Tax Guide

Ceasing to be Resident in South Africa

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A. INTRODUCTION

A global economy and mobile human capital make determining where you should be taxed a daunting determination. This applies equally to people who stay and work in South Africa, but who are citizens of other countries or South African citizens who work in other countries. Furthermore, these persons may not just choose to work in another country, but also permanently reside in another country or become such other country's citizen.

So how does South Africa treat these global citizens from a taxation perspective?

Prior to 1 January 2001 South Africa applied a source-based taxation system. The term "***source taxation***" speaks for itself as it is the imposition of tax on income derived within South Africa or which was deemed to be from a source within South Africa.

From 1 January 2001, South Africa changed to a residence (worldwide) system of taxation. Broadly speaking, income derived worldwide would be subject to tax in South Africa where the person is a resident of South Africa. However, the source taxation system is still applied where a person is a non-resident for South African tax purposes.

It is clear that different tax requirements apply for South African tax residents and non-tax residents. The source of the tax resident's remuneration may also play an important role. A tax resident with South African remuneration can have different tax consequences than that of a tax resident with foreign remuneration. Circumstances may also lead to a tax resident becoming a non-tax resident which in turn may trigger other tax requirements and consequences. The term "***resident***"[1] is however a delicate concept given that various regulatory regimes (i.e. South African Revenue Service (SARS), Department of Home Affairs, South African Reserve Bank (SARB), etc.) use similar terminology. The different requirements and consequences (which in some instances overlap) may complicate matters even further.

For example, an individual can be:

- South African an exchange control resident, but not a tax resident;
- South African citizen and passport holder, but not a tax or exchange control resident; or
- South African tax resident, but neither a citizen/passport holder nor an exchange control resident.

The concept of "***residence***" is therefore of utmost importance where individuals have left or intend to leave South Africa on a temporary or permanent basis, as such decision or action can impact individuals for life.

B. PURPOSE, SCOPE AND LIMITATIONS OF THE GUIDE

This Guide provides an overview of the most important South African income tax and exchange control considerations for individuals who have or intend leaving South Africa on a temporary or permanent basis.

The Guide does not constitute tax or legal advice and, since a person's South African income tax obligations depend on their personal circumstances it is strongly suggested that you seek professional advice that is specific to your circumstances.

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[1] Section 1(1) of the Income Tax Act 58 of 1962, definition of "resident"

This Guide is understood to be correct as at 11 November 2024, but please remember that tax laws and practices can change over time.

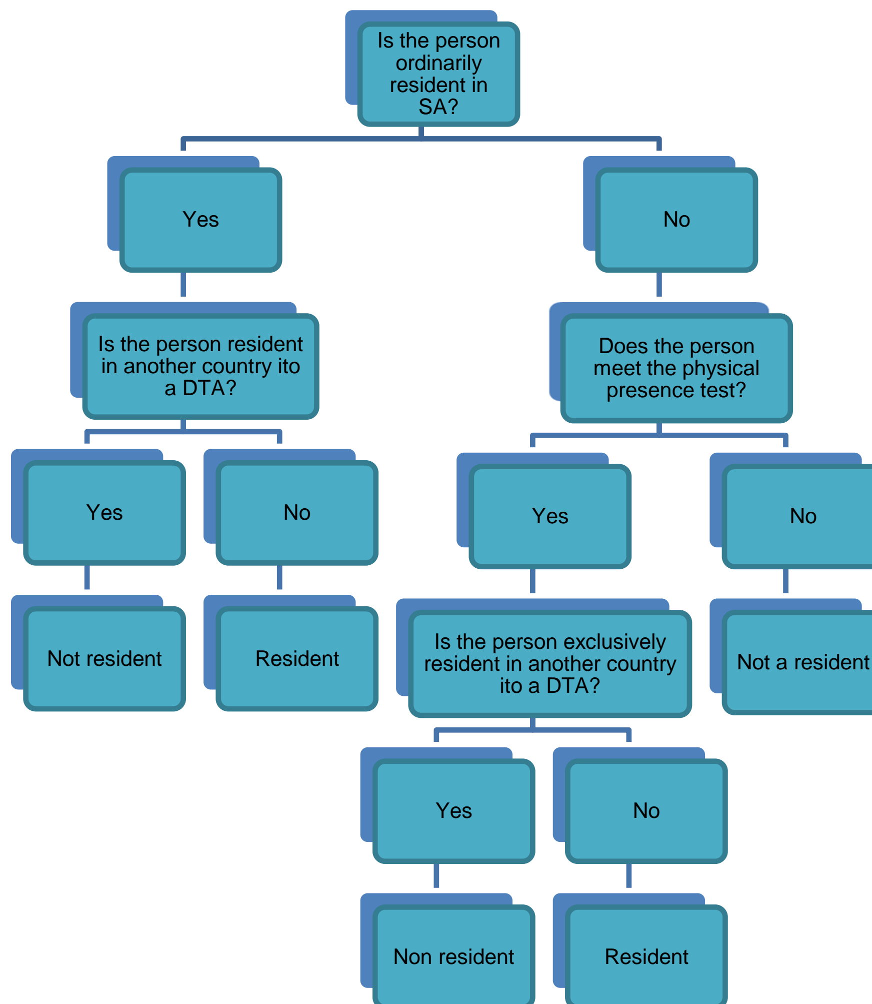
** References to 'the Income Tax Act' are to the **Income Tax Act,** No. 58 of 1962.*

1. Determination of South African Tax Residency

Since an individual's South African tax residency status is key in assessing their South African income tax liability, an extensive discussion of this area has been included below.

The following diagram sets out the tests to apply in order to determine when a person will be a resident, for purposes of normal tax, of South Africa:

Diagram 1 – Summary of Resident test



The definition of a "resident" is fundamental to the residence basis of taxation.

In respect of individuals, the Income Tax Act defines a "resident" as meaning any:

- Natural person who is ordinarily resident in South Africa; *or*

- A natural person who is not, at any stage during the relevant tax year, ordinarily resident in South Africa, but who:
  - Is physically present in South Africa for more than 91 days* in total during that tax year; and
  - Was physically present in South Africa for a period exceeding 91 days* in total during each of the prior five tax years; and
  - Was physically present in South Africa for a period exceeding 915 days* in total during those prior five tax years.

(This is generally referred to as the '*the physical presence test*')

(* Part of a day counts as a full day when determining days of presence in South Africa)

Of further importance to an outbound individual (i.e. an individual who is on a work assignment outside South Africa) is that the definition of resident determines that the term 'resident' excludes any person who is deemed to be exclusively a resident of another country for the purposes of the application of any double tax agreement (hereafter referred to as "DTA") entered into between the governments of South Africa and that other country.

So how does this apply practically?

1.1 Ordinarily residence

The definition of "resident", which was added to the Income Tax Act when the residence basis of taxation was introduced, is primarily based on the concept of "ordinarily resident in" the RSA.

There is no definition of the term "ordinarily resident in", in the Income Tax Act. The following explanation was given in the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000:

> *"The Courts have interpreted "ordinarily resident" to mean the place where a person has his or her place of permanent residence. If a person is outside the Republic and has the intention to return to the Republic to make it his or her permanent home, such person will, therefore, be regarded as a resident regardless of the period of time spent outside the Republic.*
> *Note: "the Republic" is the Republic of South Africa."*

From the above it follows that a person's subjective intention underlies an assessment whether they regard themselves as ordinarily resident in South Africa. But it remains a question of fact, and the burden would be on the individual to discharge the onus that they are not ordinarily resident in South Africa.

Where an individual ceases to be ordinarily resident in South Africa, the individual will also have ceased being a resident of South Africa (for tax purposes).

SARS follows this approach, which it has set out under Part 4 of ***Interpretation Note No 3 - Resident: Definition in Relation to a Natural Person – Ordinarily Resident (Issue 2)*** (dated 20 June 2018) (IN 3 (Issue 2)[2]) as follows:

> ***"4.2 Determining whether a natural person is "ordinarily resident"***

[2] Interpretation Note 2 (Issue 2)

The question of whether a natural person is ordinarily resident in a country is one of fact. It is not possible to lay down hard and fast rules and each case must be decided on its own merits, taking into consideration principles established by case law …

When assessing whether a natural person is ordinarily resident in the Republic, the following factors will be taken into consideration:

- *An intention to be ordinarily resident in the Republic*
- *The natural person's most fixed and settled place of residence*
- *The natural person's habitual abode, that is, the place where that person stays most often, and his or her present habits and mode of life*
- *The place of business and personal interests of the natural person and his or her family*
- *Employment and economic factors*
- *The status of the individual in the Republic and in other countries, for example, whether he or she is an immigrant and what the work permit periods and conditions are*
- *The location of the natural person's personal belongings*
- *The natural person's nationality*
  - *Family and social relations (for example, schools, places of worship and sports or social clubs)*
  - *Political, cultural or other activities*
  - *That natural person's application for permanent residence or citizenship*
  - *Periods abroad, purpose and nature of visits*
  - *Frequency of and reasons for visits*

The above list is not intended to be exhaustive and is merely a guideline.

The circumstances of the natural person must be examined as a whole, taking into account the year of assessment concerned and that person's mode of life before and after the period in question. It is not possible to specify over what period the circumstances must be examined. The examination must cover a sufficient period in the context of the specific case for it to be possible to determine whether the natural person is ordinarily resident in the Republic. The conduct of that person over the entire period of examination must receive special attention.

The effect of the above requirements is that a natural person may be resident in the Republic even if that person was not physically present in the Republic during the relevant year of assessment. A physical presence at all times is not a prerequisite to being ordinarily resident in the Republic. The purpose, nature and intention of a natural person's absence must be established and considered as part of all the facts in determining whether that person is ordinarily resident.

Regarding the taxpayer's intention to be ordinarily resident in the Republic, the court in ITC 1185 expressed useful principles about the determination of true intention and purpose. Although expressed in the context of determining whether the receipts on the sale of property were of a revenue or capital nature, it is submitted that the principles are applicable in determining intention in the context of ordinarily resident. Miller J stated the following:

> *"The difficulty in these cases lies not so much in the formulation of approach but in the application of the principles which must necessarily guide the court. It is no difficult matter to say that an important factor is: what was the taxpayer's intention when he bought the property? It is often very difficult, however, to discover what his true intention was. <u>It is necessary to bear in mind in that regard that the ipse dixit of the taxpayer as to his intent</u>*

*and purpose should not lightly be regarded as decisive. It is the function of the court to determine on an objective review of all the relevant facts and circumstances what the motive, purpose and intention of the taxpayer were. * Not the least important of the facts will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities. This is not to say that the court will give little or no weight to what the taxpayer says his intention was,* as it sometimes contended in argument on behalf of the Secretary in cases of this nature. The taxpayer's evidence under oath and that of his witnesses must necessarily be given full consideration and the credibility of the witnesses must be assessed as in any other case which comes before the court. But direct evidence of intent and purpose must be weighed and tested against the probabilities and the inferences normally to be drawn from the established facts."*

Meyerowitz expressed the view that a natural person's mode of life may be such that it cannot be said that he or she has a real home anywhere and that in such cases that person would be able to discharge the onus of proving that he or she is not ordinarily resident in the Republic. The determination of the country in which a natural person is ordinarily resident is a factual determination. As a result, it is possible that a natural person may be able to prove that he or she does not have a real home anywhere. This situation is, however, expected to be a rare occurrence because it will require a very unique set of facts. There is no set period which must be considered, and the taxpayer's circumstances years before and after the relevant year of assessment must be taken into account.

The concept of ordinary residence must not be confused with the terms "domicile", "nationality", "citizenship" and the concept of "emigrating" or "immigrating" for exchange control purposes."
(*Our emphasis)

Clearly, each case can only be decided on its own facts and circumstances in light of the principles stated above and no hard and fast rules can be made.

Thus, when a person merely states that they no longer regard themselves as ordinarily resident in South Africa, SARS may challenge that assertion if, on a balance of probabilities, relevant objective facts point towards a different conclusion.

Example 1

An illustration of the application of these principles can be found in ***Binding Private Ruling (BPR) 065 (Dated: 03 December 2009****).* [3]

This ruling by SARS concerned a foreign national, who worked outside his country of birth for 4 years before being recruited to work in South Africa for a South African company for a period of two years, renewable annually. Upon relocation to South Africa with his family, he sold his primary residence in his home country and bought a residential property in South Africa.

SARS' approach was to refer to a number of facts, such as that he sold his property in his home country, *inter alia*, because he felt that the housing market had peaked, that he bought property in South Africa because he could not find accommodation to rent that fit their specific preferences, that he had no other social or family ties in South Africa, and that he would work in South Africa in terms of a temporary work permit and did not intend to apply for South African citizenship or naturalisation.

SARS concluded that *"Although the Applicant does not have any property in his country of birth at this stage, he regards his country of birth as his real home, that is, the place to which he will return once the contract with Company A terminates"* and, accordingly, that the person was not ordinarily resident in South Africa.

1.2 Physical presence test [4]

Tax residency in terms of the "physical presence" test can only be triggered after a person (not ordinarily resident in South Africa) has spent five tax years in South Africa and is entering his/her sixth tax year in South Africa (and is not ordinarily resident in South Africa in that sixth tax year).

The physical presence test is an annual test and all three criteria have to be met in each tax year in order for a person to be considered a South African tax resident, which can be illustrated by an example:

[3] This BPR should be read with SARS' subsequent statements in IN3 (Issue 2)

[4] For further reading, Interpretation Note No 4 (Issue 5) (dated 3 August 2018) can be consulted: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-04-Resident-definition-natural-person-physical-presence.pdf

Example 2

Number of tax year	Date of arrival in SA	SA tax year commence s	SA tax year ends	Number of days in SA	More than 91 days in SA during tax year	Number of tax years > 91 days in SA
1	5-Jan-13	1-Mar-12	28-Feb-13	54	No	0
2		1-Mar-13	28-Feb-14	110	Yes	1
3		1-Mar-14	28-Feb-15	85	No	0
4		1-Mar-15	29-Feb-16	220	Yes	1
5		1-Mar-16	28-Feb-17	190	Yes	2
6		1-Mar-17	28-Feb-18	250	Yes	3
7		1-Mar-18	28-Feb-19	170	Yes	4
8		1-Mar-19	29-Feb-20	185	Yes	5
9		1-Mar-20	28-Feb-21	To be confirmed	To be confirmed	6
10		1-Mar-21	28-Feb- 22	To be confirmed	To be confirmed	7

From the table above, it is evident that the individual **may** trigger South African tax residency in terms of the physical presence test for the 2021 tax year -

- since he/she spent:
  - more than 91 days in South Africa in each of the five preceding tax years (i.e. the 2016 – 2020 tax years); and
  - more than 915 days in South Africa in total during those five preceding tax years,
- But, only if he/she spends more than 91 days in South Africa during the 2021 tax year.

Where a person meets the physical presence test during a particular tax year, they will be a South African tax resident from the first day of that tax year.

> *"In other words, with reference to the Example 2 above, even if the person only meets the requirement of spending more than 91 days in South Africa at a later stage during the 2021 tax year, he/she will be treated as having triggered South African tax residency from 1 March 2020."*

Being an annual test, should an individual meet the criteria of the physical presence test in one tax year, but not in the following tax year, he/she will not be a South African tax resident in the latter tax year and he/she will cease South African tax residency on the last day of the year that the criteria were met.

