

The *Cohen and Kuttel* stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?

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ABSTRACT

Determining the residence of a taxpayer is one of the most important aspects of modern tax systems. For an individual taxpayer who migrates, a common trend in the modern world, the questions are where the person is ordinarily resident and whether the place of ordinary residence can change. The two key cases in South African jurisprudence that are cited whenever the question of residence or ordinary residence is raised are *Cohen v CIR* and *CIR v Kuttel*. These cases form the foundation of this article as they examine the meaning of “resident” and “ordinary” resident” in the modern milieu. The article provides the historical background to these two seminal cases, extracts the key principles handed down in each of the judgments and evaluates these principles against definitions of “resident” used in other countries with a view to evaluating whether the definition of “resident” for South African tax purposes, premised on the fundamental principles from these two historic cases, is still relevant and appropriate. The article queries whether the concept of “ordinary resident”, with its connotation of permanence, should be updated to reflect the modern reality of transience and mobility. The conclusion reached is that the existing definition of “resident” may be in need of updating to accommodate global trends and to bring the South African tax legislation more in line with modern developments and the introduction of an objective test could provide more certainty to both taxpayers and the *fiscus*, but this benefit should be weighed against the possible cost of a loss to the tax base.

Key words: residence, ordinarily resident, outward-bound expatriates

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*Cross the river, 'round the bend
Howdy stranger, so long friend
There's a voice in the lonesome wind
That keeps whisp'ring, "Roam!"
I'm going where a welcome mat is
No matter where that is
'Cause any place I hang my hat is home*

(Mercer J and Arlen, H)¹

Modern-day business is transacted in an integrated environment with cross-border transactions and a globally mobile workforce. The individual players on this global business stage include sportspersons and artists who frequently compete or perform outside of their country of birth and earn multiple-sourced income, employees who work in numerous countries away from their original place of domicile or investors holding global portfolios or businesses. In all cases, the tax on the income of these individuals is inevitably affected by their mobility. As individuals move and earn income from multiple sources, the *locus* of the primary taxing rights becomes less certain unless there exists in the relevant jurisdiction a germane definition of who exactly is a tax resident of that jurisdiction. The determination of the residence of a taxpayer is therefore one of the most critical aspects of a modern tax system.

The definition of a “resident” in section 1 of the South African Income Tax Act² (hereinafter “the Act”), insofar as it relates to individual taxpayers, focuses on two issues, firstly, the ordinary residence of a person, and secondly, their physical presence in South Africa for a requisite minimum period. The question of whether a taxpayer is a “resident” or even “ordinarily resident” is often a complex one, particularly in the context of global mobility, and has given rise to many disputes between taxpayers and the *fiscus*.

Two cases in South African jurisprudence are cited whenever the question of whether a person is “resident” or “ordinarily resident” in South Africa is raised: *Cohen v CIR*³ (referred to as the “*Cohen*” case) and *CIR v Kuttel*⁴ (referred to as the “*Kuttel*” case). The cases involved two very different individual taxpayers and the Appellate Division judgments, handed down almost 50 years apart, still stand as the

1 McGovern, M. Not dated. Any Place I Hang My Hat is Home. [Lyrics]. [Online] Available at: <http://www.sing365.com/music/lyric.nsf/Any-Place-I-Hang-My-Hat-Is-Home-lyrics-Maureen-McGovern/482EA48D4FF1DF7848256EFB000B767E> [Accessed: 2013-08-17].

2 No. 58 of 1962.

3 [1946] 13 SATC 362, (1946 AD 174).

4 [1992] 54 SATC 298, (1992 (3) SA 242 (A)).

point of reference to which scholars and users of South African tax law turn when considering problems relating to the meaning of the words “ordinary residence”.

This article investigates the historical background to these two seminal cases, extracting the key principles handed down in each of the judgments to determine the meaning attributable to the words “ordinary residence”. These principles are then evaluated against other definitions of “resident” in an international context, including double tax agreements with a view to establishing whether the meaning attributable to the words “ordinary resident” for South African tax purposes should still rely so fundamentally on the principles established by these two historic cases, given the increased degree of human mobility in the modern, globalised working and business environment. The article interrogates whether the definition of “resident”, which has been in existence since the residence basis of tax was introduced in South Africa in 2001, is in need of updating in order to be more relevant and responsive to the realities of cross-border mobility. The *Cohen* and *Kuttel* judgments were handed down several decades ago in a source-based tax system and hardly any literature has been written on the aspect of the continued relevance of these judgments in the modern milieu. The contribution of this article is to build on that body of literature.

The *Cohen* case

Sam Cohen (hereinafter “Cohen”), the taxpayer in the *Cohen* case, was the co-founder of O.K. Bazaars Limited, which grew from small beginnings to become a retail giant, one of the forerunners of the multi-billion rand retail industry that thrives in South Africa today.⁵ Cohen partnered with his brother-in-law and built up a successful retail business in the high street of Johannesburg in the early 1900s. During the Second World War, anti-Semitic sentiment in South Africa posed challenges in obtaining the merchandise needed for the business. It was decided that one of the directors should establish himself in New York for a year or so to be better placed to secure supplies, and Cohen dutifully packed up his belongings and accompanied by his wife, three children and a nurse, set sail from Cape Town, travelling via Australia – a safer journey at the time, given the activity of German warships in the Atlantic Ocean – to arrive in the United States of America (hereinafter “America”) some three months later.⁶

5 O.K. Franchise Division. 2014. *History*. [Online] Available at: <http://www.okfd.com/history/> [Accessed: 2013-05-27].

6 13 SATC 362 at 363.

