TAXATION, THEORY, PRACTICE AND LAW

[Assignment submitted by: Student's name]

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[DATE]

CASE 1

The background of the case is as follow. The current scenario deals with a person called Kit who has a permanent residence of not just Australia but Chile also from where he was originally from. Kit has gained permanent residence in Australia despite being born in Chile. For the tax year under question, Kit has remained outside of Australia for the majority of the year, working on an oil rig which is just off the coast of Indonesia. The company in question with whom Kit works with is based in the United States of America. The recruitment process took place within Australia and that is where Kit signed the contract to be a part of the company. At the same time, for the previous four years, the wife and his two kids that Kit has have been living outside Australia, still in Chile. The same has been true for the current tax year as well. The family also has a home in Australia which they obtained three years ago by paying for it in full. The couple holds a joint account with Westpac Bank and the salary that Kit earns from his job at the United States based company while working at the oil rig off the coast of Indonesia is deposited into this bank account. Kit and his family have other investments, which include among other things a portfolio of shares which generates income other than capital gain in the form of dividend income. All such investments remain in Chile. After every two months at work, Kit gets the third off which he then spends with his family in either Chile or flies them in to Australia.

The question in this scenario is two-fold:

1. Whether Kit should be considered a resident of Australia or now?
2. If so, which of his incomes should be taxable in Australia?

As for the first situation, the tax laws are as follows for someone who:

Situation	Resident or not?
leave Australia temporarily and do not set up a permanent home in another country	an Australian resident for tax purposes
are an overseas student enrolled in a course that is more than six months long at an Australian institution	an Australian resident for tax purposes
are visiting Australia, working and living in the one location and have taken steps to make Australia your home.	an Australian resident for tax purposes (see factsheet)

are visiting Australia and for most of that time you are travelling and working in various locations around Australia	a foreign resident for tax purposes (see factsheet)
are either holidaying in Australia or visiting for less than six months	a foreign resident for tax purposes
migrate to Australia and intend to reside here permanently	an Australian resident for tax purposes
leave Australia permanently	treated as a foreign resident for tax purposes from the date of your departure

As per the aforementioned chart obtained from the Australian Taxation Office website, it is pretty clear that Kit falls under category number 6 as someone who migrated to Australia and is planning on staying here. Therefore, Kit is considered to be an Australian resident for taxation purposes for the tax year under question. The fact that he was born in Chile and keeps dual nationalities of both Australia and Chile is irrelevant for this consideration. Further irrelevant is the fact that he sometimes visits his family who live outside Australia on his months off as well as the fact that due to his work situation working at the oil rig just off the coast of Indonesia for the United States based company, he spends the majority of the year outside of Australia. The purchase of a house in Australia is further proof of the fact that Kit intends to remain in Australia for the near future further confirming his residency. There could be a scenario where there is a tax treaty to prevent double taxation between Chile and Australia as a result of which the income earned in Australia is taxable only in Australia and not in Chile. However, in the absence of such an agreement, there is a possibility that the income generated from his work for the US based company would be taxable in both Chile and Australia.

As for the second question of whether or not, the investments that Kit owns which are outside of Australia would be taxable or not, the Australian Tax Office states that all Australian residents are taxed on their worldwide incomes including:

1. offshore bank accounts
2. interests in foreign entities
3. rental income from overseas property
4. capital gains on overseas assets.

The same must be declared as income from such sources in the Australian tax returns filed by Kit. If Kit pays tax on any of this income in Chile, he would be allowed to claim a foreign income tax credit in Australia.

Since Kit's share portfolio, while wholly outside Australia would fall under 2 and capital gains on disposals of such shares would fall under 4, therefore it is a considered opinion that his share portfolio would be considered taxable under the Australian tax laws.

As for his other investments, since the exact nature of his investments outside Australia is unknown, therefore it is not possible to concretely state whether or not the same would be considered taxable or not under Australian law. However, due to the fact that the worldwide income of a resident is considered as taxable under Australian law, therefore, it is a safe assumption that other investments would also be considered as taxable.

Lastly, the house that is purchased by Kit and his wife is also a capital asset and if disposed off within the current tax year, the gain on the same would also be taxable as capital gain.

CASE 2

Californian Copper Syndicate Ltd v Harris (Surveyor of Taxes) (1904) 5 TC 159

This case study pertains to an issue relating to taxation of profits arising due to the realization of the sale of a property to be taxed as an ordinary income or capital gains.

