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SCHOOL OF ACCOUNTANCY

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

A research report submitted to the Faculty of Commerce, Law and Management in partial fulfilment of the requirements of the degree of Master of Commerce in the field of Taxation

A critical analysis of South Africa revoking its income tax exemption for United Nations officials

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Date:	29 March 2019

ABSTRACT

The United Nations (UN) runs an extremely complex payroll system, complicated mainly by the fact that the organisation wants to treat all employees equally, wherever in the world they may be (Loan, 2003). The Charter of the United Nations (UN Charter), signed on 26 June 1945, provided certain privileges and immunities to the UN as an organization, to its officials, and to representatives of Member States to the various organs of the UN. Immunity has been defined in the Oxford Dictionary as 'protection or exemption from something, especially an obligation or penalty'. Stemming from articles 104 and 105 of the UN Charter, the UN later introduced an exemption from national income taxation on all UN officials' earnings in terms of section 18(*b*) of the Convention on the Privileges and Immunities of the United Nations, 1946 (Convention).

Taxing rights and related exemptions are regulated by a country's tax laws. In South Africa, those are clearly stated in various tax acts. South Africa taxes on a residence basis as clearly stipulated in section 1 of the Income Tax Act 58 of 1962 (Income Tax Act), under the '*gross income*' definition. Absent the UN Charter and agreements reached regarding UN privileges and immunities, the UN would have to work around avoiding juridical double taxation by determining which countries should have taxing rights on UN employees. The following categories of the UN employees are applicable in this study: South African residents working in South Africa, South African residents working outside South Africa or non-residents working in South Africa. South African residents working outside South Africa will normally obtain a foreign employment income exemption in terms of section 10(1)(*o*)(ii) of the Income Tax Act. The section will be amended from 01 March 2020 to exempt only the first R1 million earned from foreign employment.

KEY WORDS:

UN Charter, taxing rights, juridical double taxation, privileges and immunities, income tax, PAYE, exemption.

DECLARATION

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

_____

Ntungufhadzeni Olga Mutwanamba

29 March 2019

DEDICATION

To my extra-large family, friends and colleagues, thank you for your support, encouragement and understanding during the past three years of the programme and in the writing of this research report.

ACKNOWLEDGEMENTS

Completion of this research report would have proved impossible without the guidance, contribution and support of many people. I express special acknowledgement to:

Senior lecturer Roy Blumenthal, my supervisor, for his patience, time and guidance. I called in to quit the programme, a few times.

My mother, Mrs Joyce Mutwanamba, for her support and prayers. “I am praying for you” from a mother will remain my second-most favourite words to hear.

My friend via correspondence, Mpho Matombo, for words of encouragement and support, for all the days she forced me out of bed to follow my passion and for all the long calls reminding me that I could do it.

The ‘*silent’* cheerleader(s) of all times: just being there meant a lot, and I will forever be grateful.

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LIST OF ACRONYMS AND ABBREVIATIONS

This study makes use of a number of abbreviations and acronyms. They are listed below for convenience:

BRICS – Brazil, Russia, India, China and South Africa
DTA – Double Taxation Agreement
DTC – Davis Tax Committee
DTT – Double Tax Treaty
GoI – Government of India
IRS – Inland Revenue Service (United States of America)
MAP – Mutual Agreement Procedure
OECD – Organisation for Economic Co-operation and Development
SA – South Africa
SARS – South African Revenue Service
Treasury – National Treasury of the Republic of South Africa
UN – United Nations
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
USA – United States of America

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CHAPTER 1: INTRODUCTION AND THE CONTEXT OF THE RESEARCH

1.1 BACKGROUND

Chapter 1 of the fifth interim report of the Commission of Inquiry into certain Aspects of the Tax Structure of South Africa 1997 (South Africa. Katz Commission, 1997:1) titled 'Basing the South African income tax system on the source or residence principle – options and recommendations', opened with the following statement:

> When a country's own citizens or residents transact business or invest abroad, or foreigners trade or invest within its domestic jurisdiction, the tax system as it affects these activities needs to balance carefully domestic and international economic objectives. On a global basis, countries need to maintain orderly tax regimes to promote international trade, and there is a need for accepted rules and conventions limiting any one country's rights to tax its own citizens or residents operating or investing abroad, or the citizens or residents of other countries doing so in its own jurisdiction. Two mainstream principles or bases which have developed for this kind of 'international' taxation are respectively the source and the residence bases. On the international level, these are then amplified by a network of bilateral Double Tax Agreements which seek to remove any remaining potential conflicts and to eliminate the danger of taxing the same income twice.

This research report aims to evaluate the three categories of UN employees as follows:

1) South African residents working for the organisation outside the Republic: Category A;
2) South African residents working for the organisation in the Republic: Category B; and
3) Non-residents working for the organisation in the Republic: Category C.

In the absence of the income tax exemption as contained in the Convention on the Immunities and Privileges of the UN, two categories of employees would have their UN earnings considered taxable in order to maintain a balance of domestic and international economic objectives as highlighted by the Katz Commission of Inquiry *(ibid)*. The two categories affected by the need to maintain a balance would be residents working for the organisation abroad as well as non-residents working in the Republic. Post-1994, South Africa entered into many treaties, including double taxation agreements (DTAs) (South Africa. SARS, 2018d). DTAs became ever more relevant for the country following implementation of the residence basis for taxation as the previous tax regime focused on the source of income.

Section 108 of the Income Tax Act, read with section 231 of the Constitution of the Republic of South Africa, 1996 (Constitution), introduced the concept of DTAs in order to provide relief to the taxpayers who might be affected by cross-border economic activities that had tax implications. Prior to the Constitution taking effect, the DTAs would become law as soon as they were concluded and notified by proclamation by the State President in the South African Government Gazette (Gazette) in terms of section 108(2) of the Income Tax Act in the tax years before the Constitution. Section 108(2), as amended, provides that the DTA becomes effective and shall have an effect as if it was enacted in the Income Tax Act as soon as it is approved by Parliament and the arrangements thereby made are notified by a publication in the Gazette as contemplated in section 231 of the Constitution. Section 231(5) of the Constitution states that the Republic is bound by international agreements that were binding when the Constitution took effect.

UN employees covered in the research report will be affected by the existence or non-existence of double taxation agreements, in a situation where their income taxation exemption is no longer applicable.

1.2 PROBLEM STATEMENT

Taxing citizens is vital for the financing of the most essential public sector activities, such as the legal system, national defence and the police. In addition, it provides the funding for social programmes, such as public health services, education and welfare. Finally, taxation is one of the most important ways by which a community's distributional goals may be attained (Winer & Hettich, 2004:1).

In the glossary of selected variables in the report 'Financial statistics of consolidated government 2016/2017' (South Africa. Statistics South Africa, 2018:38), tax revenue was explained as follows:

> Tax revenue forms the dominant share of revenue for many government units and is composed of compulsory transfers to the general government sector.

The same report further indicates that taxes made up 87 percent of the total receipts collected by the South African Government in that year. It is therefore clear that the South African Government collects almost all of its income from taxes.

UN employees do not pay income tax on their UN earnings, as is the case in many other countries. This is an indication that there is a gap in the country's tax base. This research will explore the possibility of including those UN employees in the South African tax base.

1.3 LITERATURE REVIEW

Despite the existence of a considerable body of literature on legislated exemptions or those exemptions legislated in the relevant Tax Acts, scant research has been done on tax immunities. Tax immunities effectively mean that the country concerned gives up taxing rights. Research has been done on other immunities. Other work on fairness and the taxation system will also be considered.

Other immunities, such as those coded in the 1961 Vienna Convention (Hestermeyer, 2009), will play a role in reaching conclusions. Goossens queried whether diplomatic immunities were still relevant (Goossens, 2011). The topic was titled: 'Diplomatic immunity: an argument for re-evaluation'. The author argued that the 1961 Convention needed to be reconsidered owing to a number of factors, for example, the passing of time and abuse of such privileges. Goossens (2011) covered aspects such as domestic legislation and legal principles in line with the Vienna Convention that are also relevant to this report.

Fairness or otherwise of the tax system is also a common topic. Much has been written around this topic, including the constitutionality of the acts mandating tax collection. Equality in general, meanwhile, comes up all the time. Van Schalkwyk (2001:290) concluded that in both of the two court cases seeking to determine whether provisions of the Income Tax Act were constitutional, the judges refrained from making a decision on that aspect. The author also wrote about the widely published VAT case, *Metcash Trading Limited v CSARS* (1999), where the Constitutional Court ruled that the draconian rule of pay-now-argue-later was constitutional (van Schalkwyk, 2001:291).

How to increase South Africa's tax base has also been the subject of much research. This report centres on the possibility of recovering the taxing rights given up in

respect of UN employees or officials. Bringing them onto the SA Income Tax register will mean nothing but much-needed expansion of the tax base. In her thesis, Yolande van Heerden explored tax reform to secure the South African revenue base using a micro-simulation tax model (van Heerden, 2013).

Much has also been written about increasing South Africa's tax base through wealth taxes. Warnings have also been issued in that regard. In its 12 April 2018 report entitled 'Closing report on the work performed by the Davis Committee', the Davis Tax Committee (2018:10) concluded that a possible wealth tax should continue to be on the agenda as the country lacks a comprehensive wealth tax system. The recommendation also touched on strengthening the existing estate duty system in order to achieve its wealth tax objectives. According to Ensor (2018) South Africa is not ready for a wealth tax.

1.4 RESEARCH QUESTIONS

South Africa gave up certain taxing rights by exempting UN officials' remuneration. The exemption is not included in the Income Tax Act, but in s 5(1) of the Diplomatic Immunities and Privileges Act, Act 37 of 2001 (DIPA) and is thus not applicable to other employees who do not work for the UN. The fact that UN officials are not taxed on their UN remuneration is, on the face of it, a loss to the fiscus. State revenue can be raised from residents working either in South Africa or offshore, or from non-residents working in the country, but this is not the case with UN employees.

South Africa's existing tax laws incorporate double taxation agreements (DTAs) as per s 108 of the Income Tax Act. Without the exemption granted indirectly to UN officials through the Diplomatic Immunities and Privileges Act, two of the three categories of employees in question would have their income taxed in South Africa, taking into cognisance the existing Income Tax Act section 10 exemptions, as well as the DTAs, where applicable. The two categories would be residents and non-residents working in South Africa.

- Without any exemptions, how will the employees of the UN as well as the fiscus be affected by normal income tax rules and is it fair to have them being granted the exemption?

The following sub-questions will be considered in this report:

1. How will the UN employees be taxed in the absence of the income tax exemption on UN earnings?

    a) The different line items that make up remuneration, as defined, in the UN official earnings

    b) How will the UN as an organisation be affected?

    c) How will the fiscus be impacted?

2. Is the blanket exemption given to UN employees fair, and does it compromise constitutionally mandated equality?

3. What will the consequences be, for South Africa as a country, of withdrawal from participation in this exemption?

1.5 FOCUS OF THE RESEARCH

In South Africa, income tax exemptions relating to employment income are specifically dealt with in terms of section 10 of the Income Tax Act. This research will focus on the three categories of UN officials entitled to an exemption covering their full earnings from the organisation. Their full earnings are remuneration as defined in the Income Tax Act. Officials in the three categories would, ordinarily, all have their earnings subject to South African income tax rules in the absence of exemption, meaning that their remuneration would fully qualify to be included in their gross income and subsequently taxed if above the threshold, in line with the definition of gross income as per s 1(1) of the Income Tax Act. At present, in terms of the UN convention on immunities and privileges, the UN employees' earnings do not get taxed. The three categories are as follows:

1) South African residents working for the organisation outside the Republic: Category A;
2) South African residents working for the organisation in the Republic: Category B; and

3) Non-residents working for the organisation in the Republic: Category C.

1.6 RESEARCH OUTLINE

The purpose of Chapter 1 is to provide the context of the research by considering a brief background of the research.

Chapter 2 introduces the South African income tax system. The chapter also brings the reader's attention to double taxation agreements or treaties as these become increasingly important in cases where there are cross-border taxable activities.

Chapter 3 introduces the UN as an organisation. Factors such as its original mandate, how it was formed, its aims and objectives, visions and funding will be covered.

Chapter 4 focuses on 'exemptions' to income tax. Exemptions mandated under the Income Tax Act will be explored and a comparison will be drawn between the UN exemption in question and other related exemptions.

Chapter 5 identifies and questions the constitutionality of the UN exemption. It considers the constitutionality of dividing workers in the same country based on for whom they work. Whether or not the act is constitutional will be dealt with in this chapter. The constitutionality of the Income Tax Act as a whole will not be considered.

Chapter 6 will conclude the research report. This chapter will collate the findings of the five chapters and summarise them in order to appropriately address the problem statement by concluding the report.

CHAPTER 2: SOUTH AFRICA'S TAX SYSTEM AND DOUBLE TAXATION

2.1 INTRODUCTION AND TAX LEGISLATION

Income tax in South Africa is regulated by the provisions of the Income Tax Act, 58 of 1962. The Republic of South Africa is a democratic sovereign state in terms of section 1 of the Constitution. The Constitution is the supreme law and since its introduction in 1996, in terms of section 1(c) read with section 2, any law or conduct that is inconsistent with it is invalid. In terms of section 77(1)(b) of the Constitution, the Income Tax Act is a money bill as it imposes national taxes. A Bill, therefore, and its regular amendments, are tabled by the Minister of Finance in the National Assembly and, after approval by the Standing Committee on Finance (National Assembly) and the Select Committee on Finance (National Council of Provinces), are sent to the President for assent before being promulgated as Acts of Parliament. The tabling, approval and promulgation are all carried out in accordance with sections 53 and 73 of the Constitution.

Jurisdiction to impose tax is based either on the relationship of the income (tax object) to the taxing state (commonly known as the source or *situs* principle) or the relationship of the taxpayer (tax subject) to the taxing state based on residence or nationality. Under the source principle, a state's claim to tax income is based on the state's relationship to income. Source taxation is generally justified on the ground that the state has contributed to the creation of the economic opportunities that allow a taxpayer to derive income generated within the territorial borders of the state (United Nations, 2003:9). These two principles thus inform the two main and distinct bases of taxation.

Theoretically the two bases of taxation are residence and source. The reason for calling them theoretical is the fact that it is almost impossible to have a system that does not contain both taxation elements. The very definition of 'gross income' in section 1(1) of the Income Tax Act that introduces the residence basis of taxation is sufficiently wide to accommodate a non-resident whose income should, legally, be subject to a South African tax net, by virtue of having been received or accrued to or in favour of the taxpayer from a source within the Republic, thus making the system a hybrid. The fifth interim report of the Katz Commission (1997), in its analysis of

international trends, captured the overlap between the two systems properly by stating as follows: *'*Nowhere in the world are either of these systems applied with any degree of purity*'.*

The three categories of UN employees being examined in this study clearly overlap, at face value, between source and residence and it would be short-sighted not to acknowledge this fact. It is clear from the employee categories that both on- and offshore considerations need to be taken into account. To reiterate, the three categories of UN employees in question are:

(a) South African residents working for the UN outside the Republic: Category A;
(b) South African residents working for the UN in the Republic: Category B; and
(c) Non-residents working for the UN in the Republic: Category C.

The right to tax forms part of a state's sovereign powers. There is no global taxing body in existence and tax laws differ from one country to the next (Olivier & Honiball, 2011:1). A country's laws, therefore, determines the basis of income taxation to be applied. In South Africa, the definition of 'gross income' in section 1(1) of the Income Tax Act determines that residence provides that basis.

Prior to 1 January 2001, South African income tax was primarily based on what is commonly referred to as the 'source plus*'* basis of taxation. This means that all income which originated in the Republic and certain types of income which were deemed to be from a source in South Africa were taxable in terms of the Income Tax Act (SARS and Treasury, 2000:1).

In the 23 February 2000 budget speech, then South African Minister of Finance Trevor Manuel presented the comparison of the two approaches when he started to explain the proposed change from a source to a residence basis as follows (Treasury, 2000a:19):

> …There are two alternative approaches to the taxation of income flows across international borders. In a source-based system, tax is levied on income earned from a source within a country irrespective of whether it was earned by a resident or a non-resident. In a residence-based system, tax is levied on the residents of a country irrespective of where in the world the income is earned…

2.2 BASIS OF TAXATION IN SOUTH AFRICA

For tax periods commencing on or after 1 January 2001, South Africa moved to a residence basis for taxation (SARS and Treasury, 2000:1). For natural persons, that meant starting in the 2002 year of assessment, as their year would have commenced on 1 March 2001. This effectively means residents are now taxed on worldwide income (*ibid*). Worldwide income may be subject to certain exclusions. This was a change from what was commonly known as the 'source plus' basis that meant residents and non-residents were taxed on income earned from a South African source or deemed source. The change had been a long time coming and was formally introduced in the budget speech of the preceding year (Treasury, 2000a:19)

In the joint briefing document issued by the National Treasury and South African Revenue Service, the Finance Ministry advanced the following reasons for the change: protection of the South African tax base from exploitation; to bring the country's system more in line with international tax principles; relaxation of exchange controls; greater involvement of South African companies offshore; and more effective catering for the taxation of e-commerce (SARS and Treasury, 2000:1).