> *"Therefore, if the person referred to in Example 2 triggers South African tax residency in terms of the physical presence test for the 2021 tax year, because he/she spent more than 91 days in South Africa during that tax year, but travels extensively in the tax year ending 28 February 2022 (2022 tax year) and spends less than 91 days in South Africa during the 2022 tax year, he/she may still trigger South African tax residency on 1 March 2021, but will cease to be a South African tax resident on 28 February 2021."*

If a person, who is a South African tax resident in terms of the "physical presence" test (i.e. not ordinarily resident in South Africa), and leaves South Africa, he/she can also break tax residence from the date that he/she leaves South Africa and not only on the last day of that tax year. In this regard, the rule is simply that the person must remain physically outside of South Africa for a continuous period of at least 330 full days after the day on which he/she left South Africa.

"This means that, if the person (referred to in Example 2 above) spends more than 91 days in South Africa after 1 March 2020, he/she will trigger South African tax residency with effect from 1 March 2020. However, if he/she then leaves South Africa on, say, 1 December 2020 and does not return to South Africa for a period of more than 330 days (i.e. not before 27 October 2021), he/she will cease to be a South African tax resident on 1 December 2020 and not only on 28 February 2021."*

(* Please refer to the discussion below regarding the end of a tax year where a person ceases to be a South African tax resident)

1.3 Exclusive tax residency under a DTA

When relocating to another country, a person will likely become subject to the tax residency provisions of that country.

In many cases, an individual will trigger tax residency in a country after having been in that country for more than 183 days in the tax year of such country (and then, in many cases, with effect from the commencement of that tax year) or when arriving in that country to activate a particular type of visa or residence permit.

Therefore, an outbound individual may remain ordinarily resident in South Africa but could at the same time become tax resident in another country under the internal rules of that country.

Should this be the case, the individual should establish if South Africa has a DTA in place with that country. If so, the so-called tiebreaker provisions of that DTA would need to be considered (which are contained in the "Residency" provisions of the DTA – normally, being Article 4).

In applying the tiebreaker clause, the individual could establish that he/she is exclusively a tax resident of the other country in terms of the DTA, which means that he/she will not be regarded as a South African tax resident (even though he/she meets the other requirements for South African tax residency).[5]

Tiebreaker clauses in DTAs may differ and it is important to consider the specific DTA in each case.

In most cases, DTAs to which South Africa is a party expressly require that tax residency in both states should be linked to some physical attachment to a state and not merely be based on taxability in that state due to having, say, income from a source in that state.

Also, some DTAs to which South Africa is a party (for example, the DTA with the United States of America) provide (prior to the actual tiebreaker clause) that, for a person to be regarded as a South African tax resident under that DTA, he/she needs to be ordinarily residence in South Africa. In such a case, an individual, who triggered South African tax residency under the physical presence test, cannot be regarded as exclusively a South African tax resident.

When applying a DTA and interpreting the wording to a particular situation, the interpretation guidance contained in the **Commentary to the Model Convention of the Organization for Economic Co-Operation and Development** (OECD) should be taken into account. Although South Africa is not a member of the OECD, it generally subscribes to the interpretation set out in the

[5] SARS discusses the interaction between the definition of "resident" in the Income Tax Act and the DTAs in paragraph 4.4 of IN 3 (Issue 2) and paragraph 4.5 of IN 4 (Issue 5).

Commentary to the Model Convention – accordingly, the principles set-out in the Commentary have been included in the discussion below.

Generally speaking, tiebreaker clauses typically have the following sequence:

- An individual is deemed a resident solely of the country in which a permanent home is available to the individual.

  A permanent home available refers to a home, whether owned or rented, which is available for an individual's personal use at any given time. The OECD Commentary specifically makes it clear that a home will only be regarded as permanent if it is arranged and retained by the individual for permanent use and should not merely be intended for stays of short duration. The "home" can be in the form of, say, a boat or caravan.

  Furthermore, the element of permanency implies that the home must be available at all times for use when the individual so requires, although the form of the "home" is not important in determining whether a permanent home exists.

  The tiebreakers become more onerous to prove if the individual is not treated to be solely a resident, due to a permanent home available to the individual in only of one of the countries.

Example 3

If an individual, who left South Africa to work in another jurisdiction (a country with which the RSA has a treaty), retains ownership of a residential property in South Africa, but enters into a long-term lease with a third party to rent that property from the outbound individual, that property will not constitute a permanent home available to the individual when applying the relevant DTA. If the person then, say, rents a property in the other country, the foreign property will be a home permanently available to that individual.

Accordingly, the individual will be exclusively a tax resident of the other country and considered as having ceased South African tax residency.

Note: For an individual, who is sent on assignment to another jurisdiction by his/her employer, it should be noted that accommodation rented by his/her employer and then provided to him/her for his/her ongoing and exclusive use will be seen as a home permanently available to him/her if it becomes necessary to establish exclusive tax residency under the DTA between South Africa and the country where the individual has been assigned to.

- If a person has a permanent home in neither or in both countries, one moves on to the next step:

  The individual is then deemed to be a resident solely of the country with which the individual's personal and economic relations are closer. This is also referred to as the person's centre of vital interests.

  In a case before the English First-Tier Tribunal Tax Chamber, between Jonathan Oppenheimer and the Commissioners for Her Majesty's Revenue and Customs[6], Tribunal Judge Anne Scott said:

[6] English First-Tier Tribunal Tax Chamber

"The burden of proof is upon Mr Oppenheimer and, in summary, he must establish that his centre of vital interests was in the RSA, or, if that cannot be determined that he had an habitual abode in the RSA and in both cases in each year in the Relevant Period."

The Commentary to the OECD Model Convention states that, in order to determine where the individual's centre of vital interest is closer to one of the two countries, regard needs to be given to their family and social relations, occupation, political, cultural or other activities, place of business and the place from which they administer their property.

In other words, the process requires a factual enquiry into the individual's lifestyle and personal relationships.

Factors such as the country in which the individual receives the majority of income, and where their main investments are situated, are relevant to determine economic relations.

Having said that, and although SARS is likely to follow the above-mentioned approach, some countries place near exclusive emphasis on where the spouse / dependents and other immediate family members are located. It is therefore important to determine the view of a country's revenue authority early in the process when establishing the location of a person's centre of vital interests.

- If the location of an individual's centre of vital interests cannot be determined, one needs to determine the country in which they have a habitual abode.

  A person's habitual abode is considered to be in the country in which they spend the majority of their time, determined over a reasonable period (i.e. not necessarily only in the tax year under review). The Commentary on the OECD Model Convention indicates that the comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two states is habitual and to determine also the intervals at which the stays take place.

  Judge Scott, in the Oppenheimer case, found that Mr Oppenheimer's "stays in both the RSA and the UK were both part of the settled routine of his life and were of sufficient frequency, duration and regularity to constitute habitual abodes in both countries."

Example 4

If an individual arrived in another country temporarily for work purposes in, say, January 2022, remains there for 15 months and then returns to South Africa, his/her habitual abode will likely be seen to be South Africa, although he/she has not have lived in South Africa for the whole of the South African 2023 tax year.

- If an individual has a habitual abode in both countries or in neither of them, they are deemed to be a resident solely of the country of which they are a national.

- Finally, if the individual is a national of both countries or of neither of them, the competent authorities of the countries will need to settle the question by mutual agreement.

SARS provides guidance on its website[7] and in its **Guide on Mutual Agreement Procedures**[8] (MAP) on how to initiate a MAP (i.e. Competent Authority assistance) request from SARS.

Example 5

Facts:

An individual was born in South Africa but relocated to United States of America (USA) with his spouse in 1997 and acquired USA citizenship in 2006.

In 2011 the individual relocated to South Africa for a temporary 2-year assignment, which has been extended annually. The individual purchased a residence in South Africa and sold the USA residence on relocating to South Africa, as he did not want the aggravation of managing it remotely.

The individual spent the majority of his time in South Africa from the date of relocation. However, the individual still considers the USA to be his true/real home and has the intention to return there once the assignment has ended. The individual never formally emigrated for exchange control purposes.

Question:

Where is the individual resident?

Application:

Article 4 of the USA/South Africa DTA provides:
- Resident of the USA is any person who under the laws of the USA is liable for tax *"by reason of his domicile, residence, citizenship, place of incorporation, or any other criterion of a similar nature …"*
- Resident of South Africa is *"any individual who is ordinarily resident in South Africa …"*

Thus, "resident" of South Africa for purposes of USA/SA DTA -
- Only if the individual meets ordinarily resident (in the RSA) test; and
- Not if he or she only meets physical presence test for South African tax residency.

The individual is exclusively tax resident of USA and thus not a South African tax resident.

Where an individual, who is ordinarily resident in South Africa, becomes a person who is deemed to be exclusively a resident of a treaty country (for purposes of the treaty), the individual ceases to be a resident of South Africa.

2. Consequences of remaining a South African tax resident

Where an individual is a South African tax resident whilst outside South Africa, he/she will remain taxable on his/her worldwide income and capital gains.

[7] Mutual Agreement Procedure
[8] Guide on Mutual Agreement Procedures

However, the individual may also be taxable in the jurisdiction where he/she works or holds his/her capital assets. In this regard, certain exemptions exist and/or the South African tax resident can claim a rebate (foreign tax credit (FTC)) in respect of foreign taxes paid on said income and/or capital gains, which may be offset against the tax payable in South Africa (with certain restrictions).

2.1 Foreign earned remuneration

2.1.1 General[9]

SA Tax residents are taxable on their worldwide income. However, section 10(1)(o))(ii) of the Income Tax Act provides a specific exemption, which is relevant if a South African tax resident individual is required to spend large amounts of time outside South Africa for work purposes, and which provides as follows:

If the individual -

- Was outside South Africa for a period/periods exceeding 183 full[10] days (i.e. 183 full days plus at least a part of a day) in aggregate during any 12 month period beginning/ending in a year of assessment; **and**
- Was outside South Africa for a continuous period exceeding 60 full days (i.e. 60 full days plus at least a part of a day) during that 12 month period; **and**
- Rendered employment services whilst he/she was outside South Africa during this 12-month period and earned remuneration earned for such services rendered outside South Africa for or on behalf of any employer.

The remuneration would then qualify for the section 10(1)(o)(ii) exemption:

- Before 1 March 2020, it was fully exempt from tax in South Africa; but
- From 1 March 2020, it will be exempt from tax in South Africa up to a limit of R1 250 000 in aggregate per year of assessment.

In other words, for years of assessment commencing 1 March 2020 only the first R1 250 000 of foreign remuneration earned during a year of assessment will be exempt from tax in South Africa if an individual otherwise meets the requirements for periods of physical absence outside South Africa.

If a South African resident individual, with respect to the foreign remuneration, does not qualify for the section 10(1)(o)(ii) exemption, the individual will be taxed in South Africa (taxed on his or her worldwide remuneration). To the extent that such remuneration is also taxable in the country where the services are rendered, the individual will be able to claim such FTC, which may be offset against (deducted from) the tax payable in South Africa (with certain limitations).

Naturally, for years of assessment commencing on or after 1 March 2020, if an individual earns remuneration for services outside South Africa in excess of R1 250 000, and is taxable on such excess in another country, the individual will also be able to utilise such FTC in determining his/her South African tax liability.

Although an individual may spend the requisite amount of time outside South Africa to qualify for the exemption, only the portion of his/her remuneration that relates to employment services rendered outside South Africa will be exempt from South African tax. Thus, the remuneration should be

[9] SARS' views, as set out in Interpretation Note No 16 (Issue 4) dated 31 January 2020 (IN16 (Issue 4)

[10] In terms of the SARS practice generally prevailing, a "full day" is interpreted as meaning the 24 hours from 0h00 to 24h00 (refer to paragraph 4.1.5 of IN16 (Issue 4)).

apportioned between South African and non-South African sourced income if it is clear that a portion of such remuneration relates to services rendered both inside and outside South Africa.[11]

However, if the services rendered inside South Africa by a person are merely casual and accidental, or subsidiary and incidental, then the originating cause of the employment income will be fully outside South Africa and no apportionment will be necessary (refer to the SARS' practice generally prevailing as set out in IN16 (Issue 4)). In other words, if the services rendered in South Africa are merely casual and accidental, or subsidiary and incidental, in nature then the remuneration for such services will be regarded as fully sourced outside South Africa and will qualify for the section 10(1)(o)(ii) exemption.

Example 6

Example 2 in IN16 (Issue 4) on the apportionment of income is instructive in this regard:

Facts:

Z is employed by the South African subsidiary of a multi-national company. Due to specialised knowledge, Z was requested to assist a New Zealand subsidiary and will be leaving the Republic[12] on 1 May 2020 to commence work on 2 May 2020. Z was contracted to work in New Zealand until 19 December 2020. The subsidiary company in New Zealand will be remunerating Z during this period. Z will be departing New Zealand on 20 December 2020 to return to the Republic.

For purposes of the example, it is assumed that Z will be returning to the Republic to fulfil local employment obligations during the following periods, which will include travel days:

- *22 June 2020 to 6 July 2020;*
- *30 August 2020 to 7 September 2020; and*
- *11 November 2020 to 20 November 2020.*

Result:

The number of calendar days for which remuneration will be derived for services rendered in New Zealand in the 2021 year of assessment will be as follows:

[11] Remuneration received subsequently to a qualifying period, but in respect of such qualifying period, will qualify for the exemption, but subject to any applicable apportionment.

[12] The "Republic" being the RSA.

	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	TOTAL
2 May 20 to 21 June 20	*30*	*21*							*51*
7 July 20 to 29 Aug 20			*25*	*29*					*54*
8 Sept 20 to 10 Nov 20					*23*	*31*	*10*		***64***
21 Nov 20 to 19 Dec 20							*10*	*19*	*29*
									198

The total remuneration that Z received for services rendered during the period 2 May 2020 to 19 December 2020 is R1 500 000.

As the table above indicates, the taxpayer satisfies the requirements of the 183-day and 60-continuous-day tests within a period of 12 months. The taxpayer has two easily identifiable qualifying periods:

- *2 May 2020 to 1 May 2021; and*
- *20 December 2019 to 19 December 2020.*

The following table sets out the work days outside the Republic for the period 2 May 2020 to 19 December 2020:

Work days during period	***Total work days during period***	***Actual work days outside the Republic***	***Actual work days in the Republic***
2 May 20 to 21 Jun 20	*34*	*34*	
22 Jun 20 to 6 Jul 20	*11*		*11*
7 Jul 20 to 29 Aug 20	*38*	*38*	
30 Aug 20 to 7 Sep 20	*6*		*6*
8 Sep 20 to 10 Nov 20	*45*	*45*	
11 Nov 20 to 20 Nov 20	*8*		*8*
21 Nov 20 to 19 Dec 20	*19*	*19*	
Total	***161***	***136***	***25***

Z will not be required to work over weekends, and weekends have thus been excluded from the total work days and actual work days' calculations. Possible public holidays in New Zealand are not taken into account in this example.

