

# **SOME COMPARISONS BETWEEN THE NIGERIAN AND SOUTH AFRICAN FISCAL REGIMES REGARDING AN INDIVIDUAL'S TAX RESIDENCE<sup>1</sup>**

Nuhu Musa Idris

*LLB BL LLM*

*PhD Candidate, University of KwaZulu-Natal  
Pietermaritzburg*

## **SUMMARY**

Internationally, one of the most widely adopted criteria for determining the jurisdictional basis of a state's taxing power is that of the taxpayer's "residence", "principal residence" or "ordinary residence". However, statutory definitions often complicate these concepts, as is the case in Nigeria, and it is common for relief to be granted where the application of these criteria would expose the taxpayer in question to tax on the same income in more than one tax jurisdiction. In Nigeria, the determination of the residence of taxable persons involves the application of statutory criteria and moreover, the legislation makes it necessary to locate residence within a particular state of Nigeria. In the interpretation of the statutory criteria, precedence is given to decisions of the Nigerian courts.

## **1 INTRODUCTION**

A "residence-based" tax system usually connotes that the state imposes a tax on both the domestic and foreign earned income of their residents, in other words, on their worldwide income. Under a residence-based fiscal regime, a person becomes "liable to tax" and "subject to tax"<sup>2</sup> once it is established that he is a "resident". He remains liable to tax even if for some reason, the regime exempts him from paying taxes, or if it grants him certain tax. Thus, all persons subject to tax are liable to tax, but not all persons liable to tax actually paid taxes. The crux of this article is the concept of residence as a determinant of establishing "liability to tax" but not of being "subject to tax".

---

<sup>1</sup> This article is based on a chapter in a PhD thesis submitted by the author to the University of KwaZulu-Natal in 2016.

<sup>2</sup> Wheeler "Persons qualifying for Treaty Benefits" in Trepelkov, Tonino and Halka (ed) *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2013) 60 63.

In addressing potential conflicts, states adopt both unilateral and bilateral mechanisms, that is to say, double taxation relief provisions in their domestic laws and in bilateral Double Taxation Agreements with each other.<sup>3</sup>

## 2 RESIDENCE-BASED TAXATION OF INDIVIDUALS AND OTHER ENTITIES IN NIGERIA

Payment of tax is a duty imposed by the Nigerian Constitution, which provides that:

“it shall be the duty of every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly”.<sup>4</sup>

Even though this section seems to impose the obligation only on a “citizen”, the obligation is interpreted as extending to all persons living in or having an economic connection with Nigeria. The protection against compulsory acquisition of movable and immovable properties of persons is a fundamental right recognised in chapter four of the Nigerian Constitution.<sup>5</sup> The protection mentioned above is not restricted to Nigerian citizens.<sup>5</sup> However, it is further provided that “nothing in subsection (1) of this section shall be construed as affecting any general law for the imposition or enforcement of any tax, rate or duty”.<sup>6</sup> Therefore, the imposition and collection of the tax in Nigeria is effected pursuant to a statutory provision. Moreover, once a statute imposes a tax, the right to property is suspended to the extent of the provision of that statute.

Nigeria's Personal Income Tax Act (“PITA”)<sup>7</sup> governs the taxation of individuals either as a corporation sole or a body of individuals.<sup>8</sup> Section 1 of the Act also imposes a tax on the income of a partnership or trustee,<sup>9</sup> estate, and on communities and families.<sup>10</sup> In other words, any entity that does not fall under the definition of a company<sup>11</sup> is a taxable person under the Act.<sup>12</sup> The taxpayers are liable to pay tax on their global income<sup>13</sup> to the relevant tax authority of the state of their residence<sup>14</sup> as at the first day of the year of

<sup>3</sup> The reference made to the bilateral or multilateral tax treaty regime is only limited to the definitional rule of “resident” for the purposes of the treaty not the detailed content of the treaty.

<sup>4</sup> S 24 (f) of the Constitution of the Federal Republic of Nigeria 1999.

<sup>5</sup> S 44 (1) of the Constitution of the Federal Republic of Nigeria 1999.

<sup>6</sup> S 44 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999.

<sup>7</sup> Cap P8 Laws of the Federation of Nigeria 2004 (as amended by PITA 2011).

<sup>8</sup> S 108 of the PITA.

<sup>9</sup> Not Incorporated Trustees, because an Incorporated Trustee is registered under Part C of the Companies and Allied Matters Act C20 Laws of the Federation of Nigeria 2004.

<sup>10</sup> S 1 of the PITA.

<sup>11</sup> Under s 105 of the Companies Income Tax Act 2007 –“‘Company’ means any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere”.

