



STANDARD INTERPRETATION GUIDELINE 2018-32

Income Tax - Residency for Individuals

This Standard Interpretation Guideline ('SIG') sets out Fiji Revenue and Customs Service's policy and operational practice in relation to residency rules for individuals.

It is issued with the authority of the Chief Executive Officer of FRCS.

All legislative references in this SIG are to the *Income Tax Act 2015* ('the ITA') and *Income Tax (Rates of Tax and Levies) Regulations 2016* and its amendments (unless otherwise stated).

This SIG is in effect from 21st September 2018 and may need to be reviewed in the event of any relevant legislative amendments.

CONTENTS

Executive Summary.....	2
Introduction.....	2
Legislative Analysis.....	3
First Test "Resides Test"	4
What is Resides Test.....	4
Second Test "Domicile Test"	5
Whether taxpayer has formed an intention to live outside Fiji.....	6
The intended period of absence from Fiji.....	6
The durability of the individual's association.....	7
Third Test "183 days Test"	8
Temporary Resident	10
Fourth Test "Government Officials posted abroad Test"	11
Double Tax Agreement (DTA).....	12
Dual Citizenship.....	12
Flowchart.....	13
Case Laws.....	14

EXECUTIVE SUMMARY

1. This Standard Interpretation Guideline ('SIG') is issued to address the residency rules under the Income Tax Act 2015.
2. The rules in ITA is in line with the global practice and rules in other tax jurisdictions.
3. There are three general rules and one specific rule to determine residency status for individuals. The general rules are **resides test, domicile test** and **183 days test**. The specific rule is for Government employees of Fiji posted abroad test.
4. The residency issue can at times be very complicated and will depend on the individual's personal circumstances or situations. Incorrect determination can result in collection of incorrect tax. Therefore, determination will be made on the facts of each case.
5. Tax residence is relevant to determine:
 - whether a person will be taxed on worldwide income or only on Fiji sourced income; and
 - the tax rates to be applied.

INTRODUCTION

6. Residency status is very important as it determines how an individual's income will be taxed.
7. An individual is considered to be a Fiji resident if one of the four alternate tests contained in Section 6 (1) of ITA is met.
8. The four tests which will be discussed in this SIG are as follows:
 - i. First test – Resides test
 - ii. Second test – Domicile test
 - iii. Third test – 183 days test
 - iv. Fourth test – Government employee/official posted abroad test
9. Under the first test which is the "resides test" an individual is a resident in Fiji if he/she meets the resides test as discussed below.
10. In the domicile test an individual will be a resident if he/she has a permanent place of abode (domicile/home) in Fiji.
11. For the third test being the "183 days test" an individual will be considered a resident if he/she is physically present in Fiji for a period of 183 days or more in a 12-month period, either continuously or intermittently.
12. The last and the fourth test which is the "government employee posted abroad test", wherein an individual will be considered a resident if he/she is absent from Fiji to perform duties abroad primarily for the government of Fiji.

13. The purpose of this SIG is to provide the CEO's views on practical issues involving residency and this SIG aims to cover the most relevant scenarios only as there may be several scenarios in practice.

LEGISLATIVE ANALYSIS

14. In general, a person is taxed on chargeable income for any tax year. 'Person' for the purpose of this SIG are resident individuals and temporary residents.

15. Resident individual is defined in section 6 of ITA 2015 which states:

[ITA 6] Resident individual

(1) Subject to subsections (2) and (3), an individual is a resident individual if the individual—

- (a) resides in Fiji;
- (b) is domiciled in Fiji unless the individual has a permanent place of abode outside Fiji;
- (c) is present in Fiji for a period of, or periods amounting in aggregate to, 183 days in any twelve-month period; or
- (d) is an employee of the Government posted abroad.

(2) An individual who is a resident individual under subsection (1) in relation to a tax year, in this section referred to as the "current tax year", but who was not a resident individual for the preceding tax year is treated as a resident individual in the current tax year only for the period commencing on the day on which the individual was first present in Fiji.

(3) An individual who is a resident individual under subsection (1) for the current tax year but who is not a resident individual for the following tax year is treated as a resident individual in the current tax year only for the period ending on the last day on which the individual was present in Fiji.

16. If one of the four alternate tests contained above in Section 6 (1) of ITA is met, an individual is considered to be a resident of Fiji. In other words, if any of the tests is satisfied in a tax year, the individual is treated as a resident for the whole of the year. This is subject to the part year residency rules in Section 6(2) and Section 6 (3).

