Recent Developments in International Taxation in Australia

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1 Introduction[1]

The Federal Government is expected to continue its focus on multinationals. The Federal Government announced in the 2019-20 Federal Budget in April 2019 that it was "*continuing to strengthen its efforts to maintain the integrity of Australia's tax system by making sure multinationals pay their fair share of tax on their Australia profits*".[2] The Federal Government will extend funding for the Australian Taxation Office's (**ATO's**) Tax Avoidance Taskforce until 30 June 2023, which it expects will raise a further $4.6 billion in liabilities over the next few years. That estimate is in addition to the $12.9 billion in tax liabilities the Federal Government's multinational tax avoidance initiatives have helped raise since July 2016.[3]

This report considers the developments in international taxation in Australia between June 2018 and May 2019. This report is separated into three sections:

(a) An update on the 2017-18 International Bar Association Report on International Taxation in Australia (**2018 Report**),[4] following the finalisation of a number of amendments which had been proposed in the previous year. These changes include:

(i) the implementation of BEPS Action 2;

(ii) the commencement of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (**MLI**);

(iii) amendments to the Multinational Anti-Avoidance Law (**MAAL**);

(iv) the release of further draft legislation relating to the introduction of a Corporate Collective Investment Vehicle (**CCIV**);

(v) the introduction of a whistleblower regime;

(vi) amendments to the progress of the corporate tax rate reduction; and

(vii) amendments to Victoria's stamp duty surcharge for foreign purchasers and foreign owner land tax surcharge and the introduction of a stamp duty surcharge for foreign purchasers in Tasmania.

(b) New developments which impact on international taxation, including:

(i) amendments to the taxation of stapled structures, managed investment trusts and thin capitalisation regimes;

(ii) a tax treaty being signed between Australia and Israel;

(iii) Australia's response to the taxation of the digital economy; and

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[1] This report was prepared with the assistance of my colleagues Paul Sokolowski (Partner), Clint Harding (Partner), Andrew Spierings, (law graduate), and Alexander Batsis (seasonal clerk).

[2] See for example, Hon Josh Frydenberg MP and Hon Mathias Cormann, *Joint Media Release*, "Lower taxes for hard-working Australians and small business", 2 April 2019, available at: http://jaf.ministers.treasury.gov.au/media-release/060-2019/.

[3] See for example, Hon Josh Frydenberg MP and Hon Mathias Cormann, *Joint Media Release*, "Lower taxes for hard-working Australians and small business", 2 April 2019, available at: http://jaf.ministers.treasury.gov.au/media-release/060-2019/.

[4] K Lowdon, 'Recent Developments in International Taxation in Australia' (Conference Paper, International Bar Association Conference, 2018).

(iv) the Commissioner finalising new guidance setting out his view on corporate residency.

(c) A number of Court decisions which impact on international taxation.

2 Update on 2018 Report

In the 2018 Report, a number of proposed amendments to international taxation in Australia were reported. To the extent there has been further development on these, they are dealt with below.

2.1 Implementation of BEPS – Action 2

In the 2018 Report, it was reported that the Federal Government had introduced a Bill into Parliament to implement the OECD Base Erosion and Profit Shifting (**BEPS**) Action 2, in relation to 'hybrid mismatch arrangements'.[5] The Bill received Royal Asset on 24 August 2018.[6]

Subject to some exceptions, the rules generally have application to certain payments after 1 January 2019 and to income years commencing 1 January 2019. While the rules broadly follow the OECD recommendation, in some respects, the enacted rules do go beyond the recommendations.

In very simple terms, the rules provide that:

(a) a hybrid mismatch arises where the same amount is deductible twice, or where an amount is deductible in one country and not assessable in another;

(b) dual inclusion income arises where the same amount is assessable in two countries; and

(c) the rules will deny deductions (or include amounts in assessable income) where a hybrid mismatch occurs, or in some cases where hybrid mismatches exceed dual inclusion income.

