

- (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) ...
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;”

4. Application of the law

4.1 Time rule

- 4.1.1 The word “**resident**”, as defined in section 1 of the Act, was introduced in the Act and is applicable with effect from years of assessment commencing on or after 1 January 2001, i.e. in the case of a natural person, as from 1 March 2001 which is the commencement date of the 2002 year of assessment.
- 4.1.2 The physical presence test, also known as the day test or time rule, is based on the number of days during which a natural person is physically present in the Republic. The purpose or nature of the visit in the Republic is irrelevant. It must be determined annually whether or not all the requirements of the physical presence test have been met.
- 4.1.3 Paragraph (a)(ii) of the definition of “**resident**” refers to a natural person, who is not at any time during the relevant year of assessment

ordinarily resident in the Republic. It, therefore, follows that where a natural person was at any time during the year of assessment under consideration ordinarily resident in the Republic, the physical presence test is not applicable to that natural person during that year of assessment.

- 4.1.4 Items (aa) and (bb) contain the requirements to which a natural person must comply with before that person can be regarded as a resident for income tax purposes.

4.2 Requirements

- 4.2.1 The requirements refer to the number of days which a natural person must be physically present in the Republic during the year under consideration as well as during the five years of assessment preceding the year of assessment under consideration (new requirement), or the three years of assessment preceding the year of assessment under consideration (old requirement).

These requirements are that the person must be physically present in the Republic for a period or periods exceeding-

- i) 91 days in aggregate during the year of assessment under consideration;
- ii) 91 days in aggregate during each of the five years (new requirement) or three years (old requirement) of assessment preceding the year of assessment under consideration; and
- iii) 915 days (new requirement) or 549 days (old requirement) in aggregate during the five (or three years) preceding years of assessment.

- 4.2.2 Note that the number of days, referred to in each of the three above-mentioned requirements, refers to-

- a) an aggregate number of days during the relevant year or years of assessment; and
- b) the aggregate number of days must exceed the specified number of days.

4.2.3 If a natural person complies with all the requirements referred to above, the person is a resident of the Republic.

4.3 Proviso (A) – Determining the number of days

4.3.1 In terms of proviso (A) to the definition of “**resident**” a day includes a part of a day. A day begins at 00:00 and ends at 24:00. Therefore, a person who arrives in the Republic through a port of entry at 23:55 would be regarded to be physical present in the Republic for a day.

4.3.2 Any day during which 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) (“the Immigration Act”), will be excluded in counting the number of days.

4.3.3 The term “**port of entry**” is defined in section 1 of the Immigration Act and reads as follows:

“means a place designated as such by the Minister where all persons have to report before they may enter, sojourn or remain within, or depart from the Republic.”

4.3.4 The admission to the Republic and the departure from the Republic by a person is dealt with in section 9 of the Immigration Act. Section 9(1) of the Immigration Act provides that no person shall enter or leave the Republic at a place other than through a port of entry.

4.3.5 Based on the ordinary meaning of the word “person” and in the context the word is used, “person” refers to a resident, citizen or a foreigner. A foreigner, resident or citizen must, therefore, report at a port of entry to enter or leave the Republic. However, in terms of section 31 of the Immigration Act, the Minister of Home Affairs may, for good cause, waive any prescribed requirement or form upon application. In order to take account of this possibility, proviso (A) provides that:

“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;”

4.3.6 Therefore, once a person enters through a port of entry or a place as permitted by the Minister of Home Affairs, and leaves through a port of

entry, both the day of arrival and departure, as indicated in his/her passport, are included in the count of the number of days.

4.4 Duel residence and treaties

- 4.4.1 Any person who is deemed to be exclusively a resident of another country for purposes of the relevant tax treaty is excluded from the definition of resident.

