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

A COMPARATIVE STUDY AND ANALYSIS OF THE AMENDED FOREIGN EMPLOYMENT INCOME EXEMPTION IN SOUTH AFRICA

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ABSTRACT

Tax exemptions are granted by the government for a multitude of reasons. These include providing some form of tax relief, alleviating specifically identified tax burdens, encouraging investment, promoting donations to approved public benefit organizations and avoiding the possibility of double taxation (Kransdorff, 2010, p. 79). One specific provision in section 10(1)(*o*)(ii) of the South African Income Tax Act of 1962, pertained to South African residents working abroad, namely the foreign employment income exemption. The intention of this exemption was to prevent residents from being double taxed (SARS, 2021a). Over the last few years, there has been a noted increase in the number of South Africans working abroad and this has been alluded to as being one of the reasons that government decided to review and amend the section 10(1)(*o*)(ii) foreign employment income exemption (Ryan, 2020). The impact of this amendment on South African residents working abroad will be analysed and investigated. A comparative analysis will be done on the tax payable of South African residents working in the following countries: the UK, the UAE and India.

Key words: tax exemption, double taxation, foreign income, tax burden, double tax agreements, tax havens, resident, Income Tax Act 58 of 1962 ('the Tax Act'), section 6*quat* rebate, globalisation, foreign employment income exemption, residency status.

Declaration

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

A Essop

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1. INTRODUCTION

Globalisation has accelerated over the last two decades due to advances in technology, the need for expansion and resource acquisition (Islam, et al., 2019, p. 258). Within a similar time-frame South Africa has undergone significant changes politically, economically and socially (Landsberg and Graham, 2017, p. 27). Coupled with globalisation, South Africa has noted a significant increase in the number of South African residents working abroad (Ryan, 2020). This research will explore the implications on taxable income of South African residents working abroad.

In paragraph 1 of the Fourth Schedule to the Income Tax Act 58 of 1962, remuneration is defined as

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

Prior to 1 January 2001, South Africa used a source-based system of taxation. This changed on 1 January 2001, when South Africa adopted the resident-based tax system. (Surtees, 2000). This meant that South African residents will be taxed on their worldwide income, and non-residents will be liable for tax on their income from South African sources (SARS, 2021). Income tax legislation which stated the definition of resident therefore became more important. The determination of a South African resident includes an ordinarily resident and physical presence test. (SARS, 2018a). The implications of the change to a resident-based tax system had a direct impact on South Africans working abroad, who were still regarded as South African residents. There was a risk that they could be taxed in the jurisdiction that they were working in as well as in South Africa based on their residency status. (Du Plessis, 2015, p. 1198). To alleviate or eliminate this burden, the foreign employment income exemption, in s10(1)(*o*)(ii), was introduced (Palmer, 2017). In the absence of Double Tax Agreements (DTA's), this exemption was crucial for residents earning foreign income from working abroad (Palmer, 2017).

An additional result of globalisation was the increase in relations between South Africa and other countries, resulting in more DTA's being established (Du Plessis, 2015, p. 1192). SARS noted that the establishment of DTA's created a loophole whereby individuals sometimes paid little or no tax on foreign employment income (Du Toit, 2018). There are also countries classified as 'tax havens' which exacerbated the problem of individuals paying little or no tax. Tax havens are viewed as a country or jurisdiction that offers foreign individuals and businesses little or no tax liability in a politically and economically stable environment. (Pieretti, et al., 2020). Tax havens therefore reduced or prevented double taxation. The original intention of section 10(1)(*o*)(ii) was to prevent double taxation (National Treasury, 2017, p. 6). Owing to the increase in tax havens, the incidence of double taxation was reduced, and this decreased the need for section 10(1)(*o*)(ii) (Pollack, 2017). National Treasury also stated that another reason double taxation will not be a problem is because there are more DTA's (National Treasury, 2017, p. 5). It can therefore be deduced that a combination of DTA's, tax havens and the section 10(1)(*o*)(ii) exemption could result in individuals paying no tax. National Treasury was of the opinion that the exemption also created disparity between the tax treatment of residents employed by government and those employed in the private sector (National Treasury, 2017, p. 6). Due to the aforementioned reasons, the South African Finance Minister announced on 22 February 2017, that there was a proposal to repeal the foreign employment income exemption [section 10(1)(*o*)(ii)] (Camay and Lopes, 2017). On 19 July 2017, National Treasury released the Draft Taxation Laws Amendment Bill, 2017 for public comment (Palmer, 2017). The repeal of the foreign employment income exemption was considered as one of the more controversial proposals and incited much debate and discussion (Monatisa, 2017). After considering public comment, National Treasury concluded that they would not repeal the exemption, but rather amend it (Pollack, 2017). The amendment was that South African residents working abroad would be allowed an exemption on the first R1 million of their foreign employment income. This amendment was effective on 1 March 2020. (SARS, 2021a). The exemption was subsequently increased to R1.25 million on 26 February 2020. The effective date of the amendment remained 1 March 2020. (SARS, 2021a). The implementation of the amendment raised concern among

employees and employers, especially companies that regularly seconded employees abroad. Employers subsequently had the responsibility of investigating which of their employees fell into the categories stated below.

a) Earned foreign income exceeding R1.25 million in a 12 month period,
b) Were considered resident in South Africa, and
c) Met the requirements in terms of the physical presence test. (Duffy, et al., 2020).

In addition to employers, employees also had to be aware of the above responsibilities. It is evident that the new amendment (the initial R1m and subsequent increase to R1,25m exemption) has impacted taxable income and tax disclosure requirements (Smith, 2020, p. 313). Professional bodies have raised concern about the additional tax to which South Africans are now subject (Smith, 2020, p. 314). This research report intends to examine the impact that the amendment to section 10(1)(*o*)(ii) has on South Africans earning foreign employment income. The research and discussion will focus on the foreign employment income exemption, section 6*quat* rebate and Double Tax Agreements between South Africa and the selected countries.

2. THE RESEARCH QUESTION

2.1 The Research Question

How are South African residents working abroad in certain jurisdictions affected by the amendment of the foreign employment income exemption, in section 10(1)(*o*)(ii) of the Income Tax Act?

This report will analyse the effect and impact of the section 10(1)(*o*)(ii) amendment on South African residents working abroad. This will be done taking cognisance of tax relief instruments such as Double Tax Agreements and section 6*quat* rebate in the South African Income Tax Act for foreign receipts and accruals. The analysis will include comparable income tax calculations for South Africans working in the UAE, the UK and India. The UK and India have been chosen because these jurisdictions were identified by industry as some of South Africa's main global trading partners (Deloitte, et al., 2017, p. 12). The UAE has been chosen because it has been identified as a jurisdiction where a large number of South African secondees and expatriates work (Cachalia, 2021).

2.2 The Sub-Questions

2.2.1 The first sub-question will answer what is meant by the term 'working abroad'. The research report will also explain the term 'secondment of South Africans overseas'.

2.2.2 The second sub-question will be: which individuals are classified as South African residents? Answering this question will enable identification of the South African tax residents working abroad who would fall within the ambit of the section 10(1)(*o*)(ii) amendment.

2.2.3 The third sub-question will examine what the section 10(1)(*o*)(ii) exemption provision is and how it was amended.

2.2.4 The fourth sub-question will address how the South African tax payable is calculated. Answering this question, will entail calculating the tax payable before and after the amendment. The calculation and comparison will be done for the following jurisdictions: the UAE, the UK and India.

3. RESEARCH METHODOLOGY

The research will be qualitative in nature. Information will be sourced, evaluated and analysed from the South African Income Tax Act 58 of 1962, SARS Interpretation Notes, the Taxation Laws Amendment Act, the Taxation Laws Amendment Bill, 2017, the Explanatory Memorandum on the Taxation Laws Amendments Bill, 2017, Double Tax Agreements, case law, journal articles, UAE Federal Tax Authority website, UK online tax portal (GOV.UK, 2022), Government of India online Income Tax Calculator (Income Tax Department, 2022), selected publications, online documentation, published tax textbooks and other relevant sources.

SCOPE AND LIMITATIONS

The following Tax jurisdictions were explored and analysed:

- United Arab Emirates (UAE)
- India
- United Kingdom (UK)

The reasoning underpinning the selection of these locations was as follows:

- They have been cited as some of the most common jurisdictions that South Africans work in (Deloitte, et al., 2017).
- Many South African companies have global trading partners located in the above jurisdictions (Cachalia, 2021). This makes it easier for South Africans to be seconded to these locations.
- This also enables networking opportunities which facilitates the ease of creating employment opportunities for South Africans in these locations.

Limitations

- Countries have differing tax legislation pertaining to expat employees. This research paper provides a general overview of the applicable tax legislation in the abovementioned jurisdictions. Detail pertaining to the intricacies of individual jurisdictional tax falls beyond the scope of this paper.

- Each jurisdiction may have other applicable indirect taxes. Owing to the nature of indirect taxes, they will not form part of the analysis in this research paper.

CHAPTER 1: PROPOSED CHAPTER OUTLINE

CHAPTER 1

INTRODUCTION

This chapter will introduce the topic and provide context to the study. The research question and sub-questions will be stated. An explanation of the research question and sub-questions will reinforce the relevance and importance of the research. The research methodology underpinning this research report will also be explained. Thereafter, the scope and limitations of the research report will be discussed.

CHAPTER 2

EMPLOYMENT INCOME TAX LEGISLATION IN SOUTH AFRICA

This chapter will provide a brief background to South African income tax legislation. The intention of this chapter is to introduce relevant income tax laws which are applicable to South African residents when calculating their taxable income. It is vital to firstly understand how gross income is defined in section 1 of the Income Tax Act 58 of 1962, and thereafter to assess the implications of this. Also, within the scope of this discussion, it is important to examine the definition of resident in terms of section 1 of the Income Tax Act to understand the extent to which individuals fall within the ambit of the South African tax jurisdiction. This chapter will also discuss what is meant by the term ‘working abroad’

CHAPTER 3

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

This chapter will discuss the original exemption under section 10(1)(*o*)(ii) granted to South African taxpayers in the year 2000. The reasons that led to the enactment of section 10(1)(*o*)(ii) will be stated. These reasons will provide a background to understanding the relevance of section 10(1)(*o*)(ii). Thereafter, the proposed amendment to section 10(1)(*o*)(ii) will be discussed. The initial intention of National Treasury was to repeal section 10(1)(*o*)(ii). Thereafter they decided to propose an amendment to section 10(1)(*o*)(ii). (Botha, 2019). The context within which the proposal was made is crucial in providing an understanding of the intention of the amendment. The debate and discussions regarding the proposal as officially reported by National Treasury will be discussed.