17. Temporary Resident is defined in section 2 which will be discussed later in this SIG.

First test - “Resides Test”

What is the Resides test?

18. Section 6 (1) (a) stated above addresses “resides test”.

In C of T v Miller (1946) 73 CLR 93 , the court found that ‘reside’ had a very wide meaning, a dictionary meaning being to ‘dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place¹

For the purpose of determining the residency status of an individual, CEO will apply the principles of the case stated above.

19. Where a person resides is a question of fact and degree determined having regard to all circumstances. The Court has relied on a number of factors to determine whether a person resides in a country. These factors are non-exhaustive or decisive rather is a matter of weighing up all the factors to determine where a person truly resides.

Factors include:

- a) **Person’s length of stay in Fiji** – for how long the individual is in Fiji;
- b) **Intention** – is the purpose, behavior or actions of individuals;
- c) **Maintenance and location of assets** – is the place where an individual organizes and maintains personal assets such as his/her home, motor vehicle, bank account, insurance policies, etc;
- d) **Personal and economic connections** – is the family (spouse, children or parents) accompanying the individual and staying with them. Also the business or employment ties an individual has in Fiji is important;
- e) **Social and Living arrangements** – is an individual’s habits and mode of life. In other words, it is the place where an individual maintains or carries out his/her way of life. Some examples of social and living arrangements are playing soccer or any other sport or being a member in a local community club; and
- f) **Nationality**

20. The important point to note is that a person simply does not “reside” in Fiji by virtue of staying in Fiji, either through a fixed address or otherwise, but what is relevant is that a person resides or dwells permanently or for a considerable time.

Example 1 – Fiji Sourced Income Only

Mr. A was born in Fiji and has resided in Fiji since his birth. He is employed in YCo Ltd as an accountant. His employment income for tax year 2018 is \$40,000. Will Mr. A be a resident for tax purpose in Fiji?

¹ F.C. of T. v. Miller (1946) 73 C.L.R. 93 per Latham C.J. at pp. 99-100

CEO's position: Yes, he will be a resident for tax purpose in Fiji under section 6 (1) (a) of ITA since he has resided in Fiji since birth. He does not need to satisfy the other tests under section 6 as he has satisfied the first test which is the resides test.

Example 2 – Fiji and Foreign Sourced Income

Mrs. B was born in Fiji and has resided in Fiji since her birth. She is employed in ACo Ltd as a lawyer in Fiji. Her employment income for tax year 2018 is \$80,000. She has a house in Fiji in which she resides and she also has a house in Australia from where she derives rental income. She declares and pays income tax in Australia for the rental income earned there. Will Mrs. B be a resident for tax purpose in Fiji?

CEO's position: Yes, she will be a resident for tax purpose in Fiji under section 6 (1) (a) of ITA since she has resided in Fiji since birth. She does not need to satisfy the other tests under section 6 as she has satisfied the first test which is the resides test. Since she will be a resident for tax purpose in Fiji, she has to declare her worldwide income in Fiji. A foreign tax credit will be given under section 60 of ITA for tax paid in Australia to eliminate double taxation.

Example 3 – Individual not born in Fiji but resides in Fiji

Mr. C was born in Australia in year 1970. He graduated from Queensland University in 1993. He worked as a programmer in Australia up to 1996. He moved to Fiji with his family in 1997 and started his own business of developing software for many companies in Fiji. He currently operates the same business since then. For 2017 he made a net profit of \$150,000. He purchased a house in year 2009 in which he resides currently. Will Mr. C be a resident for tax purpose in Fiji for year 2017?

CEO's position: Yes, he will be a resident for tax purpose in Fiji under section 6 (1) (a) of ITA as he has resided in Fiji since he moved here in year 1997. Other factors will also be considered when determining his residency status. Other factors include the length of stay in Fiji, the location of his house where he resides and his personal and economic ties. He has been in Fiji for 20 years, he owns a house in which he resides and his family also stays with him in Fiji therefore, he is a resident for tax purpose in Fiji and has to declare his worldwide income in Fiji.

Second test - "Domicile Test"

What is the Domicile test?

