# COHEN v COMMISSIONER FOR INLAND REVENUE 13 SATC 362



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| **Division:** | Appellate |
| **Judges:** | TINDALL AND SCHREINER JJA AND DAVIS AJA |
| **Date:** | 20 November 1945 |
| **Also cited as:** | 1946 AD 174 |

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*Income tax - Super tax - Exemption - Individual not ordinarily resident in the Union - Absence for business purposes for whole year of assessment - Not decisive of question of "ordinary residence" - "Residence" and "ordinary residence" -Questions of fact, not law - Section 30(1)(a), Act 31 of 1941.*

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 section 81, Act 31 of 1941.

Appellant, who was domiciled in the Union, and was one of two directors of a company carrying on business in the Union, was requested by his company to go overseas to act as the company's buyer, in view of the difficulty of obtaining merchandise, caused by war conditions.

Appellant left the Union in June, 1940, accompanied by his family. The permit authorising his departure contained the words "duration 9 months". In October, 1940, he arrived in the United States of America and established his family in an apartment in New York, where he carried on the business operations which were the purpose of his visit.

In 1941, appellant was granted an extension of 12 months in respect of his permit to remain in America. From that date and up to the 30th June, 1942, neither appellant nor his family had returned to the Union.

In 1939, appellant 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 period for which appellant had been in America.

During the year ended 30th June, 1942, appellant 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 exempt individuals "not ordinarily resident nor carrying on business in the Union."

The Commissioner for Inland Revenue having assessed appellant in respect of these dividends on the grounds that he was both "ordinarily resident" and carrying on business in the Union during the year of assessment in question, appellant lodged objection and appeal against the assessment made. The Special Court for hearing Income Tax Appeals held that appellant was not carrying on business in the Union during the year of assessment, but was ordinarily resident in the Union, and confirmed the assessment.

The appellant, being dissatisfied with this decision as being erroneous in law, required a case to be stated to the Witwatersrand Local Division of the Supreme Court, submitting for decision the following question of law:-

> "Whether on the facts found by the Special Court the appellant was an individual not ordinarily resident in the Union within the proper meaning of the words in section 30(1)(a) of the Income Tax Act, 1941, for the year of assessment ended 30th June, 1942."



The Witwatersrand Local Division of the Supreme Court (MURRAY, J.), answered the question submitted in the negative and dismissed appellant's appeal. On appeal from this decision.

*Held*, dismissing the appeal, 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 and that there was clearly evidence upon which the Special Court was entitled to find that appellant had not proved that he was not ordinarily resident in the Union;

*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;

*Held*, further, that physical absence during the whole of the year of assessment was not decisive of the question of "ordinary residence."

**SCHREINER JA:** The appellant was assessed to super tax on certain dividends from public companies in respect of the year of assessment ending the 30th June, 1942. Throughout the whole of that year he was out of the Union and he appealed to the Special Court against the assessment in respect of the above-mentioned dividends on the ground that they were exempt from super tax in terms of sec 30(1)(a) of Act 31 of 1941. The provision in question reads: "There shall be exempt from super tax(a) dividends, distributed by a public company, received by or accrued to or in favour of or apportioned in terms of paragraph(b) of section *thirty-seven* to an individual not ordinarily resident nor carrying on business in the Union." It was contended on behalf of the Commissioner before the Special
Court that the appellant was ordinarily resident in the Union and that he carried on business in the Union. It was contended on behalf of the Commissioner before the Special Court that the appellant was ordinarily resident in the Union and that he carried on business in the Union. The Special Court dismissed the appellant's appeal, finding that he was ordinarily resident in the Union. At the same time it found that he did not carry on business in the Union, and this finding has not been challenged on behalf of the Commissioner in the subsequent proceedings. At the request of the appellant a case was stated by the Special Court for the determination by the Witwatersrand Local Division of the question of law, "Whether on the facts found by the Special Court the appellant was an individual not ordinarily resident in the Union within the proper meaning of the words in sec 30(1)(a) of the Income Tax Act, 1941, for the year of assessment ended 30th June, 1942." The appeal to the Witwatersrand Local Division was dismissed by MURRAY, J., and the appellant has now appealed to this Court.



The Special Court recorded the following facts as being admitted or proved:-

"(1) The appellant is one of the two joint Directors of O.K. Bazaars(1929) Limited.

(2) At a meeting of Directors of O.K. Bazaars Limited held on 11th June, 1940, it was resolved, in view of the increasing difficulty of obtaining merchandise that the appellant be requested to proceed overseas to act as the company's buyer on a buying mission for the purpose of maintaining its supplies.

(3) In pursuance of the above resolution the appellant, and the company on his behalf, on the 15th June, 1940, made application to the Overseas Permit Officer for permission for the appellant to leave the Union and to proceed overseas to the United States and Canada on business, accompanied by his wife, three children and a nurse.

On the 28th June, 1940, this permission was granted, the permit containing the words "Duration 9 months".

(4) The appellant sailed from Cape Town at the end of July, 1940, via Australia and arrived in the United States about the end of October, 1940, having remained in Australia for six weeks to two months on the business of the company.

(5) On his arrival in New York the appellant established himself with his wife and family in an apartment or flat and occupied himself in the business of buying for O.K. Bazaars Ltd. which conducts its affairs there through a subsidiary company, The Empire State Buying Corporation, of which subsidiary company the appellant is a director.

(6) In April, 1941, the Overseas Permit Officer, South Africa, granted the appellant an extension of a further 12 months to his permit to remain in America.

(7) Since that date neither the appellant nor his family have returned to the Union.

(8) The appellant is domiciled within the Union of South Africa.

(9) The appellant was assessed for Income Tax within the Union for some time prior to 1929.

(10) The appellant is a director of certain companies carrying on business in the Union other than O.K. Bazaars(1929) Ltd., including C.T.C. Bazaars Limited and Grand Parade Buildings Limited, from which companies he derives dividends.



(11) During the period 1930 to 1940 the appellant frequently went to America, England and Europe on similar business and during that period he spent about half his time in the Union of South Africa.

(12) The appellant derives his income from directors' fees and salary from various South African companies and also from interest and dividends. Dividends received by the appellant from public companies in the Union during the year of assessment ending 30th June, 1942, amounted to £7,032.

(13) The appellant leased a flat in Sunningdale, Johannesburg, under a Deed of Lease in December, 1939, for a period of five years. This flat contains the appellant's own furniture.

(14) The flat was sub-let fully furnished by the appellant upon his departure from the Union in 1940, and it was still sublet during the year of assessment ended 30th June, 1942."

In its judgment, which is annexed to and forms part of the statement of case, the Special Court inferred from the fact that the permit granted to the appellant to leave the Union contained the words "Duration 9 months" that this period must have been stated by the appellant as the approximate period during which he contemplated that his absence would last. The Special Court also accepted a statement of a witness called on the appellant's behalf that the appellant's absence was on a temporary basis.

Before this Court, Mr *Ettlinger*, for the appellant, contended that, income tax being an annual tax, the appellant, by proving that he was out of the Union during the whole of the tax year, established that he was not resident in the Union and, consequently, that he was not ordinarily resident in the Union in that year. Alternatively, he argued that the determination of the Special Court was erroneous in point of law inasmuch as even if physical absence from the Union during the whole of the tax year does not conclusively and as a matter of law establish that the taxpayer was not oridnarily resident in the Union in such year, no reasonable person could on the facts found by the Special Court have come to the conclusion that the appellant had not proved that in the tax year he was an individual not
ordinarily resident in the Union.

It will be convenient to deal first with the second, or alternative contention. In stating the principles applied to questions of this sort by the Courts of Great Britain, Lord WARRINGTON OF CLYFFE said in *I.R.C. v Lysaght* (1928, A.C. 234 at p. 249): "I have reluctantly come to the conclusion that it is now settled by authority



that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purpose of the Income Tax Act, and 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." Under our Statute the approach of a Court of Appeal to the findings of the Special Court is the same as that of Courts in the United Kingdom to the findings of the Commissioners. And if one leaves out of account, as one must for the purposes of the present argument, the fact that the appellant's lengthy absence from the Union covered the whole of the tax year, it seems to me that the question whether he was in that year an individual not ordinarily resident in the Union is essentially a question of degree to which no single, certain, answer could be given; the answer depends on the weight to be given to the various factors set out in the stated case. It follows that it was a question of fact, on which no appeal lies unless the Special Court had before it no evidence on which it could properly find as it did. Now the appellant is domiciled in the Union and is a director of companies carrying on business in the Union. It had been his custom for ten years before the year of assessment to make extended visits to overseas countries for business reasons, but he used to return to the Union, where during those years he spent approximately half his time. From 1939 he had five years' lease of a flat in Johannesburg, which contained his furniture. The lease continued to exist during his absence and he had sub-let the flat. Although he took his family with him, his visit to America in June, 1940, was on a temporary basis and on a nine months' permit which, when it expired, was in April, 1941, extended for a further twelve months. In my opinion 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.

The appellant's main contention proceeded on the following lines: (a) Since income tax is an annual tax the facts relating to each year of assessment must be examined separately in order to see whether in the year in question the appellant was resident within the Union. (b) Residence in the country requires physical presence in that country for at least some portion of the period in respect of which the inquiry is being made. (c) Where it has



been found that the taxpayer was for part at least of the tax year physically present in the Union and by reason of the evidence was resident there, a further question arises as to whether he was ordinarily resident there; for the purposes of this final stage of the inquiry, *but for this alone*, the taxpayer's regular mode of life during periods outside the tax year may be taken into consideration.

Although there are, apart from sec 30(1)(a), several provisions in our Income Tax Act which make ordinary residence a test of liability or exemption (see secs 9(7), 10(1)(h), 10(1)(j) (ii) and para. (iv) of the proviso to sec 10(1)(h), (k) and(m)) no case in our Courts has dealt with the argument now before us. Reference was, however, made to certain cases decided in Great Britain; but in none of them has it been decided that residence, or ordinary residence, in a country requires the physical presence of the taxpayer

in that country during the year of assessment. In the case of *Turnbull v Solicitor of Inland Revenue* (42 S.L.R. 15) it was held that a merchant who usually resided in Madras but whose wife and family had for a number of years resided in the United Kingdom, where he visited them nearly every year, was not resident in the United Kingdom during the tax year in question, during which he had not paid such a visit. The Lord JUSTICE-CLERK, in giving judgment, said "We are dealing with a case in which during a whole year - the year of assessment - the person who was to be assessed as residing in the country was never in this country. I think that would require a very strong case indeed." The factor of absence during the whole tax year was treated as very nearly, but apparently not quite, decisive; the last sentence does not conclusively negative the possibility of residence in a country during a tax year without the physical presence of the taxpayer in the country during the year. Lord YOUNG concurred and Lord TRAYNER based his judgment on an admission that the ordinary residence of the taxpayer was in Madras. Whether such admission should have been treated as decisive in view of the possibility that under the British Income Tax Acts a person might be ordinarily resident in more countries than one at the same time may be open to question. Lord MONCRIEFF in his judgment made it clear that he did not regard the fact that the taxpayer was absent from the United Kingdom during the whole of the tax year as by any means conclusive, when taken by itself. In arriving at the same conclusion as the other members of the Court he too attached major importance to the evidence that the usual place of residence of the



taxpayer was Madras. Whether this case was reconcilable in all respects and as regards all its *dicta* with certain other decisions was doubted by Lord DUNDAS in *Thomson's* case (56 S.L.R. 10 at p. 12) but on the same page the learned Judge quoted a passage from the judgment of Lord PRESIDENT INGLIS in *Lloyd's* case (21 S.L.R. 482) in which it was said that if a man occupied his place of residence for a portion of a year he was for the purpose of the provision then in question residing there in the course of that year. The inference may be drawn that the learned Lord PRESIDENT, like the Lord JUSTICE-CLERK in *Turnbull's* case, regarded the presence of the taxpayer in Great Britain during some portion of the tax year as, generally speaking, an essential factor in rendering him resident there during such year. On the other hand, there is another Scottish case the decision in which appears to be inconsistent with the appellant's contention. It is the case of *Rogers v Inland Revenue* (1 T.C. 225) in which the Scottish Court of Exchequer held that a master mariner, who had been absent from the United Kingdom throughout the tax year but whose wife and children lived there, was liable to assessment as a person residing in Great Britain
within the meaning of Schedule D of the Income Tax Act. In the earlier case of *Young* (1 T.C. 57) it had been decided that a master mariner whose wife and family lived in Glasgow but who had during the tax year only been in the United Kingdom for less than three months in all, was resident there so as to bring him within Schedule D. In *Roger's* case it was sought to distinguish *Young's* case because Rogers had been absent throughout the tax year, but the Court rejected the argument. It is true that the Lord PRESIDENT appears to have said in the course of his very briefly reported judgment, "Every sailor has a residence on land . . . He has no other residence, and a man must have a residence somewhere." These remarks suggest that the case proceeded upon some view of the special position of mariners that might make it necessary to apply the case with caution to the circumstances of other taxpayers. But there is no doubt that it is a direct decision against the view that "residence" under the British Act requires in every case the physical presence of the taxpayer in Great Britain during some portion at least of the tax year.

