UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

A RESEARCH REPORT SUBMITTED TO THE FACULTY OF COMMERCE, LAW, AND MANAGEMENT IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF COMMERCE (SPECIALISING IN TAXATION)

Domestic tax relief for South African taxpayers on technical service income received from foreign jurisdictions.

Abstract

South African tax legislation provides for domestic tax relief measures in s 6*quat* of the Income Tax Act 58 of 1962[1] which cater for scenarios where taxpayers have suffered double taxation on certain income received. This is typically seen in instances where income is earned from a foreign jurisdiction, has been subject to tax in that foreign jurisdiction and is subsequently taxed in South Africa as well. The intricate application of the provisions of s 6*quat* provides for significantly different relief to taxpayers insofar as the s *6quat* deduction is available versus the s *6quat* rebate. This research will evaluate different scenarios where certain international tax aspects, such as double tax agreements and permanent establishments, impact the relief available to South African taxpayers, specifically focusing on technical service income earned from foreign jurisdictions. With an imperative focus on the 'source' of technical service income earned from a foreign jurisdiction, the analysis will highlight the role a permanent establishment and double tax agreement respectively play in the relief afforded to taxpayers domestically, by quantifying the effective relief afforded in different scenarios. The research suggests that the absence of a permanent establishment results in lesser relief available to South African taxpayers insofar as the s 6*quat* rebate would not be available but rather the s 6*quat* deduction.

Key Words: section 6*quat*, foreign tax relief, source, foreign service income, technical service income, permanent establishment, double tax agreement.

[1] All refences to 'sections' are to sections of the Income Tax Act unless otherwise indicated.

Declaration

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

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Glossary of Terms and Abbreviations

DRC	The Democratic Republic of the Congo
OECD	Organisation for Economic Co-operation and Development
SARS	The South African Revenue Service
IMF	International Monetary Fund
the Republic	The Republic of South Africa
the UK	The United Kingdom of Great Britain and Northern Ireland

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Chapter 1: Introduction

1.1 Research context

> '[South African] residents are subject to income tax on their worldwide taxable income regardless of the source of the income. Foreign-source amounts derived by a resident may under specific circumstances be taxed by the country of source and by South Africa, resulting in international juridical double taxation…' (SARS, 2022:4).

The provisions of s 6*quat* provide relief from double taxation of foreign income[2] earned and taxed in foreign jurisdictions when taxpayers include such foreign income in their gross income[3] in South Africa. This is achieved by providing taxpayers with either a tax rebate (s 6*quat*(1)) or a deduction (s 6*quat*(1C)) against taxable income[4].

This research investigates different scenarios that could impact the application of s 6*quat* and the effective relief it affords, which may be of particular importance to South African taxpayers operating on a global scale. The author of this research, being an in-house tax advisor of a multinational engineering consulting firm, has identified this research topic in practice and recognizes the need for South African taxpayers to be cognisant of the intricacies of s 6*quat* and how it affects the relief afforded to them.

For purposes of this research, and in line with the author's practical experience with engineering consulting services, 'technical services' are the cornerstone from which further application stems, even though reference and application to services in general are made in certain instances. It follows that, the first focus area of this research is that of the source of technical service income earned in a foreign jurisdiction and the principles applied thereto in South African income tax legislation and common law.

At its onset, s 6*quat*(1)(*a*) deals with income received by a resident 'from any source outside the Republic'. In order to determine the source of an amount, domestic legislation, common law principles and relevant double tax agreements should be considered (SARS, 2022:19). Section 9(2) provides for the source determination of distinct types of receipts and accruals such as dividends, interest, royalties, etc. When the determination of source of income is made, the provisions of s 9 will override any common

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[2] References to 'foreign income' are made in line with the definition of 'income' contained in s 1, being:

> *'…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'*

[3] Section 1 defines 'gross income' as:

> '(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…'

[4] Section 1 defines taxable income as

> '…(a) the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and
> (b) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act;'

law position if in conflict (SARS, 2022:20). It is the interpretation of the author that, in cases where the provisions of s 9 do not apply to a specific item of service income, common law principles would need to be applied.

Section 9(2)(*e*) specifically addresses the source determination of scientific, technical, industrial, or commercial service receipts and accruals. For purposes of analysing technical service income received by a South African taxpayer from a foreign jurisdiction in this research, s 9(2)(*e*) will be relied on for source determination. This is based on the author's view that the rendering of engineering consulting services inherently involves the imparting of knowledge or information, which falls within the ambit of s 9(2)(*e*). For example, a South African engineer that designs plans for a certain structure is imparting intellectual knowledge and information, which essentially creates the service or product that he is selling to a client.

Section 9(2)(*e*) states that an amount is received from a source within the Republic if that amount,

> 'is attributable to an amount incurred by a person that is a resident and is received or accrues in respect of the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information, or the rendering of or the undertaking to render, any assistance or service in connection with the application or utilisation of such knowledge or information, unless the amount so received or accrued is attributable to a permanent establishment which is situated outside the Republic;… [Emphasis added].'

With reference to the emphasised phrase, it is the author's interpretation that s 9(2)(*e*) may also qualify scenarios where an amount is deemed not be from a source within the Republic, i.e., foreign sourced. Therefore, implying that, in instances where technical service income received is attributable to a permanent establishment situated outside South Africa, such income will not be deemed as South African sourced, but rather be classified as foreign sourced.

This leads to the next critical aspect for analysis in the application of s 6*quat*, being the connection to or type of presence in a foreign jurisdiction a South African taxpayer has when earning income from such a foreign jurisdiction. Section 1 defines a 'permanent establishment' as:

> '…a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development…'

Article 5(1) of the OECD's *Model Tax Convention on Income and on Capital* states that:

> 'For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on…'

The article continues by stipulating specific inclusions and exclusions respectively to the definition of a permanent establishment, as well as the different types of scenarios that could constitute a permanent establishment. This research aims to investigate the influence a permanent establishment of a South African taxpayer in a foreign jurisdiction has on the ultimate relief afforded in terms of s 6*quat*.

A further level of complexity is added to the possible application of s 6*quat* insofar as a double tax agreement is in place between South Africa and the jurisdiction from which the income is earned, or no such agreement exists. In an attempt to avoid double taxation of the same income in two different jurisdictions, double tax agreements allocate taxing rights to one of the jurisdictions (SARS, 2022:69). For example, art. 7(1) of the double tax agreement between South Africa and the DRC (SARS, 2012:2), which deals with business profits, states that:

> 'The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.'

Therefore, only profits of a South African permanent establishment in the DRC will be taxed in the DRC insofar as such profits are solely attributable to the permanent establishment. Conversely, where a South African resident taxpayer generates profits from the DRC in the absence of a permanent establishment, such profits will be taxed in South Africa. By allocating taxing rights to one of the jurisdictions, double taxation may be avoided, subject to consideration of the domestic source rules.

It is submitted that, in the absence of a double tax agreement, no specific taxing right is allocated between two jurisdictions, and a dual tax claim may exist from the onset. A dual tax claim is seen, for example, where a South African resident earns income from a foreign jurisdiction which is subject to withholding tax in that jurisdiction brought on by a source claim, after which the income received is included in the taxpayer's South African gross income by virtue a residency claim (SAIPA, n.d.: para.1). In these instances where no double tax agreement is in place between South Africa and another jurisdiction, and double tax has been suffered, a South African taxpayer is left at the mercy of the domestic relief afforded in s 6*quat* on double tax suffered.

The interplay of source, permanent establishments, and double tax agreements complicates the relief available to South African resident taxpayers in terms of s 6*quat,* complexities of which will be explored further in this research.

1.2 Purpose and approach

The purpose of the research is to establish the influence that source, permanent establishments, and double tax agreements respectively have on the relief afforded to South African resident taxpayers by virtue of the provisions of s 6*quat,* specifically in relation to technical service income earned in a foreign jurisdiction.

By isolating each of these aspects, outlining their application, and applying quantified comparisons in the absence and presence thereof, the impact of each is determined as part of the ultimate relief afforded by s 6*quat*.

The approach involves a technical analysis of each aspect before being quantified in different scenarios.

1.3 Research methodology and sources

The research report aims to isolate each component that influences the application of s 6*quat*, being source, permanent establishments and double tax agreements, in order to outline the qualification of each component, as well as quantify the baseline effect that each component has in the relief provided by s 6*quat.*

The research will subsequently compare the relief provided in terms of s 6*quat* in different scenarios where the absence and presence of the components vary and qualify the influence of each component on the effective relief of each scenario.

The research is therefore both qualitative and quantitative in nature.

The sources of information relied on for the research report will consist of, but not be limited to:

I. The Income Tax Act 58 of 1962
II. Income Tax Acts of certain foreign countries
III. South African tax common law principles
IV. Interpretation Notes and Guidance issued by SARS
V. The OECD's *Model Tax Convention on Income and on Capital*
VI. Double tax agreements entered into by South Africa with foreign jurisdictions such as the DRC, the UK, India, Eswatini, and Mozambique
VII. Commentary on the interpretation of South African income tax legislation

1.4 Research question

Statement of the question

The main research question is: What is the difference between the domestic tax relief available to South Africa taxpayers on technical service income received from a foreign jurisdiction, being either from a local or a foreign source, in the absence of a permanent establishment in the foreign jurisdiction in which taxes are suffered and where no double tax agreement is in place with South Africa, versus the presence of a permanent establishment and a double tax agreement in force with South Africa?

Sub-questions

To further explore the main research question, the following sub-questions will frame the research:

I. What domestic relief is available in South Africa on foreign taxes suffered?
II. When is technical service income earned from foreign jurisdictions seen as South African sourced and what are the tax implications on such service income earned from a foreign jurisdiction?
III. What taxing right allocation does a double tax agreement generally provide, and what is the recourse in the absence of a double tax agreement?
IV. What role does a permanent establishment play in the domestic relief available to South African taxpayers?

Limitations

For purposes of this research, focus will be placed on the s *6quat* relief available to South African incorporated companies in different scenarios where double tax agreements and permanent establishments are absent and present respectively, notwithstanding the fact that reference could be made to South African individuals from time to time.

In order to quantify the s 6*quat* relief available to South African taxpayers in the presence or absence of certain key components (permanent establishments and double tax agreements), the research only analyses the double tax agreements entered into by South Africa with the UK, India and Mozambique. The intension of the selection of these double tax agreements is aimed at highlighting some of the typical outcomes of relief afforded by s 6*quat*, rather than analysing a wide variety of double tax agreements and drawing a common conclusion.

Chapter 2: Domestic relief available in South Africa on foreign taxes suffered

South African resident taxpayers can encounter situations where technical service income earned from a foreign jurisdiction is subject to tax in both the country where the income was earned (i.e., source country), as well as in South Africa (i.e., residence country). Relief from the resultant double taxation in such a scenario is usually granted by the residence country, implying that the source country generally has priority to tax the income. Countries often provide relief from international juridical double taxation by way of double tax agreements, but many countries, such as South Africa, also provide unilateral tax relief in their domestic law. (SARS, 2022:4-5.)

> 'South Africa provides relief from double taxation to its residents in its domestic law mainly by rebate methods or by a deduction for foreign taxes payable on income that is subject to South African normal tax…' (SARS, 2022:5).

South Africa abandoned the source-based tax system and converted to a residence-based tax system for years of assessment commencing on or after 1 March 2001 (SARS, 2009b:1). While a source-based system taxes income in the country it originates from, a residence-based tax system taxes the residents of a country on their world-wide income, irrespective of where the income was earned (SAIPA, n.d.: para.1). Accordingly, if South African resident taxpayers earn income in a foreign country, the income must be included in their gross income in South Africa in terms of s 1(1).

In an attempt to provide relief against double taxation for South African residents that include foreign income, which has already been taxed in a foreign jurisdiction, in their gross income, South Africa provides unilateral tax relief in its domestic tax law by way of the provisions of s 6*quat*. Section 6*quat* provides for a rebate (s 6*quat*(1)) or a deduction (s 6*quat*(1C)) as way of relief, depending on certain circumstances, which are discussed in further detail below.

2.1 Section 6quat(1) rebate

> 'Section 6*quat*(1) is South Africa's primary mechanism for avoiding double taxation. "Rebate" means "a deduction from an amount to be paid" and, more specifically, under section 6*quat* refers to a deduction of foreign taxes from normal tax otherwise payable. South Africa grants this relief unilaterally through domestic legislation and bilaterally through most of its tax treaties.' (SARS, 2022:9.)

