Question: What are the tax consequences for South African citizens who seek employment in countries, such as Dubai, United Arab Emirates? Can such citizens escape the tax net on their return to South Africa?

Answer: The tax consequence of a person who was absent from South Africa but was an ordinary resident prior to his/her departure for another country is not easily determinable. Essentially, the answer revolves around the legal definition of what is a resident. The Income Tax Act does not define ‘ordinarily resident’. We are compelled to rely on court decisions in tax law cases. The court ‘decides’ whether a person is ordinarily resident in the Republic or not and this decision depends on the specific facts that relate to each case.

In ITC 961 (1061) 24 SATC 648 it was held that a woman who marries a man ordinarily resident in a particular country and sets up home with her husband in that country cannot be said to be ordinarily resident in some other country, even if immediately before her marriage she was ordinarily resident in that other country.

In the tax case (Levene v IRC (1928 AC 217, 13 TC 486), the court held that the term ‘ordinary residence’ connotes residence in a place with some degree of continuity, discounting incidental or temporary periods of absence from the country. In another tax case (Per Schreiner in Cohen v CIR 1946 AD 174, 13 SATC 362), the court held that a person’s ordinary residence will, essentially, be the country that he/she himself regards as his home and to which he/she would naturally and as a matter of course return, from his wanderings.

These court cases indicate that when a person visits South Africa regularly and that because of their frequency the visits become habitual, the taxpayer would have difficulty in challenging SARS that he/she is not ordinarily resident in South Africa, provided he is not physically present for the periods that lead to be deemed resident in terms of the physical presence test.

In an international court case, a British subject who lived abroad for reasons of health paid short yearly visits to the United Kingdom, where he lived in various hotels because he had no permanent place of abode, so that these visits in fact became the accepted order of his life, he was held to be ordinarily resident in the United Kingdom. Court cases (Soldier v COT 1943 SR 130) have defined the term ‘ordinarily’ to emphasize the requirement that a person’s residence should be settled and certain abode and not a temporary and casual place of living. One could, therefore, suggest that if a South African, works in Saudi Arabia and is one who is unlikely to obtain Saudi Arabian citizenship or any other kind of permanency (because of Saudi domestic laws), such person would still be considered an ordinary resident of South Africa. The same cannot be said of a South African citizen who works, for example, in the US. The South African could qualify for possession of a “green card” and could be the legal owner of fixed property in the host country. In a tax law case ( Robinson v COT 917 TPD 542, 32 SATC 41), the court decided that residence may be inferred from the possession of an establishment, namely, a fixed house or flat regularly occupied from time to time by the individual. The status of ‘ordinarily residence’ for income tax purposes in the departing country could be nullified if it can be demonstrated that the person has an intention to become ordinarily resident in the host country.

Conclusion: It is thus clear that being physically domiciled in a host country does not automatically terminate the status of being ‘ordinarily resident’ for income tax purposes in the departing country. Section 82 of the Income Tax is relevant here. It unambiguously state that the burden of proof that any amount is exempt from tax chargeable under the Income Tax Act rests upon the person claiming the exemption, non-liability, deduction, abatement or set off.
Moreover, this inquiry of whether an amount is exempt, or is not liable to tax, depends on the fact of each case is, and has to be decided on its merits. In other words, courts will consider guidelines which have been laid down by earlier tax judgments but also give emphasis to the totality of all the relevant facts and circumstances of each case. Some of the factors that could influence the court decisions are as follows:

- Most fixed and settled place of residence
- Habitual abode, i.e. present habits and mode of life
- Place of business and personal interest
- Status of individual in country, i.e. immigrant, work permit periods and conditions, etc
- Location of personal belongings
- Nationality
- Family and social relations (schools, church, etc)
- Political, cultural or other activities
- Application for permanent residence
- Period abroad; purpose and nature of visits
- Frequency of and reasons for visits

“...being physically domiciled in a host country does not automatically terminate the status of being `ordinarily resident’ for income tax purposes in the departing country.”

The reader is reminded that South Africa has double tax agreements with Saudi Arabia and the United States of America. No such agreements exist between United Arab Emirates and South Africa. Generally, agreements for the avoidance of double taxation with another country stipulates that only the other country has a right to tax the income earned in the other country.