



SOUTH AFRICAN REVENUE SERVICE

INCOME TAX INTERPRETATION NOTE NO 3

DATE: 4 FEBRUARY 2002

ACT : INCOME TAX ACT, 1962 (“the Act”)
SECTION : SECTION 1
SUBJECT : RESIDENT: DEFINITION IN RELATION TO A NATURAL PERSON – ORDINARILY RESIDENT

1. Background

The income tax system in South Africa changed from a source-based system of taxation to a residence basis of taxation with effect from years of assessment commencing on or after 1 January 2001.

The consequential amendments to the Act have the effect that South African residents are, but for certain exclusions/exemptions, subject to income tax on their worldwide income, i.e. income derived within and outside South Africa.

Non-residents will remain taxable on their South African actual or deemed source income. The normal source principles as determined and developed by our courts continue to be applicable and can, therefore, not be ignored.

The definition of “gross income” in section one of the Act has been amended to include a reference to the word “resident” which has also been defined in section one and means a natural person who is:

- ordinarily resident in South Africa; or
- physically present in South Africa for a specified period (physical presence test).

In other words, two tests are applicable to determine whether or not a person is a resident of South Africa, i.e. the ordinarily resident test and physical presence test. The physical presence test is dealt with in Interpretation Note No. 4 dated 4 February 2002. The implication of agreements for the avoidance of double taxation is also not considered in this document.

The Act does not define “ordinarily resident”, and therefore the interpretation given by the courts must be followed.

2. **The law**

Although the Act does not define “ordinarily resident”, the courts have interpreted the concept to mean the country to which a person would naturally and as a matter of course return from his/her wanderings. It might therefore be called a person’s usual or principal residence and it would be described more aptly, in comparison to other countries as the person’s real home. The above approach was followed in the case, *Cohen v CIR* (13 SATC 362) and confirmed in the case *CIR v Kuttel* (54 SATC 298).

The leading Canadian case is *Thompson v Minister of National Revenue* 2 DTC 812 (SCC). In this case it was held that a person is ordinarily resident in the place “where in the settled routine of his life he regularly, normally or customarily lives” or “at which he in mind and in fact settles into or maintains or centralises his ordinary mode of living with its accessories in social relations, interest and conveniences”. The English case *Shah v Barnet London Borough Council and Other Appeals* 1983 1 ALL ER 226 (HL) 234b-c describes the meaning of “ordinarily resident” as “that a person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration”. A wider approach was followed in interpreting the concept of “ordinarily resident” in the English case. In the Kuttel judgment, Goldstone JA stated:

“In my judgment it is neither necessary nor helpful to discuss other English decisions in which the words ‘ordinarily resident’ were considered and interpreted with reference to English income tax legislation. I can find no reason for not applying their natural and ordinary meaning to the provisions now under consideration.”

In summary, the courts have held in ascribing a meaning to the concept “ordinarily resident” that it refers to -

- living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person’s ordinary regular course of life to live in a particular place with a degree of permanence, he/she must be regarded as ordinarily resident (*Levene v Inland Revenue Commissioner* [1928] ALL ER Rep. 746 (HL));
- the place where his/her permanent place of abode was, where his/her belongings were stored, which he/she left for temporary absences and to which he/she regularly returned after such absences (*H v COT* 24 SATC 738);
- the residence must be settled and certain and not temporary and casual (*Soldier v COT* 1943 SR);
- that ordinarily resident is narrower than resident. A person is ordinarily resident where he/she normally resides, apart from temporary/occasional absences (*CIR v Kuttel (supra)*).

In *ITC 1170* (34 SATC 76) it was pointed out by the court that the question whether a taxpayer may be regarded as being “ordinarily resident” at a particular place during a particular period is one of degree, and one is entitled to look at the taxpayer’s mode of life beyond the particular period under consideration.

The case of *Robinson v COT* 1917 TPD 542, 32 SATC 41 deals with the interpretation of the word “residence” only and not the term “ordinarily resident”. The case is important, though, because it focuses on the

physical presence of the taxpayer and his maintenance of a home as the crucial tests to be applied in the determination of his residence.

