THE FISCAL RESIDENCE OF NATURAL PERSONS AS IT APPLIES TO SOUTH AFRICANS WORKING ABROAD

A study of South Africa, United States of America, United Kingdom and Australia and Agreements for the Avoidance of Double Taxation

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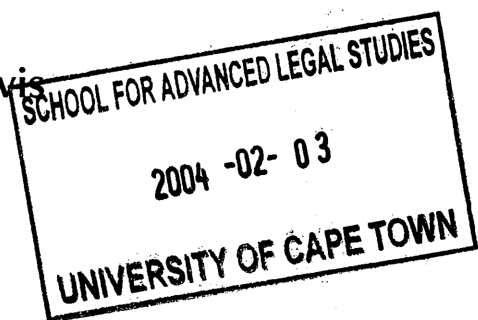
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1 Introduction

For both natural and non-natural persons the basis of South African income tax changed for years of assessment commencing on or after 1 January 2001. Prior to 2001 South Africa's income tax regime was based on the source principle. Taking the cue from the Katz Commission Reports, Minister of Finance Trevor Manuel introduced the residence basis of taxation in his 2000 budget speech, thus ensuring that South African residents (as defined in the Income Tax Act 58 of 1962 (as amended)(the 'Act')) became taxable on their worldwide income.

This paper explores the South African ('SA') residence definition as well as those of the United States of America ('US'), United Kingdom ('UK') and Australia, taking cognisance of the effect of South African Agreements for the Avoidance of Double Taxation ('DTAs') with these countries (a summary table of the different treatments is presented in Appendix A). The scope of the paper has been limited to South African individuals only and specifically excludes non-natural persons and non-residents (for South African tax purposes). The choice of the countries selected was based largely on the (be it perceived or actual) popularity as destinations for South African short- and long-term contract (or other) workers. These countries are also major trading partners and have well developed economies and tax regimes, which provides for useful discussion. The scope of this paper has been limited to exclude a full discussion on the implications of capital gains tax. However, a short discussion on the change of a South African individual's residency status is pertinent to the paper and has been included at the end of the paper.

1.1 Background

South Africa's main reasons for changing from a source system to a residence tax system were as follows[1]:

- To place the income system on a sounder footing thereby protecting the South African tax base from exploitation;
- To bring the South African tax system more in line with international practice;
- To relax exchange control regulations and facilitate greater involvement of South African companies offshore; and

[1] Ketchmin, E.P. *A Comparative Analysis of the Concept of Fiscal Jurisdiction in Income Tax Law,* thesis presented for the degree of Doctor of Laws, University of Cape Town 2002

- To more effectively cater for the taxation of e-commerce.

The reasons above (with the possible exception of the 2nd one) all relate to non-natural persons and are beyond the scope of the paper. However, a fifth reason that applies specifically to individuals which is relevant to our discussion, is the development of a global economy and a mobile workforce. In the current global economic climate individuals are able to move freely between countries, jurisdictions and continents like never before. This presents a problem from a jurisdictional perspective and one that residence-based taxation systems aim to solve. However, when discussing the tax implications of a mobile workforce, it is important to consider three issues:

- The local tax system (in this case South Africa);
- The foreign tax system (the country to which the individual travels); and
- Any applicable ('DTA').

As part of the global economic community many countries attempt to harmonise their policies and laws. Taxation law is not immune to this and when comparing different country's tax regimes common themes often present themselves. Before discussion of specific tax treatments a discussion of the more commonly used residency concepts is presented.

1.2 Commonly used residency concepts

Relevant to a discussion paper on residency (especially from an international perspective, as will become apparent later) are commonly used concepts employed by both our and foreign tax jurisdictions in their residency definitions, as well as those used in DTA's. What follows is a brief explanation of three of the more common concepts relevant to our discussion: residence (used quite extensively), nationality or citizenship (used by the US), and domicile (used by the UK and Australia). It must be noted that these concepts are complex from a legal perspective. This paper does not presume to discuss them exhaustively as that is not the focus of this paper. What follows is a brief description of these concepts.

1.2.1 Residence

Domestically, the definition of 'residence' is unique to each country's statute on income taxes. Each country's definition is different and therefore trying to provide a uniform

definition is difficult. However, due to the proliferation of DTA's the Organisation for Economic Co-operation and Development ('OECD') definition of a resident is useful in providing a starting point of the concept of residence. Residency (as it applies to individuals) is defined in Article 4 of the model as follows (it should be noted that this is the general model and contracting states are entitled to alter it, although in practice this happens rarely):

1. 'For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
   a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
   b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
   c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
   d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.'

Paragraph 1 of Article 4 provides that a person is a resident of a Contracting State (of the DTA) if so defined by the domestic laws of that Contracting State. This provides a direct link to the residency definition of each country (in our case it is the 'gross income' definition in the Act). The paragraph makes the distinction between a resident and persons who are liable only on income sourced from one of the contracting states. Such a person falls outside the definition of the OECD definition of a resident. This is consistent with the South African (and many other jurisdictions) interpretation regarding the tax treatment of non-residents (i.e. taxed on locally-sourced income only). More complex, however, is the situation where a person is a resident in terms of the domestic laws of both States.

The OECD model attempts to deem a person (resident in both States by virtue of the two countries domestic tests) to be a resident of only one State by the application of hierarchical tests (i.e. should the first test fail, the second test is applied, if it also fails, the third test is applied, and so on and so forth). The first of these so-called tiebreaker rules[2] is the place in which the individual has a permanent home (see sub-paragraph (a) above). The OECD commentary[3] (the 'commentary') suggests that the 'individual must have arranged and retained it for his personal use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration'.[4] The commentary does not require one to own a home but a real sense of permanence is required. Should an individual have a permanent home in both contracting states, one must consider the state where the 'personal and economic relations are closer' (centre of vital interests). The concept of 'personal and economic relations' refers to an individual's family and social relations, occupations, political, cultural or other activities, place of business, place from which his or her property is administered etc.[5]

Should this test fail, the 'habitual abode' test is applied. This test is distinct from the 'permanent home' test as it may be possible not to have a permanent home but to have a habitual abode in a country. The commentary provides the example of an individual who moves from hotel to hotel. In this situation a person does not have a permanent home (as discussed above) and therefore cannot meet the first test. Interestingly, *Brincker et al* suggests that the concept of 'habitual abode' refers to the country in which a person 'stays more frequently over a reasonable time'. The commentary does not provide any more clarity than *Brincker et al* suffice to say that it does point out that the comparison (between the countries) must be done over a sufficient length of time in order to 'determine whether the residence in each of the two states is habitual' (paragraph 19). Should this test also fail, the individual is deemed to be a resident of the country of which he or she is a national (sub-paragraph (c) above). If the individual is not a national of either state, the authorities of both states will decide by mutual agreement (sub-paragraph (d)).