The rules also contain a targeted "integrity rule" that applies to certain deductible interest payments or payments under a derivative, where the payments are made to an interposed foreign entity and where the rate of foreign income tax on the payment is 10% or less. The integrity rule is directed at interest paid to a group subsidiary located in a tax haven, where the foreign tax payable would have been higher if paid to the parent of the group and the payment was made for the principal purpose of obtaining the deduction in Australia and obtaining the benefit of the low tax rate overseas. Where the relevant conditions are met, the integrity rule makes the interest non-deductible in Australia. While enacted at the same time as Australia implemented BEPS – Action 2, it is beyond the scope of the OECD anti-hybrid rules.

The Australian Taxation Office (**ATO**) has released draft guidance in relation to the hybrid mismatch laws in the form of:

(a) draft Law Companion Ruling *LCR 2019/D1*, setting out the Commissioner's interpretation of the hybrid mismatch targeted integrity rule; and

(b) draft Practical Compliance Guideline *PCG 2018/D9*, which seeks to provide guidance to taxpayers in assessing the risk of the hybrid mismatch rules applying to their circumstances, and in particular in relation to the concept of 'structured arrangement'.

[5] Treasury Laws Amendment (Tax Integrity and Other Measures No 2) Bill 2018 (Cth).
[6] *Treasury Laws Amendment (Tax Integrity and Other Measure No 2) Act* 2018 (Cth).

In addition, in October 2018, the ATO finalised Practical Compliance Guideline *PCG 2018/7*. The purpose of *PCG 2018/7* is to assist taxpayers wishing to eliminate hybrid tax outcomes that would fall foul of the new legislation by outlining what the Commissioner considers are straightforward, or low-risk, restructuring options and in relation to which the Commissioner will not seek to apply the general anti-avoidance provisions.

In the 2019-20 Federal Budget, the Federal Government proposed amendments to the hybrid mismatch rules. The amendments, if they are enacted, will broadly have the same application date as the original hybrid mismatch rules.

The proposed amendments are expected to:

(a) include rules which clarify that the hybrid mismatch rules apply to Australian multiple entry consolidated (**MEC**) groups and trusts;

(b) limit the definition of "foreign tax"; and

(c) specify that the integrity rule can apply where other provisions have applied, which will give greater certainty to taxpayers in complying with the rules (this amendment will apply to income years commencing on or after 2 April 2019, being the date on which the proposed amendments were announced).

2.2 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)

The *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (**MLI**) entered into force on 1 January 2019. This was given effect in Australia by the *Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018* (Cth) which received Royal Assent on 24 August 2018.

Australia's double tax treaties with United Kingdom, New Zealand, Japan, France, Poland and The Slovak Republic have already been impacted since 1 January 2019, and tax treaties with Ireland, Singapore, Finland and Malta will be impacted from later this year.

While the date of effect for Australia depends on the actions of the relevant treaty partner, the earliest the MLI takes effect in Australia is:

(a) for withholding taxes, on income derived on or after 1 January 2019;

(b) for all other taxes, on income years starting on or after 1 July 2019; and

(c) for mutual agreement procedure and mandatory binding arbitration, generally the later date of entry into force of the MLI for Australia or the relevant partner jurisdiction.

2.3 Multinational Anti-Avoidance Law (MAAL)

As reported in the 2018 Report, the Federal Government introduced a Bill[7] into Parliament which, among other things, proposed to expand the application of the MAAL to capture the use of foreign trusts and partnerships in corporate structures that may otherwise circumvent the MAAL. The Bill received Royal Asset in October 2018.[8]

The amendments extend the application of the MAAL to closely related trusts and partnerships. The MAAL is an anti-avoidance provision that applies to "significant global entities" (an entity which has annual global income of AUD1 billion or more or part of consolidated group that has annual income of AUD1 billion or more) that are considered to be avoiding the attribution and taxation of business profits in Australia.

The amendments apply to tax benefits that arise on or after 1 January 2016, regardless of whether the scheme was entered into before that day.

[7] Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018 (Cth).
[8] *Treasury Laws Amendment (Tax Integrity and Other Measures) Act 2018* (Cth).

2.4 Corporate Collective Investment Vehicle

In its 2016-17 Budget, the Government announced a scheme to create CCIVs as transparent tax entities, similar to the existing Managed Investment Trust arrangements. As reported in the 2018 Report, this was followed by two tranches of exposure draft legislation.

