SARS
South African Revenue Service

INTERPRETATION NOTE 3 (Issue 2)

DATE: 20 June 2018

ACT : INCOME TAX ACT 58 OF 1962

SECTION : SECTION 1(1)

SUBJECT : RESIDENT: DEFINITION IN RELATION TO A NATURAL PERSON – ORDINARILY RESIDENT

Preamble

In this Note unless the context indicates otherwise –

- **"non-resident"** means any person who is not a "resident" as defined in section 1(1);
- **"section"** means a section of the Act;
- **"tax treaty"** means "any agreement entered into between the governments of the Republic and another country for the avoidance of double taxation";
- **"the Act"** means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

All interpretation notes referred to in this Note are available on the SARS website at **www.sars.gov.za**. Unless indicated otherwise, the latest issue of these documents should be consulted.

1. Purpose

This Note explains the meaning of the term "ordinarily resident" as referred to in relation to a natural person in the definition of "resident" in section 1(1).

2. Background

South Africa has a residence-based tax system. Persons who are "resident" in the Republic are taxed on their worldwide income, subject to certain exclusions. Non-residents are taxed only on their income from a source within the Republic.

A natural person is a resident for income tax purposes if the natural person –

- is ordinarily resident in the Republic;[1] or
- meets all the requirements of the physical presence test,[2] and

is not deemed to be exclusively a resident of another country for the purposes of the application of any tax treaty.

[1] Paragraph (*a*)(i) of the definition of "resident" in section 1(1).

[2] Paragraph (*a*)(ii) of the definition of "resident" in section 1(1).

This Note focuses solely on how to determine whether a natural person is ordinarily resident in the Republic. For more information on the "physical presence" test, see Interpretation Note 4 "Resident: Definition in Relation to a Natural Person – Physical Presence Test".

3. The law

The term "resident", as defined in section 1(1), is quoted in the **Annexure**.

4. Application of the law

The enquiry into whether a natural person is "resident" in South Africa for income tax purposes commences with determining whether that person is "ordinarily resident" in the Republic, since the physical presence test does not apply if a natural person is ordinarily resident in the Republic.

The Act does not define the term "ordinarily resident". The courts have, however, considered its meaning and have established principles to be applied in determining the place in which a natural person is ordinarily resident (see **4.1**).

4.1 Case law on "ordinarily resident"

In *Cohen v Commissioner for Inland Revenue,*[3] the court had to decide whether a natural person who had not been physically present in South Africa for the entire year of assessment could be "ordinarily resident" in the Republic. The taxpayer, who was domiciled in South Africa, had during 1930 to 1940 frequently travelled abroad to the United States of America (US), England and Europe on business, spending about half of his time in South Africa and returning to South Africa after the business trips. In 1940 the taxpayer applied to the Overseas Permit Officer for permission to leave South Africa in order to travel with his family to the US and Canada for business purposes. The permit was initially granted for a nine-month period but was subsequently extended for a further 12 months. It was always accepted that the visit was temporary and that the taxpayer and his family would return to their home in South Africa. To this end, the taxpayer's flat, which had been leased for five years and contained his own furniture, was sub-let for the period of his absence.

In finding that the question regarding whether a natural person was ordinarily resident was one of fact and that there was evidence upon which the Special Court was entitled to come to its finding, Schreiner JA stated the following regarding ordinary residence:[4]

> "…it seems to me that the question whether he was in that year an individual not ordinarily resident in the Union is essentially a question of degree to which no single, certain, answer could be given; the answer depends on the weight to be given to the various factors set out in the stated case."

The court also held that ordinary residence was not determined solely by the facts applicable to the particular year of assessment and that it "does not exclude the investigation of [the taxpayer's] mode of life before, or even after, that year".[5] In addition, the court found that a natural person could be ordinarily resident in a

[3] 1946 AD 174, 13 SATC 362.
[4] At SATC 362 at 366.
[5] *Cohen v CIR* 1946 AD 174, 13 SATC 362 at 373.

country for a year of assessment even if that person was physically absent from that country for that entire year, and stated that "it would certainly be giving to residence a special or technical, indeed a highly artificial meaning, if one required the physical presence to have existed during the year of assessment".[6] The taxpayer was found to be ordinarily resident in the Republic.