[2] Page 307 Brincker, E, Honiball, M, Olivier, L *International Tax: A South African Perspective* 2003
[3] Source Commentary on Article 4, *OECD Commentary*, OECD September 1995
[4] Paragraph 12, Commentary on Article 4, *OECD Commentary*, OECD September 1995
[5] Paragraph 15, Commentary on Article 4, *OECD Commentary*, OECD September 1995

1.2.2 Nationality or Citizenship

A less often used method in determining residency for tax purposes for individuals is citizenship or nationality.[6] An individual's nationality or citizenship is determined under the domestic laws of a country. This is not a very widely used method of determining residency for tax purposes. However, the US is perhaps the best-known example that uses this method, taxing both resident and non-resident citizens on their worldwide income (refer to 3 below for discussion).

1.2.3 Domicile

The concept of domicile is not unique to taxation and is generally a non-tax issue. Domicile has been said to be: '*that legal relationship between a person... and a territory subject to a distinctive legal system which invokes the system as [that person's] personal law*'.[7] Domicile determines the civil status of an individual and is different from nationality or citizenship, which are concerned with political status. As domicile relates to general law, it is not possible to have difference domiciles for different purposes. An individual cannot, for example, be domiciled in South Africa for matrimonial purposes and in the UK for taxation purposes.

Some jurisdictions, such as the UK, use domicile as a test for residency and therefore it is important to establish what an individual's domicile is, especially when dealing with a country that employs domicile as a test for residency. In the UK, domiciled individuals are taxed on their worldwide income, whereas non-domiciled individuals are only taxed on their income remitted to the UK.

Case law (in particular the UK) has provided us with some general principles[8] that are summarised below:

- No person can be without a domicile. This rule originates from the practical necessity of connecting every person with some system of law;
- No person can simultaneously have more than domicile. This rule also originates from the practical necessity of connecting every person with some system of law; and

[6] For the purposes of this paper the terms "nationality" and "citizenship" are regarded as the same and used interchangeably.
[7] See *Henderson v Henderson*, 1967, 77 at 79; also cited in Ketchmin, E.P. *supra*
[8] Summarised from Ketchmin, E.P. *supra*

- An existing domicile continues until it can be proved that the domicile has changed.

The burden of proving a change in domicile is difficult and rests on the individual asserting the change. There are two broad categories of domicile: domicile by operation of law and domicile of choice. The largest category of people qualifying for a domicile by operation of law in terms of the Domicile Act[9] are unmarried children under the age of 18. A much smaller grouping that fall into this category are people who do not have the mental capacity to make rational choices. At birth all persons acquire a domicile by operation of law, usually referred to domicile of origin. This domicile of origin is retained throughout the lifetime of a person, unless it can be proved that there has been a change in domicile (domicile of choice). In the majority judgement of *Eilon v Eilon* 1965 1 SA 703 (A) Acting Judge of Appeal Potgieter found that

> 'A person will succeed in proving that he has acquired a domicile of choice, as soon as physical presence and fixed intention to abandon the previous domicile and to settle permanently at the place of choice have been proven.'

Under UK case law an *intention to reside in the UK indefinitely with no present intention to return to another country* will satisfy the test of domicile (this is consistent with Potgieter's pronouncement above). The mere residence in a country (no matter how long) will not result in the acquisition of a domicile of choice if the necessary intention is lacking. It is, correctly in the writer's view, argued by Mc Clean[10] that the length of a residence is not important in itself but is only important as evidence of intention. A person can acquire a domicile in a country if he has the necessary intention to change permanently, even after residence for even part of a day.

For further discussion on domicile and specifically the difference between 'domicile' and 'ordinarily resident' please refer to 2.1 below.

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[9] 3 of 1992

[10] Mc Clean, J.D, *Morris: Conflicts of Laws* 1993, 4th edition, p. 14, 18

1.3 Agreements for the Avoidance of Double Taxation (DTA's)

International double taxation can generally be defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter.[11] This is due mainly to the fact that many countries use a combination of the residence basis of taxation as well as a source basis. This results in international double taxation, as countries will seek to tax individuals on the same amounts using different methods of taxation. To provide an example of how international double taxation occurs in practice, consider a resident of South Africa who earns most of his or her income in South Africa but also earns a small portion from sources within the US. As South Africa uses the residence basis of taxation it will attempt to tax the entire amount earned (including the US-sourced income). However, the US Inland Revenue Service will attempt to tax the US-sourced income as well. This results in a conflict and a real possibility of international double taxation. This is the mischief that DTA's attempt to solve.

Furthermore, Meyerowitz in *Meyerowitz on Income Tax* states that 'international double taxation may act as a deterrent to trade and investment among the nations'.[12] Meyerowitz goes on to say that a 'wise Government cannot afford to ignore this and will enquire into the desirability or otherwise of granting relief at the cost of losing part of its revenue.'

Relief from international double taxation generally takes place using a combination of the following three methods:

- the deduction method, in which a country will grant taxpayers a deduction in respect of foreign taxes paid to foreign states in respect of foreign sourced income;
- the exemption method, in which a country will exempt foreign sourced income in the hands of residents, and
- the credit method, in which a country will allow its residents a credit for taxes which are payable to a foreign state in respect of foreign sourced income

It is beyond the scope of this paper to explore and discuss the mechanics of the above methods, suffice to say that most countries have adopted the credit method as a

[11] Huxham, K and Haupt, P *Notes on South African Income Tax 2003*
[12] at 30.1. Meyerowitz, D *Meyerowitz on Income Tax 2001-2002*

general approach with the exemption method an administratively easier alternative.[13] The deduction method has largely fallen out of favour as it results in a higher total tax bill for the taxpayer as compared to the other methods.

Every country is entitled to develop and conclude agreements with other countries but the OECD has developed a model treaty used by most of its member countries. Work started in 1956 and the model has developed over a number of years and is widely used today to resolve conflicts, determine taxing rights and set maximum levels of double taxation where it is permitted.