Following his arrival in New York, he established himself and his family in a New York apartment and set about buying merchandise for O.K. Bazaars Ltd. His travel visa initially granted him permission to visit America for a period of nine months and this was later extended for another year, but he ended up spending several years there as it was unsafe to travel back to South Africa until the Second World War ended in 1945. Whilst in New York, Cohen derived various types of South African-sourced income including directors' fees and salaries from South African companies, rental from a property in South Africa as well as interest and dividends. The dividends he received from listed South African companies during the year of assessment ended 30 June 1942 gave rise to the dispute with the South African Inland Revenue⁷, which became the subject of this case.

Inland Revenue subjected these dividends to a super-tax⁸ whereas Cohen contended that he was exempt from this tax on the grounds that he was not carrying on business in the Union⁹ and was not ordinarily resident in the Union. The Special Court for Hearing Income Tax Appeals found that Cohen did not carry on business in the Union (South Africa), but he was ordinarily resident in the Union for the year of assessment. Cohen appealed to the Witwatersrand Local Division of the Supreme Court and then to the Appellate Division¹⁰ against the finding on the question of whether he was ordinarily resident in South Africa during the year of assessment in question. Cohen argued that, as income tax is an annual tax, the facts relevant to each year of assessment must be examined separately in order to determine whether a person was ordinarily resident in the county for that year. As he had not been physically present in the Union at all during the year of assessment in question, he argued that he was not ordinarily resident in the Union for that year. Alternatively, he argued that even if physical absence from the Union during the whole year did not conclusively and as a matter of law establish that he was not ordinarily resident in the Union in that year, no reasonable person could, on the facts found by the Special

7 The forerunner to the South African Revenue Service (SARS).

8 The 1916 Income Tax Act introduced a super-tax on certain types of income, which included dividends received. Exempt from the super-tax were all companies and those individuals who neither carried on business nor were ordinarily resident in the Union during the year of assessment in question (Silke, 1957). The super-tax remained in force until 1960. (Williams).

9 The Union of South Africa, founded as a dominion of the British Empire, existed from 31 May 1910 until 31 May 1961, when the nation became a republic under the name of the "Republic of South Africa".

10 Renamed the Supreme Court of Appeal of South Africa by the Constitution in 1996, the Appellate Division of the Supreme Court of South Africa was established in 1910 when four British colonies, namely the Cape, Natal, Orange Free State and Natal, joined to form a single country, the Union of South Africa. The court structure set up provided for an Appellate Division as the highest judicial authority. Department: Justice and Constitutional Development. Not dated. *Supreme Court of Appeal of South Africa: History and Background*. [Online] Available at: <http://www.justice.gov.za/sca/historysca.htm> [Accessed: 2013-05-28].

Court, have come to the conclusion that he had not proved that he was not ordinarily resident in the Union in the year of assessment.¹¹

The term “ordinarily resident” was, and remains, undefined in the Act. As this was one of the earliest cases in South African tax jurisprudence, there was no local judicial precedent on which the court could rely to determine its meaning. Schreiner JA¹² considered English case law to determine its meaning. Schreiner JA, during the course of his judgment, referred to *I.R.C. v Lysaght*¹³ in which Lord Warrington of Clyffe stated (at 249) that “the question of residence or ordinary residence is one of degree ... there is no technical or special meaning attached to either expression ... accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded”.

Schreiner JA then identified the factors that he considered to be relevant:

- Cohen was domiciled in South Africa and was a director of companies carrying on business in South Africa.
- Cohen had travelled extensively during the ten years prior to the year of assessment in question, although he had returned to South Africa in between his various excursions and spent approximately half his time in South Africa during that period.
- In 1939 he had entered into a five-year lease for a flat in Johannesburg and he had sub-let this flat when he departed for New York.
- Although he took his family with him, his visit to New York was on a temporary basis, borne out by his travelling permit that had initially been granted for only nine months and subsequently extended for another year.

On these facts, Schreiner JA concluded that there was “clearly evidence on which the Special Court was entitled, apart from the factor of the appellant’s absence throughout the tax year, to find that he had not proved that he was not ordinarily resident in the Union”.¹⁴

Schreiner JA also noted that in none of the English cases referred to, had it been decided that residence or ordinary residence in a particular country requires the physical presence of the taxpayer in that country during the year of assessment. Citing

¹¹ 13 SATC 362 at 365.

¹² *Oliver Deneys Schreiner* (1890–1980) was a highly esteemed South African judge of appeal from 1945 to 1960. Department: Justice and Constitutional Development. Not dated. *Supreme Court of Appeal of South Africa: History and Background*. [Online] Available at: <http://www.justice.gov.za/sca/historysca.htm> [Accessed: 2013-05-28].

¹³ *I.R.C. v Lysaght* [1928] AC 234 13 TC 511.

¹⁴ 13 SATC 362 at 366.

both *Levene v IRC*¹⁵ and *IRC v Lysaght*¹⁶, Schreiner JA observed¹⁷ that “in both cases I have been unable to discover any passage which directly or by clear implication states that there cannot be residence or ordinary residence without the physical presence of the taxpayer in the country in question during the tax year”.

On the question of whether a person could be “ordinarily resident” in more than one country at the same time, Schreiner JA accepted that a person can be resident in more than one country during a particular year of assessment, but “he can only be ‘ordinarily resident’ in one” and that “it would be natural to interpret ‘ordinarily’ by reference to the country of his most fixed or settled residence”.¹⁸ Schreiner continued to argue that the domicile of a person is not the same as a person’s ordinary residence. Instead, he stated that “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. If this suggested meaning were given to ‘ordinarily’ it would not, I think, be logically permissible to hold that a person could be ‘ordinarily resident’ in more than one country at the same time.”¹⁹

The judgment in the *Cohen* case also established the principle that the question of whether an individual is ordinarily resident in a particular country during a year of assessment is not to be determined solely by his actions during that year of assessment as contended by Cohen, but evidence as to his mode of life over a longer period outside that year of assessment must be considered.²⁰

Schreiner JA’s judgment in the *Cohen* case has been cited subsequently in many cases dealing with the question of the residence of a taxpayer.²¹ Although Schreiner JA favoured the interpretation that a person can have more than one residence, but can only be *ordinarily resident* in one country, he did not specifically rule on this matter. Indeed, there has not yet been a ruling on this by the South African Supreme Court of Appeal, although subsequent judgments have supported Schreiner JA’s view *obiter*.²²

Although he lost his appeal, Cohen left at least one lasting legacy that has had an impact on thousands of people who have been afflicted by blindness. Cohen

15 *Levene v IRC* [1928] AC 217 13 TC 486.

