Residence status and its Implications on Income and Capital Gains Tax

By Trevor Labuschagne

Submitted in partial fulfilment of the requirements for the degree of
MASTER OF COMMERCE (TAXATION)

Department of Accounting and Management Science
University of Kwa-Zulu Natal, Durban

Supervisor: Prof. P L. Sullivan

October 2004

DECLARATION

This research has not been previously accepted for any degree and is not being currently submitted in candidature for any other degree.

096540

....

25 October 2004

SUMMARY

As the international markets opened up it became imperative that the for South African taxation system be brought into line with those of its major trading partners whose tax systems are residence based. For South Africans the change to a residence base and the introduction of Capital Gains Tax in 2001 drastically altered the previous source-based tax playing fields.

The purpose of this research is to investigate all aspects of residence and its effect on natural persons as well as other legal personae and to discuss how the various forms of income are affected by the new tax dispensation. The position in other fiscal dispositions is also scrutinised to give the reader a more comprehensive understanding of residence-based taxation as applied by some of South Africa's major trading partners.

For foreign nationals residing in South Africa, the new system has also had its negative impact. Previously, their foreign earnings were free from local tax because of the old source base system, but this has also changed.

The South African legal system is also thoroughly canvassed regarding two important concepts, namely, "resident" and "ordinary resident" and what are meant by them in terms of tax law. These concepts have also enjoyed the scrutiny of the other fiscal dispensations legal systems reviewed.

Residence tests to determine the tax status of a person in South Africa and in other fiscal dispensations are investigated in this study to give anyone wishing to emigrate to other climes, a better understanding of what they can expect from a taxation point of view from the fiscal authorities there.

The impact of residence on most forms of income is discussed including that of foreign workers and on other legal entities such as companies, while Capital Gains Tax, and the importance of residence on this tax is also canvassed by this study. The study concludes with a review of the standard Double Tax Agreement concluded by South Africa with most other countries and lists those countries with which it has such agreements.

TABLE OF CONTENTS

Chapter One

Introduction

1.1 Background

Taxation was always an emotive subject which has occupied the minds of taxpayers through the ages as far back as the Romans, history tells us and no doubt will remain so in the future.

Allan C M., (1971) in his book *"The Theory of Taxation"* said at p23 "most descriptions of the aims of taxation start by saying that taxation is required to finance Government spending. This is misleading. The aim of taxation is to reduce private consumption and private investment so that the Government can provide social goods and merit goods and subsidise the poor without causing inflation or balance of payments difficulties. The basic function of taxation then is to reduce the demands made by the public sector on the country's productive capacity".

Eisenstein (1961) in his book, *Ideologies of Taxation,* at p3, said: "Whether taxes are high or low they are a constitutional means of appropriating private property without just compensation. The power to tax is the power to confiscate. In short, taxes are distinctly disagreeable burdens, and so there is a constant striving to place them on the backs of others".

Chodorov, F (1962) in his autobiography, "Out of Step: The Autobiography of an Individualist" on p216, said: "Taxes of all kinds discourage production. Man works to satisfy his desires, not to support the State. When the results of his labours are taken from him, whether by brigands or organized society, his inclination is to limit his production to the amount he can keep and enjoy".

Weiner, N., Director of the Adam Smith Club of Sydney, Australia writing on the club's website, quoted the father of modern economics, Adam Smith, as saying: "There are two types of taxation which obtain [my] recommend-dations: a tax on luxury consumables and a tax on ground-rents (the annual value of holding a piece of land)". All other taxes were either unfair or counter-productive, Smith is alleged to have stated.

Taxation has been with man for thousands of years in some guise or another and in South Africa, according to the LexisNexis Butterworths Electronic Tax Library (2004), Ch 1.3, (the Tax Library) tax on the income of individuals prior to 1910, was levied only in the Cape Colony and Natal. In the Cape Colony a tax was imposed on the taxable income of companies and individuals by Act 36 of 1904 and a similar tax was imposed in Natal by Act 33 of 1908. "The first income tax enactment in South Africa was Act 28 of 1914, which was based to a great extent on the Land and Income Tax Assessment Act of 1895 of New South Wales", the Tax Library (2004) explains. Since then numerous tax Acts and amendments have been piloted through Parliament with their consolidation into the Income Tax Act 58 of 1962 and its subsequent amendments, being the final product, the Tax Library (2004) states.

Two genera of taxes are imposed by the tax authorities in South Africa, name-ly, direct taxes which are levied directly on the income and wealth of indivi-duals and companies, and indirect taxes which are levied on certain commo-dities and transactions, the Tax Library (2004) states.

South Africa in its strive to sharpen its tax collection and to modernise it's taxation system, has had a plethora of commissions to pontificate on the be-nefits of a "source" versus a "residence" basis as being the ideal system for the country.

1.2 Commissions of Inquiry

The first was the Steyn Committee (1951) which at Para58 of its report, recommended that South Africa retain the source principle as its basis for raising taxation. The Franzsen Commission (1970) followed and at Para 20 of its report, advised the opposite stating that income was beginning to flow in the country bypassing the tax net because South Africa's trading partners were spread worldwide which made the individuals ability to pay more lucrative. The Government of the day accepted these proposals but never implemented them, states Olivier L. (2001), in her paper, *"Residence based taxation"*.

The Margo Commission (1987) was next and it recommended at Para 26-3 of its report, that South Africa retain the source-based system and that there should be a broadening of the deeming provisions in the Income Tax Act. This Commission was of the opinion that a residence-based system was too complex for South Africa and would deliver an insignificant revenue increase over a source-based system.

The Katz Commission (1997) at Para 9.1 also supported in principle, a source based system for South Africa but pleaded that a distinction be drawn between passive income – income earned from royalties or interest, and active income – income earned from active trade or commerce. Katz said passive income should be taxed on a worldwide basis while active income should be taxed on a source basis.

These recommendations found favour with the legislators and saw the appearance of s 9C and s 9D making their debut in the Income Tax Act (the Act).

In 1999 the Government via the Department of Finance invited several world renown tax experts to debate aspects of the Katz Commission's reports says Olivier L (2001). This was done at a public seminar held in Midrand.

In his 2000 Budget Review delivered before Parliament, the Minister of Finance announced that South Africa would be moving away from a source based taxation system to a residence-based system. The Minister said the new system, which was enacted in s 76(2) of the Revenue Laws Amendment Act 79 of 2000, would come into effect from 1 January 2001 for taxpayers whose year-end was 31 December 2001 and with effect from 1 March 2001 for all other taxpayers.

1.3 Different basis for taxation

The difference between source based and residence based taxation lies in the nexus between the income earned and South Africa. In a source-based system the connecting principle is the fact that the income was generated from a local source while on the residency side, the link lies with the person earning the income being a "resident" or being "ordinary resident" in South Africa.

There is a justification in many quarters for both source and residence based tax systems in the world, but South Africa, like most other countries, has never adopted a pure form of either system.

Katz in the executive summary at Para iii of his Fifth Interim report stated that source based taxation systems are usually adopted by developing and net capital importing countries while the residency-based system is adopted by developed and net capital exporting countries.

Based on this statement, South Africa should not have adopting a residency based tax system as we are not net capital exporters, but then the South African system is not a pure system, but rather a hybrid encompassing the two taxation principles.

"In the source based system, the taxpayer's residence is not important and he is taxed on his income derived from the country's natural resources or from activities conducted within the country's borders," Olivier L.(2001), on p21 of per paper states.

"With a resident based system, the taxpayer enjoys the protection of the State and he should therefore contribute towards the cost of running the country, even from his income earned outside the country," she continued.

In the case of Kerguelen Sealing and Whaling Company Ltd v CIR (1939), 10 SATC 263. (A), the learned judge at 380 set out the difference between the two taxation systems: "In some countries residence (domicile) is made the test for liability, for the reason, presumably that a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him."

"In others ...the principle of liability adopted is 'source of income' again presumably the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient of it may be".

1.4 Importance of residence

As South Africa joined the global economy and its tax laws came in line with those in other fiscal dispensations, the income both in and outside the Republic of all its residents – from salary earners, employers, contractors and retired persons to commercial undertakings — has come under closer scrutiny by the Revenue authorities with residence now becoming the operative word. For juristic entities new rules of the game have also come into play.

The consequential amendments to the Income Tax Act have had the effect that South African residents are, but for certain exclusions and/or exemptions, subject to income tax and capital gains tax on their worldwide income, i.e. income derived both within and outside South Africa, and their worldwide capital gains.

Non-residents will remain taxable on their South African actual or deemed source income and on gains made locally. The normal source principles as determined and developed by the South African courts continue to be applicable and can, therefore, not be ignored when dealing with non-residents. Residence has therefore become the benchmark and its definition has assumed cardinal important in the "gross income" equation, when considering whether any receipt falls within or outside the tax net from a tax perspective.

Writing in Tax Planning on *"The importance of Residence,"* Stein. M., (2001), said: "With our reacceptance into the wider world, we have had no choice but to bring our tax system into line with the first-world tax systems of many of our trading partners. The move to a residence basis of taxation is a part of this process of maturation of our tax system".

The SA Revenue Service (SARS) in a briefing note issued in September 2000 said the most important reasons for changing to the new basis for taxation was to place the South African income tax system on a sounder footing thereby protecting the South African tax base from exploitation and secondly, to bring the local system more in line with international taxation principles.

It is common cause that the salary and wage earner has for many decades been the target of the Revenue authorities who have turned their focus on whatever effort one makes to earn a living, in order to take an appropriate slice for the State's coffers. This phenomenon is not unique to South Africa. Much of this work will therefore dwell upon the effect of residence and related concepts on the income of the individual taxpayer.

As Kruger, D., & Scholtz, W., in *Bloomberg on Tax Strategy,* (2004) on p 129 so aptly put it, "the sweat of a man's brow is, from the tax point of view, probably the worst way of earning a living. Employees, and, to a lesser extent, independent contractors and professional practitioners, are the targets of a fusillade of special statutory missiles aimed to strike, from all directions, at earned income".

The Asprey Report (1975) commissioned by the Australian Government to investigate their taxation system, said: "After equity, simplicity is perhaps the next most universally sought after of qualities in individual taxes and tax systems as a whole: like fairness, it is a word that, in this context, points to a complex of ideas".

1.5 Objective of the study

The object of this study is therefore to investigate the complexity and/or simplicity, if any, of the nexus between gross income and capital gains on natural persons, and how they are affected by their "residence" or "ordinary resident" status. It will also show how one can rely on precedents set in the courts, to gain some form of certainty and clarity, and hopefully, some form of simplicity, as regards the taxability of one's endeavours. The situation with juristic persona will also be dealt with but to a lesser depth.

This study will lead the reader through the mechanics surrounding residence as viewed in the South African, Australian, New Zealand and United Kingdom context, because these foreign destinations have of late become the stomping grounds of many South Africans. Therefore, an understanding of the principles employed by the Revenue authorities in these dispensations are essential in determining the outcome of what one has earned or gathered through your endeavours.

This study will also survey the views espoused by the courts both locally and in foreign dispensations, to add further clarity to what is meant by the words "residence" and "ordinary resident" and similar variations of the same concept and what tests have been devised to assist both the taxpayer and the fiscal authorities, in the various fiscal dispensations, to reach clarity in determining the tag that should be placed upon the taxpayer's necks for income tax purposes.

Chapter Two

Residence judicially considered

2.1 Introduction

The word "residence" and "ordinary resident" are important concepts when considered in the context of a dispute regarding whether a taxpayer is liable for income or capital gains tax in all the countries under discussion, but these words are not always defined in the legislation of the various fiscal dispensations.

It has therefore been left up to the courts to distil the meaning of these words, one being "resident" and the other, "ordinary resident", and to differentiate the difference between the two.

Judgments of the courts of other countries, although they do not bind South African courts, are of significance because they do have persuasive value. Such judgments are often quoted in the South African courts and are sometimes even applied as happened in the cases of CIR v Paul, (1956). 21 SATC 1. (3) SA 335 (A) and Joffe & Co v CIR, (1946). AD 157. 13 SATC 354.

Another such example was ITC 1424, (1986). 49 SATC 99(Z) where the court at p106 relied upon the comments in an Australian case, 25 CTBR/NS Case 80, to assist it regarding the interpretation of what constituted a business.

The cases heard in the South African courts are dealt with more fully than those from foreign courts because South African judgments focus on the local Income Tax Act but sight must not be lost as to the important persuasive power that decisions in other tax court elsewhere in the world have on South African decisions, especially where new forms of taxation are concerned.

2.2 The case of being "ordinary resident"

In South Africa, the Act does not define what is meant by the word "ordinarily resident", and has left this, like most countries studied, for the courts to decide upon.

The Appellate Division in its judgment as per Schreiner JA in the case of Cohen v CIR, (1945) 13 SATC 362 (A) in an *obiter dictum,* said: "that a person is 'ordinarily resident' where he has his usual or principal residence i.e. what may be described as his real home".

This case was an appeal from a decision of the Witwatersrand Local Division of the Supreme Court, answering a question of law submitted by the Special Court for hearing Income Tax Appeals, in terms of s 81, of Act 31 of 1941.

Cohen, who was domiciled in the Union, was one of two directors of a company carrying on business in the Union, and was requested by his company to go overseas to act as the company's buyer, because of persistent difficulties in obtaining saleable stock due to war conditions prevailing in the world at that time.

In 1939, Cohen had leased a flat in Johannesburg for a period of 5 years and had furnished it. This flat had been sub-let, with the furniture, during the time that Cohen had been in America.

Cohen left the Union with his family in June 1940. The travel permit authorising his departure and contained the words "duration 9 months" in its authorisation. In October 1940, he arrived in the United States and set up his family in a New York flat from where he carried on the business operations of the company, which was the objective of his sojourn there.

In 1941, Cohen's permit to remain in America was extended for a further 12 months. From that date and up to the 30th June 1942, neither Cohen nor his family had returned to the Union.

During the year ended 30th June 1942, Cohen had derived dividends from public companies carrying on business in the Union. He claimed to be exempt from super-tax in respect of these dividends by virtue of the provisions of section 30(1)(a) of Act 31 of 1941, which at that time exempted individuals "not ordinarily resident or carrying on business in the Union" from being taxed on their dividends.

In his judgment at 373, Schreiner JA, held that the question whether an individual was "resident" or "ordinarily resident" in any particular area for the purposes of the Income Tax Act, was one of fact.

He held further, that the question whether an individual was in any one year of assessment ordinarily resident in the Union or elsewhere, was not to be determined solely by his actions during that year of assessment — his conditions of "ordinary residence" during that year could be determined by evidence as to his mode of life outside the year of assessment under consideration and that physical absence during the whole of the year of assessment was not decisive of the question of "ordinary residence".

Schreiner JA also stated that a person may not be held to be "ordinarily resident" in more than one country at the same time. This approach is however not followed by the United Kingdom authorities where their law makes provision for being "ordinary resident" in more than one country at a time.

2.3 The case of "residence"

The approach taken in Cohen's case *supra* was also followed by the Applelate Division in the later case of CIR v Kuttel, (1992). 54 SATC 298 (A). This case was heard before the definition of "resident" was introduced in the South African Income Tax Act.

In this case, Kuttel claimed he was exempted from normal tax in terms of the provisions of s10(1)(h)(i) and s10(1)(k)(ii) of the Income Tax Act No: 58 of 1962 as he was a person "not ordinarily resident nor carrying on business in the Republic".

The court was asked to rule on whether Kuttel was entitled to the exemptions then provided for by ss10(1)(h)(i) and 10(1)(k)(ii). The significance of his residency was therefore the crux of the matter under consideration.

The facts of the case were that Kuttel had emigrated to the United States where he took up residence and was granted a permanent residence permit. Since then, apart from visits to South Africa and other countries, he had lived and worked in the United States.

Kuttel liquidated most of his assets in South Africa when he left for the United States but returned on numerous occasions to pursue business interests and to participate in sporting activities. He made nine visits to South Africa in the period under review, constituting on average just over one-third of the time in South Africa.

During such visits Kuttel stayed in his former home in Cape Town which he retained upon emigrating, as a hedge against a drop in the exchange rate.

In applying the formulation as espoused in the Cohen case, *supra*, Goldstone JA, at p300 held that applying this meaning to the words in question, there could be no doubt that at the relevant times, Kuttel was not "ordinarily resident" in the Republic.

He held further, the fact that Kuttel had kept a home in Cape Town was in no way inconsistent with his usual or principal residence or home having been in the United States.

Goldstone JA said that the words "ordinarily resident" were something different and were narrower than just "resident" and that there was no reason for not applying the natural and ordinary meaning of the words "ordinarily resident" to the provisions then under consideration.

He pointed out that it was the policy of the Legislature, in providing for these exemptions from taxation, to encourage investors from outside the Republic to invest their money in the Republic and, having regard to that policy, there was no grounds for giving an extended meaning to the words – a person was accordingly "ordinarily resident" where he had his usual or principal residence.

From both these cases it can de deduced that the interpretation given is that the word "ordinary resident" means the country to which a person would naturally and as a matter of course return from his wanderings – where he had put down his roots.

2.4 Case of absence and residence

In ITC 1170, (1971) 34 SATC 76(C) it was pointed out by Watermeyer J, that a man may be ordinarily resident in South Africa even though he is absent from South Africa for the whole of the tax year. "The question whether a taxpayer may be regarded as being 'ordinarily resident' at a particular place during a particular period was one of degree, and one was entitled to look at the taxpayer's mode of life beyond the particular period under consideration", Watermeyer at p78 stated.

The facts in this case were that the taxpayer although not a South African national, had set up home in South Africa and was employed by a South African company. He was sent to the United States and spent in total 14 months there to gain further experience. His salary was paid from South African by his employer. Whilst overseas he looked for employment in the United States and the United Kingdom but could find none.

Before returning to South Africa he submitted a tax return on his earning in the United States to the Revenue authorities there, but this was declared free of taxes by their Revenue service. He returned to South Africa and only declared his earning for the period he was physically in South Africa but SARS then taxed him on all the earnings claiming they were from a South African source as he was ordinary resident in South Africa at the time.

Watermeyer J at p77 found that there was little doubt that while the appellant was in the United States, South Africa was his ordinary residence. He had a house of his own here, he had permanent employment by a company situated here, his parents were here, he had a savings bank account here, and there was no other country which could truthfully be regarded as his ordinary residence. The taxpayer had in fact returned here and he had been "ordinarily resident" in South Africa ever since.

2.5 Case of physical presence

In the case of Robinson v COT, (1917) 32 SATC 41. (TPD) the court dealt with the interpretation of the word "residence" only and not the term "ordinarily resident".

Focus in this case was placed upon the physical presence of the taxpayer and his maintenance of a home, as the crucial tests to be applied in the determination of his residence. The case followed an appeal from a decision of the Special Court, established in terms of the Income Tax Act, No 28 of 1914.

Robinson, who had been born in South Africa in 1840, had carried on business in the country. He had acquired large interests locally but had moved with his family to England in 1889 and had lived there from that date.

The extent of his interests in South Africa, however, made it necessary for him to return for varying periods at irregular intervals. On some of these visits he was accompanied by his family. In 1891 he purchased a house in Wynberg, which he still owned at the date of his appeal, and in 1894 he purchased a house in England. This he sold in 1914, moving thereafter to a house which he held under lease and which constituted his family home and housed his furniture and his art collection.

