What’s in a name: 'primary residence' examined

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The term ‘primary residence’ is defined in paragraph 44 of the Eighth Schedule to the Income Tax Act, No 58 of 1961 (ITA) (read with paragraph 1).

The reason this definition has captured the minds of many is due to the exclusion on the gain or loss made on disposal of one’s primary residence, provided the gain does not exceed R2 million or the proceeds from the sale of the property do not exceed R2 million. To qualify as a primary residence, and receive the benefit of the exemption, a residence must be one in which a natural person or a special trust holds an interest. But, in addition, the natural person or a beneficiary of the special trust or spouse of the person or beneficiary must:
ordinarily reside or have resided in the residence as his or her main residence; and
use or have used the residence mainly for domestic purposes.

In order for property to qualify as a primary residence, the residence must meet both of the latter requirements or face disqualification as a primary residence. The definition also makes it clear that a company, ordinary trust or close corporation owning a residence, will not qualify for the primary residence exclusion.

The SARS Guide to the Disposal of a Residence from a Company or Trust, 1 October 2010 to 31 December 2012 (Guide), provides that the term ‘mainly for domestic purposes’ implies a purely quantitative standard of more than 50% of the residence being used for domestic purposes. This may be measured on a floor-area or time basis. This interpretation was given by Botha JA

in SBI v Lourens Erasmus (Eiendoms) Bpk 1966 (4) SA 444 (A), 28 SATC 233 at 245 (see page 15 of the Guide).

Aside from the above definition in the ITA and the two requirements that need to be met, the 'primary residence' definition has not been interpreted by South African courts. In order to provide some clarity in this regard, we look to the recent Australian case of Commissioner of State Revenue v Burdinat [2012] WASC 359.

The case discussed comes on appeal from the State Administrative Tribunal of Western Australia and relates to principal place of residence (PPR) land tax exemption under s21 of the Australian Land Tax Assessment Act, 2002 (LTAA), being similar to the South African primary residence rebate.

The facts are briefly that a retired couple, who have lived in their Bicton home for 25 years, took an extended holiday from early June to early September 2011, to a warmer part of the country, where they lived in a caravan on their own Broome Vacation Village site. While they were away they let their house in Bicton, fully furnished, mainly for security reasons. Shortly after their return, they were issued with a land tax assessment, which effectively provided that the Vacation Village site and not their Bicton residence, was granted the PPR land tax exemption. The question the Supreme Court of Western Australia was required to answer, was whether the Bicton property was the Burdinats' primary residence. The reason for this question was that according to the LTAA, private property is exempted from land tax, if at midnight on 30 June in the preceding year, the property was owned by husband and wife, where at least one of them used it as a primary residence. Thus, given that the couple were away over the crucial date of 30 June, the tax assessment was issued.

This case is helpful in that, the court examined a multitude of analogous cases in determining the meaning of primary residence, specifically in the light of absences from the

residence in question. Various judgments provided that where a place has been determined to be the primary residence, the taxpayer is not ‘less resident’ because he leaves from time to time for business and pleasure. In other words, where the place of abode has been established, physical presence or absence from it does not change its status. It would require a change of intention by the taxpayer to change the status. The duration of residency alone does not determine permanence.

On a broad view of the facts, the Court dismissed the appeal by the Commissioner against the review decision in favour of the Burdinats, finding that their primary residence was the house in Bicton. Despite the taxpayers having been away from their residence on that crucial date namely, 30 June, the Court was not persuaded that the grounds for appeal had been made out by the Commissioner.

Thus, for South African taxpayers it is encouraging to note from the Australian example, that the primary residence definition must be applied specifically to each case, taking all circumstances into account. It is also positive that where a primary residence has been established, absences from the residence for business or recreation will not result in the residence losing its status and exemption as primary residence.