

Who is a Non-Resident for the Purposes Of Section 35A of The Income Tax Act?

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INTRODUCTION

There is often confusion as to whether or not an individual, company or trust is a resident or non-resident for income tax purposes.

This is of particular importance when applying the provisions of Section 35A of the Income Tax Act (Withholding Tax). This article looks to give some clarity on the issue.

DEFINITIONS PER THE SARS GUIDE

The external guide issued by SARS dealing with “Amounts to be Withheld when a Non-Resident Sells Immovable Property in SA” provides the definitions below.

Non-resident is defined as a person:

- i. Not normally residing in South Africa; and
- ii. falling outside of the definition of resident.

Resident is defined to include:

- i. Any natural person who is ordinarily resident in South Africa; or
- ii. Any natural person who complies with the physical presence test; and
- iii. Any person (other than a natural person) which is incorporated, established or formed in South Africa or which has its place of effective management in South Africa.

Resident is defined to exclude “any person who is deemed to be exclusively a resident of another country for the purposes of the application of any agreement entered into by the government of South Africa and that other country for the avoidance of double taxation.”

APPLICATION OF THE DEFINITION OF NON-RESIDENT

To determine if a taxpayer is a non -resident, we must look at whether the taxpayer is a resident.

If the taxpayer does not fall into the definition of “resident” then the taxpayer must be a non-resident. In the latter case, Section 35A will apply.

APPLICATION OF THE DEFINITION OF RESIDENT

Ordinarily Resident

“Ordinarily resident” is defined as the place where a person resides in the ordinary course of their daily life, i.e. the place where a person will naturally return to from his wanderings.

Although a person may not be physically present in a place, he or she may still be deemed a resident if an intention to become ordinarily resident in a country is proven and steps indicative of this intention having been or being carried out.

The following non-exhaustive list of factors is considered (by SARS) in determining whether the above two requirements are satisfied:

- most fixed and settled place of residence;
- habitual abode, i.e. present habits and mode of life;
- place of business and personal interest;
- status of individual in country, i.e. immigrant, work permit periods and conditions, etc.;
- location of personal belongings;
- nationality;
- family and social relations (schools, church, etc.);
- political, cultural or other activities;
- application for permanent residence;
- period abroad;
- purpose and nature of visits;
- frequency of and reasons of visits

Physical Presence

The “Physical Presence Test” is where the taxpayer meets the requirement that the taxpayer is physically present in South Africa for a period or periods exceeding:

- 91 days in total during the year of assessment under consideration; and

- 91 days in total during each of the five years of assessment preceding the year of assessment, and
- 915 days in total during those five preceding years of assessment.

A taxpayer who fails to meet the above, does not satisfy the terms of the test. The Physical presence test only applies to natural persons (and not incorporated entities) who were not at any stage during the relevant tax year ordinarily resident in South Africa.

In addition, any individual who meets the physical presence test, but is outside South Africa for a continuous period of at least 330 full days over two years of tax assessment, will not be regarded as a resident from the day on which that individual ceased to be physically present.

A tax year starts on the first day of March of one year and ends on the last day of February of the subsequent year.

The physical presence test as set out in the definition of the Income Tax Act can be confusing. The test is used in application for individuals who do not ordinarily reside in South Africa. The test is used by these individuals in order to gain residency.

LOSS OF RESIDENCE BY EMIGRATION

The most common way for an individual to lose their residency and for Withholding Tax to be applicable to their proceeds of sale is for an individual to emigrate from South Africa.

If a natural person has indefinitely emigrated to another country, they are no longer ordinarily resident in South Africa and automatically lose their residency the moment they arrive in their new country of residence. They cease to be resident on the day they emigrate.

The fact that an individual who has emigrated still has a South African income tax number and is still liable to submit a tax return/owes tax to SARS is irrelevant in the determination of whether or not he/she is a resident or non-resident for the purpose of Section 35A.

LEGAL ENTITIES

The definition in the SARS external guide above provides two criteria for an incorporated entity to be a resident in South Africa. The entity must;

- Be incorporated, established or formed in South Africa; or
- Have its place of effective management in South Africa

If either of these are present, the Company is a Resident – i.e. the entity won't be deemed a non-resident for withholding tax.

CONCLUSION

The above is a simplification of complex legal and tax issues and professional advice must always be taken before entering into transactions where certain tax implications are elicited by residency status.



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