In the 23 February 2000 budget speech (Treasury, 2000a:19), the then Minister of Finance explained the change in terms of challenges from the tax administration point of view, potential use of lower tax jurisdictions by taxpayers to avoid tax, international best practices as well as additional increase in revenue, as follows:

Residence-based taxation:

> …Our tax system is currently based on source principle. This is increasingly out of line with international practice and inappropriate for the circumstances of the South African economy. It creates considerable scope for tax structuring as taxpayers find ways to change income that would normally be taxed in South Africa into untaxed 'foreign source' income. The increased globalisation of our economy also creates opportunities for taxpayers to avoid tax by routing transactions through countries with low or zero tax rates; or countries with generous tax incentives, such as tax holidays.
>
> We therefore intend to move to a residence-based income tax for South African residents for tax years commencing after 1 January 2001. This measure will significantly broaden South Africa's tax base and limit the opportunities for tax arbitrage. It will also bring our tax system in line with international best practice. As an interim step, foreign source dividends accruing to South African residents become taxable as ordinary income as from today.
>
> The additional revenue from this measure is expected to be R200 million in 2000/01…

In the subsequent 'Explanatory Memorandum on the Revenue Laws Amendment Bill 2000' (Treasury, 2000b:3) it was further explained that the provisions were being introduced in the Act to protect the South African tax base from the effects of the relaxation of exchange control provisions that came to effect on 1 July 1997.

The definition of 'resident' in section 1 of the Income Tax Act 1962 was amended to delete most of the references to income from a source in the Republic and to emphasise that residents will become taxable on their world-wide income. Non-residents will, however, still only be taxed in the Republic on income which is derived from a source within the Republic.

The summarised definition prior to 1 January 2001 read as follows:

> Gross income, in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of capital nature or not) so received or accrued as are described hereunder, namely –
>
> (c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount (other than an amount referred to in section 8(1)) received by or accrued in respect of or by virtue of any employment or holding of an office:…

The definition of gross income following the above change introduced the fact that the total amount received by or accrued to or in favour of the taxpayer would thus be taxed, regardless of where in the world it had been earned. Residence, therefore, becomes very important in dealing with the income tax in South Africa, and the discussion below captures this important pillar of the taxation system.

2.2.1 RESIDENCE AND TAX

The Organisation for Economic Co-operation and Development (OECD) in its 2017 model tax convention (MTC) on income and on capital, paragraph 1 of Article 4, defines a 'resident of a contracting state' as any person, who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of effective management or any other criterion of a similar nature. The term does not include any person who is liable to pay tax in that state in respect of only income from sources in that state or capital situated therein (OECD, 2017:30).

The Income Tax Act defines a 'resident', in paragraph (a) of section 1(1) of the definition, as a natural person who during a year of assessment is either ordinarily resident in the Republic or physically present in the Republic and is not deemed to be exclusively a resident of another country for the purposes of the application of any tax treaty. With regard to physical presence, there are a few tests that the 'physically present' resident has to pass as per paragraph (a)(ii) of the definition in order to be considered a resident for tax purposes. It is important to note that the definition is broad enough to cover residents who are not natural persons.

The definitions of 'ordinarily resident' and 'physically present' persons are discussed below:

2.2.1.1 ORDINARILY RESIDENT

Philip Haupt described as ordinarily resident a person who has South Africa as his or her true home (Haupt, 2017:25). The Income Tax Act does not define 'ordinarily resident'. The courts have, however, considered its meaning and have established principles to be applied in determining the place in which a natural person is ordinarily resident (SARS, 2018b:2). In summary, the courts have held, in ascribing a meaning to the concept of 'ordinarily resident' that it refers to, for example (SARS, 2012:10):

- Living in a place with some degree of continuity, apart from accidental or temporary absences. A person must be regarded as ordinarily resident if it is part of his or her ordinary regular course of life to live in a particular place with a degree of permanence – *Levene v Inland Revenue Commissioner* (1928).
- A residence that is settled and certain and not temporary and casual – *Soldier v COT* (1943).
- Where a person normally resides, apart from temporary or occasional absences – *CIR v Kuttel* (1992).

Physical presence is, therefore, unnecessary for a resident to be considered ordinarily resident. In *Cohen v Commissioner for Inland Revenue* (1946), the court had to decide if a taxpayer, who had not been physically present in the Union of South Africa for the entire year of assessment, was ordinarily resident. The taxpayer was away on business and was initially granted a nine months permit to stay in the

United States of America. He sub-let his rented flat in South Africa while he stayed with his family in America. Circumstances changed and his stay was extended, causing him to be physically away for a full year of assessment ending 30 June 1942. The Income Tax Act 31 of 1941 of the Union of South Africa, section 30(1)(*a*) exempted from super tax those individuals not ordinarily resident and also not carrying on business in the Union. The taxpayer argued that he was liable for the exemption.

The taxpayer was found to be ordinarily resident in the Union. In determining whether or not the taxpayer was ordinarily resident, Schreiner JA in SARS (2018b:3) stated the following:

> …If, though a man may be "resident" in more than one country at a time, he can only be "ordinarily resident" in one, it would be natural to interpret "ordinarily" by reference to the country of his most fixed or settled residence… his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings, as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home….

It is, therefore, important to note which country persons would return to after all their wanderings. In Cohen v CIR, the fact that his residence was sub-let pointed to the fact that he and his family knew that one day they would return to the Union and this was thus used, together with other factors, to reach a conclusion that he was indeed ordinarily resident. According to SARS (SARS, 2018b:5) Interpretation Note 3 (Issue 2) on Ordinarily Resident, the following factors will be taken into account in determining whether a natural person is ordinary resident:

- 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; and
- Frequency of and reasons for visits.

At least two of the three categories of the UN employees would most likely be considered to be ordinarily resident, having considered all their circumstances. This would be applied to residents working for the UN in the Republic as well as those working for the UN elsewhere in the world. The test should not exclude the third category, that is, non-residents working in the Republic due to the fact that they could also fall in the 'ordinarily resident' bracket, with time. The test should, thus apply to them.

2.2.1.2 PHYSICAL PRESENCE

The second part of the 'residence' definition, as far as natural persons are concerned, refers to the physical presence test. The physical presence test is also known as the 'day test' or time rule and is based on the number of days that a natural person is physically present in the Republic. The purpose or nature of the visit is irrelevant and this test must be performed annually to determine if all the requirements have been met (SARS, 2018c:2).

For the physical presence test to be considered, the natural person in question should not have been ordinarily resident. This is according to paragraph (*a*)(ii) of the resident definition. In terms of (aa) and (bb) of the said paragraph, a natural person

has to comply with the requirements as contained therein, in order to qualify as a tax resident. The requirements are:

> (aa) the person must be physically present in the Republic for a period exceeding 91 days in aggregate during the year of assessment under consideration as well as 91 days in aggregate during each of the five years of assessment preceding the year of assessment under consideration; and
>
> (bb) for a period exceeding 915 days in aggregate during the five preceding years of assessment.

Per the provision (A) of paragraph (*a*)(ii)(bb) of the 'resident' definition in section 1(1) of the Income Tax Act, a day includes part of a day. In paragraph 4.2 of the SARS Interpretation Note 4 (SARS 2018c:2) 'Determining the number of days in South Africa', a day likewise includes a part of a day. The example given in the Interpretation Note states that a person who arrives in the Republic at 23:55 hours would be regarded as being physically present for one day, even though that person was only present for five minutes of that day. Both the arrival and departure days, as stamped on the passport, would be included in the count of the number of days.

Under the second provision (B), a person who is a resident by virtue of physical presence ceases to be a resident when physically outside the Republic for a continuous period of at least 330 full days. Residence ceases from the day the person leaves the Republic, meaning the count is performed backwards from day 330 to day 1 in order to derecognise a physically present resident.

UN employees who are ordinarily residents in other countries but physically present in the Republic for a number of days that qualify them to be recognised as residents would be considered to be tax residents unless they were deemed to be exclusively residents of other countries for the purposes of the application of any tax treaty.

In conclusion, it is evident from the discussion above that the existence of the UN as an organisation cuts across the two different types of tax regimes, these being the source and residence basis. Prior to 1 March 2001, being the first tax period that the residence basis of taxation applied to natural persons, UN employees would like any other taxpayer have paid employee tax on remuneration and been assessed on income from a source within the Republic, just like any other taxpayer, in the

absence of the UN exemption. The old definition of 'gross income' in section 1 of the Income Tax Act dealing with the source basis of taxation would have applied, together with its exclusions and inclusions. The payment of tax would have had to follow the legislation applicable at the time, in the absence of the UN exemption.

2.2.1.3 RESIDENTS WORKING IN THE REPUBLIC

In the absence of the UN income tax exemption, there should not be a debate about Category B UN employees. This group should be taxed in the Republic. The Income Tax Act would ordinarily apply to them, in full.

2.2.1.4 NON-RESIDENTS WORKING IN THE REPUBLIC

Category C UN employees' remuneration, in the absence of UN tax exemption, would ordinarily have tax implications for foreigners who work in the Republic. Both ordinarily resident and physical presence test are applicable to this category. Per the gross income definition, foreigners who earn income in the Republic will be taxed in South Africa. SARS issued a guide, Guide on the Taxation of Foreigners working in South Africa (2014/15), providing clarity on income earned by foreigners. A foreigner will be subjected to normal tax in SA on his or her income received or accrued from a source within or deemed to be from within South Africa. Such an individual pays tax at the same rate as a resident and is generally entitled to the same deductions and rebates as a resident (SARS, 2015b:9).

Per the SARS guide (*ibid*), it is generally accepted that income from employment should be taxed in the country where the services are actually rendered, irrespective of the place where the contract is entered into, where the employer is based or where the remuneration is paid. South African legislation and case law support this principle. In other words, a foreign employee working in South Africa is liable for normal tax under domestic law in respect of his or her employment income earned in South Africa. The tax position of a foreign employee may, however, be affected by an agreement for the avoidance of double taxation between South Africa and the government of the foreign country where the foreign employee is regarded as a resident for tax purposes.

The Tax Administration Act, 28 of 2011 defines dispute resolution processes in Chapter 9 of the Act. The Act and the process are logical consequences of section 33 of the Constitution that requires just administrative action for aggrieved taxpayers.

Section 33(3)(a) of the Constitution provides for systems in the Republic that allow for a review of administrative action by a court or an independent tribunal in order to comply with the requirement that everyone has a right to administrative action that is lawful, reasonable and procedurally fair.

In tax court case number 14218 *Mr X v CSARS* (2018), judgment was handed down in the Tax Court in Cape Town on 9 March 2018 in relation to employment income earned in South Africa, by a non-resident of American origin who had worked in the country during the 2014 year of assessment, with the exception of 62 days. The income for days worked in the Republic, as apportioned, became the subject of the dispute. SARS argued that because the contract was entered into in South Africa, he should be taxed in South Africa. The origination cause of remuneration was cited as being the contract of employment, entered into in South Africa.

In terms of Article 15(1) of the DTA between South Africa and America, taxation should be levied in South Africa on remuneration derived by a resident of the US where the employment is exercised in South Africa. A media article (du Toit, 2018) reported SARS' victory as a creation of its own loopholes in relation to expatriate employees as the article compared the judgement with the current treatment of foreigners working in South Africa and the contradiction therein. In the SARS guide (SARS, 2015b:9); SARS acknowledges the worldwide practice of taxing employment income where the employee physically works. The case, if it were to be relied upon in future judgements, would effectively mean that non-residents who conclude employment contracts in their countries of residence but end up being stationed in SA could get away with not paying tax in South Africa. No such exemption exists in SA legislation.

2.2.1.5 THE REPUBLIC

The Republic has been defined in section 1(1) of the Income Tax Act. The gross income definition, which is the cornerstone of the basis of taxation adopted in South Africa, also mentions the Republic, making it an important definition for this report. In the Act, the Republic includes the territorial sea and areas outside the territorial sea designated either by the domestic or international laws. 'The definition encompasses the landmass of South Africa as well as its territorial waters, which is a belt of sea

adjacent to the landmass but not exceeding 12 nautical miles (roughly 22,2 km) beyond the baselines of the country' (SARS, 2017a:3).

The domestic law identified is the Maritime Zones Act 15 of 1994 (MZA) and per the SARS guide SARS (*ibid*) on foreign employment exemption it is aligned with what constitutes a State's territorial sea under international law and specifically Articles 2 and 3 of the United Nations Convention on the Law of the Sea (UNCLOS) signed by South Africa on 5 December 1984 and ratified on 23 December 1997.

Work carried out for the UN cuts across different aspects, including the economy and the environment. The UN Global Environment Facility (UNGEF) is a programme with its financing managed as part of the United Nations Development Programme (UNDP), as part of its mandated work on water and ocean governance (UNDP, n.d.). UN employees who are involved will, as a consequence of their involvement, have to work in the sea or ocean. The Republic definition, therefore, has to be applied in relation to income earned by the employees involved, in the absence of the UN income taxation exemption.

The UN does not work alone and thus all the private and public organisations that get involved in such work affecting the sea or ocean, as well as land, will have to look into the definition of the Republic in determining where employees were physically based and for how many days, in the year of assessment, in order to determine their tax implications. The UN carries out the work, outsources its work or works in collaboration with public and private organisations in fulfilling its mandate.

In the UN report entitled 'The challenge of outsourcing for the United Nations system' (Abraszewski, *et al*; 1997:1) outsourcing was defined as:

> contracting with a third party (e.g., independent individuals, private companies, governmental agencies, non-governmental or inter-governmental organizations) to perform specific tasks, and/or provide services and their related goods, based on specified terms and conditions. Consequently, outsourcing does not include the simple procurement of goods, such as office supplies or commodities; outsourcing also excludes the replacement or supplementation for general purposes of staff by non-regular staff (e.g., short-term, temporary, free-lance staff)

2.3 SOUTH AFRICAN TAX CONSEQUENCES ON UN EMPLOYEES' EARNINGS

Income tax and employees' tax are the two important elements to consider with regard to income earned in the form of remuneration, as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act (Fourth Schedule). UN employees earn remuneration plus taxable benefits falling in the employees' tax category and should, according to the Income Tax Act, pay as they earn the remuneration (PAYE). Taxable benefits are listed in the Seventh Schedule to the Income Tax Act (Seventh Schedule) and the schedule determines which benefits are to be included in remuneration and the value to be placed on the benefit thereof. The Fourth and the Seventh schedules to the Income Tax Act are particularly important for employees' tax purposes.

Employees' tax will be applicable where employees earn above the tax threshold. At the fiscal year-end, employees will be assessed for Personal Income Tax in their own right as taxpayers. PAYE deducted throughout the tax year will be applied as a credit to determine whether or not they owe tax or are owed a refund by the fiscus. It is important to note that in the South African context there is no tax called 'PAYE'. PAYE is merely a system of estimating and collecting tax from employees as and when it is earned, in order to minimise the risk of non-compliance by individuals. Thus PAYE is an important and easy-to-collect revenue item and compliance control can focus on employers only, rather than on individual employees (IMF, 1998:564).

The two considerations—income tax and employees' tax—are discussed separately below.

2.3.1 EMPLOYEES' TAX OR PAY-AS-YOU-EARN (PAYE)

Prior to assessment at year-end, the amount would have been subjected to monthly employees' tax deduction or withholding thereof and payment to SARS as required in terms of paragraphs 2(1)(*a*) and (*b*) of the Fourth Schedule. Paragraph (*a*) covers resident employers, while paragraph (*b*) covers non-resident employers.

The UN and its agencies and/or organs are, at face value, unlikely to be South African residents. Whether or not the UN is a resident for tax purposes should be determined in terms of paragraph (*b*) of the 'resident' definition in section 1 of the

Income Tax Act. The definition states that, for persons other than natural persons, a resident means a person incorporated, established or formed in the Republic or which has a place of effective management (PoEM) in the Republic. Tests would have to be conducted on the organisation and its agencies to determine whether or not it is a resident for South African income tax purposes.

Whether or not the organisation is considered a resident, the responsibility to deduct or withhold and pay tax over to SARS does not fall away. Assuming that it has been determined the organisation and its agencies are not residents; there will be a requirement to appoint a representative employer to manage employees' tax matters per paragraph 2(1)(*b*) of the Fourth Schedule.

Judging by the fact that the headquarters of the organisation is in New York[1] in the United States of America, the UN is likely to be considered a non-resident employer as its PoEM might not be in the Republic. In the United Nations General Assembly (UNGA) resolution A/RES/100(I), the General Assembly resolved on 14 December 1946 that the headquarters of the organisation would be in New York. Assuming that the organisation is non-resident, a representative employer to act on behalf of the employer on SARS-related matters should be appointed in accordance with section 153(1)(*b*) of the Tax Administration Act. The Income Tax Act does not exempt the employees from paying tax by virtue of them having a non-resident employer. Having noted all this, it is still imperative for the organisation to meet the 'employer' definition in the Fourth Schedule to the Income Tax Act.

