ESSENTIAL PROPERTY TAX INFORMATION FOR AUSTRALIAN EX-PATS

JULIA HARTMAN

If you're an expat, you can be excused for being confused about your tax rights and obligations. This booklet provides all of the basic information you need to know to be sure you fulfill your obligations, avoid the many traps and claim what is rightfully yours.

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FOREWORD

When you live and work overseas, yet maintain your Australian citizenship and or Australian property you might still also maintain tax obligations and rights.

Knowing what these are and applying them to your personal situation can be like navigating a minefield. At Destiny, we find that our ex-pat clients have an abundance of questions, and every situation is different.

Whenever I'm unsure of anything to do with tax, my first port of call is Julia Hartman and her highly qualified staff at **BAN TACS**. Julia carries around entire tax rulings in her head and is a true walking encyclopedia when it comes to taxation advice.

And so, it made sense for Julia to put together this wonderful little booklet of information, not only for my own clients, but for ex-pats wherever they are in the world.

At the end of this booklet you'll find details about how to get some individual advice straight from Julia and her wonderful team from BAN TACS. And, if you're looking to invest in property and create wealth while you're away, Destiny offers a unique and highly advanced system of digital service provision, giving you access to me and my team of Qualified Property Investment Advisers for your property advice, and a whole host of educational information, with many interviews and video clips by Julia herself.

Julia Hartman

Margaret Lomas

DISCLAIMER

The information is presented in summary form and could be out of date before you read it. It is only intended to draw your attention to issues you should further discuss with your accountant. Please do not act on this information without further consultation. We disclaim any responsibility for actions taken on the following without further advice as to your particular circumstances.

BAN TACS National Accountants Group

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When Do You Become a Non-Resident?

Generally, if a person leaves Australia for more than two years and sets up a home in another country, they will be considered to be *not* a resident of Australia for tax purposes right from the time they leave Australia.

IT 2650 examines the relevant factors in depth:
http://law.ato.gov.au/atolaw/view.htm?Docid=ITR/IT2650/NAT/ATO/00001

The ATO web site has a series of questions you can answer to decide whether you are a non-resident, or not:
http://calculators.ato.gov.au/scripts/axos/axos.asp?CONTEXT=&KBS=residency_leaving.XR4

It is not enough to leave Australia for a long period of time - you must also establish a home overseas to be considered a non-resident of Australia for tax purposes. Australia doesn't like to give up its right to tax you easily, and considering some of the recent increases in tax on expats owning property, there are some advantages in remaining a resident for tax purposes.

Avoiding being a Resident for tax Purposes

How difficult it is to avoid being an Australian resident for tax purposes was made very clear in the case of **Sully v FCT 2012 AATA 582.** In this case, an Australian marine engineer left Australia to work and live on various yachts, returning to Australia between jobs. He left some belongings back in Australia with family, and rented out his home to his girlfriend. He did set up a home in Dubai for two years, but he was rarely there. He was working overseas for a total of three years. The AAT, after examining his relationships with girlfriends (he broke it off with his Australian girlfriend and had one in the US) and his thoughts about the future while he was overseas, found that he was still a resident of Australia for tax purposes. And so, who you sleep with and your private thoughts affect how you are taxed!

You can continue to be a citizen of Australia, or be entitled to reside in Australia, which is different from becoming a non-resident of Australia for tax purposes. The advice in this section assumes that you are considered a non-resident for tax purposes.

The Consequences of Becoming a Non-Resident

Upon becoming a non- resident of Australia, ITAA97 section 104-160 deems a capital gains tax event to have occurred. In other words, on this date you are considered to have disposed of any assets, at their market value, which were acquired after 19th September, 1985, as they are no longer "connected with Australia". Examples of assets that are considered not connected with Australia are shares listed on the stock exchange and real estate in countries other than Australia. Any assets that are connected with Australia are not considered to be disposed of, because Australia continues to have a right to tax any gain on these assets even if you are not a resident.

Leaving Australia will not trigger a CGT event on any real estate you own *in* Australia, but it will for any shares you own, as well as real estate in other countries. Accordingly, you will be subject to capital gains tax on any increase in value over their cost base, even though you do not have the benefit of the cash flow from selling them.

Section 104-165(2) gives you the option of ignoring the capital gain accrued when you leave the country, but this will effectively mean you are taxed on any gain while you are a non- resident. Australia will continue to hold taxing rights over the asset on all the gain up to when you *do* sell. Therefore, the choice is to either pay the tax when you leave, and be free of Australian tax on any gain you make while a non- resident, or defer the tax, but widen the period of time you are exposed to Australian capital gains tax. If you do not pay the tax when you leave, then the choice is removed - you are automatically stuck with Australia continuing to have a right to tax the ongoing gain.