The house in Wynberg was not occupied from the years 1907 to 1916 and was placed in the hands of agents for sale, but at the date of the appeal had not been sold.

In view of the disturbed conditions in South Africa in 1915, Robinson came out in 1915 to overseer his financial interests and at the date of the hearing of his appeal, he was still in the country. He was accompanied by his daughter and on arriving lived with her in a rented house in Muizenberg until the end of

1916, and in March, 1917, furnished six rooms in his house in Wynberg and was living there with her at the date of his appeal.

During the period of two and a half years during which he had been living in South Africa, Robinson had traveled extensively about the Union in connection with his business interests. He, however, regarded the house leased in England as his home and intended to return there as soon as his business interests allowed him to do so.

Robinson also had large holdings in Cape Government stock, the interest on which was exempted from income tax in the case of holders not residing in the Union in terms of section 5(f) of the Income Tax Act, No 28 of 1914. He claimed that he was entitled to the benefits of this exemption in respect of the interest received by him, which view was not shared by Revenue, hence the appeal following an unfavourable decision from the Special Court in Revenue's favour.

The Transvaal Provincial Division per Bristowe J. at p42 held, dismissing Robinson's appeal, that the term "residence" as used in the Income Tax Act, of 1914, must be given its ordinary meaning and that having regard to the facts that Robinson has occupied houses in the Union, very much like an ordinary resident who did not desire to set up a permanent home, and had fixed no specific date as the limit of his stay, it was difficult to say that he had not been resident in South Africa for the two and a half years preceding his appeal.

Consequently he had not discharged the onus upon him of proving that he had not been resident in the Union during the tax year in question.

Bristowe J. in handing down his judgment at p46 stated: "Residence means a man's home or one of his homes for the time being. If a man sets up an establishment in a country and lives there at intervals he is resident in that country, however many similar residences he may have elsewhere and irrespective of whether the establishment is for a defined period, or his intention is to prolong the arrangement for an indefinite period exceeding the limits of a casual visitation".

"In the case of physical presence without the setting up of an establishment, if the intention is to prolong that presence beyond the possible limits of a casual visit and that intention is not abandoned, that intention would also constitute residence", the court found.

2.6 Case of residence versus ordinary residence

In ITC 1501, (1989) 53 SATC 314, (C), the court was also asked on appeal to adjudicate on the words "resident" and "ordinary resident" which concepts were used by Revenue to raise income tax on dividends and interest earned by the taxpayer who resided in the United States.

The facts of the case were the taxpayer contended that interest and dividends earned by him during certain years of assessment were exempt from tax by virtue of the provisions of s10(1)(h)(i) and s10(1)(k)(ii) of the Income Tax Act 58 of 1962 since, during the years of assessment under consideration, he was neither "ordinarily resident" nor carrying on business in South Africa.

Income Tax provisions in question at the time exempted from liability to tax, interest from stock issued by Eskom and dividends when such interest is or dividends were "received by or accrued to . . . any person (other than a company) not ordinarily resident nor carrying on business in the Republic", according to legislation ruling at that time.

Appellant had spent a considerable time in The United States and while involved in yacht racing there saw considerable scope for the South African business operation he had invested in and which exported its products to the USA. He decided, in September–October 1982, to apply for a permanent resident's permit to reside in the United States. In May 1983 he was advised that the permit had been granted and shortly thereafter, he and his wife decided the family would emigrate to the United States.

The appellant then realised a large number of his assets and invested the proceeds in Eskom stock in order to secure the maximum personal income transmissible to him in America.

On 29 July 1983, appellant and his wife left South Africa to take up residence in the United States. As at that stage, he maintained a house in South Africa, but the major part of his business and personal interests were in South Africa where he also held several directorships.

The Commissioner for Inland Revenue taxed interest and dividends earned by appellant during the tax years 1984, 1985 and 1986 which gave rise to the appeal.

In his judgment upholding the appeal, Howie J. at p317, examining the meaning of the word "ordinarily resident" and "carrying on business in the Republic", held:

> - "That the term 'ordinarily resident' is not defined in the Income Tax Act 58 of 1962 and has no special or technical meaning;
>
> - That the inference would appear justified that the law-giver intended 'ordinarily resident' not to mean the same as 'resident', and that it intended the former to convey a residence more settled than the latter;
>
> - That one who is ordinarily resident could be absent temporarily; whether an absence is temporary must depend on the facts of each case;
>
> - That the law-giver intended 'ordinarily resident' to mean that the taxpayer's permanent or principal home is in South Africa;
>
> - That the law-giver could, in all the circumstances, never have intended the expression 'ordinarily resident' in the Income Tax Act 58 of 1962 to bear the meaning accorded those words in the English cases of *Levene v IRC* (1928) and *IRC v Lysaght* (1928);
>
> - That the law-giver intended the expression 'ordinarily resident' to mean 'the country of his [the taxpayer's] most fixed or settled residence ... his ordinary residence would be 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 . . .' it followed that a taxpayer is not 'ordinarily resident' in more than one country at a time;

- That, on the facts, on 29 July 1983, with the intention to acquire domicile in the United States, appellant transferred his family home to that country; from then on the United States was his 'most fixed or settled residence' and he was ordinarily resident there, not ordinarily resident in South Africa;

- That as to whether appellant carried on business in South Africa after 29 July 1983 it was quite irrelevant that, in colloquial speech, he had 'business' interests here, or that he returned 'on business';

- That 'carrying on business' is an expression not defined in the Income Tax Act 58 of 1962; whether a person is carrying on business is an inference from facts, which inference is a matter of law;

- That a director and shareholder of a company does not carry on his own business by reason of the mere fact that he is involved in the carrying on of the company's business;

- That, judged purely on the facts, appellant's actions as director of B did not amount to his carrying on his own business nor that, as to a shareholder, his investing in the shares of a company did not amount to his carrying on a business; and

- That, accordingly, after 19 July 1983 appellant was not ordinarily resident in South Africa and he did not carry on business here".

2.7 Case of residence for other entities

It is often thought that concepts such as residence are only applicable to natural persons, but as was decided in Nathan's Estate v Commissioner of Inland

Revenue (1948) 15 SATC 328, even an artificial person can have a residence. In this case, Revenue sought to tax Nathan's estate for Provincial Tax in Natal because at that time the law stated that "every person resident in the province" was subjected to this form of taxation.

De Wet J in delivering his judgment at p342 stated: "It is quite clear that an artificial person has a residence – see the cases of *T W Beckett & Co Ltd v H Kroomer* (1912 AD 324); *Rhodesia Railways and Others V Commissioner of Taxes* (1925 AD 438). It is true that the cases I have referred to dealt with companies, but there is no reason why other artificial persons should not have a residence as well. In this case the Estate Nathan clearly has a residence in Natal. The administrators are resident in the province, and it is from this province that the particular fund concerned is administered, so that the plaintiff is clearly resident in Natal".

2.8 Case of a permanent establishment

In another case, SIR v Downing, (1975) (4) SA 518 (A) 37 SATC 249, Revenue tried to convince the court that a Swiss national had a "permanent establishment" in South Africa because he employed a broker to buy and sell shares for him on the Johannesburg Stock Exchange.

The stockbroker had a free hand and made changes in Downing's portfolio without prior reference to him. However, whenever a change was made, Downing received a note from his stockbroker explaining the reason for the transaction. The broker also informed Downing's administrator in South Africa so they could track dividend payments and record the deal for accounting purposes.

Revenue then claimed Downing had a "permanent establishment" in the country, and as such fell into the category of being subject to tax in South Africa.

The court in its deliberations, reviewed the Double Tax Agreement (DTA) that existed between Switzerland and South Africa and came to the conclusion at p251 that the taxpayer did not have a "permanent establishment" in the country as contemplated in the DTA, and was therefore no liable for tax. A broker, the court found, did not constitute a "permanent establishment" of the taxpayer.

2.9 Case of where residence is

In Southern Rhodesia, the High Court in H v Commissioner of Taxes, (1960). 23 SATC 292 (SR) at p292 held that "where one's permanent place of abode is, was where one's belongings were stored, which one left for temporary absences and to which one regularly returned after such absences".

In an earlier ruling handed down in Soldier v COT, (1943) SR 130 at p649, the court stated that "residence" must be settled and certain and not temporary and casual.

In his judgment Tredgold J. in considering the difference between "residence" and "ordinary resident" said: "It remains to consider how far 'ordinary residence' can be distinguished from 'residence'. There are *dicta* which indicate that the distinction between the two expressions in income tax is slight. But, as is pointed out in Farnsworth on the '*Residence and Domicile of Corporations*', p17, not only do the English Acts appear to imply a distinction, but the weight of authority supports the view that 'ordinary residence' must be accepted as a narrower term than 'residence' *simpliciter*".

"In Levene's case it was suggested that 'ordinary residence' was residence in accordance with the way in which a man's life is usually ordered. Placed at its lowest it seems to me the use of the word 'ordinary residence' was residence in accordance with the way in which a man's life if usually ordered. Placed at its lowest it seems to me the use of the word 'ordinarily' serves to emphasize that the residence must be settled and certain and not temporary and casual".

In ITC 961, (1961) 24 SATC 648(F), it was held that a woman who married a man who was ordinarily resident in a particular country and sets up home with her husband in that country, cannot be said to be ordinarily resident in some other country, even if immediately before her marriage she was ordinary resident elsewhere.

The facts of the case were that the appellant's wife, who was born in Southern Rhodesia and resided there with her parents until the age of 18. In 1952, aged 18, she went to England to study, which involved continuous attendance at classes for a period of about three years. During this period she twice returned to spend holidays in Southern Rhodesia with her parents, who kept her room available for her in their home.

While in England she met the appellant, who was in business in London and whose permanent home was in England. They were married in October 1955, before she had finally completed her course. Once married, they took and furnished a flat on a two-year lease, and expended some £60 on redecorating.

In December 1955, appellant's wife, who had always been anxious to return to the Federation, broached with her husband the question of them settling in Rhodesia. He agreed and proceeded to make inquiries into prospects of employment and conditions generally and in December 1956, they arrived in Rhodesia.

In September and November 1956, dividends were declared by certain companies carrying on business in Rhodesia in which the wife of the appellant held shares. In respect of these dividends, appellant claimed that his wife was entitled to the benefit of the 'grossing-up' provisions contained in s 5 of the Taxes Charging Act, 1957.

Those provisions by the terms of the Act were restricted to persons who at the time the dividend in question accrued, were "ordinarily resident" in the Federation. The Commissioner of Taxes refused to accept the wife of appellant as a person "ordinarily resident" in the Federation at the date of the declaration of the dividends and taxed her on the proceeds.

The court at p650 held, dismissing the appeal and confirming the assessment made, said that in view of the facts that appellant's wife was living in the country of her husband's domicile and permanent residence at the time of marriage and had set up a home with him in that country after marriage without any question having been raised as to the temporary nature of that home, the appellant had failed to show that his wife was ordinarily resident in the Federation in the months in question.

2.10 Ordinary resident summarised

In summary, based on the cases discussed, the South African Revenue Services and the local courts have ascribed a meaning to the concept "ordinarily resident" and said that it refers to:

- "Living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person's ordinary regular course of life to live in a particular place with a degree of permanence, he/she must be regarded as ordinarily resident;
- The place where his permanent place of abode was, where his belongings were stored, which he left for temporary absences and to which he regularly returned after such absences;
- A residence that is settled and certain and not temporary and casual; and
- Where a person normally resides, apart from temporary occasional absences".

Perhaps the best description of one's residence can be summed up in the words used by the judge in the Canadian case of Thompson v Minister of National Revenue, DTC 812, SCC, where he held that "a person is 'ordinarily resident' in the place where in the settled routine of his life he regularly, normally or customarily lives or at which he in mind and in fact settles into or maintains or centralises his ordinary mode of living with its accessories in social relations, interest and conveniences".

Chapter Three

South African tests for residence

3.1 Introduction

The legislators and courts in most tax jurisdiction have forged tests against which their country's inhabitants can be measured to ascertain whether they fall within the tax dragnet and have publicised their various benchmarks against which they will measure a taxpayer to see whether he qualifies to pay tax or not.

3.2 The South African model

In the South African context it has been established by the courts that a physical presence at all times is not a requisite to be ordinarily resident in the Republic, says Huxham (2004).

The authors point out that the following two requirements, however, need to be present:

- "An intention to become ordinarily resident in the country; and
- Steps indicative of this intention having been or being carried out".

3.3 Ordinary resident test

It is important to note that the ordinary resident test as refined by the courts applies to a person irrespective of how many days they have spent in South Africa during a tax year.

"In other words 'ordinary resident' is not determined by physical presence. It is in effect a state of mind. A person who is 'ordinary resident' in South Africa in terms of the principles set out [by the courts] is a resident as defined even though he may not be physically present in the Republic for the required number of days", Huxham (2004) states.

3.4 The physical presence test

If a person is not ordinarily resident in South Africa he will nevertheless be treated as being "resident" for income tax purposes if he spends a certain amount of time in the country, Huxham (2004) warns.

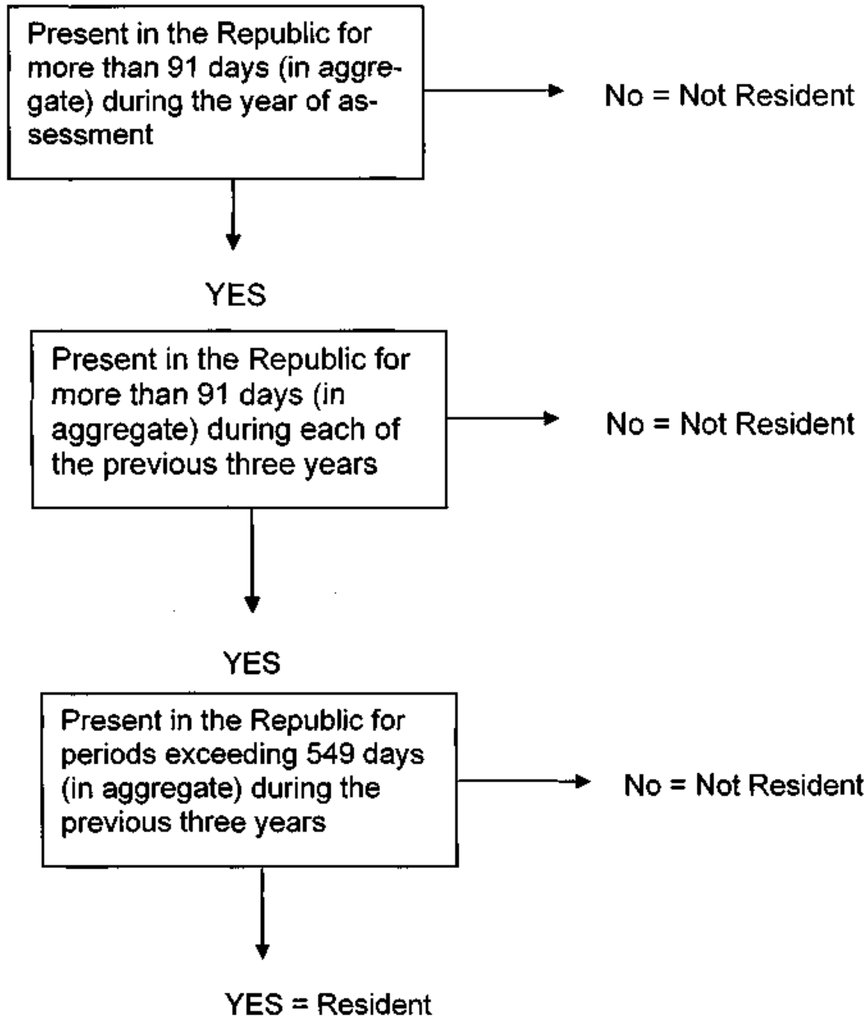
The South African test for residence is somewhat more involved than those in dispensations such as Australia and New Zealand where the position is rather clearer cut and dealt with on a year-to-year basis.

In terms of SARS Interpretation Note 4 (2002), where a natural person is resident both in the Republic and in a foreign country for income tax purposes, any agreement for the avoidance of double taxation that has been concluded with that country, must be considered when determining the taxability of their income in the Republic.

"It is also important to note that in a case where a natural person could be said to be a resident of more than one country, for example the Republic and another country, the tie breaker rules in the [Double Tax] Agreement between the Republic and the other country must be applied to determine the country of residence", Note 4 (2002) explains.

Huxham (2004) has described the test to be applied, as follows: "Such person will fall within the definition of resident if that person is in the Republic for more than 91 days in aggregate during the year of assessment and was in total during the preceding three years physically present in the Republic for a period exceeding 549 days and physically present in the Republic for a period exceeding 91 days in aggregate in each of such three preceding years".

Schematically the authors have presented this test as depicted overleaf.



"A person who falls into the definition of "resident" because of their physical presence in the Republic will however cease to be a resident on the day he leaves the country if he remains outside our borders for a continuous period of 330 days. This 330 day absence test does not apply to persons who are 'ordinarily resident' in South Africa", Huxham points out.

An exemption in terms of s10(1)(o)(ii) of the Act, however, brings relief for "residents" who are natural persons who are remunerated for services rendered on behalf of an employer outside South Africa for a period of at least 183 days of which 60 days were continuously outside the country during this period, while pensions and social grants from a non South African source are also exempted for residents in terms of s10(1)(gC) of the Act.

Chapter Four

Residence in Australia

4.1 Introduction

In the Australian context, residency status is a question of fact and is one of the main criteria that determine an individual's liability to Australian income tax. According to the Australian Tax Office's (ATO) Taxation Ruling TR98/17 (1998), Para 9, residence is determined on a year-by-year basis, rather than the taxpayer's actions over a longer period as is in the case in the South African context. They also do not make use of words such as "resident" or "ordinary resident", but prefer the words "resides" and "Australian resident" in their legislation.

Furthermore, a taxpayer's circumstances after the year of income, can come into contention when determining an individual's residency status in Australia as was stated in one of their tax cases, FC of T v Applegate, 79 ATC 4307, (1979) 9 ATR 899.

4.2 "Resides" in Australia

An 'Australian resident', as defined in section 995-1 of the Australian Income Tax Assessment Act of 1997 (the AIT Act), means a person who is a resident of Australia for the purposes of the 1936 version of the AIT Act. The term "resident" or "resident of Australia" is defined in subsection 6(1) of that Act to mean:

> "(a) a person, other than a company, who resides in Australia and includes a person:

(i) Whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(iii) Who is:

(A) A member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) An eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) The spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B) [above]".

The definition according to Para 32 of TR98/17 (1998) has four tests for determining whether an individual is a resident for tax purposes. These tests are:

- "Residence according to ordinary concepts;
- The domicile and permanent place of abode test;
- The 183 day test; and
- The Commonwealth superannuation fund test".

According to TR98/17 (1998) Para 11, the primary test for deciding the residency status of an individual is whether that individual resides in Australia according to the ordinary meaning of the word 'resides'.

4.3 The meaning of residence

However, where an individual does not so reside in Australia, then certain tests must be considered in determining the individual's residency status. The

Australians, like South Africa, have no definition of the word "reside" in their Act, so they look for the meaning as ascribed to it in the dictionary.