Schreiner JA expressed the view that the precise effect of the word "ordinarily" in "ordinarily resident" may be linked to whether a man could be ordinarily resident in more than one country at the same time. Although Schreiner JA felt that it was unnecessary for the purposes of the case to decide on whether a natural person could be ordinarily resident in more than one country at the same time, he discussed, *obiter*, what ordinarily resident could mean if that was the case:[7]

> "If, though a man may be "resident" in more than one country at a time, he can only be "ordinarily resident" in one, it would be natural to interpret "ordinarily" by reference to the country of his most fixed or settled residence… his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings, as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.

The approach in Cohen's case was followed in ITC 1170[8] in which a taxpayer, who was sent by his employer to the US on a 14-month assignment to obtain experience to be applied in South Africa, was held to be ordinarily resident in the Republic. The taxpayer retained his house in South Africa and rented it out for the exact period of his assignment overseas. The taxpayer's wife and two children accompanied him but his parents remained in South Africa, his permanent employment was in South Africa and he had bank accounts in South Africa. Although he entertained the possibility of remaining overseas, there was no definite decision in this regard and no other country was regarded as his ordinary residence.

In *Commissioner of Inland Revenue v Kuttel*,[9] the taxpayer decided in May 1983 to emigrate from South Africa and, having obtained a permanent residence's permit, left for the US on 29 July 1983. The taxpayer and his wife established a home and an office in the US, joined a local church, opened bank accounts, bought a car and registered for social security. The three children, in high school in 1983, initially remained in South Africa to complete their schooling but thereafter permanently joined their parents in the US. Subsequently, when permitted under US regulations, the parents and children became US citizens. Exchange control regulations meant the taxpayer was forced to retain substantial assets in South Africa. The taxpayer retained the family home in Llandudno, which was owned by a company in which he and his wife held the shares, and in order to protect his assets from a devaluation in the value of the rand, amongst others, effected renovations and extensions to the house. During the 31-month period under review, the taxpayer spent on average approximately one-third of his time in SA, which had become progressively less towards the end of the period.

---

6 At SATC 362 at 373.

7 At SATC 362 at 371.

8 *ITC 1170* (1971) 34 SATC 76 (C).

9 1992 (3) SA 242 (A), 54 SATC 298.

Goldstone JA stated that – [10]

> "a person may have more than one residence at any one time is clear. In the present case we are concerned with the words 'ordinarily resident'. [Ordinary residence] is something different and, in my opinion, narrower than just 'resident'."

In his judgement Goldstone JA agreed with the meaning attributed to "ordinary residence" by Schreiner JA in *Cohen v Commissioner for Inland Revenue*[11] and stated:[12]

> "I can find no reason for not applying their natural and ordinary meaning to the provisions now under consideration. … I would respectfully adopt the formulation of Schreiner JA and hold that a person is 'ordinarily resident' where he has his usual or principal residence, ie what may be described as his real home."

In applying the meaning of "ordinarily resident" indicated above to the facts of the case, the taxpayer was held not to be ordinarily resident in the Republic. The application and interpretation of the facts can be reviewed in detail in the judgement. In summary, the court found that following the decision to emigrate to the US in 1983, the taxpayer had set up his home in the US and that the subsequent visits to South Africa for business and personal matters (for example, children initially at school, family, yachting interest) were not unreasonable or incompatible with his real home being in the US.

In *Robinson v Commissioner of Taxes*,[13] the meaning of the word "residence" (and not that of "ordinarily resident") was examined. The case focussed on the physical presence of a natural person, which exceeded that of a casual visit, as a crucial requirement in the determination of residence. The taxpayer also maintained a home which was an important factor in deciding that he was resident in South Africa but the court indicated the maintenance of an establishment may not be necessary in all cases. Residence is an element of "ordinary residence" so the case is relevant, but there are differences which need to be taken into account. For example, physical presence in a year of assessment is not critical in assessing whether a natural person is ordinarily resident (see *Cohen's case* above).