16 13 TC 511.

17 13 SATC 362 at 362

18 *Ibid.* at 371.

19 *Ibid.*

20 *Ibid.* at 363.

21 Including *CIR v Kuttel* [1992] 54 SATC 298, *Nahrungsmittel GmbH v Otto*, [1993] 1 All SA 456 (A), *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* [1994] 2 All SA 33 (A) and *H v D*, [2010] 2 All SA 55 (WCC).

22 Most notably in *CIR v Kuttel* [1992] 54 SATC 298. See, also ITC 1170 [1971] (34 SATC 76) and ITC 1501 [1989] 53 SATC 314.

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lost an eye as a result of an accident whilst he was a young man, and in his later years, his other eye developed cataracts, causing him to be completely blind for two years. He founded the *Sam and Dora Cohen Foundation* and the *Blindness Research Foundation*, of which he was Chairman, and expressed the wish that “I hope I’ll be remembered longer for what I’ve done for ophthalmology than for anything I did in business”.²³ The Foundation endowed the first full-time Chair in Ophthalmology at the University of the Witwatersrand and this paved the way for the teaching hospitals of Johannesburg (now Charlotte Maxeke Hospital), St John (later named Baragwanath and now Chris Hani Hospital) and JG Strydom (now Helen Joseph Hospital) to come together as a single teaching unit with some 200 eye beds and 3 500 eye operations per annum. In 1969, Cohen was awarded an honorary doctorate by the University of the Witwatersrand in recognition of his philanthropy, and thereafter he was fondly referred to as “Doc Sam”. Some “trivia” relating to this tax case is that the presiding judge in the case, Oliver Schreiner, was the Chancellor of the University of the Witwatersrand at the time that Cohen was capped, and Schreiner himself received an Honorary Doctorate in Law from the University some years later – a remarkable coincidence!

A key principle of the *Cohen* judgment was that, although Cohen was not physically present in South Africa during the years of assessment in question, the evidence indicated that his intention was to return to South Africa after his sojourn in America, making South Africa his real and permanent home: the place to which he would return after his wanderings.²⁴ As observed previously, Schreiner JA’s judgment in the *Cohen* case has been cited extensively in later cases, most notably in the *Kuttel*²⁵ case which is discussed in the next section.

The *Kuttel* case

The individual involved in this case was Peter Clark Kuttel and the tax years in question were 1984, 1985 and 1986. The world in the 1980s was significantly different from the world of the Second World War era in which the *Cohen* case had been heard. The top marginal personal income tax rate in South Africa was 50%, as opposed to 60% plus super-tax in 1942, and rigorous exchange controls coupled with political uncertainty gave wealthy South Africans the incentive to diversify their income abroad or fully to expatriate themselves.

23 Unwin, J. 1985. O. K. Bazaars Founder Celebrates 92 Years. *The Star*, 14 September.

24 13 SATC 362 at 371.

25 54 SATC 298.

Peter Kuttel (also known as “Padda”, which means “bullfrog” in Afrikaans), hereinafter “Kuttel”) was both a successful businessman and a yachtsman. He skippered the *Atlantic Privateer* (also known as *Portotan*) in the Whitbread Round the World Race,²⁶ sailing’s equivalent of climbing Mount Everest.²⁷ This race is currently known as the Volvo Ocean Race and is one of the pinnacles of yacht racing. It grew from a four-leg race of 27 000 nautical miles to a ten-leg race where teams are required to cover 38 739 nautical miles (equivalent to 71 745 kilometres) in the 2014–2015 event.²⁸ Kuttel was a skipper in the 1981–1982 as well as the 1985–1986 races.²⁹ Kuttel’s sailing endeavours formed an integral part of the facts before the courts.

Kuttel owned listed shares, immovable property and an 85 per cent shareholding in Atlantic Fishing Enterprises (hereinafter “AFE”), a lobster and tuna fishing company³⁰ that he founded after ending his career as a lawyer.³¹ After returning from the 1981–1982 race, he started to plan for the next race, but this time he wanted to design and build a racing yacht specifically for this event. The new yacht was owned by a company in which he held shares and the expensive, time-consuming project of building the yacht commenced early in 1983.³² The day-to-day management of AFE’s local operations was essentially in the hands of a fellow shareholder, and Kuttel became more interested in AFE’s international operations, which involved exporting increasing quantities of lobster and tuna to America.³³

Kuttel travelled to New York to open an AFE office from which he could oversee and supervise the American business. On advice from a New York attorney, he applied for a permanent residence permit in America to enhance his prospects of successfully conducting AFE’s business operations there. When this permit was granted in May 1983, Kuttel and his wife decided to emigrate with their children to America, but owing to exchange control restrictions, the proceeds from the realisation of a large number of his assets had to remain in South Africa, and Kuttel invested these proceeds in Eskom (South African) stock. He, however, retained his shareholdings in AFE, Southern Ropes (Pty) Ltd, two private boat-owning companies (one owning the

26 Palley, R. 2004. *The Best of Nautical Quarterly: The Lure of Sail*. Volume 1. St Paul, MN: MBI Publishing Company.

27 Associated Press. 1985. Whitbread Round the World Race Remains Ultimate Sea Challenge. *Los Angeles Times*, 13 October. [Online] Available at: articles.latimes.com/1985-10-13/sports/sp-16043_1_whitbread-round-the-world-race [Accessed: 2013-07-20].

