No such parallel arises in this case. Whilst it may be true that only foreign nationals can obtain and hold a “working holiday visa” there is no requirement to hold one because of their nationality. It arises from their personal desire to hold it and after the making of a successful application. If it were the case that differential tax was imposed on any person who held a visa of any type, it might well then be argued that this was, in effect, the imposition of tax based solely on nationality. But here it was not suggested that Ms Addy was not entitled to apply for any of the other range of visas which may have been available.
2. It follows that the imposition of tax on Ms Addy pursuant to Pt III Sch 7 was not a form of indirect or disguised discrimination based solely on nationality which would enliven the operation of Art 25. The Commissioner was correct to assess her income at the rates in that Part.

## The primary judge’s reliance on foreign judgments

1. Before the primary judge, Ms Addy submitted that two foreign cases were of assistance in upholding her appeal on the Art 25(1) ground. Those cases were a judgment of the German Federal Fiscal Court IR 20/87, 14 March 1989, Bundessteuerblatt, 1989, 14, II, 649 (the German Case) and a judgment of the French Administrative Court of Appeal Marseille, 98MA01682, 8 February 2000 (the French Case). His Honour considered both cases, in reliance — it appears — on, for the German case, a purported English translation of the judgment text supplied by Ms Addy, and for the French case, a summary provided by the Commissioner. His Honour concluded that both cases supported Ms Addy’s appeal.
2. The Commissioner submitted that both cases concerned the content of foreign taxation law, which should have been the subject of expert evidence and, absent such evidence, the primary judge should have given the decisions no weight. Conversely, Ms Addy submitted that there is no necessity for expert evidence about the content of foreign law before a court can have regard to a foreign court decision as a precedent; Ms Addy contended that expert evidence is only necessary about the content of foreign law when it is a question of fact in a proceeding.
3. At common law, the existence of and content of foreign law is a question of fact. The court is not at liberty to take judicial notice of the existence of and content of foreign law; if it is to act on the basis of foreign law, it is required to act on expert evidence: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 923 *per* Lord Reid; *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1077 [5] *per* Einstein J. As explained by Gummow and Hayne JJ in *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [115]: “The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence”. These principles must now be read with the provisions of the *Evidence Act 1995* (Cth), s 175 of which provides as follows:

**175 Evidence of law reports of foreign countries**

(1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.

(2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

1. In this case, in order to rely on the French case and the German case, the primary judge was required to either receive expert evidence as to the existence of and content of this foreign law, or receive a book containing the reported version of these cases. Neither the translated versions of the judgments, nor the summaries answered this description. The primary judge therefore erred in giving any weight to these foreign judgments.
2. To the extent to which the information might be considered it is difficult to ascertain their relevance to the issues which arise in this case. The decision of the German Federal Fiscal Court appeared to involve a direct and overt discrimination and one not based upon the holding of a visa. Similarly, and as was submitted by the Commissioner, the decision of the French Administrative Court of Appeal Marseille only vaguely touched upon the notion of discrimination arising from the parties’ nationality and there was no suggestion that any relevant differential taxation obligation arose as the result of a foreign national being the holder of a particular visa.
3. It should be added that, even if they supported the contentions suggested by the primary judge which is by no means clear, they would be inconsistent with the relatively clear operation of Art 25 in this case as identified above and should not be followed.

# Ground 6: Did the primary judge err in failing to consider a clearly articulated submission of the appellant in relation to Art 4

1. The Commissioner did not press Ground 6 of the Notice of Appeal.

# Cross-appeal

1. Ms Addy’s cross-appeal was that, as she was a resident for the purposes of the 183 day test, she must be taken to be a resident for the whole of the income year ending 30 June 2017. The import of this was that the proportion of the year during which Ms Addy was a resident would impact her entitlement to the benefit of the tax-free threshold and ss 16, 18 and 20 of the *Rates Act*. Clearly, the benefit to Ms Addy of succeeding on the cross-appeal only arises if she is entitled to have her income assessed under Pt I rather than Pt III of Sch7 which, as the foregoing reasons disclose, is not the case.
2. The primary judge found that Ms Addy ceased to be a resident at the end of May 2017 by reason of the application of s 18 of the *Rates Act*. That had the consequence that, if her income were assessed under Pt I Sch 7, the applicable tax-free threshold would be 11/12ths of the full amount.
3. Mr Hyde Page submitted that once a person is found to be a resident under the 183 day test they are deemed to be a resident for the entire year. He maintained that was so even if a person departed from Australia permanently after spending 184 days here, and took with them all their possessions, leaving nothing here and establishing a permanent home in another country.
4. The basis of Mr Hype Page’s submission was that the 183 day test uses the words “a person…who has actually been in Australia, continuously or intermittently, during more than one half of the year of income”. He submitted that the specific reference to the expression, “the year of income” had the consequence that the test indicated the period of time for which it operated. He further submitted that all of the other tests of residency contained inherent indicators of when residency would cease, and that there was no textual support for the conclusion that if a person ceased residing in Australia the effect of the 183 day test would also cease.
5. With respect, there is nothing in the text of the 183 day test to suggest that it operated to deem a person to be a resident for the whole year. Indeed the construction would, for example, have the perverse result that a person who first entered Australia on 1 December of any income year and satisfied the 183 day test, would be deemed to be a resident for 5 months prior to setting foot in the country and, thereupon incur all of the taxation obligations of a resident for the whole year. With respect that would be a most unusual result and one to be avoided.
6. In *Stockton*, Logan J dealt with this same argument. There, his Honour noted that there was nothing in the prorating provisions of the *Rates Act* to suggest that they would not apply in respect of a person whose residency arose under the 183 day test. Before this Court Mr Hyde Page was not able to point to anything in the prorating provisions which supported his contention and Logan J’s conclusion was clearly correct and ought to be accepted.
7. There is no foundation to any argument advanced on behalf of Ms Addy in relation to the cross‑appeal. Indeed, the propositions advanced might correctly be described as spurious. Were that not serious enough, the raising of this issue led to the obfuscation of the real subject matter of the test case and an unfortunate convolution of the surrounding issues.
8. The cross appeal should be dismissed.

# Conclusions

1. As a result of the variety and complexity of the issues which arose on this appeal it is appropriate to summarise the conclusions reached in relation to the important issues.
2. The Commissioner has succeeded in establishing that the primary judge erred in concluding that Ms Addy was a resident under the ordinary concepts test. However, the primary judge was correct to conclude that Ms Addy was a resident under the 183 day test, albeit for erroneous reasons. The Commissioner’s failure to consider the application of that test in the particular circumstances had the consequence that the proviso did not operate to avoid her residency status arising from the duration of her presence in Australia.
3. Nevertheless, the Commissioner is entitled to succeed on Ground 3. The Parliament has conditioned the operation of the proviso in the 183 day test on the opinion the Commissioner reached in accordance with the usual administrative fact finding procedures. There is nothing in the definition, the decision in *Kolotex*, the appeal provisions under Pt IVC of the TAA or those of the *Federal Court Act*, which entitles a court to substitute its opinion for that of the Commissioner.
4. As the holder of a “working holiday visa”, Ms Addy’s income was subject to the imposition of tax at the rates provided for in Pt III Sch 7 of the *Rates Act*, being the Backpacker Tax. Although that imposed a greater tax burden on her than is imposed upon Australian residents who have the benefit of the tax-free threshold, it did not trigger the operation of Art 25 of the Double Taxation Agreement. The imposition of a tax at a higher rate on the holders of specific visas did not discriminate against the holder solely on the basis of nationality and did not offend the agreement.
5. There was no substance to Ms Addy’s cross-appeal.
6. The result of the above is that the appeal should be allowed. The cross appeal should be dismissed. The orders of the learned primary judge should be set aside and in lieu thereof it should be ordered that the appeal to that Court be dismissed.

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| I certify that the preceding two hundred and twenty-five (225) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington. |

Associate:

Dated: 6 August 2020

REASONS FOR JUDGMENT

STEWARD J.:

1. I have had the distinct advantage of having read the draft reasons of Derrington J. in this appeal. I respectfully and gratefully agree with his Honour’s reasoning and conclusion that the taxpayer was not a “resident” of Australia because she did not reside in Australia (sometimes called by the parties to be “residency in ordinary concepts”). I also respectfully and gratefully agree with his Honour’s other conclusions.
2. I wish, however, to express my own reasons for concurring with Derrington J.’s decision that:
	1. the taxpayer was, nonetheless, a “resident” of Australia for tax purposes, until she left to return home for England, for the purposes of what has been described by the parties as the “183 day test”; and
	2. the taxpayer was, from 1 January 2017, *not* entitled to the benefit of what is called the “tax free threshold.”
3. In these reasons, I also gratefully adopt Derrington J.’s description of the facts which were not in dispute.
4. For convenience, the “183 day test”, found in s. 6 of the *Income Tax Assessment Act 1936* (Cth.) (the “*1936 Act*”), is as follows:

***resident*** or ***resident of Australia*** means:

(a) ... a person:

…

(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;

…

1. As explained below, the 183 day test gives the Commissioner the ability to determine that a taxpayer who has been present in Australia for the required period of time is nonetheless *not* to be treated as a resident. The Commissioner’s ability to do this requires him to be actually and lawfully satisfied that the taxpayer’s usual place of abode is not in Australia and that the taxpayer does not intend to take up residence in Australia.