The Court in *H vs Commissioner of Taxes* was required to decide whether the taxpayer was resident in the Colony of Southern Rhodesia. During the judgment Murray CJ said that the taxpayer's –[14]

> "real home in the popular sense was in Somerset West, where his permanent place of abode was, where his belongings were stored which he left for temporary absences and to which he regularly returned after such absences. … if there is a difference between 'residence' and 'ordinary residence' … it might well be considered that the taxpayer was 'ordinarily resident' at Somerset West."

Although the comment is *obiter* and the case considered whether the taxpayer was resident in the Colony and not ordinarily resident in the Republic, it reflected an approach consistent with the *obiter* comments in Cohen's case in determining ordinary residence.

---

[10] *CIR v Kuttel* 1992 (3) SA 242 (A), 54 SATC 298 at 304.
[11] 1946 AD 174, 13 SATC 362 at 373.
[12] At SATC 298 at 306.
[13] 1917 TPD 542, 32 SATC 41.
[14] 1960 (2) SA 695 (SR), 23 SATC 292 at 296.

In another case in the High Court of the former Southern Rhodesia,[15] it was stated that ordinary residence is one which must be "settled and certain and not temporary and casual". The court also noted that each case had to be considered on its own merits. So, for example, although a natural person placed in a particular country for military service during a time of war is unlikely to be ordinarily resident in that country, it is necessary to examine all the facts as there could be facts which change this outcome.

In ITC 961[16] a woman married a man ordinarily resident in a particular country and set up home with him in that country without any discussion about the home being temporary. It was held that she could not be said to be ordinarily resident in some other country, even if immediately before the marriage she had been ordinarily resident in that other country and, although not yet raising the temporary nature of her home with her husband, hoped to persuade her husband to relocate to it.

4.2 Determining whether a natural person is "ordinarily resident"

The question of whether a natural person is ordinarily resident in a country is one of fact[17] and each case must be decided on its own merits, taking into consideration principles established by case law (see **4.1**). It is not possible to lay down hard and fast rules.

When assessing whether a natural person is ordinarily resident in the Republic, the following factors will be taken into consideration:

- An intention to be ordinarily resident in the Republic
- The natural person's most fixed and settled place of residence
- The natural person's habitual abode, that is, the place where that person stays most often, and his or her present habits and mode of life
- The place of business and personal interests of the natural person and his or her family
- Employment and economic factors
- The status of the individual in the Republic and in other countries, for example, whether he or she is an immigrant and what the work permit periods and conditions are
- The location of the natural person's personal belongings
- The natural person's nationality
- Family and social relations (for example, schools, places of worship and sports or social clubs)
- Political, cultural or other activities
- That natural person's application for permanent residence or citizenship
- Periods abroad, purpose and nature of visits
- Frequency of and reasons for visits

---

15 *Soldier v Commissioner of Taxes*, 1943 SR 131 at 133.
16 (1961) 24 SATC 648 (F).
17 *Cohen v CIR*1946 AD 174, 13 SATC 362.

The above list is not intended to be exhaustive and is merely a guideline.

The circumstances of the natural person must be examined as a whole, taking into account the year of assessment concerned and that person's mode of life before and after the period in question. It is not possible to specify over what period the circumstances must be examined. The examination must cover a sufficient period in the context of the specific case for it to be possible to determine whether the natural person is ordinarily resident in the Republic. The conduct of that person over the entire period of examination must receive special attention.

The effect of the above requirements is that a natural person may be resident in the Republic even if that person was not physically present in the Republic during the relevant year of assessment. A physical presence at all times is not a prerequisite to being ordinarily resident in the Republic. The purpose, nature and intention of a natural person's absence must be established and considered as part of all the facts in determining whether that person is ordinarily resident.