[13] Page 26. *Brincker et al International Tax: A South African Perspective*

2 South African definition of a resident

A resident is defined in section 1 of the Act, as follows:

'resident' means any-

(a) natural person who is-

(i) ordinarily resident in the Republic; or

(ii) not at any stage during the year of assessment ordinarily resident in the republic, if such person is 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:

Provided that –

(A) for the purposes of items (aa) and (bb) a day shall include a part of a day; and

(B) where a person, who is a resident in terms of the 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) any 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 excluding any international headquarter company)

<u>but does not include any person who is deemed exclusively to be 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</u>. [*writer's emphasis*]

In terms of the South African definition of a resident there are two distinct tests that are used to determine ones residency for natural persons: the ordinarily resident or subjective test (subsection (a)(i)) and the so-called physical presence test or objective test (subsection (a)(ii)). For non-natural persons there is only one test that is found in subsection (b). The last part of the definition above (underlined) was an amendment to the definition in June 2003, which was promulgated in the *Exchange Control Amnesty and Amendment of Taxation Laws Act of 2003.* The reason for the change was to clarify and synchronise the definitions of a resident in our Act with that commonly contained in double tax agreements.[14] It is technically possible to be a foreign resident for treaty purposes while remaining a resident for South African tax purposes under our Act and the amendment has largely solved this issue (the impact of this change is discussed more fully later).

2.1 Ordinarily resident or real home test

'Ordinarily resident' is not defined in the Act. Our courts have developed the 'ordinarily resident' or 'real home' test. The South African case law meaning of residence has been distinguished from the concept of domicile.[15] In a leading case on residence, *Cohen v CIR 1946 AD 174, 13 SATC 362,* Schreiner JA made it clear:

> This might not be his country of domicile, for it might not be his domicile of origin and he might not have formed the fixed and settled intention which "excludes all contemplation of any event on the occurrence of which the residence would cease which is necessary to bring into existence a domicile of choice;[16]

The learned judge settled the matter by concluding that a person's ordinary residence is:

> 'the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home'. (*writer's emphasis*)

[14] Explanatory Memorandum to the *Exchange Control Amnesty and Amendment of Taxation Laws Act of 2003* June 2003
[15] See *Ex Parte Minister of Native Affairs*, 1941 AD 53
[16] Schreiner was referring to the domicile case of *Johnson v Johnson*, 1931, AD 391

In the case of multiple homes, it is necessary to determine the principal residence. This approach was upheld as the correct interpretation in a more recent case, *CIR v Kuttel 54 SATC 298, 1992 (3) SA 242 (A)*:

> "the natural and ordinary meaning of 'ordinarily resident' was 'that a person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration". [*writer's emphasis*]

Therefore, the "action" words that will suggest residence, based on the two aforementioned cases, include *usual, principal, habitually* and *normally*.

Therefore, the difference between domicile and ordinary residence can only be a narrow one, but the above cases do seem to clarify the difference. The subjective *intention to reside indefinitely with no present intention to return to another country* required for the acquisition of domicile by choice (see 1.2.3 above) is not required for the acquisition of ordinary residence, which is less onerous state of mind. What makes the distinction difficult is that domicile and ordinary residence often change simultaneously 'because the facts and intention which establish the one are usually sufficient to establish the other.'[17] However, the crucial element of the test for determining one's domicile requires the further enquiry as to the *permanence of his intent.* To illustrate the point, consider the following example:

Example

Miss O has lived her whole life in the Republic and regards the Republic as her home. However, in the current year she decides to leave the Republic permanently and not to return, save for holidays and business meetings.

Miss O is no longer ordinarily resident in the Republic for tax purposes. However, this does not mean that she acquired another domicile, as she did not simultaneously intend to move permanently to another country (this is one of the general principles of domicile, see 1.1.3 above, as established by the UK courts). Her domicile will remain South Africa until she decides to permanently and with clear intention to settle in another country.

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[17] Ketchmin, E.P. *supra* p. 76

2.2 Physical presence test

Subsection (a)(ii) contains the so-called physical presence test, also known as the objective test or days test. This test is based exclusively on the number of days spent in the Republic. It has three requirements, all of which need to be met in order to qualify a natural person as a resident for tax purposes. The subsection also contains two proviso's, intended to clarify and qualify the test, as discussed in 2.2.1 and 2.2.2. The three requirements are outlined below:

A 91 days in the current year

The first requirement is a physical presence in the Republic in the current year of assessment of a period or periods exceeding 91 days. This period does not have to be continuous but in aggregate needs to exceed 91 days.

B 91 days in each of the preceding three years

The second requirement is a physical presence in each of the three preceding tax years of a period or periods exceeding 91 days. Again, the period of physical presence must in aggregate exceed a total of 91 days per year of assessment, but need not be continuous.

C 549 days in aggregate

The third requirement is a physical presence in the Republic of an aggregate period exceeding 549 days in the three preceding tax years. As with the other tests, this period also need not be continuous.

2.2.1 Proviso (A)

For the purposes of determining ones residency (in terms of the physical presence test) a day spent partly in the Republic and partly outside (i.e. whilst in transit) is considered to be a day present in the Republic and must be counted as a day when calculating the days present under the physical presence test. It is interesting to note that this treatment is consistent with the US Tax Code that has a similar provision.

2.2.2 Proviso (B)

If any person, who is a resident in terms of the physical presence test leaves the Republic during any year they will continue to be regarded as a resident from the date they leave until the year end.[18] However, if a resident is absent from the Republic for a period of at least 330 full days (these need not be continuous but needs to sum to 330 days in any 12 month period) they will be deemed to have ceased to be a resident from the day after which they actually left. They will thereafter be treated as a non-resident for tax purposes. The US Tax Code has a similar rule: If a US resident is abroad for a period for at least 330 full days in any 12-month period and they have their tax home in a foreign country, up to $78,000 of foreign earned income is exempt under US law. This would typically apply to US nationals who have left the country without renouncing their citizenship or a foreign national who is not actually present and working in the US, but holds a green card.