Tax treaties provide a separate set of rules for determining whether a person is a resident of a country. Under most of these tax treaties a person is a resident of a country if that person is liable to tax in that country by reason of that person's domicile or residence. If a person is a resident of two countries by virtue of the criteria described in the tax treaty, that person's residence is determined by virtue of the various tie-breaker rules. Where a person is exclusively deemed to be a resident of another country for purposes of the tax treaty (by virtue of tax treaty tie-breaker rules or otherwise), that person will not be a resident for purposes of the Act regardless of any other rules pertaining to the definition of "**resident**" contained in the Act.

- 4.4.2 The above exclusion is only applicable with effect from 26 February 2003. However, where a person is deemed to be exclusively a resident of another country for purposes of the tax treaty, the person will for the full 2003 year of assessment not be regarded as a "**resident**" for income tax purposes. Where the year of assessment ended prior to 26 February 2003 (due to the death or insolvency of the person), the person can still be regarded as a "**resident**" for income tax purposes for the period of assessment which ended on the day of his/her death or on the day before the day on which the order of sequestration is issued to the person. Refer to Interpretation Note No. 25.

4.5 Date on which a natural person becomes a resident

- 4.5.1 The effect of the definition is that a natural person who is not ordinarily resident in the Republic can, in terms of the physical presence test, only become a resident for tax purposes after a period of six consecutive years of assessment during which the person is physically present in the Republic. Prior to the amendment a person would have become a resident as from the fourth year of assessment.

- 4.5.2 A person will be a resident with the effect from the first day of the first year during which all the requirements of the physical presence test have been met. In these circumstances the person will be taxable in the Republic on his/her worldwide income (i.e. income derived within and outside the Republic) received by or accrued to or in favour of him/her (excluding certain income that is exempt) as from the first day of that year of assessment.
- 4.5.3 Where a person ceases to be a resident (refer to paragraph 4.6) during a year of assessment, and the person returns to the Republic during the following year of assessment for a period or periods exceeding 91 days in aggregate (complies with the first requirement), that person once again becomes a resident as from the first day of that following year of assessment, provided that the person also complies with the second and third requirements referred to in paragraph 4.2 above. Refer to Example B.

4.6 Date on which a natural person ceases to be a resident

- 4.6.1 A natural person, who is a resident by virtue of the physical presence test, ceases to be a resident as from the day after the day on which he/she left the Republic, provided that he/she is physically outside the Republic for a continuous period of at least 330 full days after the day on which he/she left the Republic. [Proviso (B) to the definition of “resident”.] See also the solution on Example A, paragraph (c).
- 4.6.2 It is not a requirement that the total number of 330 full days must all be in one year of assessment. The only requirement is that the 330 days must be for a continuous period, for example, 29 November 2005 to 3 October 2006.
- 4.6.3 **Note:** A natural person, who is ordinarily resident, spending time outside the Republic and has the intention of returning to the Republic as his/her permanent home, is regarded to be a resident, regardless of the period of time spent outside the Republic.

5. Examples

Basic Example:

X, not ordinarily resident in the Republic, was physically present in the Republic for the following number of days:

Year of assessment	Number of days
2001	95
2002	110
2003	115
2004	92
2005	151
2006	355

X was present in the Republic for more than 91 days since the 2001 year of assessment, but never complied with the previous 549 days requirement, during the three preceding years of assessment. X was therefore not a resident. The new requirements of five consecutive years and 915 days will therefore be applicable on X with effect from the 2006 year of assessment.

Requirements (2006 year of assessment)	Compliance
91 days in aggregate during the year of assessment under consideration	Yes
91 days in aggregate during each of the 5 years of assessment preceding the current year of assessment	Yes
915 days in aggregate during the 5 preceding years of assessment (95 + 110 + 115 + 92 + 151 = 563)	No

X is therefore not a resident in terms of the physical presence test for the 2006 year of assessment.