The Australians use as an example as stated in Para 14 of TR98/17 (1998), the Macquarie Dictionary, that defines "reside" as "to dwell permanently or for a considerable time; have one's abode for a time". It also refers to the Shorter Oxford English Dictionary which defines it as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place".

The ATO uses what it calls the "resides" test. It describes the meaning of "resides" in TR98/17 (1998), as follows: "The courts and the Taxation Office rely on the normal definition of 'resides' when deciding who is a resident for income tax purposes, as the term is not defined within income tax legislation. The Oxford Dictionary defines reside as: '...to dwell permanently, or for a considerable time, to have one's settled or usual abode, to live in a particular place...'

Taxation Ruling IT2607 which was published prior to TR98/17 (1998) and dealt with individuals entering Australia, according to Para 6 of TR98/17, stated that, as a rule, an individual who intended to be in Australia for less than six months would not be residing there. This ruling according to Para 5 was withdrawn, as was Tax Ruling IT2268 (1998), which stated that an individual who came to Australia to study for a period in excess of six months would generally be considered a resident of Australia.

4.4 Resident defined

Paragraph 10 of TR98/17 states that an "Australian resident", is defined in s 995-1 of the AIT Assessment Act (2003), and means a person who is a resident of Australia for the purposes of their 1936 Act. Their definition of "resident" or "resident of Australia" says the ruling, is to be found in subsection 6(1) of their 1936 Act.

The primary test for deciding the residency status of an individual is whether the individual resides in Australia according to the ordinary meaning of the word "resides" says Para 11 of TR98/17. According to Para 12 of the same ruling, if an individual resides in Australia according to the ordinary meaning of the word, the other tests in the definition do not require consideration. This was the view as expressed by the court in Applegate's case *supra*.

4.5 The resides or behaviour test

The stance taken by the ATO as stated in its electronic publication, *"Residency – the resides test"* (2004), is that when behaviour consistent with residing in Australia is demonstrated over a considerable time, an individual is regarded as a resident from the time the behaviour commences. The quality and character of an individual's behaviour while in Australia assists in determining whether the individual resides there. All the facts and circumstances that describe an individual's behaviour in Australia are relevant.

In particular, the ATO in Para 20 of TR98/17 (1998) says it uses the following factors when describing the quality and character of an individual's behaviour:

- "Intention or purpose of presence;
- Family and business/employment ties;
- Maintenance and location of assets; and
- Social and living arrangements."

"No single factor is necessarily decisive and many are interrelated," the ATO publication says. The weight given to each factor varies depending on individual circumstances. "Whether a considerable time has elapsed to demonstrate that the individual's behaviour has the required continuity, routine or habit is a question of fact; that is, it depends on the circumstances of each case", TR98/17 (1998) Para 22 states.

"The Commissioner's view of the law is that six months is a considerable time when deciding whether the individual's behaviour is consistent with residing here. When behaviour consistent with residing here is demonstrated over a considerable time, an individual is regarded as a resident from the time the behaviour commences," the ruling in Para 22 points out.

4.6 The domicile or physical presence test

Domicile and the concept of permanent place of abode are addressed in Taxation Ruling IT2650 *"Income tax: residency - permanent place of abode outside Australia"* and in the ATO's electronic publication, *"Residency – the domicile test"* (2004), and is mainly applicable to a person, who in a South African context, would not be "ordinary resident" in Australia.

The ATO in TR98/17 (1998) at Para 25 and 26 states: "If individuals enter Australia intending to remain for less than six months but later events extend their stay beyond six months, they are regarded as residents from their arrival, as long as their presence has an habitual and routine character during the entire period".

"This may apply when an individual comes to Australia on a short-term employment contract for less than six months. This would not normally be sufficient time to demonstrate behaviour that is consistent with residing here. If the employment is extended past six months, the facts surrounding the entire stay in Australia must be considered, not merely the original intended length of stay".

"On entering Australia, individuals may demonstrate they do not intend to reside in Australia, e.g., they may be visitors on holiday. When a change in their behaviour indicates an intention to reside here, e.g., they decide to migrate here, they are regarded as residents from the time their behaviour that is consistent with residing here commences".

4.7 The 183-day test

According to Para 35 of TR98/17 (1998), the 183-day test was introduced into Australian tax law in 1930 with the following explanation in the relevant Explanatory Notes to the AIT Act: "The primary test is actual residence in Australia. If a person is in fact residing in Australia, then irrespective of his nationality, citizenship or domicile, he is to be treated as a resident for the purposes of the Act "

"The third test to be applied is, subject to certain conditions, actual presence in Australia for more than half the financial year in which the income the subject of assessment is derived. This test is necessary in order to obviate the great difficulties which occasionally arise in establishing to the satisfaction of a court that a person is resident in any particular country".

This test as described in the ATO's electronic publication, *"Residency – the 183 day test"* (2004), has, the ATO says, enabled their Commissioner to consider one's usual place of abode and one's intention to take up residence in Australia so that individuals who are enjoying an extended holiday in Australia are not treated as residents.

In most cases, "if individuals are not residing in Australia under ordinary concepts, their usual place of abode is outside Australia. There may be situations where an individual does not reside in Australia during a particular year but is present in Australia for more than one-half of the income year (perhaps intermittently) and intends to take up residence in Australia. This individual is treated as a resident under the 183 day test", TR98/17 at Para 37 and 38 states.

4.8 The Commonwealth superannuation fund test

The domicile and superannuation fund tests apply mainly to individuals who are usually residents of Australia, but during the income tax year are not living in Australia, e.g. Government employees.

In terms of this test as described in the ATO's electronic publication, *"Residency – the superannuation test"* (2004), if you are a member of their superannuation scheme established by deed under the Superannuation Act 1990 or are an eligible employee for the purposes of the same Act, or a spouse or child under the age of 16 of such member, you are a resident of Australia for tax purposes. This fund is for Government and semi-Government employees.

4.9 The source of your income in Australia

According to Parsons, R.W., in his work, *"Income Taxation in Australia"* (2001), at p78, a taxpayer who is resident in Australia is liable to income tax on his income from all sources, subject to the exception that he is exempt from Australian tax on income (other than dividends) which has an ex-Australian source and is not exempt from income tax in the country of source, or is subject to royalty payment or export duty in that country.

"A taxpayer who is not a resident of Australia is liable to income tax on income which has an Australian source. He is exempt from income which does not have an Australian source", Parsons at p78 stated.

"When it comes to dealing with source, this is only covered in two sections of their Act, namely, s 25(2) and s 44(1) but generally source is left to judicial interpretation. In the case of Fidelity Trustee Co (1969) the court held that the only test in respect of jurisdiction in s25 of the Act that could be applied was the source of the income", Parsons continues.

In Australia, according to the ATO publication, *"Exempt foreign employment income"* (2004), foreign earnings of residents who work in a foreign country continuously for 91 days or more are exempt from income tax provided they paid tax in the foreign country. Where the country, as in the case of some Middle East countries e.g. Saudi Arabia, Dubai, Iraq etc., is not subject to income tax, you will have to include this income in your Australian income, the publication states.

In contrast, South African residents working in tax free countries are not expected to pay tax in South Africa if they qualify under the s 10(1)(o) exemption offered by the South African Income Tax Act.

4.10 Exempt foreign income

Some foreign income in Australia is, however, exempt says the publication even if no tax is collected provided that country has a memorandum of understanding with the Australian Government in respect of such foreign employment.

In Australia, foreign and social pensions from other countries are also taxed in the hands of residents.

According to the ATO electronic publication, *"Foreign pensions and annuities",* (2004), most pensions and annuities are taxable in Australia even if tax has been withheld from your payment by the country that paid you. If a double tax agreement exists between Australia and the country paying your pension you may be able to claim a tax credit from taxes withheld".

However, "certain service related pensions from the UK are exempted as too are pensions, annuities and allowances paid by a State of the Federal Republic of Germany as compensation for persecution during World War II or disablement pensions resulting from the person's participation in the Dutch resistance movement during World War II", the publication declares.

4.11 The case of juristic entities

According to the Australian *Master Tax Guide* (2004), (the Guide) at Para 21-040, a company is resident, within the ordinary meaning of the word, in the country or place in which its central management and control are situated as was stated in De Beers Consolidated Mines v Howe (1906) AC 455; 5 TC 198.

"That place will usually be where the directors meet to do the business of the company, but it is a question of fact and degree to be decided in each case by a scrutiny of the course of business and trading", the court ruled.

In the case of North Australian Pastoral Co (1946) 71 CLR 623; 8 ATD 121, the court stated that the central management and control of a company may be divided between two places, in which case the company will be resident in both places. For example, a company's head office may be in one country and its main business office in another.

Although the place of incorporation of a company is not decisive in determining its residence in the ordinary sense explained above, the Guide states that it is defined in s 6(1) under the statutory definition of "residence" in the AIT Assessment Act No 36. This means that, wherever else a company may also reside, the fact of its incorporation in Australia will automatically make it a resident of Australia under the statutory definition.

Under the s 6(1) definition, a company is resident in Australia if:

- "(1) it is incorporated in Australia; or
- (2) Although not incorporated in Australia, it carries on business in Australia and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia".

The Guide at Para 21-040 explains that the Australian tax system also has what is termed, "prescribed dual residents". Prescribed dual residents are companies resident both in Australia and another country which:

> "(1) Are treated as resident solely in another country for the purposes of one of Australia's double taxation agreements; or
>
> (2) Qualify as resident in Australia solely because their central management and control is in Australia, and which also have their central management or control in another country. Effectively, this applies where there is a division of central management and control between the two countries".

"Prescribed dual residents" do not enjoy the same tax benefits as ordinary resident juristic entities, the Guide says. For example, they are denied CGT roll-over relief for certain assets and the group transfer of income and capital losses. Restrictions also apply to the former inter-corporate dividend rebate and related deductions. Dual resident companies are also deemed non-residents for the purposes of the thin capitalisation and other anti-avoidance provisions, according to the Guide.

"These deeming rules also apply to dual resident entities that are treated as companies under Australian income tax law, i.e. corporate unit trusts, public trading trusts and corporate limited partnerships, even if they are not so treated under the relevant foreign law", the Guide warns.

"In the 2003/04 Budget, the Australian Government announced that the company residence rules will be amended so that companies that are residents under domestic income tax law, but are non-residents for the purposes of a tax treaty, will be treated as non-resident for all purposes of the income tax law", the Guide explains.

In determining liability to Australian tax on the basis of residence or non-residence in Australia, it is necessary to consider not only the income tax laws, but also any applicable double taxation agreement of which 40 have been signed with countries throughout the world, the Guide at Para 21-050 recommends.

4.12 Legal cases

The Australian court's approach to residence is somewhat different from that of the South African courts. A review follows of a *capita selecta* of Australian cases that deal with residence and source appertaining to their fiscal dispensation.

In the Applegate case *supra*, the court said: "Events after the year of income may assist in determining an individual's residency status".

In FC of T v Miller, (1946) 73 CLR 93 8 ATD 146, while Latham CJ and Dixon J had different opinions about the Board's conclusion of residency drawn from the facts of the case, Latham CJ provided useful analysis about the ordinary meaning of the word 'reside' at CLR 99; ATD 148. He, said: "I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word 'reside' by the courts which makes it impossible to apply the ordinary meaning of the word 'reside' in the present case". The ordinary meaning of the word "reside" has also been dealt with in British income tax law decisions.

The following cases have been used in Australian decisions. For example, Latham CJ referred to Levene in Miller's case. Dixon J in Gregory v DFC of T, (1937). 57 CLR 774 4 ATD 397 considered whether the relevant words in Australian income tax law should be given the same meaning that similar expressions had received in England.

Social and living arrangements are the way individuals interact with their surroundings during their stay in Australia and may indicate they are residing there, says the ATO.

In the Gregory case *supra*, Dixon J at CLR 778; ATD 399 said: "The matters on which I place most stress in deciding this question of fact are his business interests and the necessity of his presence in Darwin and the fact that in dividing his attention between two businesses he gave as much or more attention to Darwin and the kind of social and living arrangements that he made in Darwin".

Staying for a short period for work purposes is normally insufficient to establish that an individual is a resident in Australia. In the case of FC of T v. Pechey, (1975) 75 ATC 4083 5 ATR 322, Waddell J found that a public servant who was appointed to a position in the Cocos Islands for an expected period of four weeks was not residing there for the period of his stay. It was also noted his ordinary residence was in Canberra as he was not accompanied by any of his family.

However, individuals who enter Australia to take up prearranged employment opportunities or courses of study, may be residing there if their stay is consistent with living in Australia, as was stated in the case of Miesegaes v. Commissioners of Inland Revenue (1957) 37 TC 493.

The ATO point out a factor that may indicate individuals are residing in Australia is the presence of their families. This does not mean that the presence of their families always results in a decision that the individuals are residing here. In addition, even if their family does not accompany them, the individual may still be residing in Australia.

Time is not necessarily determinative of residency but it is an important factor when considering whether an individual resides in Australia. In 14 TBRD 346 Case 35, R R Gibson stated at 350: "'The mere length or brevity of a person's stay in a country might, I think, be such as to establish residence or non-residence, as the case might be, but in the intermediate field wherein the duration of a person's stay in a country is not decisive it might, I think, be open or proper to find, according to other circumstances, [namely,]

> *(a)* That a person who lived in a country for only a week or two was a resident of that country while he was there, and
>
> *(b)* That a person who lived in a country for several months was not a resident of that country during that period".

Chapter Five

Residence in New Zealand

5.1 Introduction

In the case of New Zealand, the rules as contained in their Income Tax Act are more simplified and according to their Act you are classified as a New Zealand tax resident if you are in New Zealand for more than 183 days in any 12-month period, or you have an "enduring relationship" with New Zealand or you are away from New Zealand in the service of the New Zealand Government.

5.2 Residence in New Zealand

Section OE 1 of the New Zealand Income Tax Act of 1994 (2004) (the NZT Act) says that a person, other than a company, who has a "permanent place of abode" in New Zealand is a New Zealand tax resident. "Permanent place of abode" means more than just the building you live in; it covers all your ties and links with New Zealand, their Revenue service points out.

These may be social, physical, economic and personal. Overall, the test could be described as whether you have an enduring relationship with New Zealand. To decide whether one has an enduring relationship with New Zealand, they look at your circumstances, which can, according to their brochure IR292 *"New Zealand Tax Residents"* (2003) include the following:

- "*Presence in New Zealand* — whether you are there continuously or from time to time;

- *Accommodation* — whether you own, lease or have access to property in New Zealand;

- *Social ties* — where your immediate family lives; if you have children being educated there; if you belong to any New Zealand clubs, associations or organisations;

- *Economic ties* — if you have bank accounts, credit cards, investments, life insurance or superannuation funds here;

- *Employment or business* — if you run a business there; if you are employed there; if you have employment to return to; the terms of any employment contract;

- *Personal property* — if you have vehicles, clothing, furniture and other property or possessions kept here permanently;

- *Intentions* — whether you intend to live in New Zealand or to return overseas after a time;

- *Benefits, pensions* — whether you receive any welfare benefits; or

- *Other payments* — pensions or other payments from New Zealand agencies or organisations".

5.3 The source of your income in New Zealand

The position in New Zealand according to IR292 (2003) is "if you are a non-resident you are taxed only on income you receive from a New Zealand source. If your only income from New Zealand is interest, dividends or royalties, and the correct amount of non-resident withholding tax (NRWT) is deducted, you will not need to file a non-resident return".

In terms of New Zealand tax legislation the only time you will be exempted from paying tax on your earnings abroad is if you do not qualify as a "tax resident" of the country. According to IR292 (2003), you will qualify to be a taxpayer if you have an enduring relationship with the country.

"Anyone who has a 'permanent place of abode' in New Zealand is a New Zealand tax resident. 'Permanent place of abode' means more than just the building you live in; it covers all your ties and links with New Zealand. These may be social, physical, economic and personal", IR292 (2003) explains.

5.4 Treatment of foreign income

In New Zealand, domestic pensions are taxable but there are two ways to tax income from overseas private or social pension schemes, according to their Revenue publication IR257, *"Overseas Private Pensions"* (2002). The method you use "depends on whether your overseas private pension scheme is a qualifying foreign private annuity (QFPA) interest", the publication states.

It explains further that a QFPA interest is an investment in an overseas private pension scheme that meets all the following four criteria:

> "1. The investment is in an overseas superannuation scheme or life assurance policy and entitles you to a pension either now or in the future;
>
> 2. The investment (including all contributions) was made:
>
> - When you were not resident in New Zealand; or
> - Within four years of the start of the income year in which you became a New Zealand tax resident; or
> - From the proceeds of a superannuation fund that were transferred either in anticipation of you leaving New Zealand or after your leaving.
>
> 3. There are restrictions on assigning future benefits (except for matrimonial transfers); and
>
> 4. There are restrictions on the investment being surrendered, charged or borrowed against."

"For a QFPA interest you simply pay tax on any pension received from the QFPA interest. This method of tax treatment is called the 'pension-received basis'. If no pension or other income is received from the scheme, there will be no taxable income. This is different from the tax treatment under the foreign investment fund (FIF) rules, where tax is payable on any increases or gains that accrued during the income year, even if you did not receive any pension or income from the interest", the publication points out.

"Some pensions will also be taxable in the country you receive them from. In this situation, you can claim a credit in your New Zealand tax return for the tax paid overseas", IR257 (2002) says. The New Zealand credit you can claim will, however, be limited to the amount of New Zealand income tax payable on the overseas private pension. You may have to produce evidence of the tax paid overseas, the publication explains.

"The case with overseas private pension schemes that are not QFPA interests, is that if it does not meet the criteria for a QFPA interest, it will be taxed under the FIF rules. The FIF rules are part of New Zealand's international tax laws which are designed to make sure that New Zealand tax residents pay New Zealand income tax on their overseas investments", IR257 (2002) states.

Under the FIF rules, a person who has an investment in an overseas private pension scheme has to:

- "complete an FIF disclosure form; and
- Pay tax on FIF income calculated using the FIF rules".

The FIF rules contain various methods for calculating FIF income. There are limited exemptions from these requirements, for example, if the interest is less than NZ$50,000.

According to the New Zealand Revenue's publication, IR258 *"Overseas Social Security Pensions"* (2002), most overseas social security pensions are also taxable in New Zealand. "If you are a New Zealand tax resident and you receive an overseas social security pension, generally this needs to be included in your New Zealand tax calculations. This applies regardless of whether you receive the pension in New Zealand or whether it is put into an overseas bank account", the publication states.

"Some overseas social security pensions are subject to tax in the countries they are paid from. If yours is, you can claim a credit for the tax you've paid overseas. The credit you can claim is limited to the amount of New Zealand income tax payable on the overseas pension", IR257 (2002) advises.

5.5 The case with juristic entities

A company for tax purposes, is a resident in New Zealand if it meets any one of the following criteria as stated in their publication IR292 (2003) *New Zealand Tax Residence:*

- *"It is incorporated in New Zealand* — A company which is incorporated under New Zealand Companies Act legislation is resident in New Zealand";

- *"Its directors exercise control in New Zealand* — Those acting in their capacity as directors control the company here, whether decision making by directors is confined to New Zealand or not";

- *"It has its centre of management in New Zealand* — this is the place from where the company as a whole is managed on a day-to-day or regular basis. The focus is on the location of the company's centre of management"; and

- *"It has its head office in New Zealand* — the head office of a company is the office from which the business of the company is directed and carried out. The focus of the test is the physical place of administration and management which is superior to all others".