28 Volvo Ocean race. 2014. *Ports and Route*. [Online] Available at: http://www.volvooceanrace.com/en/ports_stories/338_2014-15-11-ports-38-739-nautical-miles.html [Accessed: 2014-08-03].

29 Krieter. [S.a.]. *History in Progress*. [Online] Available at: http://www.krieter.tv/history/whitbread_history.pdf [Downloaded: 2013-07-20] at 7 and 9.

30 54 SATC 298 at 299.

31 Dimmer, K. 2012. Catch of the Day: Oceana’s Francois Kuttel. *Leader*, 10 July. [Online] Available at: www.leader.co.za/article.aspx?s=41&f=1&a=3797 [Accessed: 2013-07-20].

32 54 SATC 298 at 302.

33 *Ibid.*

yacht mentioned earlier and the other a cruiser) and a company owning a residence in Llandudno.³⁴

On 29 July 1983, Kuttel and his wife left South Africa to take up residence in America, while their three teenage sons remained in Cape Town to complete their high school education. Soon after arriving in America, Kuttel and his wife established a home in Fort Lauderdale. They rented a house, established church membership, opened banking accounts, acquired an office, bought a car and registered with social security. Apart from relatively short visits to South Africa and other countries, Kuttel lived and worked in America from 1983 onwards.³⁵

The case in the Special Court centred on two aspects:³⁶ ordinary residence and carrying on business. Kuttel had to be neither ordinarily resident nor carrying on a business in South Africa in order to be entitled to the interest and dividend exemptions contained respectively in sections 10(1)(h) and 10(1)(k)(ii) of the Act. The Commissioner (on appeal), however, only pursued the contention that Kuttel was not ordinarily resident in South Africa during the relevant periods. It was accepted that the facts found in the lower court would be regarded as proved and the non-pursuit of the business requirement by the Commissioner implied that the attendance of Kuttel to his business interests in South Africa did not constitute the carrying on of business.³⁷

The point in issue on appeal to the Appellate Division was thus whether or not Kuttel was ordinarily resident in South Africa during the 31-month period from July 1983 to February 1986, subsequent to him and his wife relocating to America.

Kuttel was physically present in South Africa for just over a third of the time during this period, comprising a number of short visits that were undertaken for various reasons.³⁸ The first was a 79-day visit in September 1983, during which time he continued with the liquidation of his assets and attended to his interest in AFE and the boat-building projects. As soon as the school term ended for his sons, they all went back with him to America. The next two visits in the first quarter of 1984 were for just over two weeks each, during which time he attended to his various investments, business interests and the yacht-building project.³⁹ The next three visits were for approximately two months each. The first of these trips was for business and yachting reasons and the second visit from 11 November 1984 to 12 January 1985

34 *Supra* at 302–303.

35 *Supra* at 303.

36 *ITC 1501*, (1989) 53 SATC 314.

37 54 SATC 298 at 302.

38 *Supra* at 304.

39 *Supra* at 303.

was predominantly to pursue his yachting interests. During this period, the yacht was launched and successfully completed a series of trials before its commissioning. Kuttel subsequently raced the yacht in the Rothman's Week regatta and then took part in the Cape to Uruguay race, which took him out of South Africa from 12 January until 14 March 1985. Upon his return, he spent just over a week in Cape Town before leaving for America. The third stay in South Africa was not intended to be for any length of time. Kuttel arrived in South Africa on 20 April 1985 to take delivery of a cruiser on behalf of its new owners with a plan to sail it to Spain by the end of April. Unfortunately mechanical problems arose subsequent to launching and delivery of the cruiser had to be delayed until June 1985, resulting in Kuttel spending some two months in South Africa.⁴⁰

The three subsequent visits were all less than two weeks each. The first was for four days in September 1985 when Kuttel came to Cape Town for his brother's funeral. The last two visits again related to his yachting and turned out to be longer than planned. He arrived in Cape Town on 2 November 1985 on the first leg of the round-the-world race. The mast of his yacht had broken on the journey and the vessel had to undergo repairs. While the repairs were being done, he travelled to London to open an office for a new business venture relating to his American business interests and upon his return he continued with preparations for the remainder of the round-the-world race. Thereafter he departed on the next leg of the event.⁴¹

Kuttel lived in the Llandudno house (owned by a company in which he and his wife were the sole shareholders) during all his visits to Cape Town. It was not rented out and was consequently available to him whenever he needed to stay there. Substantial renovations and extensions to the house were merely driven by the need to use this fixed property as a hedge against the falling value of the rand in relation to the US dollar.⁴²

After consideration of all of the facts mentioned above, Goldstone JA turned his attention to the words "ordinarily resident". He commented that, in his opinion, effectively agreeing with Schreiner JA's view in the Cohen case, the concept of "ordinary resident" is narrower than "resident" as a person may have more than one residence at any one time.⁴³ He also quoted with approval the words of Lord Denning MR in *Shah v Barnet London Borough Council and Other Appeals*, that the meaning

40 *Ibid.*

41 *Supra* at 303–304.

42 *Supra* at 304.

43 13 SATC 362 at 370.

