



SOUTH AFRICAN REVENUE SERVICE

INTERPRETATION NOTE NO. 25

DATE: 26 March 2004

ACT : INCOME TAX ACT, 1962 (the Act)
SECTION : SECTION 1, definition of "resident"
SUBJECT : RESIDENT: DEFINITION IN RELATION TO A NATURAL PERSON – APPLICATION OF THE PHYSICAL PRESENCE TEST IN THE YEAR OF DEATH OR INSOLVENCY

1. Purpose

The purpose of this note is to clarify the application of the physical presence test in determining the resident status of a person who dies or becomes insolvent during a year of assessment.

2. Background

Persons who are residents of the Republic of South Africa are subject to taxation on their worldwide taxable income. A person will be a "resident" as defined in section 1 of the Act if he or she is –

- ordinarily resident in the Republic; or
- physically present in the Republic for a specified number of days during the relevant ("current") year of assessment as well as during each of the three years of assessment immediately preceding the current year of assessment (the "physical presence test").

This note deals with the situation where a natural person, who is not ordinarily resident in the Republic, dies or becomes insolvent during a year of assessment and examines what comprises a year of assessment in the year of death or insolvency as well as how the 91 day test and the 549 day test must be applied in relation to such a year. The implications of a double taxation agreement have not been taken into account in this note. This note must also be read in conjunction with Interpretation Note No. 4 dated 4 February 2002.

3. The law

The following terms are defined in section 1 of the Act:

"date of sequestration" means—

- (a) the date of voluntary surrender of an estate, if accepted by the Court; or
- (b) the date of provisional sequestration of an estate, if a final order of sequestration is granted by the Court;"

“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 three years of assessment preceding such year of assessment; and
 - (bb) for a period or periods exceeding 549 days in aggregate during such three 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 in the case of a person authorised by the Minister of Home Affairs in terms of section 31 (2) (c) of that Act; and
- (B) where a person ...; or

(b) person (other than a natural person) which is ...,

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;”

“year of assessment” means any year or other period in respect of which any tax or duty leviable under this Act is chargeable, and any reference in this Act to any year of assessment ending the last or the twenty-eighth or the twenty-ninth day of February shall, unless the context otherwise indicates, in the case of a company be construed as a reference to any financial year of that company ending during the calendar year in question.”

Section 66(13) of the Act which provides for the submission of returns, provides as follows:

“(13) The return of income to be made by any person in respect of any year of assessment shall be a full and true return—

- (a) in the case of a person (other than a company), for the whole period of twelve months ending upon the last day of the year of assessment under charge: Provided that where—
 - (a) a person dies, a return shall be made for the period commencing on the first day of that year of assessment and ending on the date of death;
 - (b) the estate of a person is sequestered, separate returns must be made for the periods—
 - (i) commencing on the first day of that year of assessment and ending on the date preceding the date of sequestration; and
 - (ii) commencing on the date of sequestration and ending on the last day of that year of assessment.”

4. Application of the law

4.1 The physical presence test

In terms of paragraph (a)(ii) of the definition of “**resident**” in section 1 of the Act a person must pass three tests in terms of the physical presence test before that person is regarded as a resident in South Africa. The person must have been physically present in the Republic for –

- more than 91 days in total during the current year of assessment,
- more than 91 days in total in each of the three years of assessment immediately preceding the current year of assessment, and
- more than 549 days in total during those three immediately preceding years of assessment.

A person who dies or becomes insolvent will generally have a year of assessment of less than 12 months in the year of death or insolvency.

4.2 The year of assessment in which a person dies

In terms of proviso (a) to section 66(13)(a) read with the definition of “**year of assessment**” in section 1 of the Act where a person dies during the year of assessment, the year of assessment for that person –

- commences on the first day of the year of assessment (usually 1 March unless the person was born during the year); and
- ends on the date of death.

The 91 day test in respect of the current year of assessment is applied in the normal way to a year of assessment which is less than a full year (“period of assessment”) and is not scaled down to account for the fact that the “**year of assessment**” is less than a full year. For example, where a person dies (e.g. on 30 April) during the current year of assessment and that person was physically present in the Republic as from 1 March, that person did not meet the test of more than 91 days in total during the current year of assessment because that person was physically present in South Africa for only 61 days (1 March to 30 April).

In terms of proviso (A) to the definition of “**resident**” in section 1 of the Act, the day on which a person dies must be counted in the determination as to whether the 91 day period has been exceeded. This follows from the fact that the person would have been alive (physically present) for a part of the day, and a part of a day is treated as a full day.

4.3 The year of assessment in which a person is declared insolvent

When the estate of a person is sequestrated, the period of assessment is determined, in a case of,–

- a) a natural person, from 1 March up to the day before the date of sequestration;
- b) the insolvent estate, of the person referred to in (a) above, from the date of sequestration to the last day of February; and
- c) the natural person referred to in (a) above, from the date of sequestration to the last day of February.

In the case of a provisional sequestration, the relevant periods end or commence the day before the granting of the order and from the date of granting the order, respectively.

In terms of proviso (b) to section 66(13)(a) of the Act the Commissioner must raise an assessment up to the day before the date of sequestration, for the purpose of –

- proving any claim against the insolvent estate; and
- determining the amount of any assessed loss or assessed capital loss to be carried over to the person's insolvent estate in terms of section 25C of the Act.