"A company often satisfies more than one, or even all of these tests. Such a company is clearly resident in New Zealand. However a company need satisfy only one of the four tests, to be resident", IR292 (2003) points out.

Chapter Six

Residence in the United Kingdom

6.1 Introduction

In essence the United Kingdom (UK), bases its income tax on income arising in the UK, whether or not the person to whom it belongs is resident in the UK, or on income arising outside the UK which belongs to people resident in the UK and on any gains accruing on the disposal of assets anywhere in the world which belong to people resident or ordinarily resident in the UK, explains UK Revenue authorities publication, IR20 (2004), *"Residents and Non-residents"*.

6.2 Residence in the United Kingdom

In order to assist their tax paying public IR20 (2004), sets out the rights of tax-payers in a simple manner and deals with the important word "residence" and "ordinary resident". The terms "residence" and "ordinary residence" are not defined in their Taxes Act. Their rulings are largely based on rulings of their courts, says IR20 (2004).

"In order to be regarded as "resident" in the UK one must normally be physically present in the country at some time in the tax year. You will always be resident if you are there for 183 days or more in the tax year and the total is not based on continual presence – it is based on one's total number of days present in the UK. If you are in the UK for less than 183 days, you may still be treated as resident for the year under other tests", as per IR20 (2004).

"If you are resident in the UK year after year, you are treated as ordinarily resident there. You may be resident but not ordinarily resident in the UK for a tax year if, for example, you normally live outside the UK but are in that country for 183 days or more in the tax year. You could also be classified as being ordinarily resident but not physically resident for a tax year if, for example, you usually live in the UK but have gone abroad for a long holiday and did not set foot in the UK during that year", IR20 (2004) explains.

6.3 Ordinary residence

According to IR20 (2004), if you are resident in the UK year after year, you are treated as ordinarily resident there. You may be resident but not ordinarily resident in the UK for a tax year if, for example, you normally live outside the UK, but are in that country for 183 days or more in the year. IR20 (2004) goes on to say that you may be "ordinarily resident", but not "resident" for a tax year if, for example, you usually live in the UK, but have gone abroad for a long holiday and do not set foot in the UK during that year.

6.4 Resident in both the UK and elsewhere

"It is possible to be resident (or ordinarily resident) in both the UK and some other country (or countries) at the same time. If you are 'resident' or 'ordinarily resident' in another country, this does not mean that you cannot also be 'resident' or 'ordinarily resident' in the UK", says IR20 (2004). "Where, however, you are resident both in the UK and a country with which the UK has a double taxation agreement, there may be special provisions in the agreement for treating you as a resident of only one of the countries for the purposes of the agreement", the publication explains.

6.5 Split years

"Strictly, you are taxed as a UK resident for the whole of a tax year if you are resident there for any part of it. But, if you leave or come to the UK part way through a tax year, the year may, by [Revenue's] concession, be split. Where this applies, your tax liabilities on income which are affected by tax residence will be calculated on the basis of the period of your actual residence here during the year", says IR20 (2004) This has the same effect as splitting the tax year into "resident" and "not resident" periods.

IR20 (2004) points out that split year treatment applies where:

- "You have not been ordinarily resident in the UK and you come to live there permanently or to stay for at least two years. You are then taxed as a resident only from the date of your arrival; or

- You have been resident in the UK* and you leave to live abroad permanently for a period of at least three years, and on your departure are not ordinarily resident in the UK. You are then taxed as a resident only up to and including the date of your departure; or

- You have been resident in the UK and you leave to take up full-time employment abroad, and you meet certain conditions. You are then taxed as a resident only up to and including the date of your departure and from the date when you return to the UK".

6.6 The source of your income

According to IR20 (2004), the position in the United Kingdom "is that if you are not resident in the UK, we will generally tax you on any UK pensions or on earnings from employment the duties of which are carried on in this country. Where your duties are carried on partly in the UK and partly abroad, an allocation, based on days worked in the UK and days worked abroad, will normally be made to ascertain the earnings for duties carried on in this country which are liable for UK tax".

IR20 (2004) goes on to say that if you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not "ordinarily resident" if you meet all the following conditions and as such you will not be subjected to income tax in the UK if:

- "Your absence from the UK and your employment abroad both last for at least a whole tax year; and

- During your absence any visits you make to the UK total less than 183 days in any tax year, and average less than 91 days a tax year".

The average, says IR20 (2004), is taken over the period of absence up to a maximum of four years. Any days spent in the UK because of exceptional circumstances beyond your control, for example, the illness of yourself or a member of your immediate family, are not normally counted for this purpose. If you meet all the above conditions, you are treated as not resident and not "ordinarily resident" in the UK from the day after you leave the UK, to the day before you return to the UK at the end of your employment abroad.

"You are treated as coming to the UK permanently on the day you return from your employment abroad and as "resident" and "ordinarily resident" from that date onward," the publication explains.

In the United Kingdom the position of pensions is that all pensions and annuities of a domestic nature are taxable. According to IR20 (2004), the position of foreign pensions is as depicted in the table below

	Paid by or on behalf of a person	
Residence status and domicile	**In the UK**	**Outside the UK (overseas pension)**
Resident and ordinarily resident, and domiciled	Liable	Liable less 10% deduction
Resident and ordinarily resident, not domiciled	Liable	Liable if received in the UK
Resident but not ordinarily resident, domiciled	Liable	Liable
Resident but not ordinarily resident,	Liable	Liable if received in the UK
Not resident	Liable	Not Liable

The United Kingdom, like most other tax dispensations, does not have as liberal a taxation policy towards pensions received by their residents as does the Republic of South Africa.

6.7 The case of juristic entities

The United Kingdom's Finances Act 2003 defines the position of juristic persons subject to taxation in the country. Prior to this Act being promulgated, the UK used terms such as "branch" or "agency" as being part of their criteria for establishing whether corporate non-residents were subject to tax states Sellwood, A., (2004) writing on the *"Permanent establishment of non-resident companies"*.

Sellwood (2004) states that under s. 148 of their Finances Act, it is laid down that a company have a permanent establishment in the UK if, and only if:

> "(a) It has a fixed place of business there through which the business of the company is wholly or partly carried on; or
>
> (b) An agent acting on behalf of the company has, and habitually exercises their authority to do business on behalf of the company".

The two alternatives (a) and (b) can be seen as corresponding respectively to the branch and agency of earlier legislation, Sellwood (2004) points out. The relevant section goes on to add some qualifying details to the definition of a "fixed place of business", including:

> "(a) A place of management;
>
> (b) A branch;
>
> (c) An office;
>
> (d) A factory;
>
> (e) A workshop;
>
> (f) An installation or structure for the exploration of mineral resources;
>
> (g) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources; or
>
> (h) A building site or construction or installation project."

Other qualifications to the definition, Sellwood (2004) states, which indicate that a company is not regarded as having a permanent establishment, are:

- "By reason of its carrying on business through an independent agent acting in the ordinary course of business;
- By reason of a fixed place being maintained for the purpose of carrying on activities for the company, or by reason of an agent carrying on activities for the company; and/or
- If, in relation to the business of the company as a whole, the activities carried on are only of a preparatory or auxiliary character. This last expression is explained and amplified in s. 148(5)."

Sellwood (2004) explains that previously a non-resident company was only charged tax if it carried on a trade in the UK through a branch or agency – in which case it would be chargeable on any trading income arising directly through the branch or agency or any income from property or rights used or held by or for the branch or agency or any chargeable gains included in the companies profits.

"Previous legislation contained no rules for determining how the profits of the branch or agency were to be computed, although practices were gradually developed. But profits attributable to permanent establishments are now to be computed in accordance with s. 11AA of the Act", Sellwood (2004) points out.

He goes on to say that for this purpose the "permanent establishment" is viewed as being a distinct independent enterprise separate from the non-resident company. It is also to be regarded as having the same credit rating as the non-resident company and such equity and loan capital as it could reasonably be expected to have if it were an independent enterprise.

"The new provisions are particularly relevant to companies which are outside the protection of a double tax treaty as, where such protection exists, the provisions of the treaty may override domestic law", he states.

6.8 Legal cases

The UK legal system has also spent considerable time deliberating on the question of "residence". In Reid v The Commissioners of Inland Revenue, (1926) SC 5812 10 TC 673, the meaning of "reside" was considered. "Quality of presence and time are to be considered when determining whether individuals reside in a place where they spend part of their lives", the court stated.

In the case of Levene v IRC, (1928) AC 217, ALL ER Rep. 746, HL, "residence" was described as a place with some degree of continuity, apart from accidental or temporary absence. The court found that if it is part of one's ordinary regular course of life to live in a particular place with a degree of permanence, then one must be regarded as ordinarily resident of that country.

The leading English case is, however, Shah v Barnet London Borough Council and Other Appeals, (1983). 1 ALL ER. 266 (HL), where it was confirmed that the natural and ordinary meaning of "ordinary resident" was, to quote the learned judge, "that a person must [be] habitually and normally resident here, apart from temporary or occasional absences of long or short duration."

In the case of The Commissioners of Inland Revenue v F L Brown, (1926) 11 TC 292, the taxpayer gave up his house in the UK and, after the World War 1, commenced staying abroad for nine months in each year. The Special Commissioners held he was not resident of the UK for tax purposes. Revenue then appealed their decision.

Rowlatt J declined to overturn the decision of the Special Commissioners had placed considerable weight on the break in the taxpayer's habit of life on giving up his house. However, Rowlatt J did express some concern at the decision, based on the existence of a bank account and family connections, but could not find an error in law.

Chapter Seven

Residence in the United States

7.1 Introduction

Although the position of residence in the United States does not form part of this study, a brief summary of their major residence criteria is given to counter balance the situation in South Africa, Australia, New Zealand and the United Kingdom, whose taxation systems bear many similarities because of their past historical ties. The United States is one of the destinations favoured by many South African seeking greener pastures elsewhere.

7.2 Residence in the United States

The United States Internal Revenue Service, according to their publication No 54, *"Tax Guide for U.S. Citizens and Resident Aliens Abroad"* (2004), (the US Guide), states that as a US citizen or resident alien in their country, your worldwide income generally is subject to US income tax regardless of where you are living.

7.3 Green Card Test

Immigrant visas in the United States are commonly called green cards, hence the name for this test. In essence, the US Guide says the test dictates that if you are in possession of an immigrant visa, you are a resident alien of the country and as such are subject to income tax in the United States on your worldwide income.

7.4 Substantial presence test

If you do not comply with the green card test, you are next measured against the substantial presence rules, the US Guide states. In terms of these rules, as given in the publication already stated, you are considered a US resident if you, during the calendar year, meet the laid down criteria of the test.

Under this test, you must be physically present in the United States on at least 31 days during the current calendar year and 183 days during the current year and the two preceding years, counting all the days physically present in the current year, but taking only a third the number of days of presence in the first preceding calendar year and only a sixth the number of days in the second preceding year.

Chapter Eight

Residence and Source: its impact on income

8.1 Introduction

Stein. M.,(2001) writing on *"The importance of residence"* states that residence carries all sorts of income tax, donations tax, capital gains tax and estate duty consequences, hence the importance of understanding its impact on one's receipts and accruals.

He goes on to say that once it has been established whether a taxpayer is "resident" or "ordinary resident" in South Africa, he is taxed on all the income received or accrued to him from anywhere in the world. In many instances Double Tax Agreements (DTAs) can result in relief for local taxpayers, but the Income Tax Act also makes provision for combating tax evasion by foreign legal entities which are not deemed to be South African residents.

This chapter will deal with the law appertaining to both "residents" and "non-residents" who are natural persons and not juristic entities – the latter being dealt with in Chapter Ten.

For non-residents, gross income includes all income which is from a South African "source" or "deemed South African source" says Huxham (2004). Unlike residents who are taxed on their worldwide income, for non-residents the focus falls upon the source of their income – if the source is South African, the non-resident will be subject to tax in South Africa on that income only, Huxham (2004) explains.

Certain types of income of non-residents are exempt from income tax in terms of s 10 of the Act while in the case of royalties, the Act states that a special rate is applicable.

South Africans can invest up to R750 000 in offshore investments In terms of current *"Exchange Control Regulations"* (2004) and which usually take on the form of deposits in financial institutions, dividends from foreign companies, fixed property, shares or unit trust type investments the fruits of which have to be declared in their annual income tax return and will be taxed accordingly.

The Minister of Finance announced in his 2004 mid-term Budget Review tabled in Parliament that exchange control restrictions on foreign investment by companies would under certain conditions, be eased. There was, however, no relief for other taxpayers.

8.2 Source of your income in South Africa

"South Africans nurtured on a regime of the source basis of taxation, whereby only income arising in South Africa was taxable and foreign income was willy-nilly exempt (and if it was not, it was not to difficult to structure affairs to make it so), now need to realise that those days are gone forever", says Mazansky E., (20 01) in his paper, *"Change your mindset – the rules of the game have changed".*

"The days of structuring your affairs so that foreign income is automatically tax-free are over. The changes that have come about are such that this situation will be the exception rather than the rule as it was in the past", he added.

Jooste, R., (2001) writing in Tax Planning on *"Shifting foreign income",* stated that in the absence of effective anti-avoidance measures, residents in a country with a residence based tax system could avoid or postpone income on foreign-sourced income by shifting the income to foreign entities.

"This is because international law does not permit a country to tax foreign residents on their foreign income. So, in the absence of these measures, a South African resident could shift foreign-sourced income into an offshore (non-resident) trust and as long as the income does not vest in a South African resident in the year in which it accrues to the trust, it would escape taxation in South Africa", Jooste (2001) explains.

He points out, however, that if the income vested in a South African resident in the year in which it accrues to the trust, it would be taxed in the hands of the resident in terms of s 25B of the Act. This section has since been repealed.

As non-residents as stated above, are taxed on the source of their income, it is important to establish what in a South African context, is understood by the "source" concept.

The leading South African case on the subject is Lever Brothers & Unilever Ltd v CIR. (1946) AD 441. 14 SATC 1 where Watermeyer CJ in his judgment at p450 said that "the source of receipts, received as income, is not the quarter whence they come but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them".

This work, the judge said, may be a business which the taxpayer carried on or any activity either physical or mental in which he engaged or even the employment of his capital by the taxpayer himself or by his lending it to someone else or it may even be a combination of both.

Arendse A.,Coetzee E.S.M., et al, (2004), *"Silke: South African Income Tax"*, (Silke) says ordinarily it is not difficult to determine and locate the originating cause of income but the court decision shows that it is difficult to extract general principles as it is generally dangerous to generalise on the question of "source".

Perhaps the easiest approach to adopt is that as stated in Liquidator, Rhodesian Metals v COT (1938). AD 282. 9 SATC 363, at p436, namely, "source means not a legal concept but something which the practical man would regard as a real source of income. The ascertaining of the actual source is a practical hard matter of fact".

Foreign employees who render temporary service in South Africa are particularly vulnerable to the issue of "source".

Bloomberg (2004) puts it thus: "the issue is whether the income earned by the employee can be said to be derived from a source in South Africa, as a non-resident will only be subject to South African tax on income derived from a source in South Africa or a deemed source".

The question of source was also canvassed in the case of in CIR v Epstein, (1954). 19 SATC 221, SA 689 (A) and in COT v Shein, (1958) 22 SATC 12, SA14 (FC) the latter which is discussed on page 73.

It is generally accepted that the source of income derived from labour – which according to Bloomberg, would include the exploitation and exercise of a person's manual labour, his skill, wit, personality, connections and intellect – is where the service is rendered.

8.3 Interest

According to the South African Income Tax Act, local interest in the 2005 tax year is fully taxed for both residents and non-residents except for a exemption of R11 000 for persons under 65 years and R16 000 for persons older than 65 years. The exemption is an annual exemption and per taxpayer and not per family unit as had been the case in South Africa some years ago.

According to the Act, the interest earned by residents on foreign investment also falls within the tax net and it's value is converted in terms s 25D of the Act, but relief is granted in terms of s 10(1)(i) which offers an amount of R1 000 p.a. free from South African income tax. This R1000 exemption reduces the local exemption by the amount up to R1000 that is exempted.

The Act further provides that all interest earned by or accrued to a non-resident is exempt from tax in terms of s 10(1)(h) provided the individual is physically absent from South Africa for at least 183 days during the year of assessment in which the interest is derived and did not carry on any business in South Africa during the year of assessment.

Non-residents residing in certain neighbouring countries did not qualify for this exemption in terms of s 10(1)(hA). These countries were Swaziland, Lesotho and Namibia but the Minister of Finance announced in his 2004 mid-term Budget Review that this restriction will be lifted. Botswana, however, is treated as a foreign country in this regard.

Where an investment by a foreign resident is made with foreign funds in stocks or securities issued by the South African Government, SA Transport Services, Eskom, the SABC or any local authority, and the Treasury has given an undertaking that the interest is exempt, no tax liability will occur on such interest earned.

The source of one's interest was dealt with in the Lever Brothers case *supra*, where the court held that the source of interest payable on a loan was not the debt, but the services that the supply of credit, for which the borrower paid the interest.

Silke (2004) comments that the source is therefore where the supply of credit takes place and not where the debt is payable, or where the borrower productively employs the money, or where the agreement of loan was concluded.

The significance of this case has limited relevance in South Africa now since the deemed source provisions of s 9(6) of the Act came into force.

"A deemed foreign dividend includes any of the events constituting a deemed dividend for STC purposes which are typically, a loan or other benefit, but excluding a transfer pricing benefit, granted to a shareholder or to any South African resident 'connected person' to the shareholder. Where the deemed dividend arises from a benefit distributed to a resident person connected to the actual shareholder, the dividend is deemed to be distributed to that shareholder (whether resident or not) and not to the person receiving the benefit", the situation in STC), the Tax Library (2004) explains.

8.4 Dividends

Dividends received from local companies are entirely free of income tax in the hands of both residents and non-residents. Dividends received from foreign companies by residents are generally taxable. An important exemption is in respect of dividends declared by non-resident companies listed on the JSE Securities Exchange, provided that the resident receiving those dividends does not hold 10% or more of the equity share capital of the listed company and provided that more than 10% of the total equity share capital is held by residents collectively, the Tax Library (2004) explains.

Previously dividends received from companies in countries designated by the Minister of Finance were also exempt in certain cases but this exemption was eliminated for tax years commencing from 1 June 2004. However, foreign dividend repatriations from foreign companies in which an equity interest of more than 25% is held, became exempt from tax years commencing on or after 1 June 2004 according to the latest amendments to the Act, the Tax Library (2004) advises.

The Act states that dividends received from foreign companies are taxed in terms of s 9D of the Act and if the income of the company is subject to tax in the hands of a resident shareholder, the dividends so received will be exempt from the provisions of s 9E. Foreign dividends form part of the R1 000 exemption from tax granted to local taxpayers. As previously stated, the R1 000 exemption includes the total of one's foreign interest as well.

The Tax Library (2004) states that it should be noted that Revenue will allow the deduction of interest paid where it has been incurred in the production of one's foreign dividends to the extent that they are included in gross income. Any excess interest can be rolled over for deduction in the next tax year.

