



Précis Paper

Residency and tax in recent law including Commissioner of Taxation v Pike [2020] FCAFC 158

Abstract –The vexed issues of residency, domicile and double taxation agreements in tax law are raised in four key decisions in the superior courts in the past year including *Commissioner of Taxation v Pike* [2020] FCAFC 158.

Discussion Includes

- Concept of residency
- Harding and the no-tax commissioners
- Stockton
- Addy
- Harding and Pike
- What is domicile?
- Tiebreaker test
- Decision impact statement
- Tax Board recommendations

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Residency and tax in recent law including Commissioner of Taxation v Pike [2020] FCAFC 158

1. In this edition of BenchTV, Peter Bickford (barrister) and Angus Murray (partner) discuss the issues of residency, domicile and double tax agreements raised in their recent case *Commissioner of Taxation v Pike* and three other key decisions of the superior courts in the past year along with their historic development.

Concept of residency

2. There are effectively four tests for residency for tax purposes in Australia. 1. The ordinary concepts test – the ordinary meaning of the word resides. 2. The domicile test, as argued in *Pike*. 3. The half-year test 4. The superannuation test where a person is a member of a government superannuation plan.
3. Assets are not so important when one takes into account the subjective intentions of parties.

Harding and the no-tax commissioners

4. In *Harding*, they had a look at the statutory history. The introduction of concept of residency in Australian tax law was a means to levying tax upon the high commissioners and agents general of the Australian States that would have their income in Australia and all the benefits of Australia but may not be residing in Australia.
5. They were not covered under the 1922 Income Tax Assessment Act or British income tax.

Stockton

6. Stockton came into Australia on a sub class 462 visa.
7. Residents of Australia are accorded a tax-free threshold of \$18,200 non-residents are taxed at 32.5 per cent up to \$87,000 and working holiday makers, which is the subject of *Stockton* and *Addy*, are taxed at 15 per cent where their income is between nil and \$37,000. So, for both Stockton and Addy it was desirable to be residents of Australia, whereas for Pike and Harding it was more desirable not to be a resident of Australia.

Addy

8. In *Addy*, what was important was advice given by roommates on her intention to settle in Australia. She had a share house where she had an enduring connection to the house where she was residing, and her evidence was accepted.

Harding and Pike

9. In both cases these were Australian citizens, in both cases they lived and worked overseas for extended periods of time and earned all of their income offshore.

What is domicile?

10. Domicile initially is wherever you are born. Domicile may then be changed by choice. It requires a clear intention to abandon the domicile of origin and to acquire a new domicile in another jurisdiction.
11. In the 1929 Amendment to the Income Tax Assessment Act 1922 it becomes the definition of residence and the term 'definitely abandoned' is used there in the context of a person leaving their domicile.
12. Resident status is determined on an income year by income year basis and can change from one year to another year. Or even during the course of one year, which did happen in *Pike*.
13. Mr Harding was successful and the error made by the trial judge when he looked at the phrase 'permanent place of abode', was he was looking at specific accommodation, rather than the country or the place where the person was going to live, and that was found not to be the correct application of the test.
14. *Pike* raised more questions. Mr Pike was born in Zimbabwe. His domicile of origin was Zimbabwe. There was then a question whether he had acquired a domicile of choice somewhere else – was it Australia, where his de facto wife and two kids came, initially on a visa, which then became a permanent visa, and they became citizens, then much later Mr Pike became a citizen. It's hard to argue once someone takes out citizenship that they have not acquired a domicile of choice in Australia. Nevertheless, we did try to do that and the Court did not immediately reject it.
15. He went to Thailand and got a permanent job and was there for many years.
16. Thailand had a double tax agreement. The problems arose when he went to Tanzania and Dubai, which have no double tax agreements.

Tiebreaker test

17. We look at the double tax agreement, not the OECD agreement. It was held there was an habitual abode in both Thailand and Australia. Applying the tiebreak test, the personal and economic relations were found to be closer to Thailand than to Australia and the principal reason for that was that Mr Pike earned all of his income in Thailand, none in Australia.

Decision impact statement

18. These are useful summaries of decisions. But they need to be viewed through the lens that this is the Commissioner's view, not necessarily the correct view. It is important to examine the decision for how the courts fall on issues and where ambiguity lies on future issues or determinations.

Tax Board recommendations

19. The recommendation can effectively be boiled down to five proposals to amend the current law in Australia.

BIOGRAPHY

Peter Bickford

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Peter practises in a number of areas - administrative law revenue law, commercial and insolvency litigation trade practices and corporations law. He is a member of the Business Law Section LCA, FTIA, Member AIAL, Medico-Legal Society, INSOL and APLA. He was admitted as a barrister and solicitor in the High Court of Australia in 1982.

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Angus is a Partner and Trade Marks Attorney at Irish Bentley Lawyers. He holds a Master of Laws from Stockholm University and is a sessional academic at the University of Southern Queensland and QUT. He is also a co-founder and director of the Legal Forecast, a member of the QLS Innovation Committee and Technology & IP Committee, a Vice President of the Queensland Council for Civil Liberties and the Chair of Electronic Frontiers Australia's Policy Committee.

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Focus Case

Commissioner of Taxation v Pike [2020] FCAFC 158

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_24-09-2020_insurance.pdf

Judgment Link

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2020/158.html>

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