21. Section 6 (1) (b) discussed in paragraph 15 outlined the "domicile test". The most relevant discussion to the domicile test is found in the case of *C of IR v Diamond* [2015]² which is deliberated below.
22. The domicile test mainly applies to Fiji nationals living overseas, who retain their Fijian domicile whether of birth or of choice and who seek to establish that their permanent place of abode is outside Fiji. In this case, the Fiji national only ceases to be a resident if he/she has a permanent home outside Fiji.
23. In other words, the domicile test will be triggered when an individual:
 - i. who used to reside in Fiji but has left Fiji for some time.

² NZCA 613 (CA).

- ii. who was not a tax resident of Fiji but establishes a place of abode (also known as home or domicile) in Fiji. Note that the individual has not become a resident by virtue of the 183 days test which is the third test but has established a place of abode in Fiji.

24. In cases where individuals were not tax residents previously but have established a place of abode in Fiji, the person's residency will be determined as per discussion below.

25. The *Diamond case* sets out the approach to the domicile test which requires the taxpayer to have a "permanent place of abode" in Fiji. The following are key points:

- a. Whether an individual has a permanent place of abode is a question of fact;
- b. The inquiry involves an overall assessment as to the nature and quality of the use the taxpayer habitually makes of a particular place of abode;
- c. That inquiry will be highly contextual and subject to the circumstances of the particular case; and
- d. The mere availability of a dwelling for the taxpayer is not sufficient of itself to establish a permanent place of abode, while the unavailability of a dwelling does not necessarily mean the loss of residence status³.

26. The approach listed above have been adopted into three broad categories for the purposes of Fiji and are important to determine whether a place of abode/home is the individuals permanent place of abode:

- (a) **Whether the taxpayer has formed an intention to live outside Fiji;**
- (b) **The intended period of absence from Fiji; and**
- (c) **The durability of the individual's association** with the place of abode/home in Fiji and how close their connection is with it.

27. **Whether the taxpayer has formed an intention to live outside Fiji**

There may be factors which indicate that a person has formed an intention to live outside Fiji. This is especially relevant for people who were previously domiciled in Fiji. For example, if a person has sold most of their assets, and severed associations with Fiji, it would most likely be determined that the person has formed an intention to live outside of Fiji.

There have been a number of international case laws which illustrates the principle above. These are attached in the Appendix.

28. **The intended period of absence from Fiji**

Generally, the longer an individual is **present in Fiji**, the more likely it is that their place of abode/home in Fiji will be considered a permanent place of abode for them. On the other hand, the longer an individual is **absent from Fiji**, the less likely it is that their place of abode/home in Fiji will continue to be a permanent place of abode for them although they might have connections with Fiji. Note that where an individual is absent or intends to be absent from Fiji for a longer period, there will be a point

³ NZ Income Tax Law and Practice (revised edition) [¶125-410] Permanent place of abode]

reached where it will no longer be practical to consider that a home/abode they have in Fiji is still their permanent place of abode. Assessment will be made after considering all the facts of the case.

As a general rule of thumb, if a person is absent from Fiji for a period of more than 3 years, he/she is regarded to have a permanent place outside of Fiji and the person is not domiciled in Fiji. This rule is applied on a case by case basis and is not the sole determining factor when applying the domicile test.

The principal is also demonstrated in local case laws which are discussed in the Appendix

29. **The durability of the individual's association**

This simply implies the individual's association with the place of abode/home in Fiji and how close his/her connection is with it. Factors to consider whether an individual's home can be treated as a permanent place of abode are same as the ones discussed in paragraph 19.

30. For a person to have a permanent home, the dwelling must have a set location. A Fiji national living overseas but moving around is unlikely to have a permanent home outside Fiji even if the individual is outside Fiji for many years.

Example 4 – Domicile in Fiji

Mrs. M is a Fiji national and works on a ship that sails in international waters. Every year she spends her one month leave in Fiji which is also her home. Her family also stays in Fiji. Will Mrs. M be a resident for tax purpose in Fiji for year 2017?

CEO's position: Yes, she will be a resident under section 6 (1) (b) of ITA. The home in Fiji can be considered her permanent place of abode as her family is in Fiji. So it can be seen that she still has strong connections in Fiji even though she is away for most of the year. This treatment is consistent with the international tax practice for sea-going employees.

Example 5 – Domicile in Fiji

Mr. X resigns and departs from Fiji on a working holiday. He intends to return to Fiji after his holiday but he is not sure as to when he will return. He had been residing in his home in Suva before he left Fiji. He maintains his bank account in Fiji. He intends to return to Fiji and reside in his family home. He finally returns to Fiji after 20 months.

