

INTERPRETATION NOTE 4 (Issue 5)

DATE: 3 August 2018

ACT : INCOME TAX ACT 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 58 of 1962; and
- any word or expression bears the meaning ascribed to it in the Act.

All interpretation notes referred to in this Note are available on the SARS website at www.sars.gov.za. Unless indicated otherwise, the latest issue of these documents should be consulted.

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);¹ or
- complying with all the requirements of the physical presence test.²

¹ Paragraph (a)(i) of the definition of a “resident” in section 1(1).

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

This Note focuses solely on the application of the physical presence test. For more information on the concept of “ordinarily resident”, see Interpretation Note 3 “Resident: Definition in Relation to a Natural Person – Ordinarily Resident”.

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 24:00.³ 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.

³ For a discussion on the meaning of a “day” and “part of a day”, see paragraph 5.3.3 of Interpretation Note 14 “Allowances, Advances and Reimbursements”.

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 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:

	Days
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:

Year of assessment	Number of days
2013	95
2014	110
2015	115
2016	92
2017	151
2018	355

Determine whether X is regarded as a resident under the physical presence test for the 2018 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 (2018) 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 (2013 to 2017)*

This requirement is met, since X was physically present for more than 91 days in 2013 (95 days), 2014 (110 days), 2015 (115 days), 2016 (92 days) and 2017 (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 (2013 to 2017)*

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 (2018) 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 2018 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 income⁴ 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:

Year of assessment	Number of days
2013	113
2014	147
2015	208
2016	202
2017	305

During the 2018 year of assessment, Y was physically present in South Africa from 15 April 2017 until 31 July 2017, that is, 108 days.

Result:

- (i) Y was physically present in South Africa for more than 91 days in the current year of assessment, 2018 (108 days).
- (ii) Y was physically present for more than 91 days in 2013 (113 days), 2014 (147 days), 2015 (208 days), 2016 (202 days) and 2017 (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 2018 year of assessment. Even though Y was only present in South Africa from 15 April 2017, 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 2017.

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.

⁴ 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 that 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 returning to the Republic, 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 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 2011 and is ordinarily resident in Argentina. 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
2012	29/06/2011 – 29/02/2012	246
2013	01/06/2012 – 31/08/2012	92
2014	01/09/2013 – 28/02/2014	181
2015	01/03/2014 – 21/05/2014	82
	08/11/2014 – 28/02/2015	113
2016	01/07/2015 – 29/02/2016	244
2017	29/06/2016 – 15/07/2016	17
	29/08/2016 – 30/11/2016	94
2018	01/11/2017 – 30/11/2017	30

Result:

- (i) Z was physically present in South Africa in the 2017 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 2012; 92 days in 2013; 181 days in 2014; 195 days (82 + 113) in 2015; and 244 days in 2016).
- (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 2017 year of assessment. Z was resident in South Africa under the physical presence test from the beginning of the 2017 year of assessment, that is, 1 March 2016.

Z was physically absent from the Republic from 1 December 2016 to 31 October 2017, 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 of the original departure from the Republic, 30 November 2016. Z is therefore not resident in the Republic from 30 November 2016.

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 29 November 2016. 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, 30 November 2016.⁵ For more information on capital gains tax, see the *Comprehensive Guide to Capital Gains Tax*.

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 on or after 30 November 2016 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 2018 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.⁶

4.5 Interaction between the definition of “resident” in section 1(1) and tax treaties

A person who is exclusively a resident of a country other than South Africa for purposes of the application of a tax treaty is not a resident of the Republic under the Act. This position is achieved for two reasons.

Firstly, once approved by Parliament and published in the *Government Gazette*, tax treaties have effect as if enacted in the Act.⁷ The tax treaty's provisions and those of the Act should therefore, if at all possible, be reconciled and read as one coherent whole.⁸ In the context of the definition of “resident”, if there is conflict between the general definition of that term in section 1(1) and a more specific definition in a tax treaty, the maxim *generalia specialibus non derogant*⁹ applies and the more specific definition in the tax treaty takes precedence.

⁵ Section 9H, applicable with effect from 1 April 2012.

⁶ 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).

⁷ Section 108(2); *SIR v Downing* 1975 (4) SA 518 (A), 37 SATC 249 at 255.

⁸ *C: SARS v Van Kets* 2012 (3) SA 399 (WCC), 74 SATC 9 at 17.

⁹ See also *C: SARS v Tradehold* 2013 (4) SA 184 (SCA), 74 SATC 263 at 269.

Secondly, the precedence of a more specific tax treaty definition has been included in the definition of “resident” in section 1(1), which excludes a person deemed to be exclusively a resident of another country for purposes of applying any tax treaty. Therefore, if a natural person is held to be a resident of another country and not to be a resident of South Africa for purposes of any tax treaty, such person is excluded from the definition of “resident” in section 1(1).

A natural person who meets the ordinary residence test or the physical presence test will therefore not be a resident of South Africa if, notwithstanding having met those tests, that person is held to be exclusively a resident of a country other than South Africa for purposes of the application of any tax treaty. For example, the tax treaty might include a core definition of “resident” that differs from the definition in section 1(1) or the application of the tie-breaker rules¹⁰ might result in the natural person being held to be exclusively a resident of the other country.

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 Counsel

SOUTH AFRICAN REVENUE SERVICE

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¹⁰ For examples of possible tie-breaker rules see Article 4.2 of the Organisation for Economic Cooperation and Development’s Model Tax Convention, condensed version, dated 21 November 2017.

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