Residents are entitled to claim a tax credit in respect of any withholding tax paid in respect of foreign dividends included in their gross income. The reader's attention is, however, drawn to new legislation affecting foreign dividends which is dealt with on page 82 of this work.

In the case of Boyd v CIR (1951) 3 SA 525 (A) 17 SATC 366, the court held on p366 that the source of income from dividends was the shares giving rise to those dividends and they were situated where they were registered, e.g., the Johannesburg Stock Exchange, irrespective of the source from which the company derives its income.

8.5 Property and rental

The Tax Library (2004) says the rental income from both local and foreign sources is dealt with in the same manner. All income must be accounted for and all tax allowable deductions and exemptions in terms of ss 11(a), 11(d) and 11(e) of the Act are applicable e.g., expenses such as bond interest, rates and taxes, insurance and repairs may be claimed as a deduction subject to certain conditions. Residents and non-residents are treated the same in respect of this type of income.

Foreign income is converted in terms of s 25D. The ss 11(f) and 11(g) allowances in the case of leased property may also be applied where appropriate. Non-residents are taxed on their rental income if the property is situated in South Africa as this is the source of the income stream, the Tax Library points out.

Usually the source of rental income is the use of the asset which gave rise to the rental says Silke (2004) but in British United Shoe Machinery (SA) (Pty) Ltd v COT. (1964) 3 SA 193 (FC) 26 SATC 163, the court on p164 held that the source of the rental was where the asset – in this case machinery – was used and not where the business of the lessor was. Silke (2004) states that where the emphasis is on the property let and not on the business of the lessor, the source is located where the property is being used.

8.6 Unit trust investments

Huxham (2004) says a collective investment company or scheme – a unit trust – is taxed as if the portfolio was South African - its interest and dividends would be apportioned to the individual taxpayer in relation to their investment.

The unit holder will be taxable on the foreign dividend, and will be able to claim withholding tax imposed in respect of the foreign dividend as a credit against their South African tax liability. Non-residents will only be taxed on the non-foreign earnings of the scheme, i.e. the foreign dividend element will not be taxed locally. The s 10(1)(i) R1000 foreign interest/dividend exemption also applies to unit trust schemes.

8.7 Pensions and annuities

Pensions or annuities fall into the gross income net of a South African tax "resident" irrespective of where the pension is paid or where the services were rendered which gave rise to the pension, except in cases where in terms of s 10(1)(gC) they are exempted, says the Tax Library (2004).

Examples hereof are:

- "Any amount accrued or received in terms of the social security system of a foreign country; or
- Any pension received by or accrued to a resident from a source outside the Republic which is not deemed to be from a source in the Republic in terms of s 9(1)(g) in respect of past employment outside South Africa."

This exemption, according to the Tax Library (2004) is also applicable to the pension received by a "resident" who by virtue of having rendered services within and outside South Africa and rendered the services for at least two years out of the ten years immediately preceding retirement, in South Africa.

"In that instance, only that portion of the pension that relates to services rendered within South Africa will be taxable in South Africa," the Tax Library (2004) explains. "A pension received by or accrued to a non-resident as a result of services rendered in South Africa is subject to income tax in South Africa and the fund administrator is obliged to withhold tax on a monthly basis. Again, the taxability of the pension may be affected by an agreement for the avoidance of double taxation," the Tax Library (2004) points out.

8.8 Trading activities as a sole proprietor

Trading as a sole proprietor in South Africa renders your profit from your trade taxable and the expenses incurred in the production of income an allowable deduction in most instances, irrespective of your residency status, the latter because of the "source" principle, the Tax Library (2004) explains

However, if you are a "resident" of South Africa and carry on a business outside the country as a sole proprietor, the taxable income of such business is calculated as if your business is in South Africa and your profits/losses are converted into the rand amount in terms of s 25D of the Act, says the Tax Library. Some relief is available in terms of s 9A which provides for the exemption of any income of a sole proprietor where the laws of the country prohibit the remitting of such earnings to South Africa, the Tax Library (2004) explains.

"Where foreign trade results in a loss, such loss can only be offset against the foreign income of a South African resident taxpayer and not against his South African income from carrying on a trade or from his remuneration," the Tax Library (2004) advises.

8.9 Royalties

"Intellectual property includes trademarks, patents, copyrights, commercial knowledge. Royalties are payments for the use or right of use of intellectual property and includes payments for information concerning industrial, comercial or scientific experience e.g., technical advisory fees. The use of motion picture film, or any film or video tape or disc or any sound recording or advertising matter is also considered a royalty," the Tax Library (2004) points out.

In the case of Millin v CIR, (1928) 3 SATC 170 (A), the court had to adjudicate on the source of royalties paid to Mrs Million, a novelist. She sold the rights to her book in terms of an agreement concluded in England, which give the publisher the right to reproduce her work for which she would receive a royalty. The court on p171 of its judgment, held that the source of her royalties was where she employed her wits, labour and talent and not where the royalty payments were made. In her case it was in South Africa.

Silke (2004) points out that the decision in this case is equally applicable to the payment received from patent rights, formulae, secret processes and such like accruing to inventors.

In ITC 1735, (2001) 64 SATC 455, (GSC), the court had to adjudicate on the question of whether certain income earned by one of the world's leading golf professionals, who had participated in the Nedbank Million Dollar Golf Challenge' held at Sun City during December 1999, qualified as income or royalties.

The appellant in this case was resident in the United Kingdom during the year of assessment ending 28 February 2000 and the Commissioner had assessed the sum of $100 000 paid to him as income earned by him in South Africa during the year of assessment ending 28 February 2000.

The taxpayer had entered into an agreement with the sponsoring body of the golf tournament that paid him a lump sum payment in return for giving them the right to use his name, likeness and biographical material. The court was asked to decide whether this payment fell within the ambit of gross income or whether it was of a capital nature. The taxpayer claimed that such payment had not been intended as payment for services rendered nor did it represent "income accruals".

Alternatively, the taxpayer claimed, he should only have been taxed on 30% of the income received in terms of s 35 of the Income Tax Act 58 of 1962 read with s 9(1)(b) or (bA) of the Act.

The court held on p456 that the payment made to the taxpayer was income in the ordinary sense of the word and those monies so received formed part of the taxpayer's "gross income" as defined in s 1 of the Act.

With regard to the question of whether the payment could not be treated as a non-residents royalty payment, the taxpayer averred that the monies received by him fell within the ambit s 35 of the Act because the payment made in effect constituted a royalty payment and was not taxable in South Africa in terms of Article 11 of the Double Tax Agreement between the United Kingdom and South Africa.

The court found on p457 that the taxpayer's name, likeness, biographical details, etc, were not creative efforts by the taxpayer and were accordingly of an entirely different nature to the rights listed in s 9(1)(b)(i) and accordingly they did not fall to be assessed in terms of s 35(1) of the Act, but were part of the taxpayer's "gross income" as defined in s 1, in that it had been received by the taxpayer from a source within the Republic. Furthermore, no relief was available in terms of the Double Tax Agreement (DTA) between the two countries in this instance. See the DTA provisions on page 102 of this work.

Section 35 of the South African Income Tax Act fixes the withholding tax, which is presently set at 12% and royalties are thereafter not subjected to any further taxation in terms of s 10(1)(1), but approval is required from the Department of Trade and Industry and the Exchange Control section of the Reserve Bank before such payments can be affected to a non-resident.

One should also consult any DTA which may exist between South Africa and the country where the non-resident is resident, for possible exemptions which may exist when considering royalties' applications, the Tax Library (2004) advises.

8.10 Controlled foreign companies (CFC's)

A controlled foreign company according to the Tax Library (2004), is a non-resident and a foreign company in which a South African resident or residents individually or jointly, directly or indirectly, holds or hold more than 50% of the 'participation rights'. This concept is defined in the Act as the right to participate directly or indirectly in the share capital, share premium, current or accumulated profits or reserves of the foreign company, whether or not of a capital nature.

The Tax Library (2004) explains that where residents hold more than 50% of the participation rights in a foreign company, a portion of the net income of the foreign company will be deemed to be income in the hands of the residents. This effectively means that the net income of the CFC is imputed in the hands of the South African resident and, therefore, taxed in the hands of the South African resident.

According to the Tax Library (2004), the proportion of the net income to be included in the income of any one resident will be the proportion that the participation rights bear to all the participation rights in the company. The "net income" of a controlled foreign company in respect of a foreign year of assessment is defined as an amount that is equal to the taxable income of the company, determined in accordance with the Act as if the company had been a resident.

This, therefore, includes both investment income/service income and business income of the CFC. In certain instances, the normal controlled foreign company rules do not apply and the net income need not be attributed to the resident holding the qualifying participation rights in the controlled foreign company concerned, the Tax Library (2004) explains.

To determine the amount to be included in a South African taxpayer's gross income, the *David Strachan & Tayler Tax Guide 2004/2005*, (the Guide) uses the following formula:

$$Net\ income\ of\ the\ CFC = \frac{resident's\ participation\ rights\ in\ the\ CFC}{Total\ participation\ rights\ in\ the\ CFC}$$

The net income of the CFC, the Guide points out, is calculated in the same way as taxable income and if the calculation results in a loss, the deductions are limited to income.

The Guides states that the Act "provides for certain exemptions in respect of CFC income in the case where the net income is derived from active bona fide business establishment or the passive income of a business establishment that does not exceed 10% of the sum of revenue receipts and accruals and capital gains and forex gains of the CFC, or which arises from any active banking, insurance or rental business".

To determine whether the net income need not be attributed to the resident holding the qualifying participation rights, a detailed study of the section containing these rules (section 9D of the Act) is required and is not relevant in this study. New legislation in respect of CFC will come into operation for the 2005 tax year and readers are referred to page 88 of this work for details.

8.11 Income from a foreign trust

"Where a South African resident has made a disposition to a foreign trust, then whether that trust retains the revenue it earns or distributes it to another non-resident (but not a South African resident), any South African source income or foreign dividends earned by that trust will be immediately attributable to the South African resident", writes Clegg. D., (2003) in his paper, *"The Benevolent Immigrant,"* setting out the position for foreign trusts in an article in The Taxpayer journal.

Foreign source income excluding foreign dividends, will not be affected, Clegg points out. Taxpayers should be aware of transfer pricing provisions where offshore trusts are concerned especially where they have granted interest free loans to such trusts. Roper (2001) in his paper, *"Offshore Trusts and the residence system"*, paints the picture as follows:

"It is often overlooked that an interest-free loan to an offshore trust may nonetheless, in terms of South Africa's transfer pricing provisions, attract domestic tax".

"As an interest-free loan is not an arm's length transaction in terms of s 31, the Commissioner could apply the provisions of s 31(2) to subject the South African resident to tax, being the supplier of the loan, at a market related interest rate. It must also be borne in mind that an offshore trust is a 'connected person' in relation to a South African resident if this person or his spouse or their respective relatives to a third degree, are beneficiaries of the trust," Roper (2001) explains.

Where a resident is a beneficiary in an offshore trust and has a vested right in the income, the income that accrued to the trust will be subject to tax in the hands of the beneficiary, or where trustees have exercised their discretion to distribute income to a beneficiary who has not a vested right, income so distributed will be subjected to tax in the hands of the beneficiary, Roper (2001) concludes.

8.12 Non-residents working on a temporary basis

Non-residents working in South Africa for short periods are liable for tax in South Africa in respect of their income earned in South Africa. Their tax position may be affected by an agreement for the avoidance of double taxation entered into between the Government of South Africa and the government of the foreign country in which the non-resident resides, says Broomberg (2004).

"The exemption from (section 10(1)(c)(v) is granted to any non-resident who is temporarily employed in South Africa and the exemption is authorised in terms of an agreement between the Government of South Africa and a foreign government", Broomberg (2004) concludes.

8.13 Retirees who regularly spend time in South Africa

Many foreigners regularly spent their winter months in sunny South Africa but find themselves falling foul of the country's residence laws, especially the physical presence test, says Kolitz. M., (2001) in her paper, *"Taxing the South African Sunshine"* which appeared in The Taxpayer journal.

The following is an extract from the paper: "A retiree plans to spend the period 1 October to 31 March each year in the RSA in order to escape winter in the Northern Hemisphere where he is ordinary resident. He will arrive in South

Africa for the first time in 20X1 – this means that for the 20X1 tax year he would not have spent any days present in South Africa".

His periods of physical presence in South Africa will be as depicted in Table A overleaf.

Assessment Year	Days present
20X2	151
20X3	182
20X4	182
20X5	182
20X6	182
20X7	182
20X8	182
20X9	182

Table A

"Clearly, the retiree will meet the first requirement of the physical presence test, that of being present in South Africa in the current year of assessment for more than 91 days in each of the years of assessment shown in the table A above".

For the tax years 20X2, 20X3 and 20X4 he will not meet the 91 day requirement in each of the three prior year of assessment because be was not physically present in tax year 20X1. He also does not meet the 549 days aggregate requirement for the three years of assessment and will therefore not qualify as a resident for tax purposes in term of the physical presence test.

His worldwide income will thus not fall within the South African tax net.

The position for years 20X5 to 20X9 deliver a similar result to the previous years because our retiree will not have spent an aggregate of 549 days in any three year period. His worldwide income is still safe from the South African tax net. However, Kolitz (2001) warns that if our retiree decides to extend his stay in South Africa by a mere 7 days he could be in trouble from a taxation point of view.

"If the retiree decides to extend his stay in South Africa until 7 April in the 20X4 and 20X6 years of assessment, the situation will, however, be different. For each of the years 20X5 and 20X9 the retiree will meet the requirement of physical presence or more than 91 days in the current and each of the three prior years of assessment".

"He will also meet the requirement of an aggregate physical presence of more than 549 days for the three prior years of assessment in 20X6, 20X7 and 20X8 and 20X9 years of assessment as shown [inTable B] below", Kolitz (2001) warned.

Assessment Year	**Days present In year of assessment**	**Aggregate Days Present in 3 Prior years**
20X2	151	0
20X3	182	151
20X4	182	333
20X5	182	522
20X6	182	553
20X7	182	560
20X8	182	553
20X9	182	553

Table B

The effect on the taxpayer can be significant while the overstay may appear to be a trivial matter. As the Revenue authorities become more aggressive in their tax collection, attention needs to be paid to every detail as illustrated in the commentary above.

"As a result of the additional stay in South Africa of 7 days in 20X4 and 20X6 the retiree becomes potentially liable to tax in South Africa on his worldwide receipts and accruals rather than only on those from a South African source for the 20X6, 20X7, 20X8 and 20X9 years of assessment".

The example discussed above illustrates the danger of overstaying ones welcome and which could bring consequence not contemplated while you languish in the South Africa sunshine.

8.14 Emigrants who regularly return to South Africa

Former residents, who emigrate but regularly return to have a holiday or visit family or to conduct business in South Africa, also face the danger of falling foul of the physical presence test and having their worldwide incomes and accruals subjected to South African income tax.

Our next example illustrates how an emigrant who ceases to be a resident upon emigration, can later become resident under the physical presence test for tax years after the year in which he left the country. Our emigrant plans to visit South Africa for the periods shown in Table C below.

Year of Assessment	Period present In South Africa	No of days present	Total days present in tax year
20X2	1 Mar – 31 Mar 20X1 1 July – 31 Aug 20X1	31 62	93
20X3	1 July – 31 July 20X2 1 Nov – 31 Dec 20X2	31 61	92
20X4	1 July– 31 July 20X3 1 Nov – 31 Dec 20X3	31 61	92
20X5	1 July – 31 July 20X4 1 Nov – 31 Dec 20X4	31 61	92

Table C

Our emigrant leaves South Africa on 31 March 20X1 and therefore ceases to be an ordinary resident from that date. The physical presence test will not apply in his case for the 20X2 year of assessment because he was ordinary resident in the country during March 20X1.

He will still be liable for tax in South Africa on his worldwide income and accruals for the period 1 March to 31 March 20X1. For the rest of the tax year he will only be subject to tax on the source and deemed source receipts and accruals from a South African source.

"It should be noted that the 'physical presence' test does not apply to a person who is ordinary resident in the Republic in the year of assessment. This is because the physical presence test applies only to a person who is not at any time ordinary resident in the Republic," Kolitz (2001) points out.

Therefore, when you emigrate you are ordinary resident for the tax year prior to your departure which means the physical presence test does not apply to that year of assessment because it only is applicable to taxpayers who at *any time* were not ordinary resident in the country. In year 20X3 our emigrant will no longer be ordinary resident and will be tested against the physical presence test. The position is as in Table D below.

Year of Assessment	**Days physically in RSA**
20X3 (current)	93
20X2	93
Two prior years (each)	365

Table D

Our emigrant will be present in South Africa for more than 91 days in the current year of assessment, 91 in each of the three prior years of assessment and 549 days in aggregate in the three prior years and will therefore meet the requirements of the physical presence test.

"He will therefore become a resident of South Africa with effect from 31 December 20X2, the day on which he will have been physically present in the current year of assessment for more than 91 days. The emigrant will therefore be potentially liable for tax in South Africa on his worldwide receipts and accruals between 31 December 20X2 and 28 February 20X3".

"For the remainder of the year of assessment, he will be liable to tax in South Africa only on his receipts and accruals from a South African source or a deemed South African source", Kolitz (2001) cautions.

In tax year 20X4 our emigrant will no longer be ordinary resident in South Africa and the physical presence test will be applicable to his case as illustrated in Table E overleaf.

Year of Assessment	Days present in RSA
20X4 (current)	**92**
20X3	92
20X2	93
Prior year	365

Table E

Our emigrant will have been present in South Africa for more than 91 days in the current tax year, 91 days in each of the three prior tax years and 549 days in aggregate in the three prior tax years and will thus meet the requirement of the test with effect from 31 December 20X3, the day on which he will have been physically present in the current tax year for more than 91 days.

Again our emigrant will be liable to tax on his worldwide receipts and accruals for the period 31 December 20X3 and 28 February 20X4 but for the remainder of the tax year he will be subject to the "source" and "deemed source" rules.

Year of Assessment	Days present in the RSA
20X5	92
20X4	92
20X3	93
20X3	93

Table F

In tax year 20X5 our emigrant will again be no longer ordinary resident in South Africa and the physical presence test will again apply in his case. The position is as follows and depicted in Table F on the previous page.

Our emigrant will have been present in South Africa for more than 91 days in the current tax year, 91 days in each of three prior tax years but will not have been present for more than 549 days in aggregate in the prior three years. Consequently, he will not meet the physical presence test and will not be a resident under the ordinary residence or physical presence rules.

"From 1 March 20X4 he will be liable to tax in South Africa only on his receipts and accruals from a South African source or a deemed South African source", Kolitz (2001) explains.

"If the emigrant arranges to be physically present in South Africa for 91 days or less in 20X2 (the year of emigration), the more than 91 day requirement for each of the three prior years of assessment will not be met in years 20X3, 20X4 and 20X5 and he will continue to be taxed as a non-resident", Kolitz (2001) concluded.

Chapter Nine

Residence and service contracts

9.1 Introduction

In the case of residents or ordinary residents, the position is clear-cut. You are liable for tax in South Africa. For foreigners the position is somewhat different. The dilemma facing a foreign entity wishing to deploy staff to be involved in its South African establishment is how that person should be employed, the taxation consequences and Double Tax Agreements which may come into contention, states Broomberg (2004).

