The tax implications of the amendment of section 10(1)(o)(ii) of the Income Tax Act 58 of 1962

by

Nellie van Rooy

a mini dissertation submitted in partial fulfilment of the requirements for the degree

LLM (Tax law)

at the

University of Pretoria

Student Number: u11088461

Date: November 2021

Supervisor: Prof SP van Zyl

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

University of Pretoria

Plagiarism policy

The University of Pretoria places great emphasis upon integrity and ethical conduct in the preparation of all written work submitted for academic evaluation.

While academic staff teaches you about referencing techniques and how to avoid plagiarism, you too have a responsibility in this regard. If you are at any stage uncertain as to what is required, you should speak to your lecturer before any written work is submitted.

You are guilty of plagiarism if you copy something from another author's work (e.g. a book, an article or a website) without acknowledging the source and pass it off as your own. In effect, you are stealing something that belongs to someone else. This is not only the case when you copy work word-for-word (verbatim), but also when you submit someone else's work in a slightly altered form (paraphrase) or use a line of argument without acknowledging it. You are not allowed to use work previously produced by another student. You are also not allowed to let anybody copy your work with the intention of passing if off as his/her work.

Students who commit plagiarism will not be given any credit for plagiarised work. The matter may also be referred to the Disciplinary Committee (Students) for a ruling. Plagiarism is regarded as a serious contravention of the University's rules and can lead to expulsion from the University.

The declaration which follows must accompany all written work submitted while you are a student of the University of Pretoria. No written work will be accepted unless the declaration has been completed and attached.

Full names of candidate:

Student number:

Date

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

Signature of candidate:

Signature of supervisor:

This document must be signed and submitted to the Head: Student Administration within two months of registering for the research component of the programme.

Abstract

South Africa's tax system changed from a source-based system to a residence-based system for years of assessment commencing from or after 1 January 2001. A residence-based system means that a resident would be subject to tax on worldwide income whereas a non-resident would only be subject to income earned from a source originating from the Republic of South Africa ("hereinafter referred to as the RSA").

Before 2001, the income tax exemption in terms of section 10(1)(o)(ii) of the Income Tax Act (hereinafter referred to as the "ITA") was granted to officers and crew members employed abroad any RSA ship only. However, this exemption only applied if the officers and crew members were outside the RSA for more than 183 days during the year of assessment. A need arose for the scope of this exemption to expand when the RSA moved to a residence-based tax system in 2001, to include RSA tax residents who rendered services outside the RSA on behalf of an employer.

Previously, section 10(1)(o)(ii) of the ITA provided for an exemption from normal tax for remuneration received by or accrued to a tax resident outside the RSA during a qualifying year of assessment. In this regard, remuneration included salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered. Furthermore, reimbursed allowances under section 8(1) of the ITA, amounts obtained under broad-based employee share plans under section 8B of the ITA and amounts received by directors or employees on the vesting of instruments under Section 8C of the ITA also qualified as remuneration.

This research focuses on the amendment of section 10(1)(o)(ii) of the ITA that came into effect from 1 March 2020. In terms of the Amendment Act, RSA tax residents working abroad who qualifies for the section 10(1)(0)(ii) exemption will now be taxed in the RSA at the applicable income tax rate on all remuneration they earn as an employee in a foreign state exceeding R1.25 million.

The research further focusses on the impact that the amendment currently have on RSA tax residents who are considering emigrating to work abroad, as well as on the tax system of the RSA.

The findings from this research outlines the most important factors and impacts of the amendment. It outlines the options available for individuals who are considering moving abroad, such as financial emigration and reliance on double tax agreements. Furthermore, the research also provides a brief explanation on the tax relief available for tax residents who are taxed in more than one tax jurisdiction.

Acknowledgements

First of all, thank God for my talents and the opportunity to study, as well as for the guidance throughout the years of learning and the time it took me to complete this dissertation.

A word of gratitude to my husband who supported me throughout and motivated me when I needed it the most. Furthermore, I thank my family and friends who believed in me and supported me every step of the way to finish my degree.

Finally, I would also like to give special word of gratitude to my mini-dissertation supervisor, Prof SP van Zyl at the University of Pretoria, for his assistance and patience.

Table of Contents

List of Abbreviations

CIR	Commissioner of Inland Revenue
DTA	Double Tax Agreement
ITC	Income Tax Court
OECD	Organisation for Economic Co-Operation and Development
OECD MTC	Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital
RSA	Republic of South Africa
SATC	South African Tax Cases
SARB	South African Reserve Bank
SARS	South African Commissioner for Revenue Services
SIR	Secretary for Inland Revenue
VCLT	Vienna Convention on the Law of Treaties

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 Introduction

1.1.1 Background

South Africa's tax system changed from a source-based system to a residence-based system for years of assessment commencing from or after 1 January 2001.[1] A residence-based system means that a resident would be subject to tax on worldwide income whereas a non-resident would only be subject to income earned from a source originating from the RSA.[2]

The Income Tax Act[3] defines a resident as follows:

> "resident' means any –
>
> (a) natural person who is –
> (i) ordinarily resident in the Republic; or
> (ii) not in any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic –
> (aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment; and
> (bb) for a period or periods exceeding 915 days in aggregate during such five preceding years of assessment. ."[4]

Before 2001, the income tax exemption in terms of section 10(1)(o) of the ITA was granted to officers and crew members employed abroad any RSA ship only.[5] However, this exemption only applied if the officers and crew members were outside the RSA for more than 183 days during the year of assessment.[6] When RSA moved to residence-based tax system in 2001 a need arose for the scope of this exemption to develop to include the RSA tax residents who rendered services outside the RSA on behalf of an employer.[7]

The income tax exemption was introduced mainly to avoid double taxation of a tax resident's income between the RSA and the source country.[8] However, some problems arose with the

1 SARS *Tax and Foreign Employees* (2018).
2 Section 76(2) of the *Revenue Laws Amendment Act* No. 59 of 2000; Section 1 of the *ITA* no 58 of 1962.
3 58 of 1962.
4 Section 1 of the *ITA.*
5 The aforementioned exemption is elaborated on in subsection 1.2 below.
6 Explanatory Memorandum on Taxation Laws Amendment Bill, 2017 ("EM 2017"), 6.
7 EM 2017,6.
8 EM 2017,7.

abovementioned exemption as this exemption created opportunities for double non-taxation as the RSA became aware that some host countries only imposed little or no tax on employment income.[9]

Therefore, the National Treasury stated that "the effect of this relief measure will be monitored to determine whether certain categories of employees abuse it to earn foreign employment income without foreign taxation".[10] The National Treasury also stated that policy makers have a duty to continuously ensure that the South African tax system uplifts and upholds the principle of fairness and progressivity in line with the Constitution of the RSA, 1996.[11] The National Treasury highlighted that the principle of equity is the most important factor as it guarantees that taxpayers who find themselves in an equal position should be taxed in an equal manner as they have the same ability to carry the tax burden. The canon of equity should apply[12], which means that policy makers is required to continuously ensure that the tax system embraces the principle of fairness and progressivity. Taxpayers who are in a better financial situation should tolerate a bigger portion of the tax burden as a percentage of their income.[13] Thus, with the implementation of section 10(1)(o)(ii), RSA tax residents earning more than R1.25 million abroad will now be taxed equally.

Based on the above, the National Treasury suggested that foreign employment income earned by a tax resident should therefore no longer be fully exempt under the South African Law. The National Treasury proceeded with the amendment of section 10(1)(o)(ii) of the ITA and which amendment commenced on 1 March 2020.[14]

1.1.2 The previous position of section 10(1)(o)(ii) of the ITA

Previously, this section provided for an exemption from normal tax for remuneration received by or accrued to a tax resident outside the RSA during a qualifying year of assessment. In this regard, remuneration included the following: "*salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered*."[15] Furthermore, reimbursed allowances under section 8(1), amounts obtained under broad-based employee share plans under section 8B and amounts received by directors or employees on the vesting of instruments under Section 8C, also qualified as remuneration, subject thereto that the remuneration must have been earned from abroad[16]

9 EM 2017, 6.
10 EM 2017, 6.
11 EM 2017,6.
12 EM 2017, 7.
13 EM 2017.6.
14 *Revenue Laws Amendment Act* No. 74 of 2002.
15 Part 1 of the Fourth Schedule of the *ITA* No 58 of 1962, 343.
16 SARS Interpretation Note 16 Exemption from income tax: Foreign employment income (Issue 2) 2017 ("IN16"), 2.

Section 10(1)(o)(ii) set certain criteria to be met by a tax resident earning income abroad for this exemption to apply:

a) This exemption applied only to remuneration earned by a tax resident for services rendered outside the RSA, where that employee was outside the RSA for:

   i. an aggregate period exceeding 183 full days (a 24-hour day and need not be consecutive days), during any twelve-month period; and

   ii. a continuous 60 full day period during those twelve months.

b) The services had to be rendered by way of an employment agreement during the qualifying year of assessment as discussed above. Therefore, there had to be a clear employment relationship for this exemption to apply.[17]

c) The remuneration earned by way of rendering services could not have been subject to any other exemption.

d) Furthermore, a person who travelled through the RSA between two places outside the RSA and who did not formally enter the RSA through a border post,[18] or at any other place that was permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act was deemed to be outside the RSA.[19]

e) Where remuneration was received by or accrued to any employee during any year of assessment of which services were rendered by that individual in more than one year of assessment, the remuneration was considered to have accrued equally over the period in which those services were rendered.[20]

1.1.3 Amendment

In terms of the Amendment Act[21] RSA tax residents qualifying for the section 10(1)(0)(ii) exemption will now, effective from 1 March 2020, be taxed in South Africa at the applicable income tax rate on all remuneration they earn as an employee in a foreign state exceeding R1.25 million.[22] In other words, the first R1.25 million is exempt.

The qualifying criteria for the exemption remain unchanged.

17 IN16, 3.
18 As contemplated in section 9(1) of the *Immigration Act* 13 of 2002.
19 Section 9A of the *Immigration Act* 13 of 2002.
20 IN16, 2.
21 *Taxation Laws Amendment Act* 17 of 2017.
22 IN16, 8.

1.2 Problem Statement

The amendment of section 10(1)(o)(ii) will have a significant impact on taxpayers in that it will increase the probability that more expats will emigrate to foreign states for tax purposes. Moreover, SARS faces a tremendous challenge implementing and administering the amendment.

In the final response document on the abovementioned amendment, the public comments already highlighted the negative implications that will follow once the amendment comes into effect.[23] The National Treasury had the opportunity to consider the public comments before the final decision was made.[24]

Some of the most important comments and responses were the following:

i. The amendment will have an undesirable impact on the taxable income and the payments to the RSA taxpayer. The relative lower income individuals will be affected the most and this includes family members who receives funds for the living costs in the RSA. The remittance amounts include investments of foreign income and money spent in the RSA during visits.[25]

"The National Treasury accepted this comment and accordingly changed the proposal to allow the first R1 million of foreign remuneration to be exempt from tax in the RSA" This exemption will only be applicable to the individuals who meets the criteria.

ii. Members of public commented that "some individuals and households made the decision to work and live abroad based on the current tax treatment in the RSA," which existed from 2001 when the residence-based system was introduced. The public felt that this amendment is unfair as it creates an unexpected and substantial change in tax liabilities in one year. Some RSA tax residents working abroad signed a three- or five-year contract with their current employers.[26]

The National Treasury partially accepted the abovementioned comment. The proposed effective date for this proposal was extended to 1 March 2020, to allow more time for individuals to either change their contracts or their circumstances and to decide whether they want to change their tax status or not.[27]

23 Final Response Document on Taxation Laws Amendment Bill, 2017 ("Final Response Document"), 7.
24 Final Response Document, 7.
25 Final Response Document, 7.
26 Final Response Document, 7.
27 Final Response Document, 7.

iii. In another comment the public highlighted that there are only two out of 196 countries that have implemented a similar proposal as the amendment, as this amendment is strict and sets the RSA apart from similar countries.[28] This amendment might affect the current collection of taxes due to the number of RSA tax residents that might cut their ties with SARS through financial emigration.

The National Treasury responded by not accepting the abovementioned comment. They suggested that the policy mentioned is based on citizenship, whereas the current proposal is based on tax residency.[29]

iv. Unfairness is one of the strongest elements that came out in the comments as the public felt that it is not fair to enforce taxes on people who are not currently in the RSA and are not able to appreciate the benefits of the public expenditure.[30]

The abovementioned comment was not accepted by the National Treasury. They emphasised that "a residence-based system of taxation is based on the fact that tax residents of a country will be liable for tax on their worldwide income."[31] The ordinarily resident or a physical present test is applied to determine if a resident will be classified as tax resident or not.[32]

v. The public felt that this amendment will lead to more RSA citizens who will formally emigrate to other countries or who would give up their passports, that will lead to the loss of capital gains tax in the future.[33]

The National Treasury did not accept this comment as they are of the opinion that the proposal is not related to citizenship as the application rests solely on tax residency.[34]

vi. The public also commented that this amendment will increase the cost of employment for RSA tax residents working abroad.[35]

Response of the National Treasury: "Noted. The introduction of the capped exemption should alleviate the increased taxation costs associated with employing South Africans abroad."[36]

28 Final Response Document, 7.
29 Final Response Document, 7.
30 Final Response Document, 9.
31 Final Response Document, 9.
32 Final Response Document, 9.
33 Final Response Document, 7-8.
34 Final Response Document, 8.
35 Final Response Document, 8.
36 Final Response Document, 8.

In general, the proposed amendment created substantial uncertainty of what is going to happen and how it will really affect the RSA eventually. Taxpayers who want to become expats in the future are overall uncertain about what their options are and whether they will be able to limit their tax liability.

According to Leon the number of people proceeding with the process of financial emigration has increased significantly.[37] He, furthermore, made a statement that South Africans are willing to formally end their relationship with the country from a tax and exchange control perspective, if they meet the requirements to financially emigrate.[38] The main reason for South Africans to consider financial emigration is to guarantee that their foreign earned income and assets are protected.[39]

Thus, it is evident that more research regarding the options available for RSA tax residents who wishes to work and earn income abroad, should be conducted to assist them to limit their tax liability

1.3 Fundamental Research Question

How does the amendment of section 10(1)(o)(ii)[40] influence tax residents and what impact will the amendment have on the tax system of the RSA?

1.4 Sub questions

The following questions are discussed:

i. How are residents and non-residents taxed in the RSA?
ii. When does the ordinarily resident test apply and when does the physical presence test apply?
iii. What is the position in respect of residents earning employment income abroad?
iv. What is the scope and application of the proposed amendment?
v. What is the meaning of RSA tax residents working abroad and earning foreign employment income for the purpose of the amendment?
vi. What is the inter-relation between the amendment and existing Double Tax Agreements?[41]
vii. What is the consequence of emigration?

37 Tax Consulting *Massive Jump in the number of South Africans planning to financially emigrate* (2019),1.
38 Tax Consulting *Massive Jump in the number of South Africans planning to financially emigrate* (2019),1.
39 Tax Consulting *Massive jump in the number South Africans applying to financially emigrate* (2019), 1.
40 ITC Act 58 of 1962.
41 Hereinafter referred to as a DTA.

1.5 Delimitations of this study

In this study DTA's is not discussed in detail as a complete discussion falls outside the scope of this study. Only the impact that DTA's have on the section 10(1)(o)(ii) amendment is considered. Furthermore, only Article 1 and 4 of the OECD Model Tax Convention on Income and Capital is discussed for this study as it is the most relevant two articles in respect of the section 10(1)(o)(ii) amendment.

1.6 Methodology

The research methodology provides a framework of the research plan as well as the tools that are used to conduct the research.

The study takes the form of qualitative research through the research of legislative documentation, South African Revenue Services tax interpretation notes, journals, articles, and books.

1.7 Structure

Chapter 1: Introduction

This chapter is an introduction to the study and includes the motivation of the study, problem statement, fundamental research question, sub questions, literature review, methodology, structure, and the timeline.

Chapter 2: Residency

This chapter specifically focusses on the definition and requirements to be met to classify as a resident in the RSA as well as a non-resident. The differences between a resident and tax resident are also outlined.

Chapter 3: The scope of the amendment of Section 10(1)(o)(ii) of the ITA

This chapter specifically discusses the amendment of Section 10(1)(0)(ii) in detail and consider all the aspects of the amendment with practical examples.

Chapter 4: Options available for tax residents

This chapter specifically outlines the options for tax residents earning a worldwide income after the amendment of Section 10(1)(o)(ii). The options that are considered are financial emigration and double tax agreements.

Chapter 5: Conclusion

This chapter concludes the research conducted and provides a summary of the key findings.

CHAPTER 2: RESIDENCY

2.1 Introduction

The first point of departure in understanding a person's tax liability is to determine a person's tax residency. As mentioned in Chapter one, the RSA's income tax system was changed in 2001 from a source-based system to a residence-based system.

To understand tax residency and the way it influences the way an individual is taxed, the following three questions will be discussed:

i. How are residents and non-residents taxed in the RSA?
ii. When does the 'ordinarily resident' test apply and when does the physical presence test apply?
iii. What is the position in respect of RSA tax residents earning employment income abroad?

2.2 How are residents and non-residents taxed in the RSA?

Section 1 of the ITA[42] defines a resident in relation to a natural person as follows:

"Resident' means any –
(a) Natural person who is –
(i) Ordinarily resident in South Africa, or
(ii) Not any time during the relevant year of assessment ordinarily resident in South Africa, if that person was physically present in South Africa –
(aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment;
(bb) for a period or periods exceeding 915 days in aggregate during those five years preceding years of assessment.
In which case the person will be a resident with effect from the first day of that relevant year of assessment: Provided that –
(A) A day shall include a part of a day, but shall not include any day that a person is in transit through South Africa between two places outside South Africa and that person does not formally enter South Africa through a 'port of entry' as contemplated in Section 9(1) of the Immigration Act, 2002 Act no 13 of 2002), or at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act, and

42 58 of 1962.

(B) Where a person who is resident in terms of this subparagraph is physically outside South Africa for a continues period of at least 300 days immediately after the day on which such a person ceases to be physically present in South Africa, such a person shall be deemed not to have been a resident from the day on which such a person ceased to be physically present in South Africa, or

(b) Person (other than a natural person) who is incorporated, established, or formed in South Africa or which has its place of effective management in South Africa.

But does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the government of South Africa and that other country for the avoidance of double taxation: Provided that where any person that is a resident ceases to be a resident during a year of assessment, that person must be regarded as not being a resident from the day in which that person ceases to be a resident."

A non-resident is a natural person who is present in the RSA less than 91 days in total in each of the present and prior five tax years or is present less than five tax years in the RSA. However, if a natural person meets the criteria as set out in the above definition, the natural person will be considered as a resident in the RSA and will be subject to tax in the RSA. Double tax agreements will be discussed in Chapter Four of this study but only in respect of the impact DTA's have on the Section 10(1)(o)(ii) amendment.[43]

The general rule is that a natural person who meets the definition of a resident in the RSA is taxable on their worldwide income, whereas non-residents are usually taxed on income obtained directly or indirectly from sources within the RSA.[44]

2.3 When does the 'ordinarily resident' test apply and when does the physical presence test apply?

The residence-based system came into effect on 1 March 2001[45] and replaced the source-based system of taxation, due to a change in legislation of section 76(2) of the Revenue Laws Amendment Act.[46] The change of legislation immediately became effective for natural persons and for juristic persons (for example companies etc..) from the year of assessment commencing after 3 December 2000.[47]

43 KPMG *Thinking beyond borders* (2020) 1.
44 KPMG *Thinking beyond borders* (2020) 1.
45 Revenue Laws Amendment Act No. 59 0f 2000.
46 59 of 2000.
47 Tax Consulting South Africa (2019) 63.

The ordinarily residence test applies first and if in the case it does not apply, the physical presence test must be applied.[48] However if the taxpayer meets the requirements of either of these tests, but is considered to be a resident exclusively of a different country in respect of a DTA concluded between the RSA and that other country, the taxpayer will be excluded from the definition of a resident in the RSA.[49]

As stated in the definition of a resident above, in terms of section 1 of the ITA,[50] the phrase "resident" relates to individual taxpayers and focusses on two issues. Firstly, the ordinarily or usual residence of a natural person, and secondly, their physical presence in the RSA for the required minimum period.[51] The meaning of the term "ordinarily resident" has always been a complex one as it has never been defined in the ITA, which led to the meaning thereof to be determined by our courts.[52]

The Explanatory Memorandum on the Revenue Laws Amendment Bill holds that the courts interpret ordinarily resident to "mean a place where a person has his or her place of permanent residence. If a person is outside the RSA and has the intention to return to the Republic to make RSA his or her permanent home, such person will be regarded as a resident regardless of the period spent outside the RSA."[53]

The two main important cases in South African law that forms the foundation to examine the meaning of "resident" and "ordinarily resident" are *Cohen v Commissioner for Inland Revenue* (hereinafter referred to as the Cohen case)[54] and *Commissioner of Inland Revenue v Kuttel* (hereinafter referred to as the *Kuttel* case). [55] Both cases concerned two separate individual taxpayers, and both were Appellate Division judgments which were given nearly 50 years apart from one another.[56] Both cases still stand as the two benchmark cases to which researchers and academics of South African tax law turn when dealing with difficulties concerning the meaning of the phrase "ordinarily residence".[57]

48 Tax Consulting South Africa (2019) 64.
49 Section 1 of the *ITA* No. 58 of 1962.
50 58 of 1962.
51 J. Arendse, K. Stark & C. Renaud, *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 2.
52 Tax Consulting South Africa (2019) 65.
53 The Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000, 4.
54 (1946) 13 SATC 362.
55 (1992) 54 SATC 298.
56 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 2.
57 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 3.

2.3.1 The Cohen v CIR case [58]

2.3.1.1 Facts

Sam Cohen was the appellant and taxpayer in this matter (hereinafter referred to as "Cohen"). Cohen was one of two directors of a corporation operating in the RSA and was therefore domiciled in the RSA.[59] Cohen was demanded by his corporation to represent them abroad as their buyer, and left the RSA, together with his family in June 1940.

Cohen rented a flat in Johannesburg, for a cycle of five years, and continued to sub-let his fully furnished apartment during the period for which Cohen had been in America. Cohen frequently visited Europe, England, and America on comparable business trips, during the period 1930 to 1940. In this same decade Cohen spent approximately half of his time in the RSA.[60]

Cohen main source of income was derived from directors' fees, salaries from numerous RSA corporations as well as from interest and dividends. Cohen claimed to be exempt from super-tax by leaning on the provisions of section 30(1)(a) of the ITA,[61] which exempt individuals "not ordinarily resident nor carrying on business in the RSA".[62]

Both the Commissioner of Inland Revenue and the Special Court concluded that Cohen was not conducting business in the RSA during the year of assessment but was indeed an ordinarily resident in the RSA.[63]

2.3.1.2 Main issue in this case

Cohen was still not satisfied with the decisions, and he proceeded to the Witwatersrand Local Division of the High Court. Cohen submitted the following question of law to the Supreme Court:

> "Whether on the facts found by the Special Court the appellant was an individual not ordinarily resident in the Union within the proper meaning of the words in section 30(1)(a) of the Income Tax Act, 1941, for the year of assessment ended 30th June 1942".[64]

58 (1946) 13 SATC 362.
59 (1946) 13 SATC 362.
60 (1946) 13 SATC 362.
61 Act 31 of 1941.
62 (1946) 13 SATC 362.
63 (1946) 13 SATC 362.
64 (1946) 13 SATC 362.

2.3.1.3 The Judgment

The Witwatersrand Local Division of the High Court responded to the question of law raised by Cohen negatively and Murray J dismissed the appellant's appeal. Murray J held the following when the appeal was dismissed:

i. "Was the individual in question a resident or ordinarily resident in any specific area for the purposes of the ITA and was there clear evidence upon which the Special Court was allowed to find that the appellant had not demonstrated that he was not an ordinarily resident in the RSA.

ii. The question whether an individual was in any year of assessment an ordinarily resident in the RSA or elsewhere was not determined solely by his actions during that year of assessment.

iii. The physical absence during the whole year of assessment was not the deciding factor for the question of "ordinary residence." [65]

Cohen was still not satisfied with the judgement of the Witwatersrand Local Division and appealed the judgement made by Murray J.

Schreiner JA considered the following phrase in the English law during his course of judgment: "the question of residence or ordinarily residence is one of degree, there is no technical or special meaning attached to either expression, accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded*"*.[66]

Schreiner JA concluded that Cohen was indeed an 'ordinarily resident' of the RSA.[67] He also outlined that "a natural person can be a resident in more than one country during a specific year of assessment, but he/she can only be 'ordinarily resident' in one and that it would be natural to interpret that ordinarily means his/her main residence or most fixed or settled residence".[68] He further reasoned that ordinary residence and domicile is not the same, as ordinary residence means the country to which a natural person would naturally return to after completing his or her wanderings.[69]

Schreiner JA agreed with the judgement of Murray J and made the comment that "it was unnecessary to consider the question whether assuming that the taxpayer's ordinary residence can be changed during the tax year, the decisive date for applying the exemption under section 30(1)(a)[70]

65 (1946) 13 SATC 363.
66 (1946) 13 SATC 366.
67 (1946) 13 SATC 363.
68 (1946) 13 SATC 366.
69 (1946) 13 SATC 371.
70 *ITA* 31 of 1941.

is the date of receipt or accrual of the dividends or some other date."[71] Schreiner JA dismissed the appeal with costs.[72]

2.3.2 The CIR v Kuttel Case[73]

2.3.2.1 Facts

Peter Clark Kuttel (hereinafter referred to as "Kuttel") was the appellant and taxpayer in this matter. Kuttel was a shareholder in a fishing company named Atlantic Trawling (Pty) Ltd.[74]

The business was sold in March 1980 and Kuttel's share of the proceeds of the sale was R4.8 million. Kuttel then proceeded to form another company with his previous business associates named Atlantic Fishing Enterprises ("AFE"). Kuttel invested a percentage of the abovementioned R4,8 million in AFE and the remaining percentage in immovable property and quoted shares. Kuttel had an 85% shareholding in AFE and earned most of his income from the business. He also earned his income from the quoted shares and immovable property.[75]

Kuttel competed in a round-the-world race in 1982 as a yachtsman and only returned in September that year. Kuttel still kept in touch with AFE in his time away but was not that active in the day-to-day management in that period. Kuttel decided to move to New York to open an office of AFE, as AFE's business operations in the exporting of lobster and tuna grew tremendously. Kuttel then operated and managed AFE's American business at their New York Office. Kuttel relocated to United States with his wife in July 1983. Kuttel visited the RSA nine times, for a timeframe of up to two months, throughout the cycle of September 1983 to November 1985.[76]

2.3.2.2 The main issue

The argument the Appellate division had to consider was whether or not Kuttel was considered as 'ordinarily resident' in the RSA during the 31-month cycle. The cycle commenced from July 1983 to February 1986, which was the time before Kuttel and his wife relocated to America. Kuttel was physically present in the RSA for a period of over a third of the time for short visits for several reasons, which include amongst others investment purposes, business interests and yachting.

71 (1946) 13 SATC 373.
72 (1946) 13 SATC 373.
73 (1992) 54 SATC 298.
74 (1992) 54 SATC 298.
75 (1992) 54 SATC 298.
76 (1992) 54 SATC 306.

2.3.2.3 The Judgment

Howie J held that the Appeal Court did not challenge the following facts that was adopted by the Court a quo:

i. "In 1983 the appellant decided to emigrate to the United States and left in July 1983.
ii. Kuttel became a United States citizen three weeks before this appeal hearing, the process takes five years, so he could not do it any sooner. Therefor he naturally used his South African passport as he was not entitled to an American one.
iii. Kuttel could not take his assets with him and therefore took reasonable steps to protect his capital, one of which by effecting renovations and extensions to his house in Cape Town.
iv. The fact that Kuttel could not take his assets out of the country is a perfectly natural and understandable reason for returning to RSA from time to time to see to their proper management and preservation. It is also the reason why the bulk of his commercial interests are in RSA as he has not yet had time to build up an American estate of the same size.
v. Having regard to the need to visit RSA for the above reasons, it was reasonable not to let the house in Cape Town and rather to use it for himself.
vi. Kuttel also returned to RSA not just for business purposes but also for personal matters.
vii. When Kuttel arrived in America he did not immediately buy a house as he first wanted to assess where in the United States the family would best feel disposed to settle.
viii. Kuttel spent 31 months outside the United States and on average one-third of the time was spent in South Africa".[77]

Furthermore, the court held that lawyers are familiar with the phrase "residence" or "resident" as well as the fact that a natural person is allowed to have more than one residence at a time. In this case, the courts were only considering the problems with the phrases "ordinarily resident."[78]

Goldstone JA believed it was somewhat different and, in his view, narrower than just "resident." Goldstone JA made reference to section 9A of the Act[79] to define the words "resident of the Republic" as follows:

> "a person (other than a company) who is ordinarily resident in the Republic or a domestic company and includes a person, wherever he is a resident, who acts in a fiduciary capacity in respect of any direct or indirect interest of any beneficiary in any foreign investment company if such beneficiary is a resident of the Republic."[80]

77 (1992) 54 SATC 304.
78 (1992) 54 SATC 304.
79 *ITA* 58 of 1962.
80 (1992) 54 SATC 305.

The terms of the definition would have been illogical if there was no distinction between "resident" and "ordinarily resident." Furthermore, Goldstone JA referred to the Cohen case and made the comment that Schreiner JA gave a comparable meaning to the phrases 'ordinary residence':

> *"…* his ordinary residence would be the country to which he would naturally return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home."[81]

Goldstone JA emphasised the main object of the legislature in offering exemptions from taxation in section 10 of the Act[82] was to convince international investors to keep investing money in the RSA. He furthermore held that it was pointless to decide whether a person may not be held to be an ordinarily resident in more than one country at the same time. Goldstone JA underlined that there was no need to give the phrase "ordinarily resident" an extended meaning.[83]

Goldstone JA followed the same principle that was outlined by Schreiner JA that a natural person is "ordinarily resident" where he or she holds his or her main residence and which can be considered as his or her actual home. Kuttel's three children moved to their home in the United States as soon as they graduated from school. The visits that Kuttel made to the RSA were mainly for the purpose to conduct business activities in the RSA. The home that Kuttel still owned in Cape Town did not influence the fact that his primary residence was in the United States.[84]

Goldstone JA concluded that the judgement of the Court a quo was correct and that the respondent, at the relevant times, was indeed not ordinarily resident in the RSA. Goldstone JA dismissed the Appeal with costs.[85]

2.3.3 Critical discussion

The abovementioned two court cases are considered as the two most crucial court cases when the question of residence is raised and sets the benchmark to determine the residence of a taxpayer.[86]

In the current modern world, we live in, individuals tend to move more around the world and earn income from various sources. It is thus important to determine the locus of the primary taxing rights as it is not a secret that individuals became less certain of which country has the primary taxing rights on the income received from the various sources. The definition of the relevant jurisdiction

81 (1992) 54 SATC 305.
82 *ITA* 58 of 1962.
83 (1992) 54 SATC 306.
84 (1992) 54 SATC 306.
85 (1992) 54 SATC 307.
86 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 1.

needs to be considered to determine whether that individual can be considered a tax resident of that jurisdiction.[87]

Arendse, Stark and Renaud hold that "the judgment in the Cohen case also established the principle that the question of whether an individual is ordinary resident in a particular country during a year of assessment is not to be determined solely by his actions during that year of assessment as contended by Cohen, but evidence as to his mode of life over a longer period outside that year of assessment must be considered."[88]

Schreiner JA did not specifically make a ruling on the interpretation that a person can have more than one residence and remain ordinarily resident in one country, however, Schreiner JA did emphasise that he was in favour of the interpretation. The judgment made by Schreiner JA in the Cohen case has been cited subsequently in many cases dealing with this question of the residence of a taxpayer.[89] The RSA Supreme Court of Appeal has not made any ruling since the Cohen case and many judgments have supported Schreiner's view *obiter.*[90] Arendse, Stark and Renaud agree that "the key principle of the Cohen Judgement was that although Cohen was not physically present in the RSA during the years of assessment that were in question, the evidence still indicated that his intention was to return to the RSA after his time in America, which made the RSA the place to which he would return after his wanderings."[91]

Both the Kuttel and Cohen cases had relevance to the concept of "ordinarily resident" in the framework of a source-bases tax system. However, the term has a different meaning in the current RSA residence-based tax system which depend primarily on the meaning of "resident" and whether a natural person is an "ordinary resident" as per the meaning of "resident" as defined in the Act and mentioned in paragraph 2.2 above.[92]

SARS Interpretation Note 3 (hereinafter referred to as "the Interpretation Note") emphasizes that the phrase "ordinarily resident" must not be mistaken with "domicile", "nationality", and the perception of "emigration" for exchange control purposes.[93]

---

87 J. Arendse, K. Stark & C. Renaud -*The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 2.
88 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 6.
89 *Including CIR v Kuttel* (2019) 54 SATC 298, *Nahrungsmittel GmbH v Otto* (1993) 1 All SA 456 (A), *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* (1994) 2 All SA 33 (A) and *H v D* (2010) 2 All SA 55 (WCC).
90 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 6.
91 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 7.
92 J. Arendse, K. Stark & C. Renaud - *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 12.
93 SARS Interpretation Note 3 (Issue 2) *Resident: Definition in relation to a natural person – ordinarily resident* 5. Interpretation notes are drawn from various international judgements in which specific characteristics have

The Interpretation note outlines the difficulty to lay down fixed rules.[94] Therefore, SARS provided the following list of factors to consider when evaluating whether a natural person is in fact an ordinarily resident in RSA:

i. "The intention to be an ordinarily resident in RSA.
ii. Most fixed settled place of residence.
iii. Place of business and personal interest of the taxpayer and his/her family.
iv. The taxpayer's present habits and mode of life.
v. Employment and economic factors.
vi. The status of the individual in South Africa.
vii. The person's nationality.
viii. The location of the natural person's personal belongings.
ix. Family and social relations.
x. Political, cultural, and other activities.
xi. Application for permanent residence or citizenship.
xii. Period abroad, purpose and nature of visits; and
xiii. Frequency of and reasons for visits." [95]

The list provided above should be considered as a guideline as this is not intended to be exhaustive. The circumstances of the taxpayer must be investigated in full together with the applicable year of assessment. The taxpayer's mode of life before and after the period in question must be taken into consideration.[96]

SARS updated the abovementioned interpretation note by adding objective factors to the list to change the approach that SARS had when determining if a person is ordinarily resident.[97] The following objective factors were added to the list:

i. "The taxpayer's intention to be ordinarily resident in the RSA.
ii. The taxpayer's place of business and personal interest was previously listed as a factor, but this factor is now extended to apply to the taxpayer's family members as well.
iii. Employment and economic factors.
iv. The factor for an application for permanent residence is now expanded to include an application for citizenship." [98]

---

been identified and which provide guidance in resolving questions in law although the interpretation notes are not legally binding in law.
94 SARS Interpretation Note 3 (Issue 2) *Resident: Definition in relation to a natural person – ordinarily resident* 5.
95 SARS Interpretation Note 3 (Issue 2) *Resident: Definition in relation to a natural person – ordinarily resident* 5.
96 SARS Interpretation Note 3 (Issue 2) *Resident: Definition in relation to a natural person – ordinarily resident* 6.
97 Tax Consulting South Africa (2019) 68.
98 Tax Consulting South Africa (2019) 68-69.

Tax Consulting agrees with the amended list made by SARS and notes that the application for permanent residence or citizenship is interesting, and they strongly agree with the amendment as this factor is especially important when determining if a person is an "ordinarily resident."[99]

In *H v Commissioner of Taxes*[100] the court replicated the same approach with the obiter comments in the Cohen's case when determining ordinary residence and held that:

> "where one's permanent place of abode is, was where one's belongings were sorted which one left for temporary absences, and to which one regularly returned after such absences."[101]

Meyerowitz outlined the fact that it is possible for a natural person to have a mode of life which creates uncertainty whether that person has a real home anywhere.[102] In such a case Meyerowitz is of the opinion that a natural person would be able to discharge the responsibility of proving that he or she is not ordinarily resident in RSA. Furthermore, Meyerowitz made the expression that "the determination of the country in which a natural person is an ordinarily resident is a factual determination, and the taxpayer's circumstances before and after the years of assessment must be considered."[103]

A natural person can still fall within the definition of a resident as defined in Section 1 of the ITA[104] even though the natural person did not meet the requirements of the ordinarily presence test, but only if the natural person meet the requirements of the physical presence test. The physical presence test is also known as the "day test" or "time rule." It is built on the number of days a natural person is physically present in the RSA. The test must be applied annually and the purpose or nature of a person's travels to the RSA is irrelevant for the purposes of the physical present test.[105]

Arendse, Stark and Renaud outlined that there are numerous difficulties when defining a natural person's place of ordinary residence, and it has become a further important focus point over the past years.[106] They state the following question:

99 Tax Consulting South Africa (2019) 69.
100 1960(2) SA 695 (SR), 23 SATC 292.
101 Tax Consulting South Africa (2019) 66.
102 D Meyerowitz *Meyerowitz on Income* Tax 2003 – 2004 The Taxpayer in paragraph 5.17.
103 D Meyerowitz *Meyerowitz on Income* Tax 2003 – 2004 The Taxpayer in paragraph 5.17.
104 58 of 1962.
105 SARS Interpretation Note 4 (Issue 5) *Resident: Definition in relation to a natural person – physical presence test* 2.
106 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 15.

> "Is it still appropriate to be relying in case law principles established in the Cohen and Kuttel cases many decades ago, or is it time to introduce more specific and objective residence rules into the South African legislation to provide certainty for taxpayers and tax authorities alike."[107]

Arendse, Stark and Renaud noted that both Cohen and Kuttel cases dealt with "outward-bound expatriates", which can be defined as individuals who move from their country of birth to another country.[108] Arendse is of the opinion that the current meaning of "resident" is more explanatory in the case of outward-bound expatriates than in-ward expatriates, and the physical presence test is a more objective test.[109]

The physical presence test is included in the second part of the definition of a resident that reads as follows:[110]

> "The 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."[111]

A natural person who meets all the above requirements will be considered as a resident, for tax purposes, in the RSA. It is important to note that the word exceeding is used in the definition and the implication thereof that a person must be in the Republic for at least 92 days every year and 916 days in aggregate over the five-year period.[112]

The word day is not specifically defined in the ITA[113], therefore SARS defined a day in their interpretation note as starting at 00:00 and ending at 24:00.[114] Furthermore, SARS notes that "a person who arrives at 23:55 would thus be regarded as being physical present in the Republic for one day, even though that person was only present for five minutes of that day."[115]

---

107 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 15.
108 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 15.
109 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 15.
110 Section 1 of the ITA 58 of 1962.
111 Section 1 of the ITA 58 of 1962.
112 SARS Interpretation Note 4 (Issue 5) *Resident: Definition in relation to a natural person – physical presence test* 2.
113 58 of 1962.
114 SARS Interpretation Note 4 (Issue 5) Resident: Definition in relation to a natural person – physical presence test 2.
115 SARS Interpretation Note 4 (Issue 5) *Resident: Definition in relation to a natural person – physical presence test* 2.

Arendse, Stark and Renaud are of the opinion that the definition of "resident" as defined in the ITA does not provide enough clarity for outward-bound expatriates, as the definition does not clarify precisely when a person ceases to be ordinarily resident in the RSA.[116] Olivier[117] is of the opinion that a loophole exists in the Act as the ACT does not stipulate that a person remains ordinarily resident until such time that he or she acquires a new place of ordinary residence.[118] A need exists for the definition of "resident" to be elaborated to perhaps include a certain time-based rule that would be more appropriate for the current modern times.[119]

Arendse, Stark and Renaud emphasised that the current 21st century are significantly different to the circumstances and conditions between the 1940s and the 1980s when the activities arose in the Cohen and Kuttel cases.[120] The number of expatriates and "multinational" individuals with houses, families and business interest have increased significantly and therefore the application of the "ordinary residence" rule is very difficult and important. The application now requires more knowledge about the person's intention in a country to determine ordinary residence in a country. Arendse, Stark and Renaud is of the opinion that the time has come to re-evaluate the definition of "residence" and even more so, the constant use of the factual "ordinary residence" principles, especially when considering the current challenges that the RSA economy is facing.[121]

2.4 What is the position in respect of residents earning employment income abroad?

The amendment of Section 10(1)(0)(ii) of the ITA[122] changed the position of residents earning employment income abroad from the income being fully exempt to only exempting the first R1 250 000.00 earned while working outside the RSA.[123]

The exemption only applies if the following requirements are met:

i. The RSA tax resident must be physically outside of the RSA for 183 days in aggregate during any 12-month period; and

116 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 16.
117 Olivier, L. *Residence Based Taxation,* Journal of South African Law (2001) at 25.
118 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 16.
119 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 16.
120 J. Arendse, K. Stark & C. Renaud *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 21.
121 J. Arendse, K. Stark & C. Renaud, *The Cohen and Kuttel stories: Is the place where I hang my hat still relevant to determine my residence for tax purposes?* (2015) 21.
122 58 of 1962.
123 Section 10(1)(o)(ii) of the *ITA* No. 58 of 1962.

ii. During that 183-day period outside the RSA, at least 60 days must be spent continuously outside the RSA.[124]

However, if a taxpayer paid taxes in a foreign country relating to the foreign employment income in excess of R1 250 000.00,[125] then the taxpayer can claim foreign tax credits in terms of section 6*quat*[126] of the ITA.[127]

2.5 Conclusion

The determination of an individual's residency status is a crucial factor as it is the first point of departure when it comes to the determination of an individual's tax obligations in a certain country. Residence in RSA is the basis on which tax liability is calculated.

In terms of the ITA[128] the individual's status is dependent on whether an individual is an 'ordinary resident' in the RSA, or a resident based on him/her being physically present in the country for certain periods. The 'ordinary resident test' is the one where the taxpayer can prove that he/she is a resident for tax purposes in RSA and meets the objective test.

It is therefore critical for an individual to be aware of the nature and location of his/her affairs to determine whether he/she can be regarded as a resident for tax purposes in the RSA.

124 Investec *Home and away – How new tax law will affect South Africans earning income abroad* (2019) 2.
125 Investec *Home and away – How new tax law will affect South Africans earning income abroad* (2019) 8.
126 Section 6quat of the Income Tax Act can be used to grant a rebate against normal tax in respect of certain other taxes paid by the taxpayer on amounts included in his or her taxable income. The rebate is however limited to the amount of normal tax which is attributable to the inclusion of the relevant amounts. It is important to consider a DTA concluded between the RSA and the other country to determine the relief granted in the DTA in respect of foreign taxes paid, subject also to the relief being limited to the amount of normal tax attributable to the inclusion of the income subject to the foreign tax.
127 58 of 1962.
128 58 of 1962.

CHAPTER 3: THE SCOPE OF THE AMENDMENT OF SECTION 10(1)(o)(ii) OF THE ITA[129]

3.1 Introduction

The exemption provided for in section10(1)(o)(ii) was initially introduced in 2000 to ensure that an individual does not get double taxed on his / her income between RSA and a host country.[130] It does however happen where the host country imposes very little or no tax on employment income that results in double non-taxation which is actually an unintended result of the exemption. Consequently, the legislator monitored the exemption with the specific focus on whether the exemption results in no foreign tax on foreign employment income.[131]

As mentioned in Chapter 1 and 2, section 10(1)(o)(ii)[132] was amended with effect from 1 March 2020 in that only the first R1.25 million of income earned from foreign employment earned by a tax resident of RSA is tax exempt in the RSA.[133] Thus, any foreign remuneration income above R1.25 million will be subject to normal tax rates for the year of assessment. In this chapter, the amended section 10(1)(o)(ii) is discussed in depth.

3.2 Current Section 10(1)(o)(i) and(ii)[134]

Section 10(1)(o)(i) and (ii) reads as follows:

"*10. Exemptions:*

(1) There shall be exempt from normal tax –

…….

(o)Any form of numeration-

(i) As defined in paragraph 1 of the Fourth Schedule, derived by any person as an officer or crew member of a ship engaged-

(aa) in the international transportation for reward of passengers or goods, or

(bb) in the prospecting, exploration or mining (including surveys and other work of a similar nature) for, or production of, any minerals (including natural oils) from the seabed outside the Republic, where such officer or crew member is employed on board such trip solely for purposes of the 'passage' of such ship, as defined in the Marine Traffic Act, 1981 (Act No. 2 of 1981).

129 58 of 1962.
130 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income 1*.
131 SARS Interpretation Note 16 (Issue 3) *Exemption from Income Tax: Foreign Employment Income* 1.
132 ITA 58 of 1962.
133 SARS Interpretation Note 16 (Issue 3) *Exemption from Income Tax: Foreign Employment Income* 1.
134 *ITA* No58 of 1962.

If such person was outside of the Republic for a period or periods exceeding 183 full days in aggregate during the year of assessment.

(iA) as defined in paragraph 1 of the Fourth Schedule, derived by any person as an officer or crew member of a South African ship as defined in section 12Q(1) mainly engaged-

(aa) in international shipping as defined in section 12Q(1); or

(bb) in fishing outside the Republic;

(ii) Received by or accrued to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in paragraph (i) of the definition of gross income in section 1 or any amount referred to in section 8, 8B or 8C in respect of services rendered outside the Republic by that employee for or on behalf of any employer if that employee was outside the Republic-

(aa) for a period or periods exceeding 183 full days in aggregate during any period of 12 months; and

(bb) for a continuous period of exceeding 60 full days during that period of 12 months,

And those services were rendered during that period or periods: Provided that-

(A) For purposes of this subparagraph, a person who is in transit through the Republic between two places outside the Republic and who does not formally enter the Republic through a port of entry as contemplated in section 9(1) of the Immigration Act, 2002 (Act No. 13 of 2002) or at any other place as may be permitted by the Director General of the Department of Home Affairs in terms of that Act, shall be deemed to be outside the Republic.;

(B) The provisions of this subparagraph shall not apply in respect of any remuneration –
(AA) derived in respect of the holding of a public office contemplated in section 9(2)(g); or
(BB) received by or accrued to any person in respect of services rendered or work or labour performed as contemplated in section 9(2)(h); and

(C) For the purposes of this subparagraph, where remuneration is received by or accrues to any employee during any year of assessment in respect of services rendered by that employee in more than one year of assessment, the remuneration is deemed to have accrued evenly over the period that those services were rendered."[135]

135 Section 10(1)(o)(i) and (ii) of the *ITA* 58 of 1962.

3.3 Exemption of foreign employment income – subparagraph (ii)[136]

The abovementioned amendment of the foreign employment exemption encompasses several elements which imposes a set of criteria to be met for this provision to apply.[137] The criteria can be summarised as -

i. The taxpayer must have earned a certain type of remuneration.
ii. The remuneration earned must have been earned in respect of services rendered.
iii. The remuneration must have been earned under an employee relationship;
iv. Outside the RSA;
v. The taxpayer must have been physical present outside the RSA for certain prescribed periods.[138]

It is crucial to understand each element of the criteria and, therefore, it is discussed in more detail below:

3.3.1 Remuneration

By preceding the word 'remuneration' with the word 'any,' it is intended to widen the scope of the definition and, therefore, goes beyond the definition contemplated under the Fourth Schedule to the Act and encapsulates any amount received for services rendered or work performed.[139]

When this definition was first introduced, it applied to both subparagraph (i) and (ii). However, the Legislature noted this wide application and the Revenue Laws Amendment Act[140] amended the preceding wording to the section and read "any remuneration as defined in paragraph 1 of the Fourth Schedule".