2.3 Dates persons become residents and dates persons cease to be residents

2.3.1 Ordinary resident

In most cases a person who lives and works in South Africa, no matter their citizenship, will be regarded as an ordinary resident of South Africa and will be taxed on their worldwide income for the entire tax year. Where a person immigrates to the Republic during the year they will only be regarded as a resident from the day on which they actually arrived in South Africa.[19] Similarly, a resident who emigrates is considered to be a non-resident from the day after the one that they leave the Republic.[20] Although no clarity is offered in the Act, I submit that this approach is correct. Furthermore, it is consistent with the treatment of both the US (green card test, see later) and Australia (domicile test, see later). It is important to note that a South African who spends time abroad, such as on an overseas contract, will still be regarded as an ordinary resident if they consider South Africa to be their home, no matter their period of absence.

[18] Interpretation Note 4, issued by SARS 4 February 2002
[19] Interpretation Note 3, issued by SARS 4 February 2002
[20] Interpretation Note 3, issued by SARS 4 February 2002

Example

Miss I immigrates to the Republic on 8 August 2002.

Miss I becomes ordinarily resident during the 2003 year, as she has immigrated to the Republic. As she first became ordinarily resident on 8 August 2002 she is a resident for tax purposes from this date onwards.

Example

Mr E emigrates from the Republic on 5 July 2003.

Mr E ceases to be ordinarily resident during the 2004 tax year. The physical presence test cannot apply in a year in which a resident was ordinarily resident and thus Mr E ceases to be a resident on 6 July 2003 (per Interpretation Note 3).

2.3.2 Physical presence resident

All persons meeting the three requirements of the physical presence test will be taxed on their worldwide income in the year(s) in which they meet the definition of a resident. However, it is somewhat unclear from which date the person will be taxed as a resident. It has been suggested that a person who meets all three requirements of the physical presence test only becomes a resident from the day after meeting all the requirements.[21] This means that a person will become a resident on day 92 in the fourth year of being physically present in the Republic. This person will then only be taxed on their worldwide income from day 92 until the end of the tax year. SARS issued Interpretation Note 4 on 4th February 2002 to clarify the situation and states 'a natural person, who became a resident by virtue of the physical presence test, will become a resident as from the first day of the year of assessment during which he/she met all three requirements…'. This interpretation dictates that a person will be a resident for the entire tax year (i.e. from 1 March) in which they meet the physical presence test, irrespective of when they actually arrived in the Republic. It is interesting to note that this is both the approach of Australia and the US, but not the UK.

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[21] Silke, J *Silke on Income Tax* at 5.2B

A further complication in our definition of a resident is the so-called 330-day rule (Proviso (B)). If a resident, not ordinarily resident, is absent from the Republic for 330 full days during the 12 month period following the day from which they left, they will cease to be a resident from the day after which they actually left. A scenario that could present itself as potentially problematic is if a person, regarded as a resident in terms of the physical presence test in year 1, is absent for a period of 330 days, and then returns to the Republic in year 2 and spends the rest of the year in the Republic.[22] If the person meets the definition of a resident in year 2 they will be taxed as a resident from 1 March, notwithstanding the fact the period from 1 March to the date of his return is exempted under proviso (B) as it falls within the 330 days of absence. This problem is best illustrated using the following example:

Example

Miss B, not ordinarily resident in the Republic but a resident under the physical presence test, leaves the country on 1 September 2001 (she was present in the Republic from 1 March 2001 to 31 August 2001) and returns to the Republic on 15 October 2002 and thereafter remains in the Republic until 28 February 2003.

Miss B is a resident for the 2002 year of assessment as she meets the definition of the physical presence test. However, as she is absent from 2 September 2001 until 14 October 2002 (more than 330 full days) she ceased to be a resident on 2 September 2001. However, as she spends more than 91 days in the Republic in the following year (the 2003 tax year, 15 October 2002 to 28 February 2003, and assuming she meets the other two requirements) she will be a resident for the 2003 tax year. As illustrated Interpretation Note 4 deems Miss B to be a resident from 1 March 2002, even though this period overlaps with the 330-day period.

I submit that the correct approach under our current legislation is to exempt Miss B for the total period of her absence as proviso (B) as promulgated legislation takes precedence over Interpretation Note 4. As such Miss B only becomes a resident on the 15 October 2002 for the 2003 tax year.

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[22] Warden, D & Roeleveld, J *Interpretation Note 4: Conflict with the resident definition?* Published on www.taxnet.co.za February 2003

3 US definition of a resident

The United States of America uses a unique combination of citizenship as well as two objective tests as a basis to determine the residency status of individuals.

The US taxes all US citizens (both resident, and more importantly for our discussion, non-resident citizens) on their worldwide income. For aliens (a non-US citizen) the determination of their residency status is subject to a set of two tests. Aliens must pass one of the two tests to be regarded as a resident alien (and therefore taxable on their worldwide income). Failing this, the individual will be regarded as a non-resident and will generally be taxed on their US source income only. It is therefore important for South Africans seeking employment (especially on a longer term basis) in the US to understand the two tests which could possibly draw them into the US tax net.

3.1 Green card test

The first objective test is the so-called 'green card' test.[23] An individual will be regarded as a resident for tax purposes if at any time during the year they were a lawful permanent resident of the US. A person is a lawful permanent resident if the Immigration and Naturalisation Service issues one an alien registration card, also known as a 'green card'. You will continue to have this residence status unless it is taken away from you or you give up your green card. This is significant for South Africans who may consider themselves to be South African tax residents (either ordinarily or physically) but who hold a green card. For US tax purposes, they remain within the net of the Internal Revenue Service ('IRS'). However, what appears to be a difficult position is to some extent minimised by the South African-US DTA (discussed below).

Example

A South African resident, Miss J, obtains a US 'green card' through a lottery and works in the US for three years, before returning home (for the purposes of the example assume that Miss J makes infrequent trips to South Africa for vacation purposes only). Miss J does not return to the US to work after the three years but keeps the green card

[23] Source of U.S. Tax Code: Internal Revenue Service website (www.irs.gov). Publication 519, *Non-resident or resident Alien?* Chapter 1, page 4. Accessed mid-August 2003.

active. Assuming Miss J regards South Africa as her permanent home (and therefore falling within the residency provisions of the Act) she will be taxable on her worldwide income in both the US and South Africa.

3.2 Substantial presence test

Persons who do not hold a 'green card' can still be regarded as residents if they meet this test based largely on days physically present in the US. To be regarded as a resident in terms of this test, a person must be physically present in the US for at least

(1) 31 days in the current year of assessment (the US tax year is the same as the calendar year), and

(2) 183 days during the three year period that includes the current year and the two years immediately before that, counting:

(a) all the days a person was present in the current year

(b) $^{1}/_{3}$ of the days that a person was present in the previous year and

(c) $^{1}/_{6}$ of the days that a person was present in the year before the previous year of assessment.