For purposes of analysing the rebate available to South African taxpayers in terms of s 6*quat*, reference is made to s 6*quat*(1)(*a*), which reads as follows:

> 'Subject to subsection (2), where the taxable income of any resident during a year of assessment includes –
>
> (i) any income received by or accrued to such resident from any source outside the Republic;…

> in determining the normal tax payable in respect of that taxable income there must be deducted a rebate determined in accordance with this section.'

Section 6*quat*(1)(*a*) stipulates that the income received or accrued should be from a foreign source in order for the first qualification of the section to be met. For the purposes of this research, focus will be placed on technical service income earned from a foreign jurisdiction, the source of which is discussed in further detail in Chapter 3.

Section 6*quat* specifies the eligible amount of the rebate available to a South African taxpayer in s 6*quat*(1A) by stating:

> 'For the purposes of subsection (1), the rebate shall be an amount equal to the sum of any taxes on income proved to be payable to any sphere of government of any country other than the Republic, without any right of recovery by any person (other than a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment prior to such year of assessment) by –
>
> (*a*) such resident in respect of –
>
> (i) any income contemplated in subsection (1)(*a*)…'.

Therefore, where taxes on income were suffered by a South African resident taxpayer in a foreign jurisdiction, which it cannot recover in any way, those taxes suffered are eligible for the s 6*quat* rebate. Certain aspects of the above extract from s 6*quat*(1A) require further consideration as part of the ultimate determination of the s 6*quat* rebate available to a South African taxpayer.

Qualifying foreign taxes

In order to qualify for relief, foreign taxes must have been paid on income earned and the basis of taxation must be substantially similar to that provided for under the South African Income Tax Act. Guidance is provided by SARS in Interpretation Note 18 whereby it states that:

> '…the mere fact that a foreign tax is regarded as a tax on income by the country levying the tax or that the same term is used is insufficient. The precise nature of the foreign tax and the meaning of particular terms must be determined and considered. The foreign tax liability must be a tax on income within the South African concept of such a tax…' (SARS, 2022:28.)

Therefore, only foreign taxes that are similar in nature to those of South Africa, such as normal tax, turnover tax, withholding tax on royalties and interest, and dividends tax will qualify as substantially similar taxes for purposes of s 6*quat*. Similarly, taxes covered in a double tax agreement between South

Africa and another jurisdiction which are similar to South African taxes, will generally also qualify on the basis that these are taxes recognised by South Africa. (SARS, 2022:28.)

It is further noted that fines, penalties, interest, or additional taxes levied by a foreign jurisdiction, arising from a taxpayer's default on an original tax liability, will not form part of 'qualifying foreign taxes' that is eligible for relief. The basis for this exclusion stems from the provisions of s 11(*a*) read with s 23(*g*), which is known as the general deduction formula in South African tax legislation. Furthermore, the provisions of s 23(*o*)(ii) specifically prohibit the deduction of certain fines and penalties for South African tax purposes. (SARS, 2022:30.) It is submitted that any foreign tax penalties will not qualify towards a reduction of a taxpayer's tax liability as part of the relief afforded by s 6*quat* on the basis that fines, penalties and interest raised on default tax administration events in South Africa are similarly not allowed to be applied to reduce a tax liability.

In Interpretation Note 18, SARS lists a few examples of taxes that could have been suffered by a South African resident taxpayer in a foreign jurisdiction, which would not be considered as a qualifying tax on income. This includes, among others, capital transfer taxes, customs and excise duties, environmental taxes, estate and inheritance taxes and import duties. (SARS, 2022:30.) It is submitted that this non-exhaustive list is indicative of the intention of the provisions of s 6*quat*, which is aimed at providing relief for taxes suffered on income, rather than any other form of taxes or duties that South African taxpayers could suffer in foreign jurisdictions.

Proved to be payable

In order to satisfy the requirement that taxes are proved to be payable, an unconditional legal liability should exist in relation to the payment of the taxes to a foreign government. Therefore, a legitimate tax must be levied by a foreign government, whether the rate of that tax is reduced by a double tax agreement or not, and all events that determined the amount of tax should have taken place. This implies that finality should have been reached in relation to the tax liability and the ultimate payment thereof. (SARS, 2022:32.)

A practical example is provided by SARS in Interpretation Note 18 whereby a foreign country levies a withholding tax in terms of its domestic legislation but does not limit the tax to a lower rate specified in the double tax agreement entered into between South Africa and such a foreign country. The s 6*quat* rebate would typically be limited to the rate specified in the double tax agreement, regardless of the rate at which the foreign country levied the tax. (SARS, 2022:32.) Whether the South African taxpayer could possibly apply for a refund from the foreign country for the tax paid in excess of the specified rate per the double tax agreement is not the concern of s 6*quat*.

Furthermore, should a South African taxpayer object to a foreign tax liability raised by a foreign jurisdiction, the disputed amount would not qualify for the s 6*quat* rebate until finality has been reached on the final tax liability in the foreign jurisdiction. Therefore, only once the dispute has been resolved, will a South African taxpayer qualify for relief in relation to the tax suffered in terms of the s 6*quat* rebate. Even in instances where a South African resident taxpayer does not wish to pursue a dispute where foreign taxes have incorrectly been levied, such taxes suffered would not qualify for the s 6*quat* rebate on the basis that they are not proven to be payable. However, subject to certain requirements being met, a s 6*quat* deduction could be granted in such instances. (SARS, 2022:32-33.)

It is the experience of the author in instances where audits have been conducted by SARS on relief claimed by way of a s 6*quat* rebate, that SARS often requests a proof of payment or acknowledgement of withholding of taxes in relation to the foreign tax liability remitted to a foreign tax authority in order for the South African taxpayer to prove that foreign taxes were in fact suffered in a foreign jurisdiction.

Without any right of recovery

Where a person is eligible to receive any form of refund, credit, deduction, or similar, in relation to a tax liability payable to a foreign government, such portion of the taxes paid will not qualify for relief in terms of the s 6*quat* rebate. This credit or deduction includes any other form of economic benefit received by the person in relation to the tax liability that was payable, which could take the form of goods or services received, discharge of contractual obligations or linked subsidies for example. (SARS, 2022:36.)

Furthermore, should a taxpayer be entitled to a refund but chooses not to pursue the refund, the amount not refunded will still not qualify for a s 6*quat* rebate on the basis that the right of recovery existed (SARS, 2022:37). This could be the case, for example, where foreign taxes were overpaid, and a refund was not pursued by the South African taxpayer from the foreign tax authority. Nevertheless, the existence of a right of recovery is the focus of this aspect of the provisions of s 6*quat*(1)*,* not the enforcement thereof.

Order of deducting rebates from normal tax payable

Once a South African taxpayer has satisfied all the requirements of s 6*quat*(1), the rebate is incorporated in the calculation of the taxpayer's annual normal tax liability. The relief provided by way of the s 6*quat* rebate and s 6*quat* deduction respectively, is incorporated in the normal tax calculation in a particular order. In Interpretation Note 18, SARS provides an outline of the order in which a s 6*quat* rebate is applied towards reducing the total normal tax payable of a natural person or any person other than a natural person respectively:

Order of deduction of the s 6*quat* rebate

Natural persons:	
Normal tax payable	XXX
Less: Primary, secondary and tertiary rebates - section 6	(XXX)
Less: Medical scheme fees tax credit - section 6A	(XXX)
Less: Additional medical expenses tax credit - section 6B	(XXX)
Less: Rebate for foreign taxes - section 6*quat* (1)	(XXX)
Normal tax payable	XXX
Any person other than a natural person:	
Normal tax payable	XXX
Less: Rebate for foreign taxes - section 6*quat* (1)	(XXX)
Normal tax payable	XXX

(SARS, 2022:7)

It is noted that the rebate is applied after the South African normal tax payable is determined. This is different from the approach applied when the s 6*quat* deduction is utilised by a taxpayer, which is discussed further in Chapter 2.2.

Limitations on the s 6quat rebate

Section 6*quat*(1B) provides for certain limitations to the amount of the rebate that can be afforded to a South African taxpayer. In essence, the amount of foreign taxes which qualify for the rebate in a particular year of assessment is the lesser of:

- The sum of the qualifying foreign taxes; or
- The amount calculated under the limitation formula, being:

'Taxable income derived from foreign sources (A) / Taxable income derived from all sources (B)
***x** Normal tax payable on (B)'*

(SARS, 2022:41)

Essentially, the purpose of the limitation formula is to ensure that a rebate granted only relates to foreign income included in a South African resident's taxable income, and that it does not exceed the total amount of normal tax attributable to foreign income earned. Accordingly, the rebate available to a South African taxpayer in a given year of assessment, cannot exceed the normal tax payable on foreign income.

Section 6*quat*(1B)(*a*)(ii) stipulates that any excess amount of a rebate that was not applied in a certain year of assessment, typically brought on by virtue of the limitation formula, may be carried forward to the immediately succeeding year of assessment. Furthermore, s 6*quat*(1B)(*a*)(iii) provides that such an excess amount may be carried forward for a period of seven years from the year of assessment in which the excess arose.

2.2 Section 6quat(1C) deduction

SARS provides an overview of the purpose of the s 6*quat* deduction in Interpretation Note 18 by stating:

> 'Under section 6*quat*(1C)(*a*) a resident may claim certain foreign taxes that are not contemplated in section 6*quat*(1) as a deduction in determining taxable income derived from carrying on any trade, that is, essentially, foreign taxes paid or proved to be payable on South African-source amounts and foreign taxes paid, but not proved to be payable, on income derived from a foreign source.' (SARS, 2022:5)

On reading of the above overview provided by SARS, the deduction available under s 6*quat*(1C) has certain crucial differences when compared to the s 6*quat*(1) rebate. Firstly, South African sourced amounts which have been subject to foreign tax, can qualify for relief by way of the s 6*quat* deduction. This contrasts with the qualifying requirements of the s 6*quat* rebate that specifies that income must be received from a source 'outside the Republic'. Secondly, foreign taxes paid on foreign source income can also qualify for the s 6*quat* deduction, even if such taxes are not proved to be payable. As discussed in Chapter 2.1 of this report, the s 6*quat* rebate will not be available if a final, legitimate tax is not proven to be payable to a foreign government. Therefore, the s 6*quat* deduction is more lenient than the s 6*quat* rebate in providing relief where foreign taxes are not proved to be payable.

The observations noted above are made clear on the reading of s 6*quat*(1C), which states:

> '(*a*) For the purpose of determining the taxable income derived by any resident from carrying on any trade, there may at the election of the resident be allowed as a deduction from the income of such resident so derived the sum of any taxes on income (other than taxes contemplated in subsection (1A)) paid <u>or</u> proved to be payable by that resident to any sphere of government of any country other than the Republic, without any right of recovery by any person other than in terms of a mutual agreement procedure in terms of an international tax agreement or a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment prior to such year of assessment [<u>Emphasis added</u>].
>
> (b) Where, during any year of assessment, any amount was deducted in terms of this subsection from the income of a resident and, in any year of assessment subsequent to that year of assessment, that resident receives any amount by way of refund in respect of the amount so deducted or is discharged from any liability in respect of that amount, so much of the amount so received or so much of the amount of that discharge as

> does not exceed that amount must be included in the income of that resident in respect of that subsequent year of assessment.'

Were it not for the emphasised 'or' in par (*a*), the consequence of s 6*quat*(1C) would be similar to that of the s 6*quat* rebate. By stipulating that taxes should be paid 'or' be proved to be payable, the spectrum of qualifying taxes caught by the s 6*quat* deduction is broadened. This highlights the purpose of the s 6*quat* deduction, being, where foreign tax was suffered but it is not necessarily proven to be payable to a foreign government in the strictest sense, a South African taxpayer could still qualify for relief from double taxation, albeit not to the extent of the s 6*quat* rebate.

Paragraph (*b*) of the section goes on to highlight that, where any portion of the foreign tax paid were to be refunded to the taxpayer, such refunded amount should be included in the taxable income of the taxpayer in the next year of assessment. This aims to ensure that any deduction previously granted by the section is corrected by way of taxing the amount in the subsequent year of assessment.

Finally, s 6*quat*(1D) provides a limitation to the s 6*quat* deduction which stipulates that the deduction shall not exceed the total foreign taxable income to which the foreign taxes paid relates.

Section 6quat deduction from income

Unlike the s 6*quat* rebate, which is a reduction of the calculated normal tax payable, the s 6*quat* deduction is merely taken into account against the income of a South African taxpayer like any other deductible expense. Therefore, it is submitted that the s 6*quat* deduction effectively provides relief for South African companies equal to the corporate tax rate (currently, 27%).

