UNIVERSITY OF THE WITWATERSRAND

FACULTY OF COMMERCE, LAW AND MANAGEMENT

FOREIGN EMPLOYMENT INCOME: WHO HAS THE TAXING RIGHTS?

A COMPARATIVE STUDY ON TAX PROVISIONS IN RELATION TO FOREIGN EMPLOYMENT INCOME

Buhlebakhe Ngongoma

A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation)

Johannesburg, 2021

Abstract

The cross-border mobility of human capital has resulted in a situation where employees might be taxed by more than one tax jurisdiction. One tax jurisdiction might tax the employee based on residency and the other tax jurisdiction might tax based on source. This cross-border mobility could result in adverse impact on the tax base of a tax jurisdiction if there are no tax provisions dealing specifically with foreign employment income.

The predominant principle applied internationally by the Organisation for Economic Co-operation and Development (OECD) countries is that the source of foreign employment income is where the services are rendered and shall be taxed in the source country unless certain requirements are met.

This research report seeks to interrogate the concept of taxing rights in relation to the foreign employment income. A comparison between South Africa, Australia, and the United States of America's tax provisions in relation to the foreign employment income will be undertaken.

Key Words: foreign employment income, double taxation, double tax agreement, DTA, employee tax, foreign tax credits, tax treaties, section 6*quat*, exemptions, deductions

Declaration

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

Buhlebakhe Ngongoma

Acknowledgements

I would like to thank my supervisor Roy Blumenthal for the support and guidance during the completion of this research report.

TABLE OF CONTENT

Chapter 1: Introduction

A nexus between a tax jurisdiction and an individual is required for the tax jurisdiction to claim taxing rights on the income earned. This nexus could be obtained through either residency (ordinarily or through physical presence test) or source. In the case of foreign employment income, it is highly likely that more than one tax jurisdiction would tax the foreign employment income. One tax jurisdiction might tax the employee based on residency and other tax jurisdiction might tax based on source. Tax jurisdictions usually have relief mechanisms in their domestic tax provisions or through double taxation agreements aimed at eliminating double taxation of foreign employment income. (De Koker *et al*, 2019: 5-2)

Taxation is a legislated field through the Acts of legislative bodies which contain provisions that deal with taxation in its entirety and these provisions are legally binding (Thuronyi *et al*, 1996: 33). The Income Tax Act is an Act of Parliament of South Africa (SARS, 2018a), the Internal Revenue Code is an Act enacted by Congress which is the legislature of the federal government of the United States (IRS, 2021a) and the Income Tax Assessment Act is an Act of Parliament of Australia (Parliament of Australia, 2009). It is therefore imperative to understand how the judicial system works in each tax jurisdiction especially in the context of taxation. Taxation may result in disputes between the taxpayer and the tax authority. These disputes may be because of differences in the interpretation of certain legislative provisions (Botha, 2012: 5). It is therefore important to understand the interpretation of legislation approach adopted by each tax jurisdiction and in the context of this research report that would be South Africa, the United States and Australia.

South Africa has a 'residence-based tax system' which means that the South African residents are subjected to tax on their worldwide income (De Koker *et al*, 2019: 5-3). As a result, the foreign employment income would most likely be included in the taxpayer's gross income and may be exempted in terms of the section 10(1)(*o*)(ii) of the Income Tax Act if all the requirements of this exemption provision are met.

Foreign employment income was fully exempt from normal tax before 1 March 2020 if all the requirements of section 10(1)(*o*)(ii) of the Income Tax Act were met. From 1 March 2020, the exemption is limited to R1.25 million of foreign employment income (SARS, 2020a). South African residents who work abroad were concerned and confused by this amendment as it may significantly affect their tax positions (Geldenhuys, 2019). The South African Revenue Service (SARS) issued Interpretation Note No. 16: *Exemption from income tax: Foreign Employment Income* to clarify the amendment.

This amendment has exacerbated the possibility of double taxation and could potentially result in South African tax residents ceasing their tax residency to avoid double taxation or being taxed altogether (Rossouw, 2020). There are, however, relief mechanisms available, one of which is a rebate or credit as per section 6*quat*(1A) of the Income Tax Act. There may be challenges in applying the rebate provision in that it requires proof that tax was paid or payable in any sphere of government. Providing proof may in some instances be difficult for some taxpayers where the foreign government does not provide documentation that is satisfactory to SARS (Lobban, n.d.).

Internationally, the general rule is that foreign employment income is taxed in the country where the ‘services are rendered’ which would be in the source country (Madden and Moosa, 2018). The South African Income Tax Act does not define the term ‘source’, and this has resulted in courts being used to ascertain the meaning of the word source (Arnold, 2016: 22). In the case of *CIR v Lever Bros & Unilever* (1946), it was held that the source of interest was not the debt, but the source would be where the credit was supplied by the lender. In the *CIR v Epstein* (1954) case, it was held that when ‘business activities’ of a partnership are carried out in two different countries then the partnership income is ‘derived from two sources’.

As state above, this is a comparative study between South Africa, the United States and Australia. The residents of Australia are subjected to income tax on their worldwide income which include the foreign employment income in terms of the Income Tax Assessment Act 1936 read together with the Income Tax Assessment Act 1997. There are exemption and foreign income tax offset provisions that are aimed at eliminating double taxation, provided that certain requirements are met. (Australian Taxation Office, 2019)

The United States tax provisions are mainly based on citizenship instead of residency and this approach may exacerbate the double taxation conundrum as some citizens might be regarded as tax residents of foreign countries (IRS, 2020a). The United States has relief provisions in the form of foreign income exclusions, foreign tax deductions and foreign tax credits, provided that certain requirements are met (IRS, 2021).

The Statement of the Problem

This research report will examine the concept of taxing rights in relation to foreign employment income. Employees who work in foreign tax jurisdictions may find themselves being taxed by more than one tax jurisdiction except for residents of tax havens where there is no personal income tax.

Research questions

The main question is, which tax jurisdiction has the taxing rights on the foreign employment income earned by the residents of South Africa, the United States and Australia and how these approaches adopted by these countries compare to one another?

- The first sub-question seeks to examine the meaning of the key concepts used in the context of foreign employment income taxation. These concepts are namely, foreign employment income, citizenship, and resident. These concepts except for citizenship will be examined from a South African, the United States and Australian perspective. The citizenship will only be examined from a United States perspective since citizenship plays a monumental role in the United States tax provisions.

- The second sub-question seeks to examine the taxing rights approach by the Income Tax Act in relation to foreign employment income earned by South African residents. This question will also examine the reasons that underpin the amendment of section 10(1)(o)(ii) of the Income Tax Act to limit the exemption to R1.25 million.

- The third sub-question seeks to examine the tax provisions by the domestic tax legislation of Australia and the United States in relation to foreign employment income for the residents of the United States and Australia. These countries have been chosen because they are from different continents which would provide diverse international perspective. The United States was chosen specifically because of their approach to taxation of their citizens, where the citizens are subjected to the United States income tax on their worldwide income irrespective of where they reside (Weinstock, 2018).

This approach by the United States exacerbates the double taxation conundrum as some citizens might be regarded as tax residents of foreign countries.

- The fourth sub-question seeks to examine the taxing rights approach in relation to the foreign employment income earned by the residents of South Africa, the United States and Australia as per the Double Taxation Agreements (DTAs) held between South Africa and both the United States and Australia, and the DTA between Australia and the United States. The DTAs would generally contain a ‘tie-breaker’ clause which assists with the allocation of the taxing rights to a specific country (Steward, 2012).

- The fifth sub-question seeks to compare how South Africa’s approach to allocation of taxing rights from a domestic legislation, DTAs and where applicable judicial perspective in relation to employment income received by its residents is different or similar to the approach adopted by the United States and Australia. The comparison is aimed at identifying any inconsistencies in the approaches that may adversely affect or be favourable to South African, United States and Australian residents who earn foreign employment income.

Research Methodology

The research will be qualitative in nature. The research is a comparative study between South Africa, the United States and Australia’s tax provisions in relation to the foreign employment income. The primary source that will be used to formulate the arguments and the conclusion will be country specific tax legislation, case laws, journal articles and books.

The OECD material and the United States Model Income Tax Convention will be used together with the Double Taxation Agreements (DTAs) between South Africa and the United States and Australia to examine the approaches adopted to deal with foreign employment income.

Chapter Outline

Chapter 2 examines the key concepts in relation to the foreign employment income taxation by South Africa, the United States and Australia. These concepts are resident, citizenship and foreign employment income. The interpretation of legislation approaches by South Africa, the United States and Australia will also be examined. The citizenship will only be examined from a United States perspective since citizenship plays a monumental role in the United States tax provisions

Chapter 3 examines the tax provisions in relation to foreign employment income from a South African perspective. The legislative and judicial provisions will form part of the examination. The amendment of section 10(1)(*o*)(ii) of the Income Tax Act to limit the exemption amount will also be examined.

Chapter 4 examines the legislative and judicial approaches adopted by the United States and Australia. The United States and Australia are the countries chosen for this comparative study to provide an international perspective in relation to the taxation of foreign employment income.

Chapter 5 examines the foreign employment income provisions as per the DTAs between South Africa and both the United States and Australia, and between the United States and Australia. There are double taxation agreements that countries would sign in order to eliminate double taxation (SARS, 2021a).

Chapter 6 compares the approaches to allocation of taxing rights in relation to foreign employment income by South Africa, Australia, and the United States. The comparison is aimed at identifying any inconsistencies in the approaches that may adversely affect or be favourable to South African, the United States and Australian residents who earn foreign employment income.

Chapter 7 draws conclusions on how South Africa, the United States and Australia allocate the taxing rights in relation to foreign employment income. Conclusion will be drawn at a domestic legislation and DTA level.

Chapter 2: Examination of the key concepts in relation to foreign employment income taxation by South Africa, the United States and Australia

Taxation is a legislated field through the Acts of legislative bodies which contain provisions that deal with taxation in its entirety and these provisions are legally binding (Thuronyi *et al*, 1996: 33). The Income Tax Act is an Act of Parliament of South Africa (SARS, 2018a), the Internal Revenue Code is an Act enacted by Congress which is the legislature of the federal government of the United States (IRS, 2021a) and the Income Tax Assessment Act is an Act of Parliament of Australia (Parliament of Australia, 2009).The taxation disputes (between the taxpayer and the tax authority) would therefore, fall within the ambit of the legal fraternity, which means that judicial involvement may be necessary to resolve disputes between the parties involved (Botha, 2012: 5). The disputes between the taxpayer and the tax authority may generally arise as a result of, for an example, misinterpretation of a legislative provision, differences in the interpretation of the tax provisions or deliberate misstatement of facts by the taxpayer.

A question that one might ask is, what is special about the income tax legislation that merely reading its provisions is not sufficient in certain instances? The income tax legislation may be too technical for individuals without a legal background or the legislation may not be well drafted (Botha, 2012:7). This is demonstrated by the involvement of the judiciary in the interpretation of certain provisions of the income tax legislation as discussed below. As a result, understanding the approach adopted by the judiciary when interpreting the legislative provisions is of paramount importance especially in the context of taxation.

As mentioned above, taxation is a legislated field, logic dictates that a clear understanding of the legislative provision is a prerequisite for its application. A tax legislative provision may have key words that require a detailed analysis to discern what those key words mean (Botha, 2012:112). The specific terms that will be examined in this Chapter are resident in relation to a natural person and foreign employment income from a South African, the United States and Australian perspective as per the tax legislation of the respective countries and judicial interpretations where applicable. These terms are an integral part of this research report as they form the basis upon which the foreign employment income provisions of the Income

Tax Act for South Africa, Internal Revenue Code for the United States and the Income Tax Assessment Act for Australia are constructed.

The section below examines the interpretation of legislation approaches and the key words that are an integral part of this research report from a South African, the United States and Australian perspective.

2. 1 Interpretation of legislation

South Africa

In an ideal world, if an individual has an excellent command of the language used in the legislation and careful application of the text, there should then be no disputes pertaining to the interpretation of the legislative provisions (Botha, 2012:5). However, the interpretation of statutes requires more than an excellent command of the language used in the statute. The first challenge is the inherent difficulty of language, it may be difficult for a legislature to precisely capture what they intend to legislate in words (Botha, 2012:5). Other than the inherent difficulty of language, there are other factors that the interpreter would have to consider before arriving at the most plausible interpretation of the legislation (Botha, 2012:5). Botha (2012:7) lists numerous factors that need to be considered in interpreting the legislation. Interesting to note from the list of factors that the interpreter may need to consider, is the fact that the legislation might be poorly drafted, and the issue is not the necessarily the language itself.

In general, the ‘grammatical or ordinary meaning’ of the words of the legislative provision approach is adopted in the interpretation process unless it results in outcomes that are irrational (Roelofse and Heymann, 2018). Botha (2012:91) summarizes the approaches to interpretation of legislation into 2, namely, the ‘orthodox text-based approach’ and the ‘text-in-context approach’. These 2 approaches are examined in the section below.

Orthodox Text-based Approach

The orthodox text-based approach is in essence centred around the literal meaning of the legislative provision (Botha: 2012: 91). The outcome of this approach is that if the legislative provision is clearly defined, then it must be applied as stated in the legislation. As mentioned above, the interpretation of statute is a complex process as a result, the literal approach may, therefore not yield the results desired by the legislature. The results desired by the legislature may not be achieved if for example the literal meaning of the words is ‘ambiguous, vague, misleading’ or would result in irrational outcomes. (Botha: 2012: 91). In these instances, the courts may deviate from the literal meaning of the words to avoid the irrational outcome (Roelofse and Heymann, 2018). This approach is known as the ‘golden rule’ where the courts attempt to determine the legislature's objective (Botha: 2012: 91).

The above approach appears to be logical in a sense that the legislature would have conveyed their intended requirements in a written format. The challenge is, however, who determines that the legislative provisions are clear and unambiguous in a literal sense? This approach has a narrow focus on words, which perhaps, may assist in narrowing the interpretation enquiry as well, rather than focusing on what the legislature might have intended (Botha: 2012:91). This approach is arguably easier to follow as the focus is on what is written down rather than ascertaining what the legislature had in mind when drafting the legislative provision.

Text-in-context Approach

As mentioned above, the literal meaning of the words may be ‘ambiguous, vague, misleading’ or lead to irrational outcomes. The challenges with the literal approach have led the courts to deviate from the ‘strict literal approach’ and have attempted to determine the ‘intention of the legislature’ (Roelofse and Heymann, 2018). The text-in-context approach’s primary focus is the intention of the legislature, where the enquiry focuses on the purpose or the object of the legislation (Botha, 2012: 97). The intention of the legislature approach was ‘reformulated’ by the Supreme Court of Appeal (the SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) court case (Roelofse and Heymann, 2018). In this case, the Judge held that:

> A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules.

The challenge with what the judge said above is ‘the true intention of the of the draftsman of the rules’ statement. How does one ascertain a true intention of the lawmaker? The shift from the text to the ‘intention of the legislature or the draftsman’ introduces an element of subjectivity into the process of interpretation (Botha, 2012: 97). The subjectivity is introduced because the enquiry shifts to something that is not tangible, and it gets even more complex in instances where there are several parties involved in the drafting of the legislation. How does the ‘intention of the legislature or draftsman’ take into accounts the fact that several parties involved in the process of drafting the legislation may have different motives behind structuring the provisions the way that they decide? The Judge acknowledged this challenge and held:

> Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of Parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware.
> The sole benefit of expressions such as ‘the intention of the legislature’ or ‘the intention of the parties’ is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say.

It is noteworthy from the above, that the judges should not impose their own views on what would be more sensible but rather should ascribe meaning to the words used by others. The challenge with this though, is that who would ensure that the judges do not impose their own views especially where, appealing the judgment becomes expensive or impossible for whatever reasons? It appears that there could still be instances where the judgment is not entirely consistent with the ‘intention of the legislature or the draftsman’.

The question is, how do courts then decide on the correct interpretation in instances where there is more than one possible meaning? Judge Wallis JA in the *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) held that:

> In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike, or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

The above judgment emphasises the importance of context rather than examining the provisions in isolation. It may be important to utilize all the available resources in the interpretation process to ensure that best possible interpretation is applied. SARS issues Interpretation Notes ‘from time to time’ to provide guidance on specific statutory provisions and these may assist in the interpretation process (Strauss, 2018). It must be noted that Interpretation Notes are not legally binding, however may assist taxpayers to establish the SARS stance on certain statutory provisions (Strauss, 2018).