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of “ordinarily resident” means a place where a person is “habitually and normally resident ... apart from temporary or occasional absences of long or short duration”.⁴⁴

Goldstone JA did not consider any other English decisions as there was no reason for him not to apply the natural and ordinary meaning of the words “ordinarily resident” to the provisions of section 10 of the Act. Even though the policy of the legislature in regard to these specific exemption provisions was to encourage investors from outside South Africa to invest their money in South Africa, he could not give an extended meaning to “ordinarily resident”.⁴⁵ This was an example of giving a restrictive meaning (as opposed to an expansive meaning) to a word or phrase in seeking the “intention of the legislature”.⁴⁶

He was obliged to and did adopt Schreiner JA’s meaning of the words “ordinary resident”, namely “... 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”.⁴⁷

Goldstone JA stated that the return visits of Kuttel after immigrating to America “were not for purposes which one would normally associate with a ‘return home’”. In regard to the fact that Kuttel kept his house at Llandudno, Goldstone JA stated that he had sound financial reasons for retaining this interest in the fixed property and he required a place to live when he visited Cape Town. Goldstone JA did not see the retention of the home as being inconsistent with his usual or principal residence or home being in America.⁴⁸

Goldstone JA accordingly found that the Court *a quo* had correctly concluded that Kuttel, at all the relevant times, was not ordinarily resident in South Africa and the appeal was dismissed with costs.

Except for his eldest son, the “real home” for the Kuttel family did, however, not remain in America. Kuttel subsequently relocated to South Africa and currently lives in Cape Town. Two of his three sons also now live in South Africa, a typical example of an internationally mobile family.

As is evident from Kuttel and his family’s comings and goings, a person’s “real home” may change more than once over his or her lifetime. It is a matter of fact and each case must be decided on its own facts, having regard to established principles. In

44 *Shah v Barnet London Borough Council and Other Appeals* [1983] 1 All ER 226 (HL) at 234 b–c. 45

45 54 SATC 298 at 306.

46 Goldswain, G.K. 2008. The Purposive Approach to the Interpretation of Fiscal Legislation: the Winds of Change. *Meditari Accountancy Research*, 16(2):107–121 at 113.

47 54 SATC 298 at 305.

48 *Ibid.* at 306.

ITC 1170⁴⁹ it was pointed out that the question whether a taxpayer may be regarded as being “ordinarily resident” at a particular place during a particular period is one of degree, and one is entitled to look at the taxpayer’s mode of life beyond the particular period under consideration.

Principles drawn from the two cases

Although the concept of “ordinarily resident” was relevant for both Cohen and Kuttel in the context of a source-based tax system in which the specific question was whether or not they were entitled to certain tax exemptions, the term has a different significance in the current South African residence-based tax system which relies fundamentally upon the definition of “resident” and whether an individual is “ordinarily resident”.

“Resident”⁵⁰ is defined in section 1 of the Act and means, in the case of an individual –

- any person who is ordinarily resident in the Republic; or
- if the person was not ordinarily resident in the Republic at any time during the relevant year of assessment, a person who is physically present in the Republic for a specified minimum period (referred to as the “physical presence test”).

SARS’ Interpretation Note No. 3⁵¹ (hereinafter “the Interpretation Note”) emphasises that the term “ordinarily resident” must not be confused with “domicile”, “nationality” and the concept of “emigration” for exchange control purposes. Physical presence at all times is not a prerequisite for being ordinarily resident in South Africa, but according to the Interpretation Note, two requirements need to be present, namely an intention to become ordinarily resident in a country; and steps indicative of this intention having been or being carried out. Although SARS’ interpretation notes are not legally binding, they may provide useful guidance. Apart from local judgments, the Interpretation Note draws from various international judgments in which specific characteristics have been identified and which provide guidance in locating the place of ordinary residence. Both United

49 ITC 1170, (1971) 34 SATC 76.

50 The definition of “resident” was inserted into section 1 of the Act by section 2(h) of Act No. 59 of 2000, effective in respect of years of assessment commencing on or after 1 January 2001.

51 SARS. 2002. *Income Tax Interpretation Note No 3*. [Online] Available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-03%20-%20Resident%20definiion%20natural%20person%20ordinarily%20resident.pdf> [Downloaded: 2013-07-20].

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Kingdom (“UK”) cases that were quoted in the *Cohen* and *Kuttel* cases, namely *Levene*⁵² and *Shah*⁵³, are addressed in the Interpretation Note. The decision of the leading Canadian case, namely *Thompson v Minister of National Revenue*⁵⁴ is also quoted in the Interpretation Note. In that case, it was 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”. Three Rhodesian⁵⁵ cases are also referred to, namely *H v COT*,⁵⁶ *Soldier v COT*⁵⁷ and *Robinson v COT*.⁵⁸ In the first two of these cases, the concept of “ordinary residence” referred to the place where the taxpayer’s belongings were stored, which he or she left for temporary absences and to which he or she regularly returned after such absences; and the residence must be settled and certain and not temporary and casual. The last case is seen as important by SARS because it focuses on the physical presence of the taxpayer and his or her maintenance of a home as the crucial tests to be applied in the determination of a person’s residence.

Drawing from the body of jurisprudence, the Interpretation Note lists the following as factors (not intended to be exhaustive) that must be taken into account in considering the above two requirements (i.e. the intention to become ordinarily resident and steps indicative of this intention having been carried out):

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

52 *Levene v IRC* [1928] AC 217 13 TC 486,

53 *Shah v Barnet London Borough Council and Other Appeals* [1983] 1 All ER 226 (HL).

54 2 DTC 812 (SCC).

55 Now Zimbabwe

56 23 SATC 292.

57 1943 SR.

58 1917 TPD 542, 32 SATC 41.