5.1 Example A

Z is a citizen of Argentina and employed by a South African company, who also has a branch in Argentina. Z never visited the Republic before 29 June 2000 and is not ordinarily resident in the Republic. Z was physically present in the Republic for the following periods:

Year of assessment	Period in the Republic	Number of days in the Republic
2001	29/06/2000 – 28/02/2001	245
2002	1/03/2001 – 21/05/2001	82
	08/11/2001 – 29/02/2002	114
2003	01/07/2002 – 28/02/2003	243

2004	29/06/2003 – 15/07/2003	17
	29/08/2003 – 30/11/2003	94
2005	01/11/2004 – 30/11/2004	30

Solution:

a) Determination of residence of Z in respect of the 2004 year of assessment (the old requirements are applicable in respect of 2004)

First requirement:

Number of days, in aggregate, physically present in the Republic during the 2004 (current) year of assessment.

$$2004 = 111 \text{ days (17 + 94)} \quad [\text{exceeding 91 days}]$$

Second requirement:

Number of days, in aggregate, physically present in the Republic during each of the three years of assessment preceding the current year of assessment.

$$2001 = 245 \text{ days} \quad [\text{exceeding 91 days}]$$

$$2002 = 196 \text{ days (82 + 114)} \quad [\text{exceeding 91 days}]$$

$$2003 = 243 \text{ days} \quad [\text{exceeding 91 days}]$$

Third requirement:

Number of days, in aggregate, physically present in the Republic during the three preceding years of assessment:

$$245 + 196 + 243 = 684 \text{ days} \quad [\text{exceeding 549 days}]$$

As all three requirements have been complied with, Z is a resident of the Republic, notwithstanding the fact that Z is not ordinarily resident in the Republic.

b) Determination of the date from which Z became a resident

Due to the physical presence test, Z became a resident as from the first day of the 2004 year of assessment, that is from 1 March 2003 and is taxable on the worldwide income in cash or otherwise received by or accrued to or in favour of Z (excluding certain income that is exempt) for the full year of assessment.

c) Determination of the date from which Z is deemed to have ceased to be a resident

Z is physically outside the Republic for a continuous period of 335 full days (1 December 2003 to 31 October 2004) which is more than the required minimum period of at least 330 full days. After the continuous period of at least 330 full days that Z was physically outside the Republic, Z is deemed not to be a resident as from the commencement of the 330 day period, that is 1 December 2003, the day following the day of departure, namely 30 November 2003.

For capital gains tax purposes this will be treated as a disposal. Z will be treated as having disposed of assets (for example, shares listed on the JSE) for an amount equal to the market value of the assets and to have immediately reacquired the assets at a cost equal to the market value. Kindly refer to the Comprehensive Guide to Capital Gains Tax for further information.

If an assessment has been issued to include worldwide income for the full year, a reduced assessment must be issued in order to exclude income, in cash or otherwise received by or accrued to or in favour of Z on or after 1 December 2003, that is not from a source within or deemed to be within the Republic. The reduced assessment can only be issued once proof of the actual period of physical absence has been obtained. A reduced assessment will also be subject to the three-year prescription period contained in section 79A of the Act. The 2004 reduced assessment will therefore reflect the following -

- i) taxable income, worldwide, for the period 1 March 2003 to 30 November 2003 during which period Z was a resident; and
- ii) taxable income, from a source within or deemed to be within the Republic, for the period 1 December 2003 to 28 February 2004 during which period Z was not a resident.

d) **Determination of residence of Z in respect of the 2005 year of assessment (old requirements)**

First requirement:

Number of days, in aggregate, physically present in the Republic during the 2005 year of assessment.

2005 = 30 days [not exceeding 91 days]

Due to the fact that Z was physically present in the Republic for a period or periods not exceeding 91 days in aggregate during the 2005 year of assessment, Z does not comply with the first requirement.

It is not necessary to consider the **second and third requirements**, as the first requirement was not complied with. Z is therefore not a resident, in which case Z is only liable for tax in the Republic on taxable income from a source within or deemed to be within the Republic.