We were referred to no decision more directly relevant to the present question than these Scottish cases. But counsel for the appellant claimed that support for his contention is to be found in certain passages from the judgments in *Levene's* case (1927,



2 K.B. 38); (1928, A.C. 217) and *Lysaght's* case (1927, 2 K.B. 55); (1928, A.C. 234). Those are cases of great authority upon the meaning of "residence" and "ordinary residence" under the British Act; but one must, of course, bear in mind that, apart from differences in the contexts of particular sections, the incidence of taxation under the Union Statute rests, in general, upon a different basis from that of the British Act. Both in *Levene's* case and in *Lysaght's* case the taxpayer had been physically present in the United Kingdom for Portions of the tax year and reference is therefore naturally made in the judgments to this fact. But although I have anxiously perused the reports of the judgments in all three Courts 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.

It is, I think, well to bear in mind that, as stated by Lord WARRINGTON OF CLYFFE in *Levene's* case (*supra* at p. 232) and in the passage quoted above from *Lysaght's* case, the expressions "resident" and "ordinarily resident" in Income Tax law bear no special or technical meaning (see also *per* Lord BUCKMASTER in *Lysaght's* case, p. 247). In so far as there is any departure from this view in the other judgments in those cases the effect is rather against the taxpayer than in his favour. An example, which vividly describes how widely the net is spread under the British Act, may be taken from the judgment of Viscount SUMNER at p. 245 of the report of *Lysaght's* case, where the following passage occurs. "One thinks of a man's settled and usual place of abode as

his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed." That a man may have more than one residence for the purpose of income tax statutes has long been established, if it was ever in doubt. Whether he can be "ordinarily resident" in more than one country at the same time seems to me to be less clear. It may depend on the provision of the particular statute which is being interpreted. For instance, the Military Service Act, 1916, which was applied in *Pittar v Richardson* (116 L.T.R. 823), provided that "any male British



subject who has at any time since 14th August, 1914, been or for the time being is "ordinarily resident in Great Britain shall be deemed to have been duly enlisted." Then there was an exemption provision in favour of men ordinarily resident in His Majesty's Dominions abroad or resident in Great Britain for the purpose only of their education or for some other special purpose. In the light of these provisions it was natural for Lord READING in his judgment to say, "It is perfectly clear that under certain circumstances a man might be ordinarily resident in Great Britain and at the same time ordinarily resident in His Majesty's dominions abroad". That this might also be the position under the British Income Tax Acts was the view expressed by ROWLATT, J., in *Levene's* case (1927, 2 K.B. 38, at p. 47), where he says, "He may have two ordinary residences if his ordinary course of life is such that he acquires the attribute of residence in both places." And in *Reid v Inland Revenue* (1926, S.L.T. 365), the Lord PRESIDENT said, at p. 368, "I am not sure that there is anything impossible in a person 'ordinarily residing' in two places, although no doubt he cannot be physically present in more than one place at the same time". The difficulty of drawing a clear distinction between "resident" and "ordinarily resident" was recognised in most of the judgments in the cases of *Levene* and *Lysaght* (*cf. per* ROWLATT, J. (1927, 2 K.B. at p. 59); *per* Lord HANSWORTH (1927, 2 K.B. at p. 49); *per* SARGANT, L.J. (1927, 2 K.B. at p. 52)). On the other hand, certain passages in the judgments do indicate the nature of the distinction under the British Acts. So LAWRENCE, L.J., in *Lysaght's* case (1927, 2 K.B. at p. 74), after expressing approval of the remarks of the Lord PRESIDENT in *Reid's* case and of ROWLATT, J., in *Levene's* case, went on to say that in his view "ordinarily", which he regarded as narrowing down the meaning of "resident", was used in contrast with "casual" or "occasional" so as to mean "in conformity with rule or established custom or practice" or "as a matter of regular practice or occurrence". Lord CAVE (1928, A.C. at p. 225), who thought there was little difference between "residence" and "ordinary residence" defined the latter as "residence in a place with some degree of continuity and apart from accidental or temporary absences". Lord SUMNER (1928, A.C. at p. 243) said, "I think the converse to 'ordinarily' is 'extra-ordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not extra-ordinary", while Lord WARRINGTON OF CLYFFE in



referring to "ordinarily" at p. 232, said, "If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered."