In conclusion, the interpretation process appears to be a complex process given the challenges discussed above which are, the language itself, the legislative provisions that are ambiguous vague and having to consider other factors outside the text itself. There is also a possibility of Judges imposing their own views instead of focusing on the text. These challenges do not, however, mean that the interpretation of statute process is an arbitrary one, there is a process that needs to be followed. The point of departure is the text itself and if it leads to absurdity, then other factors are considered for example, the context in which the text appears, the context of the legislation to determine the purpose of the provisions. The ‘doctrine of precedent’ dictates that a ‘legal principle’ laid down by the superior courts must be applied to similar cases that come before the same court or other courts (State Library, n.d.). As a result, it could be argued that it would be relatively easier to interpret a provision if the judiciary had provided an interpretation of the same or similar provision in the past.

The United States

The interpretation of statute process can be complex, and these complexities are due to the fact that the statutory provisions may be unclear or ambiguous The Writing Center, 2017:2). These complexities may result in multiple plausible interpretations. The challenge is then, how does an interpreter decide on the most plausible interpretation in light of all the challenges that are present during the interpretation process? There are tools that can aid in the interpretation of legislative provisions process (The Writing Center, 2017:2). There tools are, ‘the text of the statute; legal interpretation of statute; the context and the structure of the statute and the purpose of the statute’ (The Writing Center, 2017:2).

There are multiple statutory interpretation approaches that are used; however, they fall broadly into two types of canons, namely language or linguistic and substantive canons of construction (EveryCRSReport, 2014). Given the complexities in the interpretation of statutory provisions, then the question is, how do courts decide on the more accurate interpretation? EveryCRSReport (2014) argues that, where possible, the courts will read the legislation as a whole, which means that individual parts of the legislation will be considered in connection with the rest of the legislation rather than being read in isolation. The section below examines the two broad canons of construction.

Language or Linguistic Canons

The language or linguistic canons are primarily focused on the general linguistic principles to discern the meaning of the legislative provision. These canons consider certain factors in arriving at the preferred interpretation. These factors are ‘ordinary or specialised meaning of the word, word’s context in the statue, the usage of similar words in the statue and the statue’s structure’. The focus is not on the intention of the legislature. These canons appear to be straightforward in term of their application, however, there may be challenges in instances where the legislative provision is not clear or ambiguous. (EveryCRSReport, 2014)

In the Supreme Court of United States case *Sebelius v. Cloer* (2013), the Judge held that ‘if the language of the statute is plain and unambiguous, it must be applied according to its terms’. The challenge with this judgment may be, determining what is considered plain and unambiguous. What one considers plain and unambiguous may not necessarily be the case with the next person especially if there are driven by different motives[1]. This approach narrows the interpretation enquiry to text instead of the intention of the legislature (EveryCRSReport, 2014). The question is, can the legislature clearly articulate their intention on a piece of paper? This appears to be a difficult task especially if there are multiple parties involved in drafting the legislative provisions (EveryCRSReport, 2014).

Substantive Canons

As stated above, the statutory provisions may be unclear or ambiguous and the question then becomes, how do interpreters then discern the meaning of a statutory provision? There are other canons of constructions that can be used in the statutory interpretation. These canons are substantive canons which are largely based on the ‘intention of the legislature’ to ascertain the meaning of the legislative provision (EveryCRSReport, 2014). The legislative body in the United States is the United States Congress which is made up of the House of Representatives and the Senate (The White House, n.d.). With these canons, the enquiry is about what the United States Congress clearly intended to legislate through the statutory provision. The challenge with the substantive canons is that the intention of the Congress

---

[1] For example, the taxpayer may want to pay less tax and tries to find loopholes while the tax authority may want to tax more.

must be ascertained, and this can be a mammoth task. Ascertaining the intention of Congress can be a subjective process as it is not based on something tangible like a written provision. (EveryCRSReport, 2014)

In the interpretation of statutory provisions, it appears that it is important to utilise all the resources that are available to assist in the interpretation process. The Internal Revenue Service (IRS) issues instructions and publication notes to assist the taxpayers with certain Internal Revenue Code provisions. However, Wood (2015) argues that these instructions and publication notes are not part of the Internal Revenue Code and courts usually reject them. Wood (2015) provides a list of cases where the taxpayers had relied on the instructions issued by the IRS and the taxpayer lost the court case. The question is then, why does IRS or the United States Department of the Treasury not update the Internal Revenue Code to be clear on the provisions that requires instructions or publication notes? The issue may be that it is difficult to capture what an individual intends in words (Botha, 2012: 5).

In conclusion, the interpretation of legislation can be quite complex, requiring that more factors are considered to ascertain the meaning of the legislative provisions. The starting point appears to be the text itself then the other factors may be considered if the literal interpretation does not yield the desired outcomes. The 'doctrine of precedent' dictates that a 'legal principle' laid down by the superior courts must be applied to similar cases that come before the same court or other courts (State Library, n.d.). As a result, it could be argued that it would be relatively easier to interpret a provision if the judiciary had provided an interpretation of the same or similar provision in the past.

Australia

The basic principles of interpretation involve the consideration of the 'text, the context and purpose' of the statute. The interpretation of the enacted statutory provisions must be consistent with the promotion of the 'basic civil and human rights'. The focus is on ensuring that the interpretation applied must consider not only the 'intrinsic aids' (the legislative text), however must consider the broader context in which the legislative provision exist (Kirby, 2011).

There are broadly 2 approaches to interpretation of the legislation in Australia, namely, literal interpretation approach and 'purposive' interpretation approach. These approaches are different in that the literal approach focuses primarily on the meaning of the words to ascribe meaning to the legislative provision while the latter examines the meaning of the words in a broader context in which the legislative provision exists. (Krever and Mellor, 2014: 28)

Literal Interpretation Approach

The literal interpretation approach focuses primarily on the words used in the legislative provision to attribute meaning of the legislative provision. Words are largely examined in isolation without taking into account what the legislature intended. It could be argued that this approach is often used by taxpayers who are trying to avoid tax liability on the basis that the words used in the legislative provision do not apply to their situation. As a result, the literal interpretation is 'often associated with successful tax avoidance arrangements'. (Krever and Mellor 2014: 28)

The above approach appears to be logical in a sense that the legislature would have conveyed their intended requirements in a written format. This approach has a narrow focus on words, which perhaps, may assist in narrowing the interpretation enquiry as well as focusing on what the legislator might have intended. The challenge with this approach is that it may be difficult for the legislature to clearly articulate their intentions in writing, therefore using this approach may result in interpretation that is inconsistent with the intentions of the legislature.

Purposive Interpretation Approach

The primary focus of the purposive approach is to 'give effect to the intent of the legislature in enacting' the legislative provisions (Krever and Mellor 2014: 28). This approach looks at the reasons why the legislature came up the legislative provision rather than merely reading the text and attributing meaning to the legislative provision (Krever and Mellor 2014). In the High Court of Australia, the case of *Singh v The Commonwealth* (2004), the Judge held that:

> …references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words "intention", "contemplation", "purpose" and "design" are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.

Noteworthy from the above judgment is that, text is key in determining the intention of the legislature and that, objectivity of the words; ‘intention’, ‘contemplation’, ‘purpose’ and ‘design’ must not be overlooked. This is important because there is a possibility that the interpretation may deviate from the true intention of the legislature if the enquiry does not give the text the importance that it deserves.

It is also important to use external aids as well to assist in the interpretation of statute process. The Australian Taxation Office issues guidance and rulings (public and private) which provide clarity on how specific tax provisions are too be interpreted. Some of the rulings are binding and some are not (University of Melbourne, 2021). It would then be important to examine the rulings and the guidance over and above the legislative provision.

In conclusion, the process of interpreting legislation appears to be complex and may arguably be lengthy if one looks at the factors that need to be considered as per the judgment in the *Singh v The Commonwealth* (2004) above. It also appears that the point of departure would be the text itself and then all the other related or surrounding issues must be considered. The ‘doctrine of precedent’ dictates that a ‘legal principle’ laid down by the superior courts must be applied to similar cases that come before the same court or other courts (State Library, n.d.). As a result, it could be argued that it would be relatively easier to interpret a provision if the judiciary had provided an interpretation of the same or similar provision in the past.

2. 2 The Key Concept of ‘Resident’

In order for the tax jurisdiction to claim taxing rights on the income earned by an individual, there must be a connection between the tax jurisdiction and the individual. That nexus could be achieved through residency of the individual receiving the income or source of the income being within the tax jurisdiction in question (De Koker *et al*, 2019: 5-2).

As mentioned in the interpretation of legislation section above, the point of departure into the interpretation enquiry is to understand the text itself, in this case that would be the definition of the term resident as per the Income Tax Act for South Africa, the Internal Revenue Code for the United States and the Income Tax Assessment Act for Australia. The judicial judgments in relation to the term resident will be examined where applicable. Also, the guidance, Interpretation Notes, and tax rulings will be examined to ascertain the stance taken by the tax authorities on the term resident.

It is also worth noting that the DTAs would need to be considered as they would generally allocate residency to a specific tax jurisdiction which would make the residency enquiry relatively easier. The provisions of the DTAs[2] in relation to allocation of residency and allocation of taxing rights in relation to foreign employment income will be examined in Chapter 5.

South Africa

In South Africa a natural person can be a resident in two ways namely, 'ordinarily resident' and through the 'physical presence test' (SARS, 2020b). The term resident for a natural person is defined in section 1(1) paragraph (*a*) of the Income Tax Act as follows:

> (i) Ordinarily resident in the Republic;
> (ii) not at any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic –
>
> (aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment; and
> (bb) for a period or periods exceeding 915 days in aggregate during those five years of assessment,
>
> (A)…
> (B)…
>
> (*b*)….
>
> but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation:…

It is noteworthy from the definition above that the term 'ordinarily resident' is not defined further in the Income Tax Act (De Koker *et al,* 2019: 5-6). What is the next step in determining the meaning of the term 'ordinarily resident' if the primary legislation does not define it? SARS issues Interpretation Notes 'from time to time' to provide guidelines on certain statutory provisions; however, it is worth noting that Interpretation Notes are not legally binding (Strauss, 2018).

[2] Only DTAs between South African and the United States and Australia and the DTA between the United States and Australia will be examined.

Although the Interpretation Notes are not legally binding, they may however, provide a persuasive explanation in relation to the matter in question (Strauss, 2018). Interesting to note, is the Supreme Court of Appeal judgment in the case *SARS v Marshall* (2016) where the judge held that:

> These interpretation notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question.

Therefore, the next logical step would be to find out if there is an Interpretation Note that deals with the matter at hand, which in this case is ordinarily resident. SARS issued Interpretation Note No. 3: *Resident: Definition in relation to a natural person – ordinarily resident* to provide more details on the term 'ordinarily resident'. The Interpretation Note argues that the enquiry into whether an individual is 'ordinarily resident' in the Republic is based on facts surrounding the individual and must be considered on a case by case basis. Section 4.2 of the Interpretation Note lists factors that would need to be considered in the ordinarily resident in the Republic enquiry for a natural person. The list of factors that must be considered is quite extensive and appears to be aimed at establishing the tax jurisdiction where the individual has the strongest connection. The process of determining residency can be a mammoth one if one looks at the factors that must be considered in order to ascertain residency for tax purposes.

The definition of resident above also states that an individual will qualify as a resident if the individual meets the physical presence test. It can then be argued that an individual cannot simultaneously be a resident through being ordinarily resident and through physical presence test. It is noteworthy that the 5 years mentioned above must be consecutive, this means that the individual must maintain physical contact with the Republic during that period (De Koker *et al*, 2019: 5-7). It is also worth noting that the resident who qualifies through the 'physical presence test', is not a resident from the day the individual leaves the Republic if they are 'outside the Republic for at least 330 full days' (SARS, 2018).

SARS also issued Interpretation Note No. 4: *Resident: Definition in relation to a natural person -physical presence test,* to explain the requirements for a natural person to qualify as a resident for tax purposes. This Interpretation Note explains in detail the technicalities around the physical presence test. Noteworthy also, is that a natural person who is deemed to be 'exclusively' a resident of another country as per the DTA is not a resident of the Republic.

The DTA may arguably make the resident enquiry easier as the residency will be allocated to one country instead of the going through the extensive enquiry, DTA provisions will be discussed in chapter 5 below.

It is also important to examine the judicial judgments in relation to resident since the ‘doctrine of precedent’ dictates that a ‘legal principle’ laid down by the superior courts must be applied to similar cases that come before the same court or other courts (State Library, n.d.). In the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) case, *Cohen v CIR* (1946) the judge held that:

> 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. But his ordinarily 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 would be described more aptly than other countries as his real home. If this suggested meaning were given to "ordinarily" it would not, I think, be logically permissible to hold that a person could be "ordinarily resident" in more than one country at the same time.

Noteworthy from the judgment above is that there would be a country with which an individual has the strongest connection, this strongest connection would be based on the surrounding personal factors. The determination of this strongest connection may be a mammoth task especially if an individual has homes in both countries.

In another Appellate Division of the Supreme Court (now the Supreme Court of Appeal) case, *CIR v Kuttel* (1992), the judge held that:

> a person is "ordinarily resident" where he has his usual or principal residence, that is, what may be described as his real home

There is consistency in the 2 Supreme Court of Appeal judgments above where the enquiry into allocation of residency must involve the determination of an individual’s real home.

In conclusion, the enquiry into the allocation of residency is not clear-cut in instances where there is more than one country involved. It appears that it would be easier to determine one’s residence for tax purposes if the individual was born in the Republic and has been in the Republic their entire life even if they leave the Republic for vacations and come back. In the context of foreign employment income, the taxpayer would obviously be in more than one country, physical presence may trigger tax residency in another country. Testing whether an individual is an ordinarily resident may be a complex process while the physical presence test appears to be straightforward as it is either an individual was in the country or not. Essentially both tests are trying to establish a country with which an individual has the strongest connection, and this is done through examining the specific factors surrounding the individual.

The United States

There are two concepts that are important when dealing with the concept of residence for tax purposes from a United States' perspective. These concepts are citizen and resident alien. Citizen is defined by the Fourteenth Amendment to the United States constitution as follows (National Constitution Center, n.d.):

> all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.

The above definition is arguably straightforward in a sense that it is relatively easy to determine whether a person was born or naturalized in the United States or not, because documentation from the relevant authorities would generally be there to provide proof. Resident Alien for tax purposes is defined as follows (IRS, 2020c):

> an individual who meet either the green card test or the substantial presence test for the calendar year.

The reason that these 2 concepts are important is that they are treated the same from a tax perspective (IRS, 2020c). This means that the United States taxing rights claim may be based on the fact that the natural person is a citizen of the United States, regardless of where they reside or the taxing rights claim may be based on the fact that the natural person is a resident alien of the United States (Weinstock, 2018).It is worth noting that the United States is one of the few countries that has a 'citizenship-based tax system' (Christians, 2017: 202).

There are different ways that an individual can obtain the United States citizenship. Amongst others are if a natural person was born in the United States; through 'naturalisation' if certain requirements are met and through acquisition where parents are already United States citizens. All these requirements are essentially establishing whether there is a bond between the individual and the United States. (U.S. Citizenship and Migration Services, 2020)

While citizenship appears to be straightforward as per the above, the United States experienced difficulties in determining the residence of aliens for tax purposes, these difficulties were evident from both ‘conflicting case laws and piecemeal legislation’. The complexities involved in the determination of the alien’s residency resulted in uncertainty when dealing with matters of residency. These difficulties were experienced until 1984 where section 7701(b) of the Internal Revenue Code was enacted. (Kroll, 1985)

Kroll (1985) argues that the enactment of section 7701(b) of the Internal Revenue Code was a response to the difficulties that were experienced in dealing with the matters of residency, and this enactment was not necessarily an advancement in legislative drafting. One might ask, what is the significance of the fact that the enactment of section 7701(b) of the Internal Revenue Code was reactionary? Kroll (1985) argues that the significance of highlighting the fact that this legislative provision was reactionary is that reactionary legislative definitions are primarily focused on providing certainty while foregoing fairness.