A third tranche of draft exposure legislation was released for consultation in October 2018, for which the public consultation period ended in February 2019.

The Exposure Drafts provide a vehicle which would provide 'flow through' tax treatment similar to Australia's Attribution Management Investment Trust (**AMIT**) regime (a collective investment vehicle),[9] except in a corporate form. The intent is that foreign investors are likely to be more familiar with a corporate vehicle than a Managed Investment Trust (**MIT**).

In general terms, a CCIV will be an Attribution CCIV (**ACCIV**), and have access to the 'flow through' tax treatment, if:

(a) at all times during the year it is a CCIV (a company registered under the *Corporation Act 2001* (Cth) that satisfies certain regulatory requirements); and

(b) each sub-fund of the CCIV satisfies the widely held requirements and closely held restrictions;

(c) the CCIV does not breach the trading restrictions;

(d) either the corporate director has elected into the ACCIV regime for the income year, or the entity was an ACCIV in an earlier year.

As reported in the 2018 Report, the first two tranches of CCIV exposure draft legislation provided the following key outcomes:

(a) The existing tax rules that apply to AMITs will be expanded to ACCIVs.

(b) ACCIVs will not be liable to corporate tax.

(c) Investors in the ACCIV will be liable to pay tax on amounts attributed to them (rather than dividends they receive). Amounts attributed to investors will retain the character and source they had in the hands of the ACCIV.

(d) A new CGT rollover to allow existing AMITs to change to ACCIVs without incurring a tax cost.

There have been no further changes proposed in relation to the first two tranches of the exposure draft legislation.

The third tranche of exposure draft legislation proposes to insert a new chapter into the *Corporations Act 2001* (Cth) to regulate the CCIV, including:

(a) the independence requirement for depositary;

(b) arrangements and reconstructions, receivership and winding up;

(c) a framework for deregistration of sub-fund and CCIVs;

(d) rules for takeovers, compulsory acquisitions and buy-outs; and

(e) disclosure and fundraising rules.

2.5 Whistleblower Regime

In the 2018 Report, it was reported that the Federal Government was considering a Bill to introduce a whistleblower regime. That whistleblower regime is now law, with the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017* (Cth) receiving Royal Assent on 12 March 2019. It amends the *Tax Administration Act 1953* (Cth) and

[9] The rules regarding the taxation of AMITS were reported in 2015-16 International Bar Association Report on International Taxation in Australia.

Corporations Act 2001 (Cth) to protect individuals who report breaches of the tax laws or misconduct in relation to an entity's tax affairs. It harmonises with the regime in the *Corporations Act 2001* (Cth) for reporting of corporate misconduct.

The whistleblower regime:

(a) protects whistleblowers from civil, criminal and administrative liabilities in relation to protected disclosures;

(b) introduces protections to prevent disclosure of an eligible whistleblower's identity;

(c) makes it an offence to cause detriment to an eligible whistleblower in relation to a disclosure (or potential disclosure); and

(d) enables a court to award compensation to a person who suffers damage in relation to a protected disclosure.

The legislation will commence on 1 July 2019.

Separately, a former employee of the ATO is currently being prosecuted after becoming a whistleblower last year when he exposed an alleged abuse of power inside the ATO, including aggressive debt collection practices. He initially made a disclosure internally under the provisions of the *Public Disclosure Act 2013* (Cth). His allegations were investigated by a senior ATO officer and dismissed. The ATO offered him a settlement over an alleged breach of the Public Service Code of Conduct, on the proviso he did not release the information publicly. He refused and went public with the information. He is charged with 66 offences, including using a listening device to monitor a private conversation, recording another person's tax file number and disclosing protected information. The former employee faces 161 years jail. The whistleblower has pleaded not guilty to the charges laid against him.

2.6 Corporate Tax Rate reduction

In the 2018 Report, it was reported that the Federal Government had passed legislation in May 2017 to reduce the corporate tax rate to 27.5% for entities carrying on a business that had an aggregated turnover of less than $25 million for the 2017-18 income year and less than $50 million for the 2018-19 income year (**First Act**).[10] The effected entities are known as "base rate entities".