It seems to me that the precise effect to be given to the word "ordinarily" is linked up with the question whether
a man can be "ordinarily resident" for the purpose of the statute in question in more than one country. That question has not been authoritatively decided in relation to the British Income Tax Act and there is no decision on the subject in our Courts. If, though a man may be "resident" in more than one country at a time, he can only be "ordinarily resident" in one, it would be natural to interpret "ordinarily" by reference to the country of his most fixed or settled residence. This might not be his country of domicil, for it might not be his domicil of origin and he might not have formed the fixed and settled intention, which "excludes all contemplation of any event on the occurrence of which the residence would cease", which is necessary to bring into existence a domicil of choice *Johnson v Johnson*, (1931, A.D. 391). But 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. Despite Lord SUMNER'S warning as to the danger lurking in the interpretation of "residence" which I have quoted, I should prefer to withhold my decision on the allied questions whether under our statute the word "ordinarily" bears the same meaning as was given to it in the judgments in the House of Lords, to which I have referred, and whether under that statute a man can simultaneously be ordinarily resident in more than one country.

It is in my view, unnecessary in this case to express any opinion on these problems, for whatever the precise meaning to be given to the expression "ordinarily resident" and whether or not a man may be ordinarily resident in more than one country, certain considerations negative, in my opinion, the view that a man cannot, as a matter of law, be ordinarily resident in a country from which he was absent throughout the tax year.

In the first place it should be pointed out that although the tax is an annual one and although we are

concerned with the question



whether the appellant had the quality or was in the condition of being ordinarily resident in the Union or outside it during the tax year, this does not by any means require that his actions during the tax year should alone be regarded in deciding whether the quality or condition existed. I have found no authority for the distinction sought to be drawn by counsel for the appellant between the admission of evidence as the appellant's mode of life outside the tax year to prove residence and its admission to prove that a residence, founded on physical presence, was ordinary; and I consider the distinction to be without valid foundation. Assuming that there is a material difference between "residence" and "ordinary residence" I can see no reason why the types of evidence admitted to prove them should not be the same.

Various hypothetical cases can be put to show the surprising results that would follow if the appellant's contention were correct. One such case is put by MURRAY, J., in his judgment: If a man, who it may be assumed has never left the Union in his life before, leaves on a year's holiday at the end of June in any year. According to the appellant's contention his liability to or exemption from super tax on dividends will depend on whether his return to the Union is effected on the 30th June or the 1st July in the following year. No doubt under sec 39 of the old British Income Tax Act and under General Rule 2 of Schedule D liability to tax may depend on whether the person in question has been one day more or one day less than six months during the tax year within the boundaries of Great Britain. But we have no corresponding provision and the mere fact that the tax is an annual one provides, in my opinion, a wholly insufficient foundation for a conclusion that leads to such a surprising result and one so unrelated to the ordinary meaning of language. In his heads of argument the respondent's counsel heightened the absurdity by supposing, what might well happen, that the ship on which the taxpayer was due to arrive in the early hours of the 1st July, by making a faster voyage than was expected, arrived in a South African port before midnight on the 30th June. On those facts, if the appellant's argument were valid, the taxpayer would lose the exemption that he would otherwise have enjoyed through no intentional act of his own; owing to a favourable wind or the unexpected efficiency of the ship's engines he would be converted, willy-nilly, from an individual not ordinarily resident in the Union to one who must bear the burdens of ordinary residents. Again, a taxpayer, resident



all his life in the Union, leaves at the end of June on a six months' holiday but dies overseas a few months later. On the appellant's contention his estate would be entitled to the exemption under sec 30(1)(a) because he was at no time physically present in the Union during the tax year in which he died.

No doubt the posing of hypotheses that lead to absurdity does not necessarily and in all cases provide a sure guide to the meaning of a statute. But the method is of value and may be decisive when related to the slender basis for the contention from the acceptance of which such anomalous results would flow. And what after all is that basis? As already indicated the annual character of the tax, while it refers the question whether the appellant was ordinarily resident within the Union to the tax year, does not exclude the investigation of his mode of life before, or even after, that year in order to arrive at a conclusion. For the rest of the appellant's argument is based on the unquestioned fact that residence requires that there must at some time have been actual physical presence in the country resided in. But it would certainly be giving to residence a special or technical, indeed a highly artificial meaning, if one required the physical presence to have existed during the year of assessment. In accordance with the normal use of language the effect of physical presence in the country of residence persists so as to prolong that residence after departure from the country and it becomes a question of fact, unrelated to the commencement and termination of tax years, whether the residence or ordinary residence in the country still remains a quality of the taxpayer.

For these reasons I am of opinion that the decision of MURRAY, J., was right, and it is unnecessary to consider the question, which was canvassed in the course of argument, whether assuming that the taxpayers' ordinary residence can be changed during the tax year, the decisive date for applying the exemption under sec 30(1)(a) is the date of receipt or accrual of the dividends or some other date.

The appeal is dismissed with costs.