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To be or not to be South African? Income tax implications of leaving, or staying when you want to leave

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OPSOMMING

Om 'n Suid-Afrikaner te wees of nie te wees nie? Inkomstebelastinggevolge van vertrek, of bly wanneer jy wil gaan

Met die aanvang van die inwoner-gebaseerde belastingstelsel het Suid-Afrika 'n volledige vrystelling vir buitelandse indiensnemingsinkomste ingestel ten einde dubbele belasting te vermy. Sederdien het verskeie hooggeskoolde, welgestelde, en hoë-inkomste-verdienende Suid-Afrikaners weens sosiale, politiese, en ekonomiese redes uit Suid-Afrika verhuis. In 2020 is die Inkomstebelastingwet 58 van 1962 gewysig om vir slegs 'n gedeeltelike vrystelling voorsiening te maak. Die regering het aangevoer dat die rede hiervoor is om die misbruik van hierdie vrystelling te beperk ten einde Suid-Afrikaners te ontmoedig om na buite Suid-Afrika te verhuis om belasting te vermy. Hierdie wysiging mag egter onbedoelde gevolge inhou aangesien dit sommige Suid-Afrikaners kan noop om hulle residensiële bande met Suid-Afrika heeltemal te verbreek. So 'n verbreking van residensiële bande is egter nie sonder belastinggevolge nie. 'n Uittreeheffing word geaktiveer met formele emigrasie en 'n belasting gehef op enige wins gemaak op bates van die voornemende emigrant.

Hierdie artikel beklemtoon sommige van die tegniese uitdagings verskans in hierdie bepaling. Hierdie nuwe bepaling hou nie tred met die ekonomiese realiteite van belastingbetalers wat buite Suid-Afrika woon nie. Alhoewel hierdie bepaling steeds onder die vrystellingsbepalings in die Inkomstebelastingwet vervat is, is hierdie bepaling nie 'n vrystelling nie, maar eerder 'n afslag. Dit is nog nie aangepas vir inflasie sedert dit aanvang geneem het nie, wat verdere finansiële swaarkry vir belastingbetalers beteken. In gevalle waar die inwoner indiensgeneem is in 'n land wat 'n belastingooreenkoms met Suid-Afrika het, sal die nuwe bepaling nie toepassing vind indien die persoon 'n inwoner van die ander land is vanweë die bepaling van die belastingooreenkoms nie. Hierdie bied 'n maklike weg uit Suid-Afrikaanse belasting. Aan die einde van alles is dit 'n swak poging om belasting as 'n wonderkuur vir Suid-Afrikaanse probleme te gebruik.

1 INTRODUCTION

South Africa is a wonderful country to live in. However, at the time of writing this article, there is an amplitude of socio-economic and political reasons for a South African resident to want to leave South Africa. These reasons range from rampant crime, state capture, political instability, poverty, corruption, decaying road infrastructure, lack of constant supply of electricity, poor health system, corruption in the police force, the demise of the national airline that was once the pride of the country, lowered standard of education, high levels of gender-based violence, real or perceived cadre deployment, to name but a few. High tax rates also contribute to the displeasure. And then there is one overarching reason why most South

African residents would want to stay – South Africa is home. It is the home where South Africans return to from their worldly wanderings.

In recent years, there has been growing discontent among high-income earners, who argue that excessive taxation stifles entrepreneurship and undermines economic growth in South Africa. This has resulted in a number of top-tier earners simply choosing to leave South Africa because of increasingly high taxes, among other reasons.¹ This is partly evidenced by the 2024 BRICS Wealth Report which highlighted that South Africa was home to 37 400 US dollar millionaires (including 102 centi-millionaires and five billionaires) at the end of 2023 – a 20 per cent decline from 2013.² Data provided by the South African Revenue Service (SARS) shows that more than 32 000 people ended their tax residency in South Africa between 2017 and 2021. According to the data, some 2 700 of those individuals earned more than R500 000 annually and 1 100 earned more than R1 million annually.³

This article highlights the tax implications for South African tax residents faced with the option of remaining South African tax resident but being physically present elsewhere, or of totally severing residential ties with South Africa. It also questions the aptness of the provisions imposing taxes on such persons, and whether these provisions achieve their intended purpose.

2 THE CHANGE FROM FULL EXEMPTION TO A PARTIAL EXEMPTION

Prior to 2020, the Income Tax Act⁴ provided for a full exemption of foreign employment income earned by a resident in a foreign country, provided that the resident was physically outside South Africa for longer than 183 days during any 12-month period. This was changed in 2020.⁵ Since then the law has provided for an exemption only of the first R1,25 million earned by a resident in a foreign country.