The Explanatory Memorandum explained the amendment even further:[141]

> "The proposed legislation therefor serves to clarify that the exemption only applies to "remuneration" as defined in the Fourth Schedule.'

It is now clear that the exemption under Section 10(1)(o) only pertains to remuneration as defined by the Fourth Schedule.[142]

3.3.1.1 Limitations under subparagraph (ii)

The explanatory memorandum states the following:

136 Section 10(1)(o)(ii) of the *ITA* 58 of 1962.
137 Tax Consulting South Africa (2019) 331.
138 Tax Consulting South Africa (2019) 332.
139 Tax Consulting South Africa (2019) 332.
140 No 74 of 2002.
141 Explanatory Memorandum to the Revenue Laws Amendment Bill, 2002.
142 Tax Consulting South Africa (2019) 332.

> "Furthermore, it is proposed that the ambit of the exemption be limited to specific types of remuneration for services rendered and not to all types of income included in the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act. As the requirements of the subsection are that the remuneration must be for services rendered while outside the Republic, amounts, for example, referred to in paragraph (d) of the definition of "gross income" will not fall within the exemption as they are not paid for services rendered." [143]

Therefore, remuneration under subparagraphs (i) and (iA) has the same meaning as stated in paragraph 1 of the Fourth Schedule.[144]

However, under subparagraph (ii) "remuneration" is now limited to amounts received by or accrued to a taxpayer by specific means, and it does not follow the same elements of remuneration under the Fourth schedule.

3.3.2 Services rendered

The term 'in respect of' imposes a requirement of causality between the amount received and the services rendered by the taxpayer. Therefore, there must be a sufficient causal relationship between the amount received and the services rendered by the taxpayer.[145]

To test if this above requirement is met the following question can be asked:

i. What was the quid pro quo given by the employee to receive the amount in question?
ii. The requirement of causality will only be met if the question to this answer is that the amount was received by or accrued to the employee for the services rendered by the employee.[146]

Subsequently, subparagraph (ii) now makes express provision for certain amounts that would qualify for the exemption, the requirement of causality has the effect that even though an amount is included under subparagraph (ii), such amount may still not qualify for the exemption if it is not received in respect of services rendered.[147]

The following amounts form part of subparagraph (ii) as qualifying amounts:[148]

i. "Salary;
ii. Leave pay;
iii. Wage;
iv. Overtime pay;

143 Explanatory Memorandum to the Revenue Laws Amendment Bill, 2007.
144 Tax Consulting South Africa (2019) 332.
145 Tax Consulting South Africa (2019) 333.
146 Tax Consulting South Africa (2019) 333.
147 Tax Consulting South Africa (2019) 334.
148 Section 10(1)(o)(ii) of the *ITA* No. 58 of 1962.

v. Bonus;
vi. Gratuity;
vii. Commission;
viii. Fee;
ix. Emolument or allowance for services rendered;
x. Any amount referred to in paragraph (i) of the definition of gross income in Section 1;
xi. Any amount referred to in section 8[149], 8B[150] or 8C"[151].

The following type of remuneration falls under the Fourth Schedule, and by implication under subparagraph (i) and (iA), but are excluded from subparagraph (ii):[152]

i. "pension amounts;
ii. superannuation allowances;
iii. retirement allowances;
iv. stipend;
v. annuities as contemplated under paragraph (a) of the definition of gross income;[153]
vi. any amount received for restraint of trade payments;[154]
vii. amounts in respect of relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment to any office or employment as contemplated by paragraph (d)(i) of the definition of Gross income;[155]
viii. Amounts received in respect of proceeds of insurance policies in terms of paragraph (d)(ii) of the definition of gross income;[156]
ix. Amounts in pension and provident funds as contemplated under paragraph (eA) of the definition of gross income;[157]
x. Amounts received or accrued in commutation of amounts due under any contract of employment, as contemplated by paragraph (f) of the definition of gross income[158], and

149 Income Tax Act 58 of 1962, this section regulates the taxable income of allowances and advances.
150 Income Tax Act 58 of 1962, this section regulates the taxable income of amounts derived from broad-based employee share plans.
151 Income Tax Act 58 of 1962, this section regulates the taxable income of amounts derived from the vesting of equity instrument – will be discussed in more detail in paragraph 3.5.5 of this dissertation.
152 Income Tax Act 58 of 1962, Tax Consulting South Africa (2019) 335.
153 Subparagraph (a) of the definition of gross income.
154 Subparagraph (a) of the definition of gross income.
155 The Explanatory Memorandum to the Revenue Laws Amendment Bill, 2007, specifically notes that these amounts are excluded.
156 Subparagraph (a) of the definition of gross income.
157 Subparagraph (a) of the definition of gross income.
158 Subparagraph (a) of the definition of gross income.

Certain types of dividends are included under the Fourth Schedule."[159] **Practical example of the above as provided by Tax Consulting:**[160]

i. Taxpayer A is an employee of Company B and was assigned to perform employment services in a country with which RSA has not concluded a Double Tax Agreement. A has been performing the services for the past fifteen years, despite his prolonged assignment A has remained 'ordinarily resident' in RSA. Ordinarily resident was fully discussed in Chapter two of this dissertation.

ii. A is entitled to overtime pay and receives commission where certain sales targets are achieved. A is turning 65 years old in the 2019/2020 year of assessment and plans to retire on 29 February 2020. However, before A retires, Company B informs A that they are restructuring due to operational requirements and that he will be retrenched, effective from 31 October 2019.

iii. A has met the requirements of subparagraph (ii) every year since commencing the assignment, including the 2019/2020 year of assessment. During the 2020 year of assessment, Taxpayer A received the below amounts from Company B and seeks advice hereon:

   a. Cash salary of R4 million;
   b. Accrued leave pay of R70 000.00;
   c. Overtime pay to the amount of R100 000.00;
   d. Commission to the amount of R300 000.00'
   e. A portion of A's remuneration package, in addition to his cash salary, includes a company vehicle with an annual determined value of R90 000.00;
   f. A is part of an employee share scheme and during the 2020 year of assessment his allotted shares will become unrestricted. The gain of the shares is R500 000.00;
   g. A received a retrenchment package of R350 000.00;
   h. A received a performance bonus to the amount of R300 00.00;
   i. A received an end-of-service bonus to the amount of R300 000.00;
   j. A received R2 million which constitutes one-third of his company pension.

159 This means the dividends received or accrued in respect of a restricted equity instrument as defined in section 8C and dividends received by or accrued to a person in respect of services rendered or to be rendered or in respect of or by virtue of employment or the holding of any office. Subparagraph (g) of the definition of renumeration contains more detail.
160 Tax Consulting South Africa (2019) 336-337.

Result

i. Items a to d are exempt from A's taxable income as all four items are expressly included and accrues to A in respect of services rendered, as fully discussed above in paragraph 3.3.2.1.

ii. Item e is also exempt as the vehicle will be a fringe benefit for purposes of paragraph (i) of the definition of 'gross income' which forms part of his remuneration package. Amounts under paragraph (i) are expressly included under the exemption and are received in respect of services rendered.

iii. Item f will also be exempt, and the amount will constitute an amount derived under section 8C of the Act, which is expressly included and accrues in respect of services rendered. See paragraph 3.5.5 for a more fully explanation on how Section 8C works.

iv. Item g is not exempt as the retrenchment package falls under subparagraph (d)(i) of the definition of 'gross income' which amounts do not form part of renumeration for purposes of the exemption.

v. Item h is exempt as bonusses are expressly included under the exemption and this performance bonus is paid in respect of services rendered.

vi. Item i is not exempt as this particular bonus is not paid in respect of services rendered and will fall under subparagraph (d)(i) of the definition of 'gross income' which amounts to not form part of renumeration for the purposes of the exemption.

vii. Item j is not exempt as the retrenchment package falls under subparagraph (d)(i) of the definition of 'gross income' which amounts to not form part of renumeration for the purposes of the exemption.

3.3.3 Employment relationship

As previously mentioned, for the exemption to qualify, the services must be rendered by an 'employee' to or on behalf of 'any employer.' The question that arises is if one should consider the

ordinary meaning of the words or consider the definitions provided for under the Fourth Schedule to the Act.[161]

Both words (employer and employee) are preceded with the word 'any,' which widens the definitions to fall beyond the definitions in the Fourth Schedule. Therefore, I believe that the ordinary meaning of 'employee' an 'employer' must be considered.[162]

SARS defines the term "employee" as follows:

> *"The term "employee" must be given its ordinary meaning. An "employee" under the common law excludes an independent contractor or self-employed person."*[163]

Furthermore Section 213 of the Labour Relations Act[164] defines an employee as "anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer".

The most important aspect of this part of the definition of the exemption is that the remuneration must have been earned in respect of services rendered under an employment relationship. The onus is on the employer to prove to SARS that such an employment relationship exists.[165]

The following examples can be used as proof of the employer relationship and will be accepted by SARS:[166]

i. A work permit issued to the employer and will support an employment relationship.
ii. The contract between the employer and employee must be in writing.
iii. Contributions to the foreign country's social security system under employment rules.
iv. Alignment of employment contract with earnings per bank statements will support an employment agreement.
v. Confirmatory letter by employer to support relationship.

161 Tax Consulting South Africa (2019) 337.
162 Tax Consulting South Africa (2019) 337.
163 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 3.
164 66 of 1995.
165 Tax Consulting South Africa (2019) 337.
166 Tax Consulting South Africa (2019) 338.

3.3.3.1 Practical Example as provided by Tax Consulting[167]

i. Mr Paul Visser ("Paul") is a freelance civil engineer and won a tender to design and oversee the construction of 7 amusement parks in Gorgia for Build-It-Anywhere ('BIA'), a property developer company. This tender was won during the 2020 year of assessment. Paul was not required to adhere to BIA's onsite safety requirements while rendering his services and Paul invoiced BIA once the work was completed.

ii. The relationship between Paul and BIA is one of an independent contractor and client, therefor Paul is unable to utilise section 10(1)(o)(ii) exemption on any amounts received for the services rendered to BIA.

3.3.3.2 Employees expressly excluded

The following two categories of employees are expressly excluded from the exemption:

1. "The recipient has been appointed or is deemed to have been appointed in terms of the Act of Parliament[168] and derived remuneration thereof; or
2. Remuneration received in respect of services rendered to an employer:
   2.1 in the national, provincial, or local spheres of government of the RSA,
   2.2 that is a public entity listed in schedule two and three to that Act; or
   2.3 that is a municipal entity as defined in section 1 of the Local Government Municipal systems act." [169]

3.3.3.3 Non-resident employer

The residency status of the employer has no bearing on the applicability of the Section 10(1)(o)(ii)[170] exemption as the exemption contains a wide meaning by making use of the words 'any employer'.[171]

SARS acknowledges the implication of the wide meaning of the words 'any employer' as set out in the Section 10(1)(o)(ii) exemption and therefor provides the following explanation of the wider definition of 'any employer':[172]

> "the term 'any employer' means that services rendered to resident or non-resident employers could qualify for exemption."

167 Tax Consulting South Africa (2019) 338.
168 In terms of section 9(2)(g).
169 Tax Consulting South Africa (2019) 338.
170 ITA No. 58 of 1962.
171 Tax Consulting South Africa (2019) 339.
172 Tax Consulting South Africa (2019) 339.