2.3 Comparison between relief afforded: s 6quat(1) rebate vs. s 6quat(1C) deduction

The relief afforded by s 6*quat*(1) and s 6*quat*(1C) respectively is significantly different in quantum, mainly due to the order in which they are taken into account in the normal tax calculation of a South African resident taxpayer. The comparison of the difference in relief is shown in Calculation 1 below.

For purposes of the calculation, the following scenario is used by SARS in Interpretation Note 18:

- A resident company received income of R100
- Foreign taxes of 25% (R25)[5] are proved to be payable (SARS, 2022:8).

[5] For purposes of all calculations performed in this report, assume that all foreign income and foreign tax payable amounts have been converted in line with the definition of 'average exchange rate' in s1(1) and the provisions of s 25D respectively.

For purposes of the example, the s 6*quat*(1C) deduction method starts on the basis that the total taxable income comprises South African source income, while the s 6*quat*(1) rebate method starts on the basis that taxable income comprises of foreign source income.

Calculation 1: Comparison of tax payable under the deduction and rebate methods

		Section 6*quat* (1C) deduction	Section 6*quat* (1) rebate
Taxable income from a South African source		R100.00	R0.00
Taxable income from a foreign source		R0.00	R100.00
Less: Foreign taxes paid, qualifying for the s 6*quat* deduction	A	-R25.00	R0.00
Taxable income after deduction of foreign taxes		**R75.00**	**R100.00**
Normal tax @ 27%	B	R20.25	R27.00
Less: Rebate under section s 6*quat*		R0.00	-R25.00
Normal SA tax payable		**R20.25**	**R2.00**
Total tax suffered (foreign tax and SA normal tax)	A+B	**R45.25**	**R27.00**
Difference between total tax suffered:			**R18.25**
Difference between total tax suffered as a percentage of the total tax suffered:			**25%**

Calculation 1 indicates that the source of the income (being South African or foreign) is of great significance when the calculation of the s 6*quat* relief is performed, and not necessarily the fact that taxes are proved to be payable. Taxes could be proved to be payable to a foreign government, but the source of the income is the determining factor that will result in either a s 6*quat* rebate or a s 6*quat* deduction to be afforded to a South African resident taxpayer.

Nevertheless, the difference in the relief afforded between the two scenarios is clear. Where a South African taxpayer is afforded the s 6*quat* deduction, the total tax suffered (foreign tax and South African normal tax) will be 25% more compared to the total tax suffered in the case where a s 6*quat* rebate is afforded. This result is reached by calculating the difference between the total foreign and South African tax suffered in the two scenarios (R18.25) as a percentage of the total tax suffered across both scenario's (R45.25 + R27). It is submitted that greater relief is afforded to South African resident taxpayers who qualify for relief in terms of the s 6*quat* rebate, versus those that qualify for the s 6*quat* deduction.

To put the result of Calculation 1 into perspective, the same scenario (SARS, 2022:8) is used but the taxable income amounts to R250,000,000.

Calculation 2: Comparison of tax payable under the deduction and rebate methods

		Section 6*quat* (1C) deduction method:	Section 6*quat* (1) rebate method:
Taxable income from a South African source		R250,000,000	R0
Taxable income from a foreign source		R0	R250,000,000
Less: Foreign taxes paid, qualifying for the s 6*quat* deduction	A	-R62,500,000	R0
Taxable income after deduction of foreign taxes		**R187,500,000**	**R250,000,000**
Normal tax @ 27%	B	R50,625,000	R67,500,000
Less: Rebate under section s 6*quat*		R0	-R62,500,000
Normal SA tax payable		**R50,625,000**	**R5,000,000**
Total tax suffered (foreign tax and SA normal tax)	A+B	**R113,125,000**	**R67,500,000**
Difference between total tax suffered:			**R45,625,000**
Difference between total tax suffered as a percentage of the total tax suffered:			**25%**

Based on Calculation 2, the quantum of the difference in the total tax suffered is truly highlighted even though the principal difference in normal tax payable between the two scenarios, being 25%, remains the same.

The above calculations only consider income received from either a foreign or South African source for quantification of the difference in relief between the s 6*quat* rebate and the s 6*quat* deduction. Practically, a South African resident taxpayer may typically earn both South African and foreign sourced income, which further affects the ultimate relief afforded by s 6*quat.* As discussed in Chapter 2.1, s 6*quat*(1B) provides a limitation formula to be applied in instances where a s 6*quat* rebate is afforded to taxpayers. In order to depict the application of the limitation, a taxpayer earned South African sourced income of R100, as well as qualifying foreign sourced income of R100 that has been subject to tax at a rate of 25% in the foreign country. The s *6quat* relief available to the South African taxpayer, with consideration of the limitation formula provided by s 6*quat*(1B), is calculated as follows:

Calculation 3: Application of the s 6*quat* (1B) limitation

		Section 6*quat* (1) rebate method:
Taxable income from a South African source	50%	R100.00
Taxable income from a foreign source	50%	R100.00
Taxable income		**R200.00**
Normal tax @ 27%		R54.00
Less: Rebate under section s 6*quat*	*	-R25.00
Normal tax payable		**R29.00**
***Section 6*quat* (1B) limitation:**		
Foreign tax paid @25%		**R25.00**
Section 6*quat* (1B) formula ((R100/R200)*R54))		**R27.00**

Based on the application of the limitation in s 6*quat*(1B), the lesser of the foreign tax paid or the result of the formula method will be allowed as a rebate for the South African taxpayer. Therefore, the same R25 rebate will be granted to the South African taxpayer as the rebate afforded in Calculation 1 under the s 6*quat* rebate method. However, in a scenario where the percentage of foreign tax paid is increased, the limitation of s 6*quat*(1B) would take effect. This is depicted by the following example with the same scenario as that in Calculation 3, while the rate of foreign tax paid is 30%.

Calculation 4: Application of the s 6*quat* (1B) limitation

		Section 6*quat* (1) rebate method:
Taxable income from a South African source	50%	R100.00
Taxable income from a foreign source	50%	R100.00
Normal tax payable		**R200.00**
Normal tax @ 27%		R54.00
Less: Rebate under section s 6*quat*	*	-R27.00
Normal tax payable		**R27.00**
***Section 6*quat* (1B) limitation:**		
Foreign tax paid @30%		**R30.00**
Section 6*quat* (1B) formula ((R100/R200)*R54))		**R27.00**

Calculation 4 indicates the restrictive effect that the limitation of s 6*quat*(1B) would have where the foreign tax rate is increased. By applying the provisions of s 6*quat*(1B), the lesser amount between the actual foreign tax paid (R30) and the result of the formula (R27) must be used, resulting in the lesser amount of R27 to be afforded as relief.

Chapter 3: 'Source' of foreign technical service income

In order for a South African resident taxpayer to qualify for the s 6*quat* rebate, income included in its taxable income must be from a foreign source. This is evident in the first qualification stipulated in section s 6*quat*(1)(*a*) which states that 'any income received by or accrued to such resident from any source outside the Republic' is eligible for the rebate.

> '"Source" is a crucial concept in a residence-based tax system like South Africa's in –
>
> - determining taxes to be levied on income from a South African source received by or accrued to non-residents; and
> - allowing a rebate for foreign taxes on foreign-source amounts included in a resident's taxable income.' (SARS, 2022:19.)

'Service' is not a defined concept in the Act and therefore consideration should be given to its ordinary grammatical meaning (SARS, 2022:24). The Merriam-Webster online dictionary defines 'service' as 'the occupation or function of serving' (Merriam-Webster Inc. n.d.). Furthermore, SARS provides guidance in Interpretation Note 18 on what could constitute services for purposes of applying the provisions of s 6*quat*.

> "Services" may include, amongst other things, independent professional services such as scientific, literary, artistic, educational or teaching activities as well as the activities of physicians, lawyers, engineers, architects, dentists and accountants.' (SARS, 2022:24)

Given that the focus of this research is on foreign technical service income earned and taxed in a foreign jurisdiction, for purposes of applying the relief afforded by s 6*quat* to a South African resident taxpayer, it is submitted that technical services income would qualify as a 'service' as envisaged by Interpretation Note 18 and ultimately the application of s 6*quat.*

3.1 Domestic legislation, common law, and double tax agreements

Source is not a defined term in the Act and the only domestic law provision relating to source determination is contained in s 9, which specifies certain transactions that are regarded as giving rise to South African sourced amounts. As a result, the courts have been tasked to develop the principles to be applied when determining the source of an amount received. (Benetello, 2022.) In considering the term's ordinary grammatical meaning, the Cambridge online dictionary defines source as 'the place something comes from or starts at, or the cause of something' (Cambridge Dictionary n.d.), while the Merriam-Webster online dictionary defines it as 'a generative force' (Merriam-Webster Inc. n.d.).

Section 9 provides for certain distinct items that will be seen as having a source within South Africa. The only reference to technical service income, being the focus of this report, is found in s 9(2)(*e*) which states that:

> '(2) An amount is received by or accrues to a person from a source within the Republic if that amount—…
>
> (*e*) is attributable to an amount incurred by a person that is a resident and is received or accrues in respect of the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information, or the rendering of or the undertaking to render, any assistance or service in connection with the application utilization of such knowledge or information, <u>unless</u> the amount so received or accrued is <u>attributable to a permanent establishment which is situated outside the Republic</u>;… [Emphasis added].'

It is noted that s 9(2)(*e*) states that an amount is received from a source within South Africa if that amount 'is attributable to an amount incurred by a person that is a resident'. The intention of the legislature therefore seems to be that the inclusion of an amount in taxable income in South African taxable income depends on whether concomitant expenditure was incurred in relation to such income by a South African resident taxpayer (De Koker & Williams, 2023). Therefore, the fact that expenditure was incurred by a South African resident in South Africa, could be an indication of the source of the income earned as a result of the expenditure incurred being of a South African source.

With reference to the emphasised phrase, it is the author's view that the converse interpretation of the section implies that, where an amount received is attributable to a permanent establishment outside the Republic, such an amount will not be deemed to be from a source within the Republic. This interpretation closely resembles common law principles applied to the source of income in South African case law. In the judgement laid down by Watermeyer CJ in *CIR v Lever Bros & Unilever Ltd*, it is established that the source of income is where the originating cause is located and that taxpayers should seek the true originating cause, being some sort of activity of a mental or physical nature, in order to determine the originating cause (1946:12.). By applying these principles, it is the author's view that technical service income received by a permanent establishment in a foreign jurisdiction, in relation to such services rendered in that jurisdiction, should result in the income being foreign sourced as alluded to by the s 9(2)(*e*).

As stated, the only reference to the source of technical service income is given by way of s 9(2)(*e*), which is the focus of this research. However, in order to determine the source of services in general, which is not explicitly covered by s 9, South African common law is relied on. Watermeyer CJ in *CIR v Lever Bros & Unilever Ltd* (1946:8) stated that:

> ‘When the question has to be decided whether or not money received by a taxpayer is “gross income” within the meaning of the definition referred to above, two problems arise which have not always been differentiated from one another in decided cases. The first problem is to determine what is the source from which it has been received and when that has been determined the second problem is to locate it in order to decide whether it is or is not within the Union.’

It is submitted that the guiding principle to be applied in determining the source of service income is twofold, being:

- what is the originating cause of the income; and
- where is the originating cause located.

To date, the principle laid down by Watermeyer CJ is used by SARS as a guideline to determine the true source of service income (SARS, 2022:20). South African tax courts have consistently laid down that the originating cause of services rendered is the service itself, irrespective of the place where the contract is entered or where the remunerations is paid. Therefore, indicating that the source of services is typically the location where the services are rendered. (De Koker & Williams, 2023.)

Watermeyer CJ went on to state that (1946:12):

> ‘…the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and . . . this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them. The work which he does may be a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages, and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else. Often the work is some combination of these.’

This statement provides comprehensive guidance when the source of income is being determined. A taxpayer should seek the true originating cause, being some sort of activity of a mental or physical nature and thereafter determine where such originating cause is located. For example, a South African tax resident engineer could briefly visit a building site in a foreign jurisdiction to examine certain influencing factors to his design work. However, if the engineer returns to his office in South Africa and spends the majority of the time on the project performing the design work from there, the originating cause could be seen as the intellectual application required to perform such a design and where that takes place, being South Africa. It follows that the income received by the engineer would be deemed South African sourced based on the application of common law principles.

Stratford CJ in *Rhodesia Metals Ltd v Commissioner of Taxes* (1938:379) quoted Isaacs J in a judgement of the High Court in Australia on the concept of source:

> ‘"the question (as to the 'source') must be decided as a practical matter of fact taking the substance of the transaction - and disregarding the form". "Source means, not a legal concept, but something which a practical man would regard as a real source of income"; "the ascertainment of the actual source is a practical hard matter of fact."’