CHAPTER 4

THE PRACTICAL IMPLICATIONS OF THE AMENDMENT

This chapter will provide an analysis of the practical application and implementation of the amendment to the foreign employment income exemption. Most changes or amendments in tax have an impact on other aspects of tax legislation and administration (Smith, 2020, p. 316). Double Tax Agreements will be discussed in relation to their impact on the foreign employment income exemption. Employees that are considered South African residents will be discussed as their residency status would directly impact the amount of tax that they pay. Employers that second employees abroad also need to be cognisant of the tax implications regarding the amendment and relevant sections affected by it (Patel, et al., 2019).

The possibility of double taxation needs to be discussed and critically analysed. In addition, relevant tax benefits or reductions available within the tax legislation such as section 6*quat*(1) rebate and section 6*quat*(1C) deduction will be

discussed. In an attempt to try to reduce the tax liability, employers and employees may give consideration to the merits of being a South African resident for tax purposes (Daniel, 2018). The residency status of South Africans working abroad will have a direct impact on tax collections, and subsequently the South African economy.

CHAPTER 5

IMPACT OF THE ENACTED AMENDMENT ON SOUTH AFRICANS WORKING IN THE UNITED ARAB EMIRATES – DUBAI (UAE)

The UAE is becoming an increasingly popular destination for South Africans to work (Cachalia, 2021). The tax impact of the income tax legislation on South Africans working in the UAE will be investigated and calculated. The results will then be analysed and discussed. South Africans working in Dubai have officially reported complaints and concern regarding the new changes in tax legislation (Ismail, 2017). The analysis will have examples where South Africans earn below R1.25 million per year and compare them to examples where South Africans would earn above R1.25 million per year. Both examples will apply the consequential impact of the section 10(1)(*o*)(ii) amendment. The practical application of the DTA between South Africa and the UAE will also be examined.

CHAPTER 6

IMPACT OF THE ENACTED AMENDMENT ON SOUTH AFRICANS WORKING IN INDIA

India and South African are both regarded as developing countries (Mishra, 2019). There are also established trade relations between India and South Africa (Deloitte, et al., 2017, p. 12). South Africa also has a DTA with India. India has therefore been selected in this research report as part of the analysis of the tax impact of the amended foreign employment income exemption. Practical examples will be utilised to provide an analysis of South Africans working in India

that are earning below and above R1.25 million per annum. Both scenarios will be assessed based on the amendment to section 10(1)(*o*)(ii).

CHAPTER 7

IMPACT OF THE ENACTED AMENDMENT ON SOUTH AFRICANS WORKING IN THE UNITED KINGDOM (UK)

The United Kingdom has been cited as one of the most popular countries for South Africans to work in (Philpot, 2020). The United Kingdom therefore serves as an appropriate jurisdiction to form part of this research report. South Africa also has a DTA with the UK, which will be explored. South Africans working in the UK will be affected by the section (10)(1)(*o*)(ii) amendment if they are still regarded as South African residents for tax purposes, and the impact of this will be assessed. The impact on individuals earning below R1.25 million per annum will be presented in comparison to those earning above R1.25 million per annum.

CHAPTER 8

CONCLUSION

This chapter briefly discusses that the original intention of the foreign employment income exemption was to reduce the tax liability of individuals working abroad (Musviba, 2014). It is important to state that National Treasury decided to reconsider the foreign employment income exemption by contemplating repealing it and then deciding to amend the section. Research evidence indicates that there has been a significant increase in the number of South African residents working abroad (Monatisa, 2017). This chapter then emphasizes the large number of individuals impacted by the foreign income exemption. This chapter will also state that the amendment will impact employees and employers, which include companies and businesses. The chapter will then conclude by providing a brief summary of the answers the research questions.

CHAPTER 2: EMPLOYMENT INCOME TAX LEGISLATION IN SOUTH AFRICA

The South African tax system has been developed over a few centuries. We will reflect on the more significant developments and changes within the last 2 decades. The current South African tax principles are founded on the residence-based tax system. The tax system used prior to this was the source basis of taxation. The source basis of taxation operated on the principle of taxing all income that was earned in South Africa. (Surtees, 2000). This applied to both residents and non-residents. There were several reasons for the change in tax systems:

- The impact of globalisation meant that South African taxpayers could operate companies abroad and may potentially avoid tax under the old system.
- The intention to broaden the tax collection net led to discussions on how this could be achieved. The change to the new system was one such measure that was implemented.
- With multinational companies, it is challenging to determine the exact source of income. This was a potential loophole to avoid tax.
- South Africa was moving toward increasing international trade relations and the residence-based system was considered more internationally compatible. (National Treasury, 2000).

The residence-based tax system was officially implemented from 1 January 2001 (Surtees, 2000). This entailed consequent changes to the Income Tax Act. These changes will be discussed below.

Terminology such as resident needed to be clarified, and this was done in section 1 of the Income Tax Act. A resident is defined as:

- A natural person who is ordinarily resident in the Republic;

- A natural person who is not at any stage during the relevant year of assessment ordinarily resident in the Republic, but who is physically present in the Republic for a period exceeding 91 days during the year of assessment and-
    - was on average during the three preceding years physically present in the Republic for a period exceeding 183 days; and

- physically present in the Republic for a period or periods exceeding 91 days in aggregate during each of the three years of assessment preceding such year of assessment. Where such a person is outside the Republic for a period of 330 days after such person ceases to be physically present in the Republic, such person shall be deemed not to have been a resident from the day that such person so ceased to be physically present in the Republic;

Two important terms further emanate from the above definition. These two terms are ordinarily resident and physically present. The term ordinarily resident was not specifically defined in the Act. Reliance was therefore placed on Interpretation notes and case law for guidance. Two cases have been selected as relevant for explanatory purposes:

1) In *H v COT* 24 SATC 738, the court stipulated that ordinarily resident referred to the place where one's belongings were stored, where one's permanent abode was, and where one returned after temporary absences.
2) Cohen v CIR 13 SATC 362 reinforced some of these principles by stating that one's ordinary residence is the place that one returned to after temporary wanderings. The court further expanded by stating that one's ordinary residence is regarded as one's home.

Based on the above cases, it is evident that ordinary residence refers to a person's home or a place that is considered home.

To provide more clarity, an Interpretation Note was also released by SARS. A summary of Interpretation Note 3 (June 2018) has been provided below, by stating some of the more pertinent aspects mentioned:

- The natural person's most fixed and settled place of residence
- The location of the natural person's personal belongings
- The natural person's habitual abode, that is, the place where that person stays most often, and his or her present habits and mode of life
- The place of business and personal interests of the natural person and his or her family

- An intention to be ordinarily resident in the Republic
- The status of the individual in the Republic and in other countries, for example, whether he or she is an immigrant and what the work permit periods and conditions are
- The nationality of the person
- Family and social relations (for example, schools, places of worship and sports or social clubs)
- That natural person's application for permanent residence or citizenship
- Periods abroad and purpose of these visits

The classification of being ordinarily resident is therefore pertinent as it would essentially determine if a person's world-wide income is taxable in South Africa. If a South African citizen is working abroad, it is quite important for that individual to establish whether his permanent abode is still South Africa or changes to the country he is working in. This distinction could have significant tax implications. As stated previously, there are other factors that need to be considered, and therefore this would not be the only requirement to fulfil. The physical presence test also forms an integral part of the definition of a resident, and will be discussed next.

In terms of physical presence, Interpretation Note 4 (Issue 5) (August 2018) states that in order to satisfy the physical presence test, a person must be physically present in the Republic for a period or periods exceeding –
(i) 91 days in aggregate during the year of assessment under consideration;
(ii) 91 days in aggregate during each of the five years of assessment preceding the year of assessment under consideration; and
(iii) 915 days in aggregate during the five preceding years of assessment.

It is important to note that SARS considers part of a day as a full day. This means that if an individual is abroad and decides to return to South Africa for a certain period of time, the day that the individual arrives will be considered to be the first full day. So, if a person arrives in South Africa before midnight, it will be considered that persons first

day. Transit through South Africa is excluded from the physical presence test if a person does not enter South Africa.

In addition to the above, if a person is physically out of South Africa for a continuous period of at least 330 full days, then that person is considered not to be resident. The person will then cease to be a resident from the first day commencing the 330 day period.

CHAPTER 3: SECTION 10(1)(*o*)(ii) EXEMPTION

Subsequent to the change in tax from source based to residency based, there have been several changes and updates to the tax legislation. One of the relevant changes has been to foreign employment income. The initial exemption stipulated the following:

- A South African resident who was employed abroad for a period of 183 days or more, would be exempt from tax;
- Provided that the 183 days was during a 12 month period;
- And the 183 days must consist of at least 60 continuous days.

The exemption is applied to remuneration earned outside the Republic in relation to services rendered from employment. The term remuneration has been clearly defined in the Fourth Schedule of the Act:

> 'The term "remuneration" is defined in paragraph 1 as – "any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission…. whether in cash or otherwise and whether or not in respect of services rendered, including— (a) any amount referred to in paragraph (c) of the definition of "gross income" in section 1(1)'

The definition of remuneration excludes lump-sum payments such as amounts paid for loss of employment, termination of contract or cancellation of employment. Fringe benefits are however included.

The Income Tax Act therefore clearly stipulates that income earned from employment would form part of the definition of remuneration.

The next aspect mentioned is “earned outside the Republic”. Republic refers to the legal boundaries of South Africa and any areas or jurisdictions considered to be part of South Africa.

The discussion will now address “services rendered from employment”. Our first source of guidance is The Income Tax Act. Employment is clarified by providing guidance regarding the terms employee and employer. Part 1 of the fourth schedule defines an employee:

- any person (other than a company) who receives any remuneration or to whom any remuneration accrues;
- any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;
- any labour broker;
- any person or class or category of person whom the Minister of Finance by notice in the *Gazette* declares to be an employee for the purposes of this definition;
- any personal service provider.

Employer is defined as:

- any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration,

- and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council.

Based on legislation, we can deduce the following:

- South Africans working abroad needed to ensure that they met the requirements in terms of the stipulations of the Act (Duffy, et al., 2020).
- To cite an example - If an individual was working for a company in UK and earning a salary, then they would already satisfy a significant portion of the requirements for the exemption. The individual would then need to ensure that they are not classified as ordinarily resident in South Africa. Practically, most expatriates would return to South Africa for vacation and it would therefore be easy to be classified as not ordinarily resident in South Africa.
- Based on the above it appears that many South Africans working abroad could easily meet the requirements to qualify for the section (10)(1)(*o*)(ii) exemption.

Given the increase in the number of South Africans working abroad, coupled with the factors above, it is clear that there was a negative impact on the tax net of SARS. National Treasury therefore engaged in discussions to find a way to resolve this and increase the tax net of SARS. The suggested solution was to repeal section (10)(1)(*o*)(ii) (Camay & Lopes, 2017). Their justification was that South Africans working abroad benefited from the foreign income exemption and also the double tax agreements. As globalisation progressed, bilateral trade agreements resulted in the promulgation of double tax agreements between trading partners. This meant that individuals could also benefit from the double tax agreements if they worked in these jurisdictions. The resultant effect would therefore be double non-taxation. (National Treasury, 2017). National Treasury used this reasoning to table the Draft Taxation Laws Amendment Bill, on 19 July 2017. The Bill proposed that section 10(1)(*o*)(ii) of the Income Tax Act, No. 58 of 1962 be repealed from 1 March 2019.

The suggested proposal resulted in public outcry and objection (Monatisa, 2017). National Treasury took cognisance of the concerns raised by the public and private sector regarding the repeal of the foreign income exemption.
National Treasury subsequently suggested certain changes to their original proposal

during a meeting of Parliament's Standing Committee for Finance, which was held on 15 September 2017. The suggested changes are summarised below:

- Section 10(1)(*o*)(ii) will no longer be repealed in totality.
- Instead, the first R1 million of foreign remuneration will be exempt from tax in South Africa if the individual meets the requirements of section 10(1)(*o*)(ii) in relation to that remuneration.
- The implementation date of this change was initially 1 March 2019, but it was subsequently extended to 1 March 2020. (SARS, 2021a).

An additional amendment was the increase of the exempted amount from R1 million to R1.25 million. The intention of National Treasury was to try to decrease the tax burden of South African tax residents earning income in other tax jurisdictions. The response from affected parties was that the repeal of the foreign income exemption may result in the opposite intended effect. The argument raised was that South African residents working abroad may be motivated to change their tax residency status. The argument has merit as there has been a noted increase in golden visa citizenships and citizenship by investment programs (Schengenvisa, 2022). In addition, countries are allowing more favourable citizenship programs to those who already have work permits. These factors make it easier for South Africans to acquire citizenship or residency status in other countries. The consequential impact is that the SARS tax collection base will decrease, instead of increasing. An additional complaint raised by affected parties was that factors such as international cost of living, weakening rand and more attractive salaries paid abroad may easily result in South African expats earning over R1.25 million. This will increase the tax burden on South African taxpayers (Smith, 2020). Owing to this increased tax burden, taxpayers may seek ways to avoid or evade tax. This brings to light the ethical dilemmas that have been discussed in this research paper.

CHAPTER 4: PRACTICAL IMPLICATIONS OF THE AMENDMENTS

Prior to the enactment of the amendment, National Treasury allowed for comments from the public. This was done by means of hearings and written comments. The following

summary contains some of the relevant issues raised by companies, tax consultants and the public in 2017 (National Treasury, 2017):

1. The corporate sector cited that individual taxpayers had more freedom in terms of choices with regard to tax residency. This did not imply that individuals could instantly change their tax residency status. But the point raised highlighted that it was much easier for an individual to relocate or work abroad in order to meet the requirements of being considered a non-resident for tax purposes. The individuals that would be impacted by the amendments, earn foreign income already. They therefore already have work or employment opportunities abroad. It would therefore be easier for them to further develop and enhance their networks abroad. The point raised by the corporate sector hence has merit because if these individuals decide to use their resources to change their residency status, it would have a direct impact on tax collections. Instead of increasing tax collections, the impact could actually result in a decrease in tax collections.
2. Another point that was raised related to SARS tax collection and the fact that the largest proportion of tax is sourced from individual taxpayers. This links directly to point 1, above. It reinforces the fact that individual taxpayers have a significant influence on the total tax base. Promulgating an enactment that could potentially threaten the tax base, is therefore construed as detrimental. The ultimate effect could therefore be more harmful than beneficial.
3. An additional valid point pertained to the R1 million exemption initially proposed. The concern was whether this amount was sufficient. In light of the decreasing value of the rand, this point had merit. An average salary in a dollar, pound or euro denomination would easily exceed the minimum threshold after being converted to rand.
4. More developed economies had a higher cost of living. In addition, cities such as New York and London have been cited as having a cost of living that exceeded the national average of that particular country. An individual working in New York for example, would be subject to a higher cost of living in the US and also an additional percentage increase in cost of living as a result of working in New

York. The salary paid would be commensurate to this increased cost of living and would therefore easily exceed the South African exemption. This point provided additional validity to the concerns raised.

5. Additional concerns were that individuals already working abroad had not incorporated the additional tax into their budgeting and financial decision making process. This further links to the issue of individuals that are subject to foreign taxes. They would now be liable to pay tax in two jurisdictions. Even if they qualify for foreign tax credits, the time delay could result in cash flow problems. A practical concern is that there are many South African firms that have seconded employees to overseas branches or affiliate companies. Owing to the increased tax burden, these employees may consider seeking permanent employment directly with foreign based companies. For an employee seconded overseas for a long period, the process may be simpler and it would result in the individual breaking their South African tax residency status. The consequences are that the South tax base would be negatively impacted and if the individual decides not to return to South Africa, then it would also be a loss of intellectual resources.

National Treasury responded by offering relief for some of the concerns raised. One of which was the concern of double taxation resulting in cash flow challenges. National Treasury stated that SARS would allow for some relief in this regard if the taxpayers applied for it. The recourse made theoretical sense, but the reality of application and time delays could result in a different outcome. Due to solutions offered to some of the concerns, National Treasury dismissed the concerns as not being significant enough to influence their decision to implement the new policy.

Other practical factors to consider would be the additional administrative burden on South African companies to calculate tax to withhold on seconded employees and to incorporate foreign tax, foreign credits and any double tax agreements. International tax experts may need to be employed or consulted and this has an additional cost factor to consider. This raises the cost of secondment of South Africans abroad and will influence budgeting related decision making processes. If this option is no longer competitive,

firms may choose not to second employees. This would have indirect consequences such as:

i) South Africans seconded abroad gain exposure to international companies and economies. This knowledge and experience is then ploughed back into South African companies when they return. This decreases with less South Africans being seconded as a result of the new amendment.

ii) In addition to the above, South African expats are also exposed to technological advancements abroad, innovative engineering processes and other areas of expertise extending to: medical, civil, infrastructure, economic policies, alternate energy sources and so forth. The knowledge gained could be used to develop and progress the South African economy and infrastructure. The risk of a decline in secondments or South African expats deciding not to return will have a direct impact on this inflow of knowledge and expertise from abroad. These factors are difficult to quantify but the existence of their benefit needs to be acknowledged and factored into decision making. In light of globalisation and the sharing of resources, ideas and innovation it is becoming increasingly important to gain exposure to the global knowledge base. Any amendments or policy implementation needs to take cognisance of indirect consequences as well. The long term impact could be more harmful than the intended short terms gain of trying to increase the tax base.

Individuals working abroad independently would also be faced with the additional administrative burden of determining how much tax they are liable for. These individuals include those that work internationally for a short period of time usually on a fixed term contract. When they return, they would need to know how to implement the amendments and tax legislation changes. (Duffy, et al., 2020). Given the complexity of international tax, this creates an additional challenge to overcome. DTA's have already created a landscape requiring the services of international tax experts. These individuals may therefore need to consult tax experts to assist or guide them with implementing the impact of the amendments. This would result in an additional cost that would need to be budgeted for. The increased tax burden combined with the additional

cost of paying for tax consulting services may result in the erosion of the financial benefits of working abroad. This could result in the individuals contemplating the merits of being South African tax residents. Alternately, it could also deter them from accepting or seeking employment overseas. Both options will result in a decrease in tax collections.

The impact of the amendment will need to be considered within the context of other agreements and legislation that would affect taxpayers working abroad. These include double tax agreements, foreign tax credits and the section 6*quat* rebate. This report will provide a brief synopsis on these agreements and rebates available to taxpayers.

Double Tax Agreements

With the increase in globalization, it has become more common for people to be working abroad (Ryan, 2020). Different tax jurisdictions have their own laws in terms of taxing income earned. Due to this there were cases whereby employees were taxed in the country in which they were working and in the country that they were residents. This meant that taxpayers would need to claim credits or wait on a refund. The administrative time and waiting period created challenges in terms of cash flow. The promulgation of Double Tax Agreements aimed to alleviate this burden (Du Plessis, 2015). DTA's were agreed upon rules and regulations formulated between two countries with the intention of avoiding double taxation. It is important to note that the double tax agreements do not give a taxpayer the right to choose where they want to pay tax. Double tax agreements are also not a loophole in which taxpayers can avoid tax. One of the main reasons for double tax agreements was to establish a cooperative relationship between two tax jurisdictions. This cooperative relationship allows for the exchange of information between two tax jurisdictions. This meant that it became more difficult for a taxpayer to try and avoid paying tax in both jurisdictions. A simple example would be a South African taxpayer working in a low or no tax jurisdiction that decides not to declare their income. In the absence of a double tax agreement it would make it more challenging for SARS to obtain information about the taxpayer from the foreign country. A double tax

agreement would benefit a taxpayer by ensuring that the taxpayer is not unfairly taxed (Lobban & Mudyiwa, 2022). An individual working abroad could possibly be in a position where they would need to consider the impact of a DTA and the foreign income exemption. Under Section 10(1)(*o*)(ii), income up to R1.25 million would be exempt in South Africa. If South Africa has a DTA with the country that the individual works in, then the nature of the double tax agreement would determine where the individual is liable for tax. It is important to note that income above R1.25 million could be subject to tax in South African and the foreign country. The individual would then need to refer to the double tax agreement, section 6*quat* rebate or foreign tax credits to try and reduce tax liability. Double tax agreements differ between countries and jurisdictions. Therefore, the contents of the agreement would need to be reviewed in order to determine the impact on the individual taxpayer. Another important influential factor would be the country that the taxpayer is considered resident in (Lobban, 2021).

If we refer to Article 4 of Model tax convention on income and on capital of the OECD, it states the following (OECD, 2014):

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
>
> 2. Whereby reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

Based on the above, one can conclude that the resident country would normally have the first right of claim in terms of tax payable by the taxpayer. South African resident taxpayers would therefore be subject to the impact of the foreign income exemption even though a Double Tax Agreement exists between South Africa and the jurisdiction that they are working in. A DTA therefore cannot be used to avoid paying taxes on foreign income exceeding the foreign income exemption threshold of R1.25 million. Foreign tax credits are the next aspect that will be reviewed to explore the possibility of tax relief for taxpayers.

Foreign Tax Credits

The relevant relief measures available to South Africans earning foreign income is referred to as the rebate method. Under this method section *6quat* is applicable in addressing South African residents that have been subject to foreign taxes. One of the main purposes of the section 6quat rebate is to provide relief in cases where the DTA between South Africa and the foreign jurisdiction does not offer any tax relief. Section 6*quat*(1) stipulates the following:

Subject to subsection (2), where the taxable income of any resident during a year of assessment includes—

(*a*) any income received by or accrued to such resident from any source outside the Republic; or

(*b*) any proportional amount contemplated in section 9D; or

(*c*) …

(*d*) …

(*e*) any taxable capital gain contemplated in section 26A, from a source outside the Republic; or

(*f*) any amount—

(i) contemplated in paragraph (*a*) or (*b*) which is received by or accrued to any other person and which is deemed to have been received by or accrued to such resident in terms of section 7;

(ii) of capital gain of any other person from a source outside the Republic and which is attributed to that resident in terms of paragraph 68, 69, 70, 71, 72 or 80 of the Eighth Schedule; or

(iii) contemplated in paragraphs (*a*), (*b*) or (*e*) which represents capital of a trust, and which is included in the income of that resident in terms of section 25B (2A) or taken into account in determining the aggregate capital gain or aggregate capital loss of that resident in terms of paragraph 80 (3) of the Eighth Schedule,

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

The requirements stipulated above therefore need to be met before an individual can submit a claim for foreign taxes paid. The claim can be submitted by the individual when

doing a personal tax return. If the individual has been seconded by a South African company, then the payroll department would normally handle the administrative process of the claim. With either option, as per the Income Tax Act, the rebate is limited to the South African normal tax payable in respect of the amounts included in the resident taxpayer's taxable income that qualifies for the rebate. Therefore, if the taxpayer's foreign taxes paid exceeds their South African tax liability, the taxpayer cannot claim the excess of the credit as a refund. The excess can however be carried forward (SARS, 2020). Given the complexities of the Section 6*quat* rebate that needs to be calculated in relation to foreign taxes paid, taxpayers would probably require the assistance of tax experts.

Section 6*quin* was an additional relief measure that was used to reduce the tax burden on foreign taxes paid. This section related to foreign taxes paid on South African source income. This type of scenario would arise if a South African taxpayer is taxed on this income in South Africa and in a foreign jurisdiction. The intention of the section 6*quin* rebate was therefore to avoid double taxation in cases where South Africans fall within the ambit of foreign jurisdiction tax laws that result in being taxed twice on the same income. Section 6*quin* was removed from the tax act and section 6*quat* (1C) was introduced to serve a similar purpose.

CHAPTER 5: IMPACT ON SOUTH AFRICANS WORKING IN THE UNITED ARAB EMIRATES (UAE)

The UAE has been classified as one of the most preferred destinations for foreign workers due to their policy of not having personal income tax. There has also been an increase in the number of South Africans emigrating, and the UAE has been identified as a popular destination. (Glover & Nair, 2022). There has a been a significant increase in living expenses in the UAE as well as historically high property rental costs (John, 2022). At the time of writing this report, the UAE to ZAR exchange was at 1 UAE: 5 ZAR. Salaries in the UAE could therefore easily exceed R1.25 million. South African

residents working in the UAE will therefore be significantly impacted by section 10 (1)(*o*)(ii). South African companies that second employees to the UAE will also be impacted by the enacted amendment. Employees falling within the ambit of section 10 (1)(*o*)(ii) will be subject to taxes, and employers will need to calculate the tax and submit documentation. Depending on the nature and amount of additional costs, there may be a temptation to reconsider the merits of remaining a South African resident for tax purposes. A change in residency status would have medium and long term effects on the South African tax base.

This report will now use examples to illustrate the practical income tax impact of the enacted amendments. The first example will be for a taxpayer earning below R1.25 million and the second example will be for a taxpayer earning above R1.25 million. The two examples will provide a comparative basis to illustrate the impact of the enacted amendment. Tax relief measures such as foreign tax credits and the DTA between South Africa and the UAE will also be discussed.

Example 1:

For purposes of this example, the tax year under consideration is the 2022 tax year. The taxpayer is a South African tax resident under the age of 65. It is assumed where applicable that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat* unless stated otherwise. It is assumed that the taxpayer will be present in the UAE for a period exceeding 183 days. Furthermore, it is assumed that the DTA is not applicable unless specifically stated and applied.

Background facts:

Mr. Jon is employed by a South African employer. For the 2022 tax year, Mr. Jon has been seconded to the UAE. Mr. Jon will earn foreign remuneration for services rendered in the UAE for an amount of R800 000 which is paid by an UAE employer, and South African sourced income for services rendered for an amount of R500 000. In addition, Mr. Jon earns South African rental income of R200 000 and incurs tax deductible expenses of R70 000. Mr. Jon contributes R150 000 to his South African retirement

fund and does not have any contributions to a UAE retirement fund. Mr. Jon has the following properties:

Year acquired	**Type of property**	**Country**	**Purchase price**	**Market value as at 28 February 2022**
2008	Primary residence	South Africa	R800 000	R1 700 000
2020	Rental property	South Africa	R875 000	R950 000

Tax calculation 1:

South African tax liability taking into consideration the DTA between South Africa and the United Arab Emirates (UAE)

In this scenario it is assumed that the taxpayer does not meet the requirements of the foreign employment income exemption. Therefore, the taxpayer will be required to apply the DTA for relief from double taxation.

Article 14 of the DTA between South Africa and the UAE states that:

1. Subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

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

   (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State shall be taxable only in that State (SARS, 2016:13)

Paragraph 1 of Article 14 states that the income may be taxed in both states, that is, in the UAE and in South Africa. Furthermore, paragraph 2 of Article 14 also needs to be taken cognisance of. As Mr. Jon will be rendering services in the UAE for a period exceeding 183 days, paragraph 2 (a) is not applicable. It is important to note that all these provisions contain the words 'and' at the end of each. This means that if a taxpayer fails to meet any one of these requirements, then the taxpayer is not allowed to apply the provision in its entirety. Article 22 which sets out the relief available to eliminate double taxation is not applicable as the UAE does not tax an individual's income.

It is not necessary to obtain the average exchange rate for the UAE for the 2022 tax year since the UAE does not tax personal income and therefore, no calculations are required.

Gross Income	
South African sourced income	500 000,00
UAE sourced income	800 000,00
Rental income	200 000,00
Total income	1 500 000,00
Deductions	
Rental expenses	(70 000,00)

S11F Total contribution = R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1430 000 =393 250) ○ Remuneration (1300 000); or ○ Taxable income including CGT (1 430 000) • Taxable income excluding CGT (1 430 000)	(150 000,00)
Taxable income	1 280 000,00
Tax per the tax tables (229 089+41%X [1 280 000-782 200])	443 187,00
Less primary rebate	(15 714,00)
Tax payable to SARS	417 473,00

Section 6*quat* rebate

As the UAE does not tax an individual on income, there is no tax payable in the UAE. As such, section 6*quat* is not applicable and therefore no calculation is required.

Tax calculation 2:

South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
UAE sourced income	800 000,00

Rental income	200 000,00
Total income	1 500 000
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed	(800 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000)
Total contribution =R150 000	
Deduction limited to the lesser of:	
• R350 000; or	
• 27.5% of the higher of: (27.5%X 1500 000 =412 500)	
○ Remuneration (1300 000); or	
○ Taxable income including CGT (630 000)	
• Taxable income excluding CGT (630 000)	
Taxable income	480 000,00
Tax per the tax tables (110 739+36%X[480 000-423 301])	131 150,64
Less primary rebate	(15 714,00)
Tax payable to SARS	115 436,64

Tax calculation 3:

South African tax liability for the 2022 tax year enacted amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
UAE sourced income	800 000,00
Rental income	200 000,00
Total income	1 500 000
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed as the total foreign income is less than R1.25 million	(800 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000)
Total contribution =R150 000	
Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1500 000 =412 500) o Remuneration (1300 000); or o Taxable income including CGT (1500 000) • Taxable income excluding CGT (1500 000)	
Taxable income	480 000,00
Tax per the tax tables (110 739+36%X[480 000-423 301])	131 150,64
Less primary rebate	(15 714,00)
Tax payable to SARS	115 436,64

Analysis of Example 1

The UAE does not tax personal income (Glover & Nair, 2022). Taking into consideration the foreign employment income exemption, a South African taxpayer earning below R1.25 million will not pay income tax in the UAE. The taxpayer will therefore be entitled to claim the section 10(1)(*o*)(ii) foreign employment exemption on the full amount of foreign income earned. The section 10(1)(*o*)(ii) exemption will result in no income tax payable irrespective of whether the enacted amendment is taken into consideration or not. There will also be no need to take cognisance of foreign tax credits as no foreign tax would be paid. We can therefore conclude that the enacted amended has no taxable income impact on example 1.

Example 2:

For this example, the tax year under consideration is the 2022 tax year. It is assumed that the taxpayer is a South African tax resident under the age of 65. It is also assumed where applicable that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat,* unless otherwise stated. An additional assumption is that the taxpayer will be present in the UAE for a period exceeding 183 days.

Background facts:

Mr. Jon is employed by a South African employer. For the 2022 year, Mr. Jon will earn foreign remuneration for services rendered in the UAE for an amount of R1 500 000. This amount is paid by a UAE employer. Mr. Jon earns South African sourced income for R500 000 which is for services rendered. Mr. Jon also earns South African rental income of R200 000 and incurs tax deductible expenses for an amount of R70 000. Mr. Jon contributes R150 000 to his South African retirement fund and does not have any contributions to a UAE retirement fund. Mr. Jon has the following properties:

Year acquired	Type of property	Country	Purchase price	Market value as at 28 February 2022
2008	Primary residence	South Africa	R800 000	R1 700 000
2020	Rental property	South Africa	R875 000	R950 000

Tax calculation 4:

South African tax liability taking into consideration the DTA between South Africa and the UAE

Since Mr. Jon will be rendering services in the UAE for a period exceeding 183 days, paragraph 2 of Article 14 of the DTA does not apply. Therefore, Mr. Jon will be liable for income tax in the UAE. Since the UAE does not tax personal income, Mr. Jon will not pay any income tax in the UAE. As a result, due to foreign taxes not been paid in the UAE, section 6*quat* cannot be applied.

Gross Income	
South African sourced income	500 000,00
UAE sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00

Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution = R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 130 000= 585 750) ○ Remuneration (2 000 000); or ○ Taxable income including CGT (2 130 000)	
• Taxable income excluding CGT (2 130 000)	1 980 000,00
Taxable income	733 122,55
Tax per the tax tables (587 593+45%X [1 980 000-1 656 601])	(15 714,00)
Less primary rebate	717 408,55
Tax payable to SARS	

Tax calculation 5:

South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00

UAE sourced income	1 500 000
Rental income	200 000,00
Total income	2 200 000
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed	(1 500 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000 =550 000) o Remuneration (2 000 000); or o Taxable income including CGT (630 000) • Taxable income excluding CGT (630 000)	
Taxable income	480 000,00
Tax per the tax tables (110 739+36%X [480 000 - 467 500])	115 239,00
Less primary rebate	(15 714,00)
Tax payable to SARS	99 525,00

Tax calculation 6:

South African tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
UAE sourced income	1 500 000
Rental income	200 000,00
Total income	2 200 000
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore exemption allowed	(1 250 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000)
Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000 =550 000) ○ Remuneration (2 000 000); or ○ Taxable income including CGT (1 130 000) • Taxable income excluding CGT (1 130 000)	

Taxable income	730 000,00
Tax per the tax tables (163 335+41% X [730 000-613 600])	211 059,00
Less primary rebate	(15 714,00)
Tax payable to SARS	195 345,00

The table below provides a summary of all tax calculations in this chapter pertaining to the UAE:

Tax calculation	*Total tax payable in the UAE* *(Rands)*	*Total tax payable in SA* *(Rands)*	*Total tax payable for the year of assessment* *(Rands)*
Foreign income earned is less than R1.25 million rand			
1. Tax liability taking into consideration the DTA between South Africa and the UAE	0	417 473,00	417 473,00
2. Tax liability for the 2022 tax year with no amendment made to section 10(1)(o)(ii)	0	106 454,64	106 454,64
3. Tax liability for the 2022 tax year with			

the enacted amendment made to section 10(1)(o)(ii)	0	106 454,64	106 454,64
Foreign income earned in excess of R1.25 million rand			
4. Tax liability taking into consideration the DTA between South Africa and the UAE	0	717 408,55	717 408,55
5. Tax liability for the 2022 tax year with no amendment made to section 10(1)(o)(ii)	0	99 525,00	99 525,00
6. Tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(o)(ii)	0	195 345,00	195 345,00
Breaking South African tax residency			
7. Breaking tax residency in South Africa and becoming a tax resident in the UAE*	0	7 686,00	7 686,00

*The table below calculates the tax payable if Mr Jon ceases to be a South African tax resident and becomes a resident of the UAE

South African taxable income	**Rands**
Income	
Rental income	200 000,00
Deductions	
Rental expense	(70 000,00)
Taxable income	130 000,00
Tax per the tax table	23 400,00
(130 000X18%)	
Primary rebate	(15 714,00)
Tax payable to SARS	7 686,00

Conclusion:

Based on the above summary, it indicates the tax liability of a South African resident using three scenarios. It can be deduced that individuals earning below R1.25 million will not be impacted by the enacted amendment. For individuals earning above R1.25 million, it can be concluded that the enacted amendment results in a significant increase in tax payable. The additional tax payable may result in South African residents considering other options available to reduce tax payable. One option would be to permanently move to the UAE. This would mean that the individual will only be liable for tax on the rental income (subject to allowable deductions). The option of ceasing to be a South African resident would therefore provide a significant tax saving. Extrapolating this to a few thousand individuals in the same or higher tax bracket will result in a significant loss to tax revenue in South Africa.

CHAPTER 6 IMPACT OF THE ENACTED AMENDMENT ON SOUTH AFRICANS WORKING IN INDIA

A brief overview of India's taxing system is provided below.

India follows a residence-based system of taxation. India's tax year runs from 1 April until 31 March. Indian tax residents are taxed on their worldwide income and non-residents are taxed on their Indian sourced income. Indian non-residents are also taxed on income from abroad if the income is from a business controlled in India or from a profession established in India. (KPMG, 2019a)

A resident of India is any individual who in any tax year is:

- present in India in that tax year for a period or periods exceeding 182 days; or
- present in India for a period exceeding at least 60 days during the tax year and 365 days or more during the preceding 4 tax years.

India also has a principle called not ordinarily resident (NOR). A NOR is an individual who qualifies as Resident but:

- has been non-resident in India in nine out of the 10 tax years preceding that tax year or
- has during the 7 tax years, preceding that tax year, been in India for a total period of 729 days or less.

Individuals who do not qualify as NOR will qualify as a resident. These individuals are taxed on their worldwide income. A person that qualifies as an NOR will be taxed only on India-sourced income. An Indian expatriate will be taxed on foreign-earned income only if the individual is ordinarily resident in the country. Section 90 of the Indian Income Tax Act does however provide relief for expatriates from double taxation. Section 90 of the Indian Tax Act states that:

> The Central Government may enter into an agreement with the Government of any country outside India-

a) for the granting of relief in respect of income on which have been paid both income- tax under this Act and income- tax in that country, or

b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

c) for exchange of information for the prevention of evasion or avoidance of income- tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

d) for recovery of income- tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

Therefore, the provisions of a tax treaty will override the provisions of the Indian Tax Act, which will prevent Indian expatriates from being taxed twice on the same income.

Indian employers who pay salaries to both Indian residents and non-residents are required to withhold the relevant tax from payments after deducting allowable deductions under the pay-as-you earn (PAYE) withholding system. Indian tax residents and non-residents are taxed using the same marginal tax table. The tax tables for the Indian 2021-2022 tax year were as follows (INR denotes Indian Rupee):

Taxable income (INR)		**Tax on column 1 (INR)**	**Tax on excess (%)**
Over (column 1)	**Not over**		
0	250,000	-	0
250,000	500,000	-	5
500,000	750,000	12,500	10

750,000	1,000,000	37,500	15
1,000,000	1,250,000	75,000	20
1,250,000	1,500,000	125,000	25
1,500,000		187,500	30

An individual's tax return must be filed by 31 July immediately after the end of the relevant tax year. (KPMG, 2019a).

India's tax filing system is based on self-assessment. An Indian resident and ordinary resident are entitled to claim a foreign tax credit for foreign taxes paid on foreign sourced income. This foreign tax credit may be claimed against Indian tax payable on income where:

- the agreement for avoidance of double taxation exists between the two countries in accordance with the terms of that agreement.
- in other cases, at the lower of the Indian or foreign rates of tax, or if both rates are equal, then tax must be paid based on the Indian rate of tax. (KPMG, 2019a).

Illustrative Examples

The impact of the South African enacted amendment will now be assessed through two illustrative examples. The first example will assume that the taxpayer earns foreign income less than R1.25 million and the second example will assume that the taxpayer earns foreign income in excess of R1.25 million. This will help assess the impact of the enacted amendment on both scenarios. The comparison will also enable an analysis of the alternative options available to taxpayers. These options are foreign tax credits and

the application of the DTA between South Africa and India. An additional option would be a change in the tax residency status of the taxpayer.

Example 1:

The 2022 tax year will be taken cognisance of in this example. The taxpayer in the example is a South African tax resident under the age of 65. It is assumed, where applicable, that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat,* unless stated otherwise. It is also assumed that the taxpayer will be present in India for a period exceeding 182 days. Furthermore, it is assumed that the DTA is not applicable unless specifically stated and applied.

Information:

Mr. Jon is employed by a South African employer. For the 2022 tax year, Mr. Jon has been seconded to India. Mr. Jon will earn foreign remuneration for an amount of R800 000 which is for services rendered in India. This amount is paid by an Indian employer. South African sourced income for services rendered is for an amount of R500 000. Mr. Jon also earns rental income for an amount of R200 000. The tax deductible expenses are for an amount of R70 000. Mr. Jon contributes R150 000 in total to his South African retirement fund. Mr. Jon does not have any contributions to an Indian retirement fund. Mr. Jon owns the following properties:

Year acquired	**Type of property**	**Country**	**Purchase price**	**Market value as at 28 February 2022**
2008	Primary residence	South Africa	R800 000	R1 700 000
2020	Rental property	South Africa	R875 000	R950 000

Calculation 1

South African tax liability taking into consideration the DTA between South Africa and India

In this scenario it is assumed that the taxpayer does not meet the requirements of the foreign employment income exemption. Therefore, the taxpayer will be required to apply the DTA for relief from double taxation.

According to Article 15 of the DTA between South Africa and India, it states that

1. Subject to the provisions of Articles 16, 18, and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
    (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve -month period commencing or ending in the fiscal year concerned; and
    (b) the remuneration is paid by or on behalf of an employer who is not a resident of the other State; and
    (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that State (SARS, 1997:13)

Article 15 is read in conjunction with Article 22 which provides the method of elimination of double taxation.

Article 22: Double taxation shall be eliminated as follows:

(a) In India, where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in South Africa, India shall allow as a

deduction from the tax on the income of that resident an amount equal to the South African tax paid, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income tax (as computed before the deduction is given) which is attributable to the income which may be taxed in South Africa.

(b) In South Africa, Indian tax paid by residents of South Africa in respect of income taxable in India, in accordance with the provisions of the Agreement, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income. (SARS, 1997:16)

Since Mr. Jon will be rendering services in India for a period exceeding 183 days, paragraph 2 of Article 15 of the DTA does not apply. Therefore, Mr. Jon will be liable for income tax in India. In order to eliminate double taxation of his Indian income, paragraph (a) of Article 22 is not applicable as Mr. Jon is not a resident of India. Therefore, paragraph (b) of Article 22 is applicable as Mr. Jon is a South African resident. He can therefore claim the section 6*quat* rebate for the 2022 tax year.

Mr. Jon earned R800 000 for services rendered in India. Using the SARS average exchange rate Table A (SARS, 2022), the average exchange rate for the year ended 29 February 2022 is R0.20. Therefore Mr. Jon earned INR 4 000 000 during the 2022 tax year.

A tax calculator is provided on the Indian income tax department's website. This tax calculator has been used to calculate the tax payable by Mr Jon. As per the tax calculator, INR 1 053 000 tax is payable on income earned for an amount of INR 4 000 000. (Income Tax Department, 2022).

For comparative purposes the Indian tax payable has been converted to ZAR using the average exchange rate of R0.20 for the 2022 tax year. Therefore, the total tax payable by Mr. Jon in India is R210 600.00. (Income Tax Department, 2022).

Gross Income	
South African sourced income	500 000,00
Indian sourced income	800 000,00
Rental income	200 000,00
Total income	1 500 000,00
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1 430 000 =393 250) ○ Remuneration (1 300 000); or ○ Taxable income including CGT (1 430 000) • Taxable income excluding CGT (1 430 000)	1 280 000,00
Taxable income	433 187,00
Tax per the tax tables (229 089+41%X [1 280 000-782 200])	(15 714,00)
Less primary rebate	(116 727,22)
Section 6*quat* rebate	297 745,78
Tax payable to SARS	

Section 6*quat* calculation:

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is calculated as follows:

1. South African sourced taxable income:

R630 000 / R1 430 000 X R150 000 = R66 083,92

R630 000 – R66 083,92 = R563 916,08

2. Indian sourced income:

R800 000 / R1 430 000 X R150 000 = R83 916,08

R800 000 – R83 916,08= R716 083,92

The section 6*quat* rebate is therefore calculated as follows:

R716 083,92 / 1 280 000 X R208 649.91= R116 727,22

Calculation 2:

South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
Indian sourced income	800 000,00
Rental income	200 000,00
Total income	1500 000
Exemptions	

Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed	(800 000)
Deductions	(70 000,00)
Rental expenses	(150 000)
S11F Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1 430 000 =393 250) o Remuneration (1 300 000); or o Taxable income including CGT (1 430 000) • Taxable income excluding CGT (1 430 000)	
Taxable income	480 000,00
Tax per the tax tables (110 739+31%X [480 000-467 500])	123 239,00
Less primary rebate	(15 714,00)
Tax payable to SARS	107 525,00

Tax calculation 3:

South African tax liability for the 2022 tax year enacted amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00

Indian sourced income	800 000,00
Rental income	200 000,00
Total income	1 500 000
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed as the total foreign income is less than R1.25 million	(800 000)
Deductions	
Rental expenses	(70 000,00)
S11F Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1430 000 =393 250) ○ Remuneration (1 300 000); or ○ Taxable income including CGT (1 430 000) • Taxable income excluding CGT (1 430 000)	(150 000)
Taxable income	480 000,00
Tax per the tax tables (110 739+31%X [480 000-467 500])	123 239,00
Less primary rebate	(15 714,00)
Tax payable to SARS	107 525,00

Analysis of Example 1 calculation:

Based on the above three calculations, it is evident that if a taxpayer earns foreign income less than R1.25 million for the year of assessment, there is no change in the tax implication for the taxpayer. The taxpayer will be entitled to claim the section 10(1)(*o*)(ii) foreign employment exemption in full on the foreign income earned whether the enacted amendment is taken into consideration or not.

Example 2:

The 2022 tax year will be taken cognisance of in this example. The taxpayer in the example is a South African tax resident under the age of 65. It is assumed, where applicable, that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat,* unless stated otherwise. It is also assumed that the taxpayer will be present in India for a period exceeding 182 days. Furthermore, it is assumed that the DTA is not applicable unless specifically stated and applied.

Information:

Mr. Jon is employed by a South African employer. For the 2022 tax year, Mr. Jon has been seconded to India. Mr. Jon will earn foreign remuneration for an amount of R1 500 000 which is for services rendered in India. This amount is paid by an Indian employer. South African sourced income for services rendered is for an amount of R500 000. Mr. Jon also earns South African rental income for an amount of R200 000. The tax deductible expenses are for an amount of R70 000. Mr. Jon contributes R150 000 in total to his South African retirement fund. Mr. Jon does not have any contributions to an Indian retirement fund. Mr. Jon owns the following properties:

Year acquired	**Type of property**	**Country**	**Purchase price**	**Market value as at 28 February 2022**
2008	Primary residence	South Africa	R800 000	R1 700 000

2020	Rental property	South Africa	R875 000	R950 000

Tax calculation 4:

Indian tax liability taking into consideration the DTA between South Africa and India

Paragraph 2 of Article 15 of the DTA does not apply because Mr. Jon will be rendering services in India for a period exceeding 183 days. Therefore, Mr. Jon will be liable for income tax in India. To avoid double taxation of his Indian income, paragraph (a) of Article 22 is not applicable as Mr. Jon is not a resident of India. Mr. Jon is classified as a South African resident, therefore paragraph (b) of Article 22 can be applied.

Mr. Jon earned R1 500 000 for services rendered in India. Using the SARS average exchange rate in Table A (SARS, 2022), the average exchange rate for the year ended 29 February 2022 is R0.20. Therefore Mr. Jon earned INR 7 500 000 during the 2022 tax year.

A tax calculator is provided on the Indian income tax department's website. This tax calculator has been used to calculate the tax payable by Mr Jon. As per the tax calculator, INR 2 359 500,00 tax is payable on income earned for an amount of INR 7 500 000. (Income Tax Department, 2022).

For comparative purposes the Indian tax payable has been converted to ZAR using the average exchange rate of R0,20 for the 2022 tax year. Based on these calculations, the total tax payable by Mr. Jon in India is R 471 900,00.

Gross Income	
South African sourced income	500 000,00
Indian sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00

Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution = R150 000	
Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000= 550 000) o Remuneration (2 000 000); or o Taxable income including CGT (2 130 000) • Taxable income excluding CGT (2 130 000)	
Taxable income	1 980 000,00
Tax per the tax tables (587 593+45%X [1 980 000-1656 600])	733 123,00
Less primary rebate	(15 714,00)
Section 6*quat* rebate	(307 516,72)
Tax payable to SARS	409 892,28

<u>Section 6*quat* calculation:</u>

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is calculated as follows:

1. South African sourced taxable income:

R630 000 / R2 130 000X R150 000 = R44 366,20

R63 000 – R44 366,20 = R585 633,80

2. Indian sourced income:

R1 500 000 / R2 130 000 X R150 000 = R 105 633,80

R1 500 000 –R105 633,80 = R 1 394 366,20

The section 6*quat* rebate is therefore calculated as follows:

R 1 394 366,20 /2 130 000 X R 469 755,09 = R307 516,72

Tax calculation 5:

South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
Indian sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore full exemption allowed	(1 500 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution =R150 000	

Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000 =550 000) o Remuneration (2 000 000); or o Taxable income including CGT (630 000) • Taxable income excluding CGT (630 000)	
Taxable income	630 000,00
Tax per the tax tables (163 335+39% [630 000-613 600])	169 731,00
Less primary rebate	(15 714,00)
Tax payable to SARS	154 017,00

Tax calculation 6:

South African tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
Indian sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore maximum exemption allowed	(1 250 000,00)

Deductions Rental expenses S11F Total contribution = R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000 =550 000) ○ Remuneration (2 000 000); or ○ Taxable income including CGT (1 130 000) • Taxable income excluding CGT (1 130 000) Taxable income Tax per the tax tables (163 335+39%[730 000-613 600]) Less primary rebate Less section 6*quat* rebate Tax payable to SARS	 (70 000,00) (150 000,00) 730 000,00 208 731.00 (15 714,00) (139 519,93) 53 497,07

<u>Section 6*quat* calculation:</u>

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is calculated as follows:

1. South African sourced taxable income:

R630 000 / R1 130 000 X R150 000 = R83 628,32

R630 000 – R83 628,32 = R546 371,68

2. Indian sourced income:

   R 250 000 / R1 130 000 X R150 000 = R33 185,84

   R 250 000 – R66 371,68 = R 216 814,15

The section 6*quat* rebate is therefore calculated as follows:

R 216 814,15/ R730 000 X R469 755,09 = R139 519,93

Conclusion:

The tables above summarise the tax liability of an individual from two different perspectives. As per the tables, the enacted amendment to section 10(1)(*o*)(ii) results in the taxpayer paying a significantly higher amount of tax. Based on the above calculations, the DTA between South Africa and India does provide an element of relief to the taxpayer. As clearly indicated in the above calculations, for individuals earning above R1.25 million the tax payable in India is lower than the tax payable in South Africa. Based on the abovementioned reasons, a taxpayer may conclude that terminating their South residency status will result in a lower tax liability. If a significant number of South African taxpayers choose this option, it would result in decreasing the tax collection base of SARS.

CHAPTER 7: IMPACT OF THE ENACTED AMENDMENT ON SOUTH AFRICANS WORKING IN THE UNITED KINGDOM (UK)

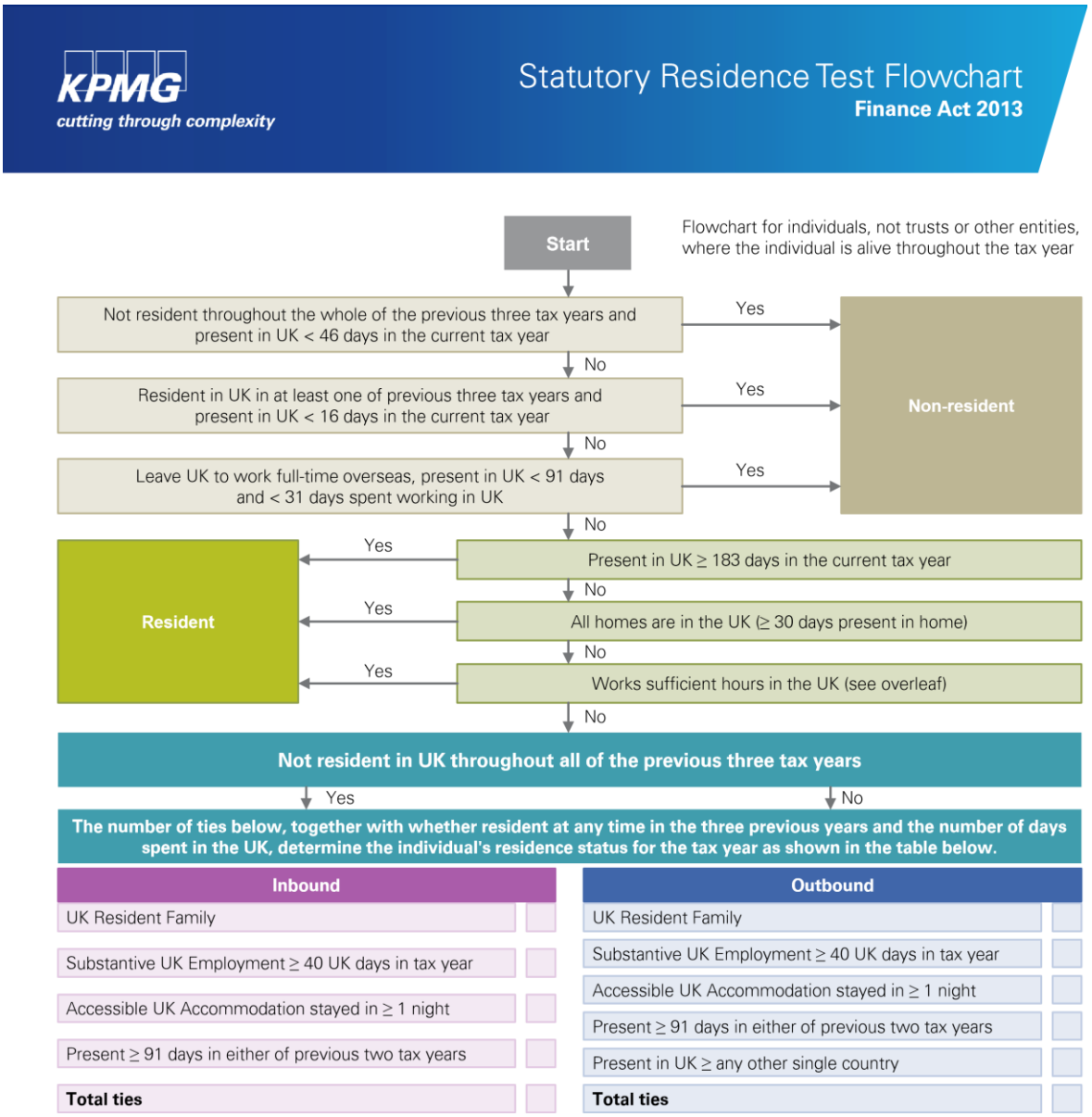
A brief overview of the UK's taxing system is provided below.

UK tax residents are taxed on their worldwide income and capital gains. Non-residents are taxed on income sourced in the UK. An individual who is a UK resident but not domiciled or deemed domiciled in the UK, can elect for the remittance basis of taxation. According to the remittance basis of taxation, the individual's non-UK investment income and capital gains are only taxed if they are remitted to the UK (PWC, 2019c). UK tax residents and UK non-residents are taxed on the same progressive tax tables. The UK's tax year runs from 6 April until 5 April.