CEO's position: Mr. X will be a resident under section 6 (1) (b) as he has a permanent place of abode in Fiji while he is overseas and he intends to return back after his holidays. Also he maintains his bank account in Fiji therefore he is a resident for Fiji.

Example 6 – Domicile in Fiji

Mrs. L is a Fiji citizen who has software businesses in Fiji and America. She owns a house both in Fiji and America. Neither of the houses are rented out. She uses both the homes as a place of residence. She spends most of her time in America, but she regularly travels to Fiji for business purposes. She spends up to five months of the year in Fiji where she stays in her house. These trips vary in length from five days up to seven months. She has significant investments including bank accounts in Fiji.

She is also a member of a cultural associations in Fiji. Her family lives in America. Will she be a resident for tax purpose in Fiji?

CEO's position: Yes, Mrs. L has a permanent place of abode in Fiji since she spent 7 months each year in Fiji therefore she will be treated as resident in Fiji. Also she has significant investments and social and economic ties in Fiji hence will be treated as a resident.

31. The facts of each case may be different therefore determination of residency will be based on a case by case basis.

Third test - "183 days test"

32. According to section 6 (1) (c) of ITA, an individual is a resident if he/she has been in Fiji for more than 183 days in any twelve-month period.

33. This test usually applies to foreign nationals working on assignment in Fiji. Such persons will normally have a home outside Fiji, but are considered to be Fiji residents if they are present in Fiji for the 183-day period.

34. The 183-day period is tested by reference to any period of twelve months and not the tax year. It may be consecutive days or intermittent days within several periods that adds up to 183 days in a twelve-month period, particularly in the year of arrival to perform employment responsibilities and the year of departure, after conclusion of the employment contract.

35. Since foreign employees are generally required to live in Fiji to perform their duties, most would be present in Fiji for a period of more than 183 days therefore are 'residents' for tax purposes from the date of arrival till the date they depart from Fiji.

36. In computing the number of days an individual is present in Fiji in a tax year, the following counts as a whole day –

- (i) part of a day that an individual is present in Fiji, including the day of arrival in and the day of departure from Fiji;
- (ii) a day spent by the individual on holiday in Fiji before, during, or after any activity conducted by the individual in Fiji;
- (iii) a public holiday;
- (iv) a day of leave, including sick leave;
- (v) a day in which the individual's activity in Fiji is interrupted because of a strike, lock-out, delay in the receipt of supplies, adverse weather conditions, or seasonal factors.

37. If a person comes in later part of the year for example October and will be under contract of employment for less than 3 years, he/she will be treated as a temporary resident for tax purpose in Fiji from the year of arrival.

38. The other tests become irrelevant if an individual satisfies that he/she is present in Fiji for more than 183 days.

39. If a person is a resident due to the 183-day test only, he or she is assessed on the income sourced from Fiji and not on the world wide income. However, if a person is a resident due to the domicile or resides test, he or she will be assessed on the world wide income in Fiji.

Example 7 – Individual who is an Expatriate

Mr. K was posted as Chief Executive Officer for ABC Bank Ltd (Fiji branch) in year 2014. His contract term is for 3 years which will be renewed after its expiry. He was born in New Zealand in 1975. He moved to Fiji with his family. His term of contract starts from 1 January 2013 which will end on 31 December 2016. ABC Bank Ltd provides his accommodation in an executive flat in Fiji. He served his initial contract term of 3 years and accepted extension for another 3 years. He does not own any home in New Zealand. Prior to his posting in Fiji, he was the Chief Financial Officer at ABC Bank Ltd (parent company) in New Zealand. ABC Bank Ltd also provided his accommodation in New Zealand. Will Mr. K be a resident for tax purpose in Fiji for year 2018?

CEO's position: Yes, he will be a resident for tax purpose in Fiji under section 6 (1) (a) of ITA as he has resided in Fiji since he moved here in year 2014. Other factors will also be considered when determining his residency status. Other factors include the length of stay in Fiji and his personal and economic ties. He has been in Fiji for 5 years and his family also stays with him in Fiji therefore, he is a resident for tax purpose in Fiji and has to declare his worldwide income in Fiji.

Example 8 - Foreign national treated as a resident

Mr. Y an Australian national, arrives in Fiji on 23 October 2017 to take up a job in Fiji with S Bank Fiji. His contract is for 4 years from 1 December 2017 to 1 December 2021. He will be in Fiji only up to the expiry of his contract after which he will leave the country. He does not exit Fiji during his term of contract. Will Mr. Y be a resident for tax purpose in Fiji for year 2017?