For the purposes of this test there are certain days which are excluded from the above calculation:

- notably if you are in the US for less than 24 hours whilst in transit between two places outside the US,
- days that you are in the US as a member of a foreign vessel,
- days you were unable to leave the US because of a medical condition that develops while in the US, and
- other circumstances in which you may be regarded as an exempt individual (such as teachers, trainees under a 'J1' visa, foreign students, professional athletes and foreign government-related individuals such as embassy staff).

There is, however, further relief from the substantial presence test above. If an individual spends less than 183 days in the US during the current year but still meets

the definition of the substantial presence test (as per points (1) and (2) above) they can avoid being treated as a resident alien if they:

(1) maintain a tax home in a foreign country during the year, and

(2) have a closer connection during the year to one foreign country in which they have a tax home than to the US. For US tax purposes a tax home is the general area of the main place of business, employment, post or duty.

If an individual meets the above two requirements then he or she will be taxed as a non-resident alien and will be taxed on their US-source income only.

Example

A South African resident, Mr V, works on a US ski resort for three winter seasons while on student vacation to earn extra money and to experience US culture. In the current year he spent 120 days in the US, the previous year 135 days and the year before that 120 days. He does not hold a "green card" and therefore has to compute whether or not he is a US resident for tax purposes, using the substantial presence test. The total number of days that Mr V spent in the US for tax purposes is 185 (120 + 45 (a third of 135) + 20 (a sixth of 120)). However, as Mr V regards South Africa as his permanent home he will be exempted from paying US tax on his non-US source income and will only pay tax on his US earnings. This is assuming that Mr V maintained a tax home in South Africa and has a closer connection with South Africa (assuming his personal and economic ties are strongest in South Africa).

3.3 Dates upon which persons become residents and dates persons cease to be residents

Individuals who meet one (or both) of the resident tests above are generally regarded as residents for the entire tax year. It is possible, however, to be both a resident alien and a non-resident alien in the same year, known as a *dual status* alien. This usually happens when a person arrives or departs in a year. In this case the individual is regarded as a non-US resident for part of the year and for the remainder of the year (after they arrive in the US) regarded as a US resident.

3.3.1 First year of residency

Generally, if a person was not a US resident, as defined, in a previous year but is a resident in the current year, the person will be a resident for tax purposes from the day (known as the *residency starting date*) that they are physically present in the US in the current tax year. If a person is a resident under both the substantial presence test and the green card test the *residency starting date* is the earlier of the first day during the year the person is present in the US (under the substantial presence test) or as a lawful permanent resident (under the green card test).

If a person was, however, a resident alien in the previous tax year, then the *residency starting date* is the first day of physical presence in the previous year and in the current year the person will be regarded as a resident from the beginning of the tax year (i.e. 1 January).

To compare the approach of the US to that of South Africa, consider the following example:

Example

Mr A, a person not ordinarily resident in the Republic, was present in the Republic from 13 May 2001 to 28 February 2002. For the purposes of this example assume that the 2002 tax year is the first year in which he becomes a resident under the physical presence test (SA) or the substantial presence test (US).

US approach

Mr A was not a resident in the previous year (2001) and therefore only becomes a resident for tax purposes on 13 May 2002, as this is his *residency starting date*.

SA approach

As Mr A becomes a resident under the physical presence test during the 2002 year he is a resident for tax purposes from 1 March 2002. This is the approach of Interpretation Note 4 (refer to 2.3.2 above).

3.3.2 Last year of residency

In determining the *residency termination date*, if a person is a US resident during a year but not during the following year, he or she is deemed to have ceased residency on the last day of the tax year, 31 December. This is subject to the following proviso: A resident can qualify for an earlier *residency termination date* (i.e. earlier than the 31 December) depending on which test was used in determining the person's residency. If a person was a resident under the substantial presence test, they will cease to be a resident from the first day that they were physically absent from the US. If the person was a resident by virtue of the green card test, they will cease to be a resident from the first day that they cease to be a lawful permanent resident of the US (i.e. usually the date that they give up their green card). If a person was a resident under both tests, the later date is used.

Example

Mrs C, not ordinarily resident in the Republic but a resident under the physical presence test (or substantial presence test in the US), leaves the Republic on 1 January 2002 and does not return to the Republic during the 2003 tax year. She intends not to return and maintains her tax home in another country.

US approach

As Mrs C is not a resident in the year following the one in which she leaves she is a dual status resident for the 2002 tax year. Therefore her *residency termination date* is the end of the tax year but as she was a resident under the physical presence test she ceases to be a resident from first day of her absence from the Republic. Therefore, she ceases to be a resident from 2 January 2002.

SA approach

Mrs C is a resident for the 2002 year of assessment as she meets the definition of the physical presence test (see 2.2 above). As Mrs C is absent for 330 continuous days (this is an application of Proviso (B) of the definition of a resident, see 2.2.2 above) from 2 January 2002 she ceases to be a resident from 2 January 2002. As she is not physically present at all during the 2003 year she is not a resident for the 2003 tax year.

The two approaches achieve the same result although the US approach achieves it without the use of a rule such as proviso (B). I submit, therefore, that the usefulness of proviso (B) is limited, provided that clearly defined legislation such as the *dual status* legislation of the US can be used.

3.4 The South African-United States Agreement for the avoidance of double taxation (US DTA)

In general, the US DTA uses the OECD model as a framework, but paragraph 1 of Article 4 was altered during the course of negotiations between representatives of the two countries. Paragraph 2 of the model was left unaltered (the so-called tie-breaker rules) and was adopted into the US DTA in its complete form.