5.2 Example B

Use the same information as in Example A, except for the 2005 and 2006 years of assessment for which the information is as follows:

Year of assessment	Period in the Republic	Number of days in the Republic
2005	01/11/2004 to 28/02/2005	120
2006	01/03/2005 to 04/06/2005	96

Solution:

Determination of residence of Z in respect of the 2005 year of assessment

First requirement:

Number of days, in aggregate, physically present in the Republic during the 2005 (current) year of assessment.

2005 = 120 days [exceeding 91 days]

Second requirement:

Number of days, in aggregate, physically present in the Republic during each of the three years of assessment, preceding the current year of assessment.

2002 = 196 days (82 + 114) [exceeding 91 days]
2003 = 243 days [exceeding 91 days]
2004 = 111 days (17 + 94) [exceeding 91 days]

Third requirement:

Number of days, in aggregate, physically present in the Republic during the three preceding years of assessment:

196 + 243 + 111 = 550 days [exceeding 549 days]

As all three requirements have been complied with Z is regarded to be a resident for the full year of assessment, i.e. from 1 March 2004 to 28 February 2005.

Note: Z would, therefore, only deemed not to have been a resident from 1 December 2003 to 28 February 2004. Although Z was physically outside the Republic for a continuous period of 335 days (1 December 2003 up to and including 31 October 2004) which is more than the required minimum period of at least 330 full days, it has no effect on the 2005 year of assessment. The three requirements must be applied each year in determining whether a natural person is deemed to be a resident.

Determination of residence of Z in respect of the 2006 year of assessment

Requirements (2006 year of assessment)	Compliance
91 days in aggregate during the year of assessment under consideration	Yes
91 days in aggregate during the 3 years of assessment preceding the current year	Yes
549 days in aggregate during the 3 preceding years of assessment (243 + 111 + 120 = 474)	No

Z will therefore not be regarded as a resident in terms of the physical presence test for the 2006 year of assessment. The old requirements are still applicable in this instance due to the fact that Z complies with the

requirements of the physical presence test in respect of the 2005 year of assessment.

5.3 Example C

Use the same information as in Example A, except for the 2005 year of assessment for which the information is as follows:

Year of assessment	Period in the Republic	Number of days in the Republic
2005	01/11/2004 to 15/11/2005	15
	26/11/2004 to 09/02/2005	76

Z returned to Argentina on 9 February 2005 to prepare for a holiday (15 February 2005 to 27 February 2005) in Botswana. The aircraft from Argentina landed at the Johannesburg International Airport on 15 February 2005 at 05:00. Z entered the Airport buildings at 05:15 but did not go through a "port of entry" or received a concession from the Minister of Home Affairs. The aircraft to Botswana departed from the Johannesburg International Airport on 15 February 2005 at 07:00.

Z's flight returned to Johannesburg International Airport on 27 February 2005 where it landed at 20:00. Without going through a "port of entry" or been permitted by the Minister of Home Affairs to enter at any other place, Z went on board of the flight to Argentina at 21:00.

Solution:

First requirement:

Number of days, in aggregate, physically present in the Republic during the 2005 year of assessment.

$$2005 = 15 \text{ days} + 76 \text{ days} = 91 \text{ days} \quad [\text{not exceeding } 91 \text{ days}]$$

Although Z entered the airport building on 15 February 2005 and 27 February 2005, Z did not enter the Republic through a port of entry.

These two days are therefore not included in the count of the number of days physically present in the Republic. Due to the fact that Z was physically present in the Republic for a period or periods not exceeding

91 days in aggregate during the 2005 year of assessment, Z does not comply with the first requirement.

It is not necessary to consider the **second and third requirements**, as the first requirement was not complied with. Z is therefore not a resident, in which case Z is only liable for tax in the Republic on taxable income from a source within or deemed to be within the Republic.

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PHYSICAL PRESENCE TEST

“Diagram”