CEO's position: Yes, Mr. Y will be a resident for tax purpose in Fiji under section 6 (1) (c) of ITA from the date of arrival on 23 October 2017 up to his departure from the country.

Example 9 – Foreign national treated as a non-resident

Mr. K an American national has a working visa in Fiji for 2 years. He has a contract with XYCo Ltd a Fiji company to develop in house softwares. He arrived in Fiji on 01 January 2018 and will be in Fiji for 2 months as per his employment contract. His next and final visit will be in 2019. He will come on 01 April 2019 and will depart the country on 31 May 2019. Will Mr. K be a resident for tax purpose in Fiji for year 2018 and 2019?

CEO's position: No, Mr. K will not be a resident for tax purpose in Fiji under section 6 (1) (c) of ITA as he does not meet the 183 days test. He will be in the country for 2 months for both his visits which is about 60 days only. Thus, he will be a non-resident for tax purposes in Fiji for tax years 2018 and 2019 as well.

Example 10 – Foreign national treated as a non-resident

Mr. P entered into a 3 years contract of employment with JFL starting September 2013 and was considered to be a "Resident" for Tax purposes by virtue of continued engagement with JFL, till the end of the contract. The facts of the case in this matter indicated that Mr. P terminated his contract

(January 2015) to take up another employment offer outside of Fiji. Will Mr. P be considered a resident of Fiji for tax purposes for 2015?

CEO's position: The CEO is of the view that Mr. P **will neither be domiciled in Fiji nor will he be in Employment in Fiji for more than one-half of the Income Year 2015.** Therefore, he cannot be considered as a resident person for tax purposes, for the Income year ending 31 December 2015.

Temporary Resident

40. An individual may also be a 'temporary resident' of Fiji for tax purposes. Temporary resident is defined in section 2 of ITA 2015 which means an individual who is a resident individual solely or mainly for the purposes of engaging in employment in Fiji under a contract of employment of not more than 3 years, but not including a Fiji citizen⁴ or permanent resident⁵ of Fiji;
41. The foreign-sourced income (other than employment income) and the cost of passages of a temporary resident are exempt income as per paragraphs 13 and 15 respectively of Part 3 of the Income Tax (Exempt income) Regulations 2016 which states:

[Part 3] Individuals

(13) The foreign income, other than employment income, of a temporary resident.

(15) The costs of passage of a temporary resident and his or her family paid or reimbursed by an employer. The exempt amount is limited to the economy airfare by the most direct route between Fiji and the home country of the temporary resident in relation to—

- (a) the initial arrival in or final departure from Fiji;
- (b) one return journey per year for leave purposes; and
- (c) journeys made for urgent family purposes.

42. In order to qualify for temporary resident status, the CEO views that an individual must be present in Fiji for at least 183 days and the term must not exceed 3 years.

Example 11 – Temporary Resident

Mr. J a New Zealand national has a working visa in Fiji for 3 years. He has entered into an employment contract with PCo Ltd a Fiji company as a Technical Advisor. He arrives in Fiji on 01 August 2018 and will resume duties from 05 August 2018. His contract will end on 05 August 2021. He does not wish to renew his contract and will return after the expiry of the contract. His annual salary will be \$200,000. He also has a property in New Zealand from which he earns rental income and bank interest. Will Mr. K be a resident for tax purpose in Fiji for year 2018?

CEO's position: Yes, he will be a resident more specifically a temporary resident for tax purpose in Fiji since he derives employment income and will be in Fiji for 3 years only. Only his employment income earned in Fiji will be taxed in Fiji. His New Zealand income is exempt from tax in Fiji under Part 3 of the Income Tax (Exempt Income) Regulations.

⁴ defined in section 2 of ITA which means an individual who is a citizen under the Citizenship of Fiji Act 2009. Section 5 of the Citizenship of Fiji Act 2009 provides that citizenship may be acquired by birth (section 6), registration (Part 3), or naturalisation (Part 4).

⁵ defined in section 2 of ITA which means an individual who is a permanent resident of Fiji under regulation 51 of the Immigration Regulations 2007. "Permanent resident" means an individual who is a permanent resident of Fiji under the Immigration Regulations 2007

Example 12 – Temporary Resident

Mrs. J an Australian national has a working visa in Fiji for 3 years. She has entered into an employment contract with DCo Ltd a Fiji company as a Country manager. She will arrive in Fiji on 01 June 2018 and will resume duties from 03 June 2018. Her contract will end on 03 June 2021. She terminated her contract on 04 July 2020. Her annual salary is \$400,000. She also has a property in New Zealand from which he earns rental income. Will Mrs. J be a resident for tax purpose in Fiji for year 2018?