The portion of Z's remuneration that is exempt from normal tax in South Africa under section 10(1)(o)(ii) is calculated as follows:

<u>Work days outside the Republic for the period</u> x Remuneration received during the period
Total work days for the period

= Remuneration that may qualify for the exemption under section 10(1)(o)(ii)

= 136/161 × R1 500 000 = R1 267 081, however the exemption is limited to R1 250 000

Of the R1 500 000 remuneration Z will be earning during the New Zealand assignment, R1 267 081 relates to services rendered in New Zealand during the 2021 year of assessment, and of that amount R1 250 000 will be exempt from normal tax in South Africa. Z will be remunerated during this period by the New Zealand subsidiary. R250 000 over and above the R1 250 000, which is made of the following two parts, will be subject to normal tax in South Africa:

- *R17 081 that relates to services rendered outside South Africa will be subject to tax in South Africa, and may qualify for relief under section 6quat(1), provided foreign taxes are proved to be payable on that amount and the requirements under that section are met.*
- *R232 919 that will be earned during that period will relate to services rendered in the Republic and will also be subject to normal tax in South Africa. No relief in the form of a tax credit will be applicable against this portion of the income.*

Remuneration earned in the Republic during the 2021 year of assessment before the assignment in New Zealand commences (that is, for the period 1 March 2020 to 1 May 2020) and after the assignment terminates (for the period 20 December 2020 to 28 February 2021) will be unaffected by the section 10(1)(o)(ii) exemption and will be fully taxable in South Africa.

2.1.2 Excluded income

The exemption only applies to remuneration for services rendered.

Accordingly –
- certain employment related receipts that do not relate to actual services rendered, such as in respect of a restraint of trade or severance benefits on retrenchment; and
- income from the conducting of a trade as a sole proprietor (as an independent contractor) or *via* a partnership (which does not constitute remuneration),

do not fall within the application of the exemption.

2.1.3 Equity & long-term incentive awards

The originating cause of a gain on the 'vesting' of an equity instrument in terms of section 8C of the Income Tax Act remains the services rendered by the employee. Therefore, such gain should, for purposes of section 10(1)(o)(ii), be apportioned between services rendered in and outside South Africa (i.e. the place where the right to participate was offered or accepted, or the place where the employee was located when vesting took place is not relevant).

However, it is important to identify the period over which such apportionment should be done ('sourcing period'), and it is important to take note that SARS[13] looks at two periods as being relevant when identifying said sourcing period, namely: the "reward" period and the "lock-in" period. SARS describes them as follows:

> *"The "reward" period is where employers grant rights to employees to participate in share schemes as a reward for past performance, for example, participation due to exceptional performance during the previous financial year of the employer. The "lock-in" period is a forward-looking period, where employees are prohibited from benefiting under the scheme until pre-determined fixed future dates, with the employees generally required to be in employment at the end of the lock-in period in order to participate in the benefits. The terms of the*

[13] Refer to paragraph 4.4 of IN16 (Issue 4).

employment agreement and the rules and participation terms of the share scheme will determine what these periods are."

The location of services rendered during both the "reward" period and the "lock-in" period (unless either, only applies) must be taken into account when determining the sourcing period for apportioning the gain under section 10(1)(o)(ii).

However, such sourcing period may overlap more than one tax year, in which case the principle is that the remuneration is deemed to have accrued evenly over the sourcing period when applying this exemption.

It is then necessary to determine if any amount so accrued over the sourcing period falls within a 12-month period in which the individual complies with the requisite number of days spent outside South Africa and to then apportion said amount between South African and non-South African sourced portions.

Example 7

Example 5 in IN16 (Issue 4) on the apportionment of gains made under section 8C of the Income Tax Act is instructive in this regard:

Facts:

On 1 July 2015, DG, an employee of a South African holding company, acquired 45 000 shares (at R5 each) from the South African company by virtue of employment. Under the agreement, DG is not permitted to dispose of the shares until 1 July 2020. The shares were granted solely to retain DG's services.

DG rendered services to a Nigerian subsidiary company, during the period 1 April 2017 to 31 March 2020. DG met the 183-day and 60-continuous-day tests for this entire period, and thus any remuneration earned for services rendered outside the Republic during that period qualifies for exemption under section 10(1)(o)(ii).

DG also rendered services outside the Republic, during the lock-in period but outside any qualifying period, from 1 October 2015 to 30 October 2015.

It is assumed for purposes of this example that DG received in March 2020 a bonus of R800 000 and a salary of R400 000.

On 1 July 2020, when DG will become entitled to dispose of the shares, they will vest under section 8C, and, it is assumed that they will have a market value of R85 per share. DG will therefore make a gain of R3 600 000 [45 000 × (R85 – R5)].

To simplify illustration in this example, any leave days taken are ignored.

Result:

The portion of the gain DG will make on the vesting of the equity instruments that relates to services rendered outside the Republic during the qualifying period of 12 months will be exempt from taxation under section 10(1)(o)(ii). The exempt portion must be calculated as follows:

Work days outside the Republic for the sourcing period X *Section 8C gain*
Total work days for the sourcing period

= The portion of the section 8C gain that may qualify for exemption under section 10(1)(o)(ii)

Years of assessment during source period	Did section 10(1)(o)(ii) apply? (Y/N)	Total work days	Total work days outside the Republic	Section 10(1)(o)(ii) apportionment ratio	Deemed accrual for section 10(1)(o)(ii) purposes R	Portion of the gain qualifying for the exemption in 2021 R
*1/7/2015 – 28/2/2016 (**2016**)*	*N*	*169*	*0*	*No portion exempt*	*R3 600 000 x 169/1252 = R485 942.49*	*Nil*
*1/3/2016 – 28/2/2017 (**2017**)*	*N*	*250*	*0*	*No portion exempt*	*R3 600 000 x 250/1252 = R718 849.84*	*Nil*
*1/3/2017 – 28/2/2018 (**2018**)*	*Y*	*250*	*228*	*228/250*	*R3 600 000 x 250/1252 = R718 849.84*	*718 849.84 x 228/250 = R655 591.05*
*1/3/2018 – 28/2/2019 (**2019**)*	*Y*	*250*	*250*	*250/250*	*R3 600 000 x 250/1252 = R718 849.84*	*718 849.84 x 250/250 = R718 849.84*
*1/3/2019 – 28/2/2020 (**2020**)*	*Y*	*250*	*250*	*250/250*	*R3 600 000 x 250/1252 = R718 849.84*	*718 849.84 x 250/250 = R718 849.84*
*1/3/2020 – 1/7/2020 (**2021**)*	*Y*	*83*	*22*	*22/83*	*R3 600 000 x 83/1252 = R238 658.15*	*Nil*
TOTALS		***1252***	***750***		***3 600 000***	***2 093 290.73*****

** Since DG's remuneration for foreign services will exceed R1 million in March 2020, the full amount of R63 258.79 (R238 658.15 × 22/83) will be taxable*
*** The total taxable gain to be included in the 2021 year of assessment is R1 506 709.27 (R3 600 000 – R2 093 290.73).*

There are a total of 1 252 work days during the sourcing period, being from 1 July 2015 to 1 July 2020. The gain is deemed to be spread evenly over this period for purposes of the exemption under section 10(1)(o)(ii). (Proviso (C) to section 10(1)(o)(ii)).

The gains attributable to periods where services were rendered outside the Republic, but that do not fall within a qualifying 12-month period, being the period of 1 to 30 October 2015, do not qualify as days outside the Republic under the formula, and the gains attributable to services rendered during those periods remain fully taxable in South Africa.

It is important to note from the above example that, even though the gain only 'crystallises' and is taxable upon vesting after 1 March 2020, the portion of the gain that can be attributed to prior years of assessment is deemed to have accrued evenly, and must therefore be apportioned evenly, over the period that the services were rendered - i.e. it would thus not be aggregated towards the R1 250 000 limitation.

2.2 Foreign pensions and annuities – exemption under section 10(1)(gC) of the Income Tax Act

A further exemption that may be applicable relates to receipts or accruals from an un-approved retirement fund:

Any lump sum, pension or annuity received by or accrued to a South African tax resident from a source outside South Africa as compensation for past employment outside South Africa is exempt from South African taxation. There is a further requirement, to qualify for this exemption, that the lump sum, pension or annuity paid accrues from a retirement that is not approved (by SARS).

Principally, the exemption for the South African resident, is available if the amount is "*from a source outside*" South Africa "*as consideration for past employment outside*" South Africa. In terms of section 9(2)(i), of the Income Tax Act, an *amount is received by or accrues to a person from a source within the Republic if that amount constitutes a lump sum, a pension or an annuity payable by a pension fund, pension preservation fund, provident fund or provident preservation fund and the services in respect of which that amount is so received or accrues were rendered within the Republic*. In terms of a proviso to section 9(2)(i), *if the amount is received or accrues in respect of services <u>which were rendered partly within and partly outside the Republic</u>, only so much of that amount as bears to the total of that amount the same ratio as the period during which the services were rendered in the Republic bears to the total period during which the services were rendered must be regarded as having been received by or accrued to the person from a source within the Republic*.

To the extent that it can be said to have been funded from services rendered outside South Africa (whether before, during or after South African tax residency) that portion would be exempt from South African tax in the hands of a South African tax resident.

In addition, depending on the law in the country where the retirement fund is located, the lump sum, pension or annuity might be taxable in that country. However, some DTAs may provide sole taxing rights to South Africa as the country of residence, although in some instances such right may be made subject to the amount being taxed in South Africa.

2.3 Foreign dividends

Certain exemptions from South African tax apply to foreign dividends received by or accrued to a South African tax resident, such as:

- The full foreign dividend where the shareholder holds at least 10% of the total equity shares and voting rights of the company declaring the foreign dividend; or
- For natural person, 25/45 of the foreign dividend is exempt (if the above does not apply).

2.4 Foreign Tax Credit (FTC) - section 6*quat* of the Income Tax Act

2.4.1 Section 6quat(1)

A South African tax resident can claim a FTC (tax rebate) against his/her South African normal tax of foreign taxes paid or payable on non-South African sourced taxable income. It should be noted that any foreign taxes that are recoverable from the foreign government (for example, due to the application of a DTA) cannot be taken into account for this purpose.

The above-mentioned FTC is, however, limited to the South African tax on the foreign income, which effectively results in a foreign-source amount only being subject to normal tax when the foreign tax

is less than the South African normal tax. The South African net normal tax generally equals the difference between the two tax rates multiplied by the foreign-source amount.

Example 8

Facts:

A South African resident derives foreign income of R100 on which foreign taxes of 25% (R25) are proved to be payable.

The South African resident's effective tax rate is 28%.

Application:

	R
Taxable income from a foreign source	100,00
Normal tax (28%)	28,00
Less: Foreign tax rebate	(25,00)
Final normal tax payable	3,00
Total tax (normal tax and foreign tax)	**28,00**

In the event that the actual qualifying foreign taxes exceed the FTC that can be claimed, the difference is carried forward and deemed to be foreign tax in the next tax year.

2.4.2 Section 6quat(1C)

A South African tax resident can, under certain circumstances, elect to claim a tax deduction on foreign taxes paid on South African sourced taxable income. The application of section 6*quat*(1C)(a) is limited to foreign taxes on income other than taxes contemplated in section 6*quat*(1A). [14]

Example 9

Facts:

A South African resident derives South African income of R100 on which foreign taxes of 25% (R25) are proved to be payable. The South African resident's effective tax rate is 28%
Application:

	R
Taxable income from a South African source	100,00
Less: Foreign taxes qualifying for deduction	(25,00)
Taxable income after deduction of foreign taxes	75,00
Normal tax (28%)	21,00

[14] Refer to paragraph 6 of SARS IN 18 (Issue 5), dated 9 December 2022 (IN18 (Issue 5) which explains this in more detail: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/Legal-IN-18-Rebate-and-deduction-for-foreign-taxes-on-income.pdf

Total tax (normal tax and foreign tax)	46,00	

2.4.3 Section 6quat(1B)(a) - limitation of tax rebate

The amount of foreign taxes which qualify for the section 6*quat*(1) rebate in a particular year of assessment is the lesser of –

- the sum of the qualifying foreign taxes; or
- the amount calculated under the limitation formula as set out below.

The limitation formula is calculated as follows:

$$\frac{\text{Taxable income derived from all foreign sources (A)}}{\text{Taxable income derived from all sources (B)}} \times \text{Normal tax payable on (B)}$$

“Taxable income derived from all foreign sources” includes all amounts of foreign source income that were included in the South African resident’s total taxable income regardless of the rate of foreign tax (if any) to which those amounts are subject. The taxable income of both the numerator and the denominator is determined according to South African tax law.

Normal tax is the South African tax calculated on taxable income before the deduction of any rebates contemplated in sections 6, 6A, 6B, 6*quat*(1) and 6*quin*, respectively.

The purpose of the limitation is to ensure that the rebate granted for foreign taxes paid only relates to the foreign income included in a resident’s taxable income. Therefore, if no foreign income is included in a resident’s taxable income, no foreign tax rebate will be available even if the resident paid foreign tax.

All qualifying foreign taxes are aggregated, and the rebate is limited (capped) at the lesser of the aggregate of the foreign taxes payable and the proportion of normal tax payable on the resident’s foreign taxable income as calculated by the limitation formula.

In summary, although all foreign source income and foreign tax can be pooled, foreign tax on income that is fully exempt from tax in South Africa (such as remuneration exempt from South African tax in terms of section 10(1)(o)(ii)) must be ignored. In other words, foreign taxes which are attributable to exempt income will not qualify for the FTC.

The following example illustrates the application of this limitation.

Example 10

Facts:

An individual, resident in South Africa, earned income from services of a technical nature rendered whilst physically present in Botswana. The individual earned these fees, not as an employee, but in an independent capacity and the individual does not have a permanent establishment in Botswana.

For the current year of assessment, the gross income derived from the technical services rendered, equalled R200 000 and the individual incurred expenses of R80 000, which qualifies for a deduction in determining the taxable income of the individual.

Botswana levies tax on technical fees at a rate of 10% on the gross amount of the fees. The tax payable in Botswana is R20 000 (being R200 000 × 10%) for the current year of assessment.

The South African resident has other taxable income of R50 000 sourced in South Africa. The rate of tax, levied in South Africa, on the total taxable income of the individual, is 18%.

The individual's normal South African tax totals R30 600 [(R50 000 + R120 000) × 18%].

Application:

The full amount of foreign tax paid of R20 000 potentially qualifies for the rebate, but the general limitation must be taken into account.

Calculation of the section 6quat limitation – using a formula:

Taxable income derived from all foreign sources X Normal tax payable
Taxable income derived from all sources

= R120 000 / R170 000 × R30 600

= R21 600

Rebate in the current year of assessment will therefore be equal to R21 600.

The excess of R9 000 (R20 000 – R21 600) may be carried forward to the immediate following year of assessment and is deemed to be a foreign tax paid in that year which may be deducted from the normal tax in that year.

Note: the excess cannot be carried forward for more than seven years reckoned from the year of assessment when the excess was for the first time carried forward.

The impact of the limitation provisions on the section 10(1)(o)(ii) exemption, can be seen in the examples below:

Example 11

Facts:

The facts are in respect of a year of assessment which commenced on 1 March 2021.

Mr R (a South African resident) is employed and renders services in Mauritius.

He earned the equivalent foreign employment income of R1 750 000 and R100 000 of rental income in South Africa during the year of assessment.

He is subject to tax in Mauritius at a rate of 15% of the amount of the remuneration.

Application:

	R
Foreign income	*1 750 000*
SA income	*113 600*
Section (10)(o)(ii) exemption	*(1 250 000)*
Taxable income	*613 600*
SA tax payable before rebates for the 2022 year of assessment (R163 335 + (R613 600 – R613 600) x 39%))	*163 335*
Primary rebate	*(15 714)*
Section 6quat(1) rebate *Foreign tax:* *R1 750 000 x 15% = R262 500* *Available:* *(R500 000 / R1 500 000) * R262 500 = R87 500* *Limit: R500 000 / R613 600 x R163 335 = R133 095.66*	*(87 500)*
Total SA tax payable	***60 121***

Example 12

Facts:

The rates of tax, and rebates, applicable to the 2021 year of assessment was used as an example as this is the first year that the limited exemption, of R1 250 000 applied.

Mrs S is a South African tax resident living and working in the UK.

Employment income:

In the 2021 tax year, Mrs S earned a salary of £60 000.

Mrs S elected to translate the foreign currency amounts by applying the average exchange rate for the year of assessment. For the purposes of this example, we assume this to be R22: £1, therefore R1 320 000.

The foreign tax, on this amount, according to the UK tax tables is R253 000 (this had to be converted at the average exchange rate of R22: £1). It was accepted that Mrs S is entitled to the personal allowance in terms of UK tax law.

Mrs S met the requirements of and qualifies for the section 10(1)(o)(ii) exemption of R1 250 000.

Scenario 1:

Other income:

In addition to her UK remuneration income, Mrs S earns rental income of R240 000 for a property, situated in South Africa, and owned by her. This amount is the amount net of any related deductible expenses. She earns no other income.

Scenario 2:
Mrs S only earns the UK remuneration income and has no SA or other income

Application:

Scenario 1	***R***
Income from foreign source	*1 320 000*
Foreign employment income exemption (set off against foreign sourced remuneration only)	*(1 250 000)*
Rental income - SA property	*240 000*
Total income	*1 560 000*
Taxable income	***310 000***
*SA tax payable before rebates ((310 000 - 205 900)*26%) + 37 062*	*64 128*
Primary rebate	*(14 958)*
Section 6quat(1) rebate: *The foreign tax (see above) is R253 000.* *The foreign tax that qualifies for the rebate is:* *(R1 320 000 - R1 250 000) / R1 320 000 X R253 000 = R13 416.67* *The section 6quat limit: (R1 320 000 - R1 250 000) / R310 000 x R64 128*	*(13 467)*
Total SA tax payable	***35 703***

Scenario 2	***R***
Income from foreign source	*1 320 000*
Other income	*-*
Total income	*1 320 000*
Foreign employment income exemption (set off against foreign sourced remuneration only)	*(1 250 000)*
Taxable income	*70 000*
SA tax payable before rebates (70 000 x 18%)	*12 600*
Primary rebate	*(14 958)*

Section 6quat(1) rebate to be <u>carried forward</u>, limited to SA tax payable. Given that the primary rebate exceeds the SA tax payable, the FTC will not be utilised and may be carried forward to subsequent years (up to 7 years).	(12 600)
Total SA tax payable	***NIL***

2.4.4 Documentary proof required by SARS

For more information regarding the claiming of the section 6*quat* rebate in respect of foreign taxes on income, and in particular the relevant documentary requirements, refer to paragraph 9 of **Interpretation Note 18 (Issue 5)** – 9 December 2022.

It is important to be aware of the documentary requirements to ensure that adequate documentation is sourced and retained to validate any section 6*quat* credit claimed.

2.5 Donations Tax

Donations tax is only leviable against a South African tax resident.

The donations tax rate is 20% if the aggregate value of all donations does not exceed R30 million during a tax year. Donations in excess of that amount are subject to donations tax at a rate of 25% (section 64 of the ITA).

R100 000 per tax year of the donations by a natural person is exempt from donations tax (Section 54 of the ITA).

Donations tax is not applicable to a non-resident donor, which includes the deemed donation on loans to trusts (or companies held by such trusts) by connected persons in relation to the trusts concerned and where the interest charged on the loans are less than the 'official rate of interest'.

2.6 Estate Duty

If an individual was ordinarily resident in South Africa at the time of his/her death, all his/her worldwide assets (including deemed property, such as proceeds from insurance policies), wherever they are situated, are included in the gross value of his/her estate for the determination of estate duty (please refer to the Estate Duty Act, Act No. 45 of 1955).

Note that the total value of all property of the deceased will not include the value of any right in or to property situated outside South Africa acquired by the deceased –

- before he or she became ordinarily resident in South Africa for the first time; or
- after he or she became ordinarily resident in South Africa for the first time, by –
  - a donation if at the date of the donation the donor was a person (other than a company) not ordinarily resident in South Africa; or
  - inheritance from a person who at the date of his death was not ordinarily resident in South Africa.

Estate duty is payable at a rate of 20% of the dutiable amount of an estate up to R30 million. The value of the estate in excess of R30 million is subject to estate duty at a rate of 25%.

If the person was not ordinarily resident in South Africa at the time of death, only assets that were situated in South Africa at that point are potentially subject to estate duty in South Africa.

2.7 Tax administration: submission of returns and provisional tax

2.7.1 Persons who are required to submit an income tax return a year of assessment

General:

SARS *"must annually give public notice of the persons who are required to furnish returns for the assessment of normal tax within the period prescribed in that notice"* – see section 66(1) of the Income Tax Act.

In terms of section 25, of the Tax Administration Act, any *"person required under a tax Act to submit a return must do so*
(a) in the prescribed form and manner; and
(b) by the date specified in the tax Act or, in its absence, by the date specified by the Commissioner in the public notice requiring the submission."

Natural persons resident in South Africa:

In terms of paragraph 2, of the public notice[15] for the "2023 year of assessment", every natural person:

"(e) who during the 2023 year of assessment—
(i) was a resident and carried on any trade (other than solely in his or her capacity as an employee); or
(ii) ….;
(f) who during the 2023 year of assessment—
(i) was a resident and had capital gains or capital losses exceeding R40 000;
(ii) was not a resident and had capital gains or capital losses from the disposal of an asset to which the Eighth Schedule to the Income Tax Act applies;
(iii) was a resident and held any funds in foreign currency or owned any assets outside the Republic, if the total value of those funds and assets exceeded R250 000 at any stage during the 2023 year of assessment;
(iv) was a resident and to whom any income or capital gains from funds in foreign currency or assets outside the Republic was attributed in terms of the Income Tax Act;
(v) was a resident and held any participation rights, as referred to in section 72A of the Income Tax Act, in a controlled foreign company;
(vi) was a resident and had taxable turnover; or
(vii) subject to the provisions of paragraph 3, at the end of the 2023 year of assessment—
(aa) was under the age of 65 and whose gross income exceeded R91 250;
(bb) was 65 years or older (but under the age of 75) and whose gross income exceeded R141 250; or (cc) was 75 years or older and whose gross income exceeded R157 900;
… must submit a return."

[15] See Gazette No. 48788, issued 14 June 2023

It must be noted that, every person that is issued an income tax return form or who is requested by the Commissioner in writing to furnish a return, irrespective of the amount of income or nature of receipts or accruals of the person must submit an income tax return.

Other than the amounts, that appears in item (vii) above, the annual notice reads the same. These amounts, of gross income, are the same as the tax threshold amounts for the individuals concerned and for the relevant year of assessment.

In terms of paragraph 3(1), of the notice for the 2023 year of assessment, a natural person is not required to submit an income tax return if the gross income of the person during the 2023 year of assessment consisted solely of gross income described in one or more of the following subparagraphs:

(a) Remuneration paid or payable from one single source, which does not exceed R500 000 and employees' tax has been deducted or withheld in terms of the deduction tables prescribed by the Commissioner;

(b) Interest (other than interest from a tax free investment) from a source in the Republic not exceeding—
   - (i) R23 800 in the case of a natural person below the age of 65 years at the end of the year of assessment;
   - (ii) R34 500 in the case of a natural person aged 65 years or older at the end of the year of assessment; or
   - (iii) R23 800 in the case of the estate of a deceased person;

(c) Dividends and the natural person was a non-resident throughout the 2023 year of assessment; and

(d) Amounts received or accrued from a tax-free investment.

It is important to note that the above exclusion does not apply to a natural person—

(a) who was paid or granted an allowance or advance as described in section 8(1)(a)(i) of the Income Tax Act other than an amount reimbursed or advanced as described in section 8(1)(a)(ii) or an allowance or advance referred to in section 8(1)(b)(iii) that does not exceed the amount determined by applying the rate per kilometre for the simplified method in the notice fixing the rate per kilometre under section 8(1)(b)(ii) and (iii) to the actual distance travelled;

(b) who was granted a taxable benefit described in paragraph 7 of the Seventh Schedule to the Income Tax Act; or

(c) who received any amount or to whom any amount accrued in respect of services rendered outside the Republic.

Where for instance, a South African resident individual therefore earned remuneration abroad, and the gross amount thereof is less than R1,25 million (and therefore exempt from normal tax in the RSA), a return of income must nevertheless be submitted.

It must be noted that, in respect of resident individuals who are required to submit a return because the amount of their gross income for the year of assessment exceeded the amounts specified in item (vii) of paragraph 2(f) of the notice, the natural person is not required to submit an income tax return if—

(a) the person is notified by the Commissioner in writing that he or she is eligible for automatic assessment; and

(b) the person's gross income, exemptions, deductions and rebates reflected in the records of the Commissioner are complete and correct as at the date of the assessment based on an estimate to give effect to automatic assessment.

A natural person not resident in South Africa:

In terms of paragraph 2, of the public notice for the "2023 year of assessment", every natural person who during the 2023 year of assessment

- was not a resident and carried on any trade (other than solely in his or her capacity as an employee) in the Republic;
- was not a resident and had capital gains or capital losses from the disposal of an asset to which the Eighth Schedule to the Income Tax Act applies;

and every non-resident whose gross income during the 2023 year of assessment included interest from a source in the Republic to which the provisions of section 10(1)(h) of the Income Tax Act do not apply, must submit a return.

2.7.2 Deadline to submit income tax returns for a tax year

Income tax returns must, in the case of natural persons be submitted electronically by using the SARS eFiling platform, provided the person is registered for eFiling.

The annual notice would specify the dates by which the returns must be submitted. Where the individual is a provisional taxpayer, a later submission date applies.

Failure to submit the return by the dates specified in the notice is subject to the imposition of an administrative non-compliance penalty in respect of each month during which the return remains outstanding.

2.7.3 Who is a provisional taxpayer?

For the purposes of the Fourth Schedule, *unless the context otherwise indicates "provisional taxpayer means—*

(a) any person (other than a company) who derives income by way of—

(i) any remuneration from an employer that is not registered in terms of paragraph 15; or

(ii) any amount which does not constitute remuneration or an allowance or advance contemplated in section 8 (1);

(c) any person who is notified by the Commissioner that he or she is a provisional taxpayer,

but shall exclude—

(dd) any—

(B) natural person who does not derive any income from the carrying on of any business, if—

(AA) the taxable income of that person for the relevant year of assessment does not exceed the tax threshold; or

(BB) the taxable income of that person for the relevant year of assessment which is derived from interest, dividends, foreign dividends, rental from the letting of fixed property and any remuneration from an employer that is not registered in terms of paragraph 15 does not exceed R30 000;"

3. Consequences of ceasing to be a South African tax resident

3.1 Source taxation on income

It was mentioned, early in this guide, that with effect 1 January 2001, South Africa changed to residence system of taxation.

At the time, the Income Tax Act did not comprehensively define the term “source” and the core of the source principles were formulated when South Africa operated on a source-plus basis with little change occurring once South Africa moved to a residency-minus system.

Some ten years later, a new uniform system of source was introduced in the Income Tax Act, when section 9 of the Act was comprehensively amended. The new system represented a combination of the common law, pre-existing statutory law and tax treaty principles. The starting point for these uniform source rules loosely reflected implicit tax treaty principles (with a few added built-in protections) so that the South African system is globally aligned. The common law however, remained as a residual method for certain categories of income. In terms of format, the new uniform set of source rules will eliminate the concept of deemed source.

In principle, South African residents are taxed on the basis of their world-wide income with foreign sourced income eligible for tax rebates (credits) in respect of foreign tax proven to be payable. Non-residents are only subject to tax on the basis of income derived from sources within (or deemed to be within) South Africa.

Upon ceasing South African tax residency, an individual will be regarded non-resident for tax purposes. The individual will be taxable in South Africa only on South African sourced income. The individual will effectively have two periods of assessment in the year he or she ceased being a resident in the RSA. A return of income, in respect of the second period, is only required under the circumstances mention in the notice (see above).

3.1.1 Remuneration

3.1.1.1 General

The source of remuneration, employment income or income earned for services rendered is generally accepted to be located where the services yielding the income are physically performed. This is irrespective of where in the world payment takes place to the individual for these services, where he/he signed his/her employment contract or where his/her employer is situated.

Judge Tredgold, in Commissioner of Taxes (SR) v Shein 22 SATC 12, said the following:

- It may be accepted that, prima facie, the test of the source of a payment for services rendered is the place where those services are rendered …
- The ultimate test of source is the originating cause …
- It is not questioned that it is legally correct to apportion income if it is in fact clear that it is derived from more than one source …

In other words, when a person ceases to be a South African tax resident, but retains some work responsibilities, and will physically be present in South Africa when the services are rendered, he or she may still have a South African tax liability. This is unless the other country has a sole right to tax the income in terms of a treaty.

South Africa does not have a *de minimis* rule, i.e. non-residents would, in principle be taxable on any remuneration from a South African source. However, it is possible to apportion the source of remuneration based on workdays spent in and outside South Africa.

SAICA DIFFERENCE MAKERS™

> ***Example 13***
>
> Where a non-resident works in South Africa for, say, 15 working days in a month and for, say, 6 working days outside South Africa, he/she will be taxable in South Africa on 15/21 x remuneration for the month, unless South Africa does not have a right to tax this income in terms of an applicable DTA between South Africa and the individual's country of residence (kindly refer to our comments on DTAs below.)

However, where it can be said that the work done or the services rendered in South Africa are merely of a subsidiary and incidental or casual and accidental in nature in relation to the work ordinarily done or services ordinarily rendered outside South Africa, remuneration relating to such subsidiary and incidental or casual and accidental work will not be considered as South African sourced.

The terms casual and incidental or subsidiary and accidental are not defined, nor has SARS given any direction as to their application. Suffice to say that it is a factual question, and, based on international practice, subsidiary and incidental or casual and accidental services will not include an employee's duties that form part of their core/substantive functions and/or responsibilities, i.e. duties/responsibilities that are essential or fundamental requirements of the employee's employment.

Judge Tredgold, in Commissioner of Taxes (SR) v Shein 22 SATC 12, said the following:

- Where a person is engaged to perform work in one place and, purely as a matter of convenience, he does part of the actual work elsewhere, while producing his final result at the place contracted, difficult questions may arise. But this difficulty does not present itself in the case under consideration, for here the respondent did the main work for which he was employed in Bechuanaland, though he did a large part of it through the agency of another.
- Once this is accepted the proportion of the work he did in Southern Rhodesia becomes inconsiderable. As has been pointed out, it has been found and indeed it is agreed that it amounted only to half a day a month. It remains to consider whether his income should be apportioned so that the small amount attributable to work done in Southern Rhodesia and which the contract contemplated should be done in Southern Rhodesia be taxed here.

> ***Example 14***
>
> For example, a non-resident quality controller comes to South Africa to attend and deliver a 'keynote' presentation at a regional conference for staff employed by the group of companies she works for.
>
> The presentation is not part of her normal job responsibilities and can be seen as subsidiary and incidental in nature.

3.1.1.2 Bonuses & equity / long-term incentive awards

As indicated under part 2.2.1.3 above, a bonus or a gain on the vesting of an equity instrument may relate to a period that overlaps more than one tax year.