Paragraph 7.1 of the SARS guide, Guide for employers in respect of employees' tax (2017 tax year) (SARS, 2017b:10), states that three elements should be present before employees' tax can be deducted, and subsequently paid over to SARS in line with the Fourth Schedule to the Income Tax Act. The three elements are all defined in the Fourth Schedule and can be summarised as: there should be an ***employer*** paying ***remuneration*** to an ***employee***. The elements are broken down below:

[1] UN General Assembly resolution, A/RES/100(I), 14 December 1946, http://www.un.org/documents/ga/res/1/ares1.htm, accessed 4 November 2018.

EMPLOYER

It is important to determine whether or not the UN is an employer as defined in the Fourth Schedule. An employer is defined and includes any person who pays or is liable to pay any amount by way of remuneration. The UN is thus an employer as defined due to the fact that the employees—also known as officials—are paid for services they render to the organisation.

REMUNERATION

Without breaking down all the amounts earned by the UN employees and where they fit in the remuneration definition, it is reasonable to conclude that the elements of pay as broken down in Chapter 3 of this report are all remuneration as defined. Certain exemptions would apply to certain elements of remuneration. Section 18(b) of the Convention of Privileges and Immunities of the UN that exempts UN officials from paying income tax, refers to salaries and emoluments. A salary is remuneration as defined, as the employees are compensated for work done for the organisation. The section reads as follows: 'Officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations'. This is a clear indication that the organisation pays salaries and per paragraph (b) of the definition of remuneration in the first paragraph of the Fourth Schedule does include a salary. If put through the 'remuneration' definition test, the majority of pay elements in Chapter 3 of this report would apply.

EMPLOYEE

In paragraph (*a*) of the employee definition in the Fourth Schedule of the Income Tax Act, an employee means any person (other than a company) who receives remuneration or to whom remuneration accrues. UN employees get compensated for the services they render to the organisation.

In summarising employees' tax or PAYE, the salaries and emoluments earned by the UN officials will thus constitute remuneration for employees' tax purposes and employees' tax should be withheld and paid over to SARS where it exceeds the threshold determined by the National Treasury as all the three elements are present. In the absence of the exemption that arises from UN privileges and immunities, the UN would be expected to register as an employer, most probably through a

representative taxpayer. The table below shows a summary derived from paragraph 7: Determining the employees' tax, SDL and UIF liability found in the SARS 'Guide for employers in respect of employees' tax (2017 tax year)' (SARS, 2017b:10), in line with the Second and Fourth schedules to the Income Tax Act. For the purposes of this report, the summary will be called 'Employees tax formula'.

Table 1: Employees' tax formula

Description	Amount (R)
Cash Earnings (definition of remuneration and its paragraphs thereof – 4th schedule)	
Retirement Funding Income	XXXXX
Non-Retirement Funding Income	XXXXX
Plus: Taxable benefits – 7th schedule	XXXXX
Total Remuneration	**XXXXX**
Less: Allowable deductions	
Pension and provident fund contributions – para 2(4)(a) 4th schedule	XXX
Retirement annuity fund contributions - para 2(4)(b) 4th schedule	XXX
Donations made by employer on behalf of employee – para 2(4)(f) 4th schedule	XXX
Equals: Balance of remuneration	**XXXXX**
Tax thereon Balance of Remuneration – using tax tables – para 9(1)(a) and (b) 4th schedule	(XXX)
Medical scheme fees credits – para 9(6)(a) 4th schedule	(XXX)
Additional/Excess medical scheme fees tax credit – para 9(6)(b)(i) and (ii) 4th schedule	(XXX)
Tax payable	**XXX**

2.3.2 INCOME TAX

UN employees who earn above the threshold would be required to register for Income Tax in their own right as taxpayers in accordance with section 22 of the Tax Administration Act, no 28 of 2011; in the absence of the UN income tax exemption. Tax will then be levied on the taxable income of the said persons in terms of sections 5(1)(*c*) and 5(2)(*a*) of the Income Tax Act read with section 6 of the said Act. Section 6 of the Income Tax Act enforces the need for the taxable income to exceed the threshold as determined after considering the rebates as listed therein, being primary, secondary and tertiary rebates. In a case where the taxable income is below the threshold, the employees will, therefore, not be required to register for Income Tax. Income is not limited to salary or remuneration from the employer. All the income that the taxpayer receives has to be declared for tax purposes in terms of section 1(1) of the Income Tax Act, that being the gross income definition. This income could include rental, interest and any other source.

In order to determine taxable income, exemptions and deductions must be determined. This research report will not dwell on other deductions, income and exemptions not related to the earnings from the UN.

Once registered, employees would have to comply with the Income Tax Act. Salaries and other emoluments earned from the UN will fall into the definition of 'Gross Income' as defined in section 1(1) of the Income Tax Act. A salary would fall into this category in both sub-paragraphs (i) and (ii) of the definition, being the total amount received or accrued to or in favour of either a resident or non-resident, while in the case of a non-resident, it would be income from a source within the Republic. The definition of gross income also makes provision for including other amounts received or that accrue to, or in favour of, taxpayers in relation to employment. This is per paragraph (*c*) of the 'gross income' definition.

Sections 6, 6A, 6B and 6quat[2] rebates should also be considered in the calculation of income tax liability. A section 6 rebate is available to all individual taxpayers and is thus called a 'normal tax rebate'. The age of an individual taxpayer determines the amount and the scales are progressive in line with the age, that is, the older the taxpayer, the higher the rebate. Section 6(2)(*a*) provides for taxpayers of all ages and this is called the primary rebate; section 6(2)(*b*) is referred to as the secondary rebate and is available to taxpayers who are 65 or would have lived to 65 years on the last day of assessment; while section 6(2)(*c*) is referred to as the tertiary rebate and is available to taxpayers who are or would have been 75 years on the last day of assessment. A taxpayer who is 75 and above, therefore, qualifies for all three rebates found in section 6.

Section 6A and 6B determine the medical scheme fees tax credits that should be deducted from tax payable in consideration of the number of medical aid dependents in relation to a medical scheme registered under the Medical Schemes Act[3] or a fund registered under any similar provision contained in the laws of any other country where the medical scheme is registered. Section 6B is specific to taxpayers over the age of 65 and the rebate is available over and above section 6A rebate.

[2] Section 6, 6A, 6B and 6quat of the Income Tax Act, 58 of 1962
[3] Medical Schemes Act, 131 of 1998

Section 6quat, on the other hand, is a rebate in respect of foreign taxes on income and it brings some relief to resident taxpayers taxed on worldwide income. At the end of the tax year, having calculated their tax liability, those taxpayers are entitled to reduce the liability using the credit paid in other tax jurisdictions. Foreign-sourced amounts derived by a resident of South Africa may sometimes be taxed by the country of source and by South Africa, resulting in international juridical double taxation (SARS, 2015a:4). SARS Interpretation Note 18 describes international juridical double taxation as the imposition of similar taxes by two or more sovereign countries on the same item of income of the same person.

Once registered as a taxpayer, individual UN employees would thus be required to file income tax returns in terms of Section 25 of the TAA. They would face non-compliance issues with the different tax acts in their own capacity as taxpayers. For income tax purposes, the Commissioner of SARS (Commissioner) issues, for each income tax period or year, a government gazette notices' clearly indicating persons who are required to, or not required to, submit tax returns, the periods within which income tax returns must be submitted, prescribed forms to file returns and the manner of submission. For the 2018 tax year, Government Gazette number 41704 was issued on 15 June 2018 entitled 'Returns to be submitted by a person in terms of section 25 of the Tax Administration Act, 2011(Act 28 of 2011)'.

In conclusion, UN employees who are above the threshold would thus be liable for Income Tax, while the organisation will be liable to deduct or withhold and pay employees' tax to SARS. The threshold is determined after taking into account 'allowable deductions' for both income tax and employees' tax purposes. Employees should include the UN salaries and emoluments in their income, for tax purposes. This, of course is in the absence of or in the lack of accession to section (18(b))[4] of the Convention on the Privileges and Immunities of the United Nations, section 5(1)[5] of the Diplomatic Immunities and Privileges Act, as well as the absence of double taxation relief for those taxpayers who may be subject to tax in respect of the same UN income in another country. Prevention of double taxation is as per section 108(1) of the Income Tax Act.

[4] Convention on the Privileges and Immunities of the United Nations, 1946.
[5] Diplomatic Immunities and Privileges Act, 37 of 2001.

2.4 DOUBLE TAXATION OR TAX TREATIES

2.4.1 INTERNATIONAL LAW

There is no international tax law. The reason for the non-existence of international tax law is obvious: no supranational taxing powers exist as the right to tax forms part of a state's sovereign powers (Olivier & Honiball, 2011:1). Double taxation treaties, therefore, play a vital role in cross-border economic activities that lead to tax implications, in the absence of international tax law.

Income taxation is fundamentally territorial. It is, therefore, hardly surprising that countries, as a result of direct international tax competition, endeavour to increase revenue collection by extending their respective tax jurisdictions as far as possible (De Koker & Brincker, 2010:3).

Article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more relevant instruments, and whatever its particular designation[6].

It has been recorded that the first double taxation agreement was concluded between Belgium and France in 1843. The UN manual (United Nations, 2003:46) for the negotiation of tax treaties between developed and developing countries stated the following:

> The question of international tax evasion has been a matter of international concern for well over a century and a half. The first tax treaty was an agreement on reciprocal administrative assistance between Belgium and France signed on 12 August 1843. Shortly thereafter, in 1845, Belgium signed similar agreements with two other states, the Netherlands and Luxembourg

DTAs or tax treaties, as they may be referred to, are international agreements between the governments of two jurisdictions aimed at eliminating double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (SARS, 2018a:1). The agreement seeks to eliminate having two jurisdictions taxing the same income, that is, juridical double taxation as introduced above. The avoidance of double taxation goes with the need to eliminate tax evasion. With the exception of residents working

[6] Vienna Convention on the Law of Treaties, 1969.

in the Republic, the two other categories of UN employees in the study warrant consideration of applicable double tax treaties due to the fact that their economic activities touch on the borders. Residents working abroad or non-residents working within the Republic are the two categories with such implications as their work and residence relationship do cross borders.

2.4.2 MODEL TAX TREATIES AND MUTUAL AGREEMENT PROCEDURES (MAP)

The OECD is of the view that tax rules should be clear and simple to understand. In explaining taxpayer certainty, the OECD touched on the fact that tax rules should minimize disputes and provide appropriate ways to solve them when they arise (OECD, 2009). Double tax agreements or treaties, like any other agreement, may yield unintended results or consequences for the taxpayer. In South Africa or in cases that only involve South African taxpayers and SARS, aggrieved taxpayers find solace in that they can dispute SARS decisions in accordance with Chapter 9 of the Tax Administration Act dealing with dispute resolution.

Article 25 of the OECD Model Tax Convention (MTC) on Income and on Capital (2017) and the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (2003) both set out mutual agreement procedures. The OECD Convention and UN Manual provide a remedy for a taxpayer who considers the actions of one or both the contracting jurisdictions result in taxation of the taxpayer not in accordance with the provisions of a tax treaty. The taxpayer can present the case to the competent authority of either contracting state. In short, the MAP serves as a dispute resolution mechanism.

Per paragraph 4 of article 25 of both the OECD and UN MTCs *(ibid*), the competent authorities of the contracting states can communicate directly with each other for the purpose of reaching a conclusion on the taxpayer's request to resolve their taxation matters. The commentaries in relation to the conventions provide that the competent authorities need not communicate through diplomatic channels.

While the initial problem necessitating tax treaties or DTAs was the need to eliminate double taxation by establishing who had the taxing rights, governments and tax administrators also face a burden that is now a by-product of the agreements. This

burden is in the form of double non-taxation. Companies, especially multi-nationals, take advantage of taxation loopholes caused by the different rules of countries to reduce their tax burden artificially (Castillo-Murciego & Lopez-Laborda, 2018:2). Many executives believe corporate taxes (especially in the US) are already high and that taking advantage of loopholes to reduce payments is legitimate (Contractor, 2016:38). Corporates are run by individuals and therefore there is nothing preventing this kind of attitude in regard to individual taxes, meaning that tax evasion and avoidance is also a risk on the personal income tax level.

International organisations have published model tax conventions in an attempt to achieve a degree of standardisation of the contents of treaties entered into by their members (Olivier & Honiball, 2011:268). In 1963, the OECD Model was prepared by developed countries around the world and it thus embodies rules and proposals developed by capital-exporting countries (Steenkamp, 2017:85). Steenkamp noted in her journal article that developing countries responded to the success of the OECD model by developing their own under the auspices of the UN in 1980. This model was drafted between the developed and developing countries in an attempt to reflect the interests of developing countries (*ibid*). The third prominent model she identified is the United States model, which is followed by most treaties that the USA has signed with other countries, including South Africa (*ibid*).

South Africa has also developed its own model tax convention and this is used as a basis for treaty negotiations (Olivier & Honiball, 2011:272). The SA model tax convention was compared to the OECD version and a discussion was held in Parliament prior to making a recommendation for approval of the SA-Malaysia double tax agreement by the Finance Select Committee on 7 September 2005. Mazansky (2009) in 'South Africa's treaty network – why is South Africa the meat in the sandwich?' criticised and also affirmed the publication of SA's own treaty by stating that it was pretentious for a small country such as South Africa to have its own model but also 'right and proper' for any country to have a template as its starting point for treaty negotiations (Mazansky, 2009:148). Mazanky's analysis shows that South Africa cedes its taxing rights to developing countries in which South African businesses are more likely to invest.

According to Steenkamp's publication, the two most prominent models are those of the OECD and the UN, while the US model is the third. The two prominent models are discussed further, as follows:

2.4.2.1 THE OECD MODEL TAX CONVENTION

The Organisation for Economic Co-operation and Development (OECD) has drafted a Model Tax Convention on Income and on Capital (OECD MTC), which has, as its main purpose:

> to clarify, standardise, and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation

Although the OECD MTC is not an international treaty and the members of the OECD are not bound to use it when negotiating Double Tax Treaties (DTTs), the OECD MTC is very influential and the vast majority of DTTs entered into worldwide use the OECD MTC as their basis (Du Plessis, 2014:3).

In its introductory paragraphs, the OECD (2008) Model Tax Convention summarised the main purpose of the convention as being a means of settling, on a uniform basis, the most common problems arising in the field of international juridical double taxation.

South Africa is not a member country of the OECD, although it was awarded an observer status in 2004. In its publication on 'Addressing base erosion and profit shifting in South Africa', the Davis Tax Committee interim report (Davis Tax Committee, 2014:18) acknowledges the fact that SA is not a member of the OECD. Despite the country not being an OECD member, South African courts have accepted that the OECD Commentary may be used in interpreting tax treaties. And although the OECD's recommendations and the Commentary on its Model Tax Convention are not legally binding, South African courts have recognised and applied the OECD Commentary. In *ITC 1503 53 SATC 342* (1990) it was held that a treaty must be interpreted according to the common law rules pertaining to the interpretation of statues as well as the OECD Commentary (*ibid*).

2.4.2.2 THE UNITED NATIONS (UN) MODEL TAX CONVENTION

In its introductory paragraphs, the UN Manual for the negotiation of bilateral tax treaties between developed and developing countries describes the goal of the MTC as that of assisting developing countries and economies in transition to negotiate tax treaties among themselves and with developed countries (United Nations, 2003:1). This method, it seem, aims to assist or favour the least-developed countries; hence it has been referred to as the model developed in response to the OECD (Steenkamp, 2017:85).

In Choosing between the UN and OECD tax policy models: An African case study (Daurer, 2012) the Robert Schuman Centre for Advanced Studies in the European University Institute sought to clarify how African countries chose their tax treaty models. The paper clarified that using the OECD model, though not always favouring poorer or capital-importing countries, many African countries have nevertheless signed tax treaties with capital-exporting nations, presuming other strategic or economic benefits from the treaties outweigh the immediate fiscal cost of sacrificed tax revenue. This practice of giving away taxing rights or powers is said to yield other benefits such as enhanced jurisdictional attractiveness as an investment location. This means it is not always the case that developing countries will select the UN MTC when negotiating with developed nations.

2.4.3 SOUTH AFRICAN TREATIES

In November 2018 South Africa had more than 80 double-taxation agreements and protocols in force (SARS, 2018d). Section 108(2) of the Income Tax Act makes a provision that, once approved by Parliament, in line with section 231 of the Constitution; the arrangements of the DTT will be published in a Government Gazette and immediately thereafter become part of the law as if enacted by the Income Tax Act.

2.5 METHODS OF ELIMINATION OF DOUBLE TAXATION

There are two common ways to eliminate double taxation. South Africa uses a combination of both, as explained below.

EXEMPTION METHOD

A country exempts its residents from tax on income from investments and activities outside the country. A few countries tax on a strictly territorial basis, taxing residents and non-residents from domestic sources and exempting both residents and non-residents from tax on all income from foreign sources (Lokken & Kitamura, 2010:622). For the tax periods up to 29 February 2020, foreign employment income is exempt from tax. Even though the residence basis of taxation implies that worldwide income should be included, section 10(1)(*o*)(ii) of the Income Tax Act provides an exemption to taxpayers who meet certain criteria.