CEO's position: Yes, she will be a temporary resident for tax purpose in Fiji since she derives employment income only and is in Fiji for 2 years only. Only her employment income earned in Fiji will be taxed in Fiji. Her Australian income is exempt from tax in Fiji under Part 3 of the Income Tax (Exempt Income) Regulations.

Example 13 – Not a Temporary Resident

Mrs. L an Australian national has a working visa in Fiji for 3 years. She has entered into an employment contract with FCo Ltd a Fiji company as a Chief Engineer. She will arrive in Fiji on 01 January 2018 and will resume duties from 03 January 2018. Her contract will end on 03 January 2020. She terminated her contract on 04 May 2018. Her annual salary is \$250,000. Will Mrs. J be a resident for tax purpose in Fiji for year 2018?

CEO's position: No, she will be a non-resident for tax purpose in Fiji since she is present in Fiji for 4 months only.

Fourth Test “Government officials/employees posted abroad”

43. There is a special rule for an individual who is an employee of the Fiji Government posted abroad for official duties e.g. Fiji diplomats, consular and trade officials etc. The rule is stated in Section 6 (1) (d) of ITA 2015.
44. This rule simply means that a person who is posted overseas for official duties will be treated as a Fiji resident during the period of stay abroad. The length of time is not an issue as 6 (1) (d) overrides the 183 days rule.
45. However, any individual born in Fiji but had been living and working overseas for more than 3 years and had applied for a position overseas for a contract of Employment with Government of Fiji, will not be treated as a resident for tax purpose in Fiji. This is according to the general rule of thumb discussed in paragraph 28 above.
46. The inclusion of Fiji Government officials working abroad as residents is necessary as often they will be exempt from tax in the country of services, particularly under international agreements (such as the Vienna Convention on Diplomatic Relations and the government employee article in tax treaties). The exemption applies in the country of service on the assumption that the foreign government official will be taxed in their home country.

Example 14

Mr. X is Fiji's ambassador to Australia and is living and working in Australia. The term of his employment is two years. His family will also accompany him overseas. Will he be treated as a resident or non-resident for tax purposes in Fiji?

CEO's position: Mr. X will be treated as a Fiji resident in accordance with section 6 (1) (d) of ITA. He will be a resident for tax purposes in Fiji for the entire term (2 years) of his contract as he is absent from Fiji for Official duties for the Government of Fiji.

Note that his family is abroad but not for official duties for the Fiji Government therefore, section 6 (1) (d) of ITA will not apply to them. The determination of tax residency for every individual must be done separately.

Example 15

Mrs. D was born in Fiji but has been living and working in New Zealand for six years as an accountant in an Accounting firm. Her family also stays with her in New Zealand. She will be treated as a non-resident for tax purpose in Fiji for the four years. She saw an advertisement that the Fiji Government is looking for a person to work in New Zealand at its Newland office. She applies for the position and finally got appointed for it. Will she be treated as a resident or non-resident for tax purposes in Fiji?

CEO's position: Mrs. D will not become a Fiji resident just because she has started working for the Fiji government. She had been living in New Zealand for six years prior to her appointment to the new position therefore the performance of duties for the Fiji Government was not the main reason for her absence from Fiji, hence she will be treated as a non-resident for tax purpose in Fiji.

Double Tax Agreement (DTA)

47. If an individual is tax resident in Fiji and also in a country with which Fiji has a DTA, the DTA will supercede the provisions of Fiji ITA and it will determine what taxing rights each country has.