<sup>12</sup> Saulawa in *Lagos State Internal Revenue Board v Motorola Nigeria Ltd* (2012) LPELR–14712 (CA).

<sup>13</sup> S 3 of the PITA.

<sup>14</sup> S 2 of the PITA.

assessment.<sup>15</sup> The significance of section 3(1) PITA is that all the income is taxable whether sourced inside or outside Nigeria. The section reads:

“Subject to the provisions of this Act, the tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of every taxable person, for the year, from a source inside or outside Nigeria...”

In short, these provisions establish a worldwide income tax system.

In any federal state, the notion of fiscal federalism envisages the decentralisation of the taxing power between the states of the federation and the central government. The Nigerian Constitution has devolved the taxing power between the states and the federation government.<sup>16</sup> However, it gives the federal government the exclusive substantive tax jurisdiction for both the individual and corporate income tax, while the federal and state governments shared the enforcement tax jurisdiction for individual<sup>17</sup> income tax.<sup>18</sup> The PITA recognises the shared enforcement jurisdiction and that is why it makes separate provision for the determination of residence both of states and at the federal level.

### 3 RESIDENCE OF AN INDIVIDUAL WITHIN THE STATES OF THE FEDERATION OF NIGERIA

The PITA sets out the criteria for the determination of the residence of all taxable persons. It provides that, for any year of assessment, income tax shall be assessed and collected only by the state in which the individual<sup>19</sup> resides in that particular year.<sup>20</sup> Thus, the taxable persons are liable to tax in the state of Nigeria where they are residing from the first day of January (that is, for 12 months) in the year of assessment.<sup>21</sup> In the case of an individual, he becomes liable if he has a “place of residence” or “principal place of residence” in the state. Therefore, all individuals and other taxable persons under PITA<sup>22</sup> who reside within the territory of a state of the

<sup>15</sup> By s 108 of the PITA, the year of assessment commences from the 1<sup>st</sup> January each year.

<sup>16</sup> Emiko “An Analysis of Federal/State Taxing Powers” in Ajemo (ed) *Tax Law and Tax Administration in Nigeria* (1991) 12 45.

<sup>17</sup> And other entities.

<sup>18</sup> This constitutional arrangement has its origins in s 10 (1) of the Nigerian (Constitution) Order-in-Council Act 1960 “The Parliament of the Federation of Nigeria may make laws for the peace, order and good government of any Region of the Federation with respect to taxes on income and profits, not being taxes on the income or profits accruing in, or derived from, that Region, of Africans resident in that Region and African communities in that Region” and s 70 of the 1960 Constitution. Prior to the 1960 constitutional arrangement, each region (North, West and East) imposed and enforced the collection of the income tax of all persons with their territory.

<sup>19</sup> Other than itinerant worker.

<sup>20</sup> S 2 (1)(a) and (2) PITA.

<sup>21</sup> In *Shittu v Nigeria Agricultural and Cooperative Bank Ltd* the court elaborated the provisions of s 2 PITA in the following words: “Section 2 (2) of the Personal Income Tax Decree No. 104 of 1993, empowers the State Government to impose Personal Income Tax for every year of assessment on the Personal Income of individuals who are resident for the year in the State under the provisions of the First Schedule to the Decree.”

<sup>22</sup> Like trust, estates, communities and families with the exception of the members of the armed forces, the police and the itinerant workers.

federation are liable to pay their income tax to the state they reside.<sup>23</sup> This heading determines the residence of the individual other than those mentioned under section 2 (1)(b) of the PITA.<sup>24</sup> Therefore, any mention of an individual refers to that class of individuals. An objective test principally determines the individual tax residence. The PITA provides for two statutory tests for the determination of the tax residence of individuals that falls under this heading. That is “place of residence” as connecting factor and “principal place of residence” as a tiebreaker test for resolving the interstate jurisdictional conflict.

#### 4 PLACE OF RESIDENCE

The location of residence of an individual for tax purposes has been defined<sup>25</sup> as a place available for the domestic use of the individual in Nigeria on a relevant day.<sup>26</sup> It does not include a hotel, guesthouse or any other lodge temporarily stayed by the individual unless he has no any permanent place available for him on that day.<sup>27</sup> In determining the residence of individuals under this test, the PITA provides that if the individual:

“holds a foreign employment on the 1st day of January in a year of assessment, or who first becomes liable to income tax in Nigeria for that year by reason of his entering that employment during that year, *shall be deemed to be resident for that year in the territory in which the principal office of his employer is situated on that day or on the day his foreign employment commences, as the case may be*”<sup>28</sup> (emphasis added).