The major difference between the US DTA and the OECD model is how the US DTA defines a resident. The relevant paragraph from the US DTA is outlined below:

1. For the purposes of this Convention the term "resident of a Contracting State" means:

    a) in the case of the United States,

        i) any person who, under the laws of the United States, is liable to tax therein by reason of his domicile, residence, citizenship, place of incorporation, or any other criterion of a similar nature, provided, however, that this term does not include any person who is liable to tax in the United States in respect only of income from sources therein or of profits attributable to a permanent establishment in the United States;

    b) in the case of South Africa, <u>any individual who is ordinarily resident in South Africa</u> and any legal person which is incorporated or has its place of effective management in South Africa; [*writer's emphasis*]

In essence the definition of a US resident has remained largely unaltered from the OECD model and basically gives the treaty (from a US point of view anyway) the effect of using any of the domestic US laws applicable to residency. However, this is not the case with the South African definition (paragraph b) above. The treaty limits the South African domestic laws to a test of ordinarily residence only. As we are aware the definition in the Act has two distinct definitions, one of ordinary residence and one of

physical presence. It is thus possible to be a non-resident of South Africa for US DTA purposes but to be a resident for South African domestic tax purposes, if one is not ordinarily resident but rather a physically present resident for South African tax purposes.

This presents a practical problem and has created anomalous situations in the past. However, the South African definition of a resident was amended in the *Exchange Control Amnesty and Amendment of Taxation Laws Act of 2003* of June 2003 (the 'Amendment') which specifically excludes any individuals that are residents of other countries i.t.o any DTA which South Africa is party to (see 2 above). The change in the definition has simplified matters somewhat and has aligned our tax treatment with that of the US DTA. Under the amended Act an individual will be excluded from the definition of a resident in the Act and will be taxed as a non-resident only (i.e. on income sourced in the Republic). To illustrate how the change will effect the tax treatment, consider the following example:

Example

Mr F, a South African individual, emigrates to the US during April 2001 to take up employment in New York. However, during that year of assessment as well as the following two years Mr F spends sufficient time in the Republic to meet the definition of resident by virtue of the physical presence test.

Pre-Amendment approach

Under the US DTA Mr F is deemed to be a resident of US, assuming that he meets the US definition of a resident. The US, therefore, has the right to tax Mr F on his worldwide income. Mr F is not a resident of South Africa for treaty purposes as he is no longer ordinarily resident in the Republic, but is a resident under the South African domestic laws. However, as Mr F is a resident for South African tax purposes SARS will also seek to tax him on his worldwide income. In effect Mr F will be taxed twice leaving him no choice but to attempt to obtain a tax credit (in terms of s 6*quat* of the Act) for the foreign tax paid.

Post-Amendment Approach

Under the new South African domestic laws as Mr F is a US resident in terms of the US DTA, he will not be a resident as defined in South Africa. The effect of this Amendment will be mean that he will be taxed in South Africa as a non-resident and in the US as a resident, thus alleviating the anomalous situation prior to the Amendment.

4 UK definition of a resident

Similar to the US and South Africa, the UK also taxes residents on their worldwide income.[24] Non-residents are generally taxed on their UK-source income, only subject to certain rules. The UK makes use of a combination of three criteria when deciding on the residency status of individuals: domicile, residence (UK-equivalent of the South African physical presence test) and ordinary residence (UK-equivalent of the South African ordinary residence test). However, none of these terms are defined in the Taxes Act. Meanings of these terms are based largely on the interpretation of the courts through the 19th and 20th centuries, as well as current international trends (such as the OECD model) and Inland Revenue's interpretations.

4.1 'Domicile'

The meaning of domicile for UK tax purposes was discussed and described in 1.2 above and will not be repeated here suffice to say that it is a general law concept[25] and the facts of each case will dictate whether or not an individual can be said to be domiciled in the UK (this is Inland Revenue's approach).

4.2 'Residence'

To be regarded as a 'resident' for UK tax purposes a person must normally spend time in the country at some point during the tax year. The circumstances in which individuals will be regarded as UK residents for tax purposes include the following:

- They spend 183 days or more in the UK in any tax year, or

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[24] Source of UK tax definition: *Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper* (the 'paper') HM Treasury and Inland Revenue, Published 2003
[25] Page 35: *Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper* (the 'paper') HM Treasury and Inland Revenue, Published 2003

- They spend more than 90 days on average over a period of up to 4 years, or
- They go to the UK intending to live there permanently, or
- They go to the UK intending to live there for at least three years, or
- They go the UK for a purpose (for example, employment) which will mean that they will remain there for at least two years, or
- They usually live in the UK and go abroad for short periods, for example, on business trips.

Individuals may lose their 'residency' status if:

- They leave the UK permanently, or
- They leave the UK to live abroad for at least three years and their return visits since leaving are less than 183 days in any tax year, and average less than 91 days per tax year over the period of absence, or
- They leave the UK to take up full time employment abroad and their absence covers a complete tax year, and their return visits do not exceed those set out immediately above.

4.3 'Ordinary Residence'

The concept of 'ordinary residence' is a question of fact but generally Inland Revenue regard an individual as 'ordinarily resident' if an individual is a 'resident' in the UK year after year (page 27 of the paper). It is possible, therefore, to be resident but not ordinary resident for a tax year if, for example, an individual who normally lives outside the UK is in the country for 183 days or more. Conversely, an individual may be ordinary resident but not resident if, for example, an individual who usually lives in the UK leaves the country for an extended holiday and does not set foot in the UK during that year.

4.4 Tax treatment of individuals in the UK

Where an individual is resident, ordinary resident and domiciled in the UK an individual will be taxed on their worldwide income. This changes if an individual is resident, but either not domiciled or ordinary resident, or neither. In this circumstance an individual is generally only taxed on amounts earned that are remitted to the UK (i.e. amounts left in foreign bank accounts are not taxed, see table 1 for summary). This is a unique

approach commonly referred to as the 'Remittance basis of taxation' (page 4 of the paper). This method is unique in that it applies to amounts physically taken back (physically) to the UK. This is in contrast to, for example, the South African gross income definition that refers to amounts 'received or accrued'. This approach also differs from that of the US which also uses an accrual basis of taxation, irrespective of whether or not the amounts are actually remitted back to the US or not.

Therefore, to summarise, even though an individual is a resident for UK tax purposes Inland Revenue will not tax the person on their worldwide income unless it is actually remitted back to the UK. Conversely, if an individual is not a resident for UK tax purposes then irrespective of their ordinary residence status or their *domicilium* they are taxed on their UK-source income only. It can thus be seen that the crucial issue for South Africans working in the UK is whether they meet the definition of resident and how long they intend to work and live in the UK.