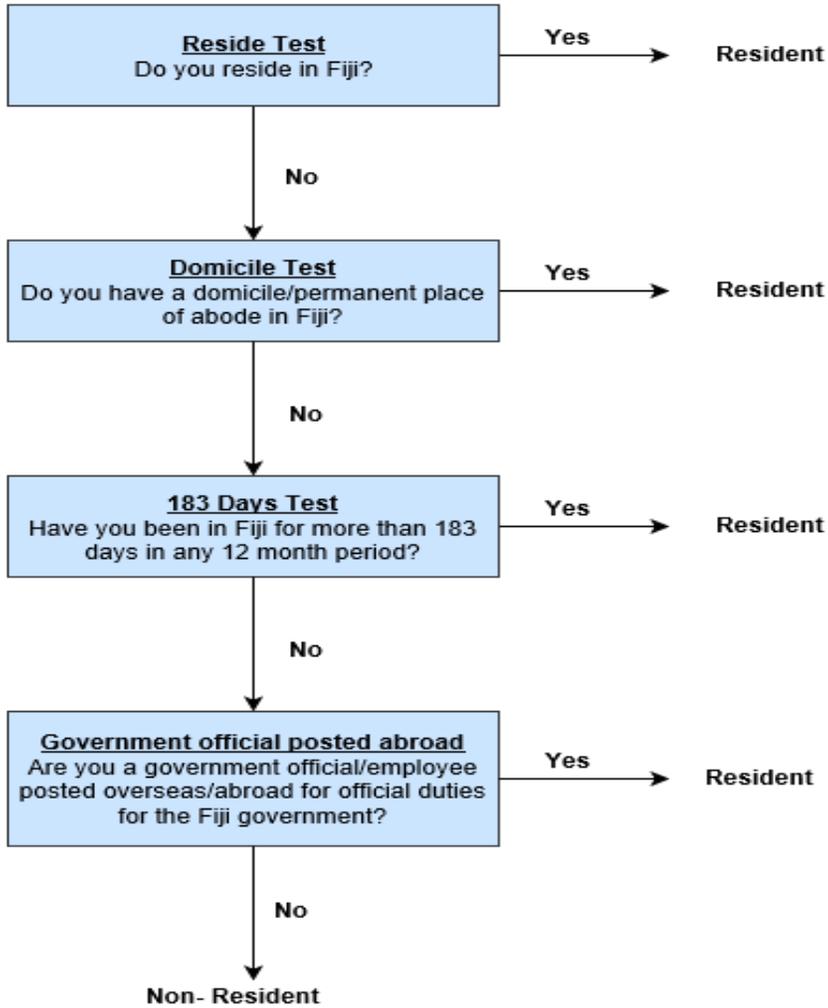
Dual Citizenship

48. An individual who has dual citizenship (a citizen of Fiji and citizen of any other country) has to satisfy the residency tests discussed above.

49. For further information, please contact us on tipu@frcs.org.fj.

Appendix One: Flowchart

Flowchart to determine whether an individual is a tax resident of Fiji



Appendix Two: Case Laws

International Case Laws

Ravi Iyengar v Commissioner of Taxation [2011] AATA 856

In *Iyengar v Commissioner of Taxation*, the Commissioner (Respondent) issued the taxpayer, Mr. Iyengar (Applicant) with notice of amended assessments for income years 30 June 2008 and 30 June 2009 on 22 November 2010. The amended assessments included the taxpayer's foreign source income of \$182,344 for the income year June 2008 and \$213,725 for the income year 30 June 2009 respectively.

The taxpayer while objecting argued that he was not a "resident" of Australia during the income tax years 30 June 2008 and 30 June 2009. Hence, the taxpayer argued that his foreign source income he derived in the United Arab Emirates (UAE) was not subject to Australian tax.

The taxpayer is a civil engineer by profession and was born in India in 1952. Mr. Iyengar emigrated from India to Australia with his wife and two children in 1998. They all became Australian citizens in June 2003. The taxpayer jointly owned a house in Australia with his wife. The taxpayer secured a contract with Maersk in Dubai so the taxpayer obtained a 3 year work residency visa to enable him live and work in Dubai in the UAE. The taxpayer left behind his personal and jointly owned personal property at their home in Australia when he went to Dubai. The taxpayer did not lease any property nor did he look into the legal requirements involved in buying a property on his own account. The taxpayer was more concerned about first paying off his mortgage on their home in Australia.

The Tribunal considered the facts and evidence and ruled that:

- (i) the taxpayer was at all material times a "resident of Australia" for the purposes of the definition of "resident" in section 6 (1) (a) of the *Income Tax Assessment Act 1936 (ITAA 1936)*;
- (ii) the taxpayer did not abandon his domicile of choice of Australia and acquired a different "domicile of choice", being the UAE, upon the taxpayer's move to Dubai; and
- (iii) the taxpayer did not establish a "permanent place of abode" outside Australia in the income years ended 30 June 2008 and 30 June 2009. Hence, the taxpayer was a "resident" under the domicile test in section 6 (1) (a) (i) of the *Income Tax Assessment Act 1936 (ITAA 1936)* of Australia.