The natural person will, therefore, have two periods of assessment in the year of insolvency. The physical presence test (see paragraph 4.1) must be applied to each of these two periods of assessment. (See the definition of “**year of assessment**” which relates to any year or other period.) The first period will be regarded as an immediately preceding year of assessment in relation to the second period.

Please note: Where a provisional order is set aside by the court, any assessment raised by the Commissioner as a result of the provisional sequestration, must be withdrawn in terms of section 79B(1A) of the Act. In terms of section 79B(2) of the Act the assessments withdrawn are deemed not to have been issued. In such a case, the natural person will be placed in the same position as if he or she had never been insolvent, and will have a single year of assessment in the year in which the rescinded provisional order was issued. The 91 day period will be determined in relation to that single year of assessment.

5. Examples

The principles discussed above are illustrated in the examples below.

5.1 Death

5.1.1 Mr. Y is ordinarily resident in Utopia with whom the Government of South Africa does not have an agreement for the avoidance of double taxation. He was physically present in South Africa for the following periods during the 2004 year of assessment:

- a) 02 June 2003 to 19 June 2003.
- b) Mr. Y arrived at Cape Town International Airport at 23:40 on 10 November 2003 intending to visit friends for the next three months.
- c) He fell ill on 15 January 2004 and passed away at 20:00 on 21 January 2004.

During the three preceding years of assessment he was physically present in South Africa for the following number of days:

2001 year of assessment	=	210 days
2002 year of assessment	=	180 days
2003 year of assessment	=	<u>185</u> days
Total number of days	=	<u>575</u> days

Mr. Y was physically present in South Africa for 91 days in aggregate during the 2004 year of assessment, namely:

02 June 2003 to 19 June 2003	=	18 days
10 November 2003 to 21 January 2004	=	<u>73</u> days
Total number of days	=	<u>91</u> days

Since Mr. Y does not comply with the first requirement, namely physically present in the Republic for a period or periods exceeding 91 days in aggregate during the period of assessment (01 March 2003 to 21 January 2004), he is not regarded as a resident for income tax purposes.

5.1.2 If Mr. Y passed away 6 hours later, i.e. the following day he would have been physically present in the Republic for a period or periods **exceeding** 91 days in aggregate during the period of assessment in question, that is:

02 June 2003 to 19 June 2003	=	18 days
10 November 2003 to 22 January 2004	=	<u>74</u> days
Total number of days	=	<u>92</u> days

He would, therefore, have been regarded as a resident because he was physically present in the Republic for –

- more than 91 days in total during the current year of assessment;
- more than 91 days in total in each of the three years of assessment immediately preceding the current year of assessment; and
- more than 549 days in total during those three immediately preceding years of assessment.

a) Commencement date of year of assessment will be 1 March 2003.

Since he is regarded as a resident in terms of the physical presence test, he became a resident as from the first day of the period of assessment, which is 01 March 2003. Refer to paragraph (a)(ii) of the definition of “resident” in section 1 of the Act.

b) The date on which the period of assessment ends will be 22 January 2004.

5.2 Insolvency

Ms. Z is ordinarily resident in Utopia. She was physically present in South Africa for the following periods:

- 12 April 2003 to 25 May 2003
- 31 July 2003 to 16 September 2003.
- 15 November 2003 to 15 March 2004.

On 1 September 2003 the court issued a provisional order placing Ms Z’s estate in sequestration. This order was later made final. As a result of the order of sequestration issued on 1 September 2003, Ms. Z will have two periods of assessment, namely:

- **First period of assessment - Period prior to insolvency**

The period of assessment commenced on 1 March 2003 and ended on 31 August 2003, the day before the order of sequestration was issued.

- **Second period of assessment - Period subsequent to insolvency**

The period of assessment commenced on 1 September 2003 (the day on which the order of sequestration was issued) and ended on the last day of February 2004.

Period of assessment prior to insolvency (1/3/2003 – 31/8/2003)

Ms. Z was physically present in South Africa for a period or periods not exceeding 91 days in aggregate during the first period of assessment (01 March 2003 to 31 August 2003), namely:

12 April 2003 to 25 May 2003	=	44 days
31 July 2003 to 31 August 2003	=	<u>32</u> days
Number of days in aggregate	=	<u>76</u> days

Since Ms. Z does not comply with the first requirement, that is physically present in the Republic for a period or periods exceeding 91 days in aggregate during the period of assessment, she is not regarded as a resident in respect of the first period of assessment.

Period of assessment subsequent to insolvency (1/9/2003 – 29/2/2004)

Ms. Z was physically present in South Africa for a period or periods exceeding 91 days in aggregate during the second period of assessment (01 September 2003 – 29 February 2004), namely:

1 September 2003 to 16 September 2003	=	16 days
15 November 2003 to 29 February 2004	=	<u>107</u> days
Number of days in aggregate	=	<u>123</u> days

Since Ms. Z was not physically present in the Republic for a period or periods exceeding 91 days in aggregate during the first period of assessment (**period of assessment prior to insolvency**), she does not comply with the second requirement of the physical presence test.

The second period of assessment will count as a year of assessment. It follows, therefore, that in terms of the physical presence test she can only be regarded as a resident from 1 March 2006, which is the commencement date of the 2007 year of assessment, if she complies with all three requirements.

6. Conclusion

In the event of death or sequestration, the 91 day test in respect of the current year of assessment is applied in the normal way to the year of assessment, notwithstanding the fact that the year of assessment is in respect of a period covering less than a full year. The 91 day test is, therefore, not scaled down to account for the fact that the “**year of assessment**” can be less than a full year.