Broomberg (2004) states that when a foreign entity employs someone to work in their South African establishment, the question arises as to whether that person should be remunerated by their local subsidiary or by the foreign company retaining the person's services on an independent contractor basis.

He adds that the foreign contractor in turn must decide whether to render his services in South Africa as an independent contractor or to be employed by a foreign entity that he himself sets up either in South Africa or in the country from which he operates.

9.2 Remuneration

The Tax Library (2004) states that the worldwide income of residents is subject to income tax and so too the local income of non-residents, unless some exemption is contained in a Double Tax Agreement between South Africa and the country of the non-resident. A director of a company, who is a non-resident, is also taxable on director's fees earned for services rendered in South Africa.

Income earned outside South Africa by a "resident" or "ordinary resident" is taxed just as income earned within the country is. Previously they were subject to the deemed source regime covered by s 9(1)(d) and s 9(1)(d)(bis), the Tax Library (2004) explains. However, there is some relief in the form of an exemption for income earned which has been specifically exempted in terms of s 10(1(o) of the Act which has, since the advent of worldwide income falling within the tax net, being expanded to cover all remuneration.

This exemption in terms of the revised Act covers:

- "The salaries of any officer or crew member of a ship engaged in the international transportation for reward of passengers or goods or is engaged in prospecting, if such person is outside the Republic for periods exceeding 183 days in aggregate during the year of assessment; or

- Any person in respect of services rendered outside the Republic for or on behalf of any employer if such person was outside the Republic for periods exceeding 183 full days in aggregate during any 12 month period commencing or ending during the year of assessment and for a continuous period exceeding 60 full days during the 12 month period."

The operative words in the above exemption are "rendered on behalf of an employer" says Broomberg (2004) and are often overlooked by the taxpayer when applying the exemption criteria mentioned above. No exemption will apply in respect of residents who are self employed or professional persons and who fall within the ambit of the 183-day test, as the operative words, as previously stated, are "rendered on behalf of an employer," he cautions.

Broomberg (2004) puts it thus: "It is important to note that the provisions of s 10(1)(o) only applies in relation to remuneration derived from an employer and will accordingly not apply in relation to income derived by independent contractors. It will be far more beneficial from a South African tax perspective for an independent contractor to in fact render his/her services abroad on the basis of being an employee".

Mitchell, L., (2001) in his paper *"Working Overseas"*, warns overseas workers: "Once the stay by the resident outside the Republic exceeds a year, a second 12-month period would commence and for the exemption to be again available, another period of more than 60 days would have to be spent outside the Republic".

"In terms of s 9(1)(e), no exemption from income tax will be applicable to South African residents who are employed in the national or provincial spheres of government, any local authority or any public entity if 80 per cent or more of the expenses of these entities are defrayed from funds voted by Parliament", the Tax Library (2004) states.

However, a non-resident who is employed by such entities to render services outside South Africa will be exempt from South African income tax on the remuneration for the services rendered, if the remuneration is taxed in his or her country of residence, and the foreign tax is not paid on his or her behalf by the employing entities, the Tax Library (2004) explains.

9.3 Foreign employees

A foreign enterprise will be deemed to have a permanent establishment in South Africa if any person, whether a resident of a foreign country or a local resident acts on its behalf and such person habitually exercises an authority in South Africa to conclude contracts in the name of the foreign enterprise.

Broomberg states: "Obviously from the contractual or economic point of view, this issue will generally represent a difference of mere form; but it may alter substantially the tax consequences both for the individual rendering the service and the person on whose behalf he may be rendering the services".

Broomberg (2004) goes on to say that it will be generally unwise for an employer to create a "permanent establishment" in the foreign country. Permanent presence in the foreign country will be viewed by the revenue authorities as creating a permanent establishment and the appointment of a truly independent contractor or agent or the creation of a subsidiary company in the foreign country is the correct step to take.

In terms of current legislation, a foreign enterprise will be deemed to have established a "permanent establishment" in South Africa if its representatives, whether residents or non-residents, habitually are allowed to enter into contracts on behalf of their foreign masters and if a permanent establishment exists that entity will be subject to South African tax on its permanent establishments receipts and accruals, Broomberg (2004) warns.

"More recently double taxation agreements have introduced a further inclusion in the meaning of 'permanent establishment' that has an important implication for the provision of services across borders. Thus for example, the SA/ USA DTA (article 5(2)(k)) provides that a resident of one contracting state will be regarded as having a 'permanent establishment' in the other state if it furnishes services in the other state 'through employees or other personnel; engaged ... for (that) purpose", Broomberg (2004) points out.

He goes on to say that the foreign employee who renders work temporarily in South Africa will only be liable for tax in South Africa on income earned from a South African source or deemed source. "The question of source has been well canvassed in the South African courts and it is settled law that the source of income derived from labour is located where the services are rendered", he concludes.

In ITC 837, (1957) 21 SATC 413, the presiding officer, Herbstein J., summarised the position on p417 as follows: "In the case of personal services the originating cause, i.e. the source of the income resulting therefrom is 'the work the taxpayer does to earn it'. The next problem is to locate that source and in the case of personal services, the location of the source is the place where the services are rendered".

In Shein's case *supra*, the court was faced with a situation where the taxpayer who resided in Rhodesia had assumed the management of a business in Botswana. Initially the taxpayer resided in Botswana, but then appointed a manager (at his own expense) to run the business and relocated to Rhodesia which from that point forward was his permanent abode.

The question facing the court was where the source of the income was.

Commenting on this case, Broomberg (2004) said: "In the event, the decision of the court turned on the nature of the employment. In particular the court held that services can be rendered merely by accepting responsibility; and that responsibility for a business is undertaken at the place where the business is situated, in this instance in Botswana. It followed that the taxpayer was not liable for tax in Rhodesia".

The strategic value of this decision, says Broomberg (2004), is obvious.

Bloomberg continues, "A provision to be found in most DTAs allows South Africa to impose tax on that employee's income in certain circumstances. Where the foreign employee is in South Africa for a period not exceeding 183 days in aggregate in the fiscal year concerned, and he is employed by a resident of the other contracting state, and his income is not to be borne by a permanent establishment or fixed base which the foreign employer has in South Africa, South Africa will generally not be entitled to impose tax on the employee's income".

"The draftsman wishing to make use of this 183-day tax free window of opportunity must, therefore, ensure that all these requirements are met", Broomberg (2004) advises.

9.4 Foreign independent contractors

Different rules are applicable to independent foreign contractors rendering services in South Africa on a temporary basis. The 183-day DTA rule does not apply to independent contractors. Instead, says Broomberg (2004), South Africa is generally prohibited from collecting tax on the foreign contractor in terms of other Articles in the double taxation agreements.

"However, if the contractor has a fixed base regularly available to him in South Africa for the purposes of performing his services, South Africa may impose tax on so much of his earnings as are attributable to that fixed base", the authors warn. The tax planner should always consult the relevant DTA to ascertain whether specific guidelines have been included with that country's DTA with South Africa, he advises.

9.5 Diplomatic representatives

Representatives of foreign governments on the other hand although being resident in South Africa in terms of the various residency tests are exempted from paying tax in terms of s 10(1)(c)(iii) provided they are not "ordinary resident" in South Africa. The domestic entourage of such official is also exempt in terms of s 10(1)(c)(iv).

This exemption has however come under the scrutiny of the courts in ITC 327, (1935). 8 SATC 254 (U). The appellant in this case had held office in the Union as South African Commissioner for a Board established under an Ordinance of a British Colony for the purpose of fostering the demand for the products of that Colony. Under this Ordinance, the Board has been established as a body corporate with perpetual succession and has been given power, *inter alia*, "to appoint, employ, remunerate and control its own officers and to direct and decided all matters connected with the administration of its own affairs".

Appellant's appointment as the South African representative of the Board was for a term of years and subject to the terms of a contract between him and the Board. His assumption of the appointment was advised by the Governor of the Colony to the Minister of External Affairs of the Union, who was asked to afford to appellant "such official assistance and recognition as may be possible."

Under these circumstances appellant claimed that he was entitled to exemption from taxation in the Union on the grounds that his emoluments were those of an official of the Colonial Government stationed in the Union for the purpose of carrying out his duties as such.

The court held on p255, dismissing the appeal and confirming the assessment, that in view of the fact that the Board was given power under its constituent Ordinance to appoint, employ, remunerate and control its own officers independently of any control by the Government of the Colony, appellant could not be regarded as holding office in the Union as an official of that Government and so be entitled to exemption.

What this case has laid down is that foreign nationals employed by their governments should be employed by their respective governments and not through other entities established by such governments e.g. Boards of Trade, Aid projects, etc., Broomberg (2004) points out.

9.6 South Africans working abroad

As South Africa operates on a residence base tax system, South Africans working abroad will be subjected to tax on their worldwide income provided they fall under the category of "residents" or are "ordinarily resident" in South Africa during the relevant tax assessment year, Broomberg (2004) advises.

Section 10(1)(o) of the Income Tax Act has, however, provided some relief for those persons who are employees and offer their services abroad on behalf of an employer. Initially this section of the Act only applied to crew of ships engaged in international transportation or oilrig workers operating outside the Continental shelf.

Broomberg (2004) explains that with the advent of worldwide taxation this section of the Act was expanded to include "any remuneration" as defined in the 4^{th} Schedule in respect of services rendered outside South Africa provided the taxpayer was outside the country for a total of at least 183 days of which 60 days must have been continuous. "The 183-day rule does not apply to a tax year, but to any period of 183 days the taxpayer was out of the country", the authors state.

Bloomberg (2004) warns that it should be noted that self-employed persons, professionals and sole proprietors do not qualify under the S10(1)(o) exemption. Where a professional person accepts an overseas post for a period in excess of six months they should insist on being engaged as an employee to take advantage of the concession discussed above.

Mosupa, F., (2001) writing on *"Who pays which taxman now?"* says it is important to note that the fact that the payroll administration of an individual takes places outside South Africa, is not sufficient to exempt such individual from local income tax liability.

"As tax laws in many countries are diverse, individuals should ensure that any transaction is carefully planned to minimize the effect of taxation", he advises.

Chapter Ten

Residence and other juristic entities

10.1 Introduction

Persons other than natural persons are dealt with differently by the South African Revenue Services (SARS) and by local legislation. The same applied in other tax dispensations. In South Africa, SARS have issued a very comprehensive guideline on this question to clarify their stance of the question of "residence" for juristic personae. Similar guide publications have been published by the other Revenue authorities covered by this study.

10.2 The situation in South Africa

SARS Interpretation Note 6, (2002) *"Resident: Place of effective management (persons other than natural persons)"*, points out that the Revenue Laws Amendment Act, 2000 (Act No. 59 of 2000) introduced a definition of "resident" in section 1 of the Act, which included the term "place of effective management" as one of the tests to determine the residence of a person other than a natural person.

The inconsistent use of the concepts "managed and controlled", "managed" or "controlled" and "effectively managed" was addressed simultaneously and a more uniform approach is now followed in the Act. "The reference to 'managed or controlled' in Practice Note 7 dated 6 August 1999, Para 1.1.3, is therefore no longer applicable", Interpretation Note 6 (2002) advises.

Because of this definition, a person, other than a natural person, which has its place of effective management in the Republic will be regarded as a "resident" as defined. The effect hereof is that such person will be subject to income tax on its worldwide income, i.e. income derived within and outside the Republic.

"It is, however, important to note that a person other than a natural person is also a resident if it is incorporated, established or formed in the Republic. This Note, therefore, only deals with the 'place of effective management' test to determine the residence of a person, other than a natural person", Interpretation Note 6 (2002) states.

"In terms of Para (b) of the definition of 'resident' in section 1 of the Act, the word 'resident' is defined as a 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. An international headquarter company is, however, excluded", Interpretation Note 6 (2002) says.

"The term 'place of effective management' is not defined in the Act and the ordinary meaning of the words, taking into account international precedent and interpretation, will assist in ascribing a meaning to it. The term 'effective management' or 'effectively managed' is used by various countries throughout the world, as well as by the Organisation for Economic Co-operation and Development (OECD) in its publications and documentation", the SARS Note states. However, this term does not have a universal meaning, and the various countries and the members of the OECD have attached different meanings to it.

Huxham (2004) points out that a person, other than a natural person, will be treated as a "resident" if it is incorporated in South Africa, or is established in the Republic or is formed in the Republic or has its place of effective management in the Republic.

The authors point out further that this definition is very wide because any one of the conditions mentioned need only apply. "The aspect of the definition which is likely to create uncertainty, is the question of what constitutes 'effective management'," Huxham states.

10.3 The meaning of "place of effective management"

The concept of effective management is not the same as shareholder-control or control by the board of directors. "Management" focuses on the company's purpose and business and not on the shareholder-function.

"In order to determine the meaning of 'place of effective management', one should keep in mind that it is possible to distinguish between the place where central management and control is carried out by a board of directors; the place where executive directors or senior management execute and implement the policy and strategic decisions made by the board of directors and make and implement day-to-day/regular/operational management and business activities and the place where the day-to-day business activities are carried out/conducted", Interpretation Note 6 (2002) explains.

The general approach adopted by SARS is that the effective management is the place where the company is managed on a regular or day-to-day basis by the directors or senior managers of the company, irrespective of where the overriding control is exercised, or where the board of directors meets.

"Management by these directors or senior managers refers to the execution and implementation of policy and strategy decisions made by the board of directors. It can also be referred to as the place of implementation of the entity's overall group vision and objectives".

"Management structures, reporting lines and responsibilities vary from entity to entity, depending on the requirements of the entity, and no hard and fast rules exist. It is therefore not possible to lay down absolute guidelines in this regard," the Interpretation Note states.

10.4 Practical application by SARS

If these management functions are executed at a single location, that location will be the place of effective management, says SARS. This location might or might not correspond with the place from where the day-to-day business operations or activities are actually conducted from or carried out.

"If these management functions are not executed at a single location due to the fact that directors or senior managers manage via distance communcation, e.g. telephone, Internet, video conferencing, etc., the view is held that the place of effective management would best be reflected where the day-to-day operational management and commercial decisions taken by the senior managers are actually implemented, in other words, the place where the business operations/activities are actually carried out or conducted", Interpretation Note 6 (2002) states.

"If the nature of the person, other than a natural person, is such that the business operations/activities are conducted from various locations, one needs to determine the place with the strongest economic nexus", Interpretation Note 6 (2002) advises.

10.5 Facts and circumstances

SARS is of the opinion that no definitive rule can be laid down in determining the place of effective management and all the relevant facts and circumstances such as those listed below must be examined on a case-by-case analysis.

Interpretation Note 6 (2002) gives the following guidelines:

- "Where the centre of top level management is located;
- Location of and functions performed at the headquarters;
- Where the business operations are actually conducted;
- Where controlling shareholders make key management and commercial decisions in relation to the company;
- Legal factors such as the place of incorporation, formation or establishment, the location of the registered office and public officer;
- Where the directors or senior managers or the designated manager, who are responsible for the day-to-day management, reside;

- The frequency of the meetings of the entity's directors or senior managers and where they take place;

- The experience and skills of the directors, managers, trustees or designated managers who purport to manage the entity;

- The actual activities and physical location of senior employees;

- The scale of onshore as opposed to offshore operations;

- The nature of powers conferred upon representatives of the entity, the manner in which [those] powers are exercised by their representatives and the purpose of conferring the powers to the representatives."

The above list is not intended to be exhaustive or specific, but serves merely as a guideline, the interpretation note states.

10.6 Legislative changes that will affect South Africa

Comprehensive amendments in respect of residence were made during the 2003 Parliamentary session and will mainly become operational from 2004 i.e. the tax year ending February 2005 or later. The effective date for the implementation of most of the amendments is 1 July 2004 and will apply to any assessment for any year after this date.

Huxham (2004) lists the amendments as follows:

- "The definition of 'designated country' and 'qualifying statutory rate' are deleted;

- The definitions of 'international headquarters company' is deleted and reference is made to the term in the definition of resident, is deleted;

- S 9F and s 10(1)(kA) which effectively provided for an exemption in respect of foreign branch profits in a designated country, are deleted;

- S 9E which deals with the taxation of foreign dividends is deleted and all references to s 9E in other section of the Act are deleted;

- A definition of 'foreign dividend' is added to s 1 of the Act. A foreign dividend is defined as 'any dividend received by or which accrued to any person from a foreign company as defined in section 9D';

- Gross income Para (k) is amended to include all dividends in gross income. Furthermore the provisions dealing with distributions by a portfolio of a collective investment scheme [unit trust] which were previously contained in s 9E are added to Para (k);

- Section 9D (controlled foreign companies) is amended by the addition of a provision which enable residents, who hold between 10% and 25% of the participation rights in a foreign company which is not a CFC, to elect that the company be treated as a CFC. Furthermore an election can be made that the exemptions in s 9D(9) do not apply. These provisions effectively enable such persons to use an imputation system in respect of foreign dividends as was previously the case in s 9C;

- Section 10(1)(k) is amended to exempt from tax foreign dividends received by residents who hold more than 25% of the equity share capital in the foreign company declaring the dividend;

- Certain of the s 9E(7) exemptions are now included in s 10(1)(k). For example a foreign dividend is exempt if more than 10% of the shares are held by South African residents and the company is a listed company;

- Interest paid by a company in producing foreign dividends is deducted under s 11(bC) which is similar to the provisions previously contained in s 9E(5A); and

- In terms of s 11(r) a person can elect to deduct the withholding tax on a foreign dividend. If such an election is made no s 6 *quat* rebate can be claimed in respect of such withholding tax".

Chapter Eleven

Capital Gains Tax (CGT)

11.1 Introduction

Residents and non-residents are taxed on the capital growth of certain assets since the imposition of Capital Gains Tax (CGT) in South Africa and the promulgation of the Eight Schedule to the Income Tax Act in 2001. The effective date for CGT was 1 October 2001 and effects taxpayer's worldwide assets. The tax is calculated only on the capital appreciation of one's assets after the October 2001 inception date and not on the base value of the asset, writes Ernst & &Young (2004) in their "*Practical Guide to Capital Gains Tax*".

The question which needs consideration is whether in South Africa the growth is real or inflationary and whether there is justification for such a tax. Some experts have said CGT is a hampering element affecting a country's growth while others have warned against the ravages of inflation when imposing such a tax.

The United States Federal Reserve Chairman, Alan Greenspan, (1997), giving evidence before the Senate Banking Committee, said: "The point I made at the Budget Committee was that if the capital gains taxes were eliminated, that we would presumably, over time, see increased economic growth which would raise revenues for the personal and corporate taxes as well as the other taxes we have. The crucial issue about the capital gains tax is not its revenue-raising capacity. I think it is a very poor tax for that purpose. Indeed, its major impact is to impede entrepreneurial activity and capital formation. While all taxes impede economic growth to one extent or another, the capital gains tax is at the far end of the scale. I argued that the appropriate capital gains tax rate was zero".

The Asprey Report (1975) when dealing with CGT said the fundamental case for such a tax rested upon equity and that it was almost universally agreed that capital gains when real, and not the result of inflation, are so closely linked to income in its everyday sense, that equity required that they be taxed as income.

"When capital gains are untaxed but income gains are, investments in the kinds of asset on which the returns come (or can be arranged to come), in the form of capital appreciation will be made relatively the more profitable. A mis-allocation of resources is therefore likely which the tax serves to correct", Asprey (1975) pointed out.