Section 7701(b) of the Internal Revenue Code employs a ‘two-pronged approach’ to defining the term residence (Kroll, 1985). These are:

- The first prong addresses those whose intent to reside in the United States establishes the necessary contacts to impose taxation without engaging in the extended factual inquiry required under the Regulations.
- The second part of the test covers those individuals who make no statement concerning their intent to reside in the United States, but nevertheless take advantage of the benefits of living in this country.

Important to note from the above is that the concept of residence enquiry is a factual one and the basic enquiry hinges on the intent of an individual. Section 7701(b) of the Internal Revenue Code defines ‘resident alien’ as follows:

> An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):
> (i) **Lawfully admitted for permanent residence**
> Such individual is a lawful permanent resident of the United States at any time during such calendar year.
> (ii) **Substantial presence test**
> Such individual meets the substantial presence test of paragraph (3).
> (iii) **First year election**
> Such individual makes the election provided in paragraph (4).

The enquiry as to whether an individual is “lawfully admitted for permanent residence” can be ascertained through the examination of the relevant documentation issued in accordance with the immigration laws (U.S. Citizenship and Immigration Services, 2021). The substantial presence test requirements are detailed in section 7701(b)(3) of the Internal Revenue Code and they are primarily focused on the physical presence of an individual.

The first-year election is generally applicable to (IRS, 2020f):

> Non-resident alien individuals who arrive in the U.S. after the midway-point of the tax year and do not obtain a green card in that year but do qualify as a resident alien in the following year under the Substantial Presence Test.

The above individuals may elect to be treated as residents in the first year that they arrived in the United States. The election essentially allows the alien to 'backdate' the start date of their United States residency to the year they arrived and one of the implications of the election is that the resident alien will not be eligible for the United States tax benefits under any DTA (IRS, 2020f).

Noteworthy from the above requirements is that they appear to be objective in a sense that it relatively easy to prove whether or not someone was 'lawfully admitted' for permanent residence in the United States and also whether they were physically present in the United States or not. It is also important to note that the aliens can make an election to be treated as residents for tax purposes in the year that they arrived in the United States if certain requirements are met.

In conclusion, the United States has two concepts that are important in determining an individual's 'residence' status for tax purposes. The resident for tax purposes would be a United States citizen or a resident alien as defined above (Weinstock, 2018). The tax residence from a United States perspective is complicated by the fact that it takes into account the United States citizens who might be regarded as residents for tax purposes of foreign countries. This situation exacerbates the double taxation conundrum before consideration of any relief mechanism that might be available.

Australia

The residents of Australia are subjected to income tax on their worldwide income which means that the source of the income does not matter in determining whether the income will be included in their income tax calculations (Australian Taxation Office, 2019). The legislative provision would be a sensible starting point to discern the meaning of the word 'resident' for tax purposes. The word 'resident' is defined in section 6 of the Income Tax Assessment Act 1936 as follows:

> (a) a person, other than a company, who resides in Australia and includes a person:
>
> > (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;
> > (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or
> > (iii) who is:
> >
> > > (A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or
> > > (B) an eligible employee for the purposes of the *Superannuation Act 1976*; or
> > > (C) the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B);

Interesting to note from the above requirements to qualify as a resident of Australia is that these requirements hinges mainly on the Commissioner being satisfied on whether the individual's place of above is in Australia or not. The inclusion of the Commissioner 'clause' result in the requirements being broad in a sense that each case would have to be decided upon individually as the Commissioner may arguably not be predicted.

Also, noteworthy from the above requirements is the term 'reside' in Australia. What does the word 'reside' mean? The Income Tax Assessment 1936 read together with the Income Tax Assessment Act 1997 do not define the word reside (Australian Taxation Office, 2020d). The High Court of Justice had to define what the word "reside" mean in the case of *Levene v IRC* (1928), the judge held that:

> …….and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." ... In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

From the judgment above, it should essentially not be difficult to determine which country an individual has stronger ties or connection with even though there may leave their place from time to time for specific purposes. The above assertion is arguable, especially in instances where the individual has homes in both countries, how would residence be determined objectively?

In another court case *Cesna Sulphur Co Ltd v Nicholson* (1876), it was held that:

> There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives.

The above judgment argues that it should not be difficult to determine individual's residence as it should be where 'he sleeps and lives', this is consistent with the previous judgment in *Levene v IRC* (1928) case above. The challenge with this assertion is again, what happens if the individual 'lives and sleeps' in more than one country?

The Australian Taxation Office (ATO) issued a Tax Ruling TR 98/17 to clarify the meaning of residence. There are two primary factors to be considered when determining the residence of an individual, these factors are the 'quality and the character of the individual's behaviour while in Australia and their period of physical presence in Australia' (Taxation Ruling TR 98/17, 1998). These two factors to be considered appear to be too broad and would require careful attention to the details surrounding a taxpayer.

Taxation Ruling TR 98/17 (1998) further states that the word 'reside' is not defined in the Income Tax Assessment Act and therefore the 'ordinary meaning' of the word must be applied. The taxation ruling also argues that, the dictionary definition of the word 'reside' is broad enough to include an individual who comes to Australia to live permanently and an individual who lives in Australia for a substantial amount of time.

In conclusion, the requirements above are essentially trying to establish the country with which an individual has the strongest ties or connection. The resident for tax purpose would be an individual who is domiciled in Australia or meets the physical presence test. There are challenges with the process of determining whether an individual is an Australian tax resident in that, factual enquiries need to be undertaken to understand individual's specific circumstances.

2.3 The Key Concept of 'Foreign Employment Income'

South Africa

The starting point for ascertaining the definition of a legislative provision is the legislation itself, in this case the Income Tax Act as discussed in interpretation section above. The term foreign employment income is not explicitly defined in the Income Tax Act, however there are terms and words that can be used to define foreign employment income. The words in the term foreign employment income will be defined separately and then the argument on what foreign employment income mean for the purposes of this report will be provided.

The first word to define is foreign, what is considered foreign from a South African perspective? The Income Tax Act does not define the word foreign, however it does define the word Republic as follows;

> Republic means the Republic of South Africa and, where used in the geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea which has been or may be designated, under the internal law and the laws of South Africa, as areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources.

It appears that it would be relatively easy to determine the South African geographical area since there are specific laws that deal with country borders. This research report will not delve into the technicalities of determining the territories. It is argued that Republic would be an area that is within the borders of the Republic of South Africa.

Now that the first word 'foreign' has been defined, the next word to define is employment. The starting point would be to look at the legislation for the definition of the word employment. The main body of the Income Tax Act in section 1 does not define the word employment, the next step would be to look elsewhere within the Income Tax Act. The Fourth Schedule of the Income Tax Act deals with employees' tax; however, it does not explicitly define the word employment. The Fourth Schedule of the Income Tax Act has, however, words that could be used to articulate what employment means for the purposes of this research report. These words are employee, employer, and remuneration. The section below will examine the definition of these terms.

Employee

The Fourth Schedule of the Income Tax Act defines the word employee and the key word from the definition of an employee is that there the person must receive a remuneration. The inclusion of remuneration requirement narrows the scope of 'any person' in the definition. Noteworthy from the definition is that it includes the labour brokers and personal service providers.

It is important to also note that South African Revenue Service (SARS) issues Interpretation Notes ‘from time to time’ to provide guidelines on certain statutory provisions; however, Interpretation Notes are not legally binding (Strauss, 2018). Interpretation Note No. 16: *Exemption from income tax: foreign employment income* was issued by SARS to clarify the exemption in relation to employment income. This Interpretation Note defines the word ‘employee’, however the definition is slightly different from the definition as per the Fourth Schedule of the Income Tax Act definition as it excludes independent contractors and or self-employed individuals. The Interpretation Note specifically states that the definition as per the Fourth Schedule of the Income Tax Act is not applicable in the foreign employment scenario.

As stated above, Interpretation Notes are not legally binding, however they provide persuasive explanations for specific provisions of the Income Tax Act (Strauss, 2018). Can an independent contractor choose to use the definition in the Fourth Schedule and claim the section 10(1)(*o*)(ii) of the Income Tax Act foreign employment income exemption, on the basis that the Income Tax Act does specifically exclude independent contractors? The challenge here might be that the Fourth Schedule definition is not in the main body of the Income Tax Act and the definition in the schedule may only be used within the context of this schedule. It is also worth noting that the Interpretation Note states that the word employee must be given its ‘ordinary meaning’ since it is not defined in the main body of the Income Tax Act.

The definition of an employee above states that a person must receive remuneration. The Fourth Schedule of the Income Tax Act defines remuneration as follows:

> "remuneration" means any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered….

Noteworthy from the above definition is that the nature of the amount stated above does not necessarily have to be received for services rendered. Why else would an individual receive a salary, leave pay, overtime etc. if that was not for service rendered? The Interpretation Note No. 16: *Exemption from income tax: foreign employment income* defines the term remuneration and again states that the definition in the Fourth Schedule is not applicable for purposes of the foreign employment income exemption. The key differences between the

Interpretation Note and the Fourth Schedule definition is that the Fourth Schedule states that the amount received does not necessarily have to be for services rendered while the Interpretation Note specifically states that the amount must be paid or payable for services rendered.

Another question that one may ask is, can an employer pay an employee an amount that is not considered remuneration as defined? If for example, an employer pays an employee an amount (not of capital nature), however, does not label it as any of the terms used in the definition of remuneration as per the Fourth Schedule of the Income Tax Act and the Interpretation Note No. 16: *Exemption from income tax: foreign employment income.* The concept 'of capital nature' is discussed in Chapter 3 below. The taxpayer or the employer might struggle with proving that the amount paid in the context of an employment relationship is not remuneration because the nature of the relationship necessitates exchange of employment related payments.

Another word that is important in the context of employment is the word 'employer' which is defined in the Fourth Schedule of the Income Tax Act as follows:

> "employer" means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council;

Noteworthy from the above definition is that the employer must be a 'person who pays or liable to any person by way of remuneration'. The above definition is broad and therefore it would be difficult for any person to claim that they are not an employer if all other requirements are met.

The last word to be defined is 'income' which has also been mentioned in the definition of remuneration above. Section 1 of the Income Tax Act defines the word income as follows:

> "income" means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II;

From the above definition, remuneration would have to qualify as gross income first which is defined in Section 1(1) of the Income Tax Act as follows:

> "gross income", in relation to any year or period of assessment, means –
> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,
> during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder….

The above definitions (employee, remuneration and employer) are based on the general Income Tax Act provision and are not necessarily in the context of foreign employment income exemption. The foreign employment income exemption, section 10(1)(*o*)(ii) of the Income Tax Act does provide a list of amounts to which the exemption applies. The argument is that, the fact that remuneration does not qualify for an exemption does not necessarily mean that it is no longer a foreign employment income.

The examination of the terms in the Fourth Schedule of the Income Tax Act as mentioned above and examination of the Interpretation Note No. 16: *Exemption from income tax: Foreign Employment Income* led to the conclusion that foreign employment income would be remuneration as defined in the Fourth Schedule of the Income Tax Act received by any person for services rendered outside the Republic.

The United States

The starting point is the examination of the legislative provisions, in this case the Internal Revenue Code which contains the tax provisions, to ascertain the meaning of the term foreign employment income. Section 911(b)(1)(A) of the Internal Revenue Code defines the term foreign earned income as follows:

> The term ‘‘foreign earned income’’ with respect to any individual means the amount received by such individual from sources within a foreign country or countries which constitute earned income attributable to services performed by such individual during the period described in subparagraph (A) or (B) of subsection (d)(1), whichever is applicable.

The definition above is broad in a sense that it does not only refer to employment income. It could therefore be argued that employment income is included in the above definition. Noteworthy from the above definition is that the service must be performed during the period described in subparagraph (A) or (B) of subsection (d)(1) of the Internal Revenue Code. The referenced subparagraph (A) or (B) talks about qualified individuals. It is also noteworthy that there's no explicitly direct link between the above provision and the subparagraph that is being referenced from how it is written. Section 911(b)(1)(A) of the Internal Revenue Code above should have at least made mention of a 'qualified individual' somewhere to make it easy for someone to follow, the referenced subparagraph states the below:

> (1) Qualified individual
> The term ''qualified individual'' means an individual whose tax home is in a foreign country and who is—
>
> > (A) a citizen of the United States and establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or
> > (B) a citizen or resident of the United States and who, during any period of 12 consecutive months is present in a foreign country or countries during at least 330 full days in such period.

The above mentions the term 'tax home' and IRS (2020d) defines a tax home as follows:

> A tax home is the general area of a taxpayer's main place of business, employment, or post of duty, regardless of where they maintain their family home. A tax home is the place where the taxpayer is permanently or indefinitely engaged to work as an employee or self-employed individual

The above provision essentially states that 'foreign earned income' is an amount that a citizen or resident receives for services rendered in a foreign country or countries. The foreign earned income definition states that the amount received must constitute earned income. Therefore, the definition of earned income will be examined. Section 911(d)(2) of the Internal Revenue Code defines earned income as follows:

> The term ''earned income'' means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered.

The foreign earned income definition states that amount received must be attributable to services performed in a foreign country. It is, therefore, important to establish the meaning of the term 'foreign country'. IRS (2020d) defines foreign country as follows:

> A foreign country usually is any territory (including the air space and territorial waters) under the sovereignty of a government other than that of the United States.

Generally, the tax legislation would have specific exclusions in certain provisions, the exclusion assists with determination of the ambits of the legislative provision. The Internal Revenue Code has specific exclusions in relation to foreign earned income. Section 911(b)(1)(B) of the Internal Revenue Code states the exclusions as follows:

> (B) Certain amounts not included in foreign earned income
> The foreign earned income for an individual shall not include amounts—
>
> (i) received as a pension or annuity,
> (ii) paid by the United States or an agency thereof to an employee of the United States or an agency thereof,
> (iii) included in gross income by reason of section 402(b) (relating to taxability of beneficiary of non-exempt trust) or section 403(c) (relating to taxability of beneficiary under a nonqualified annuity), or
> (iv) received after the close of the taxable year following the taxable year in which the services to which the amounts are attributable are performed.

In conclusion, foreign employment income from a United States perspective is arguably foreign earned income as defined above, received by a resident alien or a United States citizen from a source outside the United States. There are specific exclusions that must be taken into account in the determination of foreign earned income.

Australia

To define foreign employment income, the starting point would be to look at the legislative provision which in this case is the Income Tax Assessment Act 1936 read together with the Income Tax Assessment Act 1997. The term foreign employment income is not a term defined explicitly in the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997. There are terms within the Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997 that will be examined, and the argument put forward on what is considered foreign employment income from an Australian perspective.

The starting point is to understand broadly, the nature of the income that is taxed in relation to a natural person from an Australian perspective. Then narrow the focus to the foreign employment income. Section 6-5 of the Income Tax Assessment Act 1997 states that:

> 1) Your *assessable income* includes income according to ordinary concepts, which is called *ordinary income*.
> 2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

The provisions above do not necessarily define ‘ordinary income’, the next step is to ascertain the meaning of the term ordinary income. The Income Tax Assessment Act 1997 does not define the term ordinary income. The judiciary provides guidance on what is considered income in the Supreme Court of Appeal case *Scott v. Commissioner of Taxation* (1935) where it was held that:

> The word “income” is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable amount of such receipts: A.-G. for British Columbia v. Ostrum ([1904] AC 144 at 147); Lambe v. Inland Revenue Commissioners ([1934] 1 KB 178 at 182-3).

From the above judgment the word income may be given its ‘ordinary meaning’ and the Oxford dictionary defines ‘income’ as:

> the money that a person, a region, a country, etc. earns from work, from investing money, from business, etc.

The next step would be to determine what is considered employment income. Section 15-2(1) of the Income Tax Assessment Act 1997 provides the items included in respect of employment or services. These items include:

> Your assessable income includes the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums *provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you (including any service as a member of the Defense Force).

The above provisions have defined what is considered income and employment income. The next step would be to define what is then considered foreign employment income. Section 23AG(7) of the Income Tax Assessment 1936 defines the term foreign income as follows:

> ***foreign earnings*** mean income consisting of earnings, salary, wages, commission, bonuses or allowances, or of amounts included in a person’s assessable income under Division 83A of the *Income Tax Assessment Act 1997* (about employee share schemes),
>
> ***foreign service*** means service in a foreign country as the holder of an office or in the capacity of an employee.

The foreign earnings definition does not explicitly refer to a foreign country or overseas, however, the definition of foreign service does refer to a foreign country. Australian Tax Office (2020) defines foreign employment income as follows:

> Foreign employment income is income earned by an Australian resident working overseas as an employee. It includes salary, wages, commissions, bonuses and allowances. It may be paid by an overseas or an Australian employer

The judiciary may also intervene to ascribe meaning to certain terms used in the legislation. In the Federal Court case *Lopez v Deputy Commissioner of Taxation* (2005) the judge had to deliver judgment on whether "Consultancy and Management Fee" constituted foreign earnings as defined in section 23AG of the Income Tax Assessment Act 1936. It was held that:

> … where the expression "engaged in the performance of personal services" is expressly defined to include both services performed in the capacity of an employee and services performed under a contract for personal services, the word "earnings" is not used as a descriptor of income derived by a person engaged in the performance of personal services in the capacity of an employee.

The judgment above highlights that the personal services providers' earnings are also included with the definition of foreign earnings. The significance of the above judgement is that it provides clarity in dealing with personal service providers as in some instances personal service providers may not be considered employees for tax purposes (Australian Taxation Office, 2019a).

In conclusion, foreign employment income from an Australian perspective is arguably foreign earnings as defined above with key elements being that it must relate to foreign services and must be received by a resident of Australia.

Chapter 3: South African tax provisions in relation to foreign employment income

South African residents are subjected to tax on their worldwide income. This means that in order for this provision to apply, an individual must first be a resident of South Africa. The importance of establishing residency is that, it creates the nexus between the South African tax jurisdiction and the resident which ultimately connect the South African tax jurisdiction to the receipt or accrual. (De Koker *et al*, 2019: 5-2)

The primary question in this Chapter is, where does South African Revenue Service (SARS) allocate the taxing rights in relation to foreign employment income earned by the residents of South Africa? The word foreign in the term foreign employment income means that there might be one or more tax jurisdictions that may claim taxing rights over the employment income. SARS might claim the taxing rights based on residency of the taxpayer and the foreign tax jurisdictions might claim the taxing rights based on the source of employment income (De Koker *et al,* 2019: 5-3). This Chapter will examine the legislative provisions as per the Income Tax Act, guidance provided by SARS in the form of Interpretation Notes and the judicial interventions in relation to foreign employment income.

3.1 Legislative Provisions - Income Tax Act and SARS Guidance

The point of departure in determining the taxable income for a taxpayer is determining what is gross income, and the question is, is foreign employment income gross income as defined? Section 1(1) of the Income Tax Act defines gross income as follows:

> "gross income", in relation to any year or period of assessment, means –
> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,
> during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder….

Important to note from the above definition is that, it is quite wide in that it captures all forms of payments as long as they are not of capital nature. The next question is, is the foreign employment income of capital nature? The Income Tax Act does not define what is considered a receipt or accrual 'of capital nature' (De Koker *et al,* 2019: 3-3). However, if an amount is received for the ‘right of use of the asset without the change in ownership’, then that amount could be regarded as not being of capital nature (De Koker *et al,* 2019: 3-3) .

Based on the above, it could therefore be argued that foreign employment income is not of a capital nature because a person (an employee in this case) would allow the employer to utilise their service as per contractual agreement, however, there would be no change of ownership of the employee. The foreign employment income would then be included in the South African resident’s gross income.

The nature of foreign employment income is that there would be more than one tax jurisdiction that is involved, which present a double taxation opportunity. South Africa has relief mechanisms both unilateral and through the DTAs. The DTA provisions in relation to foreign employment income are discussed in Chapter 5 below. The unilateral relief mechanisms are rebates, deductions, and exemptions. These relief mechanisms are aimed at eliminating double taxation where the taxpayer is taxed in South Africa and in the foreign tax jurisdiction. (SARS, 2020a)

Exemption

The nature of an exemption is that the foreign employment income will not be taxed if certain requirements are met. Section 10(1)(*o*)(ii) of the Income Tax Act provides an exemption of foreign employment income if the following requirements are met:

> (ii) to the extent to which that remuneration does not exceed R1,25 million in respect of a year of assessment and is received by or accrues to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in section 8, 8B or 8C, in respect of services rendered outside the Republic by that employee for or on behalf of any employer, if that employee was outside the Republic –
>
> (aa)
>
> (a) for a period or periods exceeding 183 full days in aggregate during any period of 12 months; or
> (b) for a period or periods exceeding 117 full days in aggregate during any period of 12 months in respect of any year of assessment ending on or after 29 February 2020 but on or before 28 February 2021; and
>
> (bb) for a continuous period exceeding 60 full days during that period of 12 months,

Important to note from the requirements above is that the exemption is limited to R1,25 million during the year of assessment. The limitation of the exemption was introduced from 1 March 2020 and it could be argued that SARS has extended its taxing rights in relation to foreign employment (SARS, 2020a). The question is, what prompted the amendment of section 10(1)(*o*)(ii) of the Income Tax Act?

Section 10(1)(*o*)(ii) of the Income Tax Act was ‘introduced in the year 2000 to prevent double taxation’ where the South African residents provide employment services in foreign tax jurisdictions (SARS Interpretation No. 16, 2020). In the Interpretation Note No. 16: *Exemption from income tax: foreign employment income,* SARS is of the opinion that this exemption was exploited. SARS’s claim of exploitation is found in Paragraph 1 of the background section of Interpretation Note No. 16. Could this exemption create an opportunity for ‘double non-taxation’ where the South African resident is not taxed in South Africa because of this exemption and also not taxed in the foreign tax jurisdiction?

It could be argued that the only possible way that the ‘exploitation’ could happen is when the foreign tax jurisdiction where the South African resident provides employment services does not impose personal income tax or minimal tax is imposed. Take tax havens for an example, the United Arab Emirates (Dubai) residents do not pay personal income tax (Expatra, 2020). If for example a South African resident works in the United Arab Emirates (Dubai), that means their employment income received for the work performed in the United Arab Emirates (Dubai) will not be taxed and with the exemption before the amendment, this employment income would also not be taxed in South Africa if all the requirements of section 10(1)(*o*)(ii) of the Income Tax Act are met. It appears that SARS is not concerned about the possible ‘double non-taxation’ if the foreign employment income is below R1,25 million because the possibility of double-non taxation still exists for foreign employment income less than R1,25 million.

The exemption provisions above are largely centred around the physical location of the South African resident. Could a resident simply manipulate the number of days they spend in South Africa in order to circumvent these provisions? Interpretation Note No. 16: *Exemption from income tax: foreign employment income,* state that the 183 days and 60 consecutive days requirement does not necessarily have to be exceeded by a full day, a few hours or minutes will be sufficient. Would it make sense then for a South African resident to be outside the

Republic as defined for 184 days which equates to about six months in order to get this exemption? It appears that this is possible, however it may be costly for a taxpayer when looking at the travel and other costs that may be involved.

Noteworthy from the above as well, is the 117 days requirement between 29 February 2020 and 28 February 2021. This requirement is a temporary relief mechanism, it applies specifically to this period due to the fact that some employees may not have been able to meet the 183 days requirements due to travel ban as a result of the global pandemic 'COVID-19' (SARS, 2021). This is an interesting response by the tax authority in times where taxpayers are confronted by issues outside of their control which might affect their tax position.

An interesting question is, what happens if the employer is not a South African resident? The non-resident employer would most likely claim a deduction in their country (source country) and the employment income would also likely be subjected to income tax in the source country (OECD, 2010: 253). OECD (2010: 253) has a provision that states that if the remuneration is 'borne by a permanent establishment' in the source country then the source country should have the taxing rights. It is noteworthy that the Income Tax Act does not have an explicit permanent establishment requirement in relation to foreign employment income like the OECD Article 15 subparagraph 2c requirement. The fact that there is no explicit mention of the 'borne by a permanent establishment' requirement in the Income Tax Act could result in a double taxation situation because if the employment income payment is 'borne by the permanent establishment', the employee would likely be subjected to income tax in the source country if the permanent establishment claimed a salary deduction (OECD, 2010: 253).

Regarding the physical presence requirements, what happens if a resident of South Africa provides employment services remotely to a foreign country for the employer in the foreign country and the remuneration is paid by the employer in the foreign country. In this instance the resident of South Africa remains within the borders of South Africa, therefore the physical presence requirements would not be met. Does this situation automatically mean that the employment income will be taxed in South Africa? The source rules might need to be applied to determine the actual source of the remuneration in order to provide the appropriate tax treatment (De Koker *et al,* 2019: 5-22). The source rules states that the source of employment income is ‘where the services are physically rendered’ and therefore the employment income would arguably be taxed in South Africa (De Koker *et al*, 2019: 5-22).

Practical Application of the Exemption

Globalisation has meant that companies find themselves operating in more than one tax jurisdiction which means that employees may be required to provide employment services across different tax jurisdictions (National Treasury of South Africa, 2000). Employers who send their employees on international assignment need to consider the tax implications for both themselves and the employees to ensure that both parties are not negatively impacted by cross-border assignments (Le Roux, 2017). The recent amendment of section 10(1)(*o*)(ii) of the Income Tax Act may require that employers review the remuneration structures of their employees to ensure that the remuneration structure is still beneficial to both the employer and the employee (Le Roux, 2017).

The exemption requires that the taxpayer must be providing employment services in the foreign jurisdiction and the question is, how would SARS verify the employment status of the taxpayer while they are abroad (SARS, 2020a)? SARS may use section 46 of the Tax Administration Act to request the taxpayer to provide the documentation to substantiate the employment information. Section 46 of Tax Administration Act states:

> SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires…

Also, employers and representative employers are required to deduct employees’ tax on behalf of SARS in terms of paragraph 2(1) of the Fourth Schedule of the Income Tax Act. In the case of the foreign employment income, the employer may be a non-resident without a South African representative employer. The challenge with the non-resident employer is how would SARS enforce compliance with provisions to withhold employees’ tax on an employer in a foreign tax jurisdiction? The foreign employment income might, therefore, be subjected to provisional tax instead of employees’ tax. (Moloi, 2020)

Another consideration is related to the Tax Administrations Act provisions. How would SARS enforce the compliance with section 29 ’duty to keep records’, section 30 ’form of records kept or retained’ and section 31 ’inspection of records’ of the Tax Administration

Act? This consideration is applicable in instances where employer is a non-resident of the Republic and does not have a representative employer in the Republic.

Exceptions to the exemptions

As with most tax provisions, there are exceptions where certain provisions do not apply. Section 10(1)(*o*)(ii) of the Income Tax Act is not applicable to the following individuals (Interpretation Note No. 16, 2020:8):

- A public office holder, as contemplated in section 9(2)(*g*), who must be appointed or deemed to be appointed under an Act of Parliament.
- Employees of employers, as contemplated under section 9(2)(*h*), in the national, provincial or local sphere of government, certain constitutional institutions, national and provincial public entities listed in Schedules 2 and 3 of the Public Finance Management Act, 28 and municipal entities.

Rebates or Credits and Deductions

The exemptions above apply to individuals who meet all the requirements, but what happens to taxpayers who do not meet all the requirements? For example, a taxpayer that earns more than R1,25 million. These taxpayers may therefore be exposed to double taxation. SARS admits in the Interpretation Note No. 16: *Exemption from income tax: foreign employment income* that double taxation as a result of limiting the exempt foreign employment income will occur in instance where there is no DTA that allocate the taxing rights solely to one country.

How does SARS then relieve the South African residents from the double taxation caused by the limitation of the section 10(1)(*o*)(ii) of the Income Tax Act. A rebate or credit in terms of section *6quat* of the Income Tax Act is one of these mechanisms that the taxpayer can utilize to minimise double taxation (SARS, 2020a). Section 6*quat*(1) of the Income Tax Act requires the amount in question must be a foreign sourced amount, therefore it is critical that the source rules are applied to establish the source of the income (Stinglingh *et al,* 2020: 835). This requirement is important because section 6*quat*(1) of the Income Tax Act is not applicable to amounts from a South African source (Stinglingh *et al,* 2020: 835). In instances where a taxpayer received both South African and foreign sourced employment income, the rebate will then only apply to the portion that is foreign sourced.

Another important requirement of section 6*quat*(1A) of the Income Tax Act is that the rebate is the amount proved to be payable to a foreign country. The importance of this provisions is that if the taxes were paid contrary to the DTA that South Africa has with that foreign country then this requirement will not be met (Stinglingh *et al,* 2020: 835). Noteworthy also, is that the income tax paid may not be fully credited because the foreign tax is determined based on the South African income tax principles (Stinglingh *et al*, 2020: 836). Certain items may be taxable based on the foreign country tax provisions and may not be taxable from a South African Income Tax Act provisions perspective. Section 6*quat*(1B)(*a*)(iii) of the Income Tax Act does provide for carry forward of the taxes that could not be claimed as a rebate for not more than 7 years.

A resident may elect a foreign tax deduction in terms of section 6*quat*(1C) of the Income Tax Act. The foreign tax deduction works the same as any other 'expenditure incurred in the production of income' deductions, which means that the taxpayer will not receive a full relief on the foreign tax paid[3], and this cannot be carried forward like the rebate or credit discussed above (Stinglingh *et al,* 2020: 840). The foreign tax deduction may not be appealing as the relief will be a percentage of the foreign tax paid and most taxpayers might elect the rebate or credit instead of a deduction.

Section 6*quat*(1A) of the Income Tax Act requires also that there must be proof of foreign taxes being payable without a right of recovery. The challenge with this requirement is that in some instances the proof provided by the foreign government may not be satisfactory to SARS as there are no specification of how the proof must look like (Lobban, n.d.).

Timing and Conversion Rates

The nature of foreign employment income is that there would be more than one tax jurisdictions involved and these tax jurisdictions may have different currencies and different tax years. The question then is, when does a taxpayer include the foreign employment income in their South African tax return and what exchange rate would be used to translate the income from the foreign currency to the South African Rand? As mentioned above, the gross income is the starting point for calculating the taxable income and must be received during

[3] The deduction will be a product of foreign tax paid and the marginal tax rate of the resident

the year of assessment which is 1 March to 28 or 29 February for individuals (SARS, 2021b). Section 10(1)(*o*)(ii) exemption of the Income Tax Act can be applied in any 12-month period which means that it does not have to match with the year of assessment for individuals (1 March to 28 or 29 February) (SARS Interpretation Note No. 16, 2020). The taxpayer can look forward or backward from the day that the foreign employment income was received or accrued to determine the 12-month period (SARS Interpretation Note No. 16, 2020).

In terms of section 25D(2) of the Income Tax Act, the income or expenditure may be translated 'using the spot rate or the average exchange rate for the applicable tax period year of assessment', the taxpayer has a choice to choose between the average or spot rate. Noteworthy is that the method chosen must be applied consistently throughout the year of assessment. Spot rate is defined in section 1 of the Income Tax Act as 'the appropriate quoted exchange rate at the specific time by any authorized dealer in foreign exchange for the delivery of currency'. Average exchange rate is defined in section 1 of the Income Tax Act as:

> in relation to a year of assessment means the average determined by using the closing spot rates at the end of daily or monthly intervals during that year of assessment which must be consistently applied during that year of assessment

3.2 Judicial Interventions

There has been an interesting South African court case on the source of foreign employment income for employees on secondment. In the case *X v The Commissioner for the South African Revenue Service* (2018), the court held that the services rendered by the secondee outside of the Republic of South Africa were 'consequential contractual obligation' and therefore the source of income was South Africa. It must be noted that this judgment can be superseded by higher courts as this was held in a tax court which is the lowest level, however, it provides an indication on treatment that SARS would likely adopt (Madden and Moosa, 2018).

In conclusion, the domestic income tax legislation allocates the taxing rights to South Africa for employment income that exceeds R1,25 million. If the foreign employment income is R1,25 million or less, the domestic legislation may allocate the taxing rights to the foreign jurisdiction if all the other requirements of section 10(1)(*o*)(ii) of the Income Tax Act are met. South Africa through the Income Tax Act has relief mechanisms in place to minimise double taxation and the taxpayer has options to choose from, either a rebate or a deduction in instances where the taxpayer paid tax in the foreign jurisdiction. The DTA application is also available to the taxpayer and the details of how the DTA provisions may be applied will be discussed in Chapter 5.

