

# OVERSEAS WORKERS AND TAXATION

## HOW MUCH TAX DO I WITHHOLD FOR OVERSEAS WORKERS?

### Backpackers – Working holiday makers

As of 1 January 2017 there is a tax rate of 15% on all earnings up to \$37,000 for backpackers.

This tax rate applies to every dollar earned by the backpacker who must be on a subclass 417 Visa (working holiday) or a subclass 462 Visa (work and holiday).

If the backpacker earns more than \$37,000 the relevant taxation threshold depends upon whether the employee is considered to be an Australian Resident for tax purposes. (See below)

### Federal court decision 2019, 2020 and 2021

In 2019, the Federal Court determined that for certain working holiday makers (WHMs), the 'backpacker tax' (15% on all earnings up to \$37,000) amounted to a form of discrimination based upon nationality because an Australian worker undertaking the same work would have the benefit of the tax free threshold of \$18,200.

The effect of this decision was that WHMs who were 'Australian residents for tax purposes' were entitled to the benefit of the tax free threshold after which marginal tax rates apply starting with 19 cents in the dollar up to \$37,000 just like Australian citizens.

The ATO appealed the decision and on 6 August 2020 the full Court of the Federal Court overturned the 2019 decision.

The Appeal found that the backpacker was NOT an 'Australian resident for tax purposes' and the 15% tax rate was correctly applied.

In November 2021 the High Court held that the backpacker WAS an Australian resident for tax purposes and the 15% rate was discriminatory as compared to Australian workers.

The decision affects residents of Chile, Finland, Japan, Norway, Turkey, the United Kingdom, Germany and Israel.

The ATO is considering its position and until further information is provided dairy farmers employing WHMs should continue to withhold tax in accordance with the 'working holiday maker' requirements and the backpacker can claim the difference back from the ATO when they do their tax return. See below for further information regarding whether an overseas worker is an Australian Resident for tax purposes.

### Whose responsibility is it to ensure the threshold is not exceeded?

It is the responsibility of the employee (the backpacker) to disclose to a new employer if their taxation obligations have changed.

It is also the employee's responsibility to complete a tax return prior to leaving the country (usually through the "Tax Back" group).

At the same time, the employee may apply for refund of superannuation monies (which are also now taxed on withdrawal from the superannuation fund).

However, if the worker has earned less than \$37,000, no tax return is required, so the tax that is withheld (at the rate of 15%) goes directly into Government funds.

### What are the employer's responsibilities?

It is crucial that employers who employ a working holiday maker in Australia on a subclass 417 or 462 visa do the following:

- register with the ATO as an employer of working holiday makers to withhold tax at the working holiday maker tax rate, before making the first payment;
- check the worker's visa status using the [Visa Entitlement Verification Online External Link service](#).

The ATO may issue penalties if an employer fails to register.

If an employer has not registered their intention to employ backpackers, tax withholding must apply at the rate of 32.5% (up to \$90,000)

An employer will need to be able to demonstrate that they had taken reasonable steps to ensure that the appropriate tax documentation was provided by the employee and that the employee was permitted to work in Australia.

The reporting mechanism through Single Touch Payroll shows that the data matching on eligible workers will assist in identifying persons that have earned more than the \$37,000 threshold.

If this occurs, the ATO is likely to engage with both the employee (via My Gov) and the employer (via STP contact details) to alert each party of the need for change.

The ATO takes the view that \$37,000 is a reasonable income stream for a backpacker in a 12 month period given the purpose of the visa, and earning above this limit is likely to create greater interest from the Immigration Department.

The employer should also take into consideration an employee's commencement date (ie: commencing in the second half of the financial year).

The following questions should be asked:

- When did you arrive in Australia?
- Have you been working since you arrived in Australia?
- We note on your TFN Declaration that you have indicated you are a working holiday maker. Whilst as the employer, tax can be withheld at the rate of 15% for the first \$37,000, you may need to review your current year to date earnings, to ensure that we withhold the appropriate amounts from your wage, and to reduce the risk of you receiving a tax liability before you leave the country.
- Have you accessed the "My Gov" app? This gives you your year to date earnings and might help you with your holiday plans for the remainder of your stay in Australia

#### **MORE INFORMATION**

Further information is available on the ATO website at [ato.gov.au/WHM](https://ato.gov.au/WHM)

### **Other overseas workers**

To determine how much tax to withhold you first need to determine if the worker is regarded as an 'Australian resident' or a 'foreign resident' for tax purposes.

Note: The criteria used by the ATO to determine residency are not the same as those used by the Department of Immigration and Border Protection, or the Department of Human Services.

Foreign residents pay a higher rate of tax and they are not entitled to a tax-free threshold which means they pay tax on every dollar of income they earn in Australia.

They also do not pay the Medicare levy (and are not entitled to Medicare health benefits).

All new employees must complete a Tax File Number Declaration and this form provides the information the employer needs to determine the appropriate tax to be withheld from wages paid to the employee.

These forms can be ordered online from the ATO website or obtained from most newsagents.

It is the employee's responsibility to ensure that they understand their residency position for tax purposes in accordance with the guidelines outlined below.

Taxation tables specify the appropriate taxation to withhold from employee wages. There is a separate table for foreign residents.

The taxation tables can be found on the ATO website:

[ato.gov.au/Rates/Tax-tables](https://ato.gov.au/Rates/Tax-tables)

If a foreign resident's circumstances change and they become a resident of Australia for taxation purposes, they need to advise the employer of such change and complete a Withholding Declaration Form (NAT 3093) and send this to the ATO.