However, where an employee does not have a place of residence in Nigeria as at the relevant day the rule applies to the foreign employees as well.<sup>29</sup> For an individual under Nigerian employment, the PITA provides a different criterion for determining his residence. That is if he

“holds a Nigerian employment on the 1st day of January in a year of assessment, or who first becomes liable to income tax in Nigeria for that year by reason of his entering that employment during that year, *shall be deemed to be resident for that year in the territory in which he has a place or principal place of residence on that day or, as the case may be, on the day on which he enters upon the full duties of that employment in Nigeria*”<sup>30</sup> (emphasis added).

When an individual retires from his employment, the criterion for ascertaining his tax residence changes from the one applicable to him during the employment. The Act provides that:

<sup>23</sup> S 2 (2) of the PITA (as amended).

<sup>24</sup> S 2 (1) “(b) the following other persons, that is— (i) persons employed in the Nigerian Army, the Nigerian Navy, the Nigerian Air Force, the Nigerian Police Force other than in a civilian capacity; (ii) officers of the Nigerian Foreign Service; (iii) every resident of the Federal Capital Territory, Abuja; and (iv) a person resident outside Nigeria who derives income or profit from Nigeria”.

<sup>25</sup> Par 1 of the first schedule to the PITA.

<sup>26</sup> 1<sup>st</sup> January each year.

<sup>27</sup> Par 1 of the first schedule to the PITA.

<sup>28</sup> Par 2 of the first schedule to the PITA.

<sup>29</sup> Par 4 of the first schedule to the PITA.

<sup>30</sup> Par 3 of the first schedule to the PITA.

“(1) An individual whose only source of earned income arising in Nigeria on the 1st day of January in a year of assessment was a pension, and who had a place or principal place of residence on that day shall be deemed to be resident for that year in the territory in which that place or principal place of residence was situated on that day. (2) An individual whose only source of earned income arising in Nigeria on the 1st day of January in a year of assessment was a pension, and who had no place of residence on that day, shall be deemed to be resident for that year— (a) if the pension is a Nigerian pension wholly payable by the Government of one territory, not being a Nigerian pension in respect of which the subsection (1) (b) of section 2 of this Act applies, in that territory; (b) if the pension is not a Nigerian pension, in the territory in which the principal office in Nigeria of the pension fund or another person authorizing payment of the pension is situated. (3) An individual whose only source of earned income arising in Nigeria on the 1st day of January in a year of assessment was a Nigerian pension, and who had no place of residence on that day shall, if the pension is payable to more than one government or if there are two or more pensions arising in different territories to the individual on that day, be subject to subsection (1) (b) of section 2 of this Act.”<sup>31</sup>

The above provisions hinge on the source of income as the determinant of the individual residence because all the items mentioned relate to the source of the individual’s income. One may argue that the provision concentrates on the income derived from employment. However, for the individuals whose income is not derived from employment, the PITA provides:

“An individual who has a source of earned income in Nigeria for a year of assessment, other than employment or a pension, shall be deemed to be resident for that year in the territory in which he had a place or principal place of residence on the 1st day of January in that year.”<sup>32</sup>

And where

“An individual who has no source of earned income in Nigeria for a year of assessment, but who has one or more source of unearned income in Nigeria for that year shall be deemed to be resident for that year in the territory in which he has a place or principal place of residence on the 1st day of January of that year.”<sup>33</sup>

From the above provisions, it is clear that the individual’s tax residence is determined by his “place of residence”. Also, that the source of the individuals’ income is the sole determinant factor of the place of residence. Thus, the source of income determines the residence of the individual. In defining the taxable income, the PITA provides that:

“Subject to the provisions of this Act, tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of every taxable person, for the year, from a source inside or outside Nigeria, including, without restricting the generality of the foregoing— (a) gain or profit from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised (b) “any salary, wage, fee, allowance or other gain or profit from employment including compensations, bonuses, premiums, benefits or other

<sup>31</sup> Par 5 of the first schedule to the PITA.

<sup>32</sup> Par 6 of the first schedule to the PITA.

<sup>33</sup> Par 7 of the first schedule to the PITA.

---

prerequisites allowed, given or granted by any person to any temporary or permanent employee.”<sup>34</sup>

The scheme stipulates different criteria for determining residence and each of the criteria hinges on the source of income. Thus, the nature of the income determines the criteria applicable for ascertaining the resident status of individuals. Therefore, the ascertainment of the sources or sources of the above array of incomes is the first inquiry for the determination of the residence of individuals. The main problem with this scheme is to determine which of the criteria would be applied to determine an individual’s residence where he derived his income from different sources.