Consider the following example comparing the UK approach with that of South Africa:

Example

Mr A is not domiciled nor is he ordinarily resident in South Africa (nor the UK for UK tax purposes) but is a physical presence resident for South African tax purposes (and a resident for UK tax purposes). He earns R60 000 (£5 000 in the case of the UK) from local sources and R30 000 (£2 500 in the case of the UK) from foreign sources, half of which is actually remitted back to South Africa (UK).

SA Approach

As Mr A is a resident (as defined, see 2 above), he is taxed in terms of the 'gross income' definition on his worldwide income (received or accrued). Therefore the full R60 000 will be taxable as will the full R30 000 of foreign income earned.

UK Approach

As Mr A is a resident the full £5 000 is taxable in his hands. However, as he is not domiciled nor ordinarily resident and has only remitted back half of the foreign earned income he will only be taxed on half of the £2 500 (i.e. £1 250).

To summarise the different taxation possibilities in the UK are presented in the table below:

UK Status			**Tax treatment of employment income**
Resident (objective test)	**Ordinarily resident (subjective test)**	**Domiciled (general law concept)**	
✓	✓	✓	Worldwide income
✓	✓	✖	All UK-source (and foreign employment income remitted to the UK provided the employer is a non-UK resident)
✓	✖	✓	All UK-source (and foreign employment income remitted to the UK)
✖	✓	✓	UK-source only
✖	✓	✖	UK-source only
✖	✖	✓	UK-source only

Table 1: Tax status under UK legislation

4.5 The South African-United Kingdom Agreement for the avoidance of double taxation (UK DTA)

For the purposes of determining residency the UK DTA uses Article 4 of the OECD model *verbatim*. The difficulties that individuals may have experienced under the US DTA (of being a foreign resident for treaty purposes and a domestic resident for domestic legislative purposes) are therefore not relevant to South Africans seeking employment in the UK. However, the effect of the amendment to our resident definition means that should an individual be a resident for tax purposes (and therefore, treaty purposes, as the treaty follows the domestic laws) of both countries it is submitted that

it is no longer necessary to consider the tie-breaker rules in paragraph 2 of Article 4, as the South African definition of a resident will automatically exclude such an individual. Consider this proposition by way of an example:

Example

A South African individual obtains a two-year working holiday visa in the UK. As the individual intends to live in the UK for at least 2 years (and assuming no other restrictions or concessions apply) the individual will be regarded as a resident for UK tax purposes. However, assuming that the individual intends to return to South Africa after two years he or she will be regarded as ordinarily resident for South African tax purposes. Under the old resident definition of the Act it would now be necessary to consider the tie-breaker rules to determine which country the individual has closer ties with. However, due to the change the individual will no longer fall within the definition of a South African resident and will be deemed (for treaty purposes anyway) to be a UK resident.

5 Australian definition of a resident

Similarly to South Africa, the US and the UK, Australia taxes residents on their worldwide income and non-residents on their Australian source income. However, Australia does not use nationality or citizenship in determining an individual's residency status. This is similar to the South African legislation and quite different from the US and UK statutes. Australia uses both a subjective residency test (the 'domicile and permanent place of abode test') as well as an objective residency test ('183-day test').

5.1 Domicile and permanent place of abode test (domicile test)

There is no fixed definition of what constitutes a person's domicile or permanent place of abode in the Australian Tax Act. Reliance is placed on court decisions and general guidelines issued by the Australian Tax Office ('ATO'). This test is two-pronged in its application.[26] The first part is used to determine an individual's domicile. The Australian (tax) explanation of what constitutes domicile is very similar to what was discussed in the residency concepts part earlier (refer to 1.2.3). If it is found that an individual's

[26] Source: *Statutory tests for residency* (the 'website') Australian Taxation Office website www.ato.gov.au. Accessed mid-July 2003

domicile is not Australia then this test is not satisfied. If, however, it is found that this person's domicile is Australia then the second part of the test must be considered: determining the individual's 'permanent place of abode'. There are 'no hard and fast rules that can be used to determine a person's permanent place of abode' (page 3 of the website) but the Australian courts have considered certain factors important. These findings have been summarised in a tax ruling released by the ATO.[27] They are:

- intended and actual length of stay, including the continuity of that stay;
- existence of an established home overseas;
- existence of a residence in Australia; and
- family and financial ties

It should be noted that the above findings are very similar to the OECD commentary on 'habitual abode' (see 1.1.1 above). It is also broadly similar to the findings of our own courts (rf Kuttel *supra*). However, the major difference between this test and the South African ordinarily resident test is the additional requirement in Australia of being domiciled in Australia as well.

5.2 183-day and usual place of abode test (183-day test)

There is mutual exclusivity between this test and the test outlined above (this is similar to the South African tax treatment, please refer to the second example in 2.3.1 above). This means that where the domicile test applies this test cannot. The requirement of this test is a physical presence of more than 183 days in Australia in any tax year (it need not be continuous) as well Australia being the 'usual place of abode'. As with 'permanent place of abode' a 'usual place of abode' is not defined in the Australian Tax Act but a differentiation between the two concepts must be made. 'Usual place of abode' should be 'given its ordinary meaning' (page 3 of the website) and the Australian interpretation of the phrase is the 'abode customarily or commonly used by a person when physically present in a country' (page 3 of the website). This suggests a more short-term or current description and furthermore, the place of abode need not be fixed. The following example illustrates this test:

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[27] *Income Tax Ruling IT 2650: Income Tax Residency – permanent place of abode outside Australia* ATO

Example

Mr D arrives in Australia on a 12-month working visa. He works for one employer throughout the year and stays in the same place. In this circumstance he will not meet the requirements of the first test as he is not domiciled in Australia, nor does he have a permanent place of abode in Australia. However, he may meet the requirements of the second test, as he will be present in the country for more than 183 days and will have a customary or usual place of abode whilst present in Australia. Therefore, for tax purposes it can be assumed that the individual has acquired Australian tax residency status for that year.

5.3 The South African-Australia Agreement for the avoidance of double taxation (Australian DTA)

Unlike the UK DTA Article 4 of the Australian DTA was not used *verbatim.* The Australian definition of a resident in the treaty follows the Australian domestic laws but as with the US DTA the South African definition limits the scope to include only individuals ordinarily resident in South Africa. The relevant part of the treaty is outlined below:

> 1. For the purposes of this Agreement, a person is a resident of a Contracting State:
>
> > (a) in the case of Australia, if the person is a resident of Australia for the purposes of Australian tax but does not include any person who is liable to tax in Australia in respect only of income from sources in Australia;
> > and
> >
> > (b) in the case of South Africa, any individual who is ordinarily resident [*writer's emphasis*] in South Africa and any other person which has its place of effective management in South Africa. The term "resident" also includes a Contracting State and any political subdivision or local authority of that State.
>
> 2. Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the person shall be deemed to be a resident only of the Contracting State in which a permanent home [*writer's emphasis*] is available to the person, or if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a

resident only of the Contracting State with which the person's personal and economic relations are closer [*writer's emphasis*].