Californian Copper Syndicate Ltd (CCSL) was incorporated in 1901, its object clause in the memorandum of association provided acquisition of copper-bearing land in California. Due to insufficient capital available, CCSL was unable to work the land, as the majority of its capital was tied in land acquisition. CCSL subsequently sold the land to a company, in consideration for shares in that company, while making a substantial profit.

The Commissioner was of the view that profit from the resale of the land was of revenue nature as CCSL was formed for the purpose of acquiring and reselling copper-bearing land. Whereas CCSL contended that the nature of the transaction was the substitution of one capital (land) for another capital asset (shares), therefore no profit was realizable.

Since, it is evident from the fact that CCSL's never had funds to mine the land and its purpose was to make profit out of such investment. Therefore, this gain is assessable as income of the taxpayer and liable to tax.

Scottish Australian Mining Co Ltd v FC of T (1950) 81 CLR 188

In Scottish Australian Mining Co. Ltd. v. Federal Commissioner of Taxation, it was stated that the facts would have to be very strong before a Court would treat the profit from the sale of a land which was not acquired for the purpose of profit by making sales as assessable income when the company had simply realized the land to its best value.

In cases of land subdivision the nature, scale and complexity of the activities undertaken are important in determining if the subdivision is taking place as part of a business operation or commercial transaction. In the Scottish Australian Mining's Case, it was determined that selling off the divided lots was simply a realization. It was indicated that disposing off the land in after division necessitates the construction of roads.

It was considered that the amenities and setting aside of some of the land for park space did not fundamentally change the transaction from that of realization.

FC of T v Whitfords Beach Pty Ltd (1982) 150 CLR

The High Court determined that proceeds from the sale of any part of the taxpayer's land constituted his income under section 25 of the Income Tax Assessment Act since it is a fairly common understanding that the amount included in the taxable income each year is the amount that is to be generated from material sales only. And since the land is not considered a stock in trade, therefore, the profit needs to be calculated by subtracting the value of the land at the date of the sale from the proceeds received from the sale.

Statham & Anor v FC of T 89 ATC 4070

The applicants applied before the court that the sum under dispute was not to be considered their income since the sum did not arise by disposing off any land which was acquired for the purpose of making profit and thus could not be considered to be profit. The decision was that it was shown after the application of the principles of law that the sale of land did not result in taxable or assessable income being generated.

Casimaty vs FC of T 97 ATC 5135

The case relates to a taxpayer who was in possession of a property used for farming which comprised approximately 988 acres. The taxpayer gained possession of the property from his father. Subsequently, the taxpayer purchased an additional 40 acres on which he constructed his house. During this time, he had a business for his primary income. Due to subpar living conditions,

Since he was in lots of debt, the taxpayer divided the land into eight parts and decided to sell it off. The only reason for the division of land was to reduce the debt burden. No intention of improving the presentation of land was ever there. Further, the duty of making and agreeing to the sale terms was that of the real estate agents and not the taxpayer.

The court decided in favor of the taxpayer when it was concluded that other than the activities conducted to get the required approval for the division of the land, nothing was there which suggested that there was a change in the reason for which the land was obtained. Since it was still the taxpayer's family home and used as his business dwelling. The final conclusion was that said sale of the divided land was just the capital asset of the taxpayer being realized.

Moana Sand Pty Ltd v FC of T 88 ATC 4897

In the given case, the proceeds of the sales from the subdivided land would be considered as assessable or taxable income if the taxpayer had entered into the agreement with the explicit intent of making a gain from the transaction which was not the case in this scenario. And it is not just the subjective intention but rather the intention which can be determined after a careful consideration of the facts. Which was not the case here as there was no intention to make profit at the time of the acquisition of the land.

Crow v FC of T 88 ATC 4620

Profits generated from the sale of a land which has been subdivided can be considered to be income if we go by the provisions of section 6-5 of the Income Tax Assessment Act of 1997 or as a profit making venture within section 15-15 of the ITAA 1997 or if the subdivision become a separate business activity as was the case here.

McCurry & Anor v FC of T 98 ATC 4487

The court determined that if a property is acquired in the course of a business or a commercial activity then the profit derived from it would be considered as income for the purpose of section 25(1) of the ITAA 1936

References

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