3 RATIONALE FOR CHANGE

In 2000, the National Treasury determined that, with the change to a residence-based taxation system, all residents will be taxed on their worldwide income regardless of whether or not they are physically present in South Africa. Accordingly, the provisions of section 10(1)(o) needed to be revised to apply beyond an exemption from income tax only to officers and crew members employed on board any South African ship, if such officers and crew members

1 Daily Investor “Wealthy taxpayers flooding out of South Africa” (12 March 2024) <https://dailyinvestor.com/finance/46635/wealthy-taxpayers-flooding-out-of-south-africa/#:~:text=Data%20provided%20by%20SARS%20shows,more%20than%20R1%20million%20annually> (accessed 16-04-2024).

2 The BRICS wealth report (January 2024) <https://www.henleyglobal.com/publications/brics-wealth-report> (accessed 02-05-2024).

3 National Treasury and SARS “Tax Statistics 2023” (December 2023) <https://www.sars.gov.za/wp-content/uploads/2023-Tax-Statistics-Main-Publication-compressed.pdf> (accessed 16 April 2024).

4 Act 58 of 1962 (“the Act”). Any reference to sections in this note refers to the sections of Act, unless otherwise stated.

5 As provided for in s 16(1)(g) of the Taxation Laws Amendment Act 17 of 2017 and deemed to have come into operation on 28 February 2020, in terms of the Taxation Laws Amendment Act 23 of 2020.

were outside South Africa for longer than 183 days during the year of assessment.⁶ Treasury acknowledged that internationally it is accepted practice to exempt foreign employment income of a resident if the resident was outside his or her country of residence for a period exceeding 183 days, if the income was taxed elsewhere. The Treasury, therefore, proposed that an exemption should be provided for foreign employment income.⁷ Treasury stated that the purpose of introducing the exemption was to prevent double taxation of an individual's income by South Africa and the host country.⁸ Treasury pledged to monitor the effect of this relief measure to determine whether certain categories of employees abuse it to earn foreign employment income without foreign taxation.⁹

In 2017, ostensibly after monitoring the effect of the exemption, Treasury stated that, unfortunately, the exemption created opportunities for double non-taxation in instances where the host country imposes little or no tax on employment income, which is contrary to the policy intent expressed when the exemption was introduced.¹⁰ Treasury then decided to remove the exemption and provide for a relief of the first R1,25 million from tax. The only explanation of the monetary relief was that it “will provide relief for lower to middle income South Africans working abroad”.¹¹ Also, “[a]ny foreign employment income earned over and above this amount will be taxed in South Africa, applying the normal tax tables for that particular year of assessment”.¹²

This statement by the Treasury that the monetary relief of R1,25 million will provide relief to lower to middle income South Africans working abroad suggests that the intention of the change is to remove the exemption totally. However, as a result of the hardship that this would bring to middle income South Africans, a rebate is provided. Thus, this counters the assertion that the reason behind the change is to curb the exploitation of the opportunities for double non-taxation in instances where the host country imposes little or no tax on employment income. In addition, no evidence of monitoring is presented, let alone the outcomes of such monitoring.¹³

4 CURRENT LAW

The essential elements of the exemption are outlined below.

4.1 The exemption is available for South African residents only

A natural person is resident in South Africa if they are ordinarily resident here, or they satisfy the physical presence test of residence.¹⁴ A person is ordinarily resident in South Africa if they consider South Africa their home. It is a place where a person is habitually and ordinarily resident apart from temporary or

⁶ National Treasury *Explanatory Memorandum on the Revenue Laws Amendment Bill* (2000) 5.

⁷ *Idem*.

⁸ *Idem*.

⁹ *Idem*.

¹⁰ National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill* (2017) 7.

¹¹ *Idem* 8. It is noted that the change was effected only with regards to foreign employment income and not also to the original provision applicable to officers and crews of ships.

¹² *Ibid*.

¹³ Provided for in s 10(1)(o)(i).

¹⁴ S 1 *sv* “resident”.

occasional absences of long or short duration.¹⁵ It is a place where a person would naturally and as a matter of course return from his wanderings.¹⁶ Ordinary residence connotes some degree of continuity in a place apart from accidental or temporary absences.¹⁷ It is where a person has his usual or principle residence, what may be described as his real home.¹⁸ Ordinary residence is not impacted by the number of days that a person spends or does not spend in South Africa.

By contrast, the physical presence test of residence determines residence not based on what the person intends or considers to be his home, or place of residence, but where he is physically present. A person passes the physical presence test if he is physically present in South Africa for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment.¹⁹ Also, such person must be in South Africa for a period or periods exceeding 915 days in aggregate during those five preceding years of assessment.²⁰

A person who satisfies the physical presence test becomes tax resident with effect from the first day of the relevant year of assessment. A person who is a resident by virtue of the physical presence test but is physically outside South Africa for a continuous period of at least 330 full days immediately after the day on which such person ceases to be physically present in South Africa, is deemed to not have been a resident from the day on which such person so ceased to be physically present in South Africa.²¹

Generally, the foreign exemption would apply to persons that are ordinarily resident in South Africa. However, with regards to persons that are resident through the physical presence test it is unlikely, but not impossible, that the exemption could apply. This is because the required number of days for presence in South Africa and out of South Africa is almost equal. For a person to be in South Africa for 915 days in a five-year period, that person would have to be in South Africa for at least 183 days in each year and be out of South Africa for 183 days in each year, too. This would happen only if all years were leap years or on the application of the rule that prescribes that part of a day equals a day.