Regarding the taxpayer's intention to be ordinarily resident in the Republic, the court in ITC 1185[18] expressed useful principles about the determination of true intention and purpose. Although expressed in the context of determining whether the receipts on the sale of property were of a revenue or capital nature, it is submitted that the principles are applicable in determining intention in the context of ordinarily resident. Miller J stated the following:[19]

> "The difficulty in these cases lies not so much in the formulation of approach but in the application of the principles which must necessarily guide the court. It is no difficult matter to say that an important factor is: what was the taxpayer's intention when he bought the property? It is often very difficult, however, to discover what his true intention was. It is necessary to bear in mind in that regard that the *ipse dixit* of the taxpayer as to his intent and purpose should not lightly be regarded as decisive. It is the function of the court to determine on an objective review of all the relevant facts and circumstances what the motive, purpose and intention of the taxpayer were. Not the least important of the facts will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities. This is not to say that the court will give little or no weight to what the taxpayer says his intention was, as it sometimes contended in argument on behalf of the Secretary in cases of this nature. The taxpayer's evidence under oath and that of his witnesses must necessarily be given full consideration and the credibility of the witnesses must be assessed as in any other case which comes before the court. But direct evidence of intent and purpose must be weighed and tested against the probabilities and the inferences normally to be drawn from the established facts."

Meyerowitz[20] expressed the view that a natural person's mode of life may be such that it cannot be said that he or she has a real home anywhere and that in such cases that person would be able to discharge the onus of proving that he or she is not ordinarily resident in the Republic. The determination of the country in which a natural person is ordinarily resident is a factual determination. As a result, it is

---

[18] (1972) 35 SATC 122 (N).

[19] At SATC 122 (N) at 123 - 124.

[20] D Meyerowitz *Meyerowitz on Income Tax 2003 – 2004* The Taxpayer in § 5.17.

possible that a natural person may be able to prove that he or she does not have a real home anywhere. This situation is, however, expected to be a rare occurrence because it will require a very unique set of facts. There is no set period which must be considered, and the taxpayer's circumstances years before and after the relevant year of assessment must be taken into account.

The concept of ordinary residence must not be confused with the terms "domicile", "nationality", "citizenship" and the concept of "emigrating" or "immigrating" for exchange control purposes.

4.3 Effective dates for becoming and ceasing to be "ordinarily resident"

A natural person becomes "resident"[21] in the Republic effective from a specific date which, in the case of the "ordinarily resident" test, is the date on which that person became "ordinarily resident". This will not necessarily be from the beginning of the year of assessment, as is the case with the physical presence test. It follows that a natural person will not be liable to tax in the Republic on any income earned before the date on which that person became ordinarily resident,[22] and thus tax resident in the Republic, unless that income was from a South African source.[23]

Example 1 – Effective date for becoming "ordinarily resident"

Facts:

Z became ordinarily resident in the Republic on 1 October 2017. All amounts received by or accrued to or in favour of Z during the 2018 year of assessment were of a revenue nature.

Result:

Z did not meet the physical presence test before 1 October 2017. Accordingly, Z became resident on 1 October 2017 as a result of becoming ordinarily resident on that date.

All amounts received by or accrued to or in favour of Z from 1 March 2017 to 30 September 2017 from a source within South Africa must be included in Z's gross income for the year of assessment ending 28 February 2018.

All amounts, irrespective of whether the amounts are from a source within or outside South Africa, received by or accrued to or in favour of Z from 1 October 2017 to 28 February 2018 must be included in Z's gross income for the year of assessment ending 28 February 2018.

A natural person who ceases to be ordinarily resident in the Republic will not be "resident" in South Africa from the day that person ceased to be ordinarily resident in the Republic. A natural person cannot be resident under the physical presence test in the year that person ceases to be ordinarily resident because paragraph (*a*)(ii) of the definition of "resident" in section 1(1) provides that it applies only to a natural person who is not *at any time during the year of assessment* ordinarily resident in the Republic. Whether the physical presence test is met in subsequent years of

---

[21] As defined in section 1(1).
[22] Assuming the natural person had not met the physical presence test.
[23] Considering that non-residents are subject to tax only on income from a source in the Republic.

assessment will depend on the facts of the case. However, often when a natural person ceases to be ordinarily resident in the Republic, that person leaves the country and does not return and spend periods of time in the Republic which meet the requirements of the physical presence test. Generally, if a natural person emigrates from the Republic to another country, that person ceases to be a resident of the Republic from the date that person emigrates.