### Applicable Legislation

1. The issue of the taxpayer’s residence in this case has had a highly unsatisfactory history. This is dealt with below. As it happens, subject to the resolution of the application to the circumstances here of Art. 25(1) of the *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* [2003] ATS 22 (the “Treaty”), the taxpayer’s residence is of no moment. For the reasons set out below, regardless of her residency, and subject to an application of Art. 25(1) of the Treaty, from 1 January 2017 she was not entitled to the benefit of the tax free threshold. As such, she was required to be taxed, whilst in Australia, at the rates set out in Pt. III of Sch. 7 of the *Income Tax Rates Act 1986* (Cth.) (the “*Rates Act*”). That is because it was not in dispute that she was a “working holiday maker.” That term was defined in s. 3A(1) of the *Rates Act* as follows:

An individual is a ***working holiday maker*** at a particular time if the individual holds at that time:

(a) a Subclass 417 (Working Holiday) visa; or

(b) a Subclass 462 (Work and Holiday) visa; or

(c) a bridging visa permitting the individual to work in Australia if:

(i) the bridging visa was granted under the *Migration Act 1958* in relation to an application for a visa of a kind described in paragraph (a) or (b); and

(ii) the Minister administering that Act is still to make a decision in relation to the application; and

(iii) the most recent visa, other than a bridging visa, granted under that Act to the individual was a visa of a kind described in paragraph (a) or (b).

1. Section 3A(2) defined an individual’s “working holiday taxable income” as follows:

(2) An individual’s ***working holiday taxable income*** for a year of income is the individual’s assessable income for the year of income derived:

(a) from sources in Australia; and

(b) while the individual is a working holiday maker;

less so much of any amount the individual can deduct for the year of income as relates to that assessable income.

1. It is not disputed that all of the taxpayer’s income derived whilst in Australia from 1 January 2017 was “working holiday taxable income.”
2. The date of 1 January 2017 is significant because the foregoing provisions (and others set out below) took effect from that date: *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth.) (the “2016 Amending Act”). These provisions enacted what is colloquially known as the “Backpacker Tax.” Ironically, they were introduced in order to benefit “backpackers” wanting to work whilst on holiday in Australia. In that respect the legislature assumed, in my view correctly, that most of these holiday makers were likely to be non-residents for tax purposes (relevant passages from the Explanatory Memorandum to the Bill which became the 2016 Amending Act which support that proposition are set out below at [350]). The taxation treatment of the income derived by the taxpayer before 1 January 2017 did not otherwise appear to be in dispute.
3. Schedule 7 of the *Rates Act* is entitled “General rates of tax.” For the 2017 year of income, Part I of that Schedule set out the rates of tax for “resident taxpayers” relevantly as follows:

|  |
| --- |
| **Tax rates for resident taxpayers** |
| **Item** | **For the part of the ordinary taxable income of the taxpayer that:** | **The rate is:** |
| 1 | exceeds the tax-free threshold but does not exceed $37,000 | 19% |
| 2 | exceeds $37,000 but does not exceed $87,000 | 32.5% |
| 3 | exceeds $87,000 but does not exceed $180.000 | 37% |
| 4 | exceeds $180,000 | 45% |

1. The phrase “tax free threshold” was defined in s. 3 to mean “$18,200”. The terms “prescribed non-resident” and “resident taxpayer” were defined in s. 3 as follows:

***prescribed non‑resident***, in relation to a year of income, means a person who, at all times during the year of income, is a non‑resident, not being a person to whom, at any time during the year of income, compensation or a pension, allowance or benefit is payable under:

(a) the Veterans’ Entitlements Act 1986;

(b) subsection 4(6) of the Veterans’ Entitlements (Transitional Provisions and Consequential Amendments) Act 1986; or

(ba) the Military Rehabilitation and Compensation Act 2004; or

(c) the Social Security Act 1991;

being compensation or a pension, allowance or benefit in respect of which the person is liable to be assessed and to pay income tax in Australia.

…

***resident taxpayer***, in relation to a year of income, means a taxpayer who is not a prescribed non‑resident in relation to that year of income.

1. The term “non-resident taxpayer” was also defined in s. 3 but not in any material way. More importantly, s. 4 provided, and still provides, that the *1936 Act* was to be incorporated, and read as one, with the *Rates Act*. In the *1936 Act*, the term “non-resident” was defined in s. 6 as being a person who is not a “resident” of Australia as defined.
2. Clause 4 of Pt. I of Sch. 7 of the *Rates Act* made it clear that a person who was both a tax resident and a working holiday maker was not to be taxed at the rates prescribed in Pt. I, but rather by reference to the rates set out in Pt. III (set out further below). It provided:

If the resident taxpayer is a working holiday maker at any time during the year of income:

(a) count the taxpayer’s working holiday taxable income for the year of income as the first parts (starting from $0) of the taxpayer’s ordinary taxable income for the purposes of the table in clause 1; and

(b) do not apply the rates in that table to that working holiday taxable income; and

(c) do not count that working holiday taxable income when working out the taxpayer’s taxable income for the purposes of clause 2 or 3.

Note: The rates for the taxpayer’s working holiday taxable income for the year of income are set out in Part III.

1. Part II of Sch. 7 set out the applicable rates of tax for “non-resident taxpayers”.
2. Part III of Sch. 7 then set out the rates of tax payable by “working holiday makers”. Importantly, it did so by fixing rates of tax applicable to “working holiday taxable income” derived by a taxpayer. From 1 January 2017, Pt. III provided as follows:

1. The rates of tax on a taxpayer’s working holiday taxable income for a year of income are as set out in the following table.

|  |
| --- |
| **Tax rates for working holiday makers** |
| **Item** | **For the part of the taxpayer’s working holiday taxable income that:** | **The rate is:** |
| 1 | does not exceed $37,000 | 15% |
| 2 | exceeds $37,000 but does not exceed $87,000 | 32.5% |
| 3 | exceeds $87,000 but does not exceed $180.000 | 37% |
| 4 | exceeds $180,000 | 45% |

1. As can be seen from the foregoing table, there is no tax free threshold applicable to the earning of working holiday taxable income.

### Procedural Background

1. The taxpayer was issued her first assessment for the year of income ended 30 June 2017 on 20 July 2017. The assessment, it would seem, assumed that the taxpayer was not a resident of Australia. A note on the face of the assessment said:

Your return indicates that you were a non-resident of Australia for tax purposes. As a result we have deemed you a non-resident for income tax purposes.

1. I have assumed that the assessment was issued under the “self-assessment” regime whereby the Commissioner initially accepts as being true and accurate the information disclosed in a tax return. There then followed the issue on 13 September 2017 of an amended assessment for the same year of income. A note on the face of this amended assessment repeated the same observation about the taxpayer’s assumed non-residence. As the learned primary judge observed, it was by no means clear why this amended assessment had issued; it made no change to the taxpayer’s taxable income or to the tax payable. The taxpayer objected against this amended assessment.
2. The Commissioner then reviewed the taxpayer’s situation. That led to:
	1. the withdrawal of the objection by the taxpayer;
	2. the issue of a further amended assessment by the Commissioner for the same year of income on 20 December 2017 which taxed the taxpayer’s working holiday taxable income in accordance with Pt. III of Sch. 7 of the *Rates Act* and thus without the benefit of any tax free threshold. It otherwise, the Court was told, taxed her pre-1 January 2017 income on the basis that she was a resident of Australia; and
	3. the making of a fresh objection against that further amended assessment on 14 February 2018. That objection claimed that the taxpayer “[w]as a tax resident of Australia during the period commencing 1 January 2017.” It also claimed that pursuant to Art. 25(1) of the Treaty, the taxpayer, as a tax resident of Australia, was entitled to be taxed at the same rate as other Australian tax residents during the period commencing 1 January 2017. This included having the benefit of the tax free threshold during that period.
3. By a notice of objection decision dated 26 February 2018, the Commissioner disallowed the taxpayer’s second objection. The Commissioner decided that the taxpayer should be taxed at the rates set out in Pt. III of Sch. 7. In his opinion, Art. 25(1) of the Treaty did not apply to preclude this outcome. Importantly, the Commissioner made a finding of fact that the taxpayer was a resident of Australia until her return to England. Thus, the reasons set out in the Notice state as follows:

You were assessed at audit as a resident of Australia for tax purposes.

…

You are a British citizen and you were an Australian tax resident during the relevant period.

…

**We considered these to be the relevant facts**

* You were an Australian resident for tax purposes during the 2017 financial year.
1. The reasons do not expressly state why the Commissioner had concluded that the taxpayer was a resident of Australia. Inferentially, it was because the Commissioner had formed the view that the taxpayer had been a resident in ordinary concepts in Australia during the relevant period until she returned to England. That view was mistaken. There is otherwise no evidence that the Commissioner had ever turned his mind specifically to consider the application of the 183 day test at this point in time.
2. When this proceeding commenced below, the issue of the taxpayer’s residency was not raised by either the taxpayer or the Commissioner. That is because the taxpayer was selected to be the applicant for a “test case” concerning claims made about the application of Art. 25(1) of the Treaty to the Backpacker Tax. In order to test those claims, the taxpayer had to be a resident of Australia, it being accepted that Art. 25(1) could not be relied upon by a non-resident backpacker. In correspondence before the Court, the Commissioner’s solicitor described the taxpayer as an “appropriate vehicle” in light of the “Commissioner having accepted that Ms. Addy was an Australian resident.” In the Commissioner’s original appeal statement he thus described the taxpayer as a resident. In the taxpayer’s original appeal statement, she also claimed that she had been a resident for the 2017 year of income. At this stage the only issue raised by the parties was the applicability of Art. 25(1) of the Treaty.
3. Then, shortly before the commencement of the trial, it would appear that the taxpayer filed an amended appeal statement raising as an issue for the first time whether the taxpayer had been a resident of Australia for *all* of the 2017 year of income on the basis that she satisfied the “183 day test” and whether she needed the leave of the Court to raise this claim. The taxpayer needed leave because this contention had not been included previously as a ground of objection. An application for leave on these terms was then made at the trial below.
4. The Commissioner opposed the grant of leave. Amongst other things, he said that he had not previously had the opportunity to consider the 183 day test. Indeed, in his “Outline of Submissions” below, the Commissioner told the learned primary judge that for the purposes of that test he “had not had the chance to reach any state of satisfaction about” the taxpayer’s usual place of abode or her intention to take up residence in Australia. Critically, prior to the trial, in correspondence with the taxpayer, the Commissioner foreshadowed that if the taxpayer pursued her application for leave, and if that leave were to be granted, he would contend for the first time that the taxpayer had been a non-resident of Australia throughout the 2017 year of income. Inferentially, the Commissioner’s position at this point in time was that he was content for the tax appeal to proceed to trial as originally planned – with the taxpayer being accepted as having been a resident – even though his Senior Counsel on appeal explained to the Court that the Commissioner had already changed his mind about the taxpayer’s residency following consideration of her evidence. *If* that was the case, and I do not positively decide that it was, then, in my very respectful view, the Commissioner’s conduct perhaps fell short of what is required.
5. Having formed the opinion that the taxpayer was not a resident of Australia, with respect, the Commissioner should have issued a further amended assessment which assessed the taxpayer as a non-resident (assuming he was within time to do so). For that purpose he should also have prepared a record of his state of satisfaction about the 183 day test, if he intended to rely upon it to contend that the taxpayer had never been a resident of Australia. As Barwick C.J. observed in *Kolotex Hosiery (Australia) Pty Ltd v. Federal Commissioner of Taxation* (1975) 132 C.L.R. 535 at 541:

It is, therefore, of prime importance that the Commissioner before or at the time of assessment should apply his mind to the matters about which his satisfaction or lack of satisfaction has such importance, and that he should at the same time clearly record his relevant state of mind and the facts or his view of the facts on which it is based. If, as is the case in the present matter, there is more than one such matter upon which the Commissioner’s state of mind is of the essence of the assessment, the Commissioner should arrive at and record his satisfaction or lack of it as to each of these matters along with its factual basis. It should not be left as it is in the present case for the court to draw inferences as to whether such a matter was considered by the Commissioner, and, if it was, as to what was his relevant state of mind with respect to it. Further, consistently with what I have pointed out in another connexion (cf. *Giris Pty. Ltd. v. Federal Commissioner of Taxation*) the Commissioner must expose to the taxpayer, particularly if so requested, both his state of mind at the relevant time and its basis.

(Footnote omitted.)

1. As it transpires, the Commissioner now concedes that if the taxpayer was a non-resident, the amended assessment before the Court is incorrect. It imposed tax on the taxpayer for the period prior to 1 January 2017 on the basis that she was a resident of Australia. The Commissioner has no plans to correct that assessment.
2. The learned trial judge granted the leave sought by the taxpayer. He also refused the Commissioner’s consequential application to adjourn the trial. Before us, the Commissioner’s Notice of Appeal makes no complaint about any of these matters.
3. The learned primary judge:
	1. decided that the Commissioner had previously had a sufficient opportunity to consider the “183 day test”;
	2. decided that, because of the note on the face of the original assessment and the first amended assessment, the Commissioner must at the time of the issue of each assessment “necessarily” have been satisfied that the taxpayer’s usual place of abode was outside Australia and that she did not intend to become a resident of Australia. Thereafter, because he decided in the objection decision that the taxpayer was a resident, the primary judge concluded that the Commissioner must have changed his mind about that issue and was satisfied that the taxpayer was a resident by reason of the 183 day test and was also a resident in ordinary concepts;
	3. resolved that the Court had jurisdiction to reach its own view for the purpose of the 183 day test about the taxpayer’s usual place of abode and her intentions about residence; and
	4. concluded that the Commissioner should have been satisfied that the taxpayer’s usual place of abode was in Australia and that she did intend to take up residence in Australia.
4. I respectfully agree with the learned primary judge that the Commissioner had a sufficient opportunity in the past to invoke the exception to the 183 day test and to reach the required state of satisfaction. I agree that he had four substantive opportunities to do so. These opportunities arose with the issue of an original assessment and then two amended assessments for the same year of income, and the subsequent making of a notice of objection decision, again in respect of that same year of income. Nonetheless, the better view is that the Commissioner in fact never turned his mind to consider whether he should or should not form the state of satisfaction required by the “183 day test” when he issued the further amended assessment that was before the Court and when he made his objection decision. The Commissioner’s Senior Counsel, very properly, never suggested that the Commissioner had done this. For my part, I also doubt whether the Commissioner had ever considered the 183 day test when he issued the first two assessments. With great respect to the learned primary judge, what was noted on at least the first assessment was probably a reflection of the self-assessment regime and no more.
5. On appeal, the Commissioner sought to support the relevant amended assessment by relying on the finding of the learned primary judge that the Commissioner must have been satisfied in the way required by the 183 day test when he issued the original assessment and the first amended assessment. Neither party in this appeal, he said, had challenged that finding. However, the Commissioner did disagree with the other finding made by the learned primary judge that the Commissioner must have revised his earlier state of satisfaction when he decided to treat the taxpayer as a resident. It was said that there was no evidence to support the proposition that the Commissioner had changed his mind about the 183 day test even though the Commissioner considered the taxpayer to be a resident. That conclusion, it was said, was confined to the Commissioner’s opinion about the taxpayer’s residency in ordinary concepts. It followed, it was said, that the Commissioner’s historical satisfaction that was said to have been reached in support of the earlier assessments, either remained on foot or could now be legally resurrected.
6. In my opinion, the better view is that the Commissioner had never before considered whether the 183 day test applied to the taxpayer. He had never before formed a view about the taxpayer’s usual place of abode or her intentions about taking up residence in Australia for the purpose of that test. Indeed, this is precisely how the Commissioner explained his position in both his amended appeal statement and in his “Outline of Submissions” below. However, because no party challenged the learned primary judge’s finding that the Commissioner must be taken to have formed the required state of satisfaction under the 183 day test to support the original assessment and the first amended assessment, I will accept that this was so.
7. On that basis, in my view, the learned primary judge was nonetheless plainly right to conclude that the Commissioner had changed his mind when he subsequently decided that the taxpayer was a resident of Australia. There was clear evidence to support that finding. It is the express statement in the objection decision that the taxpayer had been found by the Commissioner to be a resident. The proposition that this should be read factually as limited to an observation about residency in ordinary concepts is, with great respect, unsustainable. First, there is no evidence to support it. Secondly, it is impossible to conceive that the Commissioner was – *at the very same time* – satisfied that the taxpayer was both a resident in ordinary concepts and satisfied that her usual place of abode was in Kent and that she did not intend to take up residence in Australia. The existence of such a tortured state of mind is entirely improbable. The only sensible conclusion available from the evidence is that if the Commissioner had ever in the past formed the necessary opinions required by the 183 day test, when it became time to assess the taxpayer for the third time, and then process her objection, the Commissioner had ceased to hold those opinions. He had changed his mind.
8. The foregoing conclusion is supported by the Commissioner’s amended appeal statement. He never pleaded, as he was required to do, that he had formed the necessary state of satisfaction in the past. Nor did he ever plead that he had persisted with that state of satisfaction in the face of his own decision that the taxpayer was a resident in Australia. In *Rio Tinto Ltd v. Commissioner of Taxation* [2004] FCA 335; (2004) 55 A.T.R. 321, the taxpayer complained that the Commissioner had never pleaded in his statement of facts, issues and contentions his state of satisfaction that there had been a scheme by way of dividend stripping pursuant to former s. 46A of the *1936 Act*. At 339 [40] Sundberg J. observed:

In arriving at the conclusion that s 46A applies, the Commissioner must have been satisfied that the dividend arose out of, or was made in the course of a transaction etc by way of dividend stripping. And he must have reached that state of satisfaction after having taken into consideration the matters listed in s 46A(3). But there is no mention in the document of any facts or matters that form the basis for the respondent’s state of mind.

1. For this reason, amongst others, Sundberg J. decided that the Commissioner’s statement of facts, issues and contentions fell “seriously short” of what was required. The Commissioner was ordered to file a new pleading. Here, the absence of a pleaded state of satisfaction supports an inference that no such state of mind had ever relevantly existed.
2. The result is that the amended assessment before the Court is not, as a factual proposition, supported by any state of satisfaction held by the Commissioner that the taxpayer’s usual place of abode was in Kent and that she had no intention of taking up residence in Australia. It was not suggested, nor could it be, that the Commissioner’s present opinion about these matters could make any difference to that outcome: c.f. *Commissioner of Taxation v. Jackson* (1990) 27 F.C.R. 1.
3. I shall otherwise return to consider the learned primary judge’s conclusions about the application of the 183 day test.

### The Applicable Rate of Tax

1. Subject to the application of Art. 25(1) of the Treaty, the Commissioner was correct to assess the taxpayer with the rates of tax applicable for taxpayers who earn working holiday taxable income from 1 January 2017. That conclusion does not turn on the residency of the taxpayer. It turns upon whether the taxpayer earned that type of income. It is not disputed that this was the only income earned from sources in Australia by the taxpayer from 1 January 2017. It is also not disputed that the taxpayer was a “working holiday maker” as defined. It follows that the rates set out in Pt. III of Sch. 7 of the *Rates Act* apply to the taxpayer’s Australian source income. Because those rates make no allowance for a tax free threshold, the taxpayer was not entitled to have the first $18,200 of her taxable income free from the burden of income tax.
2. For the reasons set out below, I have concluded that the taxpayer was a resident by reason of the 183 day test. But it does not follow from that conclusion that the taxpayer’s income should have been taxed at the rates set out in Pt. I of Sch. 7 (which deals with residents). That is because of cl. 4 of Pt. I of Sch. 7 as set out above. It is clear from that provision that even a resident of Australia is subject to the rates set out in Pt. III of Sch. 7 in respect of working holiday taxable income derived by that person.