4.2 Only specific items of income are exempt

The exemption applies to remuneration in the form of the following: (a) salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, or allowance; (b) the cash equivalent of any benefit or advantage granted in respect of employment or holding of any office;²² (c) gains made by directors of companies

¹⁵ *Shah v Barnet London Borough Council and Other Appeals* [1983] 1 All ER 226 (HL) 234b–c.

¹⁶ *Cohen v CIR* 1946 AD 174, 13 SATC 362 at 371.

¹⁷ *Levene v IRC* 1928 AC 217.

¹⁸ *CIR v Kuttel* 1992 3 SA 242 (A).

¹⁹ Para (aa) of the definition of resident in s 1 of the Act.

²⁰ Para (bb) of the definition of resident in s 1 of the Act. A day includes a part of a day, but does not include any day that a person is in transit through South Africa between two places outside the South Africa and that person does not formally enter South Africa through a “port of entry”, as contemplated in s 9(1) of the Immigration Act 13 of 2002, or at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act.

²¹ Para (B) of the proviso to the definition of resident in s 1 of the Act.

²² Para (i) of the definition of “gross income” in s 1 of the Act.

or employees in respect of rights to acquire marketable securities;²³ (d) amounts derived from broad-based employee share plans;²⁴ and (e) amounts received by employees or directors on the vesting of equity instruments²⁵ in respect of services rendered outside South Africa by that employee for, or on behalf of, any employer.

4.3 The services need to be rendered by way of employment

This exemption applies to employees for services rendered by way of employment. It follows that independent contractors and self-employed individuals, sole proprietors, and partners in partnerships do not qualify for the exemption, because they are not employees in the usual sense of the word.²⁶ Also excluded from the exemption are persons holding public office appointed in terms of an Act of Parliament, and employees of government, constitutional institutions, public entities, or municipal entities.²⁷

4.4 The employment should be outside South Africa

The employment from which the exempt remuneration is earned should be outside South Africa. The location of the employer is inconsequential; it could be outside South Africa or in South Africa. The Act specifically states that the exempt remuneration is “in respect of services rendered outside the Republic by that employee for or on behalf of *any* employer if that employee was outside the Republic”.²⁸ SARS acknowledges that “[t]he term ‘any employer’ means that services rendered to resident or non-resident employers could qualify for exemption”.²⁹ It is thus the absence of the employee from South Africa that matters and not that of the employer. Therefore, a South African employer could employ an employee outside South Africa to render services to that employer outside South Africa. The remuneration in respect of those services would qualify for the exemption.

This is where the risk of abuse may arise. A South African employer could relocate an employee that does not have to be physically present in South Africa to discharge their obligations, or to provide services, in a country outside South Africa. The purpose could be to avoid the tax and increase the financial benefit of the employee by as much as 45 per cent by merely relocating the employee for half of the year each year. In this way, the employer’s payment of the employee goes a long way, without being eroded by the tax. At the same time, the employer is still able to deduct the cost of the remuneration in terms of section 11(a) of the Act. In order to curb this risk, the blanket reduction of the exemption or the exempt amount is not a solution. A solution is to exclude remuneration paid by South African resident employers or permanent establishments from the exemption. Providing a monetary relief fails to address this challenge adequately, but also goes further to apply to instances where this abuse is not available or intended.

²³ S 8A.

²⁴ S 8B.

²⁵ S 8C.

²⁶ See Stiglingh *Silke: South African income tax* (2024) par 5.4.9.

²⁷ Para (B) of the proviso to s 10(1)(o)(ii).

²⁸ S 10(1)(o)(ii) (emphasis added).

²⁹ SARS Interpretation Note 16 Issue 4 *Exemption from income tax: foreign employment income* (2021) <https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-16-Exemption-Foreign-Employment-Income.pdf> (accessed 09-04-2024).

4.5 Period of time spent outside South Africa

The exemption applies if the employee was outside South Africa for a period or periods exceeding 183 full days in aggregate during any period of 12 months.³⁰ In addition, during that 183-day period, the employee should be outside South Africa for a continuous period exceeding 60 full days during that period of 12 months. The Act specifically refers to 183 “full days”. A “full day” means 24 hours from 00:00 to 24:00. The 183 full days do not have to be consecutive or continuous but, in order to meet the exemption requirements, a total of 183 full days in any 12-month period must be exceeded. It is not necessary to exceed this period by a full day. Any amount of time in excess of 183 full days, such as a few hours, will be sufficient. In the calculation of full days, consideration is given to calendar days, not only work days.³¹

The 12-month period need not correspond with a tax year or financial year. The provision specifically refers to “any period of 12 months.” Thus, the period may start and end at any time during any month. The service need not be rendered throughout the period of absence; it could be for any lesser duration than the period of absence. The services for which remuneration is paid need to be rendered during the period or periods that the employee is outside South Africa. If the employee renders any services in South Africa outside of the 183-day period, the remuneration attributable to those services rendered while in South Africa would not be exempted.