REDUCTION METHOD

Under this method, a country may include foreign source income in the base on which it taxes residents but allow a credit for taxes paid to other countries (Lokken and Kitamura, 2010:622). This is the case in South Africa as discussed in 2.3.2 above. At the end of the tax year, taxpayers can claim credits paid to other countries. This is in line with the residence basis of taxation where worldwide income has to be taxed in South Africa.

In the absence of the UN income tax exemption, having considered the taxation basis South Africa applies, two of the three categories identified in this research report would be affected by the double tax treaties available to South Africa. In cases where there are no treaties, one method of elimination of double taxation would apply in terms of sections 6quat and 10(1)(*o*)(ii) of the Income Tax Act. The third category, being residents working locally, would be treated like any other taxpayer as their UN earnings would be taxed locally at source in accordance with the 'gross income' definition in section 1(1) of the Income Tax Act.

For the two other categories, these being residents working abroad as well as non-residents working locally, SA will have to consider available DTAs. Non-availability of

DTAs should also be a consideration. If no DTA exists between South Africa and another country, normal income tax rules of including worldwide income should apply. In a case where the taxpayer has already paid tax in another jurisdiction, relief would be provided for tax already paid in terms of section 6quat of the Income Tax Act. Ormajee (2017) warned that double tax might be on the cards for South Africans working abroad. This article was published in response to the proposed amendment of section 10(1)(*o*)(ii) relating to exemption on foreign employment income. For the tax periods commencing on or after 1 March 2020, South African residents working abroad will be taxed on the amount above R1 million earned from foreign employment.

To strengthen collection, tax administrators can also agree to collect revenue from each other's expatriates in cases where there is a risk that assets could be concealed or dissipated. In accordance with section 185 of the Tax Administration Act, SARS can, if an international tax agreement exists, in the form of a DTA and/or protocol, collect on behalf of foreign governments and vice versa. Such collection must be done upon request by another competent tax authority. The applicability of section 185 was tested in the Tax Court in 2015 and in *Krok v CSARS* (2015), the judge ruled in favour of SARS on the preservation order against Mr Krok for taxes owed by him in Australia.

The conclusion that can be drawn from the discussion above is that much is being done by countries to ensure that taxes owing to the fiscus are collected and paid over to the relevant state and that collaboration between countries is important.

CHAPTER 3: UNITED NATIONS, THE ORGANISATION

3.1 INTRODUCTION

The UN was officially founded at the UN Conference on International Organisations in San Francisco, California, on 24 October 1945. In attendance were 50 nations and some non-governmental organisations, and so the UN came into being after ratification of the Charter (Muftau, 2016:154). Member states had an opportunity to ratify the Charter over a period of time as shown in Table 2 under 3.2.1 below. The UN committed, in Chapter 1, Article 1 of its charter to, among others, maintaining international peace and security, developing friendly relations among nations and promoting social progress, and betterment of living standards and human rights. The UN Charter was signed on 26 June 1945 in San Francisco and became effective following ratification by the relevant member states (Article 110).

The system was based on three pillars: (1) the peaceful settlement of disputes; (2) the prohibition of the threat or use of force in international relations; and (3) collective security (Pellet, 2003:145). The first chapter also echoes what is in the preamble to the Charter.

The Charter was signed in San Francisco, California on 26 June 1945 (United Nations, n.d.). It became effective following ratification by the relevant member states (articles 110 and 111). Chapter 1 is made up of articles 1 and 2, Purposes and Principles of the UN. The UN was formed after its predecessor, the League of Nations, had failed to maintain international peace as it clearly failed to prevent the Second World War. Aminzadeh (1997:10) explained this as follows:

> It was thought necessary to create an organisation which was more effective than the League of Nations, though some writers believed that "the League's record in fact, even in matters of peace and war, was not altogether bad", since it had resolved several frontier and territorial disputes between states.
>
> The primary purpose of the League of Nations, as its Covenant envisaged, was to maintain international peace and security on the basis of law and justice. To achieve this purpose, the members of the League agreed to submit their disputes to peaceful procedures of settlement or adjustment. The members undertook not to resort to war in violation of the Covenant…

The report further states that the reason the League failed to prevent the Second World War was because it focused more on the concept of collective security, which was not perceived as being more important than individual states' desires to protect what they considered to be their national interests. The United States of America,

one of the UN member states, was also cited as a state that had refused to join the League.

3.2 MEMBERSHIP OF THE UNITED NATIONS

3.2.1 OVERVIEW

Membership of the UN is regulated by Chapter II, articles 3, 4, 5 and 6, of the UN Charter. The Charter states in Article 4 that its membership is open to all peace-loving states that accept the obligations contained throughout the Charter, and that in judgement of the organisation are able to carry out these obligations. This means that subsequent to the 51 original member states[7] signing up to the formation of the organisation, it became the collective responsibility of all members to accept or reject applications for membership, while following certain protocols. As at 30 September 2018, there were 193 member states, with South Sudan being number 193[8].

As at 26 June 1945, that is, when the Charter was signed, there were delegates from 50 nations. Poland signed on 15 October 1945 and thus became one of the 51 (Table 2) founding members of the international organisation[9]. Chapter XIX, articles 110 and 111 of the Charter, covers the ratification and signatures thereto.

In accordance with Article 110.1, the Charter recognises that not all states were created equal by clearly indicating that each 'peace-loving' state should ratify the Charter using the signatories of the state in line with each state's constitutional processes. Therefore, it does not prescribe who in each government should do this. The Charter made provision that it would come into effect once signed off and ratified by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and by the majority of the other signatory states. The five member states explicitly

[7] United Nations, *History of the United Nations,* < http://www.un.org/en/sections/history/history-united-nations> , accessed 02 October 2018.
[8] United Nations, UN welcomes South Sudan as 193rd member state, < https://news.un.org/en/story/2011/07/381552>, accessed 07 October 2018.
[9] United Nations, *History of the United Nations,* < http://www.un.org/en/sections/history/history-united-nations> , accessed 02 October 2018.

stated above were and still are the permanent members of the United Nations Security Council (UNSC), since 1945, as per Article 23 of the UN Charter.

It is evident from the table of original UN member states that some members have changed their names subsequent to the ratification of the Charter, the Republic of South Africa included. At the date of signing the Charter, by Jan Christiaan Smuts as the duly delegated Prime Minister, the country was termed the Union of South Africa, in accordance with the Union of South Africa Act, 1909. Jan Smuts was also fundamental in inspiring and shaping the preamble to the UN Charter, including its mention of 'human rights' (Dubow, 2008:43).

The other signatory peace-loving states, the majority, were not explicitly named in the Charter. The United States of America was tasked with overseeing the signatory process or ratification deposits in Article 110.3 of the Charter. It was also assigned responsibility to communicate the process to all signatory states. Article 110.4 provided that once the Charter had come into force, all member states signing thereafter would become members of the UN on the date of the deposit of their respective ratifications, that is, after 24 October 1945.

Table 2: Original UN members

No	Original member state	Date of signing	Deposit of ratification	Current name/Successor state
1	Republic of China	26 June 1945	28 September 1945	People's Republic of China
2	France	26 June 1945	31 August 1945	
3	Union of Soviet Socialist Republics	26 June 1945	24 October 1945	Russian Federation
4	United Kingdom of Great Britain and Northern Ireland	26 June 1945	20 October 1945	
5	United States of America	26 June 1945	08 August 1945	
6	Argentina	26 June 1945	24 September 1945	
7	Brazil	26 June 1945	21 September 1945	
8	Byelorussian Soviet Socialist Republic	26 June 1945	24 October 1945	Belarus
9	Chile	26 June 1945	11 October 1945	
10	Cuba	26 June 1945	15 October 1945	
11	Czechoslovakia	26 June 1945	19 October 1945	Czech Republic and Slovakia
12	Denmark	26 June 1945	09 October 1945	
13	Dominican Republic	26 June 1945	4 September 1945	
14	Egypt	26 June 1945	22 October 1945	
15	El Salvador	26 June 1945	26 September 1945	
16	Haiti	26 June 1945	27 September 1945	
17	Iran	26 June 1945	16 October 1945	
18	Lebanon	26 June 1945	15 October 1945	

No	Original member state	Date of signing	Deposit of ratification	Current name/Successor state
19	Luxembourg	26 June 1945	17 October 1945	
20	New Zealand	26 June 1945	19 September 1945	
21	Nicaragua	26 June 1945	6 September 1945	
22	Paraguay	26 June 1945	12 October 1945	
23	Philippine Commonwealth	26 June 1945	11 October 1945	Philippines
24	Poland	15 October 1945	24 October 1945	
25	Saudi Arabia	26 June 1945	18 October 1945	
26	Syria	26 June 1945	19 October 1945	
27	Turkey	26 June 1945	28 September 1945	
28	Ukranian Soviet Socialist Republic	26 June 1945	24 October 1945	Ukraine
29	Yugoslavia	26 June 1945	19 October 1945	Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Slovenia and The former Yugoslav Republic of Macedonia
30	Australia	26 June 1945	1 November 1945	
31	Belgium	26 June 1945	27 December 1945	
32	Bolivia	26 June 1945	14 November 1945	
33	Canada	26 June 1945	9 November 1945	
34	Colombia	26 June 1945	5 November 1945	
35	Costa Rica	26 June 1945	2 November 1945	
36	Ecuador	26 June 1945	21 December 1945	
37	Ethiopia	26 June 1945	13 November 1945	
38	Greece	26 June 1945	25 October 1945	
39	Guatemala	26 June 1945	21 November 1945	
40	Honduras	26 June 1945	17 November 1945	
41	India	26 June 1945	30 October 1945	
42	Iraq	26 June 1945	21 December 1945	
43	Liberia	26 June 1945	2 November 1945	
44	Mexico	26 June 1945	7 November 1945	
45	Netherlands	26 June 1945	10 December 1945	
46	Norway	26 June 1945	27 November 1945	
47	Panama	26 June 1945	13 November 1945	
48	Peru	26 June 1945	31 October 1945	
49	Union of South Africa	26 June 1945	7 November 1945	Republic of South Africa
50	Uruguay	26 June 1945	18 December 1945	
51	Venezuela	26 June 1945	15 November 1945	

3.2.2 MEMBERSHIP CHANGES FOLLOWING THE ORIGINAL 51 MEMBERS

3.2.2.1 JOINING THE UNITED NATIONS

As highlighted previously, membership of the UN is open to all peace-loving states that accept the obligations as contained throughout the Charter and found to be suitable by existing members of the organisation (Article 4.1).

The process of admitting new members involves a state submitting an application to the UN Secretary-General and a declaration stating that it accepts the obligations under the Charter (Blanchfield & Browne, 2014:2). The decision to admit a new member will be affected by the UN General-Assembly upon the recommendation of the UN Security Council (Article 4.2).

According to Blanchfield and Browne (2014:5) there are four criteria for becoming a UN member after the original 51 members. The four criteria are as follows:

(a) Applicant must be a state. An entity applying for UN membership must meet the requirements of statehood under international law, that is, possess a defined territory, a permanent population, and independent governance. It must also be recognised by other states and have the capacity to conduct diplomacy with other countries.
(b) Applicant must be a peace-loving state. Blanchfield and Browne (2014) stated that the past and current conduct of a state is considered in evaluating these criteria. Also, the concept of a ‘peace loving’ state in many ways reflects the UN’s purpose of maintaining international peace and security.
(c) An applicant must declare that it accepts obligations contained in the UN Charter by consenting to be bound by the Charter, a legally binding international treaty; and also attaching a formal declaration to its UN membership application.
(d) The fourth criterion requires that an applicant must be willing and able to carry out UN Charter obligations. UN members have identified several indicators to consider when evaluating this criterion for application, including maintenance of friendly relations with other states, the fulfilment of international obligations, and the use of peaceful dispute settlement under international law.

The process of becoming a member has been summarised as follows by Blanchfield and Browne (2014:5):

> The Security Council and General Assembly are the primary bodies that consider U.N. membership applications under Article 4 of the U.N. Charter. The rules of procedure for both the Security Council and the General Assembly set forth the details of this process. Applications for membership are submitted by the requesting state to the U.N. Secretary-General, who then forwards them to the Assembly and the Council. The amount of time it takes for an application to move through the process varies. In some cases, membership may be granted within weeks or months, while in other cases an application may remain pending indefinitely.

Rules as contained in 'Provisional Rules of Procedure of the Security Council' play an instrumental role in the process of admitting new members. Rules 58 to 60 or Chapter 10 thereof specifically cover admission of new member states.

After following the process as stated above, South Sudan, the last-born of Africa, was admitted as a member state on 14 July 2011[10], when Ban Ki Moon was the UN Secretary-General. Welcoming the new member, he said the following:

> *At this moment… in this place… the world gathers to say in one voice: Welcome, South Sudan. Welcome to the community of nations*

3.2.2.2 TERMINATION, SUSPENSION OR WITHDRAWAL FROM THE UN

Article 5 and 6 of the UN charter provides for suspension and expulsion from the UN of a member against which preventative or enforcement action has been taken by the UNSC or a member that persistently violates the principles contained in the Charter, the latter justifying expulsion.

Interestingly, the UN Charter and other instruments of the organisation make no provision for, or reference to, voluntary withdrawal from being a member state.

According to Blanchfield and Browne (2014:7) no member state has been suspended by the UN. They further indicate that instead of suspension, members have opted for alternative measures including application of certain articles, such as Article 19 which states that a UN member in financial arrears shall have no vote in

[10] United Nations, UN welcomes South Sudan as 193rd member state, https://news.un.org/en/story/2011/07/381552, accessed 07 October 2018

the General Assembly, and rejection of a member state's credentials in the General Assembly.

Blanchfield and Browne (2014:4) indicated that one state, that is, Indonesia, withdrew and re-entered the UN in the mid-1960s. The General Assembly (GA) and the Security Council treated the withdrawal as if it were a 'temporary inactive membership' that ended cooperation with the organisation, rather than the country's membership. Both the Assembly and Council provided a standing invitation for Indonesia to 'reactivate' its membership at any time. Indonesia eventually re-joined the organisation without reapplying for admission.

3.2.2.3 SOUTH AFRICA'S STANDING IN THE UNITED NATIONS

South Africa is one of the original 51 UN member states. It seems that the amount of work done by Jan Smuts both for the League of Nations and the UN was overshadowed by apartheid and as a result, the Union of South Africa (later Republic of South Africa) started on the wrong footing in the organisation. In the *Journal of Contemporary History*, Dubow (2008:47) stated the following about South Africa and its standing in the UN:

> The briefest survey of General Assembly resolutions illustrates how the issue of South Africa, perhaps more than any other, punctuated and shaped the United Nations' history. At the very first session of the General Assembly, in 1946, South Africa was charged by India with discriminating against citizens of Indian descent and of violating earlier agreements entered into between the two countries.

In the UN General Assembly[11] on 6 November 1962, South Africa's apartheid policies were discussed. The resolution then taken noted that the situation in South Africa was one that had caused international friction and if continued, might endanger international peace and security. In the same meeting, the General Assembly recommended that member states implement certain economic, diplomatic and other sanctions against South Africa.

In its Resolution 3207 of 30 September 1974[12], 2248th plenary meeting, the UN General Assembly called upon the Security Council to review the relationship

[11] UNGA resolution 1761
[12] UNGA resolution 3207

between the UN and South Africa in the light of constant violation by South Africa of the principles of the Charter and the Universal Declaration of Human Rights.

In 1974 South Africa was excluded from its seat in the General Assembly, marking a new moment in the country's international isolation (Dubow, 2008:46). In its resolution A/RES/48/258 taken at a meeting held on 23 June 1994, the United Nations General Assembly welcomed South Africa back into the community of nations. The Assembly also appealed to member states and members of the international community to provide generous assistance to South Africa and its people in the implementation of the country's reconstruction and development programmes.

3.2.2.3 UNITED NATIONS AND SANCTIONS

Dubow (*ibid*) noted that sanctions against South Africa were finally agreed in 1962, as discussed above. According to Dubow (2008) "[t]his amounted to the most severe condemnation to date of a United Nations member state." South Africa had been in trouble with the world body since its establishment as it was first reported to the General Assembly at its first meeting. Its actions were condemned by the world body as noted below. In 1946 the country was accused of discriminating against Indians; in 1952 its racial policies, including mistreating South West African residents, came under attack, as the policies were viewed as a direct contravention of the Charter; and finally the 1960 Sharpeville massacre was the last in the sequence of the recorded acts that led to the world body's agreement on sanctions (*ibid*).

It seems South Africa's defence had always been Article 2(7) of the UN Charter, which requires the UN not to interfere in the running of a country's internal affairs. South Africa continued with its racial policies and apartheid despite the sanctions and hostility from the UN (Dubow, 2008:20). The article, in the Charter, is worded as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII

South Africa returned to the General Assembly in 1994 after a vote by the General Assembly to permit this. Owing to its lack of participation, South Africa had accumulated arrears in membership contributions. At the 95th plenary meeting held on 23 June 1994, in resolution A/RES/48/258, the General Assembly recognised as an exceptional measure that the arrears were due to conditions beyond the country's control and accordingly the question of applicability of Article 19 of the Charter related to the loss of voting rights in the assembly would not arise. According to Dubow (2008:47) Nelson Mandela effectively lobbied for the cancellation of the $60 million in arrears.

3.3 FUNDING OF THE ORGANISATION

There are various sources of funding for different entities and organisations around the globe. Such sources of funding or the mix of funding thereof are called capital structure, referring to the choice between equity financing and debt financing (Mohohlo, 2013:1). The UN operates differently to other organisations in that it is funded by non-refundable contributions from its member states in the form of voluntary and mandatory contributions. Article 17, paragraph 2, of the UN Charter states: "The expenses of the organization shall be borne by the Members as apportioned by the General Assembly".

The UN General Assembly (UNGA) approves the annual budget and sets assessments or contributions for each member nation based on the relative capacity of each member to pay. Capacity to pay is measured by the Gross National Income (GNI) of a state, with adjustment for external debt and low per capita income. The GNI is the equivalent of Gross Domestic Product (GDP) in South African terms. The organisation also obtains voluntary contributions in the form of pure donations (Rufai, 2016:163). In the UN Secretariat report ST/ADM/SER.B/973 containing the UN 2018 regular budget, the mandatory contribution required from each member state is set out. The strength of the economy as a measure for assessment means that bigger economies contribute more, with the United States of America (USA) contributing the highest, that is, 22 percent for the 2018 financial year and a number of preceding financial years.

Mandatory contributions are called assessments and a portion of the assessment is raised by withholding or deducting amounts from staff salaries. The difference between the assessment or contribution and amounts deducted from officials is raised by the UN member states. These amounts withheld from officials are termed staff assessments and are deducted in accordance with Regulation 3.3 of the Staff Regulations and Rules of the UN.

The scale of UN staff assessments is progressive (Regulation 3.3b), as with income tax scales for most countries, South Africa being an example. This simply means that the higher the remuneration, the higher the staff assessment. The fact that the UN staff assessment, which is a deduction from all staff members' salaries, gets credited to the Tax equalisation fund, per Regulation 3.3 could create the notion that it is a tax. Funds credited to the Tax equalisation fund are used to offset member states' contributions or assessments. Also, in a case where the member state levies income tax on UN earnings, the UN refunds employees from the same fund. The refund or reimbursement aims to put UN staff members back in the position they would have been, had they not paid income tax. In the UN information circular ST/IC/2018/6[13] on 'Payment of 2017 income taxes**',** issued on 22 January 2018, the following rationale was presented for reimbursement of taxes:

> The purpose of the United Nations income tax reimbursement system is to place United Nations staff members subject to taxation in the financial position in which they would find themselves if their United Nations remuneration were not taxed. It is not intended that the staff member derive a benefit or be placed at a disadvantage vis-à-vis other United Nations staff members whose United Nations remunerations are not subject to taxation. The scope of the income tax reimbursement system is limited to the reimbursement of taxes actually paid or actually due to the United States tax authorities…

In accordance with Article 17(1) of the Charter[14], the General Assembly is tasked with consideration and approval of the budget of the organisation. Per Article 17(2) the expenses of the organisation are borne by member states as apportioned by the General Assembly.

In its first session, the UNGA discussed budget guidelines as recorded in the UNGA resolution[15] 14(I) titled 'Budgetary and Financial Arrangements' on 1 February 1946. Reference was made in the resolution to the report of the Preparatory Commission

[13] UN Tax Circular 2018 , ST/IC/2018/6, p. 11
[14] UN Charter, Article 17
[15] UNGA resolution 14(I), 1 February 1946

of the UN (United Nations, 1946a:104)[16]. The report acknowledged that more needed to be done on the budgetary and financial fronts. The first paragraph dealing with recommendations concerning budgetary and financial arrangements noted: "The permanent budgetary and financial arrangements of the United Nations should be so designed as to promote efficient and economical administration and command confidence of Members". It can be concluded from this statement that no concrete plans and policies existed as to how an organisation of this magnitude would be funded, but some guidelines did exist.

The Preparatory Commission had prepared an interim budget and recommended in Chapter IX (United Nations, 1946a:104) that detailed budgetary process as well as other financial arrangements, including the drafting of financial rules, commence. Chapter IX of the report stated that the expenses of the UN should be apportioned broadly according to capacity to pay. A comparative estimate of national income was identified as the fairest guide for this formula. This would be the equivalent of Gross Domestic Product (GDP) in South African economic terms.

Per the preparatory report, the General Assembly was to appoint a committee of experts to handle budgetary matters such as making recommendations to the General Assembly on the contributions to be paid by new members, to consider and report to the GA on appeals by members for a change of assessment and to consider and report to the GA on actions to be taken if members fell into default with their contributions. This committee is currently the Advisory Committee for Administration and Budgetary Questions (ACABQ), as originally recommended by the Commission in its 1946 Report of the Preparatory Commission (United Nations, 1946a:106).

The preparatory report notes the provisional working capital fund and proposed budget for 1946, which was debated and voted on in the first session of the UN General Assembly. Also, per the preparatory report, the currency of contribution was proposed as that of the host nation of the United Nations headquarters, this being the United States of America and thus the United States Dollar (US$). The preparatory commission had recommended in Chapter X of the report (United Nations, 1946a:114) that the UNHQ be located in the USA. Resolutions taken on 1

[16] Report of the Preparatory Commission of the United Nations, 1946

February 1946 in the first session noted that the financial year should be a calendar year running from 1 January to 31 December and **$25 million** was approved as the recommended provisional working capital to cover the expenses of the organisation. The scale of advances was calculated taking into consideration capacity to pay, with the USA responsible for 24.614 percent of the total amount. South Africa was assessed at 1.989 percent. In 1947 the USA was assessed at 39.89 per cent. New members were also required to pay 33.33 percent of their assessment determined for the following year[17], upon joining the UN. This was to keep the organisation afloat.

Over the years, the organisation kept the method of calculation and for the 2018 financial year, United States of America was still the highest in terms of the scale of assessment, that is, at 22 percent[18]. This percentage also applies to a few preceding financial years.

In the UN Financial Rules and Regulations ST/SGB/2003/7 approved by the UNGA, in its decision 57/573 of 20 December 2002 and effective on 1 January 2003, details regarding budget or assessment scales are clearly listed. The 2003 financial regulations are merely an update or amendment to rules that have existed since 1946 and are regularly updated. Article III of the rules and regulations covers the assessed contributions by member states. The rules and regulations echo what was concluded in the preparatory report of the committee, while also providing details such as when members' assessed contributions are due and other administrative details not covered in the Charter.

Of particular interest are financial regulations 3.11 and 3.12 covering 'Voluntary contributions, gifts and donations'. These two regulations make provision for acceptance of voluntary contributions, gifts and donations in cash or in kind by the Secretary-General (S-G) provided they are consistent with the policies, aims and activities of the organisation and provided that the acceptance of such contributions that directly or indirectly involve additional financial liability for the UN shall require the consent of the appropriate authority and lastly, specify that moneys accepted for purposes specified by donors shall be treated as trust funds or special accounts.

[17] UN Resolution 69(I) of 14 December 1946, paragraph 4 thereof

[18] Assessment of Member States' advances to the Working Capital Fund for the biennium 2018-2019 and contributions to the United Nations regular budget for 2018, report ST/ADM/SER.B/973

The UN Financial Rules and Regulations also govern the Tax equalisation fund. In its earlier days and in the UNGA session held on 7 December 1946, discussions relating to exempting employees from income tax were held. The General Assembly resolved, in terms of resolution 78(I), that:

> in order to achieve full application of equity among members and equality among personnel of the United Nations, members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in the matter

3.4 ORGANS OF THE UNITED NATIONS

At the inception of the UN, six principal organs of the organisation were identified in the Charter. They are: a General Assembly; a Security Council; an Economic and Social Council; a Trusteeship Council; an International Court of Justice; and a Secretariat (Article 12.1). Article 12.2 provides for the establishment of future subsidiary organs found to be necessary in accordance with the Charter. The two considered as the main organs are discussed below.

The General Assembly is the main deliberative organ of the UN and comprises all member states, each of which has one vote, no matter its size or influence. It may discuss any matter arising under the UN Charter. Decisions on international peace and security, admitting new member states and the UN budget are decided by a two-thirds majority. Other matters are decided by a simple majority. In recent years, a special effort has been made to reach decisions through consensus, rather than a formal vote[19]. A president is appointed for each UN General Assembly session[20] and member states may not have more than five representatives in the General Assembly[21].

The Security Council has a primary responsibility under the UN Charter to maintain international peace and security. Unlike the General Assembly, the Security Council

[19] Fact Sheet: This is the United Nations Six Main Organs, UN Visitor Centre United Nations Headquarters, http://visit.un.org , ppg 2 accessed 07 October 2018
[20] UN Charter , Article 20
[21] UN Charter, Article 9

does not hold regular meetings. It can be convened at any time, whenever international peace is threatened. In practice it meets almost daily.[22]

The Council has 15 members, including five permanent members: China, France, the Russian Federation, the United Kingdom, and the United States. At the end of World War II these five countries played key roles in the establishment of the UN. The creators of the UN Charter believed they would continue to play important roles in the maintenance of international peace and security. The other ten rotating members are elected by the General Assembly on the basis of geographical representation for two-year terms. To pass a resolution in the Security Council, nine out of the 15 members of the Council must vote 'yes', but if any of the five permanent members vote 'no'—often referred to as a veto—the resolution does not pass. The Council also makes recommendations to the General Assembly on the appointment of a new Secretary-General and on the admission of new members to the UN.[23]

The UN has other specialised agencies that fall within the six main categories or organs. Examples are the United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Development Programme (UNDP), United Nations Population Fund (UNFPA) and World Health Organisation (WHO).

3.5 UN COMPENSATION SYSTEM

The UN operates the so-called UN common system and accordingly the International Civil Service Commission (ICSC) regulates and coordinates the conditions of service of the UN common system. A common system of salaries, allowances and benefits is applied by the UN, its affiliated funds and programmes and most of its specialised and related agencies. The UN common system[24] has been described as follows:

> The common system represents common standards, methods and arrangements being applied to salaries, allowances and benefits for the staff of the United Nations, those specialized agencies which have entered into a relationship with the United Nations, the International Atomic Agency and a number of other international organizations. The common system is designed to avoid

[22] Fact Sheet: This is the United Nations Six Main Organs, UN Visitor Centre United Nations Headquarters, http://visit.un.org , ppg 3 accessed 07 October 2018

[23] Fact Sheet: This is the United Nations Six Main Organs, UN Visitor Centre United Nations Headquarters, http://visit.un.org , ppg 3 accessed 07 October 2018

[24] http://www.un.org/Depts/OHRM/salaries_allowances/common.htm, accessed 4 March 2019

serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel and to facilitate the interchange of personnel. It applies to over 52,000 staff members serving at over 600 duty stations.

The World Bank Group and the International Monetary Fund, although specialised agencies of the organisation, are not part of the common system. The ICSC is composed of 15 members appointed by the General Assembly of the UN in their personal capacity. The ICSC was established in 1974 and its members are selected from among individuals with substantial experience of executive responsibility in public administration or related functions with due regard to considerations of geographical distribution (ICSC, 2002: vii).

Having regard to the definition of 'remuneration' in paragraph 1 of the Fourth Schedule to the Income Tax Act, all salaries, allowances and benefits given to UN officials by the organisation would fall within this definition. A list has been identified of the elements making up the remuneration of a UN employee, some elements being irrelevant to non-UN staff while others are self-explanatory, for example, salary. Some would be exempt from tax in South Africa, depending on their meeting certain criteria, for example, an education grant. The list, as summarised from the ICSC (2002) document, and applicable both to internationally and locally recruited UN staff, is as follows:

(a) Salary
(b) Post adjustment: Cost-of-living adjustment designed to preserve equivalent purchasing power for all duty stations
(c) Rental subsidies and deductions: An integral part of the post adjustment. A subsidy may be paid when a staff member's rent exceeds a so-called threshold rental. At field duty stations the subsidy is 80 percent of the excess of the staff member's actual rent over the rental threshold, in most cases up to a certain limit on rental subsidies and deductions. The system was designed to ensure equal treatment of staff as regards housing costs. Staff members are occasionally provided with housing by a government, agency or organization at rents substantially below the average included in the post adjustment. In such cases, a deduction or rental charge may be applicable.
(d) Overtime and night differential

(e) Special post allowance: Staff members who assume for a substantial period the full range of duties and responsibilities of a post at a level clearly higher than their own may be granted an allowance that is normally temporary and non-pensionable and is most commonly called a ‘special post allowance’ (SPA). The amount of this allowance is usually the difference between the current pay of the staff member and that which would be applicable on promotion to the higher grade.

(f) Dependency benefit

(e) Education grant: An education grant is available to internationally recruited staff members serving outside their home countries to cover a part of the cost of educating children in full-time attendance at an educational institution. The grant is payable up to the end of the fourth year of post-secondary studies; students are subject to a maximum age limit of 25 years

(f) Disabled dependant: Special assistance is available to staff with disabled dependants.

(g) Mobility and hardship: Most of the UN organizations’ work is done in the field and often in countries where living and working conditions are difficult. The hardship allowance aims to compensate staff for difficult living conditions at these duty stations.

(h) Non-removal allowance: The non-removal allowance is paid to staff who upon appointment or reassignment are granted shipment of personal effects only. The non-removal element aims to compensate for the non-payment of the removal of household goods.

(i) Assignment grant: An assignment grant is paid when a staff member travels at the organization's expense on recruitment or transfer/reassignment for a period of service expected to be for at least one year. The grant is intended to cover additional costs of taking up residence at the duty station and any pre-departure expenses incurred as a result of the relocation.

(j) Removal and shipment costs: Expenses incurred for the full removal of household goods or a smaller shipment of personal effects are normally covered by the employing organization. The organizations determine which arrangement should pertain in a particular situation, on the basis of their operational requirements (including expected length of assignment).

(k) Home leave: Staff members posted outside their home country are normally entitled to paid travel every two years to their home country for themselves, their spouse and their dependent children. Home leave is intended to permit staff members and their families to renew their ties with the home country.

(l) Family visit travel: If none of the staff member's eligible family members has travelled to the duty station at the organization's expense during the preceding 12 months (apart from children on education grant travel) an organization may pay for the travel of a staff member to visit the family. Family-visit travel may normally be taken every other year, provided it takes place in the non-home leave year. Travel may be paid to the place of home leave, the place of recruitment or the previous duty station.

(m) Transport of a privately-owned automobile: At designated duty stations outside Europe or North America, part of the cost of transporting a staff member's privately-owned automobile to the duty station may be reimbursed up to an established maximum amount. A duty station may be designated for this purpose if automobiles for private use are unavailable or in short supply in the locality, and if privately owned automobiles cannot be resold or have a low resale value.

3.6 CONCLUSION

Having reviewed the history of the UN, its funding model, membership and other relevant information, it is fair to conclude that South Africa would not rather remain outside, but should be part of this international group of nations with international peace as its major concern. In the past South Africa committed acts that violate the very existence of the organisation but it continued to be a member, although it was ‘benched’ for a number of years. At that time the country had no voting rights in the organisation due to its racial policies that defied the very existence of the UN. Indonesia is a good example that a country cannot simply exit the UN by absenting itself.

CHAPTER 4: EXEMPTION FROM INCOME TAX

4.1 INTRODUCTION

The word ‘exemption’ is not defined in the Income Tax Act. Stating that income is exempt from tax simply means that it is not included in income or it is removed from income for tax purposes, thus giving the word its ordinary meaning. Silke: South African Income Tax defined exempt income as amounts received or accrued that are not subject to normal tax (Stiglingh, *et al*., 2016:94).

In Impacts of Tax Exemptions: An overview, by Lerch (2004:25), he concluded that income tax exemptions for individuals are often used to reduce the tax burden for low-income individuals, to reduce the cost of necessities or to encourage them to engage in desirable activities such as home ownership. He further cited grounds of administrative simplicity such as exemption of casual and isolated sales, for example garage sales, from the retail tax because of the difficulties in registering casual sellers and collecting taxes from them (Lerch 2004:25) .

Lerch (2004:26) continued by stating that there are many reasons for individual tax exemptions, but identifying desired outcomes and measuring their impact is difficult. He gave the example of tax exemption for low-income individuals, which may be viewed as making the tax system fairer but also requires an income verification process that is administratively complex.

South Africa does not require individuals earning a salary under the tax threshold and other determined parameters to even file income tax returns. This can be viewed as a means of reducing the administrative burden on the state’s side as such persons would generally have paid all their dues through PAYE, where applicable. Though not prevented from filing returns, the risk to the fiscus is minimal if they do not file. Individual taxpayers were not required to file income tax returns if, among other criteria, they had a single source of remuneration not exceeding R350,000 and employees’ tax had already been deducted or withheld, for the tax year ended 28 February 2018. All the parameters or criteria as set out in Public Notice No. 600 were published in Government Gazette No. 41704 dated 15 June 2018.