It was also reported that the Federal Government had introduced into Parliament Bills to:

(a) Progressively extend the lower tax rate to all entities by the 2023-24 income year, and then to progressively lower the tax rate from 27.5% to 25% by 2026-27 income year (**Second Bill**).[11] The Second Bill has not passed Parliament and the Government has determined they will not proceed to enact the Second Bill.

(b) Replace the business test that was required under the law that passed under the First Act with a passive income test. The passive income test means that companies generating predominately passive income will not be eligible for the lower corporate tax rate.[12] This Bill received Royal Asset in August 2018 (**Third Act**).

On 16 October 2018, the Federal Government introduced the Treasury Laws Amendment (Lower Taxes for Small and Medium Businesses) Bill 2018, which received Royal Assent[13] on 25 October 2018 (**Fourth Act**). The Fourth Act accelerates the future reductions in the corporate tax rate for base rate entities as follows:

(a) 27.5% for the 2019-20 income year (legislated in the First Act);

(b) 26% for the 2020-21 income year; and

[10] *Treasury Laws Amendment (Enterprise Tax Plan) Act 2017* (Cth).
[11] Treasury Laws Amendment (Enterprise Tax Plan No 2) Bill 2017 (Cth).
[12] Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2018 (Cth).
[13] *Treasury Laws Amendment (Lower Taxes for Small and Medium Businesses) Act 2018* (Cth).

(c) 25% for the 2021-22 income year.

The rules for determining when and if a company qualifies for a reduced tax rate are disappointingly complex.

2.7 Additional Stamp Duty for foreign purchasers of residential property and foreign owner land tax surcharge

As reported in the 2018 Report, a number of a State and Territory Governments have introduced additional stamp duty for foreign purchasers and additional land tax for foreign land owners. These measures have largely been introduced in response to concerns about housing affordability and a perception that young families are being priced out of home ownership. The rates, and how they impact foreign landowners and foreign purchasers, differ across the States and Territories.

In addition to the State and Territory laws reported last year, on 1 July 2018, Tasmania also introduced a foreign owner stamp duty surcharge of 3%. The surcharge is in addition to the stamp duty that otherwise applies.

In addition, in the May 2019 Victorian State Budget, the Victorian State Government announced that it would increase the foreign duty surcharge from 7% to 8% from 1 July 2019 and increase the absentee land tax from 1.5% to 2% for the 2020 land tax year.

The foreign purchaser additional duty or surcharge regimes, with the application differing across the jurisdictions, have undergone changes since their introduction. As a result, it is even more important to consider the application of the surcharges which can significantly increase the costs of property acquisition and/or holding costs.

3 Recent Developments

3.1 Stapled Structures, Managed Investment Trust Concessions and Thin Capitalisation

On 5 April 2019, the following Acts received Royal Asset:

(a) *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2018* (referred to by the ATO as the **Stapled Structures Act**[14]);

(b) *Income Tax (Managed Investment Trust Withholding Tax) Amendment Act 2018*; and

(c) *Income Tax Rates Amendment (Sovereign Entities) Act 2018*.

The Stapled Structures Act introduces measures to address risks posed by stapled structures and similar arrangements and to limit access to concessions that were previously available to foreign investors for passive income.

The changes give effect to measures announced on 27 March 2018, which followed the release of Taxpayer Alert 2017/1 issued by the ATO.

In summary, the three Acts made changes to the following regimes:

(a) Non-concessional Managed Investment Trust (**MIT**) income by increasing the MIT withholding rate on fund payments that are attributable to non-concessional MIT. These amendments will apply from 1 July 2019.

[14] See, for example, https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Stapled-structures/ accessed on 23 May 2019.

(b) Thin capitalisation by modifying the rules to prevent double gearing structures. These amendments apply to income years starting after 1 July 2018.

(c) Super funds for foreign residents' withholding tax exemption by limiting the withholding tax exemption for superannuation funds for foreign residents. These amendments will apply from 1 July 2019.

(d) Sovereign immunity to limit access to tax concessions for foreign investors by codifying and limiting the scope of the sovereign immunity tax exemption. These amendments will apply from 1 July 2019.