SARS holds the position that days spent outside South Africa when a person is not in employment do not qualify as days outside South Africa and are thus not taken into account in the determination of the 183 days for purposes of the exemption. Such broken periods of employment may arise if an employee is employed at intervals.³² For example, an employee may be employed on a contract basis and enter into separate employment contracts for each broken period of employment. According to SARS, the period in-between the contracts where the employee is unemployed and where no services are rendered do not qualify for the exemption as days outside the Republic.³³

I do not find authority for this position in section 10(1)(o)(ii). The section provides for exemption of remuneration “in respect of services rendered outside the Republic by that employee...if that employee was outside the Republic” for the required period. The link word “if” does not link the absence to the services provided. If that was the intention, a different linking word would be used, for example “while”, to demonstrate that the absence should be linked to the provision of services. In addition, the provision does not require that the person should spend 183 days in the other country or any particular country. It merely requires that the person must be outside South Africa for a period exceeding 183 days. The person’s whereabouts do not matter, so long as he is outside South Africa. This, in my view is deliberate as its purpose is to divest South Africa of its taxing right due to absence from South Africa, and not necessarily presence anywhere else in the world.

³⁰ A transitional provision applies requiring the period of absence from South Africa for a period or periods exceeding 117 full days in aggregate during any period of 12 months in respect of any year of assessment ending on or after 29 February 2020 but on or before 28 February 2021.

³¹ SARS Interpretation Note 16 Issue 4 *Exemption from income tax: foreign employment income* (2021) 4.

³² *Idem* 5.

³³ *Idem*.

As Olivier and Honiball³⁴ state “[i]t is clear that the 183-day exemption is a formalistic time rule and therefore the purpose of the physical presence is irrelevant”.

5 TREATY RULES

South Africa follows the Model Tax Convention on Income and on Capital³⁵ (“OECD Model Convention”) in its treaties. The general rule is that employment income is sourced and taxable in the country of residence, unless employment is exercised in another country – the country of employment.³⁶ Article 15 of the OECD Model Convention entitled “income from employment” is a *lex generalis* in relation to employment income and gives the residence country the exclusive right to tax remuneration unless employment is exercised in the other country.³⁷ The state of employment may tax the remuneration only if the employee is physically present in the source state for more than 183 days in the year, remuneration is paid by employer who is resident in the employment state or is borne by a permanent establishment of the employer in the employment state. Absent the right of the employment state to tax, the resident state taxes the whole amount.³⁸

Without a tax treaty, if a person is not outside South Africa for 183 days in a year, all income is taxable in South Africa. If they are outside South Africa for 183 days, the partial exemption applies – the resident is fully taxable in South Africa subject to the R1,25 million relief. South Africa would also give the resident a credit for the taxes paid in the source country.³⁹ The presence of a treaty does not change this position, save for the fact that the relief from double taxation would be provided in terms of the treaty.⁴⁰

The tax treaty does not apply to the R1,25 million as there is no double taxation – the R1,25 million is exempt from normal tax in South Africa. The tax treaty applies to the amount of remuneration exceeding R1,25 million, as the portion of the remuneration in excess of R1,25 million may be subject to double taxation. The R1,25 million is exempt under domestic law and not under a tax treaty – it applies irrespective of whether or not there is a tax treaty.⁴¹

In instances where a person relocates from South Africa to work in another country, such person may be tax resident in such other country in terms of the laws of that other country. In that case, where there is a treaty between the two countries, the tax implications of his employment income would have to be determined in terms of the treaty. It would first have to be determined in which

³⁴ Olivier & Honiball *International tax: A South African perspective* (2011) 417.

³⁵ OECD Model Tax Convention on Income and on Capital (2017) <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (accessed 02-05-2024).

³⁶ Olivier & Honiball 416; Vann “International aspects of income tax” in Thuronyi (ed) *Tax law design and drafting* (1998) 744.

³⁷ Amatucci *International tax law* (2006) 171–172.

³⁸ See art 15 of the OECD Model Convention; Commentary on art 15 of the OECD Commentaries on the Articles of the Model Tax Convention (2017) page 251 <https://www.oecd.org/berlin/publikationen/43324465.pdf> (accessed 09-04-2024).

³⁹ S 6quat.

⁴⁰ This is generally provided in art 23B of the treaty, in line with the OECD Model Convention.