Chapter 4: The legislative and judicial approaches adopted in the United States and Australia

This Chapter seeks to examine the legislative and where applicable, the judicial approaches adopted by the United States and Australia in relation to foreign employment income. The examination of the legislative provisions and judicial judgments are aimed at determining how the taxing rights are allocated by the United States and Australia in relation to employment income.

The foreign employment income tax provisions and relief mechanisms in instances of double taxation as per the Internal Revenue Code for the United States and as per the Income Tax Assessment Act for Australia will be examined. The court judgments in relation to foreign employment income will also be examined.

4.1 The United States

The United States has a citizenship-based taxation system (Christians, 2017: 202). This means that if an individual has United States citizenship, they will be liable for tax in the United States regardless of where they reside (Weinstock, 2018). The 'citizenship-based taxation' is inconsistent with the international general standards on taxation especially in a world where cross-border mobility is on the rise (Christians, 2017: 202). It could be argued that not everyone that resides in the United States is a United States Citizen, then how are non-citizens taxed? There is a concept of resident alien discussed in Chapter 2 above, that would then capture the individuals who are not United States Citizens but hold a green card or meet the physical presence test.

The merit of 'citizenship-based taxation system' compared to the residence-based taxation will not be examined in detail in this research report unless it relates to foreign employment income. The United States citizens and resident aliens are generally subject to tax on their worldwide income, this means that foreign employment income as defined in Chapter 2 will also be taxable before the consideration of the exemption, credits, and deductions (IRS, 2020a).

Does the source of income matter in instances where an individual is a citizen of the United States? Let us say a United States citizen is based in Johannesburg (South Africa) for example and works full time in Johannesburg and as a result of this is considered a resident of South Africa for tax purposes. The employment income earned by this United States' citizen in South Africa will be subject to personal income tax in South Africa on the basis of either source or residency (De Koker *et al,* 2019: 5-3). The United States citizen will also have to file the United States tax return for the same employment income (IRS, 2020a). The fact that the source of the employment income is South Africa has no bearing on whether the income will be subjected to personal income tax in the United States, that is before considering any exemptions that may be applicable. This scenario creates a double taxation conundrum arguably for all United States Citizens who are deemed to be residents of foreign countries that subject individuals to personal income tax.

The United States has mechanisms in place to eliminate double taxation. These mechanisms include 'foreign earned income exclusion, foreign tax credits and tax deduction'. The foreign earned income exclusion shall be considered 'revoked' if a foreign tax credit or tax deduction is claimed on any of the excluded income. (IRS, 2020e)

Foreign Income Exclusion

In terms of section 911(a) of the Internal Revenue Code, a citizen or a resident alien of the United States may 'elect' foreign income exclusion from gross income if all the exclusion requirements are met. The election made by the taxpayer is applicable until the taxpayer revokes the election in terms of section 911(e) of the Internal Revenue Code.

The foreign income exclusion is applicable if the United States citizen or resident alien receives 'foreign earned income'; the 'tax home' is the foreign country and one of the following applies (IRS, 2021):

- The taxpayer is a US citizen who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year,
- The taxpayer is a US alien who is a citizen or national of a country with which the United States has an income tax treaty in effect and who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year, or
- The taxpayer is a US citizen or US resident alien who is physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months.

The above requirements mentioned a term 'tax home' and section 911(d)(2)(A) of the Internal Revenue Code defines tax home as follows:

> the general area of a taxpayer's main place of business, employment, or post of duty, regardless of where they maintain their family home. A tax home is the place where the taxpayer is permanently or indefinitely engaged to work as an employee or self-employed individual

The foreign income exclusion requirements above mentioned a term 'bona fide residence and it would be important to ascertain the meaning of this term. IRS (2020e) defines bona fide residence as follows:

> Bona fide residence - to meet the bona fide residence test, you must have established a bona fide residence in a foreign country. Your bona fide residence isn't necessarily the same as your domicile. Your domicile is your permanent home, the place to which you always return or intend to return.

The requirements above are essentially providing relief to United States citizens and resident aliens who are in substance residents of foreign countries even though they still have their United States citizenship. Do these requirements indirectly equate to residence-based taxation system in relation to foreign earned income? It could be argued that if the provisions of the Internal Revenue Code had stated that only residents of the United States are taxed on their worldwide income with physical presence requirements[4], the same results would be achieved. This argument is based on the length of time that the United States must be in the foreign country for and that they must be well established in a foreign country, these provisions appear to recognise that the United States citizen may be a resident of a foreign country even though they still have their United States citizenship.

Another argument may be that there is a limitation on how much may be excluded from the taxable income of the United States citizen. However, the substance of the provision appears to favour the first argument above. The exclusion is up to $108,700[5] per annum and is adjusted annually for inflation (IRS, 2021).

Interesting to note is that the minimum time requirements for 'bona fide residence' and physical presence may be excluded from the requirements if the United States citizen or resident alien had to leave the foreign country because of 'war, civil unrest, or similar adverse conditions' in that country as per section 911(d)(4) of the Internal Revenue Code.

---

[4] For example, if the United States resident is in a foreign country for a specified period of time then the taxing right would be allocated to the foreign country.
[5] This is a 2021 tax year amount.

In response to the global pandemic, the Internal Revenue Service introduced COVID-19 waiver of minimum time requirements (IRS, 2020b). This provision is consistent with the above waiver where the United States citizen is unable to meet the minimum time requirements due to factors outside of their control. These provisions demonstrate that the tax authority can arguably be considerate in their legislative process.

If the United States citizen or the resident alien elects to apply the foreign income exclusion, then the United States essentially waives its taxing rights to the foreign country for an amount up to $108,700 per annum (IRS, 2021).

Foreign Tax Deduction and Foreign Tax Credit

The United States citizens and resident aliens have a choice between choosing a tax credit or a tax deduction and the selection of choice must be applied consistently in all foreign earned income. The difference between the two is that the tax credit reduces the taxpayers tax liability while the tax deduction reduces the taxable income. A tax credit may be more appealing to the taxpayer compared to the tax deduction unless the foreign income tax was imposed at a rate higher than would be imposed in the United States and the foreign income is smaller in relation to the United States income. This essentially means that the foreign tax paid is determined using the United Sates tax provisions and this may create mismatch between what items are taxable or not taxable between the United States and the foreign country. (IRS, 2020e)

It is also important to examine the case laws to obtain an understanding of how the judicial system has dealt with the issues relating to foreign employment income. In the United States District Court case, *Carpenter v. United States* (1972) case, the employee had claimed the foreign income exemption on the grounds that the employee was a 'bona fide resident of a foreign country'. The Judge held that:

> It is not necessary for a taxpayer to establish a fixed, permanent, personal place of abode in order to be a "resident" of a foreign country. In Swenson v. Thomas, *supra,* taxpayer was constantly on the move as part of his job in Columbia. The Fifth Circuit nevertheless held that he was a resident of that country *despite* his intention to return at a later time to the United States. The present plaintiff has demonstrated to the Court's satisfaction, in uncontradicted testimony, that he intended upon his return to Lebanon, and later to Kuwait, to continue his well established and thoroughly documented foreign career. He has successfully met most of the criteria set forth in Sochurek v. C.I.R., *supra,* including

> intention; temporary establishment of a foreign home; physical presence consistent with employment; non-transient status; and indefinite duration of employment.

The Judge ruled in favour of the taxpayer. From this judgment it could be seen that determining whether a taxpayer is a ‘bona fide resident of a foreign country’ is a factual enquiry, meaning that the facts of each case must be examined thoroughly.

In the United States Tax Court case *Dammers v. Comm'r of Internal Revenue* (1981) case, the point of contention in this case was that the moving expenses received by the taxpayer from the employer for moving to a foreign country is income from a foreign source for purposes of calculating the foreign tax credits. On the other hand, the Commissioner of Internal Revenue argued that the reimbursement is from a source within the United State and must be included in the taxpayer’s gross income. The Judge ruled in favour of the taxpayer and stated the below:

> It is clear, given the facts of this case, that the reimbursement of petitioner's moving expenses is attributable to petitioner's employment in France, and is thus foreign source income. In 1971, petitioner's employer agreed to pay for the expenses of moving petitioner and his family back to the United States as an inducement for petitioner to accept a position in its foreign office. The agreement to reimburse petitioner was not made contingent upon petitioner's continued employment with Cleary, Gottlieb after his return to this country, but rather was given in consideration for petitioner's agreement to transfer to and work in the Paris office.

In conclusion, the United States inherently allocates the taxing rights in relation to foreign employment income to itself because of the citizenship-based taxation system. This argument is before considering any relief mechanisms that a taxpayer may choose from which includes foreign income exclusion, tax deductions and tax credits. The foreign income exclusion is arguably attempting to apply the residence-based taxation principle based on the requirements discussed above. There are also relief mechanisms offered in the DTAs that the United States has with different countries, the DTA provisions will be discussed in Chapter 5 below.

4.2 Australia

The residents of Australia are subjected to income tax on their worldwide income which means that, regardless of where the source of income is, the resident will be taxed in Australia (Australian Taxation Office, 2019). The foreign employment income earned by residents of Australia as defined in Chapter 2 will therefore also be subjected to tax in

Australia. The starting point would be to examine the legislative provisions in relation to foreign employment income as per the Income Tax Assessment Act. The Australian residents are required to include all their foreign employment income in their Australian income tax return, including the exempt income except the income that is exempt because of the following (Australian Tax Office, 2016):

- a privileges and immunities agreement, or a law covering people connected with international organisations
- specific exemptions for the pay and allowances of members of the Australian Defense Force, related to qualifying service in a specified area.

The main question is, how is the resident of Australia taxed on the foreign employment income? Does Australia's Taxation Authority waive its taxing rights on the foreign employment income earned by its residents, or the residents are also subjected to tax in Australia? There are relief mechanisms that are available to the Australian residents who receive foreign employment income to alleviate double taxation. These mechanisms are Foreign Earnings Exemptions and Foreign Income Tax Offsets (FITO). (Australian Taxation Office, 2020a)

Foreign Earnings Exemption

The foreign earnings exemption provisions were amended effective from 1 July 2009 (Australian Taxation Office, 2017). The update was essentially to limit the exemption to specific foreign services as discussed below. Before the amendment Australian residents working abroad could qualify for this exemption provided, they meet the 91 days or more requirement. The Parliament of Australia (2009) argued that the reason for the amendment was to ensure that the exemption is fair to Australian residents who work in Australia. Fundamental to the argument is that the Australians working abroad may be paying little or no income tax on their employment income (Parliament of Australia, 2009).

The argument above appears to be a sound argument to a certain extent, based on the fact that previous requirements appear to have been lenient in a sense that 91 days requirement is not a long time relative to the days requirement by South Africa and the United States discussed above. Section 23AG of the Income Tax Assessment Act 1936 provides exemption of foreign employment income if certain requirements are met. The requirements for the exemption are as follows (Australian Taxation Office, 2020a):

> Your foreign employment income is exempt from tax if all the following apply:
>
> (a) you're an Australian resident
> (b) you're engaged in continuous foreign service as an employee for 91 days or more
> (c) your foreign service is directly attributable to any of the following
> - delivery of Australian Official development assistance by your employer (except if your employer is an Australian government agency)
> - activities of your employer in operating a public fund declared by the Minister to be a developing country relief fund
> - activities of your employer in operating a public fund established and maintained to provide monetary relief to people in a developed foreign country impacted by a disaster (a public disaster relief fund)
> - activities of your employer as a prescribed charitable or religious institution exempt from Australian income tax because it's located outside Australia, or the institution is pursuing objectives outside Australia
> - deployment outside Australia by an Australian government (or authority) as a member of a disciplined force
>
> (d) you're not excluded from exemption by the non-exemption conditions.

Requirement (c) above is quite specific in terms of what services the employer must be engaged in for the exemption to apply. This leaves less room for misinterpretation of what might be covered by this exemption. On the other hand, there are limited services that will enable the Australian resident to exploit this exemption.

The non-exemption condition mentioned in requirement (d) above refers to DTAs provisions with other countries; where the foreign country does not impose personal income tax and international agreements for diplomats, consular staff, and international organisations connected individuals (Australian Taxation Office, 2017).

The exemption might still be available to the taxpayer even if the foreign income was not taxed in the foreign country for reasons like the income was below the taxable income threshold in the foreign country (Australian Taxation Office, 2017). It is noteworthy that Section 23AG of the Income Tax Assessment Act 1936 does not require that all the requirements from (a) to (d) above as per the Australian Taxation Office be met concurrently before the exemption can be granted (Thampapillai, 2016). There appear to be inconsistencies between what the Income Tax Assessment Act 1936 states compared to what the Australian Taxation Office states (Thampapillai, 2016). The question is then, which requirements must be followed by the taxpayer? It is most likely that the court would follow the legislative provisions especially if the legislation is clear and unambiguous as discussed in Chapter 2 above.

Noteworthy also from the non-exemption requirements above, is that the exemption provisions do not apply if the country where the employment income originates does not impose income tax. This appears to be targeting tax havens where there's generally no personal income tax or little personal income tax levied for example United Arab Emirates (Dubai) residents do not pay personal income tax (Expatra, 2020).

If an Australian resident qualifies for the aforesaid exemption, they must still include the exempt income in their taxable income computation to ensure that the rest of their taxable income is taxed at the appropriate income tax rate (Australian Taxation Office, 2020b). As the term foreign employment income suggest that there is more than one tax jurisdiction involved, therefore there would generally be more than one currency used. The foreign employment income must be converted to Australian Dollars at either spot rate or average rate on the day that the income is received (Australian Taxation Office, 2020b).

This exemption is 'not applicable to the Australian government employees delivering Australian official development assistance' (Australian Taxation Office, 2017).

Foreign Income Tax Offsets

There may be Australian residents who do not qualify for the foreign income exemption discussed above and pay income tax in a foreign country. These residents may still qualify for a relief from double taxation through the foreign tax offset provisions. The requirements for the foreign tax offset are primarily that foreign income tax 'must have been paid or deemed to have been paid' by the taxpayer on the amounts taxable in Australia (Australian Taxation Office, 2019)

From the above requirements it can be argued that the offset will be applicable to the extent that the foreign employment income is taxable from an Australian taxation perspective. The results of the application of the above requirements are that the Australian resident may not receive a full credit for the income tax paid in a foreign country because of different income tax rules applied in the different tax jurisdictions.

The Australian judiciary has had to deal with the issues relating to foreign employment income. In the *Coventry v Commissioner of Taxation* (2018) the dispute was, with respect to, whether the income Mr Coventry earned from his posting in Pakistan, where he was the Head of Aid for the Australian Department of Foreign Affairs and Trade, is exempt from tax in terms of section 23AG of the Income Tax Assessment Act 1936. This was held in the Administrative Appeals Tribunal, which is not a court of law, however, it provides an indication of Commissioner's stance of certain provisions (Administrative Appeals Tribunal, 2004). The Tribunal ruled in favour of Mr Coventry as follows:

> I have concluded that Mr Coventry is exempt from income tax in Australia on the basis that he was posted to Pakistan under the terms of the Development Agreement and covered by the definition of "Australian project personnel" in the Development Agreement.

It is noteworthy that Australia does not have relief for individuals who could not meet the 91 days requirement due to travel restriction as a result of the global pandemic (Covid-19) compared to South Africa and the United States (Australian Taxation Office, 2020c). This could arguably be because the exemption for foreign employment income is limited to a very small number of foreign services as discussed above, as result the impact may not be that significant.

In conclusion, the Australian taxation authority allocates the taxing rights on foreign employment income earned by the residents of Australia to Australia before taking into account any exemptions and DTA provisions. The Australian taxation authority extended their taxing rights in relation to foreign employment income by amending section 23AG of the Income Tax Assessment Act 1936 to limit the exemption. This is demonstrated by the limited instances where the Australian residents may be able to claim the exemption. The Australian residents are to a greater extent exposed to double taxation. The relief mechanism through the foreign income tax offset may not fully credit the taxpayer since the income tax rules may be different between tax jurisdictions.

Chapter 5: Foreign employment income provisions as per the DTAs between South Africa and both the United States and Australia, and between the United States and Australia

This research report is about foreign employment income. The term foreign means that there may be more than one tax jurisdictions that may be involved in the foreign employment income. As a result, it is of utmost importance that the internationally adopted conventions in relation to the cross-border transactions are examined.