3.2 Australia-Israel Tax treaty

On 28 March 2019, Australia and Israel signed a new tax treaty which, following its entry into force, will represent the first tax treaty between the two countries.

The treaty provides for capped withholding tax rates in certain cases:

(a) for dividends:

    (i) 5% in the case of certain direct investment holding at least 10% of voting rights;

    (ii) 10% in the case of government authorities, central banks or pension or superannuation funds; or

    (iii) 15%;

(b) for interest:

    (i) 5% for certain financial institutions, pension and superannuation funds; or

    (ii) 10%; and

(c) for royalties, 5%.

The treaty also incorporates the latest BEPs recommendations.

3.3 Australia's response to the Digital Economy

Australia is actively involved with other countries, through the G20 and the Organisation for Economic Co-operation and Development (**OECD**) in exploring a multilateral response to the tax challenges presented by the digitalisation of the economy.

In October 2018, the Federal Government released a discussion paper, "The digital economy and Australia's corporate tax system" seeking views on the merits and implications of pursuing an interim and unilateral response to the tax challenges presented by the digitalisation of the economy. One suggestion in the discussion paper was the possibility of Australia implementing a digital services tax.

In response, stakeholders raised significant concern about the impact of Australia taking an interim and unilateral approach, including the potential impact to Australian businesses and consumers by discouraging innovation and competition, adversely affecting start-ups and low-margin business, and the potential for double taxation.

As a result, the Federal Government has decided not to proceed with any interim measures, such as a digital services tax, at this time. The Government will, however, continue its commitment to working internationally towards a multilateral response to the digital economy.

3.4 Commissioner's finalised guidance on corporate residency

In June and December 2018, the Commissioner finalised Taxation Ruling *TR 2018/5* and Practical Compliance Guideline *PCG 2018/9* respectively dealing with the tax residency of foreign companies.

These products were released, initially in draft form, following the High Court's decision in *Bywater Investments Ltd v Federal Commissioner of Taxation* (2016) 91 ALJR 59 (***Bywater***). *Bywater* considered whether certain companies incorporated outside Australia were residents of Australia for tax purposes on the basis that 'central management and control' was exercised in Australia.

A company that is not incorporated in Australia, will be a resident of Australia if either of the following tests are satisfied:

(a) The company carries on a business in Australia and has its central management and control (**CM&C**) in Australia (**CM&C test**).

(b) The company carries on a business in Australia and its voting power is controlled by shareholders who are residents of Australia (**voting power test**).

Traditionally, both of these tests were viewed as composite tests with the requirement to carry on business in Australia considered separately from either the CM&C requirement or the voting power requirement. However, controversially, the ATO has revised this long-standing view that the tests are composite tests based on the ATO's interpretation of *Bywater*. Accordingly, the Commissioner withdrew Taxation Ruling *TR 2004/15* on 15 March 2017, which detailed his earlier view that the CM&C test and voting power test were composite tests before releasing the new products referred to above in relation to corporate residency. The new products were initially issued in draft. Stakeholders raised significant concerns in relation to the draft products. However, the Commissioner proceeded to ultimately finalise the products without significant amendment.

The position adopted by the Commissioner is that CM&C can be in more than one location. Where this occurs with a treaty country, it is likely to lead to an emphasis on the "place of effective management" (**PoEM**) tie-breaker test in Australia's tax treaties and, in some instances, reliance on the Mutual Agreement Procedure Article (if one exists) to ensure the relevant company is not taxed in two jurisdictions.

The position taken by the Commissioner in relation to the CM&C test will affect many foreign incorporated companies. Accordingly, the ATO has provided a transitional period ending on 30 June 2019 for foreign incorporated companies to make changes to their governance arrangements to ensure that the CM&C is exercised outside of Australia.

4 Case law

4.1 *COT v Resource Capital Fund IV* [2019] FCAFC 51

In the 2018 Report, it was reported that a single judge, Pagone J, of the Federal Court had held that US tax resident partners in a limited liability partnership should have the benefit of the US-Australian Double Taxation Treaty on gains made on the sale of shares in an Australian mining company.[15]

[15] *Resource Capital Fund IV v Federal Commissioner of Taxation* [2018] FCA 41 (Pagone J).