⁴¹ See SARS “Frequently asked questions foreign employment income exemption (section 10(1)(o)(ii) of the Income Tax Act, 1962)” (17 March 2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G29-PIT-FAQs-Foreign-Employment-Income-Exemption.pdf> (accessed 23-04-2024).

country he is tax resident, for treaty purposes. SARS indicates that an individual who is deemed to be exclusively a resident of another country for purposes of a tax treaty is excluded from the definition of resident. It follows that while an individual may qualify as a resident under the ordinarily resident or physical presence tests, that individual will not be regarded as a resident for South African tax purposes if that person is a resident of another country by application of the tax treaty provisions.⁴²

The OECD provides for instances where a person satisfies the residence requirements of two contracting states. It states that where an individual is a resident of both Contracting States, then his residence is determined in the following order: he is deemed to be a resident (a) only of the State in which he has a permanent home available to him; (b) only of the State with which his personal and economic relations are closer (centre of vital interests); (c) only of the State in which he has an habitual abode; or (d) only of the State of which he is a national. Failing these, the competent authorities of the Contracting States shall settle the question by mutual agreement.⁴³

It would be easy for a person who leaves South Africa to break treaty residence with South Africa in favour of the host country. Such a person would have permanent homes in both South Africa and the host country, and his personal and economic relations would, generally, be closer in the host country. In this instance, the person would be taxable only in the host country as a treaty resident and the section 10(1)(o)(ii) exemption would not apply. The presence of treaties renders the imposition of the tax on employment income ineffective in relation to employment in treaty partner countries. It limits the application of the tax on employment income to non-treaty partners countries only.

6 RESIDENTS CEASING TO BE RESIDENT

I submit that the limitation of the exemption, or the removal of the exemption, with a relief or rebate could have the inadvertent consequence of causing some residents to emigrate formally from South Africa. Some residents could be encouraged to cease to be resident in order for the tax on foreign employment income not to be charged to them. This could be for various reasons, including that the tax on employment income has no direct benefit to them – they are effectively funding, at a high cost, a country that they do not live in, and which provides no better amenities than the country that the person actually lives in. It could be cheaper to be tax resident elsewhere and visit South Africa for fewer than 183 days a year.

The question is whether there are categories of employees that abuse the exemption to earn foreign employment income without liability for foreign taxes, as stated in the Explanatory Memorandum of 2017. In order to achieve this, firstly, the person would physically have to leave the country, which is not a decision to be taken lightly. Secondly, the person would need to choose a country for relocation to, make sure they are comfortable with the country in terms of compatibility with social, economic, political, religious, and other factors. Thirdly, the employment conditions should be the same or more lucrative in the other country

⁴² SARS “Cease to be resident” (10 April 2024) <https://www.sars.gov.za/individuals/cease-to-be-a-resident/#:~:text=An%20individual%20who%20is%20deemed,the%20definition%20of%20%E2%80%9Cresident%E2%80%9D> (accessed 16-04-2024).

⁴³ Art 4(2) of the OECD Model Convention.

than they are in South Africa. Fourthly, the tax system of that country should enable the avoidance of tax in South Africa, in that the tax rate should be lower than that of South Africa. Fifthly, the person should be willing to go through the administrative hurdles of formally emigrating, ceasing to be a resident of South Africa, with all its benefits, and the hurdles of immigrating into the other country with generally limited benefits, at least temporarily. These burdensome inconveniences would result in only few a people leaving South Africa merely to avoid the tax.

The tax burden could also add some impetus for taxpayers to leave or at least to consider leaving. The high rate of personal income tax at the marginal rate of 45 per cent is problematic, especially when coupled with the fact that taxpayers still find themselves having to pay for some amenities which should ordinarily be funded by the tax system, such as toll roads, private health, private security, private education, and many other similar amenities. Personal income tax collection is the largest source of tax revenue in South Africa.⁴⁴ In the 2024 tax year, South Africa had 7,1 million individual taxpayers, down from 7,4 million in the 2023 tax year. The country's registered taxpayers are declining, while government expenditure is increasing. A tiny fraction of South Africans, only three per cent, pay over 90 per cent of all personal income tax. This shows the precarious position of the country's tax base, with more and more revenue being squeezed from fewer people.⁴⁵

According to the Treasury's 2024 Budget Review, out of the population of 62 million people, only six to seven million individuals pay personal income tax in South Africa. There are over 28 million people on social grants.⁴⁶ These statistics do matter in the minds of the taxpayers – the tax paid does not go a long way, since it has more mouths to feed. It is a huge imbalance to have about ten per cent of the people contributing to the main source of revenue for government for the benefit of the rest of the population, and this is a reflection of the dire social, political, and economic status of the country, something that is outside the scope of this article. It also reflects on the ills that cannot be corrected by the tax system.⁴⁷

7 EXIT CHARGE

When a natural person ceases to be a resident, that person is deemed to have disposed of his assets to a person that is a resident on the date immediately before the day on which that person so ceases to be a resident, for an amount received or accrued equal to the market value of the asset on that date.⁴⁸ The person is then

⁴⁴ See National Treasury *Budget Review* (2024) <https://www.treasury.gov.za/documents/national%20budget/2024/review/FullBR.pdf> (accessed 23-04-2024).