## 5 PRINCIPAL PLACE OF RESIDENCE

Under the Nigerian regime, an individual is required to pay income tax to the state where he resides at 1 January each year.<sup>35</sup> Nigeria is a federal state with thirty-six states and a Federal Capital Territory (Abuja).<sup>36</sup> In applying the provisions of section 2 (2) of PITA, there is the likelihood of a conflict of jurisdiction between the states because an individual may be resident in two or more states at the same time. To address the potential conflict, the PITA makes the “principal place of residence” a tiebreaker test applicable in resolving the conflict. Thus, where an individual resides in more than one state, he is liable to pay tax to the state where his “principal place of residence” is located. In determining the principal place of residence, the Act provides that the source of the individual’s income is the sole factor for consideration. That is to say, where the source of the income is a pension in Nigeria, the “principal place of residence” “is the place or places in which the individual usually resides”.<sup>37</sup> The same rule applies to an individual who derived his income from “unearned income”.<sup>38</sup> However, where the income is an “earned income”<sup>39</sup> the “principal place of residence” “is the place nearest to the individual’s usual place or places of work”.<sup>40</sup> Where an individual works in a branch office or operational site of a company with at least fifty workers, his “principal place of residence” “is the location of the branch office or the site.”<sup>41</sup>

---

<sup>34</sup> S 3 (1) PITA.

<sup>35</sup> S 2 (2) PITA.

<sup>36</sup> By s 2 (2) of the Constitution of the Federal Republic of Nigeria, 1999 which states that “Nigeria shall be a Federation consisting of States and a Federal Capital Territory” and s 3 (1) provides that “There shall be 36 states in Nigeria, that is to say, Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.”

<sup>37</sup> Par 1 (a) of the first schedule of the PITA.

<sup>38</sup> Par 1 (c) of the first schedule of the PITA. Unearned income refers to income derived from investment such as dividend, royalty from patent or trademark, rental income.

<sup>39</sup> This refers to income derived from trade, business, profession, vacation or employment carried on or exercised by the individual, which include profits, salaries, commission, bonuses and pension.

<sup>40</sup> Par 1 (b) of the first schedule of the PITA.

<sup>41</sup> Par 1 (d) of the first schedule of the PITA.

The PITA stipulates that when dual or multiple residence cases occur the individual pays tax to the state where he has the principal place of residence. However, it does not provide the criteria for determining the “principal place of residence”. Furthermore, the PITA provides certain exceptions to the above-stated tiebreaker rule. Firstly, members of the Nigerian armed forces and the police, who by the nature of their job, reside in more than one state, are deemed residents of the Federal Capital Territory, Abuja.<sup>42</sup> Thus, wherever this class of the individual resides, their tax residence is in Abuja. Secondly, the case of an itinerant worker.<sup>43</sup> The PITA provides that:

“In the case of an itinerant worker, the tax may be imposed for any year by any State in which the itinerant worker is found during the year.”<sup>44</sup>

Both the definition and the method of determining the residence of the itinerant worker raise a concern in terms of apportioning the taxable income to the two or more states in a year of assessment. For instance, an individual may work in two or more states at a different time in a month. The question is – where is he supposed to pay the tax? If he requires a Tax Clearance Certificate, from which state will he obtain the certificate?

The key terms used under this heading are the “place of residence” and the “principal place of residence”. As stated above, the PITA defines these two expressions, but the definitions are too vague. The Act defines individuals “place of residence” as:

“A place available for his domestic use in Nigeria on a relevant day, and does not include any hotel, rest-house or another place at which he is temporarily lodging unless no permanent place is available for his use on that day.”<sup>45</sup>

This definition suggests that the available place for the individual on that day must be a permanent one because it clearly excludes any form of temporary place. In *United Bank for Africa Plc. v Odimayo* the Court defined residence within the context of PITA as:

“One is said to reside if he lives, dwells, lodges or abides at a designated place. The residence is accordingly about personal presence at some place of abode with the purpose to remain for some undetermined period. One can be said to reside in a place without necessarily staying permanently thereat. Residence conveys the fact of abode and the intention of remaining. It means more than the physical presence.”<sup>46</sup>

<sup>42</sup> S 2 (1) (b) and (2) of the PITA.

<sup>43</sup> Who is defined by S 108 of the PITA (as amended) 2011 as “‘Itinerant worker’ includes an individual irrespective of his status who works at any time in any state during a year of assessment (other than as a member of the armed forces) for wages, salaries or livelihood by working in more than one state and work for a minimum of twenty (20) days in at least three (3) months of every assessment year.” See also s 28 for the mode of assessing the income of an itinerant worker “The assessable income for any year of assessment of an itinerant worker shall be determined either under the provisions of sections 23, 24, 25, 26 and 27 of this Act or be the income of the year ending on the thirty-first day of December within the year of assessment.