It is difficult to determine which of these specific factors are derived from the *Cohen* and *Kuttel* cases since these cases upheld previous UK decisions also discussed in the Interpretation Note. What is important, however, is that the circumstances of a person must be examined as a whole and the personal acts of the individual must receive special attention.⁵⁹

The ordinary residence tests established in the *Cohen* and *Kuttel* cases are applied on a year-by-year basis, taking into account the factors that apply for that year and the taxpayer's mode of life beyond that particular period,⁶⁰ although the Interpretation Note makes the point that "(i)t is not possible to specify over what period the comparison must be made". In theory, the application of the various factors identified in the *Cohen* and *Kuttel* cases and embodied in the Interpretation Note could result in a different conclusion on the determination of residence from one year to the next if a person's personal circumstances change (e.g. a person may be regarded as a resident, but that status could change once the person officially emigrates and severs all ties with his or her country of birth). In practice, however, it can be extremely difficult to sever the umbilical cord of ordinary residence. Indeed, the Interpretation Note notes that "a natural person may be resident in South Africa even if that person was not physically present in South Africa during the year of assessment"⁶¹ and those who live and work extensively in other countries – referred to in the Interpretation Note as "virtually permanent wanderers"⁶² – have the burden of discharging the onus that they are not ordinarily resident in South Africa.

The provisions in South Africa's extensive network of double tax agreements (DTAs) do provide some degree of certainty as the definition of "resident" in section 1 of the Act specifically excludes any person who is deemed to be exclusively a resident of another country for the purposes of the application of a DTA between South Africa and that respective country. The tie-breaker clause in Article 4 of the OECD Model Tax Convention deems a person to be resident only of the state in which he has a permanent home available to him. If he has a permanent home available to him in both states, then he shall be deemed to be a resident only of the state with which his personal and economic relations are closer ("centre of vital interests"). If the state in which he has his centre of vital interests cannot be determined, or if he has no permanent home available to him in either state, he shall be deemed to be a resident only of the state in which he has a habitual abode. If he has a habitual abode

59 *Supra* at 5.

60 34 SATC 76

61 SARS Interpretation Note No. 3 at 5.

62 *Ibid.* at 4.

in both states or in neither of them, he shall be deemed to be a resident only of the state of which he is a national. If he is a national of both states or of neither of them, the competent authorities of the contracting states shall settle the question by mutual agreement.⁶³ The reliance on a decision by mutual agreement is a further indication of how difficult it can sometimes be to determine the ordinary residence or even just the residence of a person with certainty.

Although the tie-breaker clause in the various DTAs may provide a degree of certainty, the DTA provisions cannot compensate for a deficiency in the domestic legislation, and furthermore there are many countries with which South Africa does not have a DTA. It is submitted that there remains significant uncertainty about the tax residence of an individual who, after having been born and raised in South Africa, then leaves the country for an extended period which may eventually turn out to be permanent, a reasonably common occurrence in the modern context of increasing globalisation. As stated by Meyerowitz:⁶⁴ “(t)he cessation of ordinary residence is ... very much a factual issue, so much so that facts which in the case of one taxpayer may be conclusive may not be so in another”. While the *Cohen* and *Kuttel* cases provide useful guidelines, the question arises as to whether more certainty should be provided in the legislation.

Is there an alternative approach?

The many complexities involved in determining a person’s place of ordinary residence have become more obvious with accelerated globalisation in recent years. This poses the question of whether it is still appropriate to be relying on case law principles established in the *Cohen* and *Kuttel* cases many decades ago, or whether it is opportune to introduce more specific and objective residence rules into the South African tax legislation to provide certainty for taxpayers and tax authorities alike.

Both the *Cohen* and *Kuttel* cases dealt with people who migrated away from their country of birth, generally referred to as “outward-bound expatriates”. The problems that exist with the current definition of “resident” are more pronounced in the case of outward-bound expatriates as inward-bound expatriates are addressed through the more objective “physical presence test” that is contained in the second part of the definition.

63 OECD. 2010. *Model Tax Convention on Income and on Capital*. [Online] Available at <http://www.eurofield.com:8080/emtc/index.htm?%20ln=C6924571DC844367> [Accessed: 2013-08-17].

64 Meyerowitz, D. 2000. *Meyerowitz on Income Tax 2000 – 2001 Edition*. ISBN 0-9584185-9-4.

Under the physical presence test, a natural person who is not ordinarily resident in South Africa at any time during the relevant year of assessment, will be a resident if he or she is physically present in South Africa –

- for more than 91 days during the relevant year of assessment; and
- more than 91 days during each of the five years preceding that year of assessment; and
- more than 915 days in aggregate during those five preceding years of assessment.

Natural persons meeting the physical presence test become tax-resident in South Africa from the first day of the relevant year of assessment and remain so for as long as they meet the physical presence criteria. They cease to be resident under this part of the definition only once they have remained physically outside South Africa for a continuous period of at least 330 full days.⁶⁵ The physical presence test therefore provides a clear and objective statutory test of residence as far as inward-bound expatriates are concerned.

The question remains however, whether the definition of “resident” is suitably clear for outward-bound expatriates, relying as it does on the undefined concept of “ordinary residence”. On the one hand, there is no provision in the Act to clarify exactly when a person ceases to be ordinarily resident in South Africa, while on the other, as observed by Olivier,⁶⁶ there exists a loophole in that the Act does not stipulate that a person remains ordinarily resident until such time that he or she acquires a new place of ordinary residence. The question is therefore whether the definition of “resident” could be enhanced through the introduction of clearly defined objective criteria, including a specific time-based rule that would provide certainty as to the end-point of ordinary residence status for outward-bound expatriates.

A brief review of international legislation and its interpretation reveals that different criteria exist in the various definitions of “resident”. Four countries were reviewed, all with a residence-based tax system that is similar in many respects to that of South Africa and all having a DTA with South Africa that is based on the OECD Model Tax Convention.

The analysis of the tax definition of “resident” of each country indicates several similarities and some differences. All but one of the countries has a statutory definition of “resident”, yet different rules apply within the definitions. One country has an objectively determined rule that would establish an end-point of the tax residence

⁶⁵ Proviso (B) to the definition of “resident” in section 1 of the Income Tax Act No. 58 of 1962.