In the absence of any interaction between the two or more tax jurisdictions, the employee receiving the foreign employment income may be taxed more than once. That is because the resident country would generally tax based on residency and the source country on source or both countries tax based on residency (De Koker *et al,* 2019: 5-2). The exception to the above possible double taxation would be where one or all the countries involved in the foreign employment income transaction do not impose personal income tax. The absence of interactions between the tax jurisdictions may be detrimental to the taxpayer as they may be required to pay more tax on the same income. To counter this situation, which may be detrimental to the taxpayer, countries around the world have Double Taxation Agreements (DTA) also referred to as Tax Treaties, to eliminate potential double taxation (SARS, 2021a). The DTAs would generally contain a ‘tie-breaker’ clause which assists with the allocation of the taxing rights to a specific country (Steward, 2012).

There are essentially three model agreements upon which the DTAs are concluded (SAICA, 2001). These models are:

- Model Double Taxation Convention on Income and on Capital by the OECD.
- United Nations Model Double Taxation Convention between Developed and Developing Countries.
- United States Model Income Tax Convention.

In this Chapter the DTAs between South Africa and the United States and Australia, and between the United States and Australia will be examined focusing particularly to the articles that relates to resident and foreign employment income.

5.1 DTA: South Africa and the United States

South Africa has numerous double tax agreements (DTAs) with African countries and the rest of the world (SARS, 2020b). South African DTAs, to a large extent follow the OECD model (SAICA, 2001). The provisions of the DTA are incorporated into the Income Tax Act through section 108 of the Income Tax Act in read together with Section 231 of the Constitution of the Republic of South Africa (De Koker *et al,* 2019).

The United States has its own model tax convention as stated above. Section 894 of Internal Revenue code state that:

> The provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer.

And section 7852(d)(1) of Internal Revenue Code states that:

> For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.

The challenge with the above provisions is that conflicts may arise between the domestic law and the treaty provisions and what happens in those instances of conflict? The United States Constitution states that 'treaties and federal statutes have equal status as the supreme law of the land'. Therefore, when there is conflict between the treaty and the statute, 'the later in time prevails'. (Streng, 2009)

Residence Provisions

Article 4 of the DTA between South Africa and the United States deals with the provisions in relation to residence for a natural person. Paragraph 2 of Article 4 which contains the tie-breaker clause states that:

> Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> > a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
> > b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

> c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
> d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

The primary objective of the above requirements is essentially to allocate the individuals in question to one of the states. Arguably, these requirements are trying to find a state with which the individual has the strongest connection or ties. Noteworthy is the last provision (d), that initiate the dispute resolution conversation? Is it the taxpayer or the tax authority that is aggrieved and how costly is this exercise? SARS (2018) states that the competent authority from a South African perspective is the Commissioner for SARS.

The taxpayer appears to be responsible for ensuring that the DTA's provisions are applied. This may require the taxpayer to consider cost-benefit analysis where they would weigh the cost of pursuing the matter versus the benefit (SARS, 2018). Once the residence has been allocated to one of the contracting States then the income tax legislation of that contracting state would have to be applied.

The above DTA provisions are consistent with the enquiry that is undertaken by the South African judiciary and Interpretation Note No. 3: *Resident: Definition in relation to a natural person – ordinarily resident* issued by SARS as discussed in Chapter 2 above. The specific judicial judgments referred to are from the *Cohen v CIR* (1946) and *CIR v Kuttel* (1992) cases discussed in Chapter 2 above. There are 2 concept that must be considered in relation to a resident from a United States perspective. These concepts are Citizen and Resident Alien. The DTA provisions above are not interrogating the individual's citizenship while the resident alien requirements are arguably aligned to the above provisions. It is then possible for an individual to be regarded as a Citizen of the United States and a resident of South Africa for tax purposes. Paragraph 1 of Article 4 incorporate the Citizen of United States as individuals covered by the provisions of the DTA.

Foreign Employment Income Provisions

Article 15 of the DTA between South Africa and the United States deals with the provisions in relation to foreign employment income. Paragraph 2 of Article 15 contains the tie-breaker clause and states that:

> Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State[6] shall be taxable only in the first-mentioned State if:
> a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and
> b) the remuneration is paid by or on behalf of an employer who is not a resident of the other State; and
> c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

Provision (a) is trying to establish the State in which the taxpayer spent more than half of their fiscal year in question. This provision does not link the time spent to actual employment. Does this mean an individual can be in the other Contracting State not necessarily working to meet the days requirement? The wording of the above provision suggests that, to meet the 183 days requirement, the individual does not necessarily have to be working for the entire 183 days in the other Contracting State.

Provision (b) requires that the remuneration paid must not be paid by or on behalf of the employer who is a resident of the other Contracting State. Paragraph 1 of Article 15 states that employment income must be taxed in the source country and provision (b) above states that the resident State shall tax the employment income if the employer is not a resident of the other State (source State). This appears to protect the other Contracting State's tax base in a sense that if the employer is a resident of the source state, the employer would most likely have been granted a deduction for the employment costs and it would therefore be unfair for the employment income not to be taxed in the other Contracting State (OECD, 2010: 253). Provision (c) appears to be attempting to attain the same outcomes as provision (b), with the exception that provision (c) focuses on permanent establishments.

The provisions above are not entirely consistent with South Africa's and the United States' domestic taxation legislation. The Income Tax Act and the Internal Revenue Code do not have the requirements that the employment income must not be borne by the employer who is a resident or attributed to a permanent establishment in the source country. The fact that there is no explicit mention of the 'borne by permanent establishment' and paid by an employer who is a resident of a source country in the Income Tax Act and the Internal Revenue Code could result in a double taxation situation. This is because if the payment is 'borne by the permanent establishment' or by an employer who is a resident of the source country, the

[6] This refers to the source state, where employment is exercised.

employee would likely be taxed in the source country if the permanent establishment claimed a deduction for salaries paid (OECD, 2010: 253).

In conclusion, the DTA provisions between South Africa and the United States in relation to residence allocate tax residence to the State where there is a stronger nexus between the taxpayer and the State. With regards to the foreign employment income, the DTA allocates the taxing to the source country unless certain requirements are met. The requirements to be met are essentially trying to ensure that the tax base of a State where the taxpayer spent most of their time during the fiscal year is not eroded unfairly. The United States stance on legal standing of the DTAs may result in more conflicts because of the DTAs being regarded as equal to the statutes. It is also important to note that if the residence of an individual has been allocated to a specific country as per the DTA then the tax treatment of the foreign employment income will be in accordance with the tax provisions of that country.

5.2 DTA: South Africa and Australia

Australia has DTAs with ‘over 40 countries, which provide for the exchange of information about income Australian residents earn overseas and income foreign residents earn in Australia’ (Australian Taxation Authority, 2016). In Australia, the DTA provisions may override the domestic legislation in terms of section 4(1) of the International Tax Agreement Act (The University of Melbourne, n.d.). As mentioned above, the DTA provisions are part of the Income Tax legislation in South Africa.

Residence Provisions

Article 4 paragraph 2 of the DTA between South Africa and Australia contains the tie-breaker clause and states:

> Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the person shall be deemed to be a resident only of the Contracting State in which a permanent home is available to the person, or if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident only of the Contracting State with which the person's personal and economic relations are closer.

The above provisions allocate residence to a State where there is a stronger nexus between the taxpayer and the State. This provision is consistent with the enquiry that is undertaken by the South African judiciary and the Interpretation Note No. 3: *Resident: Definition in relation to a natural person – ordinarily resident* issued by SARS as discussed in Chapter 2 above. The specific South African judicial judgments referred to are from the *Cohen v CIR* (1946) and *CIR v Kuttel* (1992) cases discussed in Chapter to above. The above tie-breaker provision is also consistent with the Australian judiciary and the Taxation Ruling TR 98/17 issued by the Australian Taxation Authority. The specific Australian judgments referred to are in the *Leven v IRC* (1928) and Cesna *Sulphur Co Ltd v Nicholson* (1876) discussed in Chapter 2 above.

Foreign Employment Income Provisions

Article 15 of the DTA between South Africa and Australia deals with the provisions in relation to foreign employment income. Paragraph 2 of Article 15 contains the tie-breaker clause and states that:

> Notwithstanding the provisions of paragraph 1, remuneration derived by an individual who is a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if:
>
> (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the year of income or year of assessment of that other State; and
> (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
> (c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.

Provision (a) above is trying to establish the State in which the taxpayer spent more than half of their fiscal year in question. This provision does not link the time spent to actual employment. Does this mean an individual can be in the other Contracting State not necessarily working to meet the days requirement? The wording of the above provision suggests that, to meet the 183 days requirement, the individual does not necessarily have to be working for the entire 183 days in the other Contracting State.

Provision (b) requires that the remuneration paid must not be paid by or on behalf of the employer who is a resident of the other Contracting State. Paragraph 1 of Article 15 states that employment income must be taxed in the source country and provision (b) above states that the resident State shall tax the employment income if the employer is not a resident of the other State (source State). This appears to protect the other Contracting State’s tax base in a sense that if the employer is a resident of the source State, the employer would most likely have been granted a deduction for the employment costs and it would therefore be unfair for the employment income not to be taxed in the other Contracting State (OECD, 2010: 253). Provision (c) appears to be attempting to attain the same outcomes as provision (b), with the exception that provision (c) focuses on permanent establishments.

The provisions above are not entirely consistent with South Africa's and Australia's domestic taxation legislation. The Income Tax Act does not have the requirements that the employment income must not be borne by the employer who is a resident or 'attributed to a permanent establishment' in the source State. The fact that there is no explicit mention of the 'borne by permanent establishment' and paid by an employer who is a resident of a source country in the Income Tax Act (South African Income Tax legislation), the Income Tax Assessment Act 1936 (Australian Income Tax legislation) and the Income Tax Assessment Act 1997 (Australian Income Tax legislation) could result in a double taxation situation. This is because if the payment is borne by the permanent establishment or by an employer who is a resident of the source country, the employee would likely be taxed in the source country if the permanent establishment claimed a salary deduction (OECD, 2010: 253).

In conclusion, the DTA provisions between the South Africa and Australia in relation to residence allocate tax residence to the State where there is a stronger nexus between the taxpayer and the State. With regards to the foreign employment income, the DTA allocates the taxing to the source country unless certain requirements are met. The requirements to be met are essentially trying to ensure that the tax base of a State where the taxpayer spent most of their time during the fiscal year is not eroded unfairly. It is also important to note that if the residence of an individual has been allocated to a specific country as per the DTA then the tax treatment of the foreign employment income will be in accordance with the tax provisions of the that country.

5.3 DTA: The United States and Australia

Residence Provisions

Article 4 paragraph 2 of the DTA between the United States and Australia contains the tie-breaker clause and states that:

> Where by application of paragraph (1) an individual is a resident of both Contracting States, he shall be deemed to be a resident of the State:
>
> (a) in which he maintain his permanent home;
> (b) if the provisions of sub-paragraph (a) do not apply, in which he has an habitual abode if he has his permanent home in both Contracting States or in neither of the Contracting States; or
> (c) if the provisions of sub-paragraphs (a) and (b) do not apply, with which his personal and economic relations are closer if he has an habitual abode in both Contracting States or in neither of the Contracting States

Paragraph 3 of Article 4 provides guidance on how to determine individual's permanent home as follows:

> For the purposes of this paragraph, in determining an individual's permanent home, regard shall be given to the place where the individual dwells with his family, and in determining the Contracting State with which an individual's personal and economic relations are closer, regard shall be given to his citizenship (if he is a citizen of one of the Contracting States).

The above provisions allocate residence to a State where there is a stronger nexus between the taxpayer and the State. Noteworthy from the above provisions is that they make no mention how a conflict should be resolved in case that there's a disagreement between the taxpayer and the tax authority. In the DTA between South Africa and the United States for example, it provides that a competent authority must intervene in cases of conflicts. The provisions above are consistent with the domestic taxation legislation of the United States and Australia in a sense that an enquiry to establish an individual's residence must be undertaken and this enquiry must take into account several factors surrounding the taxpayer as discussed in Chapter 2 above.

Foreign Employment Income Provisions

Article 15 of the DTA between the United States and Australia deals with the provisions in relation to foreign employment income. Paragraph 2 of Article 15 contains the tie-breaker clause and states that:

> Notwithstanding the provisions of paragraph (1), remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State or in respect of services performed in the other Contracting State as a director of a company shall be taxable only in the first-mentioned State if:
>
> (a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the taxable year or year of income of that other State;
> (b) the remuneration is paid by, or on behalf of, an employer or company who is not a resident of that other State; and
> (c) the remuneration is not deductible in determining taxable profits of a permanent establishment, a fixed base or a trade or business which the employer or company has in that other State.

Provision (a) above is trying to establish the State in which the taxpayer spent more than half of their fiscal year in question. This provision does not link the time spent to actual employment. Does this mean an individual can be in the other Contracting State not necessarily working to meet the days requirement? The wording of the above provision suggests that, to meet the 183 days requirement, the individual does not necessarily have to be working for the entire 183 days in the other Contracting State.

Provision (b) requires that the remuneration paid must not be paid by or on behalf of the employer who is a resident of the other Contracting State. Paragraph 1 of Article 15 states that employment income must be taxed in the source country and provision (b) above states that the resident State shall tax the employment income if the employer is not a resident of the other State (source State). This appears to protect the other Contracting State's tax base in a sense that, if the employer is a resident of the source state, the employer would most likely have been granted a deduction for the employment costs and it would therefore be unfair for the employment income not to be taxed in the other Contracting State (OECD, 2010: 253). Provision (c) appears to be attempting to attain the same outcomes as provision (b), with the exception that provision (c) focuses on permanent establishments.

The provisions above are not entirely consistent with the United States and Australia's domestic taxation legislation. The Internal Revenue Code (the United States Income Tax legislation), the Income Tax Assessment Act 1936 (Australian Income Tax legislation) and the Income Tax Assessment Act 1997 (Australian Income Tax legislation), do not have the requirements that the employment income must not be borne by the employer who is a resident or attributed to a permanent establishment in a source. The fact that there is no explicit mention of the 'borne by permanent establishment' and paid by an employer who is a resident of a source country in the Internal Revenue Code and the Income Tax Assessment Act could result in a double taxation situation. This is because where the payment is borne by the permanent establishment or by an employer who is a resident of source country, the employee would likely be taxed if the permanent establishment claimed a deduction for salaries paid (OECD, 2010: 253).

In conclusion, the DTA provisions between the United States and Australia in relation to residence allocate tax residence to the State where there is a stronger nexus between the taxpayer and the State. With regards to the foreign employment income, the DTA allocates the taxing to the source country unless certain requirements are met. The requirements to be met are essentially trying to ensure that the tax base of a State where the taxpayer spent most of their time during the fiscal year is not eroded unfairly. It is also important to note that if the residence of an individual has been allocated to a specific country as per the DTA then the tax treatment of the foreign employment income will be in accordance with the tax provisions of the that country.

Chapter 6: Comparison of the approaches to allocation of taxing rights in relation to foreign employment income by South Africa, Australia, and the United States.

This research report is about comparing the legislative and where applicable the judicial approaches adopted by South Africa, the United States and Australia. As a result, this Chapter will compare the interpretation of legislation approaches, the definition of key terms, foreign employment income legislative provisions and the DTA provisions between South Africa, the United States and Australia.

6.1 Interpretation of Legislation

As discussed in Chapter 2 above, income tax is a legislated field, this means that certain income tax related issues may end up in a court of law (Thuronyi *et al*, 1996: 33). As a result, it is important to understand how the judicial system works in each of the countries that are part of this research study, those countries being, South Africa, the United States and Australia.