Practical example as provided by Tax Consulting[173]

i. The same company is used as in example 3.3.2.1 and is this scenario the company is situated and resident in New York in USA. Paul is a South African resident and employed by BIA as a quantity surveyor, as stated on his employment contract. Vincent was seconded by BIA to assist with the construction of a hospital during the 2018 year of assessment. BIA's employment contract stipulates that employee may be required to render services worldwide. Paul was required to be on site for at least 7 months due to the magnitude of the project.

ii. Paul can apply the section 10(1)(o)(ii) exemption to his 2018 remuneration, provided that he has met all other requirements. Even though BIA is a non-resident employer, the exemption will be applicable where the employer-employee relationship exists, regardless the residency of the employer.

3.4 Outside the Republic

Section 1 of the Income Tax Act defines the "Republic" as follows[174]:

> "The Republic of South Africa and, when used in a geographical context, included the territorial sea thereof, as well as any area outside the territorial sea which has been or may be designated under international law and the laws of South Africa. This also includes designated areas within which South Africa may exercise sovereign rights or jurisdiction for the exploration of natural resources."

The above definition incorporates the land area of RSA as well as the territorial waters,[175] which can be defined as the area of sea adjoining the land area, but it cannot be more than +/- 22.2 km outside the boundaries[176] of the country.

The above definition also includes the areas outside the territorial water which falls under international and domestic law. The RSA is allowed to exercise its sovereign rights in respect of the exploration or exploitation of natural resources in the exclusive economic zone and on the continental shelf.[177]

173 Tax Consulting South Africa (2019) 339.
174 58 of 1962.
175 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 3; Defined in Section 4 of the Maritime Zones Act 15 of 1994 (MZA), that is aligned with what constitutes a State's territorial sea under international law.
176 Defined in Section 2 of the MZA and Article 3 of UNCLOS.
177 SARS Interpreation Note 16 (Issue 4) *Exemption from Income Tax: foreign Employment Income* 3.

The exclusive economic zone is described as the area +/- 370.6 km from the baselines. The continental shelf is defined as the area which extends to the outer edge of the continental margin, or 200 nautical miles from the baselines, whichever is bigger.[178]

The above will be seen as factors to consider when deciding whether a person rendered services outside or inside the RSA[179] for purposes of section 10(1)(o)(ii).[180] For example, the income will not qualify for the section 10(1)(o)(ii) exemption[181] if a resident's employment income was earned by rendering services in relation to the exploration or exploitation of natural resources and if the services was rendered outside South Africa's territorial seas but within the exclusive economic zone or on the continental shelf.[182]

3.4.1 In Transit Travel

This factor to consider in relation to "outside the Republic" was included to be aligned with the application of the physical presence test, as explained by the Explanatory Memorandum to the Bill.[183]

If a person is in transit through the RSA and does not formally enter the RSA through a border post, then that person will also be considered to be outside the RSA.[184] In simpler terms the point of departure and destination of the journey that is being undertaken must be outside the borders of the RSA.[185]

It is important to note that the taxpayer carries the onus to proof that he/she has not been physically present in the RSA during the periods in which they have been in transit.[186] SARS usually accepts the passport of the taxpayer which contains an "in transit" stamp, as proof of absence.[187]

3.5 Physical presence outside the Republic for prescribed periods

The last factor to be met to qualify for the section 10(1)(o)(ii) exemption is the "days test". This test relates to the taxpayer being physically present outside the Republic for certain prescribed periods. It is vital to note the difference between the factor that requires the services to be rendered outside the Republic and the days test.[188]

178 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 3
179 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 4.
180 58 of 1962.
181 Tax Consulting South Africa (2019) 340.
182 Tax Consulting South Africa (2019) 340.
183 Tax Consulting South Africa (2019) 340.
184 Explanatory Memorandum to the Revenue Laws Amendment Bill, 2002 at 10.
185 Tax Consulting South Africa (2019) 340.
186 Section 102 of the *Tax Administration Act* No. 28 of 2011, 96.
187 Tax Consulting South Africa (2019) 340.
188 Tax Consulting South Africa (2019) 340.

The days test comprises of the following two parts:

i. "The taxpayer must be outside the Republic for a period or periods exceeding 183 full days in aggregate during any period of 12 months; and
ii. For a continuous period exceeding 60 full days during that period of 12 months."[189]

3.5.1 Period or periods exceeding 183 full days in aggregate

i. A full day is defined as a complete 24-hour day (from 0h00 to 24h00).[190]
ii. When counting the number of days, calendar days must be considered and not only workdays. For the purposes of calculating the period or period outside the RSA, the following periods will be included: "weekends, public holidays, annual leave days, sick leave days and rest periods that a taxpayer spent outside the Republic."[191]
iii. For this requirement to be met, a total of 183 full days in any twelve-month period must be exceeded. It is not required for the183 full days to be consecutive or continuous.[192]

The SARS interpretation note provides an explanation of two scenarios – one where a person is physically outside the RSA but is unemployed, and one where a person is in employment and is working outside the RSA but is not physically rendering services.[193]

In the second scenario, it is important to note that section 10(1)(o)(ii) links the days test to a person's employment. Therefore, the days that the individual spent outside the RSA when not rendering services do not qualify as days outside the RSA. Such days will not be considered when calculating the 183 full days for purposes of the exemption.

For example, if an employee is employed on an employment contract basis and the employee enters into different employment contracts for each separate time of employment, then the employee will be considered as being unemployed for the time in-between the contracts, as no services are provided. The days will therefore not qualify under section 10(1)(o)(ii) as days outside the RSA. [194]

Where an employee is outside the RSA and remains in employment while outside the RSA, but only provides services for specified periods and then have leave periods in between, that employee will be able to claim the leave period days as days outside the RSA for purposes of the days test. A practical example will be when an employee works set shifts which rotates between time working and leave days which means that the employee renders services for a quantified number of days

189 Section 10(1)(o)(ii)(aa)-(bb) of the *ITA* No. 58 of 1962.
190 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 4.
191 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 4.
192 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 4.
193 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.
194 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.

followed by an equal number of leave days that are regularly required by local health and safety regulation. The leave periods do not intersect the continuous employment contract and will thus be included as days in the days test.[195]

3.5.2 Continuous period exceeding 60 full days

This requirement entails that of the period exceeding 183 full days, a person must have also provided services outside the RSA for a period above 60 full days unbroken in the same period of twelve months.[196]

For example: The same period of twelve months must be used to calculate both the period or periods above 183 full days in total outside the RSA, as well as a uninterrupted period above 60 full days outside the RSA.[197]

The word exceeding that is used in the definition does not mean that the period of 60 full days must be exceeded by a full day, and a few minutes or hours will be sufficient.[198]

3.5.3 During any period of twelve months

The exemption will apply when the days test was satisfied throughout "any period of twelve months." However, the phrase "month" is not outlined in the Act.[199] The Interpretation Act provides, that unless the situation otherwise demands, the phrase "month" in any law can be defined as a "calendar month".[200]The Oxford dictionary describes a calendar month as either "one of the twelve named portions into which a calendar year is divided, or it could mean a period of time which is calculated from a date in one month to the same date in a successive month".[201]

SARS is of the opinion that there are no clear indications in the context of section 10(1)(o)(ii) that there was a limited meaning to a calendar month intended.[202] The use of the phrase "any" preceding the phrases "period of twelve months" implies that the meaning should be expanded rather than confined.[203] Tax consulting agrees with SARS and further comments that from the taxpayers perspective it means that they are at liberty to apply the days test over a period of twelve months of their choosing.[204]

195 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.
196 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.
197 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.
198 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 5.
199 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
200 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
201 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
202 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
203 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
204 Tax Consulting South Africa (2019) 342.

SARS notes that the period of 183 full days must fall within a timeframe of twelve consecutive months. A calendar year is also correct, and the twelve months does not have to be a year of assessment, as long as the period is twelve consecutive months, it will qualify.[205]

SARS provides the following practical application:[206]

i. "When identifying a period of twelve months, the period during which the services were rendered to the employer should first be identified. To determine that you look at the first day of the month in which remuneration from foreign services was received or accrued, and then working forward twelve months to determine whether the 183 day and 60 continuous days tests were met. If it was met, then the foreign remuneration will be exempt. If the days test is not met, the last day of the month in which remuneration was earned can be looked at, and then by working backwards twelve months".

Tax consulting provides another practical example:[207]

i. "A taxpayer was seconded by an RSA holding company to its German subsidiary from 1 December 2017 to 30 November 2018. The taxpayer spent 285 days in aggregate outside RSA during this period, of which more than 120 days were spent continuously.
ii. During the twelve-month period, the taxpayer met both days tests and complied with the remainder of the requirements to apply for the exemption.

205 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
206 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 6.
207 Tax Consulting South Africa (2019) 343.

iii. The twelve-month period spans over both the 2018 and 2019 years of assessment:
iv. 2018 year of assessment is from 1 December 2017 to 28 February 2018 and
v. 2019 year of assessment is from 1 March 2018 to 30 November 2018.
vi. The taxpayer would be able to apply the exemption during both the 2018 and 2019 years of assessment even though only a portion of the 12-month period falls within each of the abovementioned years.
vii. It is clear that in this instance the taxpayer applied both periods to calculate his taxable income for that year of assessment and SARS explains it further that it is not an either/or approach. Some periods can overlap as a person is entitled to look both forwards and backwards over any period of twelve months. The definition includes the word "any" which implies that the test can be conducted over any specified period".

3.5.4 Apportionment of remuneration

SARS makes the comment that taxpayers usually make the same misunderstanding in thinking that all compensation received or accrued during the qualifying period of twelve months is exempt.[208] This is incorrect as the exemption only applies to the compensation received or accrued in respect of services rendered outside RSA during the qualifying period of twelve months. Normal tax will still apply to any compensation received or accrued during the qualifying twelve months in respect of services rendered within the RSA.[209]

According to SARS, it is accepted that it is acceptable to allocate a portion of income if this portion relates to services rendered both inside and outside RSA.[210] However, no allocation will be required if the services rendered inside RSA by an individual were merely casual and accidental,[211] or subsidiary and incidental.[212] The originating causes of the employment income will then be fully outside RSA.[213]

208 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 8.
209 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 8.
210 SARS Interpretation Note 16 (Issue 4) Exemption from Income Tax: Foreign Employment Income 9.
211 ITC 77 3 SATC 72.
212 COT (SR) v Shein 1958 (3) SA 14 (FC), 22 SATC 12.
213 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 9.

SARS further notes that remuneration that qualifies for the exemption should be apportioned between services rendered inside RSA and outside RSA.[214] SARS considers the following process as the acceptable process to calculate the exempt portion of remuneration:[215]

"Work days outside the RSA for the period / Total work days for the period x Remuneration received during this period

= Exempt portion of remuneration limited to R1.25 million."

SARS provides the following practical example:[216]

i. Mia is employed by an international company which has a subsidiary branch in South Africa. Mia was requested to assist a Canadian subsidiary as the subsidiary company required someone who had specialised knowledge. Mia is scheduled to leave the RSA on 1 June 2020 to commence work on 2 June 2020. Mia will be remunerated by the Canadian subsidiary and Mia will be required to work at the subsidiary until 20 December 2020. Mia will immediately return to the RSA from Canada on the 21st of December 2020.
ii. Mia will however return to the RSA to satisfy local employment requirements during the following periods (including travel days):
iii. 22 July 2020 to 7 August 2020;
iv. 29 August 2020 to 8 September 2020; and
v. 30 September 2020 to 18 October 2020.

214 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 9.
215 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 9
216 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 9-11.

Result:

Hereunder is a table of how the amount of calendar days for which remuneration will be derived for services provided in Canada for the 2021 year of assessment will be calculated:

	Jun	**Jul**	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**	**Total**
2 June '20 to 21 July '20	29	21						50
8 Aug '20 to 28 Aug '20			24	28				52
9 Sept '20 to 29 Sept '20					21			21
19 Oct '20 to 20 Dec '20					13	30	20	63
								186

Mia will receive a total remuneration of R1 400 000.00 for the services provided during the period commencing on 2 June 2020 and ending on 20 December 2020.