There are two common areas where you may experience the effects:

1. As your home, and any rental properties you own, are "connected with Australia", you will not be deemed to have disposed of your home by 104-160, and Australia just continues to hold a right to tax any capital gain made, no matter where in the world you live.
2. You should expect some trouble if you are the trustee of your self-managed superannuation fund - the trustee needs to be a resident. You may need to appoint someone to act as trustee for you.

Double Tax Agreements

Australia has many varying double tax agreements with many countries (but not with all countries) and the detail of which country taxes what assets and income can be found in these agreements. As a general rule, the country where you are a **resident for tax purposes** is entitled to tax any income earned in that country *and* any interest, royalties and dividends you earn in Australia. Australia gets their share by imposing a withholding tax on this Australian income before it leaves the country. Usually, if the country where you reside taxes this income, you will be allowed a credit for the tax already withheld.

In the case of fully franked dividends, no withholding tax applies, because you will not qualify for a refund of that franking credit as a non-resident. And so, if you have a rental property in Australia, and you must submit an Australian tax return as a non-resident, you would *not* include in that tax return your share dividends.

A further general rule is that the country where the real estate is *located* is entitled to tax the rent and capital gain earned on that property, even if the owner is a resident for tax purposes of another country. That other country may also be entitled to tax the rent but, unlike interest, royalties and dividends, Australia has a right to tax anyone from any country who is earning income or capital gains on Australian real estate.

Rental Properties in Australia

If you own a rental property in Australia, and it is making a profit, the profit will be taxed at non-resident rates once you become a non- resident. If you sell that property, the capital gain will also be taxed at non-resident rates (and without the 50% CGT discount or main residence exemption in many cases). I will outline more about that further on. Following are the non-resident tax rates for the 2017-2018 financial year (note the Medicare Levy does not apply to non-residents):

Taxable income	**Tax on this income**
$0 – $90,000	32.5c for each $1
$90,001 – $180,000	$28,275 + 37c for each $1 over $87,000
$180,001 and over	$62,685 + 45c for each $1 over $180,000

How Your Australian Home is Treated

Expats working overseas with the intention of returning to Australia, possibly into a home they already have or to sell that home to upgrade, need to be very careful not to sell their Australian home while they are a non-resident of Australia for tax purposes, and to make sure they do not die while they are a non- resident!

Proposed changes to the law will mean that you will not be able to utilise the main residence exemption, at all, if you sell your home while you are a **non-resident for tax purposes,** nor will you be entitled to the 50% CGT discount for the period of time you were a non-resident.

At the time of writing, only draft legislation has been released regarding how the government intends to remove the main residence CGT exemption from non- residents, and it is very harsh. If you sell a property while a non-resident for tax purposes you will completely lose your main residence exemption for the whole time you owned the property. It is based on your residency status when you sign the contract to sell. So, the very simple strategy of accepting a job overseas, but not putting your home on the market until you leave the country so you have somewhere to live in the interim, will render the whole capital gain on your home taxable - even if you have lived there for 30 years! You won't even get the 50% CGT discount on some of the gain, and your tax rate will be at non- resident rates', starting at 32.5%.

Using as an example a family home of 30 years in Sydney, this would mean a tax on inflation and very little chance of ever being able to afford to get back into the market. The simple solution is to **not sell your home while you are a non- resident for tax purposes**. This simple piece of knowledge will save you hundreds of thousands of dollars in tax, so spread the word. There is nothing fair about this tax - it is just a trap for the unwary.

The draft legislation does not provide for any market value reset when you leave the country, so if you are caught by this tax you won't have had the hindsight to have kept all the receipts for the expenses you incurred right back to the time you purchased the property. As a result, you will be tax on a gain that you did not really make, because you can't prove the expenses you have incurred on the property.

It is also possible that the market value reset rule, section 118-192 ITAA 1997, (applicable to when you first rent the property out) may not apply, as it is conditional upon the property being 100% covered by your main residence exemption, and this new legislation retrospectively removes that main residence exemption. There is nothing in the explanatory memorandum about this, so we will have to wait and see.

Don't go panicking just yet. These changes will initially only apply to a property you purchase after 9th May, 2017. But come 30th June 2019, it will apply to all properties that were purchased after 19th September, 1985.

As long as you do not sell your home while you are a non-resident for tax purposes you can continue to cover it with your main resident exemption while you are overseas, providing you are entitled to use the absence rule. Section 118-145 covers this - it allows you to cover your home with your main residence exemption, in your absence, for up to 6 years if it is earning income, or an indefinite period if it is not earning income.