### Application of the 183 Day Test

1. In *Harding v. Federal Commissioner of Taxation* (2019) 269 F.C.R. 311, this Court was concerned with the limb of the definition of “resident in Australia” in s. 6 of the *1936 Act* which deals with the domicile of a taxpayer. That limb is in the following form:

***resident*** or ***resident of Australia*** means:

(a) ... a person:

(i) whose domicile is in Australia, unless the Commissioner is satisfied that the person’s permanent place of abode is outside Australia;

…

1. One of the issues the Court considered was whether its role was confined to determining whether the Commissioner had been lawfully satisfied about the location of the taxpayer’s permanent place of abode; could the Court for itself determine, on the evidence, that place of abode? Because the parties had proceeded before the primary judge on the basis that the Court could make such a determination, and subsequently agreed the appeal was to continue on that basis, the Court was content to hear and determine the appeal in that way. Nevertheless, for completeness, the majority decided that the Court’s function in respect of the domicile limb of the definition of “resident of Australia” was in fact limited to judicial review of the Commissioner’s state of satisfaction. At 321-322 [18]-[20] the majority of the Court said:

Where a provision reserves to the Commissioner the task of fact finding, on a Part IVC appeal in the Administrative Appeals Tribunal, which exercises administrative, not judicial, power, the Tribunal can re-examine for itself on the evidence before it whether it is satisfied that a taxpayer has a permanent place of abode outside of Australia but the role of the Court (as distinct from that of the Administrative Appeals Tribunal) is to determine whether the Commissioner had erred in law in some way. As Dixon J (as his Honour then was) said in a well-known passage from *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 in relation to former s 80(5) of the 1936 Act (which turned upon the Commissioner’s satisfaction about the ownership of voting shares):

But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub‑section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some misconception.

It is a question of statutory construction whether, in the case of a particular provision, Parliament intended to reserve an applicable factual determination for ascertainment by the Commissioner. Many of the cases which address this issue were usefully summarised by Lindgren J in *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2006) 63 ATR 577. There, his Honour drew a distinction between provisions which turn on, or involve, the Commissioner’s state of satisfaction about a matter, and those which merely require the Commissioner to undertake some procedural step. His Honour said at [42]:

It will prove to be important to identify precisely the conditions of tax liability specified in the [1936 Act], and to distinguish between provisions referring to the Commissioner’s state of mind, eg his “opinion”, or his being “satisfied” or “not satisfied”, on the one hand, and provisions referring to his taking a step, such as making a “determination” or “decision” on the other hand. I will refer to them as “state of mind” and “Commissioner’s determination” classes of cases, respectively.

Here, in our view, the Commissioner’s satisfaction about a taxpayer’s place of abode is not just a procedural step but forms part of the criteria for determining residence in subpara (i), which comprises two parts. The first part requires a determination of the domicile of the taxpayer. The second part is an exception or “carve out” from domicile constituting “residency”. The carve out is where the “Commissioner is satisfied” that the taxpayer has a “permanent place of abode outside Australia”. Unlike the issues of where a person “resides”, where a person is domiciled, and where a person has “actually been” (subpara (ii) of the definition), the exception in subpara (i) expressly and specifically depends on the state of mind of the Commissioner. It does so, not so as to create an administrative or procedural step to be fulfilled, but to reserve to the Commissioner a function which forms part of the criteria for residence. That function is his sufficient satisfaction about the permanent place of abode of the taxpayer which is the “fact” that enlivens the exception. For reasons set out below, the statutory history also supports this construction. It follows that the question for the Court below was not whether Mr Harding had in 2011 a permanent place of abode outside of Australia; rather it was whether the Commissioner erred in law in not being satisfied that he did have such a permanent place of abode.

1. I respectfully am of the view that the foregoing reasoning applies equally to the 183 day test. Like the domicile limb of the definition of “resident of Australia”, the 183 day test juxtaposes two criteria. The first is an inquiry into the actual presence of the taxpayer in Australia, and the length of that presence. It is open to a Court to consider that criterion on its merits. The second is a “carve out” which may or may not be engaged if the first test is satisfied. The carve out is a power or discretion or ability (it matters not how it is labelled) which the Commissioner may use to defeat, in defined circumstances, the conclusion about residency which would follow from a person being actually in Australia for at least 183 days. I agree with the taxpayer’s submission that, generally speaking, the 183 day test was intended to be a pragmatic supplement to the rule about residency in ordinary concepts. It exists because the test of residency in ordinary concepts had been found, in practice, to be very difficult to apply. As was observed in *Harding*, the definition of a “resident of Australia” was first introduced by the *Income Tax Assessment Act 1930* (Cth.). “Explanatory Notes” to that Act, issued under the authority of the then Commonwealth Treasurer, describe the 183 day test (called the “third test” in the Notes) in the following way:

The third test to be applied is, subject to certain conditions, actual presence in Australia for more than half the financial year in which the income the subject of assessment is derived.

*This test is necessary in order to obviate the great difficulties which occasionally arise in establishing to the satisfaction of a Court that a person is resident in any particular country.*

In order that there may be no danger of treating as residents persons who are purely visitors, the condition is imposed that this test is not to be applied to treat any person as a resident if the Commissioner is satisfied that that person has his usual place of abode outside Australia and does not intend to take up residence in Australia.

(Emphasis added.)

1. The Commissioner’s power to apply the carve out is no mere procedural step. Parliament has reposed into the hands of the Commissioner the responsibility of determining on the evidence both the location of the taxpayer’s usual place of abode and the taxpayer’s intention about taking up residence. These are matters for the Commissioner, and not the Court, to be satisfied about. The role of the Court is limited to determining whether the Commissioner had lawfully attained that state of satisfaction. It is limited to review in accordance with the decision in *Avon Downs Pty Ltd v. Commissioner of Taxation* (1949) 78 C.L.R. 353as explained above in *Harding.*
2. The Commissioner rejected the proposition that the 183 day test contained distinct limbs or criteria. He said that it was just “one test” albeit with several elements. On that view, the 183 day test could not apply to render a person a resident of Australia unless she or he had actually been in Australia for the required period, *and* the Commissioner had decided that the taxpayer’s usual place of abode was not outside of Australia and that the taxpayer did intend to take up residence in Australia. In other words, actual presence was insufficient; the Commissioner needed to have considered the carve out and have reached a conclusion which favoured residency in Australia.
3. The Commissioner also submitted, as already mentioned, that he was entitled to support the amended assessment before the Court on the basis of his original antecedent state of satisfaction which the learned primary judge inferred must have been formed to support the original assessment and first amended assessment. The Commissioner, it was said, had attained that state of satisfaction once, and thereafter he could rely on it to support any further amended assessments issued to the taxpayer for the same year of income.
4. Finally, the Commissioner submitted that if he could not rely on that antecedent state of satisfaction, the only proper course to take was for this Court to remit the matter back to the Commissioner so that he could have the opportunity of forming a view about the taxpayer’s usual place of abode in 2017 and her then intention to take up residence in Australia and, if necessary, to re-assess the taxpayer.
5. Respectfully, each of those contentions should be rejected.
6. *First*, whether one can or cannot properly characterise the 183 day test as “one test” is probably of no consequence. That is because nothing in the language which comprises that test supports the proposition that the taxpayer can only be a resident if *both* of its limbs or elements favour that conclusion. It is also because the purpose of the test is to supplement the test of residency in ordinary concepts in a practical way. It permits a conclusion to be reached about residency by the simple expedient of the taxpayer being physically in Australia during more than one‑half of a year of income. It would seriously undermine the utility of this test if it also required, *in every case*, the Commissioner to form a view about the taxpayer’s usual place of abode and intentions about residency. That is because those issues direct one back to aspects of the test for residency in ordinary concepts, and throw up, as a result, the same difficult issues of application referred to in the Explanatory Notes. The purpose of the carve out, as the Notes make clear, is to ensure that someone who is truly a visitor to Australia, does not acquire tax residency because of an application of the somewhat arbitrary test of physical presence for 183 days. However, the carve out will never apply “unless” the Commissioner chooses to consider it (whether he can be compelled to consider it is not an issue which needs to be decided).
7. *Secondly,* it is unnecessary for me to consider whether the Commissioner, as a legal proposition, was entitled to rely on his antecedent state of satisfaction, made to support the original assessment and the first amended assessment, in support of the further amended assessment for the same year of income which is before the Court. That is because of my factual finding that the Commissioner had changed his mind. When he issued the further amended assessment and when he made his objection decision, he had ceased to be satisfied that the taxpayer’s usual place of abode was in Kent and that she had no intention of taking up residence in Australia.
8. *Thirdly,* in my opinion, the Commissioner’s inability to support the amended assessment before the Court with the required state of satisfaction is a matter that a taxpayer can take advantage of in demonstrating that an assessment is excessive; it is not a matter that justifies a remittal to the Commissioner to give him a fresh opportunity to correct his mistake, if he made a mistake. The Commissioner relied upon a number of authorities where the Court, following a conclusion that a discretion or power reposed in the hands of the Commissioner had miscarried, remitted the matter back to the Commissioner. For example, he cited the decision of the High Court in *MacCormick v. Federal Commissioner of Taxation* (1945) 71 C.L.R. 283. That case concerned former s. 14(i) and (ii) of the *Gift Duty Assessment Act 1941-1942* (Cth.) which was in the following form:

Notwithstanding anything contained in this Act, gift duty shall not be payable in respect of— ... (i) any gift concerning which the Commissioner is satisfied— ... (ii) that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship.