From a South African perspective, there is a recognition of the complexities that come with the interpretation of legislative provisions. These complexities are driven by firstly the inherent difficult of language and other factors that the interpreter may need to consider before arriving at preferred interpretation. These other factors are essentially encouraging the interpreter to consider the broad context in which the legislative provisions exist. There are two approaches that can be used to interpret legislative provisions, and these are ‘orthodox text-based approach’ and the ‘text-in-context approach’, these approaches were discussed in detail in Chapter 2 above. The courts lean more towards the ‘text-in-context approach’ if the text-based’ approach leads to ‘absurd’ results. (Botha, 2012: 5)

The United States also recognizes that process of interpreting legislation can be complex as there may be more than one plausible interpretation. The complexities are driven by the fact that the legislative provisions may be unclear and ambiguous. There are, however, tools that could be utilised to assist in the interpretation process. There are two broad interpretation approaches, and these are language or linguistic approach and substantive approaches, these approaches were discussed in detail in Chapter 2 above. The courts have stated that if the text is clear and ambiguous then it must be applied. (The Writing Centre, 2017: 2)

From an Australian perspective, the basic principle of interpretation involves consideration of the ‘text, context, and purpose of the statute’. There are two broad approaches to interpretation, and these are literal interpretation approach and purposive interpretation approach, these approaches were discussed in detail in Chapter 2 above. There is a recognition that the literal approach may not yield the desired results hence the purposive approach would be pursued. (Krever and Mellor, 2014)

The approaches adopted by the 3 countries above are similar in that they all recognise the complexities that come with the process of interpreting a legislation. All of the 3 countries have two interpretation of statutes approaches which are, the ‘literal approach’ and the ‘intention of the legislature approach’. These countries seem to concur on the point of departure which is applying the text if it clear and unambiguous. It is noteworthy that judiciary had to intervene in all these countries to ascribe meaning to certain legislative provisions which highlights the complexities that come with the interpretation of legislation process.

6.2 Definition of Key Terms

Resident

South Africa

Resident status for tax purposes can be obtained in two ways, either through ordinarily residence or through physical presence test (SARS, 2020b). The ordinarily resident and physical presence tests are essentially both tests trying to establish a country with which the individual has the strongest ties or connection and this is done through examining the specific factors surrounding an individual. The Income Tax Act does not define the term ‘ordinarily resident’ and the judiciary had to intervene and ascribe meaning to this term (De Koker *et al,* 2019: 5-6). The physical presence test is relatively straightforward as it is easier to determine whether an individual was in the country or not.

The United States

There are two key concepts that connect the United States tax authority and an individual, these are, citizen and resident alien (Weinstock, 2018). The United States citizenship is determined in accordance with the migration laws (U.S. Citizenship and Migration Services, 2020). There is a factual enquiry that is undertaken to determine whether an individual is a resident alien. The resident alien requirements are essentially trying to establish a state with which an individual has the strongest connection or ties (Kroll, 1985). The United States is one of the few governments that has a ‘citizenship-based tax system’ (Christians, 2017: 202)

Australia

Resident status for tax purposes can be obtained by residing in Australia and being either domiciled in Australia or meet the physical presence test (Alley et al, 2001). The key word with regard to residence is ‘reside’ which is not defined in the Income Tax Assessment Act and the judiciary had to intervene (Australian Taxation Office, 2020d). The enquiry into residence is essentially trying to establish a country with which an individual has the strongest connection and this is done through examining the specific factors surrounding an individual (Alley et al, 2001).

South Africa and Australia have similar provisions in relation to residence for tax purposes, in that the enquiry is based on residence of an individual which takes into account the specific facts surrounding an individual. This is how the connection between an individual and the tax authority is created. On the other hand, there are two concepts that create a connection between the United States’ tax authority and an individual, these concepts are citizen and resident alien. It could be argued that the Unites States has a lot more individuals captured in their tax base net compared to South Africa and Australia, this argument is based on the fact that the United States has a ‘citizen-based system of taxation’ while South Africa and Australia have a ‘residence-based system of taxation’, the basis of these argument were discussed in detail in Chapter 2 above.

Foreign Employment Income

South Africa

The Income Tax Act does not explicitly define the term foreign employment, however, there are terms that can be examined to provide a basis for an argument on what foreign employment income means. The Fourth Schedule of the Income Tax Act deals with employees' tax, and it has the terms that could be used to define what employment income is. The terms that were examined in Chapter 2 are employer, employee, remuneration, income, Republic, and gross income.

There is a definition of foreign employment income in the Interpretation Note No. 16: *Exemption from income tax: Foreign Employment Income*. This Interpretation Note deals specifically with the exemption provision, section (10)(1)(*o*)(ii) of the Income Tax Act. There are slight differences between the definition in the Interpretation Note and the definitions in the Fourth Schedule of the Income Tax Act. The differences are that the Interpretation Note excludes independent contractor and personal services providers in the definition of employees while the Fourth Schedule of the Income Tax Act's definition includes independent contractors and personal services providers. Another difference is that the Interpretation Note requires that the amount must be received for services rendered while the Income Tax Act states that the amount may be received for services rendered or not.

The Interpretation Notes are not legally binding, however, they may assist in the interpretation of a legislative provision (Strauss, 2018). The examination of the terms in the Fourth Schedule of the Income Tax Act as mentioned above and examination of the Interpretation Note No. 16: *Exemption from income tax: Foreign Employment Income* led to the conclusion that foreign employment income would be remuneration as defined in the Fourth Schedule of the Income Tax Act received by any person for services rendered outside the Republic.

The United States

The Internal Revenue Code does not define explicitly the term foreign employment income, there are, however, terms that can be examined to ascribe meaning to the term foreign employment income. Section 911(b)(1)(A) and section 911(d)(2) of the Internal Revenue Code define the terms foreign earned income and earned income respectively. These terms and the foreign country terms were examined in detail in Chapter 2 above. The examination of these term led to a conclusion that foreign employment income would be earned income as defined in section 911(d)(2) of the Internal Revenue Code[7] earned by a citizen or a resident alien of the United States from a foreign country.

Australia

The term foreign employment income is not explicitly defined in the Income Tax Assessment Act 1936 read together with Income Tax Assessment Act 1997. Section 23AG of the Income Tax Assessment Act 1936 defines the terms foreign earnings and the Australian Taxation Office provides the definition of the term foreign earnings, which arguably includes employment income. These terms are discussed in detail in Chapter 2 above. The examination of this terms led to the conclusion that foreign employment income from an Australian perspective would be foreign earnings as defined in section 23AG of the Income Tax Assessment Act 1936.

Noteworthy from all the countries is that the term foreign employment income is not explicitly defined in the domestic legislation. SARS defines this term in the Interpretation Note No. 16: *Exemption from income tax: Foreign Employment Income* which is not part of the Income Tax Act. There are consistencies in what would be considered foreign employment income across the 3 countries from the examination of the different terms within the respective tax legislation. The judiciary had to intervene in Australia to discern the meaning of income and foreign earnings while there were no judicial interventions that could be found in South Africa and the United States.

6.3 Foreign Employment Income Legislative and Judicial Provisions

South Africa has a ‘residence-based taxation system’ which means that residents are taxed on their world-wide income including foreign employment income (De Koker *et al*, 2019: 5-3). The foreign employment income for an individual is included in the individual’s gross income and may be exempt if the requirements of section (10)(1)(*o*)(ii) of the Income Tax Act are met. The foreign employment income is exempt up to R1,25 million if all the other requirements of (10)(1)(*o*)(ii) of the Income Tax Act are met (SARS, 2020a). There are relief

[7] The term ‘‘earned income’’ means wages, salaries, or professional fees, and other amounts received as compensation for personal services rendered but does not include distribution of earnings or profits which are not considered a reasonable compensation for services rendered.

provisions in the Income Tax Act in a form of exemptions, rebates, and deductions (SARS, 2020a).

The United State has ‘citizenship-based taxation system’ which means that a citizen of the United States is subjected to tax in the United States regardless of where they reside, this would include taxation on foreign employment income (Weinstock, 2018). The United States resident alien is also taxed on their worldwide income (IRS, 2020a). The United States has foreign income exclusions, foreign tax deduction and foreign tax credits aimed at relieving the United States citizens and the United States resident aliens from double taxation (IRS, 2020e).

Australia has a ‘residence-based taxation system’ which means that residents are taxed on their world-wide income including foreign employment income (Australian Taxation Office, 2019). Important to note from an Australian perspective is that the exemption available in limited circumstances (Parliament of Australia, 2009). The Parliament of Australia (2009) argued that the limited number of individuals to whom the exemption is applicable to, was implemented to ensure fairness with the Australian residents who work in Australia.

The allocation of taxing rights in relation to foreign employment income is to some extent similar between the 2 countries (South Africa and Australia) and is different to the United States’ approach. South Africa and Australia allocate the taxing rights to themselves before considering any exemptions. The United States also allocate the taxing rights to itself, however the difference is that the United States also include United States citizens in their worldwide taxation approach. The citizenship-based approach is not applicable to South Africa and Australia.

The noteworthy difference comes from the foreign employment income exemptions in terms of which services are included in the exemption. From a South African perspective, the section 10(1)(*o*)(ii) of the Income Tax Act exemption is not applicable only to public office holders and employees in any sphere of government (SARS Interpretation Note No. 16, 2020). Australia is specific on what services are include in the foreign employment exemption and the list of services included is limited, meaning that most Australian citizens would be exposed to double taxation. The list of the limited services is discussed in Chapter 4 above. The section 23AG of the Income Tax Assessment Act 1936 is also not applicable to the Australian government employees delivering Australian official development assistance (Australian Taxation Office, 2017). From a United States perspective, the United States government employees are excluded in the foreign earned income determination in terms of section 911(b)(1)(B) of the Internal Revenue Code.

Another noteworthy difference is that from an Australian perspective is that the exemption is not applicable if the foreign employment income originates from a country that does not impose tax on employment services (Australian Taxation Office, 2017) and there is no such provision from a South African and the United States perspective.

South Africa has exacerbated the double taxation by limiting the possible exemption to only R1,25 million (SARS Interpretation Note No. 16, 2020) and Australia also exacerbated the double taxation conundrum by limiting the foreign services to which the exemption applies to (Parliament of Australia, 2009). The limitation of the amount is arguably better than the limitation of foreign services, with the limitation of the amount means more residents are taken into account while on the other hand, the limitation of services only a few residents who provide those services are covered by the exemption. The United States issue is multi-layered in a sense that, the first issue to deal with is, the citizens who are not in substance residents of United States but are exposed to the United States taxation. The second issue to deal with is then the United States citizens (who are in substance residents as well) who are also exposed to double taxation. The United States does not have the limitation in terms of services that are covered in the exemption. All 3 countries do provide unilateral relieves in instance where the residents are also taxed in foreign countries. The DTA relieves are discussed below.

6.4 DTA Provisions in Relation to Resident and Foreign Employment Income

The important element with regards to the DTA is whether the DTA supersede the domestic laws or not. The importance of this is that, it would be futile to look at the DTA if the domestic law does not recognise the DTA provisions or overrides the DTA provisions.

From a South African perspective, DTA provisions are part of the domestic law in terms of section 108 of the Income Tax Act (De Koker *et al*, 2019). The residence of a South African will be determined in accordance with the provisions of the DTA between South Africa and the United States and Australia for an example. In term of foreign employment income, the DTA provision will supersede the domestic law provisions and the foreign employment income will be taxed in the foreign country unless the South African resident is not in the foreign country for the specified period and does not meet all the other requirements discussed in Chapter 5 above.

From a United States perspective, the DTA provisions and ‘the federal statutes have equal status as the supreme law of the land’. If there are conflicts between the DTA provision and federal statutes, ‘the later in time’[8] takes precedence. The challenge with the United States provisions is that both the domestic and DTA provisions will have to be considered at the same time and if there are conflicts then the judiciary would probably have to intervene. (Streng, 2009)

From an Australian perspective, the DTA provisions may override the domestic legislation in terms of section 4(1) of the International Tax Agreement Act as discussed in Chapter 5 above (The University of Melbourne, n.d.). The DTA provision in relation to residence and foreign employment would then most likely take precedence over the domestic provisions. The enquiry into the residency of an individual would then take place in an effort to try and establish the strongest connection or ties with a specific country.

In conclusion, the question to be answered is which resident is in a better position from a tax perspective between the South African, Australian, and the United States’ resident? The South African residents appear to be in a better position compared to the Australian and United States’ residents. The South African provisions are arguably straightforward while the United Sates provisions require a lot of enquiries before the exemption is available. On the other hand, Australia has a very limited number of foreign services to which the exemption applies. The example below illustrates the point;

Individual X is a resident in country Y and works in country Z as a business analyst. Individual X has been in country Z for more than 60 consecutive days in the current year and 184 days during the current year. Individual X received foreign employment income as defined from country Z to the value of R1 million or $100, 000 United States dollars or $110,

[8] This means that the provision that came last will take precedence.

000 Australian dollars. Individual X paid tax on the employment income in Country Z. The DTA provisions are ignored in this example.

From a South African perspective, Individual X's remuneration would be fully exempt from tax because the remuneration is less than R1,25 million and Individual X was outside the Republic for a more than 60 consecutive days and more than 183 days in total.

From a United States perspective, an enquiry would have to be undertaken to establish whether Individual X has a tax home in country Z. If it is established that Individual X has a tax home in country Z then Individual X must meet one of the 3 requirements for this exemption to apply, these requirements are discussed in Chapter 4 above. If Individual X is a citizen or resident alien of the United States then Individual X must either be a bona fide resident of country Z and there must be a DTA between the United States and country Z if Individual X is a resident alien, or be in country Z for more than 330 full days. In the example above Individual X was not in country Z for more than 330 days as required, assuming that Individual X is a bona fide resident of country Z then the exemption will be available because the foreign employment income is less than the $108, 700 limit.

From an Australian perspective, the remuneration received by Individual X would not be exempt from the Australian taxation because, being a business analyst is not part of the services covered by the exemption, the services covered by the exemption are discussed in Chapter 4 above.

For the taxes paid in Country Z:

From a South African perspective, the section 6quat of the Income Tax Act credit or deduction will not be available to Individual X because the foreign employment income was fully exempt.

From a United States perspective, the foreign tax credit or deduction will not be available because the foreign employment income was fully exempt from tax.

From an Australian perspective, the foreign tax credit or deduction will be available because the remuneration was not exempt from tax.

Chapter 7: Conclusion

In conclusion, the interpretation of legislation from the 3 different countries (South Africa, the United States and Australia) appears to be similar in a sense that they all recognise that the process of interpretation is complex, it does not only require an excellent understanding of the language in which the legislation is written. The interpretation of legislation also requires the consideration of the bigger context in which the legislative provision exists. The key challenge is ascertaining the intention of the legislature. All 3 countries (South Africa, the United States and Australia) have had challenges in interpreting the legislation which is demonstrated by the intervention of the judiciary.

The income tax legislation from all the 3 countries do not adequately define what a resident and what foreign employment income is in their domestic legislation. If the legislation does not clearly define what the legislative provisions mean, the judiciary would have to be involved to ascribe meaning to certain provisions. The unclear or ambiguous legislative provisions pose difficulties for the interpreter.

This research report is about the allocation of taxing rights in relation to foreign employment income between the residents of the 3 countries (South African, the United States and Australia). As discussed above, the United States claims taxing rights on all their citizens regardless of where they reside which is a strange phenomenon in the South African and Australian tax arena. The predominant principle is that the residents of a particular country are taxed on their word wide income, not necessarily the citizens.

The domestic allocation taxing rights in relation to foreign employment income seems to be allocated to resident countries and the resident countries have relief mechanism to minimise double taxation. Taxation in most jurisdictions is linked to residence or source however the United States creates a connection between the tax authority and an individual through citizenship as well.

The amendment of section 10(1)(*o*)(ii) of the Income Tax Act was introduced recently (1 March 2020), it has not matured, and it would be interesting to follow up on the practical application of this amendment which is not adequately covered in this research report due to limited practical examples thus far.

Reference List

Legislation

Australia

Income Tax Assessment Act, 1936

International Tax Agreement Act, 1953

Income Tax Assessment Act, 1997

South Africa

Income Tax Act 58 of 1962

Tax Administration Act 28 of 2011

Constitution of the Republic of South Africa, 1996

The United States

Internal Revenue Code.

Model Tax Conventions

Organisation for Economic Co-operation and Development. (2010). *Commentaries on The Articles of The Model Tax Convention*. Available from: https://www.oecd.org/berlin/publikationen/43324465.pdf (Accessed on 30/05/2020).

Organisation for Economic Co-operation and Development. (2017). *Model Tax Convention on Income and on Capital: Condensed Version 2017.* Available from: https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en (Accessed on 20/04/2020).

Treasury. (2016). *United States Model Income Tax Convention.* Available from: https://www.treasury.gov/resource-center/tax-policy/treaties/documents/treaty-us%20model-2016.pdf (Accessed on 02/01/2021).