In this regard, the approach is similar as used with regard to a South African resident, namely that the remuneration concerned is deemed to have accrued evenly over the period that the services yielding said remuneration were rendered ("the sourcing period") and to then apportion said amount between South African and non-South African sourced portions.

The apportionment is done using the work days spent in and outside South Africa over the sourcing period.

Similarly, Example 4 in IN16 (Issue 4) on the apportionment of gains made under section 8C of the Income Tax Act can be used as guidance. In addition, the example illustrating the determination of the sourcing period is instructive.

Example 15

Facts:

On 1 May 2020, X, an employee of a South African holding company, acquired shares from the South African company by virtue of employment. Under the agreement, X was not permitted to dispose of the shares until 1 May 2024. The shares were granted both for exceptional performance by X during the company's previous financial year (1 May 2019 to 30 April 2020) and as an incentive to retain X's services during the lock-in period.

Result:

The following periods are relevant to determine the sourcing period of the gain:

- The reward period: 1 May 2019 to 30 April 2020 (the period during which services were rendered in respect of the reward).
- The lock-in period: 1 May 2020 to 30 April 2024 (the period during which the shares have not yet vested and for which the employee is required to render services until the restriction is lifted).

The sourcing period runs therefore from 1 May 2019 to 30 April 2024, since under the agreement the shares were granted to X for both as a reward for exceptional performance during the company's previous financial year and as an incentive to retain X's services during the lock-in period.

The location of the services rendered during both the 'reward' period and the 'lock-in' period must be taken into account when determining the place where the services are physically rendered."

3.1.1.3 DTA relief for short-term assignments to South Africa

Income derived from employment performed by a resident of another country in South Africa may also not be subject to tax in South Africa. This would be if the individual is a resident of a treaty country and the DTA between South Africa and the non-resident's country of residence are met.

DTAs will specifically provide for "salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment". This will be found in the Article dealing with "Income from Employment", or "Dependent Personal Services". The wording, with respect to "employment exercised in the other Contracting State" for short periods of time, is normally the same in most, if not all the treaties that the RSA entered into and also the same as the wording used in the OECD model treaty. It is specifically dealt with in paragraph 2 of the Article and the following, was taken from the OECD model treaty, 2017 version:

Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

It is important to note that, where all of the above three requirements are met, South Africa will then not have a right to include the amount derived in South Africa in the gross income, of the individual in the RSA. It simply does not have a right to tax the amounts so derived from a South African source.

It is important to note that, with regard to the second requirement listed above, the SARS has, in Binding Private Ruling 085 (BPR085) (issued on 27 May 2010), effectively followed a substance over form approach (i.e., the so-called, "economic employer" concept). The effect of the interpretation set out in BPR085 is that, if a person renders employment services in South Africa effectively as part of the South African business operations of a South African resident entity, e.g. by being under the supervision and control of and/or reporting to a manager of that South African resident entity, they would not be exempt from South African tax on their South African sourced income even if their visits do not exceed 183 days in aggregate in any 12-month period or other required period. This is because the South African resident entity will be regarded as the employer of the person.

The following two examples from the OECD Commentary to Article 15 demonstrates this approach.

Example 16

Example 2 of the OECD Commentary to Article 15.

Facts:

Aco, a company resident of State A, concludes a contract with Bco, a company resident of State B, for the provision of training services. Aco is specialised in training people in the use of various computer software and Bco wishes to train its personnel to use recently acquired software.

X, an employee of Aco who is a resident of State A, is sent to Bco's offices in State B to provide training courses as part of the contract.

Application:

In that case, State B could not argue that X is in an employment relationship with Bco or that Aco is not the employer of X for purposes of the convention between States A and B.
X is formally an employee of Aco whose own services form an integral part of the business activities of Aco. The services that he renders to Bco are rendered on behalf of Aco under the contract concluded between the two enterprises.

Thus, provided that X is not present in State B for more than 183 days during any relevant twelve month period and that Aco does not have in State B a permanent establishment which bears the cost of X's remuneration, such remuneration will be taxable only in State A, and not in State B.

Example 17

Example 5 of the OECD Commentary to Article 15.

Facts:

Ico is a company resident of State I specialised in providing engineering services. Ico employs a number of engineers on a full-time basis. Jco, a smaller engineering firm resident of State J, needs the temporary services of an engineer to complete a contract on a construction site in State J. Ico agrees with Jco that one of Ico's engineers, who is a resident of State I momentarily not assigned to any contract concluded by Ico, will work for four months on Jco's contract under the direct supervision and control of one of Jco's senior engineers. Jco will pay Ico an amount equal to the remuneration, social contributions, travel expenses and other employment benefits of that engineer for the relevant period, together with a 5 per cent commission. Jco also agrees to indemnify Ico for any eventual claims related to the engineer's work during that period of time.

Application:

In that case, even if Ico is in the business of providing engineering services, it is clear that the work performed by the engineer on the construction site in State J is performed on behalf of Jco rather than Ico.

The direct supervision and control exercised by Jco over the work of the engineer, the fact that Jco takes over the responsibility for that work and that it bears the cost of the remuneration of the engineer for the relevant period are factors that could support the conclusion that the engineer is in an employment relationship with Jco.

State J could therefore consider that the remuneration for the services of the engineer, that will be rendered in State J, is payable by an employer who is a resident of that State.

The Commentary to the OECD Model Convention expresses the view that the term "*borne by*" means that the income earned by the individual should not give rise to a deduction in arriving at the profit of the permanent establishment (PE) situated in the state of source, or to be more specific, in South Africa. The aforementioned would apply regardless of whether the PE actually claimed a tax deduction of said remuneration.

3.1.2 Interest income

In respect of interest, section 10(1)(h) of the Income Tax Act makes specific provision for the exemption of interest received by or accrued to any person who is a non-resident.

Under this exemption, the full amount of the interest is exempt from income tax if the individual spent less than 183 days in South Africa during the twelve-month period prior to the receipt or accrual of the interest and if the debt from which the interest arises is not effectively connected to a fixed place of business in South Africa.

Whilst interest, accruing to a non-resident is exempt from income tax, South Africa has a withholding tax on interest and the amount of interest may remain taxable in the RSA. The withholding tax on interest, calculated at the rate of 15 per cent of the amount of any interest that is paid by any person to or for the benefit of any foreign person to the extent that the amount is regarded as having been

received or accrued from a source within the RSA in terms of section 9(2)(b). For purposes of the withholding tax on interest, a 'foreign person' means any person that is not a resident.

The withholding tax on interest is a final tax.
There are a number of exemptions from the withholding tax on interest which is available when the interest is for example paid by a bank, the Government of South Africa or in respect of any listed debt.

Where the interest is subject to the withholding tax on interest, or no exemption applies, the individual may qualify for a lower rate of tax in terms of a DTA. A DTA can also give an exclusive right to the country of residence to tax the interest, and then the RSA would not be able to include it in gross income, or to withhold the withholding tax on interest when it is paid. The foreign person must inform the person paying the interest that he or she qualifies for a lower rate.

It is important to consult the relevant DTA as this is treated differently in the DTA's that the RSA has with other countries.

3.1.3 Dividend income

Dividends received by or accrued to a non-resident from South African resident companies are generally exempt from the normal tax (or the income tax) in the RSA. An example of a dividend where the exemption does not apply, is a distribution by a REIT.

The fact that a dividend is exempt from income tax does not mean that it is free of tax completely. The beneficial owner of the dividend is liable to pay the dividend tax on any dividend declared and paid by a company resident in the RSA. Whilst the beneficial owner is liable to pay the dividends tax, the company paying the dividend must withhold the dividends tax, and pay it to SARS on behalf of the beneficial owner.

The rate of the dividends tax is 20% and it applies in all instances, unless the beneficial owner of the dividend is resident in a DTA country, when a lower rate of tax may apply. In some instances, the RSA will not have a right to tax the dividend at all.

The beneficial owner of the dividend must inform the company paying the dividend that he or she qualifies for a lower rate.

It is essential to check the relevant Article in the applicable DTA.

3.1.4 Rental income

The source of rental income is determined with reference to where the property is utilised on a daily basis.

As such, non-residents will be subject to income tax on rental income that arises in South Africa, for example from a residential property situated in South Africa, and expenses such as rates and taxes, bond interest, insurance and repairs for such property may be claimed as a deduction. This is because the letting of any property constitutes a trade.

If the individual is resident in a DTA country, the same principle will "apply to income derived from the direct use, letting, or use in any other form of immovable property", or "real property" as it is referred to in some DTA's.

Rental derived from other assets, movable, will typically only be taxed in the country of residence. But if the recipient of such income, being a resident of another country, carries on business in the RSA through a permanent establishment situated in the RSA and the right or property in respect of which the income is paid is effectively connected with such permanent establishment, the rental may in some instances be taxed in both countries.

It is important to check the relevant Articles in the applicable DTA.

3.1.5 Pension and annuities income

In terms of section 9, of the Income Tax Act, the rules for determining the source of private pensions or annuities derived from services will follow exactly the same principles as the source determination for service income. The source determination for services is based solely on the common law, and this largely focuses on the place where the services are rendered (with some minority arguments in favour of the dominant activity giving rise to those services).

As was explained in the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2011, the "rules for determining the source of private pensions or annuities derived from services will follow exactly the same principles as the source determination for service income. More specifically, the source for these annuity and pension payments will be based on the source of the underlying services giving rise to those payments. Therefore, if the underlying services are rendered within South Africa, the associated annuities and pensions will be viewed as South African source. If the annuities and pensions relate to mixed services (i.e. services rendered within and without South Africa), the allocation will be based on time spent." Lump sums from funds were subsequently added and the same source rules apply.

With respect to lump sums, annuities or pensions, it is essential to consult the relevant treaty between the RSA and the country of residence of the individual.

Depending on the applicable DTA, the pension or annuity might be taxable only in the country in which the individual is tax resident, although such right is in some instances subject to the amount being taxable in that country.

3.1.6 Other income

All other income, not specifically addressed above, received by a person not resident in the RSA, from a source within South Africa, will be taxable in South Africa, unless the person is a resident in a DTA country. If a resident of a treaty country, the country of residence will probably have an exclusive right to tax, but there are some exceptions.

3.2 Capital gain tax (CGT) 'exit charge'

Upon ceasing South African tax residency, an individual is deemed to have disposed of their worldwide assets, with certain exceptions, to a person that is resident on the day before ceasing South African tax residency at the market value of the assets on that day.

The determination of the base cost of the assets will follow the normal principles, and if any capital gains or losses arise, the individual will be subject to income tax on said aggregate capital gains and losses, or the taxable capital gain.

Where an individual has disposed of immovable property in the same year of assessment that the individual ceased residence, the capital gain arising from such a disposal, will also be included in the aggregate gain or loss referred to above. Put differently, the capital gains (or losses) that arise on exit, will be added to the other capital gains or losses made during the same period of assessment (from 1 March of that year to the date of exit).

For the purposes of calculating this tax, colloquially referred to as the exit charge, the following exclusions apply:

- Any cash (local or foreign currency value) is not and asset and is therefore included.

- Any immovable property situated in South African (but any interest or right in South African immovable property will form part of the CGT exit charge).

- Personal use assets.

  A personal-use asset is defined as an asset of a natural person that is used 'mainly' for purposes other than the carrying on of a trade. The word "mainly" has been held to mean more than 50%.

  Examples of personal-use assets are private motor vehicles, boats (below a certain length), personal jewellery, personal furniture and fittings.

- Any equity instruments (specifically shares, options, share appreciation rights, etc.) that had not vested at the time of ceasing South African tax residency.

  Gains made upon the vesting of these equity instruments will be taxable to income on vesting, subject to the sourcing rules (apportionment) discussed above.

- Assets effectively connected to a permanent establishment of the individual in South Africa.

3.2.1 Disposal of asset post ceasing of South African tax residency

3.2.1.1 General

A capital gain resulting from the disposal of immovable property situated in South Africa, which is (or was) held by a non-resident as a capital asset, remains subject to tax in the RSA. It must be remembered that this includes any interest or right of whatever nature of that person to or in immovable property situated in the Republic including rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources. An interest in immovable property includes equity shares held by the individual in what is colloquially referred to as property rich companies.

A capital gain resulting from the disposal of any asset effectively connected with a permanent establishment of that person in the RSA will also be taxed.

Where an individual that is a resident ceased during any year of assessment of that person to be a resident, that individual's year of assessment is deemed to have ended on the date immediately before the day on which that person so ceased to be a resident – see section 9H(2)(b). The person will then have to submit two returns of income (ITR12's). The capital gain that results from the deemed disposal, under section 9H of the Income Tax Act, (not an asset of that person that constitutes immovable property situated in the RSA, a section 8A to 8C asset, or assets effectively

connected with a PE in the RSA, that is held by that person) is declared in the return that covers the period from 1 March to the date the person ceased being a resident. Other income, RSA sourced, and capital gains arising from disposals after the date the person ceased being a resident, will be covered in the second return for that year.

In terms of the Income Tax Act, a purchaser of immovable property is obliged to withhold tax on the amount payable to a non-resident seller in respect of immoveable property purchased. The withholding tax applicable to a seller who is a natural person is 7.5% and it is a prepayment of the normal tax liability.

The withholding tax is based on the selling price of the immovable property, but if the amount withheld proves to be excessive (for example, because the property is disposed of at a much smaller capital gain), the person can request a directive from SARS to have a lower amount withheld.

However, the withholding tax is not applicable if the total amount payable for the immovable property is not more than R2 million.

For further details refer to the SARS Guide: Amounts to be withheld when non-resident sells immovable property in SA[16]

Relevant forms are also available on the SARS website:

- NR02 - Declaration by Purchaser for Sale of Immovable Property in SA by Non-Resident - External (Form)
- NR03 - Tax Directive Application by Non-Resident Seller of Immovable Property in SA - External (Form)

3.2.1.2 Primary residence

In terms of South African tax rules, a person may disregard the first R2 million of a capital gain on the disposal of their primary residence.

An apportionment of the capital gain in respect of which this exclusion can be utilised is required in the case of joint ownership, and in respect of periods where the person does not ordinarily reside in the property (for example, where a person has acquired another primary residence) or the property is used for non-residential purposes (for example, using a portion as a home office for conducting a trade).

However, a person is deemed to have ordinarily resided in the property for a continuous period of up to two years after no longer actually living in the property if, *inter alia*, the property was in the process of being sold while a new primary residence was acquired or in the process of being acquired. In other words, if a decision is taken to sell a property while it is still a primary residence, it may be deemed to remain a primary residence for up to 2 years while it is being sold although vacated.

Should the disposal take place after a person ceased to be a South African tax resident (and if the selling price exceeds R2 million), the withholding tax on non-resident sellers of immovable property will apply. Please refer to the discussion above.

[16] https://www.sars.gov.za/wp-content/uploads/Ops/Guides/IT-PP-02-G01-Amounts-to-be-withheld-when-non-resident-sells-immovable-property-in-SA-External-Guide.pdf

3.2.1.3 Other assets

If any other assets, for example, equities listed on the JSE are disposed of post ceasing South African tax residency (whether acquired before or after ceasing South African tax residency), such assets will not be subject to CGT.

3.3 South African resident trusts

Consequences attach to situations where assets have been diverted to a South African resident trust by way of donation, settlement or other disposition.

3.3.1 Attribution of income

The, so-called, attribution rules contained in the Income Tax Act operate to attribute the income and gains of a trust to a settlor/donor where the trust has been settled gratuitously, i.e. either by way of donation or a low/no interest loan.