Individuals that are classified as being domiciled in the UK are regarded as residents for tax purposes. Individuals that meet the requirements of the statutory residence test (SRT) are also regarded as tax residents. The statutory residence test was introduced on 6 April 2013. The SRT comprises the following components:

1. Automatic overseas test;
2. Automatic UK test; and
3. A sufficient tie test.

The flowchart below summaries the above and provides a better understanding of how an individual applies the rules of the SRT (KPMG, 2019b).



UK employers are required to withhold Pay-As-You-Earn (PAYE) on cash payments made to UK tax resident employees and non-UK tax resident employees. Employers are required to inform Her Majesty's Revenue and Customs (HRMC) of payments made to employees on or the day before payments are made. Employers are required to pay the calculated PAYE to the HRMC monthly by the 22nd of the following month if the employer is making an electronic payment (KPMG, 2019b).

The UK's tax filing system is based on self-assessment (GOV.UK, 2022). The UK does provide relief for foreign taxes. Relief for foreign taxes can be claimed in the following circumstances:

1. An individual who is a dual resident as a result of a tax treaty, an exemption or a reduced rate of tax will apply;
2. An individual who is a resident as a result of a tax treaty, relief will be provided in the form of a foreign tax credit and not in the form of an exemption;
3. In cases where no tax treaty exists, the UK tax legislation provides relief from double taxation.

An individual may cease to be a UK tax resident by notifying HRMC of their departure, submitting an annual tax return and providing additional details to determine the residence status of the individual. Once the individual is confirmed to be UK non-resident, they will only be taxed on their UK sourced income. (KPMG, 2019b).

Examples below to depict the impact of the enacted amendment on taxpayers

The impact of the enacted amendment will be depicted through two examples. The first example will assume that the taxpayer earns foreign income less than R1.25 million and the second example will assume that the taxpayer earns foreign income above R1.25 million. The two examples will provide a practical comparative using the two scenarios. Foreign tax credits and the DTA between South Africa and the UK will also be incorporated into the discussion.

Example 1:

The 2022 tax year will be taken cognisance of in this example. The taxpayer in the example is a South African tax resident under the age of 65. It is assumed, where applicable, that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat,* unless stated otherwise. It is also assumed that the taxpayer will be present in the UK for a period exceeding 182 days, and that the DTA is not applicable unless specifically stated and applied.

Information:

Mr. Jon is employed by a South African employer. For the 2022 tax year of assessment, Mr. Jon has been seconded to the UK. Mr. Jon will therefore earn foreign remuneration in the UK for an amount of R800 000. This is paid by a UK employer. Mr Jon will earn South African sourced income for services rendered for an amount of R500 000. Mr. Jon also earns rental income for an amount of R200 000. Expenses incurred which qualify for tax deductions amount to R70 000. Mr. Jon contributes R150 000 in total to his South African retirement fund and he does not have any contributions to a UK retirement fund. Mr. Jon has the following properties:

Year acquired	**Type of property**	**Country**	**Purchase price**	**Market value as at 28 February 2022**
2008	Primary residence	South Africa	R800 000	R1 500 000
2020	Rental property	South Africa	R875 000	R950 000

Tax calculation 1: South African tax liability taking into consideration the DTA between South Africa and the UK

In this scenario it is assumed that Mr. Jon does not meet the requirements of the foreign employment income exemption. Therefore, he will be required to apply the provisions in the DTA for relief from double taxation.

Article 14 of the DTA between South Africa and the UK states the following:

1. Subject to the provisions of Articles 15, 17 and 18 of this Convention, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

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

   (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

   (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

   (c) the remuneration is not borne by a permanent establishment which the employer has in the other State (SARS, 2003:12).

Article 14 and Article 21 provide more detail on the process to address double taxation:

1. Subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa, United Kingdom tax paid by residents of South Africa in respect of income taxable in the United Kingdom, in accordance with the provisions of this Convention, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income (SARS, 2003:16).

Mr. Jon will be rendering services in the UK for a period exceeding 183 days, therefore paragraph 2 of Article 14 of the DTA does not apply. This will result in Mr. Jon being

liable for income tax in the UK. Mr Jon is regarded as a South African resident and could therefore be double taxed. To avoid double taxation of his UK income, he can apply paragraph 1 of Article 21. This means that he can claim the section 6*quat* rebate for the 2022 year of assessment.

Mr. Jon earned R800 000 for services rendered in the UK. Using the SARS average exchange rate Table A (SARS, 2022), the average exchange rate for the year ended 28 February 2022 is R20,3679. Therefore Mr. Jon earned GBP 39 277,49 during the 2022 tax year of assessment. This has been calculated as follows:

R800 000 / R20,3679 = GBP 39 277,49

A tax calculator provided on the UK's website has been used to calculate the applicable UK tax payable (Gov.UK, 2022). As per the tax calculator, tax of GBP 5 341,50 is payable on income earned for an amount of GBP 39 277,49

For comparative purposes the UK tax payable has been converted to ZAR using the average exchange rate of R20,3679 for the 2022 tax year. Therefore, the total tax payable by Mr. Jon in the UK is R108 795,10. This has been calculated as follows:

GBP 5 341,50 X R20,3679= R108 795,10

Gross Income	
South African sourced income	500 000,00
UK sourced income	800 000,00
Rental income	200 000,00
Total income	1500 000,00
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution =R150 000	

Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 1 430 000 =393 250) o Remuneration (1300 000); or o Taxable income including CGT (1430 000) • Taxable income excluding CGT (1430 000)	
Taxable income	1 280 000,00
Tax per the tax tables (229 089+41%X [1 280 000-782 200])	433 187,00
Less primary rebate	(15 714,00)
Application of DTA: section 6*quat* rebate	(107 709,93)
Tax payable to SARS	309 763,07

Section 6*quat* calculation:

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is therefore calculated as follows:

1. South African sourced taxable income:

R630 000 / R1 430 000 X R150 000 = R66 083,92

R630 000 – R66 083,92 = R563 916,08

2. UK sourced taxable income:

R800 000 / R1 430 000 X R150 000 = R83 916,08

R800 000 – R83 916,08= R716 083,92

Therefore, the section 6*quat* rebate is calculated as follows:

R716 083,92 / R 1 280 000 X R192 531,51= R107 709,93

Tax calculation 2: South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
UK sourced income	800 000,00
Rental income	200 000,00
Total income	1500 000
Exemptions	
Section 10(1)(o)(ii) – All requirements are met, therefore full exemption allowed	(800 000)
Deductions	(70 000,00)
Rental expenses	(150 000)
S11F	
Total contribution =R150 000	

Deduction limited to the lesser of:
• R350 000; or
• 27.5% of the higher of: (27.5%X 1 430 000 =393 250)
  ○ Remuneration (1300 000); or
  ○ Taxable income including CGT (1430 000)
• Taxable income excluding CGT (1430 000)	

Taxable income	
Tax per the tax tables (110 739+36%X[480 000-467 500])	
Less primary rebate	480 000,00
Tax payable to SARS	123 239,00
	(15 714,00)
	107 525,00

Tax calculation 3: South African tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(o)(ii)

Gross Income	
South African sourced income	500 000,00
UK sourced income	800 000,00
Rental income	200 000,00
Total income	1500 000
Exemptions	
Section 10(1)(o)(ii) – All requirements are met, therefore full exemption allowed as the total foreign income is less than R1 million	(800 000)
Deductions	(70 000,00)
Rental expenses	(150 000)
S11F	
Total contribution =R150 000	
Deduction limited to the lesser of:	
• R350 000; or	
• 27.5% of the higher of: (27.5%X 1430 000 =393 250)	

○ Remuneration (1300 000); or ○ Taxable income including CGT (1430 000) • Taxable income excluding CGT (1430 000)	
Taxable income	
Tax per the tax tables (110 739+36%X[480 000-467 500])	480 000,00
Less primary rebate	123 239,00
Tax payable to SARS	(15 714,00)
	107 525,00

Analysis of Example 1 calculation:

Based on the above three calculations, it is evident that if a taxpayer earns foreign income less than R1.25 million for the year of assessment, there is no change in the tax implications for the taxpayer. The taxpayer will be entitled to claim the section 10(1)(*o*)(ii) foreign employment exemption in full on the foreign income earned whether the enacted amendment is taken into consideration or not.

Example 2:

The 2022 tax year will be taken cognisance of in this example. The taxpayer in the example is a South African tax resident under the age of 65. It is assumed, where applicable, that the taxpayer meets the requirements of section 10(1)(*o*)(ii) and section 6*quat,* unless stated otherwise. It is also assumed that the taxpayer will be present in the UK for a period exceeding 182 days, and that the DTA is not applicable unless specifically stated and applied.

Background facts:

Mr. Jon is employed by a South African employer. For the 2022 tax year, Mr. Jon has been seconded to the UK. Mr. Jon will therefore earn foreign remuneration in the UK for an amount of R1 500 000. This is paid by a UK employer. Mr Jon will earn South African

sourced income for services rendered for an amount of R500 000. Mr. Jon also earns South African rental income of R200 000. Expenses incurred which qualify for tax deductions amount to R70 000. Mr. Jon contributes R150 000 in total to his South African retirement fund and he does not have any contributions to a UK retirement fund. Mr. Jon has the following properties:

Year acquired	**Type of property**	**Country**	**Purchase price**	**Market value as at 28 February 2022**
2008	Primary residence	South Africa	R800 000	R1 700 000
2020	Rental property	South Africa	R875 000	R950 000

Tax calculation 4: South African tax liability taking into consideration the DTA between South Africa and the UK

In this scenario it is assumed that Mr. Jon does not meet the requirements of the foreign employment income exemption. Therefore, he will be required to apply the provisions in the DTA for relief from double taxation.

Article 14 of the DTA between South Africa and the UK stipulates the following:

1. Subject to the provisions of Articles 15, 17 and 18 of this Convention, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

(c) the remuneration is not borne by a permanent establishment which the employer has in the other State (SARS, 2003:12).

Article 14 and Article 21 provides guidance to avoid double taxation:

3. Subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa, United Kingdom tax paid by residents of South Africa in respect of income taxable in the United Kingdom, in accordance with the provisions of this Convention, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income (SARS, 2003:17).

Mr. Jon will be rendering services in the UK for a period exceeding 183 days, therefore paragraph 2 of Article 14 of the DTA does not apply. This will result in Mr. Jon being liable for income tax in the UK. Mr Jon is regarded as a South African resident and could therefore be double taxed. To avoid double taxation of his UK income, he can apply paragraph 1 of Article 21. This means that he can claim the section 6*quat* rebate for the 2022 year of assessment.

Mr. Jon earned R 1 500 000 for services rendered in the UK. Using the SARS average exchange rate Table A (SARS, 2022), the average exchange rate for the year ended 28 February 2022 is R20,3679. Therefore Mr. Jon earned GBP 73 645,29 for the 2022 tax year of assessment. This has been calculated as follows:

R1 500 000 / R20,3679 = GBP 73 645,29

In order to establish the UK tax payable, a tax calculator provided on the UK's website has been used. According to the tax calculator, tax for an amount of GBP 12 215,06 is payable on income earned of GBP 73 645,29 (Gov.UK, 2022).