To quantify the number of employees who are not subjected to filing income tax returns will come at a cost to SARS but it is to be noted that such interventions as non-filing of returns by certain salary earners lead to savings for the revenue authority. The cost-saving argument can be applied to all exemptions that are not registered in the system. During the opening of the 2018 individuals' tax season, the Acting Commissioner, Mark Kingon, indicated that there were taxpayers who were not required to file their tax returns yet continued or chose to do so. He indicated that the number was 1.8 million and 1.6 million taxpayers respectively for the 2016 and 2017 tax years. In addressing filing backlogs by SARS, the Acting Commissioner stated that the tax authority had assessed its operations and taxpayer trends and the findings indicated that, among other issues, too many taxpayers who did not need to file returns were doing so at branches. The Acting Commissioner also stated that to avoid such backlogs and traffic at its branches, SARS had sent personalised letters and direct communications to taxpayers who did not need to submit returns (Mhlanga, 2018).

4.2 CERTAIN EXEMPTIONS APPLICABLE TO EMPLOYMENT INCOME

Section 10 of the Income Tax Act provides for income taxation exemptions in general. Included in the exemptions are those relating solely to employment income. The section provides for partial as well as full exemptions. For the purposes of this report, only certain employment-related income tax exemptions will be considered. There is a long list of exemptions available that can be linked to employment, but only certain ones will be discussed, and the reasons provided therefore. The following are the exemptions to be considered:

(a) Section 10(1)(*c*)(iii): A person who holds office in the Republic for a government other than South African Government, that is, an employee of a foreign government. This exemption is applicable to an employee who is stationed in South Africa and is not ordinarily resident.
(b) Section 10(1)(*c*)(vi): Foreign employees of certain foreign government agencies contemplated in section 10(1)(*b*A)(iii) or certain multinational

organisations providing foreign donor funding contemplated in section 10(1)(*b*A)(iii).

(c) Section 10(1)(*o*)(ii): This section exempts an employee's remuneration derived in respect of services rendered outside South Africa, under certain circumstances. The circumstances will be discussed below.

The exemptions are discussed below.

4.2.1 SECTION 10(1)(*c*)(iii) EXEMPTION

This exemption is self-explanatory. An employee of a foreign government who is stationed in South Africa and is not 'ordinarily resident' does not pay tax in South Africa. An example of this category of employee would be an ambassador or any other diplomat. Even though diplomats are not UN employees, they are also not taxed on their employment income from abroad. This category is briefly considered below.

Per Article 34 of the Vienna Convention on Diplomatic Relations, 1961, a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal. The article has some exceptions, as follows:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) Dues and taxes on private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission;
(c) Estate, succession or inheritance duties levied by the receiving state, subject to the taxes on investments made in commercial undertakings in the receiving state, subject to the provisions of paragraph 4 of Article 39;
(d) Dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving state;
(e) Charges levied for specific services rendered; and
(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Per Article 49 of the same Vienna Convention, consular officers, consular employees and members of their families are also entitled to the same exemption and conditions as listed for diplomatic agents.

From the list of exceptions it is easy to deduce, loosely, that diplomats are not taxed on income they receive from their governments in relation to their diplomatic work. The UN Convention appears to have couched this exemption better than the Vienna Convention as it is specific to remuneration or income earned from the UN. Other taxes such as capital gains, VAT and other indirect taxes are not covered by the UN convention as the convention makes it clear that the exemption applies to UN earnings. Indirect taxes are levied on consumption. Value Added Tax has been called a consumption tax in the National Tax Journal (Carlson & Patrick, 1989:339). This argument is advanced in defence of the exemption only being applicable to employment income earned by diplomats and similar employees.

In the SARS guide (SARS, 2012a:7) diplomats are specifically mentioned and unless they become 'ordinarily resident', they continue to receive the exemption. The exemption also applies to those employees who, at some point in their South African stay, become residents through the application of the 'physical presence' test. South African nationals who are employed by foreign diplomatic or consular missions in South Africa (that is, locally-recruited employees) are not exempt from normal tax on their remuneration. For the purposes of this research report, this category can easily be compared to Category C as defined above for UN employees and the difference shown in treatment of employees of the UN and foreign governments.

4.2.2 SECTION 10(1)(*c*)(vi) EXEMPTION

The exemption is applicable to foreign employees of certain foreign government agencies contemplated in section 10(1)(*b*A)(ii) or certain multinational organisations providing foreign donor funding contemplated in section 10(1)(*b*A)(iii). Government agencies are not defined in the Income Tax Act, while the exemptions relating to receipts and accruals from organisations contemplated in section 10(1)(*b*A)(iii) are to be announced by notice in a gazette. By consequence of working for such organisations, employees' employment income is also exempt.

Foreign subjects of foreign government agencies can be compared easily with foreigners who are employees of foreign governments and exempt in terms of section 10(1)(*c*)(iii). Section 10(1)(*b*A)(iii) employees are a direct opposite to the UN employees in that the organisations identified in the relevant section of the Income Tax Act are providing donor funds to South Africa while the UN expects contributions from South Africa. This means the fiscus benefits directly and the amount of benefit can easily be quantified in the case of foreign donor-funded programmes.

4.2.3 SECTION 10(1)(*o*)(ii) EXEMPTION

Category A UN employees would best fit this exemption in the absence of the UN exemption, all other considerations being taken into account. The section was a subject of media interest and worried South Africans working outside the shores of the Republic. In one such media article Roux (2017)—having cited tax professionals—analysed the impact of the proposal to repeal the section, stating that some taxpayers had indicated they would not pay tax. They cited two ways to avoid paying the taxes as (a) returning to work in South Africa or (b) leaving the country permanently.

In the 2017 Draft Taxation Laws Amendment Bill issued on 19 July 2017, clause 14 was a proposal by the National Treasury to repeal section 10(1)(*o*)(ii) of the Income Tax Act (Treasury, 2017a:17). This would have meant that South Africans working abroad who previously met the criteria for this exemption would not now qualify. In the accompanying explanatory memorandum (Treasury, 2017b:5), the Treasury sought to clarify the reasons for the proposal to repeal the section. Prior to 1 January 2001, taxpayers were taxed on source and not residence. For the periods commencing on or after 1 January 2001, the Income Tax Act had to be amended to cater for this category of employees. That is when section 10(1)(*o*)(ii) was inserted in the Act.

According to the Treasury's explanatory memorandum, South Africa had concluded over 78 DTAs by July 2017 and generally per the article in those DTAs dealing with taxation of income from foreign employment, the taxing powers are allocated to the source state. On the other hand, per domestic tax law, the residence state is also empowered to tax the resident if certain conditions are met. According to the

Treasury, the reason for introducing section 10(1)(*o*)(ii) was to avoid double taxation and there was never any intention to have foreign employment income not taxed at all by either contracting states. Also stated was the fact that South Africa had a limited number of DTAs at the time. In its 2017 Explanatory Memorandum (Treasury 2017b:7), the Treasury referred to its 2000 proposed Explanatory Memorandum and how it cautioned against possible abuse by stating the following:

> "The effect of this relief measure will be monitored to determine whether certain categories of employees abuse it to earn foreign employment income without foreign taxation..."

In the 2017 Explanatory Memorandum, the Treasury couched its concerns over the exemption as twofold. The first was the fact that government had realised the exemption created an opportunity for double non-taxation in cases where the foreign host country did not impose income tax on the employment income or taxed employment income at significantly reduced rates. Secondly, the exemption was creating unequal tax treatment between residents employed in the public sector and residents employed in the private sector as the former did not qualify for the exemption in respect of foreign employment income (Treasury 2017b:6).

As part of the legislative process, hearings or consultations with individuals, the public at large, professional bodies and all relevant stakeholders were held and from articles in the press as well as the government's response it was clear the proposal to repeal the section was not well received. Taxpayers advanced many arguments and the reaction included, among others, petition(s). According to the www.change.org website, the petition had 13,637 supporters and was directed to the National Treasury of the South African Government through Attorney Natasha Wilkinson on behalf of petitioners.

In the response document (Treasury, 2017c) various issues were raised and noted by the Treasury in relation to the proposed repeal. Arguments advanced against repeal of the exemption included: the high cost of living abroad; individuals and households being motivated by current legislation to live abroad; the extremely long delays in permitting and processing foreign tax credits; and that the proposal would overwhelm the tax system. Other taxpayers also argued that it was unfair to impose taxes on people not present in the country to enjoy the benefits of public expenditure and that only two countries in the world had implemented such a proposal. The

Treasury accepted, did not accept, partially accepted and/or noted the comments. The Treasury provided reasons for the decisions taken. When the bill was finalised and tabled to amend the Act, the section remained in the Act, with a slight twist. Instead of being repealed, the National Treasury amended the section to exempt only the first R1 million earned from foreign employment income. The section will be applicable for tax periods commencing on or after 1 March 2020.

It appears South Africa is not the only country struggling with the levying and collection of tax on expatriate income. The US appears also to share concerns regarding those working abroad. Burggraf (2017) in a media article '6,400 expat American signatures sought on petition to end citizenship-based tax', a petition called for 'territorial taxation for individuals', or TTFI, to replace the system of taxing Americans for their entire lives on the basis that they are citizens, unless they renounced their citizenship. The article makes an interesting reference to the fact that only two countries in the world have adopted the citizenship basis, the second being Eritrea. This point came up in the comments made during the 2017 draft amendments season, but it seems commentators had confused citizenship with tax residence tax, while government rejected the comment and provided context at the same time.

Cabezas (2016:101), in 'Reasons for citizenship-based taxation?' asserts that the United States is alone in its practice of taxing the worldwide income of not only U.S. residents, but also U.S. citizens. The author further notes that such a practice, at first glance, presents serious concerns of equity for Americans living abroad. The U.S. Government last discussed its reasons for using such a system in 1924, this being the year in which the U.S. Supreme Court affirmed the constitutional validity of citizenship-based taxation in *Cook v Tait* (1924). In justifying its decision, the Supreme Court relied on the inherent benefits received by U.S. citizens and their property from the U.S. Government, regardless of where the citizens made their home or where the citizens' property was located (Cabezas, 2016:101).

In short, section 10(1)(*o*)(ii) exempts foreign employment income from income tax in South Africa. The exemption is granted under certain circumstances. In order to qualify for the exemption, the taxpayer must meet the following requirements or qualification criteria:

Remuneration for services rendered

In terms of the section, the following are the types of remuneration it would apply to: salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance.

The criteria seek to avoid the inclusion of other sums of money received from the employer in question. SARS Interpretation Note 16 (Issue 2) gives examples of amounts that are excluded, even though received from an employer. Those are payments for the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment to an office as those are received by virtue of such termination, loss, repudiation, cancellation or variation and not in respect of services rendered. These payments are included in paragraph (*d*)(i) of the definition of 'gross income' in section 1(1) of the Income Tax Act.

Employer/Employee relationship

It is important for the relationship to exist between the taxpayer and the employer. The relationship must be determined in terms of an employment contract and services rendered in line with this contract. 'Employee' is not defined in the main body of the Income Tax Act. It is, however, defined in paragraph 1 of the Fourth Schedule to the Income Tax Act to include any person who receives remuneration. The term was also discussed in Chapter 2 of this report. In the SARS Interpretation Note 16 (Issue 2) (SARS, 2017a) issued 2 February 2017, SARS indicated that the term employee should be given its ordinary meaning while further indicating that an 'employee' under common law excludes an independent contractor or self-employed person.

Outside the Republic during specified periods

The taxpayer will only qualify for the exemption for services rendered outside the Republic. The Republic was discussed in Chapter 2, above.

The taxpayer should have been away from the Republic for a period exceeding 183 full days in aggregate during any 12-month period. It is also a must for a taxpayer to have also been away for a continuous period of 60 full days, in the more than 183 full days. Contrary to the discussion on the definition of a physically present 'resident' in

Chapter 2 above, section 10(1)(*o*)(ii) states that a day means a full day starting from 00:00 to 24:00. The 'resident' definition counts five minutes as a full day. The income tax return, ITR 12, makes provision for a taxpayer to capture the relevant movements. SARS may also request that a taxpayer prove those absences. A passport or an employment contract or any other document may be requested to prove the movements to SARS.

For the purposes of section 10(1)(*o*)(ii), the count thus excludes all the days stamped on the passport as these will not be full days, unless it was stamped at 00:00. Proviso (A) to the section states that a person who is in transit between two places outside the Republic and who does not formally enter the Republic through a port of entry as contemplated in section 9(1) of the Immigration Act[25], or at any place permitted by the Director General or Minister of the Department of Home Affairs, shall be deemed to be outside the Republic.

SARS Interpretation Note 16 also clarifies that the taxpayer must be in the employment of the employer while outside the country. This means that if an employee remains in employment while outside the Republic but only renders services for specified periods—then gets rest periods—this employee will be able to claim the rest period days as days outside the Republic for the purpose of the days test.

SARS also sought to clarify that the 12-month period is not limited to 12 calendar months and that it does not necessarily have to be a year of assessment, a financial year or a calendar year: it is any period of 12 consecutive months.

In conclusion, UN employees in Category A would have had enjoyed this exemption fully from 1 March 2000 to 29 February 2020 had they not already enjoyed the UN income taxation exemption. This is in terms of the legislation in force at the time. Interestingly, even following this period, the practice as defined in the DTAs is to have these employees taxed where they are working. The government did not accept the comment that it was unfair to pay taxes in a country where a taxpayer does not live. This rejection of the comment is contrary to the practice formally recognised by SARS in its guide (SARS, 2012:5) for foreigners and explaining their

[25] Immigration Act, Act No 13 of 2002

tax obligations in South Africa. Possibly it was the argument that the taxpayers are not in the country to enjoy the benefits of public expenditure that led to rejection by the Treasury. For tax periods commencing on or after 1 March 2020, they would thus qualify to have the first R1 million exempted.

4.3 UNITED NATIONS INCOME TAX EXEMPTION

4.3.1 HISTORY OF THE EXEMPTION

The UN was founded in terms of the UN Charter in 1945 as discussed in Chapter 3 of this report. Article 105, paragraphs 1 and 2 in Chapter 16 of the Charter introduced the immunities and privileges to be enjoyed by members, representatives of members as well as employees of the organisation. This was an open-ended portion of the Charter as in terms of Article 105.3, more work was still to be done by the General Assembly along the lines of recommending what form those immunities and privileges should take. A preparatory commission (United Nations, 1946a:5) was set up to assist with the establishment of the organisation. Completion of the report was the fourth step in the process of establishing the UN and this was finalised on 23 December 1945. The preparatory commission met for the first time a day after the charter was signed and commenced work immediately. The commission was tasked with various matters such as the drafting of staff rules, drafting the agenda for the first UN General Assembly, as well as making recommendations for the organisation's running.

The recommendations on immunities and privileges are reported on page 47 of the report, paragraph 48. Under 'Taxation', the report states that it is necessary to consider the position arising where nationals of certain states are subject to taxation by their respective governments, while nationals of other states are exempt. This recommendation clearly shows that it was anticipated not all countries would adopt the exemption. Recommendations in relation to Article 105 were recorded on page 60 of the report. A draft version of the immunities and privileges was attached for consideration by the UN General Assembly.

The Convention was then adopted by the General Assembly of the UN on 13 February 1946 and in section 18(b), a UN income taxation exemption became effective. The convention was not intended to cover all cases as member states had the option to either accede or not to accede in relation to the provisions contained in the convention. In the accession document (United Nations, 1946b); countries were required to indicate whether they had any reservations.

South Africa expressed no reservations with regard to income taxation. According to the information available, SA only acceded to the Convention on 30 August 2002. Certain reservations were registered, though unrelated to income tax exemption. In 2001 the Diplomatic Immunities and Privileges Act (DIPA) Act 37 of 2001 was enacted, giving effect to income tax exemption for UN employees, as well as other immunities and privileges.

Subsequent to the signing of the Convention, the Government of India (GoI) enacted legislation known as The United Nations (Privileges and Immunities) Act 46 of 1947 and in section 18(b) specifically included the exemption for salaries and emoluments paid to the officials of the UN, by the UN. This legislation effectively mirrors the Convention as it was passed specifically to give effect to the Convention on the Privileges and Immunities of the UN. Sections were effectively taken from the UN convention and inserted into the Indian Act. No reservations were registered by the Government of India, meaning that all immunities and privileges were acceded to (United Nations, 1946b). India's accession date was 13 May 1948.

In *CIT v Ramaiah* (1980), the applicability of section 18(b) was tested in the Karnataka High Court, sitting in Bangalore, India. The court held that all UN earnings, including pension, were exempt from income tax.

