Working holiday maker visa review

Introduction

The so-called "backpackers tax" is a misleading term. It suggests that working holiday makers pay a special tax. They do not.

Rate of tax

The rate of tax a person pays (including a working holiday maker) depends on whether they are an Australian resident or a foreign resident.

Foreign residents generally pay a higher rate of tax because they do not get the benefit of the tax-free threshold and pay 32.5% on the first $80,000. In contrast, Australian residents benefit from the tax-free threshold and pay tax at a rate of only 19% on taxable income between $18,200 and $37,000.

There is one group of foreign residents who pay a lower rate of tax – those who hold a Special Program Visa (subclass 416) and are employed by an approved employer under the *Seasonal Labour Mobility Programme*. They are effectively taxed at 15%.

Resident or foreign resident?

The key issue, from an income tax perspective, is whether a person is an Australian resident or a foreign resident. Since a "foreign resident" is defined in s 995-1 of the *Income Tax Assessment Act 1997* as simply *a person who is not a resident of Australia for the purposes of the Income Tax Assessment Act 1936* (ITAA 1936), the key question is whether a person is an Australian resident for income tax purposes.

A person is an Australian resident for income tax purposes if they satisfy one of 4 residency tests (see the definition of "resident" in s 6(1) of the ITAA 1936). The 4 tests are:

1. The ordinary concepts test – ie a person is an Australian resident for income tax purposes if they "reside" in Australia according to the ordinary meaning of the term "reside". This is a relevant test for a working holiday maker.
2. The domicile test – ie a person is an Australian resident for income tax purposes if they are domiciled in Australia and their permanent place of abode is not outside Australia. This test is unlikely to be relevant to a working holiday maker as they do not change their domicile when visiting Australia.
3. The 183-day test – ie a person is an Australian resident for income tax purposes if they are present in Australia for at least 183 days in the income year (ie between 1 July and the following 30 June), unless their usual place of abode is overseas and they do not intend to take up residence in Australia. This is a relevant test for a working holiday maker.
4. The Commonwealth superannuation scheme test – ie a person is an Australian resident for income tax purposes if they are a member of a relevant Commonwealth government superannuation scheme or if they are the spouse or child under 16 of such a member.

This test is unlikely to be relevant to a working holiday maker as they are unlikely to be a member of a relevant Commonwealth government superannuation scheme (or the spouse of such a member).

Ordinary concepts test

Whether a person "resides" in Australia according to the ordinary meaning of that term (and thus is an Australian resident for income tax purposes) depends on whether their behaviour over a considerable period of time (generally 6 months minimum) has the degree of continuity, routine or habit that is consistent with "residing" in Australia. Relevant factors include:

- the person's living arrangements;
- the purpose and duration of their visit to Australia;
- the extent of business/employment ties with Australia;
- the extent of family and social ties with Australia;
- ownership of real estate in Australia;
- the location of other assets and personal effects;
- where bank accounts are maintained; and
- the nationality and citizenship of the individual.

For further reading on this topic, see paragraph [2 060] of the *Australian Tax Handbook 2016* (published by Thomson Reuters).

Whether a person is an Australian resident under this test is a question of fact and thus each case must be judged on its merits. Some working holiday makers may be able to establish residency – one cannot state with certainty that every working holiday maker fails to satisfy this test.

The 183-day test

As most working holiday makers are present in Australia for at least 183 days during the income year, the key question is whether their usual place of abode is outside Australia (and they do not intend to take up residence). The test actually requires the Commissioner of Taxation to be satisfied that the person's usual place of abode is outside Australia.

The usual place of abode of a working holiday maker is likely to be outside Australia – and therefore they will not be an Australian resident under this test. This is exemplified by 3 Administrative Appeal Tribunal cases in 2015 – *Re Clemens and FCT* [2015] AATA 124, *Re Jaczenko and FCT* [2015] AATA 125 and *Re Koustrup and FCT* [2015] AATA 126. However, each case must be decided on its own facts and, in certain circumstances, a visiting working holiday maker may be a resident of Australia under the 183-day test.

For further reading on this topic, see paragraph [2 080] of the *Australian Tax Handbook 2016* (published by Thomson Reuters).

Conclusion

Although it is likely that most working holiday makers will remain foreign residents for income tax purposes (and thus be subject to higher rates of tax), it is possible for a working holiday maker to be a resident of Australia (and thus pay tax at the lower rates that apply to residents). ***Each case has to be assessed according to its particular facts and circumstances.***

Whether working holiday makers should be taxed at lower rates, even if foreign residents for income tax purposes, is a policy decision which is outside the area of expertise of the writer of this submission. Although it is the writer's personal view that working holiday makers should pay some tax – and preference should always be given to Australian citizens or permanent residents when employing people.

If the Government decides that working holiday makers should be taxed at a lower rate (particularly those working in the agricultural sector), one option may be to implement a scheme similar to the Seasonal Labour Mobility Programme.

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