#### **ato.gov.au/Forms/Withholding-declaration**

If a foreign resident becomes an Australian resident for tax purposes the employer must then use the taxation tables for Australian residents.

The ATO deems the residency status of the employee to have commenced when the behaviour of the employee is first regarded as being consistent with Australian residence. This may be the time they arrived in Australia or it may be later.

Any additional taxation which will have been paid as a foreign resident before the employee could be considered an Australian resident for taxation purposes may be refundable to the employee when they lodge their annual taxation return.

### **Is your worker an Australian resident for tax purposes?**

Generally, the ATO considers a person to be an Australian resident for tax purposes if they:

- have always lived in Australia or you have come to Australia and now live here permanently;
- are an overseas student doing a course that takes more than six months to complete;
- have been in Australia continuously for six months or more, and for most of that time worked in the one job and lived in the same place;
- will be or have been in Australia for more than half of the financial year (unless their usual home is overseas and they do not intend to live in Australia).

Note: Generally, it is a combination of the factors of time and behaviour while in Australia that will determine residency status.

The ATO uses two tests to help decide if a person is an Australian resident or a foreign resident for tax purposes.

#### **1 The resides test**

The first test is the 'resides' test and this centres around the way the person organises their domestic and social life while they are in Australia and includes the purpose of their presence in Australia, whether ties to the local community are established, social and living arrangements and business and employment ties.

#### **2 The 183 day test**

Under this test if a person is actually present in Australia for more than half of the financial year they may be said to be a resident of Australia unless it can be established that their usual place of living is outside of Australia and they have no intention of taking up permanent residence in Australia.

## CASE STUDIES

### Lars - a foreign resident

Lars lives in Munich and is granted a 12 month working holiday maker visa. He plans to return to Munich, and resume his career as a carpenter, after his 12 month working holiday in Australia. He takes 12 months leave from his work. He owns a home in Munich which he does not rent out. Lars arrives in August 2007 and has five different jobs whilst he travels around Australia, visiting every capital city during his 12 month stay. He stays in no place for longer than two months. Lars only works for seven of the 12 months he is Australia as he is primarily here to see as much as he can, picking up carpentry work to supplement his funds as he travels. Lars is not an Australian resident under ordinary concepts and although he is in Australia for more than six months in the year ended 30 June 2008, Lars will not satisfy the 183 day test, as his usual place of abode is outside Australia.

### Kate - a visitor, working and living in one place

Kate is from Ireland and entered Australia on a working holiday visa in July 2004. She intended to, and did in fact, stay in Sydney for most of the twelve months she was in Australia. Kate is close to her brother who has migrated to Australia and lives in Sydney.

Kate had one ten day holiday travelling up the east coast just after arriving in Sydney, and another two week holiday at Byron Bay in January 2005. She spent the last three weeks of her stay in Australia travelling around Western Australia.

Kate lived in share accommodation at one location for four weeks in Sydney and share accommodation at another location in Sydney for ten months. Kate's name was put on the lease and she made a part contribution to the bond. She also purchased her bed, other bedroom furniture and a fridge.

Kate worked in coffee shops and restaurants throughout the whole period she was in Sydney. Kate joined a library, the Irish club and a water polo club while staying in Sydney.

### Outcome: why is Kate an Australian resident?

Kate's intention was to reside and live in one location. Kate's behaviour and abode for 11 out of the 12 months

exhibited the attributes of a place of residence as contrasted with overnight, weekly, monthly or transitory accommodation of a traveller. By living and working in close proximity to her brother and establishing links in the community by joining the local library and membership of two local clubs, Kate demonstrated her family and social ties.

Kate's behaviour during the time spent in Australia reflects a degree of continuity, routine or habit that is consistent with residing here.

### Janine - combining work and travel

Janine is a British national who has longed to spend twelve months 'down under'. After saving for years, she takes twelve months leave from her work and departs for Australia on her twenty-fourth birthday. Although she travels with considerable savings, her intention is to spend at least part of her time working. She has obtained a working holiday visa enabling her to work for no more than six months with one employer.

Through a contact in Australia, she is assured of work in Perth for the first three months. After that period, she decides to travel to the east coast via Adelaide. She spends a month in Adelaide where she works for two weeks and continues her journey to Melbourne.

Once there, she meets some friends from back home. After working for a further three months, she decides to spend the balance of her time in Melbourne and uses her savings for living expenses. To keep costs down, she leases a house with two other friends. At the end of her twelve months in Australia, she returns to the United Kingdom and resumes living in her house there, which she had been renting out while in Australia.

### Outcome: why is Janine a foreign resident?

Although Janine obtains work, by travelling from place to place she has not established a pattern of habitual behaviour, even though she is physically present in Australia for twelve months and she co-leases a house. Janine's main purpose for being here is to have a holiday and she is merely supplementing her savings by working. Janine also fails to meet the 183 day test because she had a usual place of abode outside Australia and did not intend taking up residence in Australia.

## Conclusion

The complexities of the Australian Taxation system places significant responsibility on the employer to ensure that the appropriate tax is withheld from the wages paid to workers, and subsequently remitted to the Australian Taxation Office through the relevant monthly or quarterly reporting mechanisms.

Employers do need to take steps to ensure that the workers employed in Australia do have the correct requirements to be gainfully employed in Australia, as is required under our Immigration legislation. Such action by an employer will enable the employer to be positioned to take all reasonable steps to comply with the various legislative obligations that all employers face within Australia