The Income Tax Act provides that, where a person has made a donation, settlement or other disposition subject to a stipulation or condition that the beneficiaries will not receive the income until the happening of some event (which is accepted as including the exercise of a trustee's discretion), the income will, until the happening of that event (in other words until the income is vested in a beneficiary), be deemed to be the income of the donor/lender concerned and will be taxable in his/her hands. Refer to section 7(5) of the Income Tax Act in this regard.

In terms of section 7(8), where by reason of or in consequence of any donation, settlement or other disposition made by a resident, any amount is received by or accrued to any person who is not a resident, which would have constituted income had that person been a resident, there must be included in the income of the resident so much of that amount as is attributable to that donation, settlement or other similar disposition.

From an expenditure perspective (section 7(8)(b), so much of any expenditure, allowance or loss incurred by the foreign person, had he/she been a resident, as does not exceed the amount included in the income of the resident, will be deemed to have been incurred by the resident in the determination of his/her taxable income from that amount.

The expression "donation, settlement or other disposition" used in the "attribution provisions" has been interpreted widely to also embrace transactions such as interest free or low interest loans ("continuing donation") and where an asset has been disposed of for a consideration that is less than the market value of the asset.

The attribution rules will remain applicable to a donation or similar disposition made by a person even after becoming a non-resident of South Africa for income tax purposes. However, this would only apply to a trust's South African sourced income.

Diagram 2 – Summary of consequences when it comes to Trusts

TAX CONSEQUENCES	DONATION	LOW / NO INTEREST LOAN	INTEREST BEARING LOAN
Donations Tax	@ 20%, or 25% on donations exceeding	N/A.	N/A.

	R100 000 annual aggregate.		
Estate Duty	No estate duty on amount donated - no longer an asset in donor's hands.	Estate duty at 20% (or 25%) on ZAR value of loan (if rest of estate exceeds R3.5 million).	Estate duty at 20% (or 25%) on ZAR value of loan (if rest of estate exceeds R3.5 million).
Income Tax	Attribution rules (7(5)): Donor taxable in full on income earned by trust and not vested / distributed to beneficiary. Reinvested income arguably not as a result of original donation (i.e. trust is self-funding to such extent). Income from re-invested income thus not attributable to donor. Attribution rules (7(8)): Resident donor taxable in full where as a result of donation, income has been received by or accrued to a non-resident which would have been subject to SA income tax if that person was a resident. Any expenditure, allowance or loss incurred by the foreign person, had he/she been a resident, as does not exceed the amount included in the income of the resident, will be deemed to have been incurred by the resident in the determination of his/her taxable income from that amount.	Attribution rules (7(5)): Lender taxable on income earned by trust up to an amount equal to the interest forgone if a market interest rate had applied. Reinvested income arguably not as a result of original loan (i.e. trust is self-funding to such extent). Income from re-invested income thus not attributable to lender. Attribution rules (7(8)): Resident donor taxable in full where as a result of donation, income has been received by or accrued to a non-resident which would have been subject to SA income tax if that person was a resident. Any expenditure, allowance or loss incurred by the foreign person, had he/she been a resident, as does not exceed the amount included in the income of the resident, will be deemed to have been incurred by the resident in the determination of his/her taxable income from that amount.	Lender taxed on interest received on loan account. Lender taxed on interest received on loan account.

Capital Gains Tax (CGT)	Attribution rules: Donor taxable in full on capital gains earned by trust if such gains are not distributed/vested in a beneficiary. Transfer of assets to trusts will be a disposal for CGT purposes. Refer to self-funding comments above.	Attribution rules: Lender taxable on capital gains earned by up to an amount equal to the interest forgone if a market interest rate had applied. Transfer of assets to trusts will be a disposal for CGT purposes. If cash, no CGT. Refer to self-funding comments above.	No CGT in lender's hands. Transfer of assets to trusts will be a disposal for CGT purposes. If cash, no CGT. Refer to self-funding comments above.
Deemed donation rules	N/A	Transfer pricing rules might be used to deem donation in hands of SA resident lender to offshore trust if interest rate is not at an arm's length rate. Section 7C deemed donation to extent that loan is below 'official rate'.	

Example 18

Facts:

The Trust is a South African resident and has not received any donations in the tax year.

The Trust Income Statement for the 2022 tax year is as follows:

	R
Income	100 000
Expenditure (deductible)	(40 000)
Net income	**60 000**
25% distribution to beneficiary	(15 000)
Retained in trust	**45 000**

Application:

The taxable income of the trust and the beneficiary are as follows:

	Total (R)	**Trust (R)**	**Beneficiary (R)**
Income	100 000	75 000	25 000*

Expenditure (deductible)	(40 000)	(30 000)	(10 000)
Taxable income	60 000	45 000	15 000

(* If portion of vested income was, say, interest, the beneficiary could claim an interest exemption)

3.3.2 Vesting of income in non-resident beneficiary

Where income is vested in an identifiable beneficiary (whether a South African tax resident or not) the income is deemed to have accrued to that beneficiary, who will then be responsible for the tax payment at their marginal tax rate.

The beneficiary would be able to deduct any expenditure and losses incurred by the trustees of the trust in the production of the income vested in the beneficiary, but such deductions will be limited to the amount of the income vested in the beneficiary. In other words, a loss cannot be distributed to a beneficiary, or the expenses can only be deducted by the beneficiary to the extent that it reduces the amount to zero.

In terms of section 25B, which codified the conduit principle, the amount that accrued to the trust, when the trustees exercise their discretion to vest it, is deemed to have accrued to the discretionary beneficiary and not to the trust. It creates this fiction that, where the vesting takes places after the accrual to the trustees, the accrual vesting event and the accrual are the same event. This fiction is to effectively deem the accrual to have been by the beneficiary (and not the trust). Put simply, any income vested in a beneficiary would then appear to 'retain its identity' in the hands of the beneficiary who is liable for tax on it, i.e., interest/dividends would remain interest/dividends in the hands of such beneficiary.

3.3.3 Attribution and vesting of capital gains

The attribution and vesting rules set out above only apply to South African resident donors and/or beneficiaries, as the case may be.

In other words, any capital gain that is not vested in the hands of a resident beneficiary will remain taxable in the hands of the trustees of the trust.

Where the capital gain is vested in a beneficiary resident in the RSA, the gain will be taxed in the hands of the beneficiary. Where the gain is vested in a non-resident beneficiary, the gain will be taxed in the trust.

3.4 Donations Tax

Donations tax is not applicable to a non-resident donor, which includes the deemed donation on loans to trusts (or companies held by such trusts) by connected persons in relation to the trusts concerned and where the interest charged on the loans is less than the 'official rate of interest'.

3.5 Estate Duty

If a person was not ordinarily resident in South Africa at the time of his/her death, only assets that were situated in South Africa at that point are subject to South African estate duty.

Estate duty is payable at a rate of 20% of the dutiable value of the estate exceeding R3.5 million up to R30 million. The value of the estate in excess of R30 million is subject to estate duty at a rate of 25%.

Section 16(c) of the Estate Duty Act provides relief for foreign taxes, irrespective of section 26.

Currently, South Africa has Agreements for the Avoidance of Double Estate Duty only with Canada, Botswana, Lesotho, Swaziland (Eswatini), Sweden, the United Kingdom, the United States of America (USA), and Zimbabwe.

3.6 Administrative considerations

3.6.1 Tax year end

Where a person ceases to be a tax resident, the tax year is deemed to end on the day immediately prior to the date that residency ceases, and a new tax year will commence on the day that residency ceases.

In other words, up to the date immediately before the date that an individual ceases South African tax residency, they will have to submit a South African income tax return as a South African tax resident. Their worldwide income and capital gains up to that date (including the capital gains exit charge calculation – refer to discussion above) will need to be disclosed in that income tax return.

Further, in the event that the individual qualifies as a provisional taxpayer, they will need to submit the final provisional tax return on that date, being the last day of the tax year - i.e. the date immediately before ceasing tax residency. For example, a person ceasing tax residency on 1 August, will need to request their provisional tax return on 31 July, calculate final tax due for the period of assessment (1 March - 31 July), including any CGT exit charge and pay tax as at that date. This date must then correspond to the date noted in the ITR12 annual income tax return.

Thereafter, if any South African sourced income or capital gains arise, the individual will submit a tax return as a non-resident for the period up to the last day of February of the next year (and for tax years following if the same applies, or if notified to do so by the Commissioner for SARS). See the detailed discussion in paragraph 2.7 of this guide.

Once it is clear that an individual will have no further South African income or capital gains to declare or will not be in need of a South African tax clearance certificate (e.g. if an individual is still an exchange control resident and wishes to utilise their annual foreign investment allowance or to formally emigrate for South African exchange control purposes), they would be able to deregister as a South African taxpayer. Alternatively, if an individual will have to access retirement funds in the future, it may be advisable for the individual to request SARS to have the tax number made dormant – it can then be reactivated when the individual has to declare any proceeds from such retirement funds in the future.

3.6.2 Submission of income tax returns

As mentioned earlier, an income tax return and/or provisional tax return is required on the day immediately before the date that a person ceases to be a South African tax resident.

3.6.1.1 Annual income tax return

Tax returns for any year of assessment must be submitted to SARS by the dates announced by the Minister by way of public notice in the Government Gazette.

SARS will impose the administrative non-compliance penalty if a return was not filed by the relevant due date.

3.6.1.2 Provisional income tax return

With effect from 1 March 2017, the definition of "provisional taxpayer" was amended to include any person who received any remuneration from employers that are not registered for employees' tax (PAYE) purposes.

This may affect employees receiving or earning remuneration that is taxable in South Africa due to services rendered in South Africa, but which remuneration was not subjected to South African PAYE withholding.

But it would also mean that a South African individual, earning remuneration from employment outside the RSA, and from a foreign employer, will be a provisional taxpayer.

C. EXCHANGE CONTROL

In Annexure E (Financial sector update) of the Budget Review to the 2020 Budget, the following was stated:

> ***"Tax and exchange control treatment of individuals***
>
> *Following reforms to the income tax treatment of South African tax residents who receive remuneration outside the country, government proposes to remove the exchange control treatment for individuals, while strengthening the tax treatment. The intention is to allow individuals who work abroad more flexibility, provided funds are legitimately sourced and the individual is in good standing with the South African Revenue Service. Individuals who transfer more than R10 million offshore will be subjected to a more stringent verification process. Such transfers will also trigger a risk management test that will include certification of tax status and the source of funds, and assurance that the individual complies with anti-money laundering and countering terror financing requirements prescribed in the Financial Intelligence Centre Act (2001). This will be phased in by 1 March 2021.*
>
> *Under the new system, natural person emigrants and natural person residents will be treated identically. Additional restrictions on emigrants – such as the restrictions on emigrants being allowed to invest, and the requirement to only operate blocked accounts, have bank accounts and borrow in South Africa – have been repealed. The concept of emigration as recognised by the Reserve Bank will be phased out, to be replaced by a verification process based on the requirements above. Tax residency for individuals will continue to be determined by the ordinarily resident and physically present tests as set out in the Income Tax Act (1962). Under existing international standards, South Africa participates in the automatic sharing of information between tax authorities on individuals' financial accounts and investments. These cooperative practices will remain in place to ensure that South African tax residents who have offshore income and investments pay the appropriate level of tax."*

The changes announced are clearly far reaching. However, the South African Reserve Bank (SARB) issued a circular post the 2020 Budget Speech to Authorised Dealers indicating that the *status quo* remains and that, over the next twelve months, SARB and Treasury will work on "*the drafting and finalisation of the new capital flow management regulations, implementation of the relevant tax amendments as well as further engagements with other relevant stakeholders*".

There are thus no immediate changes - whilst some may be introduced piece-meal, it is expected that the implementation of the vast majority of changes will only take place early next year.

Accordingly, the rules as set out below remain applicable – however, it is advised that you consult with your advisors to confirm the application of any of said rules when wishing to conduct exchange control relevant transactions.

4. Exchange control consequences of leaving South Africa

4.1 Exchange control residency

A "resident in South Africa", for exchange control purposes, differs from the concept of "resident" for tax purposes. In the Currency and Exchanges guidelines for individuals[17], unless the context indicates otherwise:

> "***Non-resident*** *means a person (i.e. a natural person or legal entity) whose normal place of residence, domicile or registration is outside the CMA*[18].
>
> ***Resident*** *means any person (i.e. a natural person or legal entity) who has taken up permanent residence, is domiciled or is registered in South Africa.*
>
> ***Resident temporarily*** *abroad means any resident who has departed from South Africa to any country outside the CMA with no intention of taking up permanent residence in another country, but excluding those residents who are abroad on holiday or business travel."*

Prior to 1 March 2021, when a South African resident left the country, without formalising his or her emigration, the person remained a South African resident irrespective of the period of the person's absence from South Africa.

Therefore, if a person wished to relinquish South African exchange control domicile permanently, the only way to do so was to formalise emigration for exchange control purposes.
However, with effect from 1 March 2021, the concept of emigration as recognised by the Financial Surveillance Department was phased out.

The distinction between South African resident assets and non-resident assets however, remained extant.

The abolishment of formal emigration was explained as follows in Exchange Control Circular No. 6/2021 (date of issue - 2021-02-26), under the heading:

<u>Emigration - phasing out the concept of emigration as recognised by the South African Reserve Bank</u>

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[17] Version 1.37, which includes circular 11 of 2021, issued by the Financial Surveillance Department on 21 May 2021.
[18] Where CMA means the Common Monetary Area, which consists of Lesotho, Namibia, South Africa and eSwatini.

- … the concept of emigration as recognised by the South African Reserve Bank will be phased out with effect from 2021-03-01 and be replaced by a verification process …
- … all applications by individuals in excess of the single discretionary allowance threshold, require a Tax Compliance Status (TCS) from … (SARS).
- Under the new framework[19], natural person emigrants and natural person residents will be treated identically. The current process of controlling or blocking an emigrant's remaining assets in a special 'blocked funds account' will fall away and all transfers from these accounts will be handled as normal fund transfers in line with any other foreign capital allowance transfer.
- To ensure a smooth transition, the Financial Surveillance Department (FinSurv) of the South African Reserve Bank and SARS have agreed that the current exchange control policy pertaining to emigration will apply to all Forms MP 336(b) that have been attested, i.e. stamped and signed by an Authorised Dealer on or before 2021-02-28.
- SARS will not require a Form MP 336(b) as part of the TCS application process, however, all the assets and liabilities of the taxpayer must still be completed per SARS TCR01 "Emigration" application form.
- All private individuals that cease to be residents would have to request a TCS in respect of "emigration" from SARS before Authorised Dealers may be permitted to transfer any funds in this regard.

4.2 Emigration for exchange control purposes

It should be noted that emigration for exchange control purposes is not necessarily the same as emigration for the purposes of the Department of Home Affairs or for tax purposes.

4.2.1 Eligibility

For persons wishing to relinquish South African domicile permanently, it is no longer necessary to formally emigrate. A person will also cease being a resident of the RSA, when he or she is deemed exclusively to be a resident of a DTA country.

Where a "private individual" ceased to be a resident "for tax purposes in South Africa", an Authorised Dealer may allow the transfer of assets, of the individual, abroad.

Paragraph 4, of the Currency and Exchanges guidelines for individuals (the 21 May 2021 version), sets out what may be transferred.