There is another trap in the draft legislation. If you die while you are a non-resident of Australia for tax purposes then your estate, if it sells the house, is treated as if you did sell the house while living overseas. The estate will be taxed on all the capital gain you made in your lifetime on your home, right back to the day you purchased it.

It appears from the draft legislation that there will be no changes to section 128-10. So, this means that your estate will be able to transfer that property to your heirs without triggering a CGT event (assuming they are not non- residents) but if they ever sell it they will have to pay CGT on all the gain in your life time. They will also have to pay CGT on the gain during their ownership period, unless they choose to cover it with their main residence exemption, but even then the gain will be apportioned on a days covered by their main residence exemption and days not. There will be no consideration for the period it was your main residence.

What to do with your own home if you are about to leave Australia

If you are about to leave Australia and are concerned how this law will pan out, it may be worth renting the property out before you leave the country. This may allow you to utilize section 118-192 to reset the cost base to market value at that date, but as stated above there is no certainty on that yet.

If your adult children are going to live in the home while you are overseas and you are concerned that you will want to sell it when they move out and you are still living overseas, then maybe you should charge them rent, just in case you *will* be able to trigger the reset under section 118-192, mentioned above.

You may consider selling the house before you leave to avoid being forced to sell it while you are overseas, or to avoid the huge tax consequences to your estate if you die while overseas and still a non-resident of Australia for tax purposes. It's a decision which needs to take into account many factors, not just the CGT one. You must consider where you will invest the sale proceeds and whether prices may continue to grow on the home you are selling.

If you purchased your Australian home before 19th September, 1985 you can relax, as CGT will not apply to it whether you are a resident or a non-resident.

Returning to Australia

As long as you pass the residency test (ie you are not just here on a holiday) then you should be able to sell your home and cover it with your main residence exemption, even for the period when you were overseas, if you qualify to use the absence rule (commonly called the 6- year rule) in section 118-145 ITAA 1997.

The changes that the draft makes to the example in section 118-145 are very telling. Previously, the example simply showed that if, at the end of your time overseas, you sell your home, then the main residence exemption will apply. This is now changed to say that if you return to your home and live in it for 3 years, after which you sell it, the main residence exemption applies. There are no changes to the wording of section 118-145 other than this example, so I am assuming that this edit may have been made so that it can't be implied that the house could be sold (with the main residence exemption) just as you were leaving to come back to Australia. That may be all this means, but until the dust settles it might be a plan to move back into the house upon your return to Australia, before you actually sell it, rather than come back and settle in another house and then sell.

How Your Australian Investment Property is Treated

Any capital gain on a property made after 8th May 2012 by a non-resident will not be entitled to the 50% CGT discount. If you owned an Australian property before 8th May 2012, even if you were a resident then, you will need to know the value of that property on 8th May, 2012. From that date, the 50% CGT discount only applies pro- rata on the basis of the number of days you were a resident for tax purposes, versus the number of days you were not, to the whole gain, from 8th May 2012 till you sell.

Even if you own the property in a trust, the trust will not be entitled to the 50% CGT discount either. There are provisions in the legislation that drill down to the controller of the trust.

Do not panic if you do not have a valuation as at 8th May, 2012. Qualified Valuers can give you a retrospective valuation, using historical data. Nevertheless, it is probably best to have one done before the property deteriorates or you make changes that will make it difficult for the valuer to determine what the property was worth on 8th May, 2012. At the very least, get some photos with a date stamp.

You will need to lodge an Australian tax return each year to declare your rental income. BAN TACS has a very stream- lined service to make this as easy as possible for you.

If your property is making an overall loss, and you have no other income in that tax return, then the loss accumulates over the years until you (or the trust if you have used one) start to make a profit, have other income or a capital gain from its sale. The losses are not wasted – they just accumulate to be offset against future income. Even though the property is not making a profit, you must still lodge an Australian tax return, simply because you have gross rent income.

How to Buy an Australian Investment Property While Overseas

Destiny Financial Solutions have a complete range of services for expats who want to become, or continue to be, a property investor while overseas. These services are employed using a range of advanced technological solutions – including courses, one to one assistance, webcasts and a host of education and support services.