"Capital gains tax is emerging as an area of high risk across all markets. We are getting feedback from both taxpayers and their agents about the complexities of the capital gains tax system and are working with these groups to make it easier to comply", the assistant commissioner for CGT in Australia, Malcolm Allen, said while addressing a NSW State Legal Conference, in August 2004.

"On the other hand, we are seeing some large capital gains made on property simply not being included in returns. We are also looking at a number of capital gains tax reduction arrangements in the large market. At the extreme end of these cases, we are seeing profits of $500 million being publicly reported which then appear as a $500 million capital loss in their tax return", he added.

"As a result, we will be increasing our focus on capital gains tax through the introduction of a Tax Office wide compliance strategy reaching across all of the markets. A particular focus will be in the individuals market. We will also increase our capability to identify capital gains risks, for example, we will make greater use of our data matching capability in areas such as property and share disposals", Allen M., (2004) said.

From the aforegoing it is clear that CGT is an involved tax and not easy to administer, or a very profitable form of taxation. In a South African context it has more of a political benefit than a fiscal one as it requires skilled personnel to administer and police it.

With the promulgation of the Eight Schedule to the Income Tax, South Africa introduced CGT in the country from 1 October 2001. This coupled with the move to a new basis of ascertaining tax liability, made residence status play an important role in determining both CGT and normal income tax liability.

Geach (2001) in *"Capital Gains Tax in South Africa - The Essential Guide"*, points out that CGT does not replace any tax: "It is an additional burden on a taxpayer. All existing taxes remain".

Ernst & Young (2004) explain that "it is not a tax on capital or wealth itself, because it is only gains and not the underlying capital base which is taxed".

South Africa levies income tax on a "residence" or worldwide basis, meaning that every South African "resident" is subject to South African income taxation on income and capital gains wherever in the world they accrue. Non-residents on the other hand, are taxed on the "source" basis.

11.2 Residence rules

The rules which are used to determine residency for income tax purposes are also applicable to CGT. Ernst & Young (2004) explain the position as follows: "There is therefore a qualitative rule of 'ordinary residence' which can be overridden positively by a quantitative time-based rule which in turn can be overridden by a negative quantitative rule".

The authors go on to state the following practical points as being apparent:

- "If the pattern of a person's existence indicates that he is ordinary resident in South Africa, the time-based positive and negative rules are irrelevant;

- A presence of 91 days or less every four years will remove any possibility of the time-based residence rule applying although the ordinary resident rule may continue to apply depending upon the circumstances; and

- Where a person emigrates in a year and loses ordinary resident status he will be non-resident for the remainder of that tax year irrespective of aggregate and *de minimus* time-based rules, but in the tax years subsequent to the year of emigration, the time-based rules must be considered and may apply".

While certain income is exempted in terms of the 183 day exclusion offered by s 10(1)(o) this is not applicable to an capital gains made by the taxpayer while outside South Africa during that period, according to the 8th Schedule to the Act.

According to the Tax Library (2004), it is the responsibility of a taxpayer to establish the base cost of an asset disposed of. "In the event that this cannot be done, then the base cost will be nil or will be limited to so much of the base cost as can be established. It is therefore essential to develop a procedure for ensuring the retention of all documentation which verifies the expenditure incurred on assets as described below," the Tax Library (2004) warns.

"While a statement of the historic cost of an asset in the audited financial statements of a company may be acceptable in most circumstances, it must be remembered that original evidence may be necessary in the case of a dispute in court and original documents are much preferred", the Tax Library (2004) cautions.

11.3 Non-Residents

South Africans become non-residents for tax purposes on emigration and their assets are deemed to have been disposed of the day before emigration. In the case of a person who is a non-resident, only certain assets situated in the Republic can give rise to taxable capital gains.

The Eight Schedule to the Income Tax Act provides that only certain assets of non-residents situated in South Africa are subject to CGT. These are:

- "Immovable property or an interest or right in immovable property held by the non-resident; or
- Any asset of a 'permanent establishment' through which he carries on business in South Africa".

A 'permanent establishment' is defined in accordance with the meaning of that term in the *"Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development"* (OECD) which in essence, covers branches, offices, factories, construction sites, mines and similar establishments, as well as certain dependent agents acting on behalf of the non-resident, the Tax Library (2004) explains.

According to the Tax Library, (2004) a "permanent establishment" essentially, covers branches, offices, factories, construction sites, mines and similar establishments, as well as certain dependent agents acting on the non-resident's behalf.

Ernst & Young (2004) point out a situation which may prove expensive for non-residents of South Africa, namely, where fixed property which is used for residential purpose, as an example, now becomes a business asset of the non-resident's permanent establishment or vice versa.

"In that event, despite the fact that there is no change of ownership or any logical CGT event, there is nonetheless a trigger arising from a deemed disposal which in both cases may result in a CGT liability," the Tax Library (2004) states.

In determining whether a non-resident has an interest in immovable property, ownership via a company or other entity is taken into account.

"For example, where a non-resident holds (alone or together with a 'connected person') at least 20% of the equity or interest in a company, and 80% of the market value of the net assets of that company is attributable directly or indirectly to immovable property (which is not trading stock) in South Africa, then an interest is held in that property by the non-resident", the Tax Library (2004) says.

"It should be noted that the interest can be held 'indirectly', typically through the medium of another company. It is not completely clear whether the company must itself be 'situated' i.e. incorporated, in South Africa. Clearly if the provision extends to foreign companies it will be difficult if not impossible to police but on balance the wording appears intended to apply to foreign companies as well as South African ones", the Tax Library (2004) advises.

11.4 Example

The following example is an extract from the Tax Library (2004):

"A UK resident individual owns 30% of a UK resident company, which in turn owns:

- A UK situate property with a market value of R1 million; and
- His aggregate capital gain for the year is R30 000 less the annual exclusion of R10 000 = R20 000.
- 50% of the shares in a South African company which owns property with a market value of R10 million.

On these facts, the UK resident and the UK company both hold an indirect qualifying interest in the South African property. The UK resident will be subject to South African CGT if he disposes of his interest in the UK company and if the UK company disposes of its interest in the South African company, then that gain will also be subject to CGT".

11.5 CGT triggers

CGT is triggered by the disposal of an asset which is defined in the Eight Schedule to the Income Tax Act as "any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset". It should be noted that a disposal is not necessarily a bilateral transaction and can be triggered by an Act of God (an event), a conscious action (typically the act of entering into a transaction), the failure to do something (forbearance) or the action of a third party (through the operation of law). The 'transfer', destruction ('extinction') or alteration ('variation') of an asset can easily be understood to result in a CGT event if consideration is received in respect of that event," the Tax Library (2004) points out.

In the case of CGT, it is expressly provided in the Act that the tax applies to the disposal of 'any asset of a resident'. According to the Act, a "resident" can be a natural or a juristic person. Therefore, if a South African resident – being an individual, company or other entity - earns capital gains in South Africa and, say, suffers capital losses on assets owned abroad, those must be combined for purposes of calculating the taxpayer's net capital gains/loss for the year, the Tax Library (2004) explains.

11.6 No set-off of net losses

McAllister D. S., (2002) in the *"Draft Comprehensive Guide to Capital Gains Tax"* points out that although the net taxable gain of a person is included in taxable income, any aggregate capital loss cannot be included in any way in the eventual tax calculation. Instead, that aggregate loss forms an assessed capital loss which is carried forward indefinitely and can be set off against capital gains arising in later years.

"Losses on foreign currency assets are not ring-fenced and can be set off against South African gains. An income tax loss can, however, be offset against a taxable capital gain", McAllister (2002) states.

11.7 How CGT gains or losses are accounted for

According to Ernst & Young (2004), capital gains are added to the resident taxpayer's normal income before computing his tax liability. In the case of natural persons it is 25% of the gain and in the case of juristic entities and trusts, it is 50% of the gain. Special trusts are treated, they state, at the same rate as natural persons. However, capital losses are not deducted from normal income but can only be offset against capital gains. Where capital losses occur they can be carried forward to future years to be written off against future capital gains.

"Unlike the case with normal tax where foreign income losses cannot be offset against South African income, foreign capital losses can be offset against South African capital gains," Ernst & Young (2004) point out.

11.8 Non-resident trusts

Non-resident trusts have no liability for CGT in South Africa except in the case of immoveable property or business assets, says McAllister (2002). Ernst & Young (2004), point out that distributions of capital to a resident beneficiary which represents earlier gains in the trust are subject to CGT to that extent in the beneficiary's hands.

"Where a non-resident trust has been funded by a gratuitous dispositions from a South African resident, that resident will have all gains of the trust attributable to his funding, subjected to CGT in his hands", the authors state.

11.9 Companies

McAllister (2002) explains that when a company or other juristic entity including a trust (except a special trust) makes a capital gain, 50% of that gain is subjected to CGT in the hands of the entity concerned. According to Ernst & Young (2004) some actions in these entities will trigger CGT events. They are:

- "Issue of shares in return for cash or kind – no CGT for the company but their acquired price is the base cost for the individual;
- Declaration of a normal cash dividend
- Distribution of an asset to a shareholder whether called a dividend in specie or not – deemed disposal by the company at market value and CGT arises upon the net gain;

- Disposal of an asset to a "connected" person and especially to another company within the same group – deemed disposal at market value and CGT arises on net gain even though the group as a whole have not realised a gain;

- Dividends in specie upon liquidation of the company – company has disposed of all assets at market value and CGT payable on net gain; or the

- Revaluation of assets by the company – the difference between the old book value and the new value, is the gain made which is subject to CGT".

Chapter Twelve

Double Taxation Agreements

12.1 Introduction

Double taxation agreements are entered into between countries to regulate how they will tax income of citizens of contracting states in their countries to avoid taxing the person twice for the same income and to combat tax avoidance. These agreements are important who foreign workers working in a country other than the country where they are ordinary resident.

South Africa has entered into comprehensive double tax agreements over many years, with the vast majority since 1994. In recent years the worldwide trend has been towards the use of the 2002 model convention developed by the Organisation for Economic Co-operation and Development (OECD), and this model, in its various forms, has been utilised for most of the agreements entered into, but frequently with unique variations arising out of the peculiarities of each country's tax system and economic objectives, the Tax Library (2004) states.

The United States does not normally follow this model. The treaty with the United States was signed in February 1997 and became effective from 28 December 1997.

Comprehensive agreements have been entered into between South Africa and the following governments: Algeria, Australia, Austria, Belgium, Botswana, Canada, China (People's Republic), Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Grenada, Hellenic Republic, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Korea, Lesotho, Luxembourg, Malawi, Malta, Mauritius, Namibia, Netherlands, Norway, Pakistan, Poland, Romania, Russian Federation, Seychelles, Singapore, Slovak Republic, Swaziland, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Uganda, United Kingdom, United States of America, Zambia and Zimbabwe. An agreement was also concluded with New Zealand at the end of September 2004.

12.2 Objectives of double taxation agreements

The objectives of the agreement are threefold, namely—

(a) The avoidance of double taxation;

(b) The prevention of fiscal evasion. Both of these first two objectives are set out in the preamble to the agreement; and

(c) The exchange of information. This is perhaps not as important, but is subsidiary to the major two objectives.

Article 25 of the Agreement reads as follows: "The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation there under is not contrary to this Convention, in particular, to prevent fraud and to facilitate the administration of statutory provisions against legal avoidance".

"The exchange of information is not restricted by Article 1 of this Convention. Any information received by a Contracting State shall be treated as secret and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions".

The OECD recently recommended that an amendment be made to the model agreement by adding a new paragraph to Article 26 to prevent "domestic tax interest requirements from hindering exchange of information". A domestic tax interest requirement refers to laws or practices that would prohibit one treaty partner from obtaining or exchanging information requested by another treaty partner unless the requested treaty partner had an interest in such information for its own tax purposes.

"The new paragraph clarifies that Contracting States should obtain and exchange information irrespective of whether they also need the information for their own tax purposes", the proposed amendment reads.

"The confidentiality rules in Article 26 have also been changed so as to permit disclosure of information to oversight authorities. This change reflects a growing trend in OECD countries. Oversight authorities are authorities that supervise tax administration and enforcement authorities as part of the general administration of the government of a Contracting State. A new paragraph has also been added to ensure that ownership information and information held by banks, financial institutions, nominees, agents and fiduciaries can be exchanged. A new paragraph 5 prevents bank secrecy from being used as a basis for refusing to exchange information", the OECD's website states.

12.3 Taxes subject to the agreement

The taxes which are the subject of the agreement are separately set out in respect of the two contracting states. In the case of South Africa, these taxes are the following:

(a) Normal tax;

(b) Secondary tax on companies; and

(c) Withholding tax on royalties.

In the case of the United Kingdom, the taxes subject to the agreement are the following:

(a) Income tax;

(b) Corporation tax; and

(c) Capital gains tax.

The Agreement applies to any identical or substantially similar taxes imposed after the agreement was entered into, in addition to or in place of the existing taxes. Although capital gains tax is mentioned separately in relation to the United Kingdom, it is not in relation to South Africa, as it forms an integral part of normal tax.

12.4 Residence in terms of the agreement

The mechanism of the agreement is based upon laying down certain rules which one jurisdiction must follow in taxing the residents of the other jurisdictions, the Tax Library (2004) states. It goes on to say: "Therefore it is essential, as a first step in applying the agreement, to determine the residence of a taxpayer for the purposes of the agreement. The rules prescribed ensure that for this purpose a taxpayer can be regarded as a resident of only one of the jurisdictions".

"In the double tax agreement between the governments of South Africa and the United Kingdom, [for example], the term 'resident of a Contracting State' means any person who, under the law of that State, is liable to taxation therein by reason of domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. Obviously this broad rule can lead to a taxpayer being categorised as a resident of both States, and accordingly further rules, generally referred to as 'tiebreaker' rules, are laid down to deal with this situation".

"In the case of an individual who fails to be regarded as a resident of both states on the general principle, his status is determined in accordance with the following rules:

> "(a) He is deemed to be a resident of the contracting state in which he has a permanent home available to him if he has a permanent home available to him in both States, he is deemed to be a resident of the State with which his personal and econo-

mic relations are closest (referred to for the purposes of the agreement as 'his centre of vital interests'). The determination of this centre of vital interests is a question of fact which may not always be possible, as the ensuing provisions recognise";

(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 is deemed a resident of the State in which he has a habitual abode;

(c) If he has an habitual abode in both States or in neither of them, he is deemed to be a resident of the State of which he is a national; and

(d) If he is a national of both States or of neither of them, the taxation authorities of the two States determine the question by mutual agreement".

In the case of a company or any other taxpayer other than an individual, the question is somewhat simpler, the Tax Library (2004) explains. Where such a taxpayer is by reason of the general rule regarded as a resident of both States, that taxpayer is deemed a resident of the State in which its place of effective management is situated. This accords with the "source" principle of taxation.

"Once again this is a question of fact. In most cases the place of effective management of a company will be the place where the top executive manager meets and takes decisions, but this will not always be the case. There is also no necessary correlation between the place of incorporation of a company and the place of effective management", the Tax Library (2004) comments.

It goes on to say that "In the case of a trust, all the facts of the case must be looked to. It is important to note that the criterion here is not where the assets or the bulk of the assets are deployed or used, or where the day-to-day business is carried on, but the place of effective management, which may be removed in particular cases from the place where the assets are used or the day-to-day business is carried on and which may also be distinct from the place where the board of directors meets". Once the residence of a taxpayer has been established, the remainder of the provisions of the agreement can be applied.

12.5 Business profits

"The business profits of an enterprise of one State cannot be subjected to tax in the other State unless that enterprise carries on a business in the other State through a permanent establishment established in that other State. If the enterprise does carry on a trade or business in this way, the State in which the permanent establishment is situated may tax only those profits which are attributable to the permanent establishment", the Tax Library (2004) explains.

"For this purpose those profits are to be calculated as if the permanent establishment were an independent enterprise carrying on its business at arm's length with the enterprise of which it is a permanent establishment.

12.6 Dividends

The agreement restricts the taxation of dividends in the state in which the company paying the dividends is a resident. The rules applying to dividends, according to the Model Agreement, are as follows:

> "(a) Dividends which are paid by a company which is a resident of one state to a resident of the other state may be taxed in that other state;
>
> (b) However, such dividends —
>
> > (i) Shall be exempt from tax in the Contracting State of which the company paying the dividend is a resident if the beneficial owner of the dividends is a company which is a resident and controls, directly or indirectly, at least 10% of the voting power of the company paying the dividends;
> >
> > (ii) In any other case the dividend may also be taxed in the Contracting State at which the company paying the

dividends is a resident, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 15% of the gross amount of the dividend;

(c) The rules set out in (a) and (b) do not apply if the recipient of the dividends, a resident of one of the states, has in the other state, in which the company paying the dividends is resident, a permanent establishment with the business of which the shareholding concerned is effectively connected. In this case the dividends are regarded as part of the business profits of that permanent establishment;

(d) Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State;

(e) The rules set out above do not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid to take advantage of this Article".

The requirement of beneficial ownership 'makes plain that the State of source is not obliged to give up taxing rights over dividend income merely because that dividend income was immediately received by a resident of a State with which the State of source had concluded a convention, the Tax Library (2004) points out.

12.7 Interest

Interest is defined in the Model Agreement as meaning income from the following:

> "(a) Government securities;
>
> (b) Bonds or debentures; and
>
> (c) Other debt claims of every kind (whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits).

"The term 'interest' excludes any item which is treated as a dividend. The provisions applying to interest are as follows:

> (a) Interest arising in one State and paid to a resident of the other State shall be taxed only in that other State, if such resident is the beneficial owner of the interest;
>
> (b) This rule does not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State, through a permanent establishment. In such case, the provisions of Article 7 (business profits) apply;
>
> (c) The provisions of this Article do not apply if it was the main purpose or one of the main purposes of any person concerned with the erection or assignment of the debt claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment. In this case the interest is treated as part of the industrial or commercial profits of that permanent establishment;
>
> (d) where, as a result of a special relationship between the payer and recipient of the interest, or between both of them and some other person, the amount of interest paid, having regard to the debt claim for which it is paid, exceeds the amount which would have been agreed upon between payer and recipient in

the absence of that relationship, only the amount which would have been paid is treated as interest for the purpose of the provisions described above. The excess part of the payment remains taxable according to the laws of each Contracting State. The existence or otherwise of a special relationship, and the exact boundaries of the meaning of that phrase, which is not defined, is a question of fact".

12.8 Royalties

Royalties are defined in the Model Agreement as meaning payments of any kind received as a consideration for the use of, or the right to use, the following:

"(a) any copyright of literary, artistic or scientific work, including cinematograph films and films, tapes or discs for radio or television broadcasting;

(b) Any patent, trademark, or design;

(c) Any model, plan, secret formula or process; or

(d) Information concerning industrial, commercial or scientific experience".

The above rule does not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State on which the royalties arise, though a permanent establishment would then apply.

"Where, as a result of a special relationship between the payer and recipient of royalties, or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which paid, exceeds the amount which would have been agreed upon between those parties in the absence of the special relationship, the provisions set out above apply only to this amount", the Agreement states.

"The excess part of the payments remain taxable according to the laws of each Contracting State, due regard being had to other provisions of the convention", the Agreement adds.

