

## **INTERPRETATION NOTE: NO. 4 (Issue 4)**

DATE: 12 March 2014

**ACT : INCOME TAX ACT NO. 58 OF 1962**

**SECTION : SECTION 1(1)**

**SUBJECT : RESIDENT: DEFINITION IN RELATION TO A NATURAL PERSON – PHYSICAL PRESENCE TEST**

### ***Preamble***

In this Note unless the context indicates otherwise –

- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act No. 58 of 1962; and
- any word or expression bears the meaning ascribed to it in the Act.

### **1. Purpose**

This Note explains the requirements of the physical presence test, with which a natural person, who is not at any time ordinarily resident in the Republic of South Africa during the relevant year of assessment, must comply before that person will be a “resident” as defined in section 1(1).

### **2. Background**

South Africa’s tax system has been residence-based since years of assessment commencing on or after 1 January 2001. For a natural person, this was the commencement of the 2002 year of assessment, that is, 1 March 2001. Persons who are “resident” in the Republic are taxed on their worldwide income, subject to certain exclusions. Persons who are not resident are only taxed on their income from a source within the Republic.

A natural person can become a resident for income tax purposes by –

- being ordinarily resident in the Republic (1);<sup>1</sup> or
- complying with all the requirements of the physical presence test.<sup>2</sup>

This Note focuses solely on the application of the physical presence test. For more information on the concept of “ordinarily resident”, see Interpretation Note No. 3 dated 4 February 2002 “Resident: Definition in Relation to a Natural Person – Ordinarily Resident”.

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<sup>1</sup> Paragraph (a)(i) of the definition of a “resident” in section 1(1).

<sup>2</sup> Paragraph (a)(ii) of the definition of a “resident” in section 1(1).

### 3. The law

For ease of reference the term “resident”, as defined in section 1(1), is quoted in **Annexure A**.

### 4. Application of the law

The physical presence test, also known as the “day test” or “time rule”, is based on the number of days that a natural person is physically present in the Republic. The purpose or nature of the visit is irrelevant. It must be determined annually whether all the requirements of the physical presence test have been met.

Paragraph (a)(ii) of the definition of a “resident” in section 1(1) refers to a natural person who is not at any time during the relevant year of assessment ordinarily resident in the Republic. The ‘ordinarily residence’ test supersedes the physical presence test. The physical presence test is thus not applicable during any year of assessment that a person is ordinarily resident in the Republic.

#### 4.1 Requirements

Items (aa) and (bb) of paragraph (a)(ii) of the definition of a “resident” in section 1(1) contain the requirements that a natural person must comply with before that person can be regarded as a resident for income tax purposes.

The requirements refer to the number of days that a natural person must actually be present in South Africa, during a year of assessment and also during the five years of assessment preceding the year of assessment under consideration.

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 of assessment preceding the year of assessment under consideration; and
- (iii) 915 days in aggregate during the five preceding years of assessment.

A natural person who complies with all the requirements referred to above is a resident of the Republic, for tax purposes, for the year under consideration.

#### 4.2 Determining the number of days in South Africa

Under proviso (A) to the definition of a “resident” a day includes a part of a day. A day begins at 00:00 and ends at 24:00.<sup>3</sup> A person who arrives in the Republic at 23:55 would thus be regarded as being physically present in the Republic for one day, even though that person was only present for five minutes of that day. For this reason, both the day of arrival and departure, as indicated in the person’s passport, are included in the count of the number of days.

For purposes of calculating the aggregate number of days in the physical presence test, any day during which a person is in transit through the Republic between two places outside the Republic, **and** where that person does not formally enter the

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<sup>3</sup> For a discussion on the meaning of a “day” and “part of a day”, see paragraph 5.3.3 of Interpretation Note No. 14 (Issue 3) dated 20 March 2013 “Allowances, Advances and Reimbursements”.

Republic through a “port of entry”, as contemplated in section 9(1) of the Immigration Act, 2002 (the Immigration Act), is excluded.

The term “port of entry” is defined in section 1 of the Immigration Act, and 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;”.

Admission into the Republic and the departure from the Republic is dealt with in section 9 of the Immigration Act and provides that a person may not enter or leave the Republic at a place other than a port of entry.

Based on the ordinary meaning of the word “person”, and the context in which the word is used, a “person” includes a resident, citizen or a foreigner. A resident, citizen or foreigner must enter or exit South Africa through a port of entry. However, under section 31 of the Immigration Act, this requirement may be waived. In order to take this possibility into account, proviso (A) of the Act provides that, where entry or departure is not carried out through a port of entry, it may occur –

“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;”

#### **Example 1 – Calculating the number of days**

*Facts:*

A, who is not ordinarily resident in South Africa, enters the Republic on 1 February at 19:00 and departs on 4 February at 06:00. A is not in transit through South Africa.

How many days is A considered to be physically present in the Republic?

*Result:*

A is physically present in the Republic as follows:

	<b>Days</b>
1 February from 19:00 to 24:00 (5 hours, or part of a day)	1
2 February (24 hours)	1
3 February (24 hours)	1
4 February from 00:00 to 06:00 (6 hours, or part of a day)	<u>1</u>
Total days physically present in South Africa	<u>4</u>

Although only actually in South Africa for 2 days and 11 hours, for purposes of the physical presence test, A is present in the Republic for 4 days.