Pagone J's decision fundamentally changed the understanding of how limited partnerships, which have been a preferred vehicle for numerous offshore investors into Australia, are taxed and imposed further complexity for inbound investors.

However, Pagone J's decision has been fundamentally reversed on appeal to the Full Federal Court.[16]

The Full Federal Court held that:

(a) The proceeds from sale of shares (on revenue account) in an Australian resident company listed on the Toronto Stock Exchange but operating a mine in Australia was Australian-sourced income. At first instance, Pagone J also made this finding and, accordingly, the Full Federal Court upheld this aspect of the primary judge's decision.

(b) The corporate limited partnership is a taxable entity. This overturns the decision of Pagone J, who had held that limited partnerships were not taxable entities.

(c) As the corporate limited partnership was resident in the Cayman Islands, the Full Federal Court held that it did not get the benefit of the US-Australia Double Taxation Treaty. This overturns the decision at first instance of Pagone J who had held that treaty relief was available.

The decision is a return to the more conventional view that corporate limited partnerships are not transparent entities for the purposes of Australian tax law. Due to their popularity as an investment vehicle into Australia, this is a welcome clarification. However, the Full Federal Court's decision in relation to source and treaty relief may create confusion for non-residents as the case highlights the importance of considering the availability of tax treaties when using a corporate limited partnership.

The taxpayer has applied to the High Court of Australia for special leave to appeal the Full Federal Court's decision.

4.2 *FCT v BHP Billiton Ltd* [2019] FCAFC 4

The case *FCT v BHP Billiton Limited* considered the meaning of the phrase "sufficient influence", which is part of the associate test in s 318 of the *Income Tax Assessment Act 1936*.

FCT v BHP Billiton Limited was an appeal of the decision of the Administrative Appeals Tribunal in *MWYS v COT* [2017] AATA 3037. The Full Federal Court allowed an appeal by the Commissioner, deciding that the Australian and UK head entities of BHP Billiton's dual listed company (**DLC**) structure, as well as a marketing entity indirectly owned by both, were associates. As a result, the controlled foreign company rules could attribute income of the offshore subsidiary to the Australian entity.

The Full Federal Court (Allsop CJ and Thawley J, Davies J dissenting) considered that the head companies were sufficiently influenced by each other.[17] In forming that view, the Full Federal Court had regard to the arrangement between the two entities and, in particular, that:

(a) the entities had entered into a DLC agreement pursuant to which they were treated as a "single unified economic entity" with a common purpose;

[16] *Commissioner of Taxation v Resource Capital Fund IV* [2019] FCAFC 51 (Besanko, Middleton, Davies, Steward and Thawley JJ).
[17] *Federal Commissioner of Taxation v BHP Billiton Ltd* [2019] FCAFC 4, [155].

(b) the directors (who were common between the two entities) were to take into account the interests, and to further the common interests, of the shareholders of both head entities;

(c) the head entities were to hold certain shareholder meetings at or about the same time;

(d) each of the head company's power to declare a dividend had been delegated to the same committee and the head companies were to match dividends; and

(e) there were various guarantees between the two head entities.

While much of the reasoning turned on the peculiar terms of the dual listing agreement, importantly, the majority held that "sufficiently influence" requires a lower threshold than control and does not require an abdication of responsibility or a subservience to the other entity.[18]

BHP Billiton Ltd successfully applied for special leave to the High Court. It is expected that the appeal will be held later this year.

4.3 *Harding v FCT* [2019] FCAFC 29

In February 2019, the Full Federal Court delivered its decision on an appeal from the Federal Court, *Harding v Federal Commissioner of Taxation* [2018] FCA 837 (***Harding***). The issue in *Harding* was whether the taxpayer, an Australian citizen living in Bahrain and working in Saudi Arabia, was a non-resident for tax purposes. The Full Federal Court held that the taxpayer:

(a) did not reside in Australia (**resides test**); and

(b) had established a permanent place of abode outside of Australia (**permanent place of abode test**).[19]

The taxpayer had lived in three different apartments within the one apartment complex between 2009 and 2015, each fully furnished. He considered that these were temporary arrangements until he could organise for his wife and child to join him from Australia at the end of 2011. He never used any of the addresses as his mailing address. However, his marriage broke down in about October 2011 and his wife and child ultimately never joined him overseas.