Federal Commissioner of Taxation v. Applegate., Federal Court of Australia, Full Court, 29 June 1979

In *Federal Commissioner of Taxation v Applegate*, the Commissioner included an assessable income of the taxpayer (salary) which he had earned during part of the income year from New Hebrides, the source country outside Australia. The issue was whether or not the taxpayer was a resident in Australia for tax purposes as per definition in section 6 (1) (a) (i) of the *Income Tax Assessment Act 1936*.

The taxpayer was an associate partner in a firm of solicitors practicing in Sydney and he was always domiciled in Australia until November 1971. The taxpayer and his wife went to live in New Hebrides in order for the taxpayer to establish and manage a branch office for his firm. The taxpayer and his wife then leased a house in the New Hebrides where they obtained limited resident permits. The taxpayer left no assets in Australia but retained his membership in a hospital benefit fund.

The Supreme Court of New South Wales held that in the income year ending 30th June, 1972 the taxpayer was not a resident in Australia after November 1971. The Commissioner appealed but the appeal was dismissed by the Federal Court of Australia. The Federal Court ruled that whether a person domiciled in Australia has a permanent place of abode outside Australia to be considered as a non-resident or resident of Australia *'must be separately determined in relation to each year of income in which the question is relevant and having regard to the circumstances of the person relevant to that year'*.

Domestic Case Laws

Taxpayer K v Fiji Revenue & Customs Authority

In *Taxpayer K v Fiji Revenue & Customs Service*, the Tribunal relied on the cases of *Applegate* and *Iyengar* to determine taxpayer's residency status for tax purposes in Fiji. The taxpayer took leave from his Fijian based employer in 1998 before he accepted his employment with South Pacific Regional Environment Program (SPREP). The contract of employment entered into between the taxpayer and SPREP stated that the remuneration under the contract of employment, would be tax free in Samoa for non-citizens or non-residents of that country. There is nowhere within the Income Tax Act Cap. 201, that provides any exemption for such purpose.

The taxpayer was employed in Samoa for two years and the taxpayer contended that his permanent place of abode was Samoa. The Commissioner of Inland Revenue (CIR) contended that the taxpayer's permanent place of abode was Fiji.

In determining the taxpayer's residency status, the Tribunal at paragraph 30 emphasised the important value of the parallel between the definitions of "resident" in the Income Tax Act (ITA) Cap 201, with the definition of "resident or resident of Australia" in section 6 of the Australian *Income Tax Assessment Act (Cth) 1936*.

The Tribunal held that taxpayer is a resident in Fiji for tax purposes of section 2 of ITA Cap 201 and the taxpayer's permanent place of abode during the years in question was Fiji and not Samoa. Insert other facts..

Maneklal Maganlal v Commissioner of Inland Revenue

In *Maneklal Maganlal v Commissioner of Inland Revenue*, the Court relied on the definition of "resident" in section 2 of the Income Tax Act Cap. 201 to determine the taxpayer's (Appellant) residency status. The Court stated that 'the proper construction of the definition is to be ascertained first by considering the meaning of the term by ordinary concepts of interpretation, and if that fails to yield a result, by resorting to the extended meaning of the term as per the definition of 'resident' in section 2 of ITA Cap. 201. The Court cited the case of *Federal Commissioner of Taxation v Applegate* as its authority for the construction of the term 'resident'.

In the *Maneklal Maganlal* case, the taxpayer came to Fiji with his wife and they became Fiji citizens. The taxpayer decided to return to India in 1979 and intended to live there permanently. The taxpayer disposed of his assets in Fiji except for his house in Knolly Street, Suva. The taxpayer's cousin requested the taxpayer to return to Fiji to train his daughter-in-law in the administration of the firm's

business, a firm known as Bhanabhai & Company in which the taxpayer was a partner. The taxpayer agreed and returned to Fiji in September 1980 and resided in his house in Knolly Street, Suva.

The taxpayer received substantial sums as income in 1979 and claimed that he was not a resident in Fiji. Hence, he was only liable to withholding tax on his income. But the Commissioner contended that the taxpayer was a resident of Fiji. The Court held that the taxpayer was a resident in Fiji in 1979 in view of the ordinary concepts of interpretation of the definition of 'resident'. The Court did not consider the extended meaning of the definition of "resident" as per section 2 of the ITA Cap. 201.