In Interpretation Note 18, SARS relies on Stratford CJ's judgement for purposes of determining the source of service income when applied to s 6*quat*:

> ‘The same approach applies for purposes of determining the source of gross income for non-residents, [when] calculating the rebate for foreign taxes for residents under section 6*quat*(1) and determining the deduction of foreign taxes under section 6*quat*(1C)(a).
>
> Some tax commentators have suggested that the word "source" should be interpreted differently for the purposes of section 6*quat* than from the way in which it is interpreted in relation to the definition of "gross income". They argue that in the context of section 6*quat* "source" should be given the less-restrictive meaning of "the quarter from which it comes" rather than the meaning of "originating cause". Nevertheless, SARS has considered this view, but does not accept it.' (SARS, 2022:21.)

This statement by SARS could serve as an indication of the attempts of certain taxpayers to qualify for greater relief in terms of the s 6*quat* rebate. By implication, where a less restrictive meaning of source can be applied, more scenarios would fall within the scope of foreign source income and therefore the s 6*quat* rebate would be available instead of the s 6*quat* deduction. From the comparative calculations set out in Chapter 2.3, which shows that the s 6*quat* rebate would grant a taxpayer greater relief than in a scenario where the s 6*quat* deduction is afforded, it is understandable why certain commentators would want the less restrictive meaning of the source of service income to be applied and accepted by SARS. Nevertheless, the narrower interpretation of source of service income that is applied by SARS should be respected by taxpayers.

Benetello provides general principles to be applied by South African taxpayers to determine whether an amount is received from a source within the Republic:

> ‘(i) in determining the source of an amount, the first step is to determine what is the originating cause of the income and when that has been determined, the second step is to locate it;
> ii) in seeking the originating cause and the location of the source of income one must have regard to the overall factual matrix of the circumstances;

iii) against this factual matrix, the originating cause of a particular receipt may not necessarily all occur in the same place and may occur in different countries, in which case, the dominant, or main or substantial or real and basic cause of the accrual of income must be determined; and

(iv) one should not lose sight of the fact that ascertaining the actual source of a given income is a practical, hard matter of fact where it may be necessary to adopt a common sense approach.' (Benetello, 2022.)

From the above guiding principles, another important matter is raised, being that of the main or dominant cause of income. To put this concept in perspective, the following example is used by SARS in Interpretation Note 18.

'Facts:

A, a [South African] resident, manufactures factory equipment in South Africa which is sold to customers based in and outside South Africa. As part of the sale of the equipment, A provides on-site assistance with the installation of the equipment. Most of A's clients are located in South Africa.

During the year of assessment, A sold equipment to C in Zimbabwe and sent a technician to Zimbabwe to assist with the installation. A does not have a permanent establishment in Zimbabwe.

In addition to the manufacture and sale of the equipment, A concludes contracts with some clients to provide on-site monthly maintenance services. A has concluded a maintenance contract with three South African clients and with C.

Result:

The manufacturing of the equipment, and not the installation thereof, is the dominant originating cause of the income received by or accrued to A in respect of the manufacture and sale of the equipment. The source of the income is South Africa.

The installation services are not the dominant originating cause and are merely an incidental part of the composite supply and installation of the equipment.

The monthly service contract is separate from the manufacture and sale of the equipment. The true source of the income will be where the services are rendered.' (SARS, 2022:26-27.)

As per the example, ancillary services performed outside South Africa, that are incidental to the main product or service supplied, will not change the source of the main supply made to be of a foreign source.

However, certain cases could result in the apportionment of income between different locations. For example, where a service is rendered in more than one location and a single invoice is issued for both local and foreign work performed, it is necessary to consider which portion of the income originated from a local source versus a foreign source. Where services supplied outside South Africa qualify to be of a foreign source and taxes are proved to be payable to a foreign government in relation to such income, the s 6*quat* rebate would typically be available for that portion of the income. Such a scenario would be subject to consideration of the provisions of s 9 or an applicable double tax agreement. Only in the absence of a domestic law provision or a double tax agreement allocating taxing rights to one of the jurisdictions, would the source of income be deemed to be where the services are rendered (SARS, 2022:27).

When the determination of source of income is made, the provisions of s 9 will override any common law position if in conflict. However, the provisions of an article in a double tax agreement will override s 9 in cases of conflict. (SARS, 2022:20.)

This is enforced by way of s 108 that deals with the prevention of or relief from double taxation:

> '(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
>
> (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act.'

Therefore, where a double tax agreement deems the source of an amount of income to be different to the position reached by way of applying s 9 and common law principles, the double tax agreement's source allocation will prevail (SARS, 2022:22). The allocation of taxing rights by double tax agreements is discussed in further detail in Chapter 4.

An example of a scenario where a double tax agreement provides source allocation for service income is provided by SARS in Interpretation Note 18.

> 'Facts:
>
> A resident company provides technical consulting services to a company resident in Eswatini [previously known as Swaziland] under an agreement negotiated and concluded in South Africa. The services are rendered in South Africa. The company in Eswatini does not have a presence in South Africa and vice versa for the resident company.

> Under Eswatini's domestic tax law a withholding tax of 15% is imposed on fees derived from independent professional services remitted to South Africa. The tax treaty between South Africa and Eswatini reduces the rate of the withholding tax to 10%.
>
> Result:
>
> The true source of the fees is where the services are rendered, namely, South Africa.
>
> However, article 13(5) of the tax treaty between South Africa and Eswatini, which deals with technical fees, provides as follows:
>
> "Technical fees shall be deemed to arise in a Contracting State when the payer is a resident of that State…"
>
> Article 13(5) overrides the true source for the service fees and deems the fees to be from a source in Eswatini for purposes of the Act and the tax treaty. As a result, article 13(2) gives Eswatini a right to tax the income subject to the limitation that the tax charged may not exceed 10% of the gross amount of the fees.' (SARS, 2022:25.)

From the above example and based on the fact that the source of the technical service income is allocated to and accordingly taxed in Eswatini, the South African resident taxpayer would typically qualify for the s 6*quat* rebate. This is on the basis that the technical service income is from a foreign source and taxes are proved to be payable to a foreign government.

The above interpretation of extracts from s 9, common law and tax commentary sketch clear guidance on the approach to follow when determining the source of service income in general, as well as the source of technical service income. It is submitted that a phased approach should be applied by South African resident taxpayers when source determination of service income is made, being:

- considering the provisions of s 9, specifically s 9(2)(*e*) in relation to technical services;
- in the absence of s 9 providing guidance on the source of service income in general, considering common law principles; and
- considering the provisions of a double tax agreement and whether such provisions conclude that the source of the service income is different than that provided for by way of s 9 and common law.

This determination is crucial for the application of s 6*quat* and the extent of relief that can be afforded. South African taxpayers need to be cognisant of the principles laid down by these governing sources when the evaluation of source of service income is made, in order to ensure they correctly apply the relief measures provided for in s 6*quat* when calculating their normal tax liabilities.

3.2 Source-based tax systems and dual tax claims

Another influencing factor to be considered when determining the relief available to South African resident taxpayers in relation to foreign technical service income earned is that of the type of tax system followed by the foreign country where the income is earned. As noted in Chapter 2, a source-based system taxes income in the country it originates from, while a residence-based tax system taxes the residents of a country on their world-wide income, irrespective of where the income was earned (SAIPA n.d.: para.1).

The IMF provides a definition of source-based taxation which states that:

> 'Source-based taxation allows countries to tax the income of both resident and nonresident taxpayers, with the profits of nonresident taxpayers only taxed if there is sufficient "nexus" with the jurisdiction. Broadly, three types of income have historically met this requirement:
>
> - Profits (including capital gains on the sale of business assets) of permanent establishments
> - Passive income payments (dividend, interest, and royalties) representing domestically sourced profits paid from resident to nonresident entities
> - Capital gains from the sale of domestic immovable property located in the source country, and related rights…' (IMF, 2021:388.)

Importantly, non-resident taxpayers operating in a jurisdiction that follows a source-based tax system are only taxed in such a jurisdiction to the extent that they have sufficient 'nexus' in that jurisdiction where the income is earned. The Merriam-Webster online dictionary defines nexus as 'a connection or link between things, persons, or events' (Merriam-Webster Inc. n.d.). Therefore, a person should have a certain economic connection to a country in order for that country to claim the taxing right on income generated within the country. In tax terms, an example of a 'nexus' could be that of a permanent establishment, the concept of which is discussed in further detail in Chapter 5.

In practice, withholding taxes may be levied by foreign jurisdictions in relation to technical services rendered by a South African resident taxpayer in that jurisdiction, without the South African resident taxpayer having sufficient nexus in that foreign jurisdiction. This is a result of the source claim that the source-based tax system imposes. For example, a South African tax resident engineer renders technical services to a Liberian resident client by way of designing a mine that will be constructed in Liberia. The engineer performs the design work from his office in South Africa and only visits the site in Liberia intermittently. The engineer does not have a permanent presence in the form of a permanent establishment in Liberia. When the Liberian client settles the South African resident's invoice, s 806 of the Liberian Revenue Code requires withholding tax to be withheld at a rate of 15% on technical services.

Therefore, 15% withholding tax will be remitted to the Liberian Revenue Authority, while the balance is remitted to the South African engineer.

Regardless of the taxing right allocation provided by a double tax agreement, it can be said that a source-based country has a source claim to income generated within the country, on which it levies tax. As a result, when South African resident taxpayers declare their world-wide income in South Africa by virtue of the residence-based tax system followed by South Africa, another tax claim is effectively created by South Africa. The South African resident is left with a dual tax claim on the income earned and is subjected to tax on both claims.

Fortunately, South Africa provides relief by way of s 6*quat* for double taxation suffered. However, as per the analysis in Chapter 2.1 and 2.2, the extent of the relief provided will be based on the source of the service income earned, which will either afford the s 6*quat* rebate if the source of income is foreign, or the s 6*quat* deduction if the source of income is South African.

With reference to the same example stated above where a South African tax resident engineer renders technical services for a project in Liberia, without having a permanent establishment in Liberia, the source of such income will likely be deemed South African in terms of s 9(2)(*e*). This interpretation is based on the fact that the technical services are rendered by the engineer from his office in South Africa and there is no permanent establishment of the engineer in Liberia. Hypothetically, should the type of income received not have be classified as technical service income but rather general service income, which is not covered by the ambit of s 9, common law principles need to be applied for source determination. In line with the discussion in Chapter 3.1, the jurisdiction in which the originating cause of services is located, is typically the source jurisdiction for services in general. It is submitted that common law principles would likely result in the same conclusion in the applied example if the income related to services in general, rather than technical services. The result is that both types of service income are deemed South African sourced, by way of s 9(2)(*e*) and common law respectively, and a deduction in terms of s 6*quat*(1C) would typically be available to the South African tax resident.

Additionally, if a double tax agreement was in place between South Africa and Liberia, the lack of a permanent establishment (discussed in Chapter 4 to follow) by the South African taxpayer in Liberia would not change the result of the source of technical service income, as the provisions of s 9(2)(*e*) would result in the income to be of a South African source in the absence of a permanent establishment. Only if a permanent establishment was present, would a double tax agreement typically allocate taxing rights on the income earned by the permanent establishment to that jurisdiction, possibly resulting in the income to be deemed foreign sourced and related taxes suffered to be eligible for relief by way of the s 6*quat* rebate.

The above scenario is indicative of the complex nature of source determination, specifically in an instance where no permanent establishment exists for a South African resident taxpayer in a foreign country where services are rendered. The result is that the taxpayer may suffer tax in both countries and only qualify for the s 6*quat* deduction, which, as per the analysis in Chapter 2.3, is proven to provide less relief than the s 6*quat* rebate.

Chapter 4: Allocation of taxing rights by double tax agreements

Based on the analysis of source of service income in Chapter 3, the hierarchy of source determination for technical service income is determined. Essentially, South African domestic legislation, insofar as the income item is explicitly catered for in such domestic legislation, will override any common law position if in conflict. Therefore, in relation to technical service income that is provided for in s 9(2)(*e*), it is the author's interpretation that the source of technical service income will generally be South African, unless such income is generated from a permanent establishment situated outside South Africa. However, the provisions of an article in a double tax agreement will override s 9 in cases of conflict, in line with the provisions of s 108.

The intricacies of taxing right allocation by double tax agreements, as well as the recourse in the absence of a double tax agreement in force with South Africa, is discussed in further detail below.

4.1 Taxing right allocation in the presence of a double tax agreement

As per the discussion in Chapter 3.1, the provisions of an article in a double tax agreement will override the provisions of s 9 in cases of conflict. This position is enacted by way of the provisions of s 108. Boruchowitz AJA stated in *C: SARS v Tradehold Ltd* (2013:269):

> 'As long as the convention is in operation, its provisions, so far as they relate to immunity, exemption or relief in respect of income tax in the Republic, have effect as if enacted in Act 58 of 1962 (see s 108(2)).
>
> [17] Double tax agreements effectively allocate taxing rights between the contracting states where broadly similar taxes are involved in both countries. They achieve the objective of s 108, generally, by stating in which contracting state taxes of a particular kind may be levied or that such taxes shall be taxable only in a particular contracting state or, in some cases, by stating that a particular contracting state may not impose the tax in specified circumstances. A double tax agreement thus modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.'

A double tax agreement with 'deemed' source allocation rules is therefore seen to be domestic law for purposes of interpretation of the Act as a whole and where a double tax agreement allocates the source of a particular amount differently than the position reached by virtue of s 9 and common law principles, the deemed double tax agreement allocation will prevail for purposes of relief afforded in s 6*quat*. This could result in circumstances where South Africa should grant a s 6*quat* rebate to a resident on South African sourced income, which is generally not the case based on the provisions of s 6*quat*, but nevertheless an acceptable consequence as a result of the double tax agreement (SARS, 2022:22).

Interpretation Note 18 provides an example where a double tax agreement overrides the common law position reached on the source of income earned.

‘Facts:

A resident company manufactures teapots in South Africa which are sold in stores operated by the resident company in South Africa and Country X.

Based on the specific facts and circumstances of the case, the originating cause of the income is the manufacturing activity which is conducted in South Africa.

The business profit article in the tax treaty entered into between South Africa and Country X provides that –

“the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated in that other State. If the enterprise carries on business in that manner, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment”.

The store operated by the resident company in Country X constitutes a permanent establishment as defined in the tax treaty. Under the tax treaty, both South Africa and Country X have a right to tax the income.

Result:

Section 9(2) does not contain a specific source rule for income derived from the manufacture of goods. However, under common law, based on the originating cause being in South Africa, the income is determined to be from a source in South Africa. The common law position is, however, overridden by the tax treaty when the business profit article of the tax treaty gives Country X a right to tax the profits attributable to the permanent establishment in Country X. The income underlying the attributable profits will effectively be treated as being from a foreign source. This means that the resident will potentially qualify for relief under section 6*quat*(1) for the taxes proved to be payable on such income in Country X.’ (SARS, 2022:23-24.)

Though the above example concerns the manufacture of goods, it highlights a typical scenario where s 9 does not specifically provide a deemed source position, which leads to the common law position being considered. However, even if the common law position concludes that the source of the income should be South African, the provisions of a double tax agreement could override this position where a permanent establishment is present in the foreign country.

Double tax agreements analysis

In order to depict the typical taxing right allocation by double tax agreements entered into by South Africa, and ultimately determine the relief afforded by s 6*quat*, the double tax agreements with India and Mozambique are analysed. (SARS, 2015:2, SARS, 2009a:2.) The selection is made from the top five export countries that South Africa most frequently traded with during 2023, being China, the United States, Mozambique, Germany, and India (SARS, 2023). In addition, the double tax agreement with the

UK will also be analysed on the basis that the UK has been a long-standing trading partner of South Africa (SARS, 2003:2).

In line with the focus of this research, the aim is to analyse the taxing right allocation made by double tax agreements between South Africa and the other country with reference to technical service income earned.

For purposes of interpreting the double tax agreements, it is crucial to note that not all double tax agreements entered into by South Africa have a dedicated clause that covers technical service fees. In the absence of this clause, the 'business profits' clause should be relied on when seeking the taxing right allocation made by the double tax agreement (SARS, 2022:84).

In order to analyse the s 6*quat* relief available to South African resident taxpayers by considering the provisions of the double tax agreements selected, a hypothetical scenario will be used, being:

A South African resident taxpayer renders technical services to a client situated in the foreign country in question (i.e., the UK, Mozambique and India) and does not have a permanent establishment in such a foreign country. The majority of the work is performed by the South African resident taxpayer from an office in South Africa, even if short visits to the foreign country are required. Therefore, as envisaged by s 9(2)(*e*), all expenditure incurred by the South African resident towards the ultimate compensation received in the form of technical service fees from a foreign client, are incurred in South Africa. On completion, the client remits payment for the technical services performed from the foreign country to South Africa.

For purposes of the analysis, assume that all foreign income and foreign tax amounts expressed in Rands have been converted in line with the definition of 'average exchange rate' in s1(1) and the provisions of s 25D respectively.

The United Kingdom

When analysing the double tax agreement entered into between South Africa and the UK, which does not contain a dedicated technical service fees clause, article 7 which deals with business profits is relied on for purposes of determining taxing right allocation.

An extract from article 7(1) reads as follows:

> '(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the

enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.' (SARS, 2003:14-16.)

Applied to the hypothetical scenario where a South African resident taxpayer renders technical services to a client in the UK without having a permanent establishment in the UK, the article will imply that the technical service income of the South African resident earned in the UK will only be taxable in South Africa unless the enterprise carries on business in the UK through a permanent establishment.

It is the experience of the author that the UK does not levy any withholding tax on technical service income generated within the UK[6]. Therefore, when determining the source claim in this instance, the UK does not impose a source-based claim to the technical service income. South Africa creates a tax claim to the income by virtue of its residence-based tax system, based on the definition of 'gross income' in s 1 which includes 'the total amount, in cash or otherwise, received by or accrued to or in favour of such resident'. By virtue of art. 7(1) of the double tax agreement, the taxing right is allocated to South Africa which will see the South African resident taxpayer including the technical service income generated in the UK in its taxable income in South Africa.

This interpretation is applied without consideration of South African source rules which are governed by way of s 9 and common law principles. If one were to apply these to this scenario, the result would be aligned to the outcome of the double tax agreement on the basis that:

- s 9(2)(*e*) deems technical services income to be of a South African source in the absence of a permanent establishment in the foreign jurisdiction; and
- the common law principles on source determination would seek to determine the originating cause of the income and where such originating cause is located, both being South African in the current scenario due to work being executed from South Africa and the lack of a permanent establishment in the UK.

This scenario will not fall within the ambit of s 6*quat* as no source claim exists in the UK and the double tax agreement allocates taxing rights to South Africa, effectively avoiding double taxation of the same income in two jurisdictions. As a result, since no tax will be levied by the UK and no double taxation will be suffered by the South African resident, no s 6*quat* relief will be applicable.

[6] On the basis that the UK's Income Tax Act of 2007 does not contain a provision that raises withholding tax on technical service income generated in the UK and remitted to a non-UK resident, no reference is available to support the statement.

India

When analysing the double tax agreement entered into between South Africa and India, art. 12 which deals with royalties and technical service fees, is relied on for purposes of determining taxing right allocation.

Article 12 of the double tax agreement between South Africa and India reads as follows:

> '(1) Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
>
> (2) However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services…' (SARS, 1997.)

When applied to the hypothetical scenario, technical service fees generated in India and paid to a resident of South Africa, will be taxable in South Africa by virtue of the taxing right allocation in art. 12(1) of the double tax agreement. However, by virtue of s 115A of the Income Tax Act of 1961, India levies a withholding tax on technical service fees paid to non-residents by way of its domestic legislation at a rate of 10%, subject to certain requirements being met. Therefore, even though art. 12(1) of the double tax agreement allocates taxing rights to South Africa, art. 12(2) permits the Indian withholding tax claim on the technical service fee.

The withholding tax levied by way of the Indian domestic legislation implies that India has a source-based claim to the income generated in India, which it levies tax on at a rate of 10%. The South African resident receiving the income will be required to include the receipt in its gross income as defined in s 1 in South Africa, resulting in a dual tax claim and potential double taxation. Effectively, even in the presence of a double tax agreement allocating taxing right to South Africa, the South African resident still suffers double taxation before consideration of the possible relief available in terms of s 6*quat*.

In order to determine the relief afforded to the South African resident in terms of s 6*quat*, the source of the technical service income would need to be established. On the basis that the services are executed in South Africa and the South African resident does not have a permanent establishment in India, the provisions of s 9(2)(*e*) would deem the income to be of a South African source. Furthermore, the principles of common law would seek to establish what the originating cause of the income is and where such a cause is located, being the technical services rendered from South Africa in this scenario. As a result of the technical service income being South African sourced, the South African resident would only qualify for relief by way of the s 6*quat* deduction, which is depicted by way of the following calculation:

Calculation 5: s 6*quat* relief on Indian scenario

	Section 6*quat* (1C) deduction method:
Taxable income from a South African source	R100.00
Less: Indian withholding tax paid @ 10%	-R10.00
Taxable income after deduction of foreign taxes	**R90.00**
Normal SA tax @ 27%	**R24.30**
Foreign tax paid	**R10.00**
Total SA and Foreign tax suffered (after relief)	**R34.30**

Mozambique

The double tax agreement between South Africa and Mozambique does not contain a dedicated technical service fees article. As stated in Chapter 4.1, in the absence of this clause, the 'business profits' clause should be relied on when seeking the taxing right allocation made by the double tax agreement (SARS, 2022:84). Therefore, the analysis below is performed based on the business profits provisions contained in art. 7 of the double tax agreement between South Africa and Mozambique.

Article 7(1) of the double tax agreement reads as follows:

> '(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.' (SARS, 2009a.)

When applying the above provision of the double tax agreement to the hypothetical scenario, the technical service income earned by the South African resident taxpayer in Mozambique will be subject to tax only in South Africa by virtue of the taxing right allocation of the double tax agreement. However, Mozambique levies withholding tax at a rate of 20% on technical service fees paid to non-residents by way of its domestic law (Leitao, 2023:46), even though the double tax agreement does not contain a dedicated technical fees clause. This creates a conflicting application between the domestic law enforced in Mozambique and what the double tax agreement specifies in relation to taxing right allocation. Nevertheless, the provisions of art. 7 of the double tax agreement should be applied when the determination on taxing right allocation is made, which confers exclusive taxing right to South Africa in this scenario. (SARS, 2022:84.)

The purpose of this research is not aimed at clarifying the recourse for taxpayers in cases where controversial positions are created due to conflict between domestic legislation of foreign jurisdictions and the taxing right allocation contained in double tax agreements, but rather how the provisions of s 6*quat* are applied in determining the relief available to a South African resident taxpayer. Broadly, the s 6*quat* rebate and s 6*quat* deduction afford relief to South African taxpayers for 'taxes on income' that are 'paid' or 'proved to be payable' to a foreign jurisdiction 'without any right of recovery'. In cases where a foreign country levies withholding tax in terms of its domestic legislation and fails to limit the tax levied to a lower rate specified in a double tax agreement entered into with South Africa, the taxes suffered will not qualify as 'taxes on income' that are 'proven to be paid' as the levying thereof is in contravention of the applicable double tax agreement. The result is that the South African taxpayer would not qualify for a s 6*quat* rebate, while a s 6*quat* deduction would only be available insofar as no right of recovery exists, other than under a mutual agreement procedure provided for in certain double tax agreements. (SARS 2022:82-85.) Furthermore, consideration should be given to the limitation clause contained in s 6*quat*(2) which states that:

> '(2) The rebate under subsection (1) and the deduction under subsection (1C) shall not be granted in addition to any relief to which the resident is entitled under any agreement between the governments of the Republic and the said other country for the prevention of or relief from double taxation, but may be granted in substitution for the relief to which the resident would be so entitled.'

Therefore, even though a South African resident taxpayer would typically be able to claim a s 6*quat* deduction for taxes 'paid' or 'proven to be payable' in the absence of satisfying the stricter requirements of the s 6*quat* rebate, relief cannot be afforded 'in addition to' the relief afforded by way of a double tax agreement. The relief provided for in s 6*quat* could, however, be granted 'in substitution' of the relief provided for a double tax agreement, implying that a South African resident taxpayer should make an election between the relief measures available. It is submitted that, where a double tax agreement has effectively provided for relief against possible double taxation of the same amount, the relief available in terms of s 6*quat* would no longer be available for a South African resident taxpayer.

When analysing the possible s *6quat* relief available to the South African resident taxpayer in this scenario, Mozambique has a source-based claim to the technical service income generated in Mozambique by virtue of its domestic law provisions, on which it levies withholding tax. In addition, South African has a residence-based claim to tax the income whereby South African resident taxpayers are required to include the foreign technical service income in their gross income. On the basis that art. 7(1) of the double tax agreement allocates taxing rights to South Africa in the absence of a permanent establishment, and by virtue of the provisions of s 9(2)(*e*), the technical service income will be deemed to be of a South African source and the s 6*quat* deduction would typically be available to the South African taxpayer. However, on the basis that the double tax agreement allocates the taxing right to South Africa, no foreign tax liability arises in Mozambique according to the provisions of the double tax agreement. Therefore, it could be said that the double tax agreement reduced the rate of Mozambiquan tax levied to Nil by allocating taxing rights to South Africa, resulting in no portion of the withholding tax paid to Mozambique to qualify for any relief in terms of s 6*quat*. The only possible recourse in such a scenario would be for the South African resident taxpayer to rely on the Mutual Agreement Procedure contained in art. 24 of the double tax agreement entered into between South Africa and Mozambique, which could result in a refund being obtained from the Mozambiquan Revenue Authority for the foreign taxes suffered (SARS, 2022:82).

This scenario provides for an interesting conclusion based on the application of s 6*quat.* Even though the South African resident taxpayer suffers double taxation by virtue of the Mozambiquan withholding tax levied and the required inclusion in gross income in South Africa, the taxing right allocation of art. 7(1) of the double tax agreement results in no domestic relief being granted in South Africa on the double taxation suffered. This result is based on the fact that the double tax agreement does not permit tax to be levied on the technical service income by Mozambique, and for purposes of relief afforded by s 6*quat,* the foreign tax levied does not qualify as 'tax on income' that are 'paid' or 'proven to be payable' 'without any right of recovery'. As a result, the South African resident taxpayer is left at the mercy of the mutual agreement procedure provided for by the applicable double tax agreement in order to obtain a refund from the Mozambiquan revenue authority.

Summary of taxing right allocation – double tax agreement present

Based on the analysis of the double tax agreements of the UK, India and Mozambique above, significantly different relief is afforded in terms of s 6*quat* even in the presence of a double tax agreement entered into by South Africa. On the basis that the technical services are rendered from South Africa and a permanent establishment is not present in the foreign jurisdiction, the provisions of s 9(2)(*e*) will deem the source of the income to be South African. The relief afforded in the above scenarios is summarised as follows:

Calculation 6: Summary of s 6*quat* relief afforded on analysis of double tax agreements

	UK	India	Mozambique
Taxable income from a South African source	R100.00	R100.00	R100.00
Less: Foreign withholding tax paid, qualifying as deduction	R0.00	-R10.00	R0.00
Taxable income after deduction of foreign taxes	**R100.00**	**R90.00**	**R100.00**
Normal SA tax @ 27%	**R27.00**	**R24.30**	**R27.00**
Foreign tax paid	**R0.00**	**R10.00**	**R20.00**
Total SA and Foreign tax suffered (after relief)	**R27.00**	**R34.30**	**R47.00**

In the case of the UK, it is noted that double taxation is effectively avoided by virtue of the taxing right allocation of art. 7(1) the double tax agreement, which requires no further South African domestic relief to be afforded in terms of s 6*quat.* The result is based on the fact that art. 7(1) of the double tax agreement allocates taxing rights to South Africa in the absence of a permanent establishment in the UK.

As for the Indian case, double taxation is not effectively avoided by virtue of the provisions of the double tax agreement on the basis that art. 12(2) allows India to levy withholding tax on technical service income generated in India. Nevertheless, some relief is granted the South African taxpayer on the double taxation suffered by way of the s 6*quat* deduction in South Africa.

The summary especially highlights the extent of double taxation suffered in the case of Mozambique, which is brought on primarily by the withholding tax levied in terms of Mozambiquan domestic law, despite the taxing right allocation made in the double tax agreement entered into between South African and Mozambique. The extent of double taxation suffered does not take into account the possible recovery of foreign taxes paid by the South African resident taxpayer in Mozambique. As a result, even though the South African resident taxpayer would typically be able to claim a s 6*quat* deduction for taxes ‘paid’ or ‘proven to be payable’ in the absence of satisfying the stricter requirements of the s 6*quat* rebate, relief cannot be afforded ‘in addition to’ the relief afforded by way of a double tax agreement. It is submitted that, by virtue of art 7(1) of the double tax agreement that allocates taxing rights to South Africa, relief against double taxation is effectively provided and s 6*quat* relief cannot be afforded in addition thereto, as provided for in s 6*quat*(2). Essentially, when the double tax agreement between South Africa and Mozambique allocates taxing rights to South Africa, the consequence of the domestic law provisions in Mozambique, which contradicts the application of the double tax agreement, results in no relief to be available in terms of the s 6*quat* rebate or the s 6*quat* deduction for the South African resident taxpayer.

4.2 Taxing right allocation in the absence of a double tax agreement

In certain circumstances, South African taxpayers could generate income from countries with which South Africa does not have a double tax agreement. For purposes of illustrating the s 6*quat* relief that would be applicable in such a scenario, Liberia is used as an example.

In order to apply this example, the same scenario is used as that in Chapter 4.1 which involves a South African resident rendering technical services in a foreign country, being Liberia for purposes of this analysis. The South African resident does not have a permanent establishment in Liberia and does not spend the majority of the time on the project physically present in Liberia.

When the Liberian client settles the invoice of the South African resident taxpayer, s 806 of the Liberian Revenue Code requires withholding tax to be withheld at a rate of 15% on technical service fees paid to non-Liberian residents. This effectively creates a source-based claim by Liberia, on which it levies tax on technical service income generated in Liberia. The South African resident taxpayer is required to include such foreign income in its gross income by virtue of the residence-based claim that South Africa has, effectively creating a dual tax claim and ultimately double taxation of the same amount.

For purposes of determining the relief available in terms of s 6*quat*, the source of the technical service income must be established. Based on the author's interpretation of the provisions of s 9(2)(*e*) and considering the common law principles applied in South Africa, the amount will be seen to be of a South African source. This position is achieved by the general guiding principles as held in the *Level Brothers* and *Unilever* case (discussed in Chapter 3.1 of this report) which aim to determine what the originating cause of the income is and where such originating cause is located. If, for example, the South African resident is an engineer that performs all the engineering design work from an office in South Africa, while only briefly visiting Liberia to ensure surrounding details of the design are considered, the originating cause of the income could be seen to be the services performed at the office in South Africa where the majority of the mental or intellectual inputs are executed.

On the basis that the technical service income would be seen to be from a source in South Africa and no double tax agreement exists to allocate taxing rights, the South African resident will not be eligible for the s 6*quat* rebate but rather the s 6*quat* deduction. As illustrated in Chapter 2, the s 6*quat* deduction affords less relief than that afforded by way of the s 6*quat* rebate.

The following calculation illustrates the total tax suffered by the South African resident taxpayer in the absence of a double tax agreement allocating taxing rights to one of the jurisdictions:

Calculation 7: s 6*quat* relief in Liberian scenario

	Section 6*quat* (1C) deduction method:
Taxable income from a South African source	R100.00
Less: Liberian withholding tax paid @ 15%	-R15.00
Taxable income after deduction of foreign taxes	**R85.00**
Normal SA tax @ 27%	**R22.95**
Foreign tax paid	**R15.00**
Total SA and Foreign tax suffered (after relief)	**R37.95**

Calculation 7 highlights the reality that a South African resident would suffer a total of R37.95 in taxation on taxable income generated of R100. This result effectively equates to 37.95% tax suffered by a South African resident after relief against double taxation is afforded by South Africa in terms of s 6*quat*.

4.3 Comparison of relief afforded in the absence and presence of double tax agreements

Based on the different scenarios analysed in this chapter, the below summary of the calculations performed in Chapter 4.1 and 4.2 depicts the resultant relief afforded by s 6*quat*:

Calculation 8: Summary of calculations performed on double tax agreements analysed

	UK	India	Mozambique	Liberia
Taxable income from a South African source	R100.00	R100.00	R100.00	R100.00
Less: Foreign withholding tax paid, qualifying as deduction	R0.00	-R10.00	R0.00	-R15.00
Taxable income after deduction of foreign taxes	**R100.00**	**R90.00**	**R100.00**	**R85.00**
Normal SA tax @ 27%	**R27.00**	**R24.30**	**R27.00**	**R22.95**
Foreign tax paid	**R0.00**	**R10.00**	**R20.00**	**R15.00**
Total SA and Foreign tax suffered (after relief)	**R27.00**	**R34.30**	**R47.00**	**R37.95**
	No dual tax claim	***Dual tax claim, double tax agreement reduced rate***	***Dual tax claim, no reduced rate in double tax agreement***	***Dual tax claim, no double tax agreement***

The summary shown in Calculation 8 reflects scenarios where double tax agreements are in place between South Africa and the UK, India and Mozambique respectively, while no double tax agreement is in place with Liberia.

Most noteworthy is that the total tax liability of R47 suffered in the case of Mozambique is the highest of all scenarios, including that of Liberia (i.e., R37.95) where no double tax agreement exists, even though a double tax agreement is in place between South Africa and Mozambique.

It is submitted that the presence of a double tax agreement does not necessarily combat potential double taxation being suffered by South African resident taxpayers, a result primarily brought on by the residence-based tax system followed by South Africa which requires world-wide income of South African resident taxpayers to be included in their gross income in South Africa.

Chapter 5: The significance of a permanent establishment for s 6quat relief

This research has made various references to a 'permanent establishment' as part of the analysis of source determination and taxing right allocation of double tax agreements. Based on the author's interpretation of the source rules contained in s 9(2)(*e*), the section prescribes that technical service income earned by a South African resident taxpayer will be deemed to be from a South African source, unless the income is generated by and attributable to a permanent establishment situated outside South African. Therefore, implying that s 9(2)(*e*) would not deem technical service income received by a permanent establishment to be of a South African source, resulting in such income to be foreign sourced. Furthermore, by virtue of the typical 'business profits' or 'technical service' articles contained in certain double tax agreements, taxing rights on income generated in a foreign jurisdiction, which is attributable to a permanent establishment in that jurisdiction, may likely be granted to such a foreign jurisdiction.

Source determination and taxing right allocation are crucial for the determination of the relief afforded by s 6*quat* for South African resident taxpayers earning technical service income in a foreign jurisdiction. In the absence of a permanent establishment and insofar as technical services are rendered from a physical location in South Africa, the source of technical service income could be seen to be South African by virtue of the provisions of s 9(2)(*e*). The result is that the s 6*quat* deduction is typically available to a taxpayer to provide relief against double taxation suffered, being the lesser relief when compared to the s 6*quat* rebate. Furthermore, in the absence of a permanent establishment in a foreign jurisdiction where technical service income is earned, a double tax agreement may allocate taxing rights to the country where the taxpayer is resident. Even where taxing rights are allocated to one jurisdiction by a certain double tax agreement, the analysis in Chapter 4 indicates that South African resident taxpayers may still end up suffering double taxation by virtue of withholding taxes levied by countries that impose a source-based tax claim on the technical service income, as well as the residence-based tax system followed by South Africa which requires South African resident taxpayers to include world-wide income in their gross income. The income earned from a foreign jurisdiction, insofar as the technical services are rendered from South Africa, is typically deemed to have a South African source in the absence of a permanent establishment in the foreign jurisdiction, as prescribed by s 9(2)(*e*), resulting in the lesser relief being available in terms of the s 6*quat* deduction.

When put into perspective for relief determination in terms of s 6*quat*, the significance of a permanent establishment is truly highlighted. The concept of a permanent establishment, as well as the significance thereof in determining relief afforded by s 6*quat* is discussed in further detail below.

5.1 The definition of a permanent establishment

The purpose of this research is not to provide a comprehensive analysis of the concept of a permanent establishment, but rather to provide an overview relevant to the ultimate interpretation thereof for purposes of applying the s 6*quat* relief available to South African resident taxpayers.

Section 1 defines a 'permanent establishment' as:

> '…a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development…'

Article 5(1) of the OECD's *Model Tax Convention on Income and on Capital* states that:

> 'For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on…' (OECD, 2017:M-19).

The article goes on to list certain specific inclusions to the term 'permanent establishment' such as, a place of management, a branch, an office, a factory, a workshop, and any place of extraction of natural resources. The article also lists certain exclusions to the term permanent establishment which is mainly aimed at activities preparatory or auxiliary to a main service or supply of goods. (OECD, 2017:M-19.)

For purposes of further interpretation of the definition of a permanent establishment, reliance is placed on the commentary on art. 5, as contained in the condensed version of the OECD's *Model Tax Convention on Income and on Capital*, which summarises the conditions of the definition of a permanent establishment to be:

> '- the existence of a "place of business", i.e., a facility such as premises or, in certain instances, machinery or equipment;
>
> - this place of business must be "fixed", i.e., it must be established at a distinct place with a certain degree of permanence;
>
> - the carrying on of the business of the enterprise through this fixed place of business. This means usually persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.' (OECD, 2017:117.)