Example 2 - Effective date for ceasing to be "ordinarily resident"

Facts:

B, a South African citizen who had always lived in South Africa, emigrated to Zambia on 29 October 2017 and married a Zambian resident. B does not intend to return to the Republic except possibly for a week a year to visit family. B did not return to South Africa during the remainder of the 2017 calendar year or the 2018 calendar year.

Result:

B ceased being ordinarily resident in the Republic, and therefore resident for tax purposes, on 29 October 2017.

4.4 Interaction between the definition of "resident" in section 1(1) and tax treaties

A person who is exclusively a resident of a country other than South Africa for purposes of the application of a tax treaty is not a resident of the Republic under the Act. This position is achieved for two reasons.

Firstly, once approved by Parliament and published in the *Government Gazette*, tax treaties have effect as if enacted in the Act.[24] The tax treaty's provisions and those of the Act should therefore, if at all possible, be reconciled and read as one coherent whole.[25] In the context of the definition of "resident", if there is conflict between the general definition of that term in section 1(1) and a more specific definition in a tax treaty, the maxim *generalia specialibus non derogant*[26] applies and the more specific definition in the tax treaty takes precedence.

Secondly, the precedence of a more specific tax treaty definition has been included in the definition of "resident" in section 1(1), which excludes a person deemed to be exclusively a resident of another country for purposes of applying any tax treaty. Therefore, if a natural person is held to be a resident of another country and not to be a resident of South Africa for purposes of any tax treaty, such person is excluded from the definition of "resident" in section 1(1).

A natural person who meets the ordinary residence test or the physical presence test will therefore not be a resident of South Africa if, notwithstanding having met those tests, that person is held to be exclusively a resident of a country other than South Africa for purposes of the application of any tax treaty. For example, the tax treaty might include a core definition of "resident" which differs from the definition in

24 Section 108(2); *SIR v Downing* 1975 (4) SA 518 (A), 37 SATC 249 at 255.
25 *C: SARS v Van Kets* 2012 (3) SA 399 (WCC), 74 SATC 9 at 17.
26 See also *C: SARS v Tradehold* 2013 (4) SA 184 (SCA), 74 SATC 263 at 269.

section 1(1) or the application of the tie-breaker rules[27] might result in the natural person being held to be exclusively a resident of the other country.

5. Conclusion

The definition of “gross income” in section 1(1) provides that a resident is subject to tax on worldwide income. The term “resident” is also defined in section 1(1) and includes any natural person who is ordinarily resident in the Republic provided that person is not a resident of another country for purposes of the application of a tax treaty.

Briefly, ordinary residence is the place where a natural person has his or her usual or principal residence, what may be described as his or her real home. Whether a natural person is ordinarily resident in the Republic is determined based on that person’s particular facts. A natural person who was previously not resident and who becomes ordinarily resident in the Republic, will be liable to tax on worldwide income as from the date that he or she became ordinarily resident.

Legal Counsel
SOUTH AFRICAN REVENUE SERVICE
Date of 1st issue : 4 February 2002

[27] For examples of possible tie-breaker rules see Article 4.2 of the Organisation for Economic Cooperation and Development’s Model Tax Convention, condensed version, dated 21 November 2017.

Annexure – The law

Section 1(1) definition of the term "resident"

"resident" means any—

(*a*) natural person who is—

(i) ordinarily resident in the Republic; or

(ii) not at any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic—

(*aa*) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment; and

(*bb*) for a period or periods exceeding 915 days in aggregate during those five preceding years of assessment,

in which case that person will be a resident with effect from the first day of that relevant year of assessment: Provided that—

(A) a day shall include a part of a day, but shall not include any day that a person is in transit through the Republic between two places outside the Republic and that person does not formally enter the Republic through a "port of entry" as contemplated in section 9(1) of the Immigration Act, 2002 (Act No. 13 of 2002), or at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act; and

(B) where a person who is a resident in terms of this subparagraph is physically outside the Republic for a continuous period of at least 330 full days immediately after the day on which such person ceases to be physically present in the Republic, such person shall be deemed not to have been a resident from the day on which such person so ceased to be physically present in the Republic; or

(*b*) person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic,

but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation: Provided that where any person that is a resident ceases to be a resident during a year of assessment, that person must be regarded as not being a resident from the day on which that person ceases to be a resident: