Ordinary residence & physical presence test

In principle, the first step in determining the normal tax liability of any natural person in South Africa is to establish whether or not that natural person is a “resident” as defined in section 1. Two separate tests are applicable to determine whether or not a natural person is a resident, namely – • the ordinarily resident test; and • the physical presence test.

Ordinarily resident test This concept means that a natural person is a resident if his or her permanent home, to which he or she will normally return, is in South Africa. A continuous physical presence is not a prerequisite to be ordinarily resident in South Africa. The courts have held, in ascribing a meaning to the concept “ordinarily resident”, that it refers to, for example – • 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 or she must be regarded as ordinarily resident; • the place where his or her permanent place of abode is, where his or her belongings are stored, which he or she leaves for temporary absences and to which he or she regularly returns after these absences; • a residence that is settled and certain and not temporary and casual; or • where a person normally resides, apart from temporary or occasional absences.

A natural person, who becomes ordinarily resident in South Africa, will become a resident as from a specific date. It, therefore, follows that any income that is received by or accrued to that person from a source outside South Africa, before he or she becomes ordinarily resident in South Africa, will not be subject to tax in South Africa unless such person is regarded as a resident by virtue of the physical presence
Example 1 – Ordinarily resident test  X became ordinarily resident in South Africa on 1 October 2008. All worldwide income received by or accrued to X, on or after 1 October 2008 (excluding certain income that may be exempt) will be included in the taxable income of X for the tax years ending on 28 February 2009 and thereafter. A natural person, who emigrates from South Africa to another country, will cease to be a resident as from the date that he or she emigrates.

Example 2 – Ordinarily resident test  B married a Zambian resident and emigrated from South Africa to Zambia on 29 October 2008. B has no business or financial connection in South Africa and does not intend to return to South Africa. In these circumstances B ceased being a resident on 29 October 2008. For more information regarding the concept “ordinarily resident”, see Interpretation Note No. 3 “Resident: Definition in relation to a natural person – ordinarily resident” – 4 February 2002, which is available on the SARS website.

Physical presence test  This concept is time-based and is only applicable to a natural person who was not at any stage during the relevant tax year ordinarily resident in South Africa. This test is based on the number of days during which a natural person is physically present in South Africa. It is important to note that a day includes a part of a day. Thus both the day of arrival and departure are included in the count. This test is also known as the day test or time rule. A day is regarded to start at 00:00, therefore, a person who arrives in South Africa at 23:55 would be regarded to be present in South Africa for a full day. However, any day that a person is in transit through South Africa between two places outside South Africa and that person does not formally enter South Africa through a port of entry, 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, is excluded in the count.
The physical presence test must be performed annually in order to determine whether the natural person concerned is a resident for the tax year under consideration. The test consists of three requirements, that is, the natural person must be physically present in South Africa for a period or periods exceeding – 2 i) 91 days in aggregate during the tax year under consideration; ii) 91 days in aggregate during each of the five tax years preceding the tax year under consideration; and iii) 915 days in aggregate during the above five preceding tax years.

A natural person has to meet all three requirements before he or she will be regarded a resident (refer to the attached diagram in Annexure A). A tax year starts on the first day of March of one year and ends on the last day of February of the subsequent year.

In terms of the physical presence test, a natural person who is not ordinarily resident in South Africa only becomes a resident for income tax purposes as from the first day (beginning) of the sixth tax year if he or she is physically present in South Africa for the periods as set out above. The purpose of the presence is irrelevant. A day is therefore counted even if the presence is as a result of a holiday, visiting friends, funeral etc. A natural person, who is a resident by virtue of the physical presence test, ceases to be a resident if he or she is physically outside South Africa for a continuous period of at least 330 full days. The continuous period begins the day after the day on which he or she physically left South Africa. The natural person ceases to be a resident as from the day immediately after the day on which he or she left South Africa for a continuous period of at least 330 full days. Note: Any natural person who is deemed to be exclusively a resident of another country with which South Africa has entered into an agreement for the avoidance of double taxation is excluded from the definition of “resident”.