Similar to the US DTA, due to the change in the definition of a resident in the Act the anomaly (of one possibly being a resident for domestic purposes and not for treaty purposes) that once presented itself as a problem has now been nullified. The other interesting point to note is the different way that paragraph 2 has been set out in the Australian DTA. In substance it is similar to the OECD model, but excludes sub-paragraph (c) (nationality) and (d) (mutual agreement).

6 Capital gains tax considerations

Capital gains tax ('CGT') became an economic and taxation reality on 1 October 2001 in South Africa. In terms of the resident definition of the Act South African residents are liable for CGT on their worldwide assets. Pertinent to our discussion is what a change in residency can have on an individual's CGT liability.

In terms of paragraph 12(2) of the Eighth Schedule a person who ceases to be a resident as defined in terms of the Act, or ceases to be a resident in terms of any DTA, is deemed to have disposed of their worldwide assets at market value. It is important to note that the paragraph refers to cessation of domestic residence *or* treaty residence, for reasons that will become apparent in the next paragraph. This paragraph applies to the disposal of all assets except for the following two classes:

- immovable property situated in the Republic, and
- assets in the person's South African permanent establishment

The provision in paragraph 12(2) may seem inequitable, as we have already discussed the anomalous possibility of being a foreign resident for treaty purposes and a South African resident for domestic tax purposes. In term of this paragraph it may be possible to be taxed twice on the disposal of an asset, once each by the two countries party to a DTA. Consider the following example illustrating the proposition:

Example

A South African resident emigrates (but still maintains close links with South Africa) to Australia during the 2002 tax year. At the date of emigration he has the following assets:

Fixed property in South Africa	1m
Other assets (assume that they not exempt i.t.o. the Act)	1m

For the next five years the individual commutes between South Africa and Australia spending enough time in the Republic to qualify as a resident in terms of the physical presence test. After the fifth year the individual does not return to the Republic again.

In terms of paragraph 12(2) the individual is deemed to have disposed of the other assets at the time of emigration. Due to the fact that he is a treaty resident he will be deemed not to be a domestic resident under the amendment. Therefore, he will only be taxed on the other assets once, by South Africa on emigration. However, when the individual disposes of the property after 5 years, both countries may seek to tax the capital gain. Australia will seek to tax the gain from the moment that the individual became an Australian resident and South Africa will seek to tax the gain from the time it was purchased to the time it was sold, as CGT is applicable equally to residents and non-residents on immovable property.

Therefore, there is the possibility of double CGT being paid. Fortunately though, this oversight has been identified by many countries (including Australia) and many have introduced domestic laws providing relief in such circumstances. However, in countries where relief has not been granted (such as Canada[28]) relief can only be obtained through the conventional channels (such as a credit mechanism, like s 6*quat* in South Africa).

[28] Brincker et al *International Tax: A South African Perspective*

7 Conclusion

There is no doubt that the globalisation of corporations and the ease with which individuals are able to move internationally has lead to an increase of migrant workers, short- and longer-term contract workers. With the blurring of international boundaries it is important to understand and appreciate the ramifications of seeking employment in foreign countries.

This paper has discussed the residency legislation as it pertains to individuals of South Africa and three of her biggest trading partners (the US, UK and Australia) which are popular destinations of South African individuals, both on a temporary basis and on a permanent basis. South Africa has made significant strides in aligning itself with the rest of the developed world in the tax treatment of individuals. An example of this is the introduction of the residence basis of taxation and capital gains tax. However, the tax treatment of individuals is not always congruent across countries and the widespread use of agreements for the avoidance of double taxation serves to alleviate anomalies and inequities. It is crucial for South Africans seeking foreign employment to understand appreciate these agreements as well, both to minimise their tax liabilities legally and to manage their affairs efficiently.

The introduction of the Eighth Schedule into the income tax system has introduced a new dimension to our fiscal horizon. The change of residency status not only has income tax consequences but also CGT consequences. Anomalies do exist, such as the risk of possible double CGT on the disposal of immovable and permanent establishment assets in the Republic after emigration. It is crucial for South Africans, foreign employers as well as the local revenue authorities to be aware of the inherent limitations of new and complex legislation.

Appendix A

A summary table of the different tax treatments of the countries examined is presented below:

Country	Subjective test	Objective test
South Africa	**'Ordinary residence' or 'real home' test** An individual is a resident of South Africa if it is *the country to which he would naturally and as a matter of course return from his wanderings*	**'Physical presence' test** An individual is a resident if they are physically present for more than 91 days in the current year, 91 days in each of the preceding three years and for an aggregate of 549 days in the preceding three years
United States of America	**'Green Card' test** An individual is a resident if they hold a valid green card (there are certain exemptions for absences exceeding 330 days)	**'Substantial presence' test** An individual is a resident if they are physically present for more than 31 days in the current year and 183 days in the current and preceding two years, counting all the days in the current year, 1/3 of the days in the previous year and 1/6 of the days of the year before the previous year
United Kingdom	**'Ordinary residence' test** An individual is a resident if they are a resident (as defined in the cell alongside) *year after year* (this is a question of fact) **'Domicile'** An individual is domiciled if they *intend to live in the UK permanently* (please refer to table 1)	**'Residence' test** An individual is a resident if they are physically present for more than 183 days in any year, spend more than 90 days on average over a period up to 4 years, intend to live for at least 3 years or permanently, live in the UK for a specific purpose for at least 2 years or if they usually live in the UK and travel abroad for short periods
Australia	**'Domicile and permanent place of abode' test** An individual is a resident if they are both domiciled and can be regarded as having a *permanent abode* in Australia (factors usually taken into account include intention and actual length of stay, established foreign and local homes and family and financial ties)	**'183 day and usual place of abode' test** An individual is a resident if they are physically present for more than 183 days in any year and can be regarded as having a usual abode in Australia (this is of a more short-term or temporary nature than a permanent abode)

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