In terms of paragraph 4.3, of the guide, authorised Dealers may allow the transfer of assets abroad, provided a private individual:

(a) has ceased to be a resident for tax purposes in South Africa;
(b) has obtained a TCS in respect of "emigration" from SARS; and
(c) is tax compliant upon verification of the TCS.

Paragraph 4.4 to 4.17 sets out the detail of what may be remitted and is copied below for ease of reference:

(4.4) In addition to (4.3) above, private individuals may in the same calendar year that they ceased to be residents transfer via an Authorised Dealer up to R1 million as a travel allowance, without the requirement to obtain a TCS PIN letter. This is a once-off dispensation and cannot be used

[19] Essentially for all persons who cease to be resident in the RSA on or after 1 March 2021.

in subsequent calendar years. Private individuals ceasing to be residents for tax purposes only qualify for the aforementioned travel allowance, and may not avail of any unutilised portion of the single discretionary allowance available to residents.

(4.5) In addition, household and personal effects up to an amount of R1 million per family unit may be exported under a SARS Customs Declaration form within the same calendar year that the individual ceases to be a resident for tax purposes provided such assets have been declared on the relevant forms. Transactions of this nature will be treated similar to cash. For amounts in excess of R1 million, the provisions of (4.6) and (4.7) below will apply.

(4.6) In addition to the transfers mentioned in (v) above, Authorised Dealers may allow the transfer of up to a total amount of R10 million per calendar year per private individual who ceases to be a resident for tax purposes in South Africa and is 18 years and older, provided that the individual is tax compliant and submits the applicable TCS Application for verification.

Currency and Exchanges guidelines for individuals

(4.7) South African non-tax residents who transfer more than R10 million offshore are subject, initially to a more stringent verification process by SARS; as well as a subsequent approval process from the Financial Surveillance Department. Such transfers will trigger a risk management test that will, inter alia, include verification of the tax status and the source of funds, as well as risk assess the private individual in terms of the anti-money laundering and countering terror financing requirements, as prescribed in the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

(4.8) With regard to (4.7) above, it is imperative that the application to the Financial Surveillance Department is accompanied by, inter alia, a TCS PIN letter that will contain the tax number and TCS PIN to verify the taxpayer's tax compliance status and amount requested to be transferred.

(4.9) Any requests for further transfers of remaining assets will be subject to a TCS application in respect of Foreign Investment Allowance (FIA) irrespective of the date of emigration, i.e. prior or after 2021-03-01.

(4.10) The externalisation of listed and unlisted domestic securities by individuals who cease to be residents for tax purposes will be treated similar to cash, which will form part of the foreign capital allowance and is also subject to the TCS process at SARS.

(4.11) In respect of the withdrawal of retirement funds (lump sum benefits from pension preservation, provident preservation and retirement annuity funds) when South African residents cease to be residents for tax purposes in South Africa, payment of lump sum benefits to such individuals shall only be allowed by Authorised Dealers if the individual member has remained non-tax resident for at least three consecutive years. The requirements stated in (4.6) and (4.7) above will apply.

(4.12) All assets that were previously blocked as per a specific directive that was given by the Financial Surveillance Department in terms of the provisions of Exchange Control Regulation 4(2), may be dealt with as follows:

(a) In respect of income and capital distributions from inter vivos trusts, such distributions may be transferred abroad, subject to the TCS process being completed by the trustees of the trust. For any transfers above R10 million, the requirements of (vii) above will apply.

(b) With regard to pre-inheritance gifts, such funds may be transferred abroad, subject to the TCS process being completed by the resident donor. For any transfers above R10 million, the requirements of (4.7) above will apply.

(4.13) Applications by private individuals who cease to be residents for tax purposes and who are no longer active on the SARS registered database and receive an inheritance or life insurance policy (excluding lump sum benefits from pension preservation, provident preservation, retirement annuity funds and annuities from insurers) up to R10 million, will not be required to apply to SARS for a Manual Letter of Compliance - Transfer of funds. For applications above R10 million, applicants are required to obtain a Manual Letter of Compliance - Transfer of funds, from SARS.

(4.14) In the interim, the existing FinSurv Reporting System categories to report emigration outflows to the Financial Surveillance Department remain extant, as outlined in section J. of the Authorised Dealer Manual.

(4.15) With regard to the gathering of statistical information on the assets and liabilities declared by South African residents who cease to be residents for tax purposes, the Financial Surveillance Department will rely on information collected by SARS via the SARS TCR01 form.

(4.16) In terms of the TCS system, a TCS PIN letter will be issued to the South African residents who cease to be residents for tax purposes that will contain the tax number. Authorised Dealers must use the TCS PIN to verify the applicant's tax compliance status via SARS eFiling prior to effecting any transfers. Authorised Dealers must ensure that the amount to be transferred does not exceed the amount approved by SARS. Authorised Dealers should note that the TCS PIN can expire and should the Authorised Dealers find that the TCS PIN has indeed expired, the Authorised Dealers must request that the taxpayer must submit a new TCS application to SARS to be issued with a TCS PIN.

(4.17) Income due to private individuals who ceased to be residents for tax purposes in South Africa may be transferred offshore, provided the Authorised Dealers ensure that the amounts to be transferred are legitimately due to private individuals who ceased to be residents for tax purposes in South Africa, ensure that suitable arrangements are made to meet all local liabilities and verify a TCS of good standing at least once a year to confirm that the private individual who ceased to be resident for tax purposes in South Africa is tax compliant in respect of the transfer of income referred below. With regard to (g) and (h) below, a TCS of good standing is required at least once a year on applications up to R10 million and a tax compliance status request – TCS FIA is required for above R10 million applications.

(a) interest and profit;
(b) dividends: Authorised Dealers may allow the transfer of dividends, profit and/or income distributions from quoted companies, non-quoted companies and other entities in proportion of percentage shareholding and/or ownership. Authorised Dealers may not allow the transfer from South Africa of any income earned outside South Africa, unless such funds represent the profits of wholly-owned subsidiaries or of branches of South African registered companies previously transferred to South Africa;
(c) income distributions from close corporations;
(d) directors' fees or members' fees;
(e) pension payments paid by registered funds only;
(f) cash bonuses on insurance policies;
(g) income received from a trust created in terms of a last will and testament;

(h) income received from an inter vivos trust;
(i) rentals on fixed property including rental pool agreements, provided that rentals are substantiated by the production of a copy of the rental or rental pool agreement;
(j) annuity payments;
(k) refunds paid by SARS, provided that Authorised Dealers are satisfied that the beneficiaries are permanently resident outside the CMA; and
(l) salaries and/or fees payable in respect of services rendered.

4.2.2 Process to follow and documents required

The process is explained on the SARS website - the explanation starts under the heading:

How do I cease to be a tax resident in South Africa?

The determination of whether an individual ceases to be a tax resident in South Africa is based on the manner in which such individual has been a tax resident in South Africa. If the taxpayer has been an ordinarily tax resident, it is a factual enquiry on whether or not that person's subjective intention to cease to be ordinarily resident in South Africa and no longer make South Africa his or her real home, is supported by various objective factors. If a person has ceased to be an ordinarily tax resident, it will be from the day such person ceased his or her residence.

Factors that will be taken into account to determine whether a taxpayer has ceased to be a tax resident of South Africa:

- The type of visa on which you have gone to the foreign country.
- Proof of permanent residence in the foreign country (if applicable).
- A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates that you are regarded as a tax resident in that country (if available).
- Details of any property that you may still have available in South Africa. Indicate the purpose for which such property is being used.
- Details of any business interest (e.g. investment and employment) that you may still have in South Africa.
- Details of your family. Indicate whether any family members are in South Africa and the reasons therefor.
- Details of your social interests (e.g. gym contract, recreational clubs and societies) and location of your personal belongings.
- Details of any return visits to South Africa, their frequency and the reason for undertaking such visits.

It then continues as follows:

With respect to the How do I declare to SARS that I have ceased to be a tax resident in South Africa?

If a taxpayer ceased to be a tax resident of South Africa, the taxpayer should inform SARS through the Registration, Amendments and Verification Form (RAV01) on eFiling by capturing the date on which the taxpayer ceased to be a tax resident under the Income Tax Liability Details section. The form can be obtained on eFiling Client Information System | South African Revenue Service (sars.gov.za) or SARS branch by making appointment.

Note: A case will be created whereby the taxpayer will receive a letter from SARS to submit supporting documents.

If you are not registered yet on eFiling, you may continue to use the contactus@sars.gov.za email address.

What is the purpose of such declaration?

The purpose of the declaration is to inform SARS of the change in tax residency that will impact the basis on which you will be subject to tax in South Africa and how your returns will be assessed going forward. The year in which you have ceased to be a tax resident may also result in a possible deemed capital gains tax disposal depending on the type of assets you held and where they are located at the time.

When must a declaration be made?

When an individual ceases to be a tax resident, SARS must be informed.

Who must make such declaration?

The individual taxpayer must make such declaration to SARS or his or her duly authorised representative who must inform SARS.

What documentation should be provided?

The Declaration form must be completed and be submitted with the relevant supporting documentation through eFiling or SOQS upon the taxpayer informing SARS that s/he ceased to be a tax resident on the RAV01.

If you are not registered yet on eFiling, you may continue to use the contactus@sars.gov.za email address.

Standard requirements (To be submitted with all declarations)

- The signed declaration indicating the basis on which you qualify.
- A letter of motivation setting out the facts and circumstances in detail to support the disclosure that you have ceased to be a tax resident.
- A copy of your passport/travel diary.

Specific requirements

In addition to the aforementioned information, also supply the following as applicable, depending on the basis you have ceased to be a tax resident in South Africa:

Qualifying basis 1: Cease to be ordinarily resident

- The type of visa on which you have gone to the foreign country.
- Where you have already taken up permanent residence in the foreign country, submit proof thereof.
- A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates that you are regarded as a tax resident in that country (if available).

- Details of any property that you may still have available in South Africa (Indicate the purpose that such property is being used for).
- Details of any business interest (e.g. investment and employment) that you may still have in South Africa.
- Details of your family. Indicate whether any family members are in South Africa and the reason thereof.
- Details of your social interests (e.g. gym contract, recreational clubs and societies) and location of your personal belongings.
- Details of any return visits to South Africa, the frequency thereof and the reason for undertaking such visits.

Qualifying basis 2: Cease by way of the physical presence test

- Only the standard requirements must be supplied

Qualifying basis 3: Cease due to application of Double Tax Agreement (DTA)

- A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates your status as a tax resident in that country.

When will a declaration be declined?

A declaration will be declined if one of the following conditions apply:

- If the taxpayer does not meet the criteria for ceased to be tax resident.
- If the taxpayer cannot provide us with the relevant materials or the correct relevant materials as requested.

If you previously declared that you ceased to be a tax resident, how do you request confirmation?

If you previously informed SARS that you have ceased to be a tax resident of South Africa, and would like to request confirmation of your status, you can submit your request by way of a letter to Contact Us.

The letter should contain the:

- background to the request;
- basis on which you have ceased to be a tax resident; and
- date and manner in which SARS has previously been informed.

End of details taken from the SARS website.

4.2.3 Status post ceasing to be a resident

From the date the individual ceased being ordinarily resident in South Africa, the following will apply to the individual and his or her remaining assets, as well as future transactions with South Africa:

- From the date of emigration, they are regarded as non-residents for exchange control purposes but as previous residents, certain restrictions and conditions will also apply.

- Cash balances remaining after emigration facilities have been accorded together with capital payments accruing thereafter, as well as the sale proceeds of assets subsequently sold need to be credited to an “Emigrant capital account” which is an account in the books of the local bank and under their control.
- Funds standing to the credit of such an account may be used locally (in South Africa) for any purpose and at the discretion of the emigrant.
- Securities or investments in collective investment schemes, forming part of the emigrant’s remaining assets, must at all times be controlled by the Authorised Dealer (bank) who will permit and control switches.
- Income earned from date of emigration on remaining assets may be transferred to emigrants. Restrictions on certain types of income do, however, apply such as distributions from trusts.
- Restrictions will also apply on local borrowings by emigrants such as for instance an outstanding mortgage loan.
- Subsequent transfers of capital from South Africa either as part of the annual allowance or on application to the SARB, will be subject to obtaining a further tax clearance.

Paragraph 4.17, of the Currency and Exchanges guidelines for individuals, deals with income accruing to persons who ceased being resident of the RSA. It reads as follows:

Income accruing to non-residents

Income due to private individuals who ceased to be residents for tax purposes in South Africa may be transferred offshore, provided the Authorised Dealers ensure that the amounts to be transferred are legitimately due to private individuals who ceased to be residents for tax purposes in South Africa, ensure that suitable arrangements are made to meet all local liabilities and verify a TCS of good standing at least once a year to confirm that the private individual who ceased to be resident for tax purposes in South Africa is tax compliant in respect of the transfer of income referred below. With regard to (g) and (h) below, a TCS of good standing is required at least once a year on applications up to R10 million and a tax compliance status request – TCS FIA is required for above R10 million applications.

(a) interest and profit;
(b) dividends: Authorised Dealers may allow the transfer of dividends, profit and/or income distributions from quoted companies, non-quoted companies and other entities in proportion of percentage shareholding and/or ownership. Authorised Dealers may not allow the transfer from South Africa of any income earned outside South Africa, unless such funds represent the profits of wholly-owned subsidiaries or of branches of South African registered companies previously transferred to South Africa;
(c) income distributions from close corporations;
(d) directors’ fees or members’ fees;
(e) pension payments paid by registered funds only;
(f) cash bonuses on insurance policies;
(g) income received from a trust created in terms of a last will and testament;
(h) income received from an inter vivos trust;
(i) rentals on fixed property including rental pool agreements, provided that rentals are substantiated by the production of a copy of the rental or rental pool agreement;
(j) annuity payments;
(k) refunds paid by SARS, provided that Authorised Dealers are satisfied that the beneficiaries are permanently resident outside the CMA; and
(l) salaries and/or fees payable in respect of services rendered.

4.3 Belated emigration

Under the rules, in effect before 1 March 2021, a person could qualify to belatedly formalise his or her emigration for exchange control purposes, if he or she-

- Left South Africa more than five years prior to formalising the emigration, and
- Can prove that he or she received permanent residence in his or her new country of domicile.

This has also been replaced with the new system. The individual will, when the RAV01 is completed, merely indicate a date in the past, as the date he or she ceased being ordinarily resident in the RSA. And will then provide the detail as required by SARS and explained in the previous paragraph to support the declaration.

4.4 Minors

Where a person left South Africa as minor with his/her family, and:

- His/her parents <u>formalised</u> exchange control emigration, -
  - The person is considered as an emigrant for exchange control purposes;
- His/her parents <u>did not formalise</u> emigration at the time of leaving South Africa, -
  - The person is considered a South African resident temporarily abroad, and
  - He/she needs to formalise emigration if so wish / need to.

4.5 Aspects to consider regarding South African trusts and non-residents

4.5.1 Testamentary trusts

Capital and income distributions from testamentary trusts may be remitted to non-residents. In the case of emigrants, distributions of both capital and income are subject to the Authorised Dealer (bank) ensuring compliance with certain set conditions. In certain instances, it may necessitate an application to the SARB.

See paragraph 3.10.1, Legacies and distributions from resident estates, of the Currency and Exchanges guidelines for individuals.

The general principle is:

Cash bequests and the cash proceeds of legacies and distributions from resident estates due to non-resident private individuals, non-resident entities and/or trusts may be remitted abroad, provided that the Liquidation and Distribution Account bearing a Master of the High Court reference number is available.