**Example 2 – Calculation of days to determine physical presence***Facts:*

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

<b>Year of assessment</b>	<b>Number of days</b>
2009	95
2010	110
2011	115
2012	92
2013	151
2014	355

Determine whether X is regarded as a resident under the physical presence test for the 2014 year of assessment.

*Result:*

In order to meet the requirements of the physical presence test, X must satisfy all three elements of the test:

- (i) *Was X present in the Republic for a period or periods exceeding 91 days in aggregate in the current (2014) year of assessment?*

This requirement is met, since X was physically present for 355 days.

- (ii) *Was X present in the Republic for a period or periods exceeding 91 days in aggregate in each of the previous five years of assessment (2009 to 2013)*

This requirement is met, since X was physically present for more than 91 days in 2009 (95 days), 2010 (110 days), 2011 (115 days), 2012 (92 days) and 2013 (151 days).

- (iii) *Was X present in the Republic for a period or periods exceeding 915 days in aggregate during the five previous years of assessment (2009 to 2013)*

The aggregate of days during the five previous years of assessment amounts to 563 days (95 + 110 + 115 + 92 + 151). As this does not exceed the required 915 days, the third requirement has not been met. The days present during the current year of assessment (2014) are not taken into account for purposes of this part of the calculation.

All three requirements have not been met, therefore X is not resident in terms of the physical presence test for the 2014 year of assessment.

**4.3 Date on which a natural person becomes a resident**

The effect of the definition of a “resident” 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 in the year after a period of five consecutive years of assessment during which the person is physically present in the Republic for a qualifying period or periods.

A person will be a resident with effect from the first day of the relevant year (that is, the sixth year) during which all the requirements of the physical presence test have been met. A person who has met the requirements of the physical presence test and is therefore resident will be subject to tax in the Republic on worldwide income<sup>4</sup> received or accrued from the first day of that year of assessment.

**Example 3 – Date on which a person becomes resident**

*Facts:*

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

<b>Year of assessment</b>	<b>Number of days</b>
2009	113
2010	147
2011	208
2012	202
2013	305

During the 2014 year of assessment, Y was physically present in South Africa from 15 April 2013 until 31 July 2013, that is, 108 days.

*Result:*

- (i) Y was physically present in South Africa for more than 91 days in the current year of assessment, 2014 (108 days).
- (ii) Y was physically present for more than 91 days in 2009 (113 days), 2010 (147 days), 2011 (208 days), 2012 (202 days) and 2013 (305 days).
- (iii) Y was physically present for a period exceeding 915 days in aggregate during those preceding 5 years of assessment ( $113 + 147 + 208 + 202 + 305 = 975$  days).

Y is resident in South Africa for the 2014 year of assessment. Even though Y was only present in South Africa from 15 April 2013, Y will be resident in South Africa from the first day of the year of assessment that he or she became resident, that is, 1 March 2013.

A person who ceases to be a resident (see 4.4 below) during a year of assessment, and then returns to the Republic during the following year of assessment and again meets the requirements of the physical presence test in that following year, will once again be resident as from the first day of that following year of assessment in which the requirements for the physical presence test are met.

<sup>4</sup> The term “income” is defined in section 1(1) and means “gross income” less amounts that are exempt from normal tax. In the case of any person who is a resident, “gross income” includes amounts received or accrued from sources both within and outside the Republic, in accordance with paragraph (i) of the definition in section 1(1).

#### 4.4 Date on which a natural person ceases to be a resident

A natural person, who is resident by virtue of the physical presence test, ceases to be a resident when that person is physically outside the Republic for a continuous period of at least 330 full days. Residence will cease from the day after the person left the Republic.

The continuous period of 330 full days cannot be observed over a single year of assessment, because the person must have been physically present in South Africa for at least 92 days during that year in order to qualify as a resident during that year of assessment. The continuous period of at least 330 full days will therefore always extend over two years of assessment.

A natural person, who is ordinarily resident, spending time outside the Republic and who intends on returning to the Republic after his or her wanderings, is regarded as a resident, regardless of the period of time spent outside the Republic. For more information in this regard, refer to Interpretation Note No. 3.

##### Example 4 – When a person ceases to be a resident

###### *Facts:*

Z, a citizen of Argentina employed by a South African company, never visited South Africa before 29 June 2007 and is not ordinarily resident in the Republic. Z was physically present in the South Africa for the following periods:

Year of assessment	Period in the Republic	Number of days in the Republic
2008	29/06/2007 – 29/02/2008	246
2009	01/06/2008 – 31/08/2008	92
2010	01/09/2009 – 28/02/2010	181
2011	01/03/2010 – 21/05/2010	82
	08/11/2010 – 28/02/2011	113
2012	01/07/2011 – 29/02/2012	244
2013	29/06/2012 – 15/07/2012	17
	29/08/2012 – 30/11/2012	94
2014	01/11/2013 – 30/11/2013	30

###### *Result:*

- (i) Z was physically present in South Africa in the 2013 year of assessment for a period exceeding 91 days (17 + 94 = 111 days).
- (ii) Z was physically present for more than 91 days in each of the five prior years of assessment (246 days in 2008; 92 days in 2009; 181 days in 2010; 195 days (82 + 113) in 2011; and 244 days in 2012).
- (iii) Z was physically present for more than 915 days in aggregate during those five preceding years of assessment (246 + 92 + 181 + 195 + 244 = 958 days).