The United States accession date is recorded as 29 April 1970 and a few reservations were registered. The two most relevant here involve sections 18(b) and 18(c) of the Convention and the reservations are worded as follows:

> Paragraph (b) of section 18 regarding immunity from taxation and paragraph (c) of section 18 regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted for permanent residence…

Senate Joint Resolution 136 of the U.S. 80th Congress dated 6 August 1947 stated that the president of the United States of America, at the time, accepted the

immunities and privileges as stipulated in the Convention of Privileges and Immunities of the UN with the exception of sections 18(b) and s 18(c). Section 18(b) is the exemption from national taxation on UN emoluments and salaries, while section 18(c) stipulates that UN officials shall be immune from national service obligations. The committee considered it undesirable to create within the United States a group of nationals not subject to the normal responsibilities of citizenship. This led to income tax being levied on US residents working for the UN.

From the UN General Assembly resolution 78(I) of 7 December 1946, and the accession dates per the document (United Nations, 1946b) found on the UN website, it is clear that member states did not all accede to the immunities and privileges at the same time. Nations took their time to accede and/or register reservations. General Assembly resolution 78(I) recorded that member states that had not yet completely exempted from taxation the salaries and allowances paid out of the budget of the organization were requested to take early action in order to achieve full equity among members and personnel.

The 'Tax equalisation fund' was incorporated in the staff regulations and rules of the UN, Regulation 3.3. The fund is used to deposit all the assessments withheld for two reasons. One is for them to be used as a credit against member states' contributions while the second function is to enable the UN to reimburse employees who pay tax on UN salaries and emoluments. A discussion on the 'Tax equalisation fund' is in Chapter 3 of this report.

4.3.2 SOUTH AFRICAN LEGISLATION IN RELATION TO UN EMPLOYEE EXEMPTION

There are no provisions in the Income Tax Act for exemption in respect of salaries and emoluments paid to UN employees by the UN. Section 231(4) of the Constitution provides as follows:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

The Convention adopted by the General Assembly of the UN on 13 February 1946, is enacted in terms of the Diplomatic Immunities and Privileges Act (DIPA) (2001)

and has the force of law in South Africa in terms of section 2 of DIPA. Section 5(1) of DIPA (2001) provides as follows:

> "The Convention on the Privileges and Immunities of the United Nations, 1946, applies to the United Nations and its officials in the Republic."

Section 17 of Article V of the UN Convention provides that:

> The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter, these categories shall be communicated to the Government of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

Section 9(1)(b) of the DIPA provides that:

> "(1) The Minister must keep a register in which there must be registered the names of all persons who enjoy-
>
> (b) immunities and privileges in accordance with the Conventions or in terms of any agreement contemplated in section 7."

Section 18(*b*) of Article V of the UN Convention provides that:

> "Officials of the United Nations shall: (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations."

4.3.3 ADMINISTRATION OF THE EXEMPTION IN THE UN

It would be easy to conclude that the UN has no administrative responsibilities in relation to member states that tax their employees. The opposite is true. The UN is concerned about its employees and every year its Tax Unit issues a Tax circular. The circular 'Payment of 2017 income taxes', ST/IC/2018/6, issued on 22 January 2018, is addressed to staff members liable to pay income tax to United States tax authority on UN their salaries and emoluments. The document details the process of filing returns, provision of supporting returns to the UN, and refunds from the UN to those whose government(s) tax(es) them.

The Unit explains on page 11 of the Tax circular the rationale for reimbursement. In simple terms, the General Assembly established procedures to refund personnel in order to place them in the financial position in which they would find themselves if

their UN remuneration were not taxed. The scope of the income tax reimbursement system is limited to the reimbursement of taxes actually paid or actually due to the United States tax authorities. The UN does not indicate the names of member states that do tax their employees; however, the circular is directed to staff members who pay tax to the US tax authority or the Inland Revenue Service (IRS).

The UN is aware that the applicability of the exemption to UN staff can easily be seen as unfair. The ICSC was established in 1974 and in 1976, in response to the UN General Assembly's request to conduct a salary review as per resolution 3357 of 1974, the ICSC provided a response and in its discussion mentioned the exemption as follows:

> …It noted that the GA, in establishing staff assessment, had recognized two purposes: one, conceptual, i.e., given the principle that UN salaries should not be subject to national income taxation, UN staff should not be seen as a privileged group exempt from any form of income tax; and the other, practical, i.e., given the fact that some Member States nevertheless continued to impose national income tax on the UN earnings of their nationals, to provide a source from which the amounts paid by those staff members in taxes could be reimbursed to them, so as to ensure equality of treatment as between staff members, regardless of their nationality, while not imposing any additional financial burden on those Member States which did not reap returns on their contribution to the budget in the form of income taxes…

The comment on 'privileged group exempt from any form of income tax' is in line with the U.S. stance on exemption. The commission further acknowledged the existence and functioning of the 'Tax equalisation fund' that, in the view of the Commission, would not have been necessary had all member states applied fully the provisions of the conventions on privileges and immunities. This sounds like a plea to member states to exempt their nationals. It also suggests that it is proving a burden to administer the fund from the UN side.

4.4 CONCLUSION

Having explored the history of the exemption and discussed similar or related exemptions, it is fair to conclude that exemptions are not an easy tax area and that they require an in-depth study. Also interesting is the discovery that only two countries impose citizenship tax: one developed and one developing. The two countries are the United States of America and Eritrea.

In terms of DIPA, section 11, the loss of revenue caused to any municipality or statutory public utility organisation by reason of the Act relating to exemptions from

taxation must be made good to such municipality or organisation out of funds approved by Parliament for that purpose. It is interesting to note that South Africa anticipates losses due to non-taxation, and having the fiscus paying for it.

The South African Government appears to have shot itself in the foot when it introduced section 10(1)(*o*)(ii) during the tax regime change of 2001. Though anticipated and documented as such, the Treasury could have done more to ensure that abuse in the form of double non-taxation is curbed early in the regime change, that is, in the year 2001. The government waited for more than 16 years to implement a change that was clearly necessary from the beginning. Although lack of, or insufficient, data could have contributed due to fewer DTAs being applicable at the time, the furore in the 2017 calendar year could have been minimised by keeping taxpayers on their toes. The government could have introduced this change in much earlier tax years.

Having reviewed the history of the UN exemption, one can also conclude that America got its way with the refusal to participate in the exemption, leading to the world body succumbing to refunding US staff their tax paid to the Federal government. Over 70 years have passed since the world body was created and it will appear curious to want to withdraw from the exemption now: however, if America got its way, why cannot South Africa attempt something similar?

Lastly, in terms of DIPA, section 11, the loss of revenue caused to any municipality or statutory public utility organisation by reason of the Act relating to exemptions from taxation is to be made good to such municipality or organisation out of funds approved by Parliament for that purpose. South Africa seems to be digging another fiscal hole by the application of this section in the Act.

CHAPTER 5: FAIRNESS, EQUALITY AND THE TAX SYSTEM

5.1 INTRODUCTION

South Africa is a democratic state based on a written Constitution (section 1 of the Constitution). The state was founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
(b) Non-racialism and non-sexism;
(c) Supremacy of the Constitution and rule of law; and
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The Constitution is the supreme law and since its introduction in 1996, in terms of section 1(c) read with section 2 thereof, any law or conduct inconsistent with it is invalid. The South African Constitution has been referred to by an associate justice of the United States Supreme Court, Judge Ruth Bader Ginsburg, as a 'great piece of work' (Philp, 2012). In a response to a 2012 interview question, when asked whether she thought Egypt should use the constitutions of other countries as a model, Ginsburg (Keating, 2012) responded as follows:

> 'I would not look to the U.S. Constitution, if I were drafting a Constitution in the year 2012. I might look at the Constitution of South Africa,' says Ginsburg, whom President Clinton nominated to the court in 1993. 'That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights had an independent judiciary. … It really is, I think, a great piece of work that was done. Much more recent than the U.S. Constitution.'

Section 1(a) introduces equality as a founding value. The Bill of Rights or Chapter 2 of the Constitution affirms equality as a right (section 9). Section 9(3) states:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Chapter 2 is the cornerstone of the Constitution and should be adhered to. It introduces the concept of fairness. Whether or not income tax is constitutional will not be the focus of this chapter. The focus will be on the fairness or lack thereof

when it comes to segregating the country's work force based on which organisation or employer they work for, while fairness and equality will be the key words.

5.2 DEFINING FAIRNESS

'Fairness' has not received a universally accepted definition. In such a case, it is always safer to turn to case law in order to identify what courts have held in ascribing meanings to concepts. In defining 'fairness', Lawton J in *Maxwell v Department of Trade and Industry* (1974), stated the following in order to arrive at a conclusion as to whether or not a certain process was carried out fairly:

> From time to time during that period lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts a word in common usage has acquired the trappings of legalism: 'acting fairly' has become 'acting in accordance with the rules of natural justice,' and on occasion has been dressed up with Latin tags. This phrase in my opinion serves no useful purpose and in recent years it has encouraged lawyers to try to put those who hold inquiries into legal strait jackets. …For the purposes of my judgment I intend to ask myself this simple question: did the inspector act fairly towards the plaintiff?

Just as it is difficult to define fairness, equality is also difficult to define. Through their actions, taxpayers will react to a system they perceive to be unfair. For the purposes of this report, both fairness and equality are defined as 'the absence of discrimination'.

5.3 DEFINING EQUALITY

The term 'equality' has no universally accepted definition, but it has been recognised that equality is tantamount to non-discrimination; hence an act of discrimination will lead to the violation of rights to equality (Durojaye, 2017:34). In the *South African Journal of Economics*, Professor Robert William Vivian opens by acknowledging that the Katz Commission relied heavily on equality and the Constitution in reforming South Africa's personal income tax. The professor states that the commission did not explain its understanding of the meaning of equality in general or equality in taxation in particular, being content merely to remove mechanically what were perceived to be discriminatory words in the legislation (Vivian, 2006:79).

In ‘Equality constitutional adjudication in South Africa’ Smith (2014:611), in the paragraph headed ‘Defining equality’, Smith opened as follows: ’Equality has perplexed writers and thinkers for well over two millennia. To this day, there is no consensus on the exact meaning of equality’. Smith (*ibid*) continued by quoting Fredman’s *Discrimination law* book: ‘We all have an intuitive grasp of the meaning of equality and what it entails, yet the more closely we examine it, the more its meaning shifts’. She proceeded to state that in broad terms there are two concepts of equality, these being substantive and formal equality. The principle of equality has a legal basis in the South African Constitution as per sections 1(a) and 9(3).

5.3.1 FORMAL EQUALITY

Formal equality implies that individuals are treated in the same manner regardless of their socio-economic situations. In essence, formal equality is only interested in treating people alike, irrespective of whether they are treated equally badly or equally well (Durojaye, 2017:34).

5.3.2 SUBSTANTIVE EQUALITY

The preferred notion of equality is substantive equality. A substantive approach to equality re-orients the right to equality from a negatively oriented right of non-discrimination to a positively oriented right to substantive equality. With the emphasis on the impact of laws or policies and the move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis (Smith, 2014:613). Generally, the concept treats individuals equally, paying attention to their peculiar circumstances as this approach to equality is founded on the core value of accommodating people’s differences with the aim of achieving equality of outcome. The main aim of substantive equality is to correct historical injustice or disadvantages suffered by a specific group of people (Durojaye, 2017:40).

5.4 FAIRNESS OF THE FISCAL POLICY OR EQUALITY OF THE TAX SYSTEM

In Chapter 1 of this report, the need for taxes for each state, including the Republic of South Africa, was highlighted. Taxes are important for any state. It is important, therefore, to have a tax system that is perceived by taxpayers to be fair. The role of

the perception of tax fairness in influencing tax compliant behaviour has been widely discussed by concerned parties around the globe. Previous studies generally suggest that taxpayers will be more likely to comply when the tax system of a country is perceived to be fair (Saad, 2012:89).

If a tax system is perceived as unfair, it could result in devastating results. In March 1990, rioters in London set fire to parked Jaguars and Porsches, smashed store windows, destroyed a Renault showroom, and ultimately caused the injury of over 400 people and the arrest of nearly 350 people. The cause of the riot was a tax reform proposal by British Prime Minister Margaret Thatcher's government. Thatcher had proposed to replace the system of property taxes (based on real estate value) with a poll tax, a flat charge levied equally on all individuals, regardless whether they were rich, poor, or somewhere in between (Gruber, 2011:532).

The proposal provoked outrage because the tax burden was being shifted away from wealthy citizens owning valuable property and onto poor citizens who didn't previously pay property taxes. They would have been required to pay a poll tax. Because of the unpopularity of this poll tax proposal Thatcher was eventually ousted as leader of her party and the proposal was quickly abandoned. Thatcher may be perceived as having got off easily as a previous attempt to impose such a tax in England, in 1381, led to the beheading of several prominent citizens (*ibid*).

The United Kingdom, by the time of the introduction of income tax, had already experienced a series of tax-inspired revolts. These included the revolt by the barons, leading to the grant of the Magna Carta (1215), the English Civil War (1642-48), and the Great Excise Tax Revolt (1733) (Langford, 1975); it had also lost the American colonies over tax policy in the Revolutionary War (1775-1783). When it witnessed the French social order being overthrown by the French Revolution (1789-1799), taxation was once again a catalyst (Vivian, 2006:81).

South Africa's tax reform process was formalised starting from mid-1994. This process was undertaken by the appointed Katz Commission. The parliament Joint Standing Committee on Finance (JSCOF) recognised the various sets of parameters the Commission laid down to be comprehensive in terms of adherence to internationally established criteria necessary for a modern tax system. According to JSCOF, the system is one that is responsive to economic and socio-economic

imperatives. Across the range of issues, JSCOF asserted that the Commission had remained true to the canons of taxation desirable for a good tax system, these being equity, neutrality, simplicity, efficiency and others that the Commission had consistently tried to accommodate (Katz Commission, 1994:2). Equality of the income tax system determines the integrity of the entire tax system (Vivian, 2006:79).

Two distributional goals are frequently considered in measuring tax fairness. One is horizontal equity and the other is vertical equity. The two are discussed below:

Horizontal equity: Horizontal equality requires that taxpayers who are in the same financial position should pay the same tax. Prior to the Katz Commission, a number of tax tables existed. There were tables for married men, working women and single persons. The Commission recommended that these be replaced with a single unified tax table. Where there were two incomes, two rebates were allowed and because of the unified rate system these taxpayers would pay tax at a marginal rate lower than the single-income household with an identical income. The multiple rates attempted to ensure that both households paid at the same rate. This was not an easy outcome to achieve (Vivian, 2006:99). This principle means that individuals who are similar but who make different economic or lifestyle choices should be treated in the same way by the tax system (Gruber, 2011:533). Taxing of people based on their marital status or gender violates the founding provisions of the Constitution.

Vertical equity: This principle effectively results in groups with more resources (higher income, higher wealth, higher profits) paying higher taxes than do lower-resource groups. Most analysts conclude that to be vertically equitable, tax systems must be progressive: effective average tax rates must rise with income so that the rich pay a higher share of their income in taxes than do the poor (Gruber, 2011:534). This is the case with South Africa as the scales of individual income tax are progressive.

The availability of income tax exemption to specific group of employees, for example UN employees, could easily fit in with the vertical equity, as it divides employees who could easily be earning the same amount of money. Category A employees could easily be compared to employees who are eligible to obtain a section 10(1)(*o*)(ii) exemption, that is, foreign employment income tax exemption. Category B

employees have no other category with which they can be compared, being residents working in the country like any other employee in either the public or private sectors. Category C, on the other hand, could be compared to foreign government employees who are entitled to exemption on their employment income.

Exemptions in income taxes constitute an integral element in the design of a tax system. They allow the tax system to have non-fiscal functions. The scope and amount of such exemptions reflect the state's priorities in fiscal policy. What needs to be stressed is the fact that such exemptions are primarily given to taxpayers for social and economic reasons. Apart from that, they may aim at greater equity in tax distribution, at the growth of businesses as well as at influencing economical decisions made by taxpayers. Independently from these aims, however, tax exemptions always result in the lowering of tax burden and a decrease in public revenue (Jarczok-Guzy, 2017:79).

5.5 CASE LAW

The law consists of all forms of law—common law, statute law, indigenous (customary) law, case law—while **a law** is a written statute enacted by those legislative bodies having the authority to make laws. Case law, often referred to as 'judicial precedent', is the law as various courts in specific cases before them have decided it (Botha, 2012:3).

As alluded to previously, the aim is not to test the constitutionality of the income tax itself but the exemption which is a provision found in another Act of Parliament, and not the Income Tax Act. According to van Schalkwyk (2001:290) only two Constitutional Court cases relating to challenges on the grounds of unconstitutionality of provisions of the Income Tax Act and one that challenged the constitutionality of provisions of the VAT Act had been heard (*ibid*). Only in the VAT case did the Constitutional Court pass judgement on its constitutionality. This was the *Metcash Trading Limited v The Commissioner for the South African Revenue Service* (2000) case on the pay-now-argue-later rule: the Constitutional Court ruled that there was nothing unconstitutional about it.