⁴⁵ See Jacobs "3 million South Africans pay 90% of income tax" *Daily Investor* (24 February 2024) <https://dailyinvestor.com/finance/45252/3-million-south-africans-pay-90-of-income-tax/> (accessed 23-04-2024).

⁴⁶ *Idem*.

⁴⁷ The argument that it is not six million people who pay tax but all 62 million people, because everyone pays VAT, is ill-informed. It ignores the fact that there is an exemption for VAT on basic goods that should effectively exempt the poor from paying VAT. It either confirms one or two of the negatives – that the poor who should not be paying VAT actually inadvertently pay VAT and/or that the VAT system is poor and badly designed in that it fails to do what it supposed to do. It means that some goods that are supposed to be exempt from VAT are not so exempt and should be revised. There have been calls for government to increase or extend the list of exempt goods for the benefit of the poor, but those calls have not been heeded.

⁴⁸ S 9H(2)(a)(i); Oguttu *International tax law: Offshore tax avoidance in South Africa* (2015) 96–98.

deemed to reacquire each of those assets on the day on which that person so ceases to be a resident at an expenditure equal to the market value on that date.⁴⁹ The deeming provision further provides that the tax year of that person is deemed to have ended on the date immediately before the day on which that person so ceases to be a resident.⁵⁰ The next succeeding tax year of that person is deemed to have commenced on the day on which that person ceases to be a resident.⁵¹

The following items are excluded from the deeming provision (they are not deemed to be disposed of): (a) immovable property situated in South Africa that is held by that person;⁵² (b) any qualifying equity share that was granted to that person less than five years before the date on which that person ceases to be a resident;⁵³ (c) any equity instrument that had not yet vested, as contemplated in that section, at the time that the person ceases to be a resident;⁵⁴ and (d) any right of that person to acquire any marketable security.⁵⁵ While these items are excluded from the deeming provision, such exclusion does not mean they escape the tax net. They continue to be within the tax net and the tax implications of their disposal is deferred until the taxpayer actually disposes of them. For example, with regards to immovable property situated in South Africa, the cessation of residence of the owner does not affect this, because, at disposal, the Eighth Schedule subjects immovable property owned by a non-resident to capital gains tax in South Africa.⁵⁶

The choice to remain South African tax resident depends on many issues, of which tax may be just one. For some, it could be the main driver. However, as Lord Tomlin stated many moons ago:

“[e]very man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”⁵⁷

As to whether a taxpayer, for tax purposes, would choose to remain tax resident and be taxable on the excess of the foreign employment income exemption, or cease to be resident and be subject to the exit charge, would depend on the financial circumstances of the taxpayer. For example, a taxpayer who has amassed considerable amounts of property of a capital nature, which is subject to capital gains tax, would likely choose to remain resident so as to not expose his assets to immediate taxation on emigration. By contrast, if such property is immovable property, the exclusion of the exit charge on immovable property would enable the taxpayer to emigrate without the immediate tax implications. However, a

49 S 9H(2)(a)(ii). See *CSARS v Tradehold Ltd* (132/11) [2012] ZASCA 61 on the timing of the application of treaties upon cessation of residence.

50 S 9H(2)(b).

51 S 9H(2)(c).

52 S 9H(4)(a).

53 S 9H(4)(d). This applies in respect of equity shares contemplated in s 8B.

54 S 9H(4)(e). This applies in respect of equity instruments contemplated in s 8C.

55 S 9H(4)(f). This applies in respect of marketable securities contemplated in s 8A.

56 Para 2(1)(b) of the Eighth Schedule to the Act. This paragraph applies to “the disposal on or after valuation date of – (a) any asset of a resident; and (b) the following assets of a person who is not a resident, namely – (i) immovable property situated in the Republic held by that person or 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...”.

57 *IRC v Duke of Westminster* [1936] AC 1 (HL) 19.

taxpayer who has few or no assets of a capital nature, but whose earning capacity is lucrative, is likely to opt to cease to be resident altogether, in order to avoid the tax on foreign employment income.

8 SOUTH AFRICAN TAX RESIDENT'S PLIGHT OF DUAL HARDSHIP

There are many reasons why countries do, or do not, tax residents or employees, and determine the tax rates in those countries. These reasons are, generally, unique to those countries. The countries may be willing to forgo the tax for reasons unique to them. It could be that the cost of living in that country is considered high and is higher than the cost of living in South Africa. Furthermore, other taxes and costs-of-living items should be considered. For example, if the country chooses to impose a higher indirect tax, like value-added tax (VAT), on goods and services in lieu of a lower, or no, income tax, the overall tax burden on a South African resident in that country will be much higher than the tax on residents of that country and residents of other countries that provide an exemption for foreign employment income.