1. The Court decided that the Commissioner’s state of satisfaction that the gift in question had not been made for the maintenance, education or apprenticeship of a person had miscarried. The Court decided that it could not itself replace the Commissioner’s state of satisfaction with its own views about the purpose of the gift. Latham C.J. said the following at 299:

This Court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and that upon an appeal the Court cannot substitute the discretion or opinion of the Court for that of the Commissioner. But in those cases the Court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law: See *Moreau v. Federal Commissioner of Taxation; Australasian Scale Co. Ltd. v. Commissioner of Taxes (Q.); Commissioner of Taxes (Q.) v. Ford Motor Co. of Australia Pty. Ltd*. It has uniformly been held that upon an appeal under Acts the provisions of which are indistinguishable in relevant particulars from the present Act it is not for the Court to substitute its opinion for that of the Commissioner. I am, therefore, of [the] opinion that question 4 should be answered in the negative.

(Footnotes omitted.)

1. With respect, the Commissioner’s reliance on *MacCormick*, and other cases like it, is misconceived. In *MacCormick* the taxpayer sought to rely upon a provision which permitted the Commissioner to exercise a power or discretion in favour of the taxpayer. The Commissioner declined to do so. He exercised that power or discretion in an unfavourable way. Before the Court, the taxpayer’s task was to seek to impugn that exercise of power or discretion. But precisely because the Court could not itself re-exercise that power or discretion in favour of the taxpayer, the only remedy the taxpayer could seek was to have the exercise of power or discretion set aside (for error of law) and to have the matter remitted back to the Commissioner.
2. This case is different. That is because the successful impugning of the required state of satisfaction, or the demonstration that no such state of satisfaction had been arrived at or maintained (assuming, for the moment, that Art. 25(1) favours the taxpayer), necessarily demonstrates (without more) the excessiveness of the further amended assessment. In other words, the valid formation of that state of satisfaction is a condition which must be fulfilled if the taxpayer is to be treated as a non-resident in the face of her physical presence in Australia: c.f. *McAndrew v. Federal Commissioner of Taxation* (1956) 98 C.L.R. 263 at 271.
3. *Fourthly*, I note that a holiday maker, even someone on a very extended holiday, would, generally speaking, be considered to be a visitor.

### The Role of the Court and the 183 Day Test

1. It would appear that the learned primary judge was of the view that the Court could determine itself the factual enquiries which comprise the carve out to the 183 day test. Such an approach was certainly urged upon us by Counsel for the taxpayer. With very great respect, I am unable to agree with that proposition. For the reasons set out above, the legislative scheme is quite clear. It is the Commissioner’s function, and not that of the Court, to determine on the merits the usual place of abode of the taxpayer and her or his intention about residence.
2. It was said that the foregoing conclusion was wrong for two reasons:
	1. it did not take account of an amendment made in 2013 to s. 14ZZO(b)(i) of the *Taxation Administration Act* *1953* (Cth.) (the “*T.A.A.*”); and
	2. because of what the majority of the High Court said in the *Kolotex* decision.

#### Section 14ZZO

1. Section 14ZZO of the *T.A.A.* provided as follows:

**Grounds of objection and burden of proof**

In proceedings on an appeal under section 14ZZ to a court against an objection decision:

(a) the appellant is, unless the court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and

(b) the appellant has the burden of proving:

(i) if the taxation decision concerned is an assessment — that the assessment is excessive or otherwise incorrect and what the assessment should have been; or

(ii) in any other case — that the taxation decision should not have been made or should have been made differently.

1. The taxpayer placed particular reliance upon the phrase “and what the assessment should have been.” These words were added in 2013 by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act* *2013* (Cth.) (the “2013 Amending Act”). It was said that the additional words gave the Court statutory authority to determine “what the assessment should have been” by the exercise of applicable powers and discretions otherwise reposed in the hands of the Commissioner.
2. With respect, that conclusion is incorrect for the following reasons:
	1. *First*, s. 14ZZO does not confer any jurisdiction or power on the Court. It instead delimits the burden and task of the taxpayer in a Pt. IVC tax appeal brought before this Court. The jurisdiction of the Court is instead conferred by s. 14ZZ(1) of the *T.A.A.* which was in the following terms:

**Person may seek review of, or appeal against, Commissioner’s decision**

If the person is dissatisfied with the Commissioner’s objection decision (including a decision under paragraph 14ZY(1A)(b) to make a different private ruling), the person may:

(a) if the decision is a reviewable objection decision — either:

(i) apply to the Tribunal for review of the decision; or

(ii) appeal to the Federal Court against the decision; or

(b) otherwise — appeal to the Federal Court against the decision.

The power of the Court to make orders in a Pt. IVC tax appeal is then conferred by s. 14ZZP of the *T.A.A.*, which was in the following terms:

**Order of court on objection decision**

Where a court hears an appeal against an objection decision under section 14ZZ, the court may make such order in relation to the decision as it thinks fit, including an order confirming or varying the decision.

Section 14ZZP was not in any way altered by the 2013 Amending Act which added the words to s. 14ZZO now relied upon by the taxpayer.

* 1. *Secondly*, it is clear that the new words were not inserted into the *T.A.A.* to expand the powers of the Federal Court, but rather to clarify the burden a taxpayer must meet as a result of certain relevant observations made by the High Court in *Federal Commissioner of Taxation v. Dalco* (1990) 168 C.L.R. 614. This is made clear in the Explanatory Memorandum to the Bill that then became the 2013 Amending Act at paras. [7.36]-[7.38] as follows:

7.36 A taxpayer who is dissatisfied with a decision the Commissioner makes on their objection can take their dispute to the Administrative Appeals Tribunal or the Federal Court. A taxpayer who does that has the burden of proving that the Commissioner’s decision was ‘excessive’. As a result of the High Court’s decision in *FCT v Dalco* (1990) 168 CLR 614, the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment is.

7.37 This causes a difficulty to arise if a taxpayer wants to show that the assessment is not high enough, as will usually be the case with assessments of the amount of a refund arising from refundable tax offsets. Therefore, the amendments change the ‘burden of proof’ rules so that the taxpayer must prove that:

* in the normal case — the assessment is excessive; or
* where the taxpayer contends that the assessment should be higher — the assessment is incorrect.

7.38 In either case, the taxpayer must also prove what the correct amount of the assessment is, preserving the effect of the *Dalco* decision. ***[Schedule 5, items 25 and 26, paragraphs 14ZZK(b) and 14ZZO(b) of the Taxation Administration Act 1953]***

* 1. *Thirdly*, if Parliament had intended to confer on this Court jurisdiction to exercise powers and discretions solely reposed in the hands of the Commissioner, it would have amended s. 14ZZP of the *T.A.A.* to make this clear. It might have introduced an equivalent to s. 101(1) of the *Taxation Administration Act 1996* (N.S.W.) which relevantly states:

**101 Powers of court or tribunal on review**

(1) The court or tribunal dealing with the application for review may do any one or more of the following:

…

(b) make an assessment or other decision in place of the assessment or other decision to which the application relates,

…

However, there is no equivalent language in the *T.A.A.*

#### Kolotex

1. *Kolotex* concerned certain former provisions of the *1936 Act* which limited the ability of a company to carry forward unused tax losses. In general terms, one of the requirements was that the Commissioner needed to be satisfied that the same requisite persons beneficially owned shares in the taxpayer company both during the year in which the loss was incurred and the year in which the loss was to be used. In *Kolotex*, the Commissioner was not so satisfied. Gibbs J. (as his Honour then was) and Stephen J. decided that the Commissioner had erred in law in reaching that conclusion. However, their Honours did not remit the matter back to the Commissioner. Rather, based on alternative grounds raised for the first time before the Court by the Commissioner, it was decided, by reference to those grounds, that the Commissioner could not otherwise properly be satisfied about the necessary continuity of ownership. It followed that the Commissioner had been correct to disallow the taxpayer’s deduction.
2. The taxpayer relied upon *Kolotex* as authority for the proposition that in a Pt. IVC tax appeal a Court, once satisfied of the presence of error in the attainment by the Commissioner of his state of satisfaction, can decide for itself whether or not the Commissioner should on the evidence before the Court be so satisfied. With respect, I do not accept the correctness of that submission for the following two reasons:
	1. *First*, the form of the relief ordered by Gibbs and Stephen JJ. was the product of what the parties wanted the Court to do. As Gibbs J. observed at 568:

Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court.

As such, *Kolotex* should not be taken as a binding authority for the proposition put forward by the taxpayer. As McHugh J. said in the High Court decision of *Coleman v. Power* (2004) 220 C.L.R. 1 at 44-45 [79]:

The only power with which this Court is invested is judicial power together with such power as is necessary or incidental to the exercise of judicial power in a particular case. The essence of judicial power is the determination of disputes between parties. If parties do not wish to dispute a particular issue, that is their business. This Court has no business in determining issues upon which the parties agree. It is no answer to that proposition to say that this Court has a duty to lay down the law for Australia. *Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue*. If the conceded issue is a necessary element of the decision, it creates an issue estoppel that forever binds the parties. But that is all. The case can have no wider ratio decidendi than what was in issue in the case. Its precedent effect is limited to the issues.

(Emphasis added.)

* 1. *Secondly*, and in any event, it should be accepted that Gibbs and Stephen JJ. did not remit the matter for reconsideration because in *Kolotex*, as a matter of law, only one conclusion was open to the Commissioner to reach with respect to the beneficial ownership of the taxpayer. This was explained by Davies J. (Senior) in *Ferris v. Commissioner of Taxation* (1988) 20 F.C.R. 202, where his Honour rejected a submission that the Court should re-exercise the Commissioner’s power under s. 109 of the *1936 Act* to treat certain payments made to shareholders or directors by a private company as a dividend. Davies J. said at 212:

In an appeal of this nature where what is in issue is the exercise of a discretion by the Commissioner, the Court’s function is limited to determining whether there was an error such that, in judicial review proceedings before it, this Court would make an order of review with respect to the challenged decision. That issue is to be determined by reference to the material which was or ought to have been taken into account by the Commissioner when the challenged decision was made: see *Avon Downs Pty Ltd v Commissioner of Taxation* *(Cth)* (1949) 78 CLR 353 and *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (1975) 132 CLR 535.