In ITC 961 (1061) 24 SATC 648 it was held that a woman who marries a man ordinarily resident in a particular country and sets up home with her husband in that country cannot be said to be ordinarily resident in some other country, even if immediately before her marriage she was ordinarily resident in that other country.

3. **Application of the law**

The question whether a person is ordinarily resident in a country is one of fact and each case must be decided on its own facts having regard to principles already established by case law, meanings expressed in the text books, etc. It is not possible to lay down hard and fast rules. The concept must also not be confused with the terms 'domicile', 'nationality' and the concept of emigrating or immigrating for exchange control purposes.

A physical presence at all times is not a requisite to be ordinarily resident in the Republic. The following two requirements need to be present:

- an intention to become ordinarily resident in a country; and
- steps indicative of this intention having been or being carried out.

A person's mode of life may be such that it cannot be said that he or she has a real home anywhere. A common feature of multinational corporations is that certain staff is virtually permanent wanderers. In such a case the burden would be on the taxpayer to discharge the onus that he/she is not ordinarily resident in the Republic. It is not possible to lay down any clearly defined rule or period to determine ordinarily residence.

The effect of the above is that a natural person may be resident in South Africa even if that person was not physically present in South Africa during the relevant year of assessment. The purpose, nature and intention of the taxpayer's absence must be established to determine whether the taxpayer is still ordinarily resident. The following factors will be relevant in considering the above two requirements:

- most fixed and settled place of residence
- habitual abode, i.e. present habits and mode of life
- place of business and personal interest
- status of individual in country, i.e. immigrant, work permit periods and conditions, etc
- location of personal belongings
- nationality
- family and social relations (schools, church, etc)
- political, cultural or other activities
- application for permanent residence
- period abroad; purpose and nature of visits
- frequency of and reasons of visits

The above list is not intended to be exhaustive or specific, merely a guideline.

The circumstances of the person must be examined as a whole, and the personal acts of the individual must receive special attention. As stated in ITC 1170, one is entitled to look at the taxpayer's mode of life beyond the particular period under consideration. It is not possible to specify over what period the comparison must be made. The comparison must cover a sufficient period for it to be possible to determine whether the person is ordinarily resident in South Africa.

A natural person, who became ordinarily resident, will become a resident as from a specific date. That date will be the date on which he or she became ordinarily resident in the Republic. It, therefore, follows that a natural person will not be taxable in the Republic on any income earned outside the Republic prior to the date on which he or she became ordinarily resident in the Republic, unless it was deemed to be of a South African source and was therefore taxable in terms of paragraph (ii) of the definition of “gross income” in section one of the Act.

Example:

Mr. X became ordinarily resident in the Republic on 1 October 2001. All income received by or accrued to Mr. X from a source outside the Republic prior to 1 October 2001 will be excluded from his income for the year of assessment ending 28 February 2002. All income (worldwide) received by or accrued to Mr. X, on or after 1 October 2001 (excluding certain income that may be exempt) will be included in his taxable income for the year of assessment ending 28 February 2002.

A natural person, who emigrates from the Republic to another country, will cease to be a resident as from the date that he or she emigrates.

Example:

Ms. A, emigrated to Zambia on 29 October 2001 and married a Zambian resident. She has no business or financial connection in the Republic and does not intend to return to the Republic. In these circumstances Ms. A ceased to be a resident on 29 October 2001.

4. **Further references**

(1990) 29 Income Tax Reporter 195 ‘Ordinarily Resident’ and ‘Carrying on Business’

Silke on South African Income Tax, paragraph 14.41

Meyerowitz on Income Tax, paragraph 5.16

Butterworths: Income Tax Practice Manual "Ordinarily Resident", page A 568(1)

IR20 Residents and non-residents: Liability to tax in the United Kingdom (<http://www.inlandrevenue.gov.uk/pdfs/ir20/htm>)

Law Administration
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