The primary judge held that the taxpayer was a resident for tax purposes on the basis that the fully furnished apartment was insufficient to satisfy the permanent place of abode test. The taxpayer appealed the decision. The primary judge had held the taxpayer was not a resident pursuant to the resides test, and the Commissioner cross-appealed that aspect of the decision.

The Full Federal Court (Logan, Davies and Steward JJ) allowed the appeal, holding the taxpayer was not a resident of Australia for tax purposes. The Full Federal Court upheld the primary judge's decision that the taxpayer was not a resident pursuant to the resides test, but reversed the primary judge's decision on the permanent place of abode test. Accordingly, the Full Federal Court held that the taxpayer was not a resident of Australia for tax purposes.

Logan J, in a minority judgment, emphasised the importance of not relying on factual "checklists" in order to answer the question of residency.[20]

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[18] *Federal Commissioner of Taxation v BHP Billiton Ltd* [2019] FCAFC 4, [170].
[19] The parties agreed that the taxpayer had a domicile in Australia.
[20] *Harding v Federal Commissioner of Taxation* [2019] FCAFC 29, [7].

The Commissioner has applied to the High Court for special leave to appeal to the Full Federal Court's decision.

4.4 *Satyam Computer Services Limited v FCT* [2018] FCAFC 172

The Full Federal Court held that the 'source' rule in Article 23 of the Australia-India Double Taxation Agreement (**Australia-India DTA**) prevailed over the domestic definition of 'source', resulting in the payments from Australia to a company in India for work performed in India being taxable in Australia.

The definition of "Australian source" in section 995-5 of the *Income Tax Assessment Act 1997* provides that income will be sourced in Australia if, and only if, it is derived from a source in Australia. Ordinarily, income from services will have its source where the services are performed.

The taxpayer contended that Article 23 of the Australia-India DTA did not create a tax liability in circumstances were the liability did not arise under the domestic law of the relevant contracting state (Australia). In other words, the taxpayer argued that double tax agreements only work by allocating a taxing right between contracting states and do not themselves impose tax – a double tax agreement could only be a "*shield*", not a "*sword*".

The Full Federal Court did not agree and held that, as a matter of language, Article 23, "*operates to deem an item of income which one of the Contracting States has the right to tax to be from sources in that Contracting State 'for the purposes of' the law of that State 'relating to its tax*."[21] As section 6-5(3) of the *Income Tax Assessment Act 1997* is part of the law of Australia "*relating to tax*", the effect of Article 23 was that the payments in question were deemed to have an Australian source for the purposes of that section.

The Full Federal Court unanimously held that the payments made by the Australian clients to Satyam Computer Services Limited were derived and sourced in Australia, even though the work was performed by employees based in India. Importantly, the Court held that the Australia-India DTA and the Australian tax legislation were "*to be read as one*".[22] As there were two "source" rules, the Australia-India DTA prevails as the "*leading provision*", while the definition in the *Income Tax Assessment Act 1997* was "*subordinate*" and "*must give way*".[23]

As a result, the Australia-India DTA operated to deem an item of income to be sourced from the contracting state that has the taxing right – in this case, Australia – resulting in Satyam Computer Services Limited being liable to tax on those payments in Australia, despite the work being performed in India by Indian employees.

While the case specifically involved the Australia-India DTA, there was nothing in the decision which would suggest a court would interpret the source rule in other tax treaties differently.

[21] *Satyam Computer Services Ltd v FCT* [2018] FCAFC 172, [15] (Robertson, Davies and Wigney JJ).
[22] *Satyam Computer Services Ltd v FCT* [2018] FCAFC 172, [16] (Robertson, Davies and Wigney JJ).
[23] *Satyam Computer Services Ltd v FCT* [2018] FCAFC 172, [19] (Robertson, Davies and Wigney JJ).