⁶⁶ Olivier, L. 2001. *Residence Based Taxation*. Journal of South African Law (2001) at 25. ISSN 0257-7747.

of a person who, having been a resident under the “ordinarily resident” principle (as opposed to circumstances similar to the “physical presence” test), subsequently ceases to be a resident. The findings of the analysis are summarised in Table 1.

Table 1: Summary of “resident” definitions

	Australia	Canada	New Zealand	United Kingdom
Does a statutory definition of “resident” exist?	Yes	No (See Note 2 to this table.)	Yes	Yes
Main criterion in the definition equivalent to the “ordinary residence” test.	“Domicile” unless a “permanent place of abode” outside Australia. (See Note 1 to this table.)	Not applicable	More than 183 days in the country in a 12-month period or an “enduring relationship” with the country. (See Note 3 to this table.)	If the person does not meet any one of three “automatic overseas” tests and meets one of the “automatic UK” tests or the “sufficient ties” test. (See Note 4 to this table.)
Objective rule to determine end-point of residency where a person was has been ordinarily resident.	None	None	None	A person meeting any of the “automatic overseas” tests for a tax year is automatically non-resident for that year. ⁶⁷
Is a person deemed to be exclusively a resident of another country under the provisions of a DTA excluded from being a tax resident?	No	Yes	No	No

67 HM Revenue and Customs. 2013. *Guidance Note: Statutory Residence Test (SRT)*. [Online] Available at: <http://www.hmrc.gov.uk/international/rdr3.pdf> [Downloaded: 2014-02-06] at 11.

Notes to the table:

1. A person acquires a domicile of origin at birth and retains that domicile “until he acquires a domicile of choice in another country, or until he or she acquires another domicile by operation of law”.⁶⁸ Some recognition of international mobility is given by excluding “a person whose permanent place of abode is outside Australia”.⁶⁹ According to a tax ruling provided by the Australian Tax Office,⁷⁰ whether a person has changed his or her permanent place of abode can only be determined by considering a range of factors including the intended length of stay in the new country, the intention to remain in that country permanently, the establishment of a home and so on. In some cases, where the length of stay in the other country is intended to be more than two years, this has been persuasive, but the time factor alone will not be conclusive: this must be considered together with other prevailing factors. The test is thus relatively subjective and complex.
2. The residence of an individual is determined taking into account various factors such as his or her dwelling place, the dwelling place of his or her spouse and dependants, the location of his or her personal property and economic interest and his or her social ties.⁷¹ The leading Canadian case on the subject of residence is *Thompson v Minister of National Revenue* 2 DTC 812 (SCC), in which it was held that a person is ordinarily resident where “in the settled routine of his life he regularly, normally or customarily lives” or where 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”.
3. A person has an “enduring relationship” if he or she has a permanent place of abode in New Zealand, taking into account various indicators such as accommodation, economic ties, social ties, employment, personal property, intentions and welfare benefits.⁷²
4. The “automatic UK” test applies if a person spends 183 days or more in the country during the year of assessment.⁷³ The UK residence rules are explained in more detail in a section of this article.

68 Australian Tax Office. 1991. *Taxation Ruling IT 2650*. [Online] Available at: <http://law.ato.gov.au/atolaw/view.htm?docid=ITR/IT2650/NAT/ATO/00001> [Accessed: 2013-11-19].

69 *Ibid.*

70 *Ibid.*

71 Canada Revenue Agency. 2013. *S5-F1-C1: Determining an Individual's Residence Status*. [Online] Available at: <http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s5/f1/s5-f1-c1-eng.html#N10619> [Accessed: 2014-02-03].

72 New Zealand Inland Revenue. 2014. *Tax Residency and Status*. [Online] Available at: <https://www.ird.govt.nz/international/residency/personal/> [Accessed on 2014-02-03].

73 HM Revenue and Customs. 2013. *Guidance Note: Statutory Residence Test (SRT)*. [Online] Available at: <http://www.hmrc.gov.uk/international/rdr3.pdf> [Downloaded: 2014-02-06] at 11.

The United Kingdom residence rule

The UK residence rules and jurisprudence are at the root of the South African principles regarding the tax residence of an individual and, as was seen in the cases discussed above, South African courts in interpreting “residence” and “ordinary residence” referred extensively to judgments of the English courts for guidance. Hence it is significant for the purposes of this study to follow the evolution of the UK residence rules.

Until early in 2013, the UK had no definition of “resident” and relied on case law and guidance from the revenue authority. The UK has effectively abandoned the concept of “ordinary residence” for tax years from 2013–2014 onwards and has introduced a statutory residence test, enacted in the Finance Act 2013 and effective from 1 April 2013, with the aim of bringing certainty to the determination of tax residence.⁷⁴ The statutory residence test is intended to “eliminate as far as possible the concept of ordinary residence”,⁷⁵ and a person meeting the statutory residence test is a resident for UK tax purposes.⁷⁶

Under this statutory residence test, an individual is a tax resident in the UK for a particular year of assessment (or part of that year) if the person

- (i) does not meet any of the “automatic overseas” tests; and
- (ii) meets one of the “automatic UK” tests, or the “sufficient ties” test.

There are three “automatic overseas” tests (two other “automatic overseas” tests apply for persons who die during a year of assessment), which are as follows:⁷⁷

- (i) The person was resident⁷⁸ in the UK in any of the three tax years preceding the current tax year and spends fewer than 16 days in the UK in the current tax year.
- (ii) The person was not resident in the UK in any of three tax years preceding the current tax year and spends fewer than 46 days in the UK in the tax current year.

74 HM Revenue and Customs. 2013. *Overview of Tax Legislation and Rates*. [Online] Available at: <http://www.hmrc.gov.uk/budget2013/ootlar-main.pdf> [Downloaded: 2014-02-06] at p 3.