12.9 Income from rental

Income from immovable property may be taxed in the state in which it is situated. Income for this purpose, states the Tax Library (2004), means income derived from the direct use, letting or use in any other form of immovable property.

This rule applies also to income from immovable property of an enterprise, and to income from immovable property used for the performance of professional services.

12.10 Capital Gains Tax

Gains derived by a resident from the alienation of immoveable property situated in the other State may be taxed in the other State while gains derived by a resident from the alienation of shares deriving their value or the greater part of their value directly or indirectly from immoveable property situated in the other State or excluding shares quoted on an approved stock exchange may be taxed in that other State, the model agreement points out.

"Gains derived by a resident from the alienation of an interest in a partnership or trust, the assets of which consist principally of immoveable property situated in the other State, or of shares referred to above may be taxed in that other State", the Agreement dictates.

"Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a State has in the other State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State", the Agreement points out.

12.11 Income derived from employment

A number of provisions in the agreement apply to income derived from services rendered. These, the Tax Library (2004) says, may be summarised as follows:

> "(a) Salaries, wages and other similar remuneration derived by a resident of one state in respect of an employment are subject to tax in that state only, unless the employment is exercised in the other state, in which case the remuneration derived from the other state may be taxed in that state;
>
> (b) Notwithstanding the general rule described in (a), remuneration derived by a resident of one state in respect of an employment exercised in the other state may be taxed in the state of residence only if three conditions are met:
>
> > (i) the recipient is present in the state in which he is not resident for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned;
> >
> > (ii) The remuneration is paid by or on behalf of an employer who is not a resident of the state in which the recipient is not resident; and
> >
> > (iii) The remuneration is not borne by a permanent establishment, which the employer has in the state in which the recipient is not resident;
>
> (c) Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State;
>
> (d) Remuneration derived in respect of employment exercised while aboard a ship or aircraft operated in international traffic

may be taxed in the Contracting State of which the enterprise operating the ship is a resident;

(e) Notwithstanding the business profits (Article 7) and income from employment (Article 14) articles of the agreement, income derived by a resident of a Contracting State as an entertainer such as a theatre, motion picture, radio or television artiste and musician, or as a sports -person, from their personal activities as such, may be taxed in the State in which these activities are exercised – see also case ITC 1735 on page 59;

(f) Where such income accrues not to the entertainer or sportsperson but to another person, such activities may be taxed in the State where the activities are exercised (notwithstanding the business profits and income from employment articles);

(g) Payments which a student or business apprentice from one state, who is present in the other state solely for the purposes of his education or training, receives for the purpose of his maintenance, education or training, and who is or immediately before being so present was a resident of the other Contracting State, is exempt from tax;

(h) Remuneration (other than pensions) paid by one state to an individual for services rendered to that state or subdivision or authority in respect of services rendered to the State is exempt from tax in the other state. However, if the individual is not resident in that other state, and is either a national of such State or did not become a resident of that State solely for the purposes of rendering services, the income is only taxable where the services are rendered. The provisions of Articles 14, 15, 16 and 17 of this convention shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof;

(i) Any pension paid by or out of funds created by a Contracting State or a political subdivision or a local authority to an individual in respect of services rendered to that State or sub-division or authority is taxable only in that State. However, if the individual is a resident of, and a national of, that State, the pension is taxable only in that State;

(j) Pensions and other similar remuneration paid in consideration of past employment, and any amounts (other than those referred to in Para (i)) who is a resident of a Contracting State shall be taxable only in that State. The term 'annuity' for this purpose means a stated sum payable periodically at stated times, during life or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth."

The Agreement goes on to provide for contributions borne by an individual who is in employment in a Contracting State to a pension scheme established in and which contributions are tax deductible in the other Contracting State, shall be deducted in the employing State, in determining the individual's taxable income, and treated by the employing State in the same way and subject to the same conditions and limitations as contributions made to a pension scheme in the employing State, provided that:

"(a) The individual was not a resident of that employing State and was contributing to the pension scheme, or to another pension scheme for which it has been substituted, immediately before that individual began to exercise such employment; and

(b) The pension scheme is accepted by the competent authority of that State as generally corresponding to a pension scheme recognised as such for tax purposes by that State".

Contributions to a pension scheme by the enterprise paying the remuneration of that individual does not form part of the taxable income of that individual and is deductible in computing the profits of the enterprise.

12.12 Restricted agreements

According to the Tax Library (2004), restricted agreements, dealing only with shipping and aircraft business income, have been entered into with:

(a) Brazil;

(b) Greece;

(c) Portugal;

(d) Spain.

"These agreements are very short, and in general terms normally exempt from tax in the other States, on a reciprocal basis, the income derived from the business of shipping and air transport in international traffic by an enterprise of one State. However, the wording of the agreements is not consistent, and reference must be made to the particular wording where required", the Tax Library (2004) points out.

12.13 Transfer pricing

As a general rule South African tax laws did not, prior to 19 July 1995, provide for the adjustment of prices merely because transactions have not been concluded on an arm's length basis. This was changed with effect from that date, with the repeal of the then existing s 31, and its replacement by a new s 31 which provided for such adjustment irrespective of whether a double tax agreement covered the situation or not.

12.14 Effect of a double tax agreement

Whatever the situation with a person – whether natural or juristic, is concerned before any tax can be imposed, reference should be made to any existing DTA's between South Africa and the particular country of the person involved.

The position according to Huxham (2004) is as follows:

- "Any person who is exclusively deemed to be a resident of another country for the purposes of the application of a double tax treaty between that country and South Africa, is not a resident as defined;

- The words 'for the purposes of the application' suggest that the person must be subject to the provisions of a treaty i.e. must be seeking relief in terms of a treaty; and

- It is a universal requirement of treaty law that for the purposes of the treaty, a person can only be a resident of one of the countries which are party to the treaty. For this reason the treaties have their own definition of residence".

Chapter Thirteen

Conclusion

The question of residence and its impact on income tax in South Africa and the other dispensations canvassed in this study has been settled law to a large extent, as most permutations of residence and ordinary resident have been thoroughly scrutinized and any vagueness which may have previously existed, have been clarified by the various judgments of the courts.

From this study, it is evident that South Africa has a much more favourable tax dispensation when it comes to "residence" compared with some of the other fiscal dispositions included in this study.

The question of whether residence and its impact on Capital Gains Tax (CGT) will follow the same route of being so vigorously challenged in the courts as did "ordinary resident" and "residence" is open to debate. In none of the fiscal dispensations studied, has the question of residence been as fiercely debated in the courts as was the case with its impact of normal tax.

The South African tax system, compared with other systems, is also more favourably disposed towards residents who work out of the country and for those taxpayers who are in receipt of overseas pensions.

In South Africa, CGT is a relatively new tax and its effect on taxpayer's gains has not been so intrusive that the taxpayer has found it worthwhile to challenge any of the rulings of the revenue authorities or conversely, the revenue authorities have not found it necessary to disagree with their tax paying clients on their interpretation of these concepts.

On the other hand, the revenue authorities also do not have the necessary skills to police this new form of taxation to the same extent as may be the case with normal tax or as the authorities in the other countries studied, have been able to do.

However, as time passes, the acquisition of the necessary skills by revenue will have its effect on CGT, which will no doubt, have a greater influence on the outcome of the capital gains made by taxpayers. What can be expected to come under closer scrutiny in the future will be the valuations placed on assets on 1 October 2001by taxpayers — the effective date of the imposition of CGT in South Africa.

With the elapse of time, it is more likely that SARS may challenge valuations which have not been done on a professional basis and which appear to be out of line with what they perceive values were at the inception of CGT. For instance, the property market was somewhat depressed in 2001, thus rendering relatively low values, whilst in 2004, this same market boomed with prices in many instances rising by more than 34% in the space of a year.

Assets acquired after the CGT inception date will not cause a valuation problem since their acquisition price will be their base cost.

Because taxpayer were given dispensation to file valuations for certain assets by 30 September 2004, the erroneous belief amongst taxpayers is that 2004 values should to placed upon their assets, especially land and buildings. Not only has this created confusion amongst the lay public, but also it has resulted in pressure being placed upon those doing the valuations to affix a substantially higher value on the asset being valued than is appropriate.

It is in these cases where challenges no doubt will in the future arise. Unfortunately, the Act did not specify who could do a valuation, thus leaving the question of the valuation wide open to challenges by anyone who wished to do so.

Had the question of valuations been limited to persons skilled in that field, the outcome may have been different.

South African taxpayers have enjoyed the lowest tax rates in the country's history and the adoption of a residence-based system of taxation has just brought the country into line with its major trading partners.

Bibliography

ALLEN C M. 1971. The Theory of Taxation. Penguin Books

ALLEN, M., 26 August 2004. Address to the NSW State Legal Conference. Available from: http://www.ato.gov.au/large/content.asp?doc=/content/48307.htm&mnu=10923&mfp=001/009. Accessed 10.10.04.

Arendse A., Coetzee E.S.M., Jordaan K., Kolitz M.A., Stein M.L., Stiglingh M. (2004). Silke: South African Income Tax. Durban. LexisNexis Butterworths.

ASPREY K.W., 1975. Taxation Review Committee. Australian Government Publishing Service.

AUSTRALIA. Parliament. 2003. Income Tax Assessment Act No 36 of 1997. Canberra. Government Publishing Service.

AUSTRALIA. Parliament. 1933. Explanatory Note .Canberra. Australian Government Publishing Service.

AUSTRALIA. 2004. Master Tax Guide. CCH Australia

AUSTRALIAN TAXATION OFFICE. 2004. Exempt foreign income. Available from: http://www.ato.gov.au/print.asp?doc=/content/28908.htm. Accessed on 8/08/04

AUSTRALIAN TAXATION OFFICE. 2004. Foreign pensions and annuities. Available from: http://www.ato.gov.au/print.asp?doc=/content/34780.htm. Accessed 9/08/04.

AUSTRALIAN TAXATION OFFICE. 2004. Income from a trust. Available from: http://www.ato.gov.au/individuals/content.asp?doc=/content/20036.htm. Accessed 8/09/04

AUSTRALIAN TAXATION OFFICE. 2004. Residency – the domicile test. Available from: http://www.ato.gov.au/print.asp?doc=/content/36263.htm. Accessed 30/08/2004.

AUSTRALIAN TAXATION OFFICE. Residency – the resides test. Available from: http://www.ato.gov.au/print.asp?doc=/content/36255.htm. Accessed 30/08/2004

AUSTRALIAN TAXATION OFFICE. Residency – the 183 day test. Available from: http://www.ato.gov.au/print.asp?doc=/content/36270.htm. Accessed 30/08/2004

AUSTRALIAN TAXATION OFFICE. Residency – the superannuation test. Available from: http://www.ato.gov.au/print.asp?doc=/content/362712.htm. Accessed 30/08/04

AUSTRALIAN TAXATION OFFICE. Taxation Ruling 98/17. 25/11/1998

AUSTRALIAN TAXATION OFFICE. Taxation Ruling IT2268

AUSTRALIAN TAXATION OFFICE. Taxation Ruling IT2607

AUSTRALIAN TAXATION OFFICE. Taxation Ruling 2650

CHODOROV, F., 1962. Out of Step: The Autobiography of an Individualist. The Devin-Adair Company. New York. pp. 216–2312.

CLEGG. D., 2003. Tax Planning. The benevolent immigrant. Vol. 17. P15

DAVID STRACHAN & TAYLER, 2004. Tax Guide 2004/2005. Durban.

DEPARTMENT OF FINANCE., 2000. Republic of South Africa Budget Review 2000. Pretoria. Government Printer.

EISENSTEIN, L., 1961. Ideologies of Taxation. New York. Ronald Press. p3.

ERNST & YOUNG., 2004. Practical Guide to Capital Gains Tax. 4th edition. Durban. LexisNexis Butterworths.

FRANZSEN., 1970. Commission of Inquiry into the Fiscal and Monetary policy in South Africa. Taxation in South Africa. Second report. RP 86. Pretoria. Government Printer.

GEACH, W. D., 2001. Capital Gains Tax in South Africa – The Essential Guide. 1st edition. Landsdowne. Juta Law.

HM COLLECTOR OF TAXES. IR20. Residents and Non-residents. Available from: http://www.inlandrevenue.gov.uk/leaflets/c12.htm. Accessed 5/09/04.

HUXHAM K. & HAUPT P., 2004. Notes on South African Income Tax. 23rd edition. Cape Town. H & H Publications.

JOOSTE. R., 2001. Tax Planning. Shifting foreign income to escape tax. Vol 15. P55

KATZ. M., 1997. Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa. Fifth Report. Pretoria. Government printer.

KOLITZ. M., 2001. Tax Planning. Taxing the South African Sunshine. Vol. 15. P67:71.

KRUGER, D., SCHOLTZ, W., 2004. Broomberg on Tax Strategy. 4th Edition. Durban. LexisNexis Butterworth.

LEXISNEXIS BUTTERWORTHS. 2004. The Complete Tax Library. Durban. LexisNexus Butterworths.

MARGO. C., 1987. Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa. RP34. Pretoria. Government printer.

MAZANSKY. E., 2001. Tax Planning. Change your mindset. Vol. 15. P.31

McALLISTER D. S., (2002) Comprehensive Guide to Capital Gains Tax. SA Revenue Services. Pretoria.

MITCHELL. L., 2001. Tax Planning. Working Abroad. Vol 15. P.60.

MOSUPA. F., 2001. Who pays which taxman now? The Quarterly Law Review for People in Business. Vol 12. Part 4. p161.

NEW ZEALAND INLAND REVENUE DEPARTMENT. IR257. 2002.Overseas Private Pensions. Available from: http://www.ird.govt.nz/library/publications/geninfo/ir257.pdf. Accessed 11/09/04.

NEW ZEALAND INLAND REVENUE DEPARTMENT. IR258. 2002. Overseas social security pensions. Available from: http://www.ird.govt.nz/library/publications/geninfo/ir258.pdf. Accessed 11/09/04.

NEW ZEALAND INLAND REVENUE DEPARTMENT. 2003. IR292. New Zealand Tax Residence. Available from: http://www.ird.govt.nz/library/publications/generalinformation.html. Accessed 5/9/2004.

NEW ZEALAND PARLIAMENT. 2004. Income Tax Act of 1994

OLIVIER L., 2001. Residence based taxation. Journal of South African Law. Cape Town. Juta

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. 2002. Model Agreement on Exchange of Information in Tax Matters. Available from: http://www.oecd.org/document/63/0,2340,en_2649_201185_33623679_1_1_1_1,00.html. Accessed 9/09/04.

PARSONS, R.W., 2001. Income Taxation in Australia. Sydney. University of Sydney Library. P78.

ROPER. P. 2001. Tax Planning. Offshore trusts. Vol 15. P53.

SA RESERVE BANK. 2004., Exchange Control Regulations. Pretoria.

SA REVENUE SERVICES. Briefing note. Issued on 15/09/2000.

SA REVENUE SERVICES. Interpretation Note 4. Resident: Definition in relation to a natural person – Physical presence test. 4/02/02

SA REVENUE SERVICES. Interpretation Note 6. Resident: Place of effective Management. 26/03/02

SELLWOOD, A., 2004. Tax Adviser. Permanent establishments of non-resident companies. Chartered Institute of Taxation. P12

SOUTH AFRICA. Parliament. Eight Schedule to the Income Tax Act 58 of 1962. 2000. Pretoria. Government printer.

SOUTH AFRICA. Parliament. 2000. Revenue Laws Amendment Act 79 of 2000. Pretoria. Government Printer.

SOUTH AFRICA. Parliament. 2004. Income Tax Act No 58 of 1962 as amended. Pretoria. Government Printer.

STEIN. M., 2001. Tax Planning. The importance of residence. Vol 15. p78.

STEYN., 1951. Committee of Enquiry into the Income Tax Act. First Report. UG No: 75. Pretoria. Government Printer.

UNITED KINGDOM. Parliament. 2003. Finance Act 2003.

US SENATE BANKING COMMITTEE. 1997. Greenspan, A., Testimony - Chairman of the Federal Reserve. Given 25 February.

US INTERNAL REVENUE SERVICE. 2004. Publication 54. Tax Guide for U.S. Citizens and Resident Aliens Abroad.

WEINER, N. 2004. Adam Smith on Justice of Taxation. Adam Smith Club of Sydney. Available from: http://www.progress.org/banneker/adam.html. Accessed 22/09/04.

Income Tax cases

ITC 327, (1935). 8 SATC 254 (U)

ITC 837, (1957). 21 SATC 413

ITC 961, (1961). 24 SATC 648(F)

ITC 1170, (1971). 34 SATC 76(C)

ITC 1424, (1986). 49 SATC 99(Z)

ITC 1501, (1989). 53 SATC 314, (C)

ITC 1735, (2001). 64 SATC 455, (GSC)

IRC v Lysaght, (1928). AC 234

14 TBRD 346 Case 35

25 CTBR/NS Case 80

Boyd v CIR (1951) 3 SA 525 (A) 17 SATC 366

British United Shoe Machinery (SA) (Pty) Ltd v COT. (1964) 3 SA 193 (FC) 26 SATC 163

CIR v Epstein, (1954). 19 SATC 221, SA 689 (A)

CIR v Kuttel, (1992). 54 SATC 298 (A)

CIR v Lever Bros and Unilever Ltd. (1946). 14 SATC 1, AD441

CIR v Paul, (1956). 21 SATC 1. (3) SA 335 (A)

Cohen v CIR, (1945) 13 SATC 362. (A)

COT v Shein, (1958). 22 SATC 12, SA14 (FC)

De Beers Consolidated Mines v Howe (1906) AC 455; 5 TC 198)

FC of T v Appelgate, 79 ATC 4307, (1979) 9 ATR 899

FC of T v Miller, (1946). 73 CLR 93. 8 ATD 146

FC of T v. Pechey, (1975). 75 ATC 4083. 5 ATR 322

Gregory v DFC of T, (1937). 57 CLR 774. 4 ATD 397

H v Commissioner of Taxes, (1960). 24 SATC 738. (SR)

Joffe & Co v CIR, (1946). AD 157. 13 SATC 354.

Kerguelen Sealing and Whaling Co. Ltd v CIR, (1939). 10 SATC 263. (A)

Liquidator, Rhodesian Metals v COT (1938). AD 282. 9 SATC 363

Levene v IRC, (1928). AC 217, ALL ER Rep. 746, HL

Lever Brothers & Unilever Ltd v CIR. (1946) AD 441. 14 SATC 1

Miesegaes v. Commissioners of Inland Revenue (1957) 37 TC 493.

Millin v CIR, (1928). 3 SATC 170. (A)

Nathan's Estate v Commissioner of Inland Revenue (1948) 15 SATC 328

North Australian Pastoral Co (1946) 71 CLR 623; 8 ATD 121

Peel v. The Commissioners of Inland Revenue, (1927). 13 TC 443

Reid v The Commissioners of Inland Revenue, (1926). SC 5812. 10 TC 673

Robinson v COT, (1917). 32 SATC 41. (TPD)

Shah v Barnet London Borough Council and Other Appeals, (1983). 1 ALL ER. 266 (HL)

SIR v Downing, (1975) (4) SA 518 (A). 37 SATC 249

Soldier v COT, SR 130

The Commissioners of Inland Revenue v F L Brown, (1926). 11 TC 292

Thompson v Minister of National Revenue, DTC 812, SC