The limitation of the foreign income exemption ignores the simple proposition that each country determines its taxes on the basis of its domestic circumstances. Income tax may be low in a country, but that may be set off against other costs. The other factor to consider is the high standard of living in the host country. A cost-of-living comparison between the main financial centres of the leading countries to which South Africans emigrate and South Africa indicates that the cost of living in the financial centres of these countries is much higher than in Johannesburg.⁵⁸

Countries to which most South Africans emigrate to are the United Kingdom, Australia, and the United States of America, in that order.⁵⁹ While the United Arab Emirates (UAE) does not feature prominently in terms of the numbers of people emigrating to that country, its lower tax rate and high economic growth attract many potential expatriates. While Hungary is not one of the preferred destinations for most South Africans working abroad or emigrating, it is the best example of the plight of South Africans working abroad. The table⁶⁰ below draws a direct comparison between the cost of living and the personal income tax rates and the VAT rates in these countries and in South Africa.

⁵⁸ Numbeo "Cost of Living Comparison Between Johannesburg and Dubai" https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=South+Africa&city1=Johannesburg&country2=United+Arab+Emirates&city2=Dubai (accessed 16-04-2024).

⁵⁹ Statistics South Africa "Migration profile report for South Africa – A country profile 2023" <https://www.statssa.gov.za/publications/03-09-17/03-09-172023.pdf> (accessed 02-05-2024) ch A3; Fraser "The countries where most South Africans emigrate to" *BusinessTech* (25 January 2024) <https://businesstech.co.za/news/lifestyle/745261/the-countries-where-most-south-africans-emigrate-to/> (accessed 24-04-2024).

⁶⁰ Numbeo <https://www.numbeo.com/cost-of-living/comparison.jsp> (accessed 23-04-2024); OECD "Taxing Wages" (2021) <https://www.oecd-ilibrary.org/sites/86d58c46-en/index.html?itemId=/content/component/86d58c46-en> (accessed 23-04-2024).

	<i>Australia</i>	<i>Hungary</i>	<i>UAE</i>	<i>UK</i>	<i>USA</i>
Consumer prices excl rent	110.8%	28%	77.1%	120.3%	182.1%
Consumer prices incl rent	174.7%	21.5%	146.9%	213%	326.5%
Rent	413.1%	0.6%	407.2%	561.6%	864.9%
Restaurant prices	108.9%	31.7%	111%	173.8%	243.5%
Groceries prices	176.8%	41.7%	64.8%	123.5%	251.6%
Personal income tax rate	45%	15%	0%	45%	37%
VAT/sales tax rate	10%	27%	0%	20%	7.25%

The plight of South Africans working abroad is well illustrated by using Hungary as an example. The cost of living is high in Hungary, and the VAT rate is also high. However, these are compensated by the low rate of personal income tax. Subjecting a South African tax resident who lives and works in Hungary to tax in South Africa would result in that compensation being consumed by the tax in South Africa.

Even though the marginal tax rates in the Australia and the United Kingdom are the same as those in South Africa at 45 per cent, the values at which a person reaches the marginal rates in these countries are much higher. In the United Kingdom, the 45 per cent marginal tax rate applies only from the taxable income of the equivalent of R2 957 146,⁶¹ and in Australia at the equivalent of R2 340 477.⁶² In South Africa, the amount is R1 817 001.⁶³ This implies that the South African tax incidence is higher than in Australia and the United Kingdom, and the cost of living in these countries is also higher, to the economic detriment of South Africans.

9 MISMATCH BETWEEN CAUSE AND EFFECT OF CHANGE

There is a mismatch between the reason provided by Treasury for the removal of the total exemption to the partial or limited exemption. Treasury alleges that there is abuse, but instead of conjuring up a specific and targeted anti-avoidance provision, it removes or limits the exemption for all foreign employees. As a result, the reasoning behind the change becomes questionable. Failing any cogent explanation from Treasury about the reason, one could look at the effect of the change and possibly understand the reason for it. The effect of the change is, firstly, that government would now collect taxes that it did not collect before, and that increases its revenues. Indeed, the loss of economically viable and active taxpayers is a loss to the fiscus. And, therefore, I suppose the first reason for the

⁶¹ GOV.UK “Income Tax rates and Personal Allowances” <https://www.gov.uk/income-tax-rates> (accessed 23-04-2024). Rates are correct as of 23 April 2024.

⁶² The Treasury Australian Government “New personal tax rates and thresholds for 2024–25 onwards” (5 March 2024) <https://treasury.gov.au/tax-cuts> (accessed 23-04-2024). Rates are correct as of 23 April 2024.