On the provisions of the Income Tax Act, the Constitutional Court refrained from deciding on the constitutionality of provisions relating to search and seizure in *Rudolph and Another v Commissioner for Inland Revenue and Others* (1996). The constitutionality of the then section 74(3) of the Income Tax Act was being challenged. In the matter *Mmampobane Elizabeth Motsepe v CIR* (1997 (2) BCLR 898 (CC)) the constitutionality of the provisions of sections 92 and 94 of the Income Tax Act was challenged. These provisions relate to the fact that the correctness of an assessment on which a statement filed in terms of section 91(1)(*b*) cannot be questioned and to the conclusiveness of evidence regarding assessments. Once again the Constitutional Court refrained from deciding on the constitutionality of the challenged provisions (van Schalkwyk, 2001:290).

Van Schalkwyk (2001:293) also indicated that during the Katz Commission, specific provisions of the Income Tax Act found to be unconstitutional were identified. They were unconstitutional in terms of the 1993 Constitution and some have since been amended by the Taxation Laws Amendment Bills that have been passed into law over the years. Examples given would be those distinguishing taxpayers based on gender, marital status or age and provisions impacting the right to privacy.

It is, therefore, important to consider some of the court cases. The following case summaries are relevant:

***City Council of Pretoria v Walker* (1998) ZACC 1**

In this case, the applicant was the City Council of Pretoria (the council). It sued the respondent, Mr Walker, in the Pretoria Magistrate's Court for payment of an amount of R 4 753, 84 being arrear charges for services rendered by the council during the period July 1995 to 23 April 1996. The respondent did not deny that he owed the amount claimed. He contended instead that he was entitled to withhold payment by reason of the fact that the council's conduct constituted a violation to his constitutional right of equality. The amount of R5 041, 70 as originally claimed had been amended to an agreed amount of R4 753, 84.

The council was established by the consolidation, on 8 December 1994, of a number of municipalities into one. These included, among others, the two black townships of Atteridgeville and Mamelodi and the formerly white municipality known as the

Pretoria City Council. It will be convenient to refer to this last area as old Pretoria. The respondent was a resident of Constantia Park, a suburb in old Pretoria. It is common knowledge that the population of Mamelodi and Atteridgeville is black and that of old Pretoria overwhelmingly white and the case was argued on that basis.

The background to the issues raised in this matter may be summarised as follows: electricity and water charges in the council's area were levied on a differential basis. The residents of old Pretoria, including the respondent, were levied on a tariff based on actual consumption measured by means of meters installed on each property. This had been the position long before the amalgamation. Residents of Mamelodi and Atteridgeville, in the absence of meters, were levied on the basis of a uniform rate for every household. This system generally referred to as a flat rate, also predated amalgamation.

The respondent's objections to the council's conduct were based on the following grounds: (a) the flat rate in Mamelodi and Atteridgeville was lower than the metered rate and this therefore meant the residents of old Pretoria subsidised those of the two townships; (b) the differentiation in tariffs continued even after meters had been installed on some properties in Mamelodi and Atteridgeville; (c) only residents of old Pretoria were singled out by the council for legal action to recover arrears while a policy of non-enforcement was being followed in respect of Mamelodi and Atteridgeville; and (d) the imposition of differential rates was a contravention of section 178(2) of the interim Constitution. The respondent also complained that the council did not take the residents of old Pretoria into its confidence when target dates for the implementation of a consumption-based tariff were not met. Instead, misleading information was given to old Pretoria residents, leaving them under the impression that the metered rate was being uniformly applied at a time when it was not. With regard to the objections in (a), (b) and (c), the respondent's complaint was that the council's conduct amounted to unfair discrimination and was therefore a breach of section 8 of the interim Constitution.

In its judgment on appeal, the High Court held that the actions of the council summarised in (a) to (c) above amounted to discrimination based on race; that the council had not, under section 8(4) of the interim Constitution, established that such discrimination was not unfair; and that accordingly such actions were

unconstitutional as being inconsistent with section 8(2) of the interim Constitution. The High Court also held that the council's conduct described above constituted a breach of section 178(2) of the interim Constitution.

While treated differently, the respondent was not unfairly discriminated against. He was being sued for an account that was legally due, and for services which had been properly rendered. The minority agreed with the findings of the magistrate's court decision in that the selective enforcement of arrears accounts was based on geographical areas and not on race. There existed no indirect racial discrimination merely because white people lived in one area, and black people lived in another area. Nothing in the papers proved that the respondent was prejudiced directly or indirectly by the conduct of the council. The respondent failed to prove a prima facie case of discrimination as no actual or potential prejudice followed from the differentiation.

It can be argued that in this case, the main aim was to correct the historical injustice or disadvantaged suffered by a specific group of people, making this substantive equality and thus not wrong on the council's side.

5.6 UNITED STATES' LACK OF ACCESSION TO THE INCOME TAX EXEMPTION

In terms of the Convention accession document (United Nations, 1946a:5) dated or registered 14 December 1946, the United States of America acceded to the Convention on 29 April 1970. Upon acceding to the conventions, the country also noted certain reservations, of which one was recorded as follows:

> United States of America … (1) Paragraph (b) of section 18 regarding immunity from taxation and paragraph (c) regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted for permanent residence.

In the United States Senate Joint Resolution 136 of its 80th Congress dated 6 August 1947, it was stated that the president of the United States of America at the time accepted the immunities and privileges as stipulated in the Convention of Privileges and Immunities of the UN, with the exception of sections 18(b) and 18(c). Section 18(b) was the exemption from national taxation on UN emoluments and salaries, while section 18(c) stipulated that UN officials should be immune from national

service obligations. The committee considered it undesirable to create within the United States a group of nationals not subject to the normal responsibilities of citizenship. This led to income tax being levied on US residents, working for the UN.

Paragraph 38 of the Report of the Preparatory Commission of the UN 'Privileges and Immunities' states that harmonious relationships needed to be facilitated between the UN and its specialised agencies in order to avoid inequitable differentiation in the treatment of personnel in the arrangement to grant privileges and immunities (United Nations, 1946b:47). The report also noted that certain matters relating to the treatment and conditions of service of personnel would give rise to difficulties, if differentiation between officials of similar status engaged on similar work occurred. Taxation was given as an example as follows (*ibid*):

> It appears necessary to consider the position which arises where nationals of certain states are subject to taxation by their respective governments, while nationals of other states are exempt. A wide variation between the effective salaries of persons on identical salary scales would, amongst other things, clearly limit the possibilities of interchanges of staff.

The fact that the preparatory commission had already envisaged this is an indication that this exemption was a contentious issue from the beginning or establishment of the organisation. The organisation was not yet fully established but the exemption was already subject to debate.

5.7 CONCLUSION

Though the discussion is not directly linked to the exemption on income tax due to its exclusion from the Income Tax Act, the fact that conclusions are drawn from the Constitution, the Income Tax Act (where the exemption is best suited), and case law on fairness and equality, the conclusions arising can be applied to the exemption. It can be concluded from the United States' lack of accession and the reasons given for the practice that the government opted not to participate in the exemption in order to be fair to the rest of the U.S. workforce. The reluctance of South Africa's courts to pronounce on constitutionality, in as far as the Income Tax Act is concerned, has also been noted.

CHAPTER 6: CONCLUSION

6.1 INTRODUCTION

This chapter presents a summary of the study, the major conclusions, and important policy recommendations. The purpose of this study was to analyse the impact of taking back taxing rights that are currently not exercised, specifically relating to UN officials. The study covered SA's tax system and the impact on it of double taxation treaties. The history of some exemptions as contemplated in section 10 of the Income Tax Act was explored while the act or deed of being selective in exempting certain taxpayers—and not all—was also considered.

The lack of a UN income tax exemption in the Income Tax Act could be seen as an omission or a gap. The fact that the exemption is addressed by other international agreements that are legal and binding, is not overlooked, but it would be appropriate to have this exemption listed in Section 10 of the Income Tax Act, together with related exemptions. The UN taxation exemption has a history, as do other exemptions, so it is only fair all should be covered in the same Income Tax Act.

6.2 SUMMARY AND MAIN FINDINGS

6.2.1 QUANTIFICATION OF THE DIFFERENCE BETWEEN ASSESSMENT AND TAX

It has become apparent from the discussions in previous chapters that UN employee deductions, known as staff assessment, are used for the benefit of the South African fiscus as South African staff in the UN basically subsidise UN membership fees. At face value, the amount of staff assessment deducted from UN employees is less than the tax payable or that would have been payable in the absence of the exemption. The example below compares the difference between what a UN employee on the highest salary scale of an Under-Secretary-General position or job grade would have as a deduction against any other employee who is in a different sector. Without all the data for UN employees who are either residents or non-residents working in the Republic, an example below should suffice.

The South African tax year for individuals runs from 1 March to 28 February in the ensuing year, while the UN's financial year runs from 1 January to 31 December, that is, a calendar year.

Table 3: South African Income Tax rates for individuals for 2017/18 year of assessment

Taxable income (R)	Rates of tax (R)
0 – 189 880	18% of taxable income
189 881 – 296 540	34 178 + 26% of taxable income above 189 880
296 541 – 410 460	61 910 + 31% of taxable income above 296 540
410 461 – 555 600	97 225 + 36% of taxable income above 410 460
555 601 – 708 310	149 475 + 39% of taxable income above 555 600
708 311 – 1 500 000	209 032 + 41% of taxable income above 708 310
1 500 001 and above	533 625 + 45% of taxable income above 1 500 000

Table 4: Staff assessments to be used in conjunction with gross base salaries, from 01 January 2018

Assessable Income (US$)	Assessment rate (%)
First $50,000	17
Second $50,000	24
Third $50,000	30
Remaining (any amount over $150,000)	34

From the table above, it appears at face value that staff assessment rates are much lower than income tax rates. The comparison can be demonstrated below, by using an example of Ms M, who is employed by the UN, and Ms S who is employed by Company A, in the Republic. Both Ms M and Ms S are resident in the Republic.

Table 5: Example – comparison between staff assessment and tax

Highest UN salary range, for 2018 year of assessment (averaged 2017 and 2018, as UN is on a calendar year)

Details	**Ms M (working for the UN)**	**Ms S (working for a SA-company or government, within the Republic)**
Currency of income	US Dollar (US$)	South African Rand (ZAR)
Average exchange rate for year of assessment	13.0852	R 1
Age	Below 65	Below 65
Taxable Income	193,283	2,520,011.06
Taxable Income converted	2,520,011.06	2,520,011.06
Tax thereof (R533 625 + 45% of R 1,042834) minus R 13,635 primary rebate	N/A	R 989 265
Staff assessment	$50,216 of R 657,087.06 calculated as follows:	N/A
	17% * 1st $50,000 = $ 8,500	
	24% * 2nd $50,000 = $ 12,000	
	30% * 3rd $50,000 = $ 15,000	
	34% * remaining $43,283 = $ 14,716	
	$8,500 + $12,000 + $ 15,000 + $ 14,716 = $ 50,216	
	$50,216 * R 13,0852	
	R 657,087.06	
Effective rate	26%	39%
(Staff assessment/Gross Earnings) OR		
(Tax/Taxable Income)		
VARIANCES		
Tax Loss		
Quantum (R989 265)		
Percentage (39%)		
Total loss to the fiscus		
Quantum R 989 265 less R657 087 = R332 178		
Percentage 39% less 26% = 13%		

At the beginning of the 2018 UN financial year, South Africa's contribution was set at 0.364 percent of the total budget of the organisation and this converted to $9,784,785. The Republic had a credit of $937,012 raised through staff assessments or deductions from staff, meaning that the fiscus needed to raise a balance of $8,847,773 (United Nations Secretariat, 2017:11). The amount of $937,012 means that the country could have collected more than R12 million in taxes from UN officials

during the period ending 31 December 2017. This figure was arrived at by applying the SARS average exchange rate of R13, 0852 for the period ending 28 February 2018. Having established that the assessments are at lower rates, this is just an indication that the fiscus is losing out more just on one organisation. The figure cannot be estimated with reliability due to a mix of different employee scales or grades.

From the example above, the fiscus loses a total of R332 178 from just one employee on the higher UN scales, while the total tax loss amounted to R989 265.

6.2.2 OTHER FINDINGS

6.2.2.1 POSSIBLE SANCTIONS

Based on the work done in relation to sanctions that could be imposed by the UN, it can be concluded that having different views from the other members does not necessarily lead to punitive measures being imposed. The fundamental principle that a country must maintain to be part of the organisation is that of ‘peace-loving’. The rest are an added advantage. South Africa if it so decided, should follow proper channels and amend its laws by removing the exemption and clarify to the UN that its employees will be paying SA income tax. America’s example can be followed, with no harm done.

The country’s laws can be cited in making a decision to tax residents, and that can easily be referred to as the internal affairs of the country. The worst that happened to South Africa, in relation to sanctions in the UN, between 1962 and 1994 (32 years) was the fact that South Africa could not vote in the UN General Assembly. The reason for the sanction was, however, directly linked to the very existence of the organisation, which is peace, and it can be argued that a country taxing its own residents should not be an issue for the UN. That way, South Africa would be applying Article 2(7) of the UN Charter for good reason.

6.2.2.2 GOVERNMENT’S INTENTIONS ON EXEMPTIONS

Drawing from the discussion in Chapter 4, it can be concluded that the government never intended for section 10(1)(*o*)(ii) to result in double non-taxation. The fact that

government intended to review the exemption following the tax regime change effected on 1 January 2001 has been noted. The comments made in the 2000 drafting of the Taxation Laws Amendment Bill could easily be applied to the exemption given to UN employees. The government could still pursue UN employees who are in a similar position, to widen the tax base.

The section on foreign governments' workers also derives from the signing of the Vienna Convention. That can be revisited as well.

6.2.2.3 UNITED NATIONS REFUND EMPLOYEES WHO PAY TAX

The fact that the UN has also committed to refund its officials who face income taxation by their countries is fully documented, which should encourage South Africa to impose taxation on those employees. The UN would reimburse these employees so they could remain in the same position as their colleagues who do not get taxed. America is an example of the reimbursement system in operation. The researcher found that no country other than the United States was taxing its nationals. The UN documentation reviewed, however, keeps referring to member states. This fact points to the open-mindedness of the organisation in acknowledging that member states can pass laws that could change the landscape relating to exemption. South African could just follow the US example.

6.2.2.4 ADMINISTRATIVE TAX BURDEN

There is no indication from SARS' side that taxing UN employees would be an administrative burden. From the responses by the National Treasury (2017a) relating to the consultations in relation to proposal to repeal section 10(1)(o)(ii), taxpayers cited the fact that the lack of exemption and processing of tax credits would overwhelm SARS' systems. National Treasury defended SARS' systems and indicated that they were functioning properly. Although this comment was made specifically in regard to tax credits, it indicates that the systems are sufficient to administer all the taxes under consideration.

6.2.2.5 GENERAL

Two important conclusions, in relation to America and its tax collection mechanisms, came out of this research. America is bold in that it contested the granting of the exemption to its citizens. Also from the discussions in the previous chapters, it came to light that America and Eritrea are the only nations that apply citizenship tax. America emerged as the only one taxing UN employees. South Africa could learn from this stance and revoke the exemption.

Secondly, the fact that the UN employees' income tax exemption is addressed in an ordinary bill, in terms of the Constitution, is also a matter that requires consideration. In terms of Section 77(1)(c) of the Constitution, a bill that abolishes, reduces, or grants exemptions from any national taxes, levies, duties or surcharges is a money bill. This means the Diplomatic Immunities and Privileges Act of 2001 is a money bill as it has powers to exempt UN employees, diplomats, consular staff and their family from tax. A part of the diplomatic staff exemption has been included in the Income Tax Act.

6.3 CONCLUSION AND POLICY RECOMMENDATIONS

The fact that UN employees' tax exemption falls outside the scope of the Income Tax Act makes it elusive in the sense that it is not affected by the annual review of taxation laws. The section should thus be included in the Act for reasons of transparency and visibility. Other citizens who might wish it to be reviewed may be prevented from doing so simply by the fact that they would not know where to find it.

The SA Government should consider transferring the burden of paying tax to the UN. The organisation is open to reinstating the earnings of its employees, should tax be levied on them.

6.4 RECOMMENDATIONS FOR FUTURE RESEARCH

The National Treasury, in consultation with the Department of International Relations and Cooperation (DIRCO), should consider the effect of amending the Diplomatic Immunities and Privileges Act (DIPA) and the Income Tax Act to have the income tax exemptions dealt with appropriately by a tax Act.

It is of the utmost importance to review the current list of immunities—tax included—given to residents through the DIPA for their relevance. Income tax exemption was first introduced over 70 years ago. It may not be relevant today.

In terms of DIPA, section 11, the loss of revenue caused to any municipality or statutory public utility organisation by reason of the Act relating to exemptions from taxation must be made good to such municipality or organisation out of funds approved by Parliament for that purpose. SARS should consider quantifying these losses.

Lastly, the timeline from 13 February 1946 when the Convention on the Privileges and Immunities of the United Nations was signed, 28 February 2002 when the Diplomatic Immunities and Privileges Act came into effect, as well as 30 August 2002 when South Africa acceded, with reservations, to the Convention on the Privileges and Immunities of the United Nations, needs a proper analysis in determining the legality or otherwise of income tax exemption for UN officials.

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