* 1. Davies J. rejected a submission that the Court should set aside the assessment the subject of appeal based on additional evidence adduced by the taxpayer. His Honour said at 216:

Mr Staff submitted that the Court should set aside the assessment without remitting the matter for reconsideration and that on the evidence before the Court it should do so. Mr Staff referred to *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (supra) and *Henry Comber Pty Ltd v Commissioner of Taxation (Cth)* (supra). However, the Court would so act only if it were satisfied that the result contended for was the only one to which a decision maker, properly instructed and not acting unreasonably, could come. It is not for the Court itself to exercise the discretion which is conferred upon the Commissioner. The function of the Court is a function in the nature of judicial review. Unless the Court is satisfied that there is no room for the exercise of the subject discretion, the Court must remit the matter for reconsideration.

I very respectfully agree with and gratefully adopt what Davies J. said in *Ferris*.

* 1. This is not a case where it can be said that *only* one conclusion was legally open to the Commissioner in relation to the issue of both the taxpayer’s usual place of abode and her intention to take up residence. Whilst the primary judge found that the taxpayer intended to reside in Sydney for more than 12 months, it was also the taxpayer’s intention to return to England to study acting. In such circumstances, I do not think that there was only one conclusion that could be legally reached about the taxpayer’s intention about residency. Notwithstanding that finding, for my part my strong impression is that the taxpayer’s usual place of abode in the 2017 year of income remained Bexleyheath in Kent and that she also had no intention of taking up residence in Australia. The taxpayer was in Australia temporarily on an extended holiday. She only worked to support her holiday. She had no right to stay in Australia permanently. In that respect, I refer to the following observation made by the majority in *Harding* concerning the 183 day test (called the “third test” in the following) at 329 [39]:

In contrast to the second test, what is described in the Notes as the third test in subpara (ii) is, initially, concerned with a person who is physically present in Australia for most of a given year of income. The exception to it probably applies to a person who is physically present in Australia for the required number of days but who would not be considered to be an Australian because he or she is only a temporary visitor of this country for a period of time. That period might even extend to a term of years.

* 1. However, my personal views are not what matter. The authority to determine whether the taxpayer’s usual place of abode in the 2017 year of income was in England and to ascertain whether she intended to take up residence in Australia, lay with the Commissioner.
	2. Finally, the taxpayer cited in her written submissions the following authorities in support of the proposition that, based on *Kolotex*, a Court may exercise powers and discretions reposed in the hands of the Commissioner:

*Tourism Holdings Australia Pty Ltd v Commissioner of Taxation* [2005] NTCA 3 per Martin CJ at [36] and [67]-[68], Mildren J at [136] and [142]; *Amway of Australia Pty Ltd v Commonwealth of Australia* [1999] FCA 283 per Hill, Lehane and Hely JJ at [66] – [67]; *Mochkin v Commissioner of Taxation* [2002] FCA 675 at [84]; *Kajewski v Commissioner of Taxation* [2003] FCA 258 at [11] – [12]; *Blues Pty Ltd v Deputy Commissioner of Taxation* [2012] FCA 320 at [13]; *Hii v Commissioner of Taxation* [2015] FCA 375 at [127]; *Re Rigby Forest v Commissioner* [1988] FCA 304 at [50] – [51], *Barnsdall v Commissioner* [1988] FCA 192 at [28], *Russell v Commissioner of Taxation (Cth)* [2009] FCA 1224 at [198]; *Crusher Holdings Pty Ltd v Cmr of Taxes* [1994] NTSC 82 at [20] and [23]; *Feez Ruthning (a firm) v Commissioner of Pay-Roll Tax* [2001] QSC 303 at [12] and [18]; *Ngurratjuta Pmara Ntjara Aboriginal Corp v Commissioner of Taxes* [2000] NTSC 17 at [20] – [21].

* 1. These cases, in my view, do not clearly support the taxpayer’s proposition. Some of them address another issue, namely the relevance of fresh material or evidence in the ascertainment of an error of law. To the extent that some authorities, such as *Russell* at first instance, may, on one view, appear to favour the broader contention of the taxpayer here, with profound respect I prefer the expression of the law by Davies J. in *Ferris*: c.f. *Minister for Immigration and Multicultural Affairs v. Thiyagarajah* (2000) 199 C.L.R. 343 per Gaudron J.

### Consideration of Carve Out to the 183 Day Test

1. What then is the legal consequence of an absence of the Commissioner’s satisfaction about the carve out to the 183 day test? By its terms, and as already mentioned, that test results in a person being a resident of Australia if they satisfy the objective requirement of being actually in Australia for the stipulated period “unless” the Commissioner “is satisfied” that the taxpayer’s usual place of abode is not in Australia and the person does not intend to take up residence in Australia. In my view, to be legally efficacious any satisfaction about these matters by the Commissioner needed to persist and remain in existence prior to the issue of the further amended assessment in question and at the time of the making of the objection decision. The Commissioner is entitled to reach that state of satisfaction for the first time at the objection stage. In that respect, s. 169A(3) of the *1936 Act* provides as follows:

In determining whether an assessment is correct, any determination, opinion or judgment of the Commissioner made, held or formed in connection with the consideration of an objection against the assessment shall be deemed to have been made, held or formed when the assessment was made.

1. It is also my view, as already mentioned, that the valid existence of a state of satisfaction concerning the matters required by the carve out to the 183 day test is a necessary precondition to an assessment issued to a taxpayer on the basis that she or he is a non-resident, where that taxpayer has actually been in Australia for more than one-half of the year of income. If a taxpayer in those circumstances can show that no such state of satisfaction relevantly existed, it will follow that they are a resident of Australia.
2. Neither s. 175 of the *1936 Act* nor s. 350-10 of Sch. 1 to the *T.A.A.* preclude that conclusion. This is not a case where a power has been exercised by the wrong person. This is a case where a prior exercise of power had been abandoned: it is as if it had never been exercised *simpliciter*. In *WR Carpenter Holdings Pty Ltd v. Commissioner of Taxation* [2006] FCA 1252; (2006) 63 A.T.R. 577, Lindgren J. made the following observation at 604 [144] about the Commissioner’s power to make determinations pursuant to ss. 177F and 136AD of the *1936 Act*:

In both ss 177F and 136AD, the ITAA 1936 specifies a number of conditions, and provides that if they are met, the Commissioner may make a determination, the effect of which is that the taxpayer’s taxable income will be greater than it would otherwise have been. With one exception, all of the conditions are “objective” (the exception is the condition in s 136AD(1)(b) and s 136AD(2)(b) (and s 136AD(3)(b), not presently relevant) that the Commissioner is satisfied that the parties to the international agreement were not dealing at arm’s length with each other). Neither section makes the existence of any particular state of mind of the Commissioner in relation to the making of the determination, a condition of the power to make it. *Sleight* should be regarded as establishing that the legislature has revealed an intention that even in an appeal under Pt IVC of the TAA, the Commissioner’s reasoning that led him to make the determination is shielded by s 177(1) of the ITAA 1936 from attack on judicial review grounds as part of the “due making” of the assessment. *Of course, the fact itself of the making of the determination goes to the substantive liability to tax: if a determination was not even purportedly made, or if a determination purportedly made was not authorised by the ITAA 1936 because the statutorily prescribed conditions of the enlivening of the power were not satisfied, or, I suggest, failed to satisfy the* Hickman *principle, the assessment will be shown to be excessive*.

(Emphasis added.)

1. Here there has been no “fact itself” of the Commissioner maintaining his state of satisfaction that engaged the carve out to the 183 day test. It follows that the taxpayer was a resident of Australia because she satisfied the objective requirement of being in Australia for more than one half of the 2017 year of income.

### Notice of Cross-Appeal

1. In its Notice of Cross-Appeal, the taxpayer contended as follows:

The Cross-Appellant, as a person who satisfied the ‘183 day test’ in respect of the period ending 30 April 2017, continued to satisfy this test during the period 1 May – 30 June 2017. The court should not imply a qualification into the statute that causes a taxpayer who satisfies the ‘183 day test’ in respect of a tax year to cease to satisfy the test at the point when the taxpayer departs Australia. The ‘183 day test’ does not require continuous physical presence in Australia.

1. During the period 1 May to 30 June 2017, the taxpayer was living in England. The taxpayer wanted to claim that she was a resident for the entire 2017 year of income because this affects, it was said, the calculation of the tax free threshold. The case for the taxpayer was based on the presence of the phrase “the year of income” in the 183 day test, and to the need to measure a taxpayer’s actual presence in Australia by reference to one income year. That contention is supported by the following observation of the Commonwealth Taxation Board of Review in *Case 78* (1944) 11 C.T.B.R. 232 at 238:

It is only in [the 183 day test] that the definition of ‘resident’ speaks of ‘the year of income’ and of a period occurring in that year. This suggests, as a probability, that the class of case contemplated is one in which the person concerned was in Australia for more than one half, but less than the whole, of the year of income, and that the purpose of the sub-paragraph is to deem such a person to be a resident for the whole of the year. Such a purpose seems reasonable enough in the prescribed case, i.e., the case of a person who spends most of the year of income in Australia and has no residential roots elsewhere.

(Emphasis in original.)

1. The Commissioner disagreed with the taxpayer. He was of the view that if the taxpayer had been a resident, she ceased to be so when she returned to England. He relied upon the presence of ss. 18 and 20 in the *Rates Act*. They provide for part-year residency and, in such a case, the pro-rata application of the tax free threshold. Section 18 provides:

(1) Subject to subsection (2), the following periods are part-year residency periods in relation to a person in relation to a year of income:

(a) where the person was a resident at the beginning of the first month of the year of income and continued to be a resident until a time during a subsequent month in the year of income when the person ceased to be a resident — the period from the beginning of the year of income until the end of that subsequent month;

(b) where the person commenced to be a resident during a month of the year of income and continued to be a resident until the end of the year of income — the period from the beginning of that month until the end of the year of income;

(c) where the person commenced to be a resident during a month of the year of income and continued to be a resident until a time during a subsequent month of the year of income when the person ceased to be a resident — the period from the beginning of that first-mentioned month until the end of that subsequent month.