When applying the above definition of a permanent establishment to the analysis of source of technical service income and allocation of taxing rights by double tax agreements, the picture becomes clearer. Essentially, when an enterprise has sufficient substance in a certain jurisdiction by way of a fixed place of business through which the business of the enterprise is carried on, the income earned by such an enterprise may be from a source in that jurisdiction. For purposes of applying the provisions of s 9(2)(*e*), it is the author's interpretation that technical service income generated by a permanent establishment in a foreign jurisdiction will likely result in such income to be classified as foreign sourced. Furthermore, in instances where a foreign permanent establishment of a South African resident taxpayer generates income in such a foreign jurisdiction, a double tax agreement may typically allocate taxing rights on the income to the foreign jurisdiction in which the permanent establishment is situated.

Practical aspects of a permanent establishment

In order to understand the tax treatment of a foreign permanent establishment of a South African resident as applied in South Africa, and ultimately the relief afforded in terms of s 6*quat*, an overview of the practical aspects of taxation of profits of a permanent establishment is required.

The definition of a permanent establishment in art. 5 of the OECD's *Model Tax Convention on Income and on Capital*, specifically includes a branch, an office, or a place of management, where the business of an enterprise is carried out (OECD, 2017:M-19). Therefore, when a South African resident taxpayer has a required degree of permanent presence in a foreign country by way of these specific inclusions, a permanent establishment of that South African taxpayer will exist in the foreign country.

Steyn M in his article *Foreign branch operation in a globalised environment: a South African income tax perspective (Part I)* provides a summary of the concept of a permanent establishment:

> 'The concept of a P[ermanent] E[stablishment] essentially represents a set of criteria with which a business operation of a resident outside its own tax jurisdiction must comply before such an operation will attract income tax in the foreign tax jurisdiction…
>
> Since the introduction of the worldwide system of taxation in South Africa in 2001, resident taxpayers are taxed on all income, regardless of source or origin. Consequently, the income earned by a resident from branch operations abroad, which may or may not constitute a P[ermanent] E[stablishment], is also subject to normal South African income tax…
>
> Since residents are liable for normal income tax on receipts and accruals on a worldwide basis, all income earned from a P[ermanent] E[stablishment] in a foreign tax jurisdiction of a resident will be subject to South African income tax in the hands of the resident.' (Steyn, 2003:48-49.)

Based on the above summary, the mechanism of taxation of the profits of a permanent establishment is made clear. A South African resident taxpayer is required to include its world-wide earnings, including the earnings from a permanent establishment in a foreign jurisdiction (similar to the treatment of a branch), in its South African taxable income. Importantly, the inclusion of earnings from a permanent establishment in South African taxable income will be applicable regardless of the taxing right allocation provided for by a double tax agreement entered into between South Africa and the foreign jurisdiction in which the permanent establishment is located.

As per the analysis in Chapter 4, a double tax agreement would typically allocate taxing rights on the profits of a permanent establishment to the country in which the permanent establishment is situated. However, even with due consideration given to the taxing right allocation of a double tax agreement entered into between South Africa and the foreign country in which the permanent establishment is situated, a South African resident taxpayer would nevertheless be required to include the income from a permanent establishment in its world-wide income in South Africa in terms of the definition of gross income in s 1. The result is that the foreign jurisdiction in which the permanent establishment is situated, as well as South Africa, has a tax claim to the profits of the permanent establishment, even in the presence of a double tax agreement typically allocating taxing rights to one of the jurisdictions.

Furthermore, the inclusion of profits of a permanent establishment in South African taxable income will be applicable even in the absence of a double tax agreement in force between South Africa and the foreign jurisdiction in which the permanent establishment is situated, as a South African taxpayer would still be required to include the profits from a permanent establishment in their South African taxable income.

It is therefore crucial to note that the inclusion of profits of a foreign permanent establishment in South African taxable income is required by virtue of the world-wide tax system followed by South Africa, regardless of whether a double tax agreement is applicable or not, resulting in possible double taxation of profits earned by a foreign permanent establishment of a South African taxpayer.

Fortunately, the technical service income earned by a permanent establishment in a foreign jurisdiction would be of a foreign source in terms of the provisions of s 9(2)(*e*), which may result in relief being afforded by way of a s 6*quat* rebate (if all requirements are met), being greater relief than that afforded by the s 6*quat* deduction as confirmed by the analysis in Chapter 2.3.

5.2 Section 6quat relief in the presence of a permanent establishment

As discussed in Chapter 5.1, the presence of a permanent establishment plays a fundamental role in the relief afforded to South African taxpayers in terms of s 6*quat,* mainly due to the interpretation that the source of the technical service income generated by the permanent establishment will not be South African sourced for purposes of s 9(2)(*e*). In order to compare the resultant relief in scenarios where a permanent establishment is present, a comparison will be drawn between an instance where a double tax agreement is in force between South Africa and the foreign jurisdiction in which the permanent establishment is situated, versus an instance where no double tax agreement is in place with South Africa.

Presence of permanent establishment and double tax agreement

In order to analyse a scenario where both a permanent establishment and double tax agreement is present, the same scenario applied for purposes of Calculation 7 in Chapter 4.2 is altered as follows:

A South African resident taxpayer generates a taxable income of R100 by performing technical services to a Liberian client in Liberia, through its Liberian permanent establishment. Liberia levies income tax on Liberian resident companies at a rate of 25% in terms of s 200(*b*)(2)(C) of the Liberian Revenue Code. Assume that taxes suffered in Liberia meet the requirements of s 6*quat*(1) insofar as qualifying taxes are suffered on income, which are proved to be payable, without any right of recovery. In addition, the South African resident generates a taxable income of R100 from unrelated services performed in South Africa. As it stands, no double tax agreement is in force between South Africa and Liberia. However, for purposes of depicting a scenario where a double tax agreement hypothetically is in place between South Africa and Liberia, the principles of the OECD's *Model Tax Convention on Income and on Capital* will be applied. The Liberian Revenue Code does not provide for withholding tax to be levied in Liberia on technical service fees paid by one Liberian entity to another[7]. Therefore, when the Liberian client settles the invoice of the Liberian permanent establishment, no withholding tax will be levied on the payments.

On the basis that a permanent establishment of the South African resident taxpayer exists in Liberia, the commentary on the provisions of the 'business profits' article as per the OECD's *Model Tax Convention on Income and on Capital* states that:

> '…unless an enterprise of a Contracting State has a permanent establishment situated in the other State, the business profits of that enterprise may not be taxed by the other State.
>
> …if such an enterprise carries on business in the other State through a permanent establishment situated therein, the profits that are attributable to the permanent establishment… may be taxed by that other state…' (OECD, 2017:175.)

Applied to the current hypothetical scenario, the taxing rights on technical service income earned by the permanent establishment in Liberia, will be allocated to Liberia. Therefore, Liberia will levy income tax on the taxable income of the permanent establishment at the relevant domestic tax rate. In the case of a company, s 200(*b*)(2)(C) of the Liberian Revenue Code levies income tax at a rate of 25%. However, on the basis that the permanent establishment 'belongs' to the South African resident taxpayer, the profits

[7] Section 806 of the Liberia Revenue Code provides for withholding tax to be levied on service income generated in Liberia and paid to a non-Liberian resident. However, no provision exists for withholding taxes to be levied on service income generated in Liberia and paid to another Liberian resident.

of which are required to be included in the gross income of the South African resident taxpayer, the foreign profits earned in Liberia will be included in the total taxable income of the South African resident taxpayer as well. On the basis that the income originates from the permanent establishment in Liberia in relation to technical services rendered by that permanent establishment, s 9(2)(*e*) provides that the income would not be South African sourced and the s 6*quat* rebate would accordingly be available to the South African taxpayer where all other requirements of s 6*quat*(1) are met. The s *6quat* relief available to the South African taxpayer is depicted by way of the following calculation:

Calculation 9: s 6*quat* relief in Liberian scenario - presence of permanent estabishment and double tax agreement

		Section 6*quat* (1) rebate method:
Taxable income from a South African source	50%	R100.00
Taxable income from a Liberian source	50%	R100.00
Taxable income		**R200.00**
Normal SA tax @ 27%		R54.00
Less: s 6*quat* rebate		-R25.00
Normal tax payable		**R29.00**
Section 6*quat* (1B) limitation:		
Liberian income tax paid @ 25%		R25.00
Section 6*quat* (1B) formula ((R100/R200)*R54))		R27.00

Calculation 9 indicates that a s 6*quat* rebate would be granted equal to the 25% corporate tax suffered in Liberia. The calculation also considers the limitation of relief stipulated in s 6*quat*(1B), which states that the qualifying rebate should be the lesser of the qualifying taxes paid and the amount determined by way of the limitation formula, resulting in the R25 qualifying taxes paid to be applied as a rebate in terms of s 6*quat*.

Presence of permanent establishment but absence of double tax agreement

In the same scenario applied for purposes of Calculation 9, but where no double tax agreement is in place between South Africa and Liberia in which the permanent establishment is situated, the resultant relief would be the same. The technical service income generated by the Liberian permanent establishment will not be deemed South African sourced in terms of s 9(2)(*e*), regardless of the absence of a double tax agreement. Therefore, a s 6*quat* rebate equal to the 25% corporate tax paid in Liberia will also be available to the South African taxpayer, assuming that all other requirements of s 6*quat*(1) are met.

It is therefore noteworthy that the presence of a double tax agreement would not necessarily make a difference to the relief available to a South African resident taxpayer when a permanent establishment is present in the foreign jurisdiction, as the basis for the relief provided by way of s 6*quat* is the source of the income. Therefore, the fact that the income is earned from a foreign source (i.e., by the Liberian permanent establishment) is the determining factor resulting in the s 6*quat* rebate to be available, not necessarily the influence of a double tax agreement.

5.3 Section 6quat relief in the absence of a permanent establishment

The resultant relief in scenarios where a permanent establishment is absent, with a comparison between an instance where a double tax agreement is in force between the foreign jurisdiction and South Africa, versus an instance where no double tax agreement is in place, is subsequently analysed based on the same example as in Chapter 5.2.

Absence of permanent establishment and double tax agreement

In a scenario where a double tax agreement is not in place between South Africa and Liberia and the South African resident taxpayer does not have a permanent establishment in Liberia, the income generated by the South African resident taxpayer will be deemed South African sourced in terms of s 9(2)(*e*). The South African source determination is based on the fact that the technical services are rendered by the South African tax resident from an office in South Africa. Accordingly, when the Liberian client settles the invoice of the South African resident taxpayer, 15% withholding tax on technical services fees paid to non-Liberian residents will be withheld, as required by s 806 of the Liberian Revenue Code. The South African resident will include the technical service income in its gross income in South Africa and qualify for relief by way of the s 6*quat* deduction. The calculation of relief is depicted as follows:

Calculation 10: s 6*quat* relief in Liberian scenario - absence of permanent establishment and double tax agreement

		Section 6*quat* (1C) deduction method:
Taxable income from a South African source	50%	R100.00
Taxable income from a Liberian source	50%	R100.00
Less: Liberian withholding tax paid @ 15%, qualifying for the s 6*quat* deduction		-R15.00
Taxable income		**R185.00**
Normal tax payable in South Africa @ 27%		**R49.95**

Absence of permanent establishment but presence of double tax agreement

In a scenario where a South African resident taxpayer does not have a permanent establishment in Liberia, but a double tax agreement hypothetically exists between South Africa and Liberia, the result would be the same as the above instance where a double tax agreement is present. Due to the lack of a permanent establishment and insofar as the technical services are rendered from South Africa, the technical service income generated in Liberia will be deemed to be of a South African source in terms of s 9(2)(*e*), which results in the South African taxpayer only being afforded relief by way of the s 6*quat* deduction.

This result makes for another noteworthy conclusion as a double tax agreement between the two jurisdictions that provided for the typical allocation of the taxing right of business profits of the permanent establishment to Liberia, would not have changed the resultant relief available to the South African resident, i.e., the source of the income would nevertheless be South African in terms of the provisions of s 9(2)(*e*) on the basis that the technical services are rendered from South Africa.

5.4 Comparison of relief afforded in the absence vs. presence of a permanent establishment

The four scenarios analysed in Chapter 5.2 and 5.3 are considered for purposes of drawing a resultant comparison of the relief afforded by s 6*quat*:

- presence of a permanent establishment and double tax agreement (analysed in Chapter 5.2);
- presence of a permanent establishment but absence of a double tax agreement (analysed in Chapter 5.2);
- absence of a permanent establishment and double tax agreement (analysed in Chapter 5.3); and
- absence of a permanent establishment but presence of a double tax agreement (analysed in Chapter 5.3).