4.5.2 Inter-vivos trusts

Capital and/or income distributions from trusts in which a South African resident is the donor and/or funder in favour of a non-resident, requires specific exchange control approval. Often a negative outcome can be expected to such requests if the donor/funder is still alive.

In the case of emigrants, a distinction will be made between so-called "own asset" trusts and "third party" trusts. An own asset trust will be one set up by the emigrant as donor and funder using the emigrant's own assets. Income distributions from such trusts are generally permissible, subject to

certain conditions being adhered to. Capital distributions are subject to specific exchange control approval.

Third party trusts, in general, are trusts established by and funded by a party other than the emigrant, but the emigrant is a beneficiary of the trust. Distributions to an emigrant from such trusts, capital or income, are subject to specific exchange control approval.

Example 19

Facts:

South African resident settlor and funder of a South African trust.

Resident settlor/funder emigrates and formalises this with the Financial Surveillance Department of SARB.

Application:

The interest in the trust should was declared on the emigration form (MP336(b)) and SARB then placed certain restrictions on the trust.

The trust is a "own asset" trust for exchange control purposes having been established and funded by the emigrant:

- Income distributions to settlor/funder:
  - Taxable in hands of settlor/funder – likely to be non-resident for tax purposes;
  - May be transferred abroad – administrative procedures required;
- Capital distributions to settlor/funder:
  - Assuming that the settlor/funder is non-resident, capital gains distributed will remain taxable in the trust (**NB** funds required by trust to pay tax);
  - Restricted to funding the emigrant's capital account (previously known as emigrant blocked account). Transfers from there within the emigration limits and rules;
- Resident beneficiaries:
  - Income and capital gains taxable in the hands of beneficiaries (unless previously taxed in settlor/funder's hands);
  - Distributions to them may be done without exchange control approvals;
- If trustees decide to wind up the trust:
  - SARB approval will be required;
  - SARB likely to direct that the proceeds be credited to the emigrant's capital account of the settlor/funder;
  - Income tax consequences will be as above;
- Settlor/funder passes and the trust in existence:
  - Application to SARB - consider trust's assets as assets of a resident estate and agree to distribution of assets to resident and non-resident beneficiaries.

Example 20

Facts:

South African resident settlor and funder of a South African trust.

Settlor/funder remains a South African resident.

Application:

If the beneficiaries are non-residents then no capital or income distributions are permitted.

If settlor/funder emigrates or passes away, the distributions to non-resident beneficiaries would be permitted on application.

Example 21

Facts:

South African trust and non-resident settlor/funder.

Application:

Distributions to non-residents are subject to exchange control approval.

It should be approved, if funds to be distributed:
- Originate from funds introduced from abroad;
- Local assets sold but originally bought from funds introduced from abroad; and
- Borrowed locally within the local borrowing restrictions.

Note however that, in terms of paragraph 4.12, of the Currency and Exchanges guidelines for individuals, all assets that were previously blocked as per a specific directive that was given by the Financial Surveillance Department in terms of the provisions of Exchange Control Regulation 4(2), may be dealt with as follows:

(a) In respect of income and capital distributions from inter vivos trusts, such distributions may be transferred abroad, subject to the TCS process being completed by the trustees of the trust. For any transfers above R10 million, the requirements of (vii) above will apply.

(b) With regard to pre-inheritance gifts, such funds may be transferred abroad, subject to the TCS process being completed by the resident donor. For any transfers above R10 million, the requirements of (4.7) above will apply.

4.5.3 Receipts from preservation funds and retirement annuities (RA)

Paragraph 4.13, of the Currency and Exchanges guidelines for individuals, explains the position as follows:

> *"Applications by private individuals who cease to be residents for tax purposes and who are no longer active on the SARS registered database and receive an inheritance or life insurance policy (excluding lump sum benefits from pension preservation, provident preservation, retirement annuity funds and annuities from insurers) up to R10 million, will not be required to apply to SARS for a Manual Letter of Compliance - Transfer of funds. For applications above R10 million, applicants are required to obtain a Manual Letter of Compliance - Transfer of funds, from SARS."*

The normal rule is that a person may only access funds in an RA after the age of 55 years. However, if a person emigrates for exchange control purposes prior to age 55, he/she will be able to access

the full fund value. This is treated as a resignation from the fund and the lump is taxable using the applicable tax table.

Income transfers from annuities, pension funds etc. are transferable to emigrants without limitation.

4.6 Donations to non-residents by residents

South African residents may donate/gift to non-resident natural persons or South African residents temporarily abroad. However, it is limited to their overall annual discretionary allowance (currently, R1 million per calendar year).

4.7 Inheritances from South African estates

4.7.1 To non-resident beneficiaries and emigrants

An inheritance to a non-resident beneficiary or emigrant may freely flow when it comes to a South African estate, irrespective of whether it is a local or foreign asset of the estate.

4.7.2 South African residents inheriting foreign assets from a South African estate

South African residents must declare the assets to SARB and obtain approval to retain abroad if wish to when such residents inherit a foreign asset from a South African estate.

4.7.3 Where the beneficiary is a local trust

Where a local trust acquires a foreign asset as a beneficiary, the local trust must declare the acquisition to SARB and obtain approval to retain that asset abroad if it wishes to.
Distributions from a local trust to non-resident beneficiaries must be done on application basis and it will be considered based on the trust policy at the time.

4.7.4 Where the beneficiary is a foreign trust

Where a foreign trust acquires a foreign asset as a beneficiary from an estate, such asset is permissible.

Distributions from a foreign trust to a resident beneficiary must be done on application basis to SARB if he/she wish to retain that asset abroad. The distribution from the foreign trust to the resident beneficiary is permissible if the funds are to be introduced into South Africa.

FREQUENTLY ASKED QUESTIONS

No	Question	Answer
SA Tax Residency		
1	Is it possible not to be technically a tax resident of any country?	Yes – there are individuals who, for example, live on passenger ships and regard themselves as non-resident everywhere
2	An SA resident spends some of the year in Canada. She owns a residence in both countries. Could she select her Canadian property as her primary residence? If so could this affect her tax residency?	The Eighth Schedule defines a 'primary residence' as a residence (which is in itself defined) which the person concerned "*(i) ordinarily resides or resided in as his or her main residence; and (ii) uses or used mainly for domestic purposes.*" It will be a question of fact and the burden of proof would be on the individual to substantiate that the particular residence indicated as her primary residence is indeed that. Having her primary residence outside SA would be quite relevant, but not conclusive, if she had to argue that she was ordinarily resident outside SA. On the contrary, if she regards herself as ordinarily resident of SA, she can have a primary residence outside SA.
3	A person moved to Hong Kong during August of 2017 to take up a permanent position there, and his spouse also took up a permanent position there. Per the taxpayer, they are now living there permanently. Prior to the move they both worked and lived in SA. They still have small RAs and investments here in SA. For purposes of their tax residency, can we say that they are no longer SA tax residents from the date they moved, as their intentions are not to come back? If so, will they only be taxed on the income from their investments?	If they left South Africa and do not consider South Africa to be their permanent / real home anymore, and this can be supported by various objective factors, they will be able to prove that they are no longer ordinarily resident in South Africa. As non-residents of South Africa (and assuming that they do not have a business with a permanent establishment in South Africa), they are taxable in South Africa only on their South African sourced income, e.g. interest from South African bank accounts, or rental from South African situated immovable property, AND on capital gains on the disposal of immovable property situated in South Africa. Upon ceasing South African tax residency, they will have had a 'capital gains tax exit charge'.
Foreign Earned Remuneration		
4	SA company pays remuneration to overseas non-resident employees – is the SA company obliged	Yes, but only to the extent that the remuneration is taxable in SA (i.e. on the non-residents' SA sourced remuneration).

	to deduct PAYE from the remuneration?	
Trust and Attribution Rules		
5	Can the donor/ provider of the low interest loan be taxed on the trust income and be liable for donations tax?	The attribution rules in section 7, of the Income Tax Act, for "income", and paragraph 70 – 72 of the Eighth Schedule to the Act, for capital gains, are anti-avoidance provisions relating to income and capital gains taxes and the income, or capital gain will in some instances be deemed to be that of the donor. However, the deemed donation provisions of section 7C relate to the avoidance of donations tax and estate duty. Thus, both can be applied to the same low/no interest loan to a trust.
Estate Duty		
6	Just to clarify: Estate Duty applicability are the physical presence rules not applicable if the deceased was not ordinarily resident?	Correct – in other words, if a person was a SA tax resident in SA at the time of their death based on the physical presence test (i.e. was not ordinarily resident of SA), Estate Duty would only be calculated on their SA estate.
Capital Gain Tax (CGT) Exit Charge		
7	CGT exit charge regarding worldwide assets, does this only apply to foreign assets purchased before ceasing to be a tax resident?	Yes, that is correct.
8	Is there a CGT exit charge on immovable property outside of SA if in terms of the DTA the foreign country has the first taxing right to charge CGT on that property?	The CGT exit charge is based on a deemed disposal when a person ceases to be a SA tax resident, and includes foreign immovable property. The taxing rights under a DTA will only need to be determined upon the actual disposal of such immovable property.
9	Is the deemed CGT exit charge, disclosed in the same place as normal capital sales in the income tax return?	The tax return (ITR12), previously asked the question whether the taxpayer ceased SA tax residency during the year of assessment. If ticked 'YES' the date should be inserted and the details of the CGT 'exit' charge can be included in the part of the tax return that then opens up. This has now been replaced, and the detail must be recorded on, the RAV01. The 'wizard' also asks whether there were actual capital disposals. The total proceeds & base cost amounts will need to be disclosed in the part that opens up – SARS will then request supporting schedules & documents.

Administrative matters		
10	It is said that non-residency should be indicated in the tax return. Is there a place on the income tax return for "non-resident"? Please clarify where in the income tax return is it.	The income tax returns for the 2017, 2018 and 2019 tax years differs from previous tax years in that they do not include a specific section where a person can indicate their SA tax residency status (including amount of time spent in SA for purposes of the physical presence test for SA tax residency). AS was explained in the guide, the RAV01 must be used to communicate this to SARS.
11	If one decides now that one is no longer ordinarily resident, but there is no specific event on this date, does one backdate the date to the date that one left SA or can one select the start of this tax year?	A person ceases to be ordinarily resident from the date that he/she subjectively considers himself/herself as no longer ordinarily resident in SA. As such one cannot merely choose an earlier date for the sake of convenience. The onus is on the taxpayer to prove the date on which he or she ceased being resident in the RSA.
Exchange Control		
12	What strength does it have if you do or do not emigrate with SARB?	It is assumed that the question relates to the determination of ordinarily residence. It would form part of the objective factors to be taken into account in determining whether an individual's assertion that they are no longer ordinarily resident in SA is justifiable. However, the absence of exchange control emigration cannot and is not definitive in any way. SARS in their Frequently Asked Questions in respect of the Foreign Employment Income Exemption dated 22 October 2019 indicate that the so called 'financial emigration' is a factor which may be taken into account whether one is resident. And formal emigration is, since 1 March 2021, no longer required. The test however remains whether an individual has ceased to be ordinarily resident.
Comprehensive Examples		
13	Is there any CGT implication on the following person: SA resident moved to Australia 20 years ago. He never officially emigrated but has not been back for 20 years. He comes back this year for a parent's funeral and decided that while here he may as well formally notify	The concept of 'formally emigrating' is used with regard to exchange control residency. Specifically, an SA permanent resident/ citizen will remain an SA exchange control resident until they formalise their emigration by completing the prescribed process. Ceasing SA tax residency, on the other hand, is not such a formalised process and depends on the outcome of the application of the definition of 'resident' in the Income Tax Act. A person's income tax return has been the mechanism to convey such status to SARS – naturally, SARS could on

	SARS as he will not be back. He has some assets in SA, as a result of funds left here and has a pension fund now payable as he is over 60. During the 20 years he has amassed wealth in Australia. Would SARS attempt to tax the capital gains on his Australian assets when he now exits 20 years later.	assessment request substantiating information and/or documentation. With regard to the situation described in the example, the individual is likely to have: • remained an exchange control resident (in the absence of formal emigration); but • ceased SA tax residency some time before his temporary return to SA – perhaps by ceasing to be ordinarily resident in SA upon or after relocating to Australia. If he can convince SARS, who will be within its rights to question his SA tax residency status, that he ceased to be a SA tax resident prior 1 October 2001, no CGT exit charge will have to be calculated. Also, as an Australian tax resident, he would be able to claim DTA relief from SA tax on the SA pension fund benefit – to the extent that the benefit is taxable in Australia.
14	For all questions below presume that **Husband is a tax resident in SA**, currently **living in Germany** and **outside of SA for more than 183 days** each year. Furthermore, assume that the year of assessment is **after 1 March 2020** and hence **only the R1,25m exemption** in terms of **section 10(1)(o)(ii)** is available	

14.1	Income is split 50/50 between husband and wife in Germany (and other countries) before being taxed. If, for example, wife earns 50k€ and is German and Husband earns 150k€ and is South African. Germany will tax each person on 100k€. Will SARS treat the full 150k€ as taxable by Husband or only 100k€?	In principle, spouses are <u>not</u> taxed jointly in South Africa. Accordingly, they will need to separately calculate their South African taxable income (if the spouse is taxable in South Africa).
		In establishing the above, one would also need to obtain confirmation of the following:
		• Are they married in community of property (ICOP) or out of community of property (OCOP)?
		• What is the composition of the 'income' referred to?
		  o Section 10(1)(o)(ii) only applies to remuneration earned for services rendered outside South Africa.
		  o If married ICOP and some of the 'income' relates to investment income, they would each be taxable on their half share.

14.2	In Germany the employer is obliged to contribute to medical insurance and public pension for all	In principle a South African resident would need to apply the South African Income Tax Act to determine his/her South African taxable income. Thus, the benefit may be taxable in South Africa, but further analysis would be required.

	employees. This is not taxable in Germany. Will SARS deem these contributions as part of remuneration and include it in the taxable income for Husband?	However, BPR247 may provide guidance.
14.3	Certain tax credits exist in Germany. For example an amount per child or an amount for child care. I presume these will be ignored by SARS and no reduction will be allowed?	They will be able to utilise the actual German taxes due (and not refundable) on income for purposes of the section 6*quat* tax rebate.
14.4	Fringe benefit rates differ in Germany. 1% of the value of a company car is included in remuneration. Will SARS include 3.5% in Husband's taxable income as per SA tax law?	SARS accepts (refer to IN18) that a foreign tax law may include certain items of income or may allow certain exclusions or deductions not included or allowed under South African domestic tax law, however it could still be considered a tax on income.
14.5	Certain levies (based on tax payable) is payable in Germany. For example, tax residents of western Germany have to pay a "solidarity levy" for the support of eastern German provinces. This is calculated as 5.5% of income tax payable. Furthermore, Husband also pays social levies and unemployment levies. Will any deduction be granted for these levies?	The position is not clear – in practice, SARS seems to accept the value of foreign remuneration as determined under the applicable law of the applicable foreign jurisdiction. No tax deduction would be available. If said levies can be seen to be a tax on income, the section *6quat* rebate could be available.
14.6	How will the differences in the tax years be treated when submitting the SA tax return? Germany's tax year is Jan to Dec. SA is Mar to Feb.	The appropriate portion of the German income that relates to the South African tax year will need to be determined. The corresponding German tax liability on that portion will then need to be determined. If income is equally spread throughout the period(s), a time apportionment method could be acceptable.