(2) A period shall not be taken to be a part-year residency period in relation to a person in relation to a year of income if:

(a) the person is an eligible pensioner in relation to the year of income; or

(b) the period is the whole of the year of income.

1. The Commissioner, not unreasonably, pointed out that it would be an anomalous outcome if the foregoing provision could apply to a person who is a resident in ordinary concepts and not to a person who is a resident by reason of the 183 day test.
2. The learned primary judge rejected this aspect of the taxpayer’s case. His Honour did so in accordance with reasons he had given in another decision, namely *Stockton v. Commissioner of Taxation* [2019] FCA 1679. At [49]**-**[50] in that case Logan J. said:

An immediate difficulty with this contention is that it lacks textual support in s 18 of the Rates Act. There is nothing in the text of s 18 which suggests any intention, even by necessary implication, to qualify the general reference to “resident” by excluding those to whom paragraph (a)(ii) of the definition of “resident” in s 6(1) of the 1936 Act is applicable because, there being no exception arising from the Commissioner’s satisfaction as to usual place of abode, they are, per force of time spent in Australia, taken to be a “resident”. Especially that is so given that s 4 of the Rates Act requires that the 1936 Act and thus the definition of “resident” be “incorporated, and ... read as one, with [the Rates] Act”. The evident purpose of s 18 is to provide generally for a deemed period of residency when, but irrespective of how, a person becomes a “resident” as defined during a given income year.

As to “how”, I can see no logical basis for distinguishing between any of the bases upon which a person might, in terms of the s 6(1) definition, be a “resident”. Indeed, it is quite possible that a person might be a resident according to the ordinary meaning of that word and also under, materially, paragraph (a)(ii) of the definition. If, in the example posited as to an academic who came to Australia on sabbatical leave, that academic arrived after the start of an income year, was present more than 183 days and secured during the income year a teaching, research or administrative appointment in Australia extending well beyond that income year, it may be difficult, if not impossible, reasonably to be satisfied that [their] usual place of abode during that income year was other than Australia and that they were also, after their arrival, a resident within the ordinary meaning of that term in any event.

1. I respectfully agree with this reasoning. I also respectfully agree with the Commissioner’s concern about anomalous outcomes, although such outcomes are not always determinative: *ConnectEast Management Ltd v. Commissioner of Taxation* (2009) 175 F.C.R. 110 at 119 [41]. In my view, a person who is a resident of Australia by reason of an application of the 183 day test is eligible to be a person who is capable of “ceasing to be a resident” part-way through a year of income, to use the language of s. 18 of the *Rates Act*. That provision makes no distinction between the different ways in which an individual can be a resident, and assumes in each case that all types of residency can be brought to an end. Once it is accepted that s. 18 is capable of applying to the taxpayer here, it is self-evident that when she finished her holiday and returned home to England, she “ceased to be a resident” of Australia for income tax purposes.

### Article 25(1) of the Treaty

1. For convenience I reproduce Art. 25(1) below:

Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

1. I should also set out Art. 25(5) of the Treaty. It supports an important attribute of Art. 25(1), namely that it is concerned only with discrimination by reason of nationality and not by reason of residence. Article 25(5) provides:

Nothing contained in this Article shall be construed as obliging a Contracting State to grant to individuals who are residents of the other Contracting State any of the personal allowances, reliefs and reductions for tax purposes which are granted to individuals so resident.

1. The foregoing Article does not appear in the O.E.C.D.’s “Model Tax Convention on Income and on Capital.”
2. It is not disputed that the taxpayer’s nationality was British. Article 3 of the Treaty defines the term “national” in relation to the United Kingdom as follows:

... any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom; and any company deriving its status as such from the law in force in the United Kingdom;

…

1. The definition in the Treaty of a “national”, in relation to Australia, included not only an Australian citizen, but also a non-citizen who had been granted “permanent residency status” (Art. 3).
2. Nationality is not the same as residency. According to the O.E.C.D. Commentary on Art. 24 (the equivalent to Art. 25 in the Treaty), the principle of non-discrimination set out in Art. 24 pre-dates the creation of the first double tax treaties. Its origin was said to lie in the broader need “to extend and strengthen the diplomatic protection of [a State’s] nationals wherever resident…” (para. 2 of the Commentary on Art. 24). As such, Art. 25 (and Art. 24 of the Model Convention) may, in a practical sense, now be of limited relevance in the 21st century.
3. By its terms, Art. 25(1) calls for a comparison to be made between the taxation of the taxpayer and the taxation of a hypothetical Australian national who is “in the same circumstances” of the taxpayer. Thus, Art. 25(1) requires the position of the taxpayer to be compared to another notional taxpayer:
	1. who is an Australian citizen or a non-citizen with permanent residency status (such a person could be a citizen of another country); and
	2. who is “in the same circumstances” of the taxpayer. All parties accepted that this could *not* include the nationality of the taxpayer.
4. Before the learned primary judge there was a dispute about which of the taxpayer’s circumstances should be attributed to the hypothetical taxpayer. The Commissioner submitted below, and again presses before this Court, that the same circumstances must include a person who also held the same working holiday visa as the taxpayer. Because an Australian citizen and a person with permanent residency in Australia are not eligible for the grant of such a visa, the comparison could not take place. It therefore followed that the taxpayer could not seek any relief pursuant to Art. 25(1). A similar result, albeit in the case of an English company, occurred in *Commissioner of Inland Revenue v. United Dominions Trust Ltd* [1973] 2 N.Z.L.R. 555, a decision of the New Zealand Court of Appeal.
5. The learned primary judge rejected the Commissioner’s submission. In his Honour’s view, the lawful ability of the taxpayer to have remained in Australia by reason of her holding a working holiday visa, was so bound up with her nationality it should be ignored. As his Honour reasoned at [90]:

In relation to individuals, the definition of “national” in Art 3(1)(l) of the Double Taxation Agreement assimilates citizenship with, in the case of the UK, a right of abode and, in the case of Australia, a grant of permanent resident status. Either by mutual assumption or necessary implication, Art 25(1) envisages that a comparison is possible between, materially, a UK citizen in Australia who does not hold a permanent resident visa and not just an Australian citizen but also a UK or other non-Australian citizen who holds a permanent resident visa (who is also, by definition, a “national” of Australia) “in” Australia. Where his or her presence is lawful (and that is the case here) the “national” of the “Contracting State” will only ever be “in” the “other State” if he or she holds whatever the law of the “other State” requires to permit that individual to enter that “other State”. It seems to me to follow from these features of the text of Art 25(1) that the inability of a national of the “other State” to hold a particular visa of that “other State” authorising him or her to be “in” that “other State” must be taken to have been regarded as nothing to the point in relation to what might constitute “the same circumstances” for comparative purposes. The Commissioner’s submission based on an inability of an Australian citizen to hold a working holiday visa (or any other Australian visa) is, for this reason, flawed.

1. The learned primary judge relied upon parts of both the well-known text “Klaus Vogel on Double Taxation Conventions” and the O.E.C.D.’s “Commentaries on the Articles of the Model Convention.” As for Vogel, his Honour relied upon the following observation (at [95]):

Ascertainment of a case of discrimination requires a hypothetical comparison with a person who is a national. The comparison must be based on the **actual circumstances which are decisive in connection with the taxation procedure.**

(Emphasis in original.)

1. As for the O.E.C.D. Commentaries, the learned primary judge relied upon the following passage at [96]:

This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, **the Article should not be unduly extended to cover so-called “indirect” discrimination**. For example, **whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality** such as a different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State, **it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality** for purposes of that paragraph.

(Emphasis added by his Honour below.)

1. The learned primary judge reasoned that because the definition of a “working holiday maker” in the *Rates Act* necessarily referred to a person who was not of Australian nationality, and because that Act differentially taxed Australian residents and working holiday makers, it followed that it discriminated on the basis of nationality. It was a “disguised form of discrimination”, to use the language of the O.E.C.D. Commentaries, based on nationality (at [104]). As his Honour said at [103]:

The Rates Act expressly envisages that, in respect of persons who are resident in Australia, a different rate of tax will apply in respect of income derived in Australia from the same source, depending on whether the individual deriving that income is or is not a “working holiday maker” (as defined). On examination, the definition of “working holiday maker” in s 3A(1) of the Rates Act necessarily extends only to particular individuals who are not nationals of Australia. Likewise by reference to s 3A(2) of the Rates Act, it is only such persons who may derive “working holiday taxable income”. These are what *Vogel* terms the “actual circumstances which are decisive in connection with the taxation procedure”. In my view, this means that the discrimination between resident derived income from the same source in Australia is based on nationality. It is disguised by the reference to “working holiday maker” but the definition of that term makes it plain that what the disguise covers is nationality. A resident “national” of Australia undertaking the same work as did Ms Addy, in other words “in the same circumstances”, would not be taxed by reference to the rates specified in Pt III of Sch 7 to the Rates Act. Such a person would have the benefit of the tax free threshold.