<sup>44</sup> S 2 (3) of the PITA.

<sup>45</sup> Par 1 of the first schedule to the PITA.

<sup>46</sup> (2005) 2 NWLR (Pt 909) 21 38 E–F.

Therefore, the “place of residence” means a permanent residence. What does “permanent residence” mean? The answer to this question needs to be inferred from the definition of “permanent place of abode”. Justice Fisher succinctly explained the nature of “permanent place of abode” as follows:

“[t]he word “permanent” is used to qualify the expression ‘place of abode’ i.e. the physical surroundings in which the person lives, and to describe that place... *the proper construction of place upon the phrase ‘permanent place of abode’ is that it is the taxpayer’s fixed and habitual place of abode...* Material factors for consideration will be the continuity or otherwise of the taxpayer’s presence, the duration of his presence and the durability of his association with the particular place”<sup>47</sup> (emphasis added).

The “permanent residence” suits the above description of the permanent place of abode because the only difference between the two expressions is the “place of abode” and the “residence”. Lord Viscount Cave LC in *Levene’s* case<sup>48</sup> defined residence as the place of abode. Based on this pronouncement, residence, and place of abode mean one and the same thing. It follows that permanent residence and permanent place of abode is the same. That is a residence with some degree of permanence. Conversely, in defining the “principal place of residence”, the PITA uses the word “usual” in all the three circumstances to qualify the word “residence”. That is the individual’s usual residence. Therefore, the central question is – what is the distinction between “permanent residence and usual residence”? Ordinarily, they all suggest that the residence should be a continuous one.

However, there could be a conflict between the definition of “place of residence” and “principal place of residence”. The PITA defines “place of residence” as an available place for the individual’s domestic use that is not a hotel or guesthouse. On the other hand, in defining “principal place of residence”, the PITA does not exclude a hotel and guesthouse.<sup>49</sup> In all the circumstances that could lead to the application of “principal place of residence”, the PITA defines the principal place of residence as “the place where the individual usually resides”.<sup>50</sup> Arguably, the usual place of residence could be a hotel or guesthouse that has been excluded in defining “place of residence”. Similarly, in respect of an individual who works at a branch office or operational site of a company, the principal place of residence is the location of the branch office or site.<sup>51</sup> The conflict may arise where the corporation operates its branch activities from a hotel or guesthouse and individual works in that branch. Going by the definition of “place of residence” the hotel and guest house cannot be the individual’s place of residence, whereas the “principal place of residence” is defined to

<sup>47</sup> *Applegate v FCT* (1979) 79 ATC 4307 4317, see also *FCT v Jenkins* (1982) 82 ATC 4098. The same line of reasoning was followed in the case of *Mayhew v FCT* (2013) AATA 130. However, in *Iyengar v Commissioner of Taxation* (2011) AATA 856 the Tribunal found that the terms of the appellant’s overseas employment was fixed and more specific than that of Jenkins’ case. It was also found that he maintained all his social, family and business ties with Australia. Therefore, his stay in Dubai was temporary and transitory and it does not amount to permanent place of abode.

<sup>48</sup> *Levene v IRC* (1928) AC 217.

<sup>49</sup> As it did while defining “place of residence”.

<sup>50</sup> Par 1 (a) and (b) of the first schedule to the PITA.

<sup>51</sup> Par 1 (d) of the PITA (as amended).



---

be the location of the branch office. The conflict mentioned above creates a complex situation for individuals, tax experts as well as the tax administrators in ascertaining the “place of residence”. Moreover, if he has more than one place of residence the difficulty lies in determining his “principal place of residence”.

Ideally, the “place of residence” and “principal place of residence” are supposed to be objective tests. The international trend in designing the objective test for the determination of an individual is the number of days spent in the state at issue. However, the Nigerian regime, under this heading, does not specify the period of presence in the “place of residence” or “principal place of residence” that qualifies an individual to be a resident. It only determines the commencement period of the residence status that is “on the first day of January in a year of assessment”. The key word in the commencement date is “on” meaning that once an individual happens to be in a state on the 1st January, he automatically becomes a resident of that state. Thus, an individual can become a resident of a state, even if he spent only one day. For instance, if he arrives at the state on 31<sup>st</sup> December, then become resident on the following day (1 January). Given the permanent nature of “place of residence” and “principal place of residence” mentioned above, an individual could acquire permanent residence status in just one day. Conversely, an individual can spend over 365 days in a state without establishing permanent residence status.