All the requirements were therefore met for the 2013 year of assessment. Z was resident in South Africa under the physical presence test from the beginning of the 2013 year of assessment, that is, 1 March 2012.

Z was physically absent from the Republic from 1 December 2012 to 31 October 2013, which is a continuous period of 335 full days. This meets the 330-day rule. Z thus ceases to be a resident from the day after the original departure from the Republic, 30 November 2012. Z is therefore not resident in the Republic from 1 December 2012.

For capital gains tax purposes, Z is deemed to have disposed of worldwide assets (other than immovable property situated in the Republic, or an interest or right in such property) for an amount equal to the market value of the assets, on the day before Z ceases to be a resident, in this case 30 November 2012. Z is also deemed to have immediately reacquired those assets at a cost equal to the market value on the day Z ceases to be resident, that is, 1 December 2012.<sup>5</sup> For more information on capital gains tax, see the *Comprehensive Guide to Capital Gains Tax* on the SARS website [www.sars.gov.za](http://www.sars.gov.za).

If an assessment has been issued to include Z's worldwide income for the full year of assessment, a reduced assessment could be issued in order to exclude amounts received or accrued after 1 December 2012 that are not from a source within the Republic (provided all the other requirements for a reduced assessment have been met). The reduced assessment may only be issued once proof is provided that the actual period of physical absence from South Africa met the 330-day rule. For the processes and rules relating to disputing assessments, refer to the SARS website.

Z was only physically present in South Africa for 30 days during the 2014 year of assessment. As the 91-day requirement is not met, Z is not resident in South Africa under the physical presence test for that year. It is not necessary to consider the second and third requirements, as the first requirement was not met. As a non-resident, Z is only liable to tax in the Republic on income from a source within the Republic.<sup>6</sup>

#### 4.5 Dual residence and tax treaties

A person's status as a resident of a particular country depends on the domestic laws of that country. Internationally, a country's domestic laws may provide that a person is a "resident" if that person is liable to tax in that country by reason of domicile, citizenship, residence, or other factors.<sup>7</sup> Thus, because the domestic laws of various states use differing criteria for determining residence, a person may be a "resident" of two or more states.

The double taxation that could arise as a result of this is often resolved by means of a double taxation agreement or tax treaty. Tax treaties recognise that a person will only be a "resident" under the treaty, if that person is resident under the domestic law of a contracting state to that treaty.

In such cases, that person's residence status *under the tax treaty* is determined by virtue of the various tie-breaker rules. These rules will determine which country, *for*

<sup>5</sup> Section 9H, applicable with effect from 1 April 2012.

<sup>6</sup> Z, as a non-resident, will only be subject to tax on amounts received or accrued from a South African source, in accordance with paragraph (ii) of the definition of the term "gross income" in section 1(1)

<sup>7</sup> The term 'resident', as used in this context, does not refer to a "resident" as defined in section 1(1), but to residence in the general sense, for example, where an individual actually resides.

*the purposes of the treaty*, the individual is exclusively resident of. A treaty does not prescribe what is relevant to be considered a resident under a country's domestic laws, only which country – for treaty purposes – has the better claim to residence of a particular person under international law.

A person who is exclusively deemed to be a resident of a country other than the Republic under a tax treaty (as a result of the tax treaty tie-breaker rules or otherwise), is not a resident for purposes of the Act,<sup>8</sup> regardless of any other rules in the definition of a “resident” in section 1(1). This exclusion is applicable with effect from 26 February 2003.<sup>9</sup>

## 5. Conclusion

A resident of the Republic is subject to tax on worldwide income in accordance with paragraph (i) of the definition of the term “gross income” in section 1(1). An individual can either be ordinarily resident, or can be deemed to be a resident by application of a physical presence test. The physical presence test is applied annually.

An individual who meets the requirements of the physical presence test is a resident from the first day of the year of assessment during which the requirements of the test are met.

An individual ceases to be a resident in terms of the physical presence test if that individual is outside the Republic for at least 330 continuous full days.

Any individual who is deemed to be a resident by virtue of the physical presence test is subject to tax on worldwide income. The individual will therefore be required to declare all receipts and accruals in this regard.

Attached as **Annexure B** is diagram setting out the process that must be followed to determine whether a person is a resident under the physical presence test.

### Legal and Policy Division SOUTH AFRICAN REVENUE SERVICE

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<sup>8</sup> As provided in paragraph (A) of the exclusions from the definition of a “resident” in section 1(1).

<sup>9</sup> As amended by section 33(1) of the Exchange Control Amnesty and Amendment of Taxation Laws Act, 2003



## Annexure A – 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

## Annexure B – Physical presence test diagram