75 *Supra* at p 3.

76 HM Revenue and Customs. 2013. *Guidance Note: Statutory Residence Test (SRT)*. [Online] Available at: <http://www.hmrc.gov.uk/international/rdr3.pdf> [Downloaded: 2014-02-06] at p 9.

77 *Supra* at p 9.

78 Under the common law tests for years of assessment prior to the introduction of the statutory residence test, which applies for years of assessment commencing on or after 6 April 2013.

- (iii) The person works overseas full time during the current tax year without any significant breaks and spends less than 91 days in the UK in the current tax year and works less than 31 days (more than three hours per day) in the UK in the current year.

A person who meets any one of these tests is deemed not to be a UK tax resident for that year of assessment and no further enquiry is necessary. Tests (i) and (iii) above provide clear, objectively determined rules for the determination of the tax residence of outward-bound expatriates. The tests will ensure that persons who leave the UK and live and work elsewhere for several years will cease to be tax-resident in the UK after a period of three years, provided they do not spend more than a certain number of days in the UK. A person who moves abroad during a tax year will have two periods of assessment, referred to as a “split year”, with a UK part for the period that the person was a UK resident and an overseas part for which the person is taxed as a non-UK resident.⁷⁹

The new legislation introduced in the UK provides a practical approach to recognise the migratory pattern of many taxpayers in the modern world. The obvious benefit of the new statutory test is that it provides certainty to taxpayers and the revenue authority. The motivation for its introduction was “to increase the UK’s reputation as a good place to invest in and do business, whilst continuing to ensure that those with close connections to the UK continue to pay their fair share of tax ... (a)bolishing the concept of (o)rdinary (r)esidence will also be a significant major simplification of the UK tax system”.⁸⁰ The drawback of the test is that more detailed records will have to be kept to prove the number of days spent in the UK in the respective years and detailed guidance is necessary (and has been provided)⁸¹ to explain what the various terms such as “days spent in the UK” mean. The benefit of certainty would probably outweigh the negative aspect of record-keeping. The test therefore provides a useful comparison for evaluating whether the South African definition of “resident” should be revised. South Africa, however, is different to the UK, because it is a developing country with a much smaller economy. The impact of

79 HM Revenue and Customs. 2013. *Guidance Note: Statutory Residence Test (SRT)*. [Online] Available at: <http://www.hmrc.gov.uk/international/rdr3.pdf> [Downloaded: 2014-02-06] at p 52.

80 HM Revenue and Customs. 2013. *Statutory Definition of Tax Residence and Reform of Ordinary Residence: Summary of Responses to the June 2012 Consultation*. [Online] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190097/consult_responses_statutory_definitions_of_tax_residence_reform_of_ordinary_residence_responses.pdf. [Downloaded: 2015-04-09].

81 *Supra*.

a change to the statutory residence test on the South African tax base would have to be carefully evaluated and such an examination could be an area for further research.

Conclusion

This article has investigated the historical background of the *Cohen* and *Kuttel* cases, contrasting interesting details about the characters involved and extracting the key principles handed down in each of the judgments.

For both *Cohen* and *Kuttel*, the question of whether they were “ordinarily resident” was necessary to determine whether or not they were entitled to certain tax exemptions in a source-based tax system. However in the current South African residence-based tax system, the question of whether a natural person is “ordinarily resident” is fundamental to and establishes the starting point of a person’s tax liability. A “resident” is defined in section 1 of the Act and means, for natural persons, any individual who is ordinarily resident in South Africa or if the person was not ordinarily resident in South Africa at any time during the relevant year of assessment, a person who is physically present in South Africa for a specified minimum period.

There is no doubt, however, that the world and mobility in the 21st century are markedly different to the situation that prevailed between the 1940s and the 1980s when the activities giving rise to the *Cohen* and *Kuttel* cases occurred. The number of “multinational” individuals, with homes, family and business interests in two or more jurisdictions, has increased significantly over the past few decades. The application of the “ordinary residence” rule is extremely complex and requires knowledge and certainty about a person’s circumstances and future plans to determine whether the person has the intention to end his or her ordinary residence and furthermore, whether steps indicative of this intention have been taken. Such depth of insight is not always possible, and even the person concerned may not have absolute clarity on his or her future plans at the point of migrating. Apart from the degree of expertise and the significant amount of time and effort that is expended by both taxpayers and the revenue authority in examining and attempting to resolve questions of residence, the uncertainty of a person’s residence status can linger and even recur for many years, effectively undermining the necessary principle of certainty.

Various definitions of “resident” in an international context, including in the tie-breaker clause of the OECD Model Tax Convention, were analysed with a view to evaluating whether the definition of “resident” for South African tax purposes should still rely fundamentally on the principle of “ordinary residence” as one of the cornerstones of determining residence (the other being the “physical presence test”). A useful example was gleaned from recent developments in the UK, which has seen

the introduction of a statutory residence test with clearly defined objective criteria to establish the end-point of a person's residence.

In the light of the realities of an increasingly global workforce and the resultant uncertainty regarding the tax residence of individuals, it would be opportune to conduct a re-evaluation of the definition of "residence" and specifically, the continued use of the factual "ordinary residence" principles, taking into account the specific challenges of the South African economy and the need to protect its tax base. While the UK legislation provides a useful example of the type of provision that could be adopted as far as it relates to individuals, a hybrid system might be more appropriate for the South African context. Such a system could include a statutory residence test to provide certainty, with a proviso that a person having been ordinarily resident, remains so until such time as the person demonstrates that he or she has acquired a new place of ordinary residence, thus closing a loophole that currently exists. It is submitted that such an evaluation should form part of the review of the tax system of South Africa that is currently under way.

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