As the above table indicates, Mia will fulfil the conditions of the 183-day and 60-continious day tests within a cycle of 12 months. Mia will have the following identifiable qualifying period:

i. 2 June 2020 to 20 December 2020.

ii. The following table sets out the workdays outside the RSA for the period 2 June 2020 to 20 December 2020:

Workdays during period	**Total workdays during period**	**Actual workdays outside the Republic**	**Actual workdays in the Republic**
2 June '20 to 21 Jul '20	50	50	
22 Jul '20 to 7 Aug '20	11		17
8 Aug '20 to 28 Aug '20	52	52	
29 Aug '20 to 8 Sep '20	6		11
9 Sep '20 to 29 Sep '20	21	21	
30 Sep '20 to 18 Oct '20	8		19
19 Oct '20 to 20 Dec '20	63	63	
Total	**233**	**186**	**47**

i. The percentage of Mia's compensation that will be exempt from normal tax in RSA under the exemption is calculated as follows:

ii. 186/233 x R1 400 000.00 = R1 117 596.57, however the exemption is limited to R1.25 million.

iii. Thus R282 403.43 will be subject to normal tax in the RSA.

iv. Thus, of the R1 400 000.00 remuneration earned by Mia during the Canada assignment, R1 117 596.57 relates to services rendered in Canada during the 2021 year of assessment and of that amount R 1 250 000.00 will be exempt from normal tax in RSA.

3.5.5 Gains under Section 8C and section 10(1)(o)(ii)

The provision (c) was added to subparagraph (ii) under the Revenue Laws Amendment Act to deal with the instances where remuneration is received or accrued in respect of services rendered during more than one year of assessment.[217] This amendment addresses the difficulties experienced with share option gains in particular, while it also applies to other forms of qualifying remuneration.[218]

The inclusion of a gain in income under section 8C takes place when the "vesting" of the equity instrument arises. It is important to note that the reason for the gain received is for the services provided by the employee and not the vesting of the gain.[219]

To allocate the gain between services rendered in RSA and foreign services correctly, the place where the services were rendered must be focused on, and not the place where the right to take part as offered or accepted, or the place where the employee was physically located when the vesting took place.[220]

Share schemes will be used as an example – there are generally two periods applicable to the inclusion of the gain as income which are the "vesting" period and the "lock-in" period.[221] The location of services rendered during both the "vesting" and "lock-in" period must be taken into account when

217 Explanatory Memorandum to the Revenue Laws Amendment Bill, 2007 at 60.
218 Tax Consulting South Africa (2019) 346.
219 Tax Consulting South Africa (2019) 346.
220 Tax Consulting South Africa (2019) 346.
221 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 13.

defining the period of apportionment of the gain under section 10(1)(o)(ii) and the gain is taxable in the year that it vests.[222]

The exempt portion must be determined based on the following apportionment method:[223]

"Workdays outside RSA in the sourcing period x Section 8C gain
Total workdays in the sourcing period

= Exempt portion of the gain under section 10(1)(o)(ii)"*

**For the purposes of this calculation public holidays, weekends and leave days are specifically excluded.*[224]

The sourcing period for section 8C gains will be as follows:

i. "From the first day of the "reward" period up to the date of vesting of the equity instrument under section 8C; or
ii. Form the date of grant to the date of vesting of the equity instrument, where there is simply a "lock-in" period and no "reward" period."[225]

222 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 13.
223 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 15.
224 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 15.
225 Tax Consulting South Africa (2019) 346.

3.5.5.1 Practical example as provided by Tax Consulting[226]

i. Peter who is worker of a RSA holding company, obtained 4000 shares, at R4 per share, on 1 July 2009. The shares were acquired from the RSA company by virtue of employment. Peter entered into an agreement with the RSA company which stated that Peter was not allowed to discard of the shares, up until 1 July 2014. The shares were awarded solely to preserve Peter's services.

ii. Peter provided services to a Tanzanian subsidiary company throughout the period of 1 February 2011 to 31 January 2013. Peter qualified for the section 10(1)(o)(ii) exemption for compensation received for services outside RSA, as Peter satisfied the 183-day and 60-continious day tests for this whole period.

iii. During the qualified period while Peter was in Tanzania, he provided services for a full amount of 460 actual workdays.

iv. Peter also provided services outside the Republic, throughout the lock-in period but outside any qualifying period, as follows:

v. 1 October 2009 to 30 October 2009; and

vi. 10 April 2014 to 26 May 2014.

vii. When Peter became entitled to discard of the shares, on 1 July 2014, the shares vested under section 8C, and had a market value of R40 per share. Therefor Peter made a profit of R144 000.00 (4000 x (R40– R4)).

viii. Leave days was not considered in this example.

ix. The percentage of the profit made by Peter on the vesting of the equity instruments that relates to services delivered outside the RSA during the qualifying period of 12 months is exempt from taxation under section 10(1)(o)(ii). The part that will be exempt must be calculated as follows:

a. Total workdays for the sourcing period

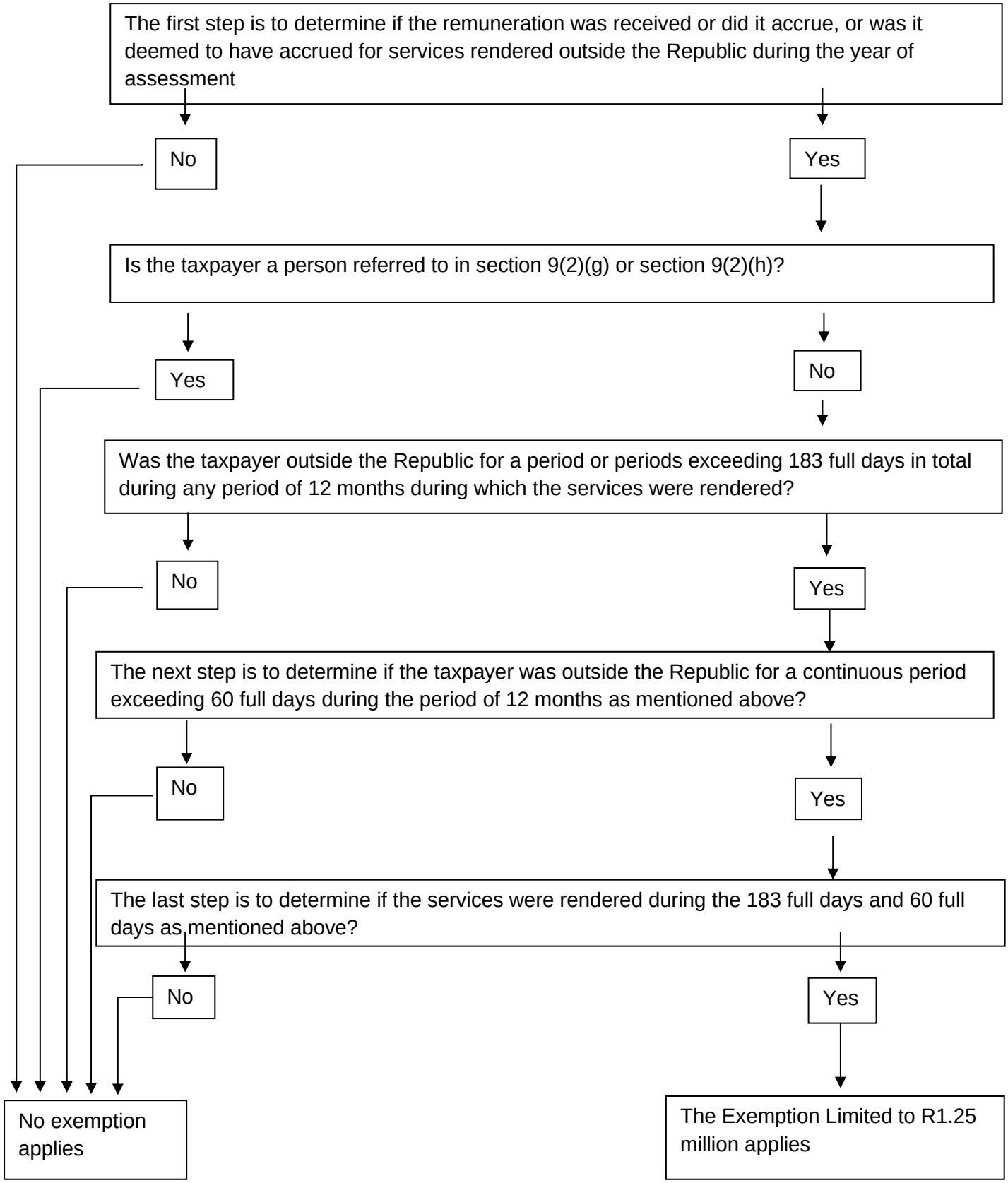
   i. = exempt remuneration under section 10(1)(o)(ii)

b. = 460/1250 x R144 000.00 = R52 992.00

   i. R144 000.00 – R52 992.00 = R91 008.00 is the balance of the section 8C gain which is still taxable in the RSA.

   ii. The periods of 1 to 30 October 2009 and 10 April 2014 to 26 May 2014, is not eligible as days outside RSA under the formula as it does not fall within the qualifying 12-month period, and the profits relating to services provided during those periods remain fully taxed.

SARS provides the following diagram for the basic steps to be followed in determining the exemption:[227]



226 Tax Consulting South Africa (2019) 347.
227 SARS Interpretation Note 16 (Issue 4) *Exemption from Income Tax: Foreign Employment Income* 19.

3.6 Conclusion

It is clear that the exemption under section 10(1)(o)(ii)[228] applies to a RSA tax resident who provides services in another country than the RSA on behalf of an employer and in terms of an employment agreement. The services must be rendered for a period longer than 183 full days in a 12-month period as well as a continuous period above 60 full days outside the RSA in the same period of 12-months. It is crucial to understand that the exemption only relates to residents of the RSA.

If all the requirements under the abovementioned exemption are fulfilled, then the resident will be eligible for the exemption of R1.25 million on any foreign employment income earned outside of the RSA. The foreign employment income higher than R1.25 million will be subject to the normal tax tables in the RSA for that particular year of assessment.

It is, therefore, crucial for the taxpayer to understand that the responsibility rests on him/her to prove that the exemption applies to his/her specific facts and failing which the exemption will not apply. Rules and interpretation of the legislation applicable to the exemption in terms of the ITA[229] should be approached in a narrow sense.

228 Of the ITA 58 of 1962.
229 58 of 1962.

CHAPTER 4: OPTIONS AVAILABLE FOR TAX RESIDENTS

4.1 Introduction

According to Jonty Leon "there are effectively three schools of thought for expatriates, excluding those who are adopting an "ostrich, head in sand" and / or "catch-me-if-you-can" approach":[230]

i. Some expatriates are starting to finalise their expatriate work and preparing to return to the RSA.
ii. Some expatriates are taking the financial emigration route which is considered as the formal SARS route which means that the tax resident's status will be changed to a non-resident of the RSA for exchange control purposes. However, your tax residency status is a separate matter and does not automatically cease in the RSA when you financially emigrate. The normal tax residence rules still needs to be applied in terms of the law.
iii. The DTA route.

This chapter provides a summary of the legal framework with regards to double taxation in the South African context and how it is included and regulated in the South African legal framework. The determination and interpretation of the legal framework is an essential building block to determine the legal status of a treaty in the RSA and more importantly if a tax resident can rely on such a DTA. Furthermore, this chapter also outlines what financial emigration consists of.

4.2 Financial Emigration

4.2.1 What is financial emigration

Financial emigration can be defined, as per website descriptions, "as a formal emigration process done through the South African Reserve Bank[231] whereafter SARS will change one's status from a resident of the RSA to a non-resident for exchange control purposes."[232] In order words it is the process of chasing one's tax residency status.[233] However, legislation still requires that the normal resident test be complied with.