⁶³ SARS “Rates of Tax for Individuals – 2025 tax year (1 March 2024–28 February 2025)” (22 February 2024) <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/> (accessed 23 April 2024).

change was to increase revenue collection. Secondly, the effect of the change is that it disincentivises persons that would like to leave the country from leaving, especially if the high tax is a motivation for leaving. Thus, the effect is to discourage taxpayers from leaving the country. I once again suppose that the effect is the reason to discourage emigration and retain the tax base. Thirdly, the truth is that South Africa is losing talented, educated, and skilled individuals, because of the key determinants that were outlined earlier in this article. And it is a known and accepted fact that amongst the reasons why taxes are imposed, is the need to change or influence behaviour. The tax is charged on high income earners, and, therefore, highly skilled, educated, and talented individuals, especially because relief is provided expressly for the low- and middle-income earners. I accordingly suppose that the purpose is to discourage highly skilled, educated, and talented individuals from leaving the country and so to retain skill, education, and talent. This is a situation where tax is used as a panacea to cure all ills. Unfortunately, the emigration from South Africa of highly skilled, educated, and talented individuals inevitably discourages highly skilled, educated, and talented individuals from immigrating. Those aspiring and potential immigrants would not immigrate for the same reasons that make others emigrate.

Thus, an individual with a high earning capacity and many assets, other than immovable assets, presents a peculiar tax dilemma. If they do not formally emigrate, their income will be taxed indefinitely in South Africa. If they emigrate, their capital assets will immediately be subjected to capital gains tax in South Africa.

10 DOES THE EXEMPTION STILL EXIST, OR IS IT A WOLF IN A SHEEP'S SKIN?

There are three main forms of avoiding double taxation – exemption, credit, and deduction methods.⁶⁴ With the exemption method, income that has been taxed in one country is exempted from tax in the other country.⁶⁵ This means that such income is not taxed at all in the other country. In the South African context, that income will be included in gross income but exempted, thus not forming part of income. With the credit method, the income is included in gross income, is not exempted, and forms part of income. Allowable deductions are deducted from that income. Then the amount of taxable income is determined, and the tax amount is computed. A rebate is deducted from the amount of the tax, that being the amount of tax paid in the other country. The credit is up to the amount of domestic tax on that income.⁶⁶ The deduction method allows for the amount of tax to be deducted from the income of the taxpayer, when determining the taxpayer's taxable income.⁶⁷

The current tax status of foreign employment income does not fit into any of the above. It is not a method to avoid double taxation. It is more aptly a rebate as opposed to an exemption.⁶⁸ Effectively, government repealed the exemption and replaced it with a partial rebate, similar to a rebate provided for personal income

⁶⁴ Olivier & Honiball 6.

⁶⁵ Arnold & McIntyre 33–36.

⁶⁶ Vann 757; Arnold & McIntyre 36–39.

⁶⁷ Arnold & McIntyre 32–33.

⁶⁸ It is noted that this method is not unique to South Africa. Rohatgi *Basic international taxation* (2002) 209 notes that several countries with worldwide tax regimes also exempt, either fully or partly, foreign income, and may even couple it with progression for rate purposes.

tax for individuals. If it were to be imposed as an exemption, at best it could be a partial exemption, similar to the partial exemption on interest income for individuals,⁶⁹ which also, I submit, is effectively a rebate. In reality, therefore, foreign employment income is subject to tax in South Africa, subject to a rebate of R1,25 million. The credit is only thereafter granted by section 6quat or the treaty, if the country of employment taxes the amount. It would otherwise not be the most appropriate state to grant an exemption and a credit to avoid double taxation in respect of the same item of income.

11 NO INFLATIONARY ADJUSTMENT

It is noteworthy that since the change from the exemption to the rebate or partial exemption in 2020, the amount of the rebate has not been adjusted for inflation. Needless to say, this erodes the value of the relief and imposes a higher tax burden than was originally budgeted for taxpayers. The appropriate place for provisions that contain or prescribe monetary values is the Rates and Monetary Amounts and Amendment of Revenue Laws Acts that are adjusted annually for inflation or at the very least allow the Minister of Finance to make a decision not to adjust the amount for inflation. When it is part of the law, it does not receive annual attention, as is the case with many other monetary values.

12 CONCLUSION

It is an irresistible proposition that the change from full exemption to a partial exemption or rebate has inevitably caused some residents working outside South Africa to formally emigrate and cease to be tax resident in South Africa. This is a negative result of the tax collection goals that government might have thought would result from the tax on foreign employment income, more so if it was hoped that the change would result in South African residents returning to South Africa for work. This goes to show that tax is not a panacea for all ills, and it can only be used to a limited extent to change behaviour.

The change and the new provision are fraught with problems. There is a stark mismatch between the reasons for the change and the change itself. The exemption is no longer an exemption. The lack of an annual inflationary adjustment depletes the value of the rebate. The tax on foreign employment income causes financial hardship to residents employed elsewhere based on the cost of living in some of the countries and the high tax in South Africa. Taxpayers are able to avoid the application of the tax or the exit charge where there is a treaty between South Africa and the host country. In the end, it might just be that the partial exemption does more harm than the full exemption ever did, if any.

⁶⁹ Provided for in s 10(1)(i).



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Professor Coenraad Visser
EDITOR