Once you find a property, please contact BAN TACS before you sign the contract. Destiny provide a wonderful service to support you through the decision- making process, organising finance and great ongoing record keeping support. Nevertheless, we would really like to speak with you before you sign that contract. We would like to check it for GST clauses and discuss with you what is the best name to put on the contract. We like to do this face to face if we can, so for our overseas clients we utilise Skype®. For details of how you can contact Julia Hartman, please go to http://www.bantacs.com.au/shop-2/consultation-with-julia-hartman/

Structure of a property purchase as a non-resident

The NSW state revenue office charges a higher rate of stamp duty and land tax to foreigners. As an Australian citizen (for the purposes of NSW state revenue law) you are not considered a foreigner. In this case, it is not a question of being a non-resident for tax purposes, but one of citizenship. If you have a spouse who is not a citizen of Australia, you may save a lot in state taxes by buying the property in your name only.

It is more difficult with trusts. The NSW office of state revenue basically consider a trust to have a foreigner as a beneficiary unless it states otherwise. As an Australian citizen, you are not considered to be a foreigner for the particular purposes of NSW state revenue. While you may be ok, if you have a spouse who is not an Australian citizen (or elect a beneficiary who is not an Australian citizen) you have an added cost to owning a property in NSW. To qualify for the lower rate of stamp duty and land tax in NSW, your trust deed will need to have a clause stating that a foreigner cannot be a beneficiary.

Victoria is also considering imposing extra taxes on foreigners and, of course, they will have their own definition of ‘foreigner’. Accordingly, even before you decide on an area where you would like to purchase a property, it is worth looking into how that state will treat the fact that you are living overseas, as that will make considerable difference to the profitability of the property. Your conveyancing solicitor is normally a good source of information on the stamp duty and land tax law in their state.

Another new trap is the withholding tax requirements now placed on buyers. If you are buying a property for $750,000 or more, then you will have to withhold 12.5% of the purchase price and send it to the ATO unless the seller provides you with a tax clearance certificate from the ATO. If you do not receive a clearance certificate from the seller, and you do not withhold the tax, then you have to pay the 12.5% to the ATO out of your own pocket, with no recourse to the seller. Don’t think it will slip past the ATO - they will automatically data match each sale through the information they get from the Land Titles office.

If you buy a brand- new home or recently subdivided vacant land after 30th June 2018 (date of signing the agreement to buy) then you must withhold 1/11th of the purchase price and send that to the ATO. Under the margin scheme the amount to be withheld is 7% or the seller can apply to have the ATO determine a lower percentage.

Regardless of whether the seller will ultimately have to pay that much to the ATO or whether GST even applies, the purchaser must withhold, this could cause quite a few problems with mortgagees.

The seller is required to give the purchaser their details but regardless the purchaser must withhold. We recommend that before you go withholding the lesser amount of 7% make sure the seller is actually registered for GST. All of the liability rests with you yet the seller’s right to privacy will prevent you from being provided with any information that you would need to fight the ATO. This only applies to residential premises or land, as the rule is not being applied to business properties.

Important Information on Selling a Property While Overseas

As a non-resident of Australia for tax purposes, you will have difficulty obtaining a clearance certificate from the ATO. If you are selling a property for more than $750,000, this will mean the buyer will withhold 12.5% of the selling price and send it to the ATO. You will be able to claim this amount back when you lodge your tax return for that financial year. It is Australia’s way of making sure they get their tax money before it goes overseas.

If not receiving 12.5% of the selling price is going to cause you difficulties, say for example your bank will not discharge the mortgage unless it receives all the sale proceeds on settlement, then you can apply to the ATO, detailing your special circumstance, and they will issue a clearance certificate.

Summary

Thank you for requesting and reading this important information. Remember that BAN TACS have a huge range of resources, education and information on their website, and Destiny also provides free educational vidcasts and podcasts, with fresh content every week.

Margaret and I look forward to being of assistance to you with any of your property investing questions and needs.

Further Reading

Newsflash http://www.bantacs.com.au/ns/

Overseas booklet http://www.bantacs.com.au/booklets/Overseas_Booklet.pdf

Our Expats Page http://www.bantacs.com.au/topics/overseas/

Our Property Investors Page http://www.bantacs.com.au/topics/property-investors/

Before You Buy Booklet http://www.bantacs.com.au/booklets/Before_You_Buy_A_Rental_Property.pdf

Buying a Rental Property Booklet http://www.bantacs.com.au/booklets/Buying_A_Rental_Property.pdf

Owning a Rental Property Booklet http://www.bantacs.com.au/booklets/Owning_A_Rental_Property.pdf

Selling a Rental Property Booklet http://www.bantacs.com.au/booklets/Selling_A_Rental_Property.pdf

Check List to Mail In Your Tax Return Details http://www.bantacs.com.au/docs/m3.pdf

Lodging Australian Tax Returns Remotely

Details on our web site http://www.bantacs.com.au/topics/mail-in-tax-returns/

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