The combined resultant calculations can be summarised as follows:

Calculation 11: Combined resultant calculation considering a double tax agreement and permanent establishment

		Scenario 1: PE and double tax agreement	Scenario 2: PE but no double tax agreement	Scenario 3: No PE or double tax agreement	Scenario 4: No PE but double tax agreement
		Section 6*quat* (1) rebate method:	**Section 6*quat* (1) rebate method:**	**Section 6*quat* (1C) deduction method:**	**Section 6*quat* (1C) deduction method:**
Taxable income from a South African source	50%	R100.00	R100.00	R100.00	R100.00
Taxable income from a Liberian source	50%	R100.00	R100.00	R100.00	R100.00
Less: Liberian withholding tax @ 15%, qualifying for s 6*quat* deduction		R0.00	R0.00	-R15.00	-R15.00
Taxable income after deduction of foreign taxes		**R200.00**	**R200.00**	**R185.00**	**R185.00**
Normal tax @ 27%		R54.00	R54.00	R49.95	R49.95
Less: Liberian income tax @ 25%, qualifying for s 6*quat* rebate		-R25.00	-R25.00	R0.00	R0.00
Normal South African tax payable		**R29.00**	**R29.00**	**R49.95**	**R49.95**

Section 6*quat* (1B) limitation:		
Liberian income tax paid @25%	R25.00	R25.00
Section 6*quat* (1B) formula	R27.00	R27.00

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Total SA and Foreign tax suffered (after relief)	**R54.00**	**R54.00**	**R64.95**	**R64.95**

Difference in SA normal tax (scenario 1 & 2 (R29.00) vs. scenario 3 & 4 (R49.95)):	**R20.95**
Difference in SA normal tax as a percentage of the total normal tax:	**27%**

It is noted that the resultant calculations of Scenario 1 and 2 are the same. This is on the basis that the presence of a permanent establishment and double tax agreement results in the same relief (a s6*quat* rebate of R25) if no double tax agreement is in place between the two jurisdictions. The primary cause of the resultant s 6*quat* rebate being granted in both Scenario 1 and 2 is based on the fact that the technical services are rendered by the foreign permanent establishment which results in s 9(2)(*e*) not deeming such income to be South African sourced.

Furthermore, the resultant calculations of Scenario 3 and 4 are also the same (a s6*quat* deduction of R15) on the basis that the presence of a double tax agreement would not change the relief, as the determining factor of source revolves around the presence of a permanent establishment. In the absence of a permanent establishment and insofar as the technical services are rendered from South Africa, the source of the income is seen as South African in terms of s9(2)(*e*).

From the results shown in Calculation 11, it is evident that when a permanent establishment is present in a foreign jurisdiction and technical service income is received by that permanent establishment, the presence or absence of a double tax agreement does not change the resultant relief afforded to a South African taxpayer. By virtue of the technical services being rendered by a foreign permanent establishment, such income is not deemed to be of a South African source in terms of s 9(2)(*e*), which results in the s 6*quat* rebate to be available to a South African taxpayer, provided that all other requirements of s 6*quat*(1) are met.

Furthermore, where no permanent establishment is present in a foreign jurisdiction and the technical services are predominantly rendered from South Africa, the presence or absence of a double tax agreement also does not affect the resultant relief afforded to a South African resident taxpayer. Due to the technical services being rendered from South Africa, the source of the technical service income will be deemed to be South African in terms of s 9(2)(*e*), resulting in the s 6*quat* deduction being available to the South African taxpayer.

Ultimately, in Scenario 1 and 2 where a s *6quat* rebate is afforded to the South African taxpayer, a R20.95 difference in normal tax payable is realised when compared to Scenario 3 and 4 where a s 6*quat* deduction is afforded, which equates to a 27% difference in the normal tax payable.

Chapter 6: Conclusion

This research has highlighted various fundamental aspects to be considered in the application of s 6*quat* relief for South African resident taxpayers earning technical service income from foreign jurisdictions. With a specific focus on the role that a permanent establishment and double tax agreement respectively plays in the relief afforded, the extent of the difference in relief afforded by s 6*quat* is determined.

At the onset, the workings of s 6*quat* are analysed in Chapter 2 and a comparison is drawn between the effective relief afforded between the s 6*quat* rebate and the s 6*quat* deduction. Calculation 1 shown in Chapter 2.3 highlights that greater relief is afforded to South African taxpayers that qualify for the s 6*quat* rebate versus those that qualify for the s 6*quat* deduction. This result is primarily based on the source determination of the income earned, either being South African or foreign sourced.

In Chapter 3, focus is placed on the source determination of technical service income, as well as that of services in general. It is submitted that the source of technical services income would be seen as South African in terms of the provisions of s 9(2)(*e*), unless such income is generated by and attributable to a permanent establishment situated outside South Africa. This interpretation of the author implies that, insofar as a foreign permanent establishment of a South African taxpayer generates technical service income in that foreign jurisdiction, the source of such income would be foreign. The interpretation applied closely resembles common law principles laid down in cases such as *CIR v Lever Bros & Unilever Ltd* (1946:8) and *Rhodesia Metals Ltd v Commissioner of Taxes* (1938:379), which aim to seek what the originating cause of service income is and where that originating cause is located, in order for the source to be determined. The holistic approach applied by the author for source determination of technical service income, being the provisions of s 9(2)(*e*) and common law principles, would typically result in the same outcome. Therefore, services rendered in a foreign jurisdiction would most likely result in those services being classified as foreign sourced by application of common law principles, which is similar to the applied interpretation of s 9(2)(*e*) which implies that services rendered by a foreign permanent establishment would be deemed foreign sourced.

Dual tax claims, created by way of source claims of source-based tax system and South Africa's residence-based tax system respectively, further complicates the attempts of double tax agreements to effectively avoid double taxation. As is evident in the comparative calculation in Chapter 4.3, the presence of a double tax agreement between South Africa and another jurisdiction would not necessarily result in effective relief from double taxation. Furthermore, insofar as technical service income is South African sourced, whether by way of s 9(2)(*e*) or common law principles, the lesser of the relief measures provided for by s 6*quat* would apply, being the s 6*quat* deduction. The result is that, neither an applicable double tax agreement, nor the relief provided by way of domestic legislation, effectively combats the double tax suffered as a result of the dual tax claim of two jurisdiction on the same income.

The significance of a permanent establishment in the determination of the relief afforded in terms of s 6*quat* is evident by way of Calculation 11 shown in Chapter 5.4. The presence of a permanent establishment is submitted to be the fundamental factor that could lead to greater relief being afforded by way of a s 6*quat* rebate being granted, rather than a s 6*quat* deduction, provided that all other requirements of s 6*quat*(1) are met. This outcome is primarily based on the fact that technical service income received by a permanent establishment would result in the source of the technical service income being foreign in terms of the author's interpretation of s 9(2)(*e*). Based on the results shown in Calculation 11, the normal tax payable is 27% higher in a scenario where a permanent establishment is absent, versus where it is present and the s 6*quat* rebate is afforded. Furthermore, Calculation 11 shows that the presence or absence of a double tax agreement would not result in different relief being granted to a South African taxpayer. This result is based on the fact that the taxing right allocation made by a double tax agreement would not affect the source of the technical service income.

The ultimate conclusion of the research indicates the great significance of a permanent establishment in the determination of the relief afforded by s 6*quat.* South African resident taxpayers rendering technical services from South Africa for foreign clients, which suffer double taxation on such income, doesn't greatly benefit from the domestic relief provided for by South Africa in terms of s 6*quat*. The outcome is based on the fact that the source of the technical service income would inevitably be South African, in terms of s 9(2)(*e*) and common law principles, which leads to lesser relief being granted by way of a s 6*quat* deduction, versus the relief granted by the s 6*quat* rebate. By way of Calculation 11, the research confirms that the resultant relief afforded by s 6*quat* would be the same in the absence or presence of a double tax agreement, emphasizing the reality that the effects of a double tax agreement and South African domestic relief on foreign taxes suffered does not effectively combat double taxation.

This research examined the difference in effective relief provided to South African resident taxpayers in terms of s 6*quat*, as well as the effectiveness of double tax agreements entered into by South Africa. The worldwide tax system followed by South Africa, which requires South African resident taxpayers to include both local and foreign income in their gross income, may be the cause of possible double taxation. As the examples have shown, the relief afforded by s 6*quat* is often not comprehensive enough to truly combat double taxation suffered by South African tax residents earning technical service income in foreign jurisdictions. The disadvantageous result of relief afforded by s 6*quat* in general is a matter for possible reconsideration by National Treasury in South Africa.

REFERENCE LIST

Legislation and related material

Income Tax Act 58 of 1962

India Income Tax Act of 1961

Liberia Revenue Code as amended 2020

South African Revenue Service, 2022, *Interpretation Note 18: Rebate and Deduction for foreign Taxes on Income*.

South African Revenue Service, 2012. Income Tax Act, 1962: Convention between the Government of the Republic of South Africa and the Government of the Democratic Republic of Congo for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. *Government Gazette,* 35805:2, 24 October.

South African Revenue Service, 2009a. Income Tax Act, 1962: Convention between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. *Government Gazette,* 31983:2, 13 March.

South African Revenue Service, 2009b, *Guidance on the residence basis of taxation for individuals*.

South African Revenue Service, 2005. Income Tax Act, 1962: Convention between the Government of the Republic of South Africa and the Kingdom of Swaziland for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. *Government Gazette,* 27637:2, 1 June.

South African Revenue Service, 2003. Income Tax Act, 1962: Convention between the Government of the Republic of South Africa and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. *Government Gazette,* 24335:2, 31 January.

South African Revenue Service, 1997. Income Tax Act, 1962: Convention between the Government of the Republic of South Africa and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. *Government Gazette,* 18545:2, 28 November.

OECD documents

Organisation for Economic Co-operation and Development, 2017, *Model Tax Convention on Income and on Capital: Condensed version 2017*.

Organisation for Economic Co-operation and Development, 2017, *Model Tax Convention on Income and on Capital: Full version 2017*.

Case law

C: SARS v Tradehold Ltd 2013 SCA 269 (74 SATC 263)

CIR v Lever Bros & Unilever Ltd 1946 AD 441 (14 SATC 1)

Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes, Southern Rhodesia 1938 AD 282 (9 SATC 363)

Commentary

Benetello, M. 2022. Jurisdiction to tax. In: *Silke on International Tax*. Chap. 2.2.

De Koker & Williams. 2023. Deemed source – 'know-how' payment. In: *Silke on South African Income Tax*. Chap. 5.19.

De Koker & Williams. 2023. South African source. In: *Silke on South African Income Tax*. Chap. 34.1.

Leitao, M. 2023. *Guide to doing business in Mozambique*. Chap. 7.1.2, p. 46

World Wide Web

Cambridge Dictionary, n.d. *Cambridge Dictionary.* https://dictionary.cambridge.org/dictionary/english/source Date of access: 3 Feb. 2024

International Monetary Fund. 2021. *Chapter 11 Strengthening Source-Based Taxation.* https://www.elibrary.imf.org/display/book/9781513511771/ch011.xml#:~:text=Source%2Dbased%20taxation%20allows%20countries,%E2%80%9Cnexus%E2%80%9D%20with%20the%20jurisdiction Date of access: 5 Feb. 2024

Merriam-Webster Inc., n.d. *Merriam-Webster dictionary.* www.merriam-webster.com/dictionary/service Date of access: 3 Feb. 2024

Merriam-Webster Inc., n.d. *Merriam-Webster dictionary.* https://www.merriam-webster.com/dictionary/source Date of access: 3 Feb. 2024

Merriam-Webster Inc., n.d. *Merriam-Webster dictionary.* https://www.merriam-webster.com/dictionary/nexus Date of access: 5 Feb. 2024

SAIPA, n.d. *Tax residence for individuals.* https://www.saipa.co.za/tax-residence-individuals/ Date of access: 25 Jan. 2024

SARS. 2023. *Exploring South Africa's Merchandise Trade Statistics.* https://www.sars.gov.za/customs-and-excise/trade-statistics/ Date of access: 23 Jan. 2024.

Steyn, M. 2003. Foreign branch operation in a globalised environment: a South African income tax perspective (Part I). *Sabinet African Journals*. https://journals.co.za/doi/pdf/10.10520/EJC91220 Date of access: 19 Feb. 2024