Cases

Australia

Cesna Sulphur Co Ltd v Nicholson [1876] LR 1 Ex D 428
Coventry v Commissioner of Taxation [2018] AATA 175
Levene v IRC [1928] UKHL 1, AC 217, 222
Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157
Re Grant v Federal Commissioner of Taxation [2007] AATA 1783
Scott v Commissioner of Taxation (NSW) (1935) 35 SR (NSW) 215
Singh v The Commonwealth [2004] HCA 43

South Africa

Cohen v CIR 1946 AD 174, 13 SATC 362
CIR v Epstein 1954 (3) SA 689 (A), 19 SATC 221
CIR v Kuttel 1992 (3) SA 242 (A), 54 SATC 298
CIR v Lever Bros & Unilever Ltd 1946 AD 441, 14 SATC 1
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
X v The Commissioner for The South African Revenue Service (14218) [2018] ZATC 9

United States

Carpenter v United States 348 F. Supp. 179 (N.D. Tex. 1972)
Cesna Sulphur Co Ltd v Nicholson [1876] LR 1 Ex D 428
Dammers v Comm'r of Internal Revenue 76 T.C. 835 (U.S.T.C. 1981)
Levene v IRC [1928] UKHL 1; [1928] AC 217, 222
Sebelius v Cloer [2013] 569 U.S. 369

Books

Arnold, B.J. 2016. *International Tax Primer,* 3rd Edition, Kluwer Law International B.V.: The Netherlands

Botha, C. 2012. *Statutory Interpretation: An Introduction for Students,* 5th Edition, Juta: Cape Town

De Koker, A., Koekemoer, A., and Williams, RC. 2019. *Silke on South Africa Income Tax* (loose-leaf, last updated 2019), LexisNexis: Durban

Stiglingh, M., Koekemoer, A.D, Van Heerden, L., Wilcocks, J.S., and Van der Zwan, P. 2020. *Silke: South African Income Tax,* LexisNexis: South Africa

Thuronyi, V., Gordon, R.K., Vanistendael, F., Williams, D., Cnossen, S., Terra, B.J.M., Youngman, J.M., and Rudnick R.S. 1996. *Legal framework for taxation*., IMF Graphics Section: Washington

Online Publications

Australian Tax Office. (2016). *Foreign Employment Income.* Available from: https://www.ato.gov.au/General/International-tax-agreements/In-detail/Foreign-source-income-of-Australian-residents/Foreign-employment-income/ (Accessed on 23/07/2020).

Australian Tax Office. (2017). *Foreign Employment Income – General Questions*. Available from: https://www.ato.gov.au/Individuals/International-tax-for-individuals/In-detail/Foreign-income-of-Australian-residents/Foreign-employment-income-and-section-23AG---employees/?page=2#:~:text=Your%20foreign%20employment%20income%20may,five%20categories%20of%20foreign%20service (Accessed on 12/02/2021)

Australian Tax Office. (2019). *Guide to Foreign Income Tax Offset Rules 2019.* Available from: https://www.ato.gov.au/Individuals/Tax-return/2019/In-detail/Publications/Guide-to-foreign-income-tax-offset-rules-2019/?=redirected_GuideToForeignIncomeTaxOffsetRules-redirect (Accessed on 02/06/2020)

Australian Tax Office. (2019a). *Personal Services Income.* Available from: https://www.ato.gov.au/Business/Personal-services-income/ (Accessed on 31/03/2021)

Australian Tax Office. (2020). *Reporting Your Foreign Employment Income.* Available from: https://www.ato.gov.au/individuals/international-tax-for-individuals/going-overseas/working-overseas/reporting-your-foreign-employment-income/ (Accessed on 14/11/2020).

Australian Tax Office. (2020a). *Foreign Income Exempt from Tax.* Available from: https://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Income/Exempt-foreign-employment-income/?anchor=Foreignincomeexemptfromtax#Foreignincomeexemptfromtax (Accessed on 12/02/2021).

Australian Tax Office. (2020b). *How Exempt Foreign Employment Income Affects your Tax.* Available from: https://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Income/Exempt-foreign-employment-income/?anchor=Exemptforeignemploymentincomehowitaffect#Exemptforeignemploymentincomehowitaffect (Accessed on 12/02/2021).

Australian Tax Office. (2020c). *Residency and Source of Income.* Available from: https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/. (Accessed on 12/02/2021).

Australian Tax Office. (2020d). *Residency – the Resides Test.* Available from: https://www.ato.gov.au/individuals/international-tax-for-individuals/in-detail/residency/residency---the-resides-test/. (Accessed on 30/03/2021)

EveryCRSReport. (2014). *Statutory Interpretation: General Principles and Recent Trends.* Available from: https://www.everycrsreport.com/reports/97-589.html#ifn12. (Accessed on 14/11/2020)

Expatra. (2020). *Dubai Income Tax & Taxation Advantages for Expats*. Available from: https://expatra.com/guides/dubai/dubai-tax-explained/ (Accessed on 20/07/2020).

Geldenhuys, J. (2019). *South Africa's new 'expat tax' – 7 things you need to know*. Available from: https://www.moonstone.co.za/south-africas-new-expat-tax-7-things-you-need-to-know/ (Accessed on 12/06/2020).

IRS. (2020a). *Taxpayers Living Abroad.* Available from: https://www.irs.gov/individuals/international-taxpayers/taxpayers-living-abroad (Accessed on 12/06/2020)

IRS. (2020b). *COVID-19 Relief for Form 2555 filers – 7-MAY-2020.* Available from: https://www.irs.gov/forms-pubs/covid-19-relief-for-form-2555-filers (Accessed on 10/02/2021).

IRS. (2020c). *Resident Aliens.* Available from: https://www.irs.gov/individuals/international-taxpayers/resident-aliens (Accessed on 02/01/2021)

IRS. (2020d). *Foreign Earned Income Exclusion - Tax Home in Foreign Country.* Available from: https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-tax-home-in-foreign-country (Accessed on 02/01/2021)

IRS. (2020e). *Tax Guide for U.S. Citizens and Resident Aliens Abroad.* Available from: https://www.irs.gov/pub/irs-pdf/p54.pdf (Accessed on 10/02/2021)

IRS. (2020f). *Residency Starting and Ending Dates.* Available from: https://www.irs.gov/individuals/international-taxpayers/residency-starting-and-ending-dates (Accessed on 30/03/2021)

IRS. (2021). *Foreign Earned Income Exclusion*. Available from: https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion (Accessed on 10/02/2021).

IRS. (2021a). *Tax Code, Regulations and Official Guidance.* Available from: https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance (Accessed on 28/03/2021)

Kirby, M. (2011). *Statutory Interpretation: The Meaning of Meaning*. Available from: http://classic.austlii.edu.au/au/journals/MelbULawRw/2011/3.html#fnB19 (Accessed on 29/01/2021)

Krever, R. and Mellor, P. (2014). *Legal Interpretation of Tax Law: Australia.* Available from: https://www.researchgate.net/publication/303859448_Legal_Interpretation_of_Tax_Law_Australia (Accessed on 14/11/2020).

Le Roux, H. (2017). *Taxing of Income Earned from Foreign Employment*. Available from: https://0-search-proquest-com.innopac.wits.ac.za/docview/1945000614/DBD26ED80AEE428EPQ/8?accountid=15083 (Accessed on 20/06/2020).

Lobban, T. (n.d.). *South African Taxpayers Must Familiarise Themselves with Relief from Double Taxation*. Available from: https://www.taxconsulting.co.za/south-african-taxpayers-must-familiarise-themselves-with-relief-from-double-taxation/ (Accessed on 02/01/2021).

Madden, C. and Moosa, Z. (2018). *New Tax Court case on source.* Available from: https://home.kpmg/content/dam/kpmg/xx/pdf/2018/07/tnf-south-africa-jul2-2018.pdf (Accessed on 20 June 2020).

National Constitution Center. (n.d.). *Citizenship Rights, Equal Protection, Apportionment, Civil War Debt*. Available from: https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv (Accessed on 02/01/2021)

National Treasury of South Africa. (2000). *The Impact of Globalization on Tax Policy and the Use of Tax Incentives.* Available from: https://static.pmg.org.za/docs/2000/appendices/001025Globalisation.htm. (Accessed on 31/03/2021)

Parliament of Australia. (2009). *Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009*. Available from: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0809/09bd158 (Accessed on 12/02/2021)

Reabetswe, M. (2020). *Should expatriates pay provisional tax to SARS.* Available from: https://www.iol.co.za/personal-finance/tax/should-expatriates-pay-provisional-tax-to-sars-47976249#:~:text=%22Therefore%2C%20despite%20only%20earning%20a,to%20Sars%2C%E2%80%9D%20says%20Moloi. (Accessed on 22/05/2020).

Roelofse, L.R., and Heymann, M. (2020). *The interpretation of tax legislation. Taxpayers should approach the interpretation of tax legislation as set out in Natal Joint Municipal*

Pension Fund. Available from: https://www2.deloitte.com/za/en/pages/tax/articles/the-interpretation-of-tax-legislation.html.
(Accessed on 14/11/2020).

Rossouw, C. (2020). *New tax laws for expats*. Available from: https://www.allangray.co.za/latest-insights/personal-investing/new-tax-laws-for-expats/ (Accessed on Accessed on 14/11/2020

SAICA. (2001). *Residence Basis of Taxation.* Available from: https://www.saica.co.za/integritax/2001/935_Double_taxation_agreements.htm (Accessed on 13/02/2021)

SARS. (2018). *Mutual Agreement Procedure (MAP).* Available from: https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/Mutual-Agreement-Procedure.aspx (Accessed on 13/02/2021)

SARS. (2018a). *Primary Legislation.* Available from: https://www.sars.gov.za/Legal/Primary-Legislation/Pages/default.aspx (Accessed on 28/03/2021)

SARS. (2020a). *Foreign Employment Income Exemption.* Available from: https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Foreign-Employment-Income-Exemption.aspx (Accessed on 13/06/2020)

SARS. (2020b). *Non-residents.* Available from: https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Tax-and-Non-Residents/Pages/default.aspx#:~:text=South%20Africa%20has%20a%20residence,where%20their%20income%20was%20earned.&text=This%20possibility%20of%20double%20taxation,Double%20Taxation%20Agreements%20(DTAs). (Accessed on 13/06/2020).

SARS. (2021). *Foreign Employment Income Exemption.* Available from: https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Foreign-Employment-Income-Exemption.aspx (Accessed on 31/01/2021)

SARS. (2021a). *Double Taxation Agreements (DTAs) & Protocols*. Available from: https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx. (Accessed on 13/02/2021)

SARS. (2021b). *Personal Income Tax.* Available from: https://www.sars.gov.za/TaxTypes/PIT/Pages/default.aspx#:~:text=The%202020%20year%20of%20assessment,your%20annual%20income%20tax%20return. (Accessed on 31/03/2021)

State Library, New South Wales. (ND). *Section 4: Precedent and evidence.* Available from: https://legalanswers.sl.nsw.gov.au/hot-topics-courts-and-tribunals/precedent-and-evidence. (Accessed on 16/02/2021)

Steward, A. (2012). *Tax Treaties and Residence*. Available from: https://www.thesait.org.za/news/114193/Tax-Treaties-And-Residence.htm (Accessed on 14/11/2020).

Strauss, B. (2018). *Status of SARS Interpretation Notes*. Available from: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes-.html (Accessed on 30/01/2021)

Streng, W.P. (2009). *U.S. Income Tax Treaties.* Available from: http://www.law.uh.edu/faculty/wstreng/HoustonInternationalTaxForum.pdf (Accessed on 13/02/2021)

The University of Melbourne. (2021). *Australian Taxation Office (ATO) Guidance & Rulings*. Available from: https://unimelb.libguides.com/c.php?g=925287&p=6682439. (Accessed on 20/02/2021)

The White House. (ND). *The Legislative Branch.* Available from: https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/#:~:text=Established%20by%20Article%20I%20of,form%20the%20United%20States%20Congress (Accessed on 20/02/2021)

The Writing Center, Georgetown University Law Center (2017). *A Guide to Reading, Interpreting and Applying Statutes*. Available from: https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (Accessed on 29/11/2021)

U.S. Citizenship and Migration Services. (2020). *Citizenship and Naturalization*. Available from: https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization#:~:text=Naturalization%20is%20the%20process%20by,and%20Nationality%20Act%20(INA). (Accessed on 18/02/2021)

U.S. Citizenship and Migration Services. (2021). *Chapter 2 - Lawful Permanent Resident Admission for Naturalization*. Available from: https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2. (Accessed on 30/03/2021)

Weinstock, I. (2018). *U.S. Tax Residency: Some Black-and-White Rules, Some Gray*. Available from: https://0-search-proquest-com.innopac.wits.ac.za/docview/2185815644/7875390F3F1F46E5PQ/11?accountid=15083 (Accessed on 20/06/2020).

Wood, R.W. (2015). *Amazingly, IRS Says You Can't Rely on IRS Instructions.* Available from: https://www.forbes.com/sites/robertwood/2015/11/11/amazingly-irs-says-you-cant-rely-on-irs-instructions/?sh=57d9767a341a. (Accessed on 16/02/2021)

Journal Articles

Alley, C., Bentley, D. and James, S. (2001). ‘The New Zealand Definition of 'Residence' for Individuals: Lessons for Australia in a 'Global' Environment’, *Journal of Australian Taxation:* Volume 4, Issue 1. Available from: http://classic.austlii.edu.au/au/journals/JlATax/2001/2.html#fn57 (Accessed on 14/11/2020)

Christians, A. ‘A Global Perspective on Citizenship-Based Taxation’, *Michigan Journal of International Law:* Volume 38, Issue 2. Page 193-197. Available from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1486&context=mjil (Accessed on 09/02/2021)

Kroll, R.E. (1985). ‘Internal Revenue Code Section 7701(b): A More Certain Definition of Resident’, *Penn State International Law Review*: Volume 3, Issue 3. Page 233-253. Available from: *https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1025&context=psilr* (Accessed on 14/11/2020)

Taylor, C.J. (2011). ‘Some distinctive features of Australian tax treaty practice: An examination of their origins and interpretation’, *eJournal of Tax Research*. Page 294-338. Available from: https://www.business.unsw.edu.au/research-site/publications-site/ejournaloftaxresearch-site/Documents/paper4_v9n3_Taylor.pdf (Accessed on 02/01/2021).

Double Taxation Agreements

South Africa and Australia:

Agreement between the Government of The Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income. Available from: https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-23%20-%20DTA%20Australia%20GG%2020761.pdf (Accessed on 02/06/2020).

South Africa and the United States:

Convention between The Republic of South Africa and The United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains. Available from: https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-82%20-%20DTA%20United%20States%20of%20America%20GG%2018553.pdf (Accessed on 02/06/2020).

The United States and Australia

Double Taxation Taxes on Income Convention Between the United States of America And Australia. Available from: https://www.irs.gov/pub/irs-trty/aus.pdf. (Accessed on 15/02/2021)

Interpretation Notes

South Africa Revenue Service Interpretation Note: No. 3 (Issues 2), 2018, *Resident: Definition in Relation to a Natural Person –Ordinarily Resident.* Available from: https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-03%20-%20Resident%20definition%20natural%20person%20ordinarily%20resident.pdf (Accessed on 20/06/2020).

SARS. (2018). South African Revenue Service Interpretation Note: No. 4 (Issue 5), 2018, *Resident: Definition in Relation to a Natural Person – Physical Presence Test.* Available from: https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-04%20-%20Resident%20definition%20natural%20person%20physical%20presence.pdf (Accessed on 15/08/2020)

South Africa Revenue Service Interpretation Note: No. 16 (Issues 3), 2020, *Exemption from Income Tax: Foreign Employment Income.* Available from: https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-16%20-%20Exemption%20Foreign%20Employment%20Income.pdf (Accessed on 15/05/2020).

Tax Rulings

Australian Taxation Office Tax Ruling 98/17, 1998, *Income tax: residency status of individuals entering Australia*. Available from: https://www.ato.gov.au/law/view/pdf/pbr/tr1998-017.pdf (Accessed on 14/11/2020).

Working Paper Series

Thampapillai, D.J. (2016). *Foreign Employment Income and Double Tax Avoidance Agreement: Australia's Possible Governance Failure*, National University of Singapore