1. It followed, according to the learned primary judge, that the taxpayer should have been taxed at the rates prescribed by Pt. I of Sch. 7 rather than by Pt. III. Whilst not expressly adverted to, it would appear to have been accepted below that being taxed by reference to Pt. III of Sch. 7 was to be made subject to taxation which is “other or more burdensome” than tax imposed on Australian nationals in the same circumstances.
2. In reaching the foregoing conclusion, the learned primary judge did not need to decide upon the correctness of two competing constructions of the phrase “in the same circumstances.” According to the O.E.C.D. Commentaries, this phrase is a reference to taxpayers in “substantially similar circumstances both in law and in fact” (para. 3 to the Commentary on Art. 24). The New Zealand Court of Appeal in *United Dominions* favoured a stricter test. In that case, McCarthy P. was of the view that the word “same” carried with it “the connotation of uniformity, of exactness in comparison.” According to his Honour, the phrase “in the same circumstances” meant “substantially identical circumstances” rather than “roughly similar circumstances” (at 561). Richmond J. was of the same view. His Honour also said that what must be identical is all matters (save nationality) “which are relevant from a taxation point of view to the notional comparison” which must be made (at 566). All three judges agreed that the residence of the taxpayer was one of the matters required to be considered in the comparison which was to remain the same.
3. The Commissioner also submitted that Art. 25(1) would only ever apply where it had been shown that the taxpayer had been discriminated against *solely* on the grounds of nationality. This sole purpose test was said to flow from the words “in the same circumstances”. The Commissioner contended that the correctness of this proposition was supported by the following observation contained in the O.E.C.D. Commentary on Art. 24:

In applying paragraph 1 [of Article 24], therefore, the underlying question is whether two persons who are residents of the same State ***are being treated differently solely by reason of having a different nationality.***

(Emphasis added by the Commissioner.)

1. Here, the Commissioner contended that even assuming a connection between nationality and the taxpayer’s visa status, it could not be said that she was subject to different rates of income tax *solely* because she was British. Rather, the taxpayer was subject to those rates because she chose to apply for and then hold a working holiday visa for her Australian working holiday. In contrast, if she had travelled to Australia on another type of visa, she would have been subject to the same rates applicable for either a resident or non-resident.
2. The taxpayer keenly defended the primary judge’s reasons concerning Art. 25(1). Relying on *United Dominions*, she submitted that because the circumstances of the hypothetical taxpayer need not be identical but rather needed only to be “substantially identical”, there was room to omit from the required comparison the taxpayer’s status as the holder of a working holiday visa. In any event, the visa here, being the very thing that permitted a foreign person to enter and remain in Australia, was integral “to the separateness of nationality” and thus needed to be ignored.
3. The taxpayer also made the point that if a foreign national’s visa were not excluded from the required comparison, the only taxpayers that would ever be able to invoke the protection of Art. 25(1) would be those who had arrived in Australia illegally without any visa. That is because in all other cases, it was said, an Australian national is not entitled to hold a visa and the holder of a permanent visa would have no need or basis for acquiring a further visa. On one view, such an outcome is absurd. That suggests that the learned primary judge was perhaps right to decide that the taxpayer’s working holiday visa should not form part of the attributes of the hypothetical Australian notional taxpayer for the purposes of Art. 25(1).
4. Because of that contention, Mr. Hyde Page of Counsel, who represented the taxpayer, submitted that it would be “self-defeating” and contrary to “common-sense” to include as an attribute of the comparator taxpayer the holding of a working holiday visa. That was because the foreign national in such a case could only lawfully be in Australia and earning working holiday taxable income by holding such a visa. I have some sympathy for this complaint, but very respectfully, I am unable to accept it for the reasons that follow.
5. I make the following three observations.
6. *First*, it is no part of the *discrimen* for the application of the rates set out in Pt. III of Sch. 7 of the *Rates Act* that a person bear any particular nationality. The principal criterion is that the taxpayer earns a certain type of taxable income. The type of taxable income is then defined by reference to the earning of income from sources in Australia (less allowable deductions) by a working holiday maker. A working holiday maker is not defined in s. 3A by reference to a taxpayer’s nationality of any particular country; indeed, the provision does not refer at all to a person’s nationality. Rather, a person is a working holiday maker if that person holds one of the particular classes of visa identified in s. 3A.
7. *Secondly*, a British national who is a non-resident of Australia and who has earned income with a source in Australia (other than working holiday taxable income), or is otherwise liable to pay Australian income tax, would pay income tax on such income at the rates set out in Pt. II of Sch. 7 (dealing with non-residents). An Australian national, who is also a non-resident, would be liable to pay tax at those same rates if she or he had earned income from a source in Australia, or was otherwise liable to pay Australian income tax. Again, the nationality of the non-resident is neither here nor there.
8. *Thirdly*, a British national who is a resident of Australia would pay income tax at the rates set out in Pt. I of Sch. 7 (dealing with residents) other than in respect of the earning of working holiday taxable income. The same rates would apply to an Australian national that is a resident of Australia. Once again, the nationality of the foreign tax resident is neither here nor there.
9. The foregoing suggests that the *Rates Act* does not discriminate on the basis of nationality. It does provide for different rates of tax to be payable depending on the tax residence of a taxpayer, or upon a taxpayer being in Australia pursuant to particular classes of visa. But nationality is not a ground or basis for taxation at different rates. Of course, there is a form of correspondence between the concept of nationality and a person who holds a working holiday visa; the Commissioner accepted that a person who holds a working holiday visa will in *all* cases also be a foreign national. But this type of correspondence is of no consequence because, as noted at paragraph [223] of Derrington J.’s reasons, a foreign national can always stay in Australia using a different visa; in such a case that person would not be taxed on their Australian source income pursuant to Pt. III of Sch. 7. This observation highlights that it is the holding of a working holiday maker visa, and not nationality, which is decisive in determining the rates of tax payable.
10. It follows that, with very great respect, I am unable to agree with the conclusion of the learned primary judge that this is a case of disguised discrimination. That is so for two essential reasons. First, the O.E.C.D. Commentary, in the passage set out above, warns against “unduly” extending the reach of Art. 24 of the Model Tax Convention (here Art. 25 of the Treaty) to “cover so-called “indirect” discrimination.” Secondly, care must be taken to ensure that it is a person’s nationality which is the reason for differential treatment. For the reasons set out above, it was not the taxpayer’s nationality that caused her to be taxed in accordance with Pt. III of Sch. 7 of the *Rates Act*, but rather her derivation of working holiday taxable income. Her income was of this kind because she chose to apply for and then hold a working holiday visa. Her nationality did not compel her to apply for this class of visa in order to enter Australia.
11. Moreover, I respectfully agree with the Commissioner’s submission that the circumstances that must be the “same” are only those which go to, or affect, the tax liability of the foreign national. Here, Australia has enacted legislation which makes the holding of certain types of visa determinative of the rates of tax that have to be paid. It follows, that where the foreign national is a working holiday maker, the circumstances of the hypothetical taxpayer which must be the “same” need to include the holding of the same working holiday maker visa. Depending on the terms of the legislation in question, there may be cases where the holding of a different visa is not relevant to a person’s taxation liability. In such a case it may be appropriate to ignore the existence of such a visa when applying Art. 25(1) of the Treaty.
12. As for Mr. Hyde Page’s contention, with great respect, I must apply the words of the Treaty. Those words focus in Art. 25(1) on the concept of “nationality.” They preclude discrimination because of a person’s nationality but not for other reasons. Critically, both Australia and the United Kingdom are free to discriminate on the basis of tax residency. This may be seen more clearly from the terms of Art. 25(5) set out above. For the reasons I have already given, Pt. III of Sch. 7 does not discriminate against the taxpayer because she is a citizen of the United Kingdom.
13. The Explanatory Memorandum to the Bill which, when enacted, became the 2016 Amending Act supports my conclusion. By enacting Pt. III of Sch. 7, Parliament was not intending to discriminate against foreigners by reason of their nationality. To the contrary, Parliament was intending to confer a *benefit* on foreign nationals who wish to have an extended working holiday in Australia. Such nationals, being present in Australia whilst on a holiday, are most unlikely to be residents of Australia for tax purposes. Rather, they are more likely to remain non-residents. The need to confer a benefit on such “backpackers” was explained at paras. [3.16]-[3.18] and at [3.21]-[3.22] in the Explanatory Memorandum as follows (the references to “WHMs” are to working holiday makers):

3.16 Recent AAT decisions have established that, under the existing law, most WHMs are non-residents for tax purposes and therefore required to pay 32.5 per cent tax from the first dollar of income. However, not all WHMs are classified as non-residents for tax purposes. Those who stay in the one place and establish ties to the community may be classified as residents. This disadvantages WHMs that are transient compared to WHMs that stay in one place. In addition, WHMs tend to incorrectly self-assess as residents.

3.17 Taxing WHMs at the 32.5 per cent tax rate has led to concerns, particularly in the agriculture and tourism industries, for which WHMs are a vital source of labour, that WHMs will choose to visit other countries over Australia.

3.18 Australia seeks to remain an attractive destination for WHMs, but the current tax treatment of WHMs threatens this goal.

….

3.21 Without legislative change, the AAT decisions, which imply that the majority of WHMs would be treated as non-residents for tax purposes and required to pay 32.5 per cent tax from the first dollar of income, will apply as the default position for administering the current tax law.

1. 3.22 Legislation is required to ensure that all WHMs are taxed on a consistent basis, at a rate that ensures that Australia is an attractive destination for WHMs, given their role in providing seasonal labour.I finally note that the Commissioner made a further submission which he submitted had been presented to the primary judge, but had not been dealt with. It is unnecessary to deal with that submission as the Commissioner has succeeded in his appeal for other reasons.
2. This case has had an unfortunate history. For the reasons given by Derrington J., the Commissioner was mistaken to have treated the taxpayer as a resident in ordinary concepts. The Commissioner was also mistaken in submitting that the taxpayer was nonetheless not a resident because the further amended assessment was supported by the required state of satisfaction under the 183 day test. It follows that the taxpayer was a resident by reason of her physical presence in Australia for more than half of the 2017 year of income. However, the Commissioner was correct to assess the taxpayer in accordance with the rates set out in Pt. III of Sch. 7 of the *Rates Act*. His application of the Treaty was correct.
3. The appeal should be allowed.

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| I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 6 August 2020