For comparative purposes the UK tax payable has been converted to ZAR using the average exchange rate of R20,3679 for the 2022 tax year. Therefore, the total tax payable by Mr. Jon in the UK is R248 795,08. This has been calculated as follows:

GBP 12 215,06 X R20,3679 = R248 795,08

Gross Income	
South African sourced income	500 000,00
UK sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000,00)
Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 130 000 = 585 750) ○ Remuneration (2 000 000); or ○ Taxable income including CGT (2 130 000) • Taxable income excluding CGT (2 130 000)	
Taxable income	1 980 000,00
Tax per the tax tables (587 593+45%X [1 980 000-1 656 601])	733 122,55
Less primary rebate	(15 714,00)

Application of DTA: section 6*quat* rebate	(333 866,57)
Tax payable to SARS	383 541,98

Section 6*quat* calculation:

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is calculated as follows:

1. South African sourced taxable income:

R630 000 / R1 980 000 X R150 000 = R47 727,27

R630 000 – R47 727,27 = R582 272,73

2. UK sourced taxable income:

R1 500 000 / R1 980 000 X R150 000 = R113 636,36

R1 500 000 – R113 636,36 = R1 386 363,64

Therefore, the section 6*quat* rebate is calculated as follows:

R1 386 363,64 /R 1980 000 X R476 827,14= R 333 866,57

Tax calculation 5: South African tax liability for the 2022 tax year with no amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income	500 000,00
UK sourced income	1 500 000
Rental income	200 000,00
Total income	2 200 000

Exemptions	
Section 10(1)(o)(ii) – All requirements are met, therefore full exemption allowed	(1 500 000)
Deductions	
Rental expenses	(70 000,00)
S11F	(150 000)
Total contribution =R150 000	
Deduction limited to the lesser of:	
• R350 000; or	
• 27.5% of the higher of: (27.5%X 2 000 000 = 550 000)	
○ Remuneration (2 000 000); or	
○ Taxable income including CGT (630 000)	
• Taxable income excluding CGT (630 000)	
Taxable income	480 000,00
Tax per the tax tables (110 739+36%X [480 000 -467 500])	123 239,00
Less primary rebate	(15 714,00)
Tax payable to SARS	107 525,00

Tax calculation 6: South African tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(*o*)(ii)

Gross Income	
South African sourced income.	500 000,00

UK sourced income	1 500 000,00
Rental income	200 000,00
Total income	2 200 000,00
Exemptions	
Section 10(1)(*o*)(ii) – All requirements are met, therefore exemption allowed	(1 000 000)
Deductions	
Rental expenses	(70 000,00)
S11F Total contribution =R150 000 Deduction limited to the lesser of: • R350 000; or • 27.5% of the higher of: (27.5%X 2 000 000 =550 000) o Remuneration (2 000 000); or o Taxable income including CGT (1 130 000) • Taxable income excluding CGT (1 130 000)	(150 000,00)
Taxable income	980 000,00
Tax per the tax tables (229 089+41% [980 000-782 200])	310 187,00
Less primary rebate	(15 714,00)
Less section 6*quat* rebate	(182 978,54)
Tax payable to SARS	111 494,46

Section 6*quat* calculation:

Section 6*quat*(1B)(a) states that the S11F deduction related to the retirement annuity fund contribution must be apportioned on the basis of taxable income from sources within South Africa and income from foreign sources.

The apportionment of the S11F deduction is calculated as follows:

1. South African sourced taxable income:

R 630 000 / R1 130 000 X R150 000 = R83 628,32

R630 000 – R83 628,32 = R546 371,68

2. UK sourced taxable income:

R500 000 / R1 130 000 X R150 000 = R66 371,68

R500 000 – R66 371,68 = R433 628,32

Therefore, the section 6*quat* rebate is therefore calculated as follows:

R433 628,32 /R1 130 000 X R R476 827,14 = R182 978,54

Transaction 7: Breaking tax residency in South Africa and becoming a tax resident in the UK

As previously discussed in this research report, the increased tax burden could result in South Africans seeking ways to reduce their tax burden (Ismail, 2017). One of the options available would be to terminate their South African residency status. Terminating South African residency status can be achieved by permanently leaving South Africa and relocating to another country.

For the purposes of transaction 7 of this scenario, it will be assumed that Mr Jon terminates his South African residency and relocates to the UK. After Mr. Jon terminates his South African residency, the only income that will be subject to tax in South Africa is his South African rental income. The rental income will be included in the calculation done below and includes the relevant tax-deductible expenses. It is important to note that Mr Jon will be assumed to be a UK tax resident for the 2022 year

of assessment and therefore he will taxed in the UK on his worldwide income. This will result in double taxation and therefore the Double Tax Agreement between South Africa and the UK can be used to claim some tax relief. The relevant aspects of the DTA will be stated below.

In terms of Article 6 of the DTA between South Africa and the UK:

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.
2. The term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships and aircraft shall not be regarded as immovable property.
3. The provisions of paragraph 1 of this Article shall apply to income derived from the direct use, letting or use in any other form of immovable property.
4. The provisions of paragraphs 1 and 3 of this Article shall also apply to the income from immovable property of an enterprise (SARS, 2003).

As per the above DTA, the rental income will be taxed in the country in which the property is situated. Therefore, the rental income earned by Mr Jon will only be taxed in South Africa and not in the UK.

Based on the assumptions stated above, the estimated taxable income calculation for Mr Jon has been completed below:

South African taxable income	**Rands**
Income	
Rental income	200 000,00
Deductions	
Rental expense	(70 000,00)
Taxable income	130 000,00
Tax per the tax table	23 400,00
(130 000X18%)	
Primary rebate	(15 714,00)
Tax payable to SARS	7 686,00

UK taxable income	**GBP**
Income	
Salary	73 645,29
SA rental income - N/A	
Taxable income	73 645,29
UK tax payable	12 215.06
(Gov.UK 2022)	

Analysis of Example 2 calculations:

Based on the above calculations, it can be deduced that the DTA provides limited tax relief. The taxpayer is taxed twice on a large portion of the foreign income.

Implementing the enacted amendment, for the year of assessment when the taxpayer earns foreign income in excess of R1.25 million, tax is paid twice on a portion of the amount in excess of R1.25 million even after the section 6*quat* rebate is applied.

Summary of all tax calculations in this chapter:

Tax calculation	*Total tax payable in the UK* *(Rands)*	*Total tax payable in SA* *(Rands)*	*Total tax payable for the year of assessment* *(Rands)*
Foreign income earned is less than R1.25 million			
1. Tax liability taking into consideration the DTA between South Africa and the UK	108 795,10	320 063,97	428 859,07
2. Tax liability for the 2022 tax year with no amendment made to section 10(1)(o)(ii)	108 795,10	103 772,50	212 567,60
3. Tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(o)(ii)	108 795,10	103 772,50	212 567,60

Foreign income earned in excess of R1.25 million			
4. Tax liability taking into consideration the DTA between South Africa and the UK	248 795,08	400 107,43	648 902,51
5. Tax liability for the 2022 tax year with no amendment made to section 10(1)(o)(ii)	248 795,08	106 608,00	355 403,08
6. Tax liability for the 2022 tax year with the enacted amendment made to section 10(1)(o)(ii)	248 795,08	123 379,36	372 174,44
Breaking South African tax residency			
7. Breaking tax residency in South Africa and becoming a tax resident in the UK	248 795,08	7 686,00	256 481,08

Conclusion:

Based on the above calculations, it can be deduced that there is an element of limited tax relief for individuals earning below R1.25 million. For individuals earning above R1.25 million, there is very limited tax relief. After the implementation of the enacted

amendment to section 10(1)(*o*)(ii), the calculations above clearly indicate an increase in the tax liability of the taxpayer. It is interesting to note that if an individual chooses to terminate their South African residency and permanently move to the UK, then the total tax payable in the UK will be less. The decreased tax liability therefore creates an incentive for individuals to relocate to the UK. The consequential impact of individuals relocating is a decrease in tax collections by SARS.

CHAPTER 8: CONCLUSION

One of the core intentions of this research report was to calculate and analyse the impact of the foreign income exemption on South African taxpayers working abroad. This was achieved by selecting three countries that were identified as relevant tax jurisdictions for this research report. Research evidence has indicated that there has been a significant increase in the number of South Africans working abroad (Monatisa, 2017). This means that there are a large number of taxpayers impacted by the foreign income exemption amendment. As discussed in this research report, the impact of the foreign income exemption amendment extends to companies as well. South African companies that second employees abroad would be responsible for the administration and calculation of tax payable for the seconded employees. The foreign income exemption amendment therefore has a significant impact on South African taxpayers.

Based on the discussions and calculations, it can be deduced that the foreign income exemption amendment results in a higher a tax liability. This has been noted in all three of the selected tax jurisdictions. The Double Taxation Agreements do not prevent the higher tax liability. The foreign income exemption amendment therefore increases the tax collection base of SARS. In addition to the higher tax, there is also an increased administrative burden created by the foreign income exemption amendment. Furthermore, the complexities of international tax, double tax agreements and rebates would require the services of tax experts. The use of these services increases the cost of working abroad. There is also the administrative burden of complying with tax legislation in the foreign jurisdiction as well as in South Africa. Complying with the requirements of two tax jurisdictions could also result in delays. These delays would mean that the taxpayer may need to wait until a tax credit is granted or a tax refund is obtained. If a taxpayer has to wait for a tax refund, it could result in cash flow challenges for the taxpayer. The abovementioned factors therefore create a temptation for South African taxpayers to break their South African tax residency status. Breaking South African tax residency would eliminate the tax burden imposed by South Africa. Based on the tax calculation examples in this research report, it can be noted that South

Africans working in the UAE would have the largest tax savings by breaking their South African tax residency. The income tax calculations based on the other jurisdictions also illustrate tax savings if a taxpayer breaks their South African tax residency. As depicted in the calculations, the savings are significant, and this increases the motivation for South African taxpayers working abroad to end their South African tax residency. In the long term, this will therefore result in reducing the tax collection base of SARS. The foreign income exemption amendment therefore appears to be achieving more harm than good.

Areas for future research would entail investigating the number of South Africans working abroad who have ended their South African tax residency after the implementation of the enacted amendment to section 10(1)(*o*)(ii). The research can investigate the proportion of South Africans working abroad who have ended their South African tax residency before the implementation of the enacted amendment to section 10(1)(*o*)(ii). This number can be compared to the proportion of South Africans working abroad who have ended their South African tax residency after the implementation of the enacted amendment to section 10(1)(*o*)(ii). An analysis of the investigation would provide deeper insight as to whether the enacted amendment to section 10(1)(*o*)(ii) is achieving its purpose of increasing the tax collection base of SARS.

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