230 Jonty Leon *New Tax Laws: What are SA expats' options?* 3 May 2018 Available at https://www.bizcommunity.com/Article/196/710/176640.html
231 Hereinafter referred to as SARB.
232 Hugo 2019 https://www.businesslive.co.za/bt/money/2019-04-07-unpacking-the-complex-and-costly-financail-emigration-process/.
233https://www.financialemigration.co.za/what-is-financial emigration/?campaignname=Financial_Emigration&adname=FE022_Financial_Emigration&platform=Google_Ad&adgroupid=60910695543&campaignid=606858857&marketingid=FE022&gclid=CjwKCAjwybyJBhBwEiwAvz4G75KwXjvhu84tAva7PjR0XURzqZnrQySVCUodz0PFONSfwX32bRMKjBoCwjAQAvD_BwE

All the requirements must still be met as determined in the ITA[234] to make sure that a person is a non-resident in accordance with the tax residence tests as discussed in paragraph 2.2 above.

Breytenbach and Van Zyl discuss[235] the importance between formal and informal emigration. Informal emigration can be defined as the process of moving to another country without transferring one's financial property from your home or birth country. They also make the point that when a person chose to emigrate financially it does not affect that person's citizenship or the use of his/her South African passport.[236]

4.2.2 How to Financially emigrate

On 28 February 2021, the previous Exchange Control (hereinafter referred to as "Excon") regime pertaining to South Africans emigrating from the RSA came to an end.[237] As from 1 March 2021, the South African Excon's regime no longer recognises the concept of "emigrant" or "emigration".[238] The Financial Surveillance Department of the South African Reserve Bank (hereinafter referred to as "FinSurv") issued an Excon Circular 6/2021 entitled "Emigration – phasing out the concept of emigration as recognised by the SARB".[239]

The Circular[240] states that the concept of emigration will be phased out starting from 1 March 2021 and will be changed to a verification process.[241] This means that as from 1 March 2021 all new emigration applications will now be processed by SARS in terms of a new verification process verifying that the taxpayer has ceased to be a resident for tax purposes.[242]

This means that natural person emigrants and natural persons residents will now be treated the same under the new structure.[243] Furthermore, all transfers of an emigrant's remaining assets that were previously controlled or blocked through the current process will now fall away and all transfers from these accounts will be treated as normal fund transfers.[244]

234 58 of 1962.
235 Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.
236 Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.
237 Louis Botha *Exchange control and emigration: The new dispensation* Issued 11 March 2021, 1.
238 Louis Botha *Exchange control and emigration: The new dispensation* Issued 11 March 2021, 1
239 Louis Botha *Exchange control and emigration: The new dispensation* Issued 11 March 2021, 1.
240 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 1.
241 Louis Botha *Exchange control and emigration: The new dispensation* Issued 11 March 2021, 2.
242 Louis Botha *Exchange control and emigration: The new dispensation* Issued 11 March 2021, 2.
243 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 1.
244 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 1.

SARS confirms that when it is necessary to determine whether an individual ceases to be a tax resident in the RSA, the determination will be built on the manner in which such individual has been a tax resident in the RSA.[245] If the taxpayer has been an ordinarily tax resident in the RSA, a factual enquiry will be considered by SARS. This factual enquiry entails that an investigation will be conducted to determine whether the ordinary tax resident had the subjective intention to cease to be an ordinarily resident in the RSA and no longer wishes to make the RSA his or her permanent home. SARS made it clear in their circular that a person will cease to be an ordinarily tax resident from the day that the person ceased his or her residence.[246] It is however important to note that legislation is silent in this regard besides what is stated in Section 1 of the Act.[247]

SARS published the following factors to be considered when determining whether a taxpayer has ceased to be a tax resident of the RSA:

i. "The type of visa on which the individual has gone to a foreign country.
ii. Proof of permanent residence in the foreign country.
iii. A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates that the individual is regarded as a tax resident in that country.
iv. Details of any property that the individual may still have in the RSA and the purpose for which the property is being used.
v. Details of any business interest for example any investments that the individual may still have in the RSA.
   (a) Details of the individual's family and if they are situated in the RSA.
   (b) Details of the individual's social interest and location of the individual's personal belongings.
   (c) Details of any return visits to the RSA, their frequency, and the reason for undertaking such visits."[248]

SARS further notes that if an individual, who is considered to be a resident through the physical presence test, is physically outside the RSA for a continuous period of at least 330 full days, then the individual will be considered to have ceased to be a tax resident from the day the individual decided to leave the RSA.[249] Whereas when an individual become a tax resident of another country

245 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.
246 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.
247 *ITA* No. 58 of 1962.
248 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.
249 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.

through the application of a DTA that individual will cease to be a resident for tax purposes in the RSA. DTA's will be discussed in more detail below.[250]

4.2.3 The process to be followed for an individual to cease to be tax resident

The taxpayer that wants to cease his or her tax residency, must apply to SARS by way of the following two ways:[251]

i. The taxpayer must inform SARS through the web portal on the income tax return (ITR12) that he or she is no longer considered to be a tax resident of the RSA during the current year of assessment. The taxpayer must also submit the date on which the taxpayer ceased to be a tax resident of the RSA.

ii. Alternatively, the taxpayer can submit the Declaration of Cease to be a Tax Resident to SARS. This declaration entails that the individual informs SARS that he or she has amended his or her tax residency and that the amendment will have an impact on the basis on which the individual will be taxed in the RSA. The declaration will also assist to determine how that individual's tax returns will be assessed going forward. SARS will notify the individual once the declaration is submitted of the supporting documentation that needs to be submitted by the individual to SARS to substantiate the declaration made.

4.2.4 The consequences of ceasing to be a tax resident

When a tax resident ceases to be a tax resident in the RSA, then a deemed disposal for capital gains tax purposes will take place on the date immediately before the day on which that person ceases to be a resident.[252] Section 9H(2)(j) of the ITA[253] deals with the consequences of becoming a non-resident for tax purposes and states the following:[254]

> "(2) Subject to subsection (4), where a person (other than a company) that is a resident ceases during any year of assessment of that person to be a resident –
>
> (a) That person must be treated as having –
>
> (i) Disposed of each of that person's assets to a person that is a resident on the date immediately before the day on which that person so ceases to be a resident for an amount received or accrued equal to the market value of the asset on that date; and

250 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.
251 SARS *Cease to be a resident* Issued 16 July 2021, available at https://www.sars.gov.za/individuals/cease-to-be-a-resident/.
252 Section 9H(2)(j) of the *ITA* No. 58 of 1962.
253 58 of 1962.
254 Section 9H(2) of the ITA 58 of 1962.

(ii) Reacquired each of those assets on the day on which that person so ceases to be a resident at an expenditure equal to the market value contemplated in subparagraph (i);

(b) That year of assessment must be deemed to have ended on the date immediately before the day on which that person so ceases to be a resident; and

(c) The next succeeding year of assessment of that person must be deemed to have commenced on the day on which that person ceases to be a resident.

…….

(j) disposed of each of that person's assets to a person that is a resident on the date immediately before the day on which that person so ceases to be a resident for an amount received or accrued equal to the market value of the asset on that date; and"

4.2.5 Emigration on or after 1 March 2021

The previous section B.2(J)[255] has been amended and now states the following:[256]

i. As from 1 March 2021 the previous concept of emigration as established by the FinanSurv has been phased out.[257]
ii. The difference between the RSA resident assets and non-resident assets still exists.[258]
iii. Authorised dealers may consent to the transfer the assets an individual after confirmation is received that the individual has ceased his or her tax residence in the RSA.[259]
iv. Individuals who cease to be a tax resident and who transfer less than R1 million rand per individual per year, will not require a tax compliance status (TCS).[260]
v. However, individuals who cease to be a tax resident and who transfer between R1 million to R10 million abroad, will not be able to have the funds remitted offshore without a TCS.[261]
vi. When an individual who ceases to be a tax resident transfer more than R10 million then that individual is subject to more stringent verification processes by SARS. A risk management test will have to be conducted that will include the verification of the tax status and the source of funds of the individual.[262]

255 Of the Currency and Exchanges Manual for Authorised Dealers, issued by the SARB must be read in conjunction with the Exchange Control Regulations.
256 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
257. South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
258 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
259. South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
260 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
261 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 3.
262 As prescribed in the Financial Intelligence Centre Act 38 of 2001, South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 4.

vii. All transfers of assets by an individual who ceases to be a tax resident will be transferrable, but subject to further detailed rules that are set out and discussed in detail in Circular 6.[263] For this dissertation the writer is not going to go in depth regarding the abovementioned detailed rules.

In summary, the remittance will be subject to tax compliance and in the case where more than R10 million is intended to be transferred, more stringent SARS verification processes and rules will apply.

4.2.6 Emigration on or before 28 February 2021

If the MP336 (b) form has been stamped by and Authorised Dealer on or before 28 February 2021 then the taxpayer will still be able to apply for the TCS status during the timeframe until 28 February 2022. The current exchange control emigration process will still apply to them.[264]

4.3 DTA's

4.3.1 What is a DTA

Countries enter into DTA's to prevent double taxation and fiscal evasion. DTA's also determines which country has the right to charge tax and which country must give credits for taxes paid in the other country.[265]

Vogel explains the concept of double taxation in his article as "international double taxation occurs when two or more states impose taxes on the same taxpayer for the same subject matter."[266]

One of the primary objectives of a DTA is to prevent that a single amount of renumeration or capital in the hands of one person is subject to tax twice.[267] The predominant mechanism of any DTA is the allocation of rights to tax different types of income.[268] The DTA is usually divided up into different articles that each deal with the tax treatment of specific types of income as recognised in the contracting countries, that will not be discussed in detail for the purposes of this study.

DTA's are international bilateral agreements between two states and these agreements are based on numerous model treaties.[269] The model most frequently used is the Organisation for Economic

263 South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank* Issued 26 February 2021, 4.
264 Esther Geldenhuys, Robyn Berger and Aneria Bouwer *South Africa: Exchange Control – Emigration* 3 March 2021.
265 Tax Consulting South Africa (2019) 556.
266 Vogel 'Double Tax Treaties and Their interpretation' *International Tax and Business Lawyer* 4 1 1986 4.
267 Tax Consulting South Africa (2019) 556.
268 Tax Consulting South Africa (2019) 556.
269 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 271.

Co-operation and Development.[270] The DTA is subject to the general law on treaties as codified in the Vienna Convention on the Law of Treaties,[271] as with other treaties.[272]

The two fundamental principles that permits the resident state as well as the source state to levy tax, is the "source jurisdiction" and the "residence jurisdiction".[273] The source rule stipulates that income accrues to the resident or a non-resident and the income may be taxed under the tax law of a country as a nexus exists between the country and the activities that generated the income..[274] The residence rule however stipulates that the authority to tax must lie with the state in which the taxpayer is a resident.[275] If both rules apply simultaneously then the DTA will become very important in order to prevent the taxpayer to suffer tax at both ends.[276]

4.3.2 Recognition of DTA's under the South African Law

Du Plessis is of the opinion that it is crucial to determine the process of incorporation of a DTA's, as this may affect the individuals who are permitted to rely on the DTA. The timing of such reliance and whether domestic legislation promulgated subsequently to the DTA and if there are any conflicts with the DTA is particularly important. The status of the DTA is important when assessing the process of the incorporation of DTA's in South African Law.[277]

The two following provisions are the most crucial provisions that also forms the foundation of the legislative framework in the RSA, when it comes to DTA's in South African Law:[278]

(i) Section 108 (1) and (2) of the ITA[279] states the following:

> "(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangement are made with such government with a view to the prevention, mitigation and discontinuance of the levying under the laws of the Republic and of such other country, of income tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.

270 Hereinafter referred to as the "OECD Model"
271 Hereinafter referred to as "VCLT".
272 Rohatgi, R (2005) *Basic International Taxation*, Volume 1, p 3.
273 Brian, A. & McIntyre, M (2002) International Tax Primer, p 21.
274 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 11.
275 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 19.
276 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 10.
277 I Du Plessis *The Incorporation of Double Taxation Agreements into South African Domestic Law* PER/PELJ (2015)(18)4 p 1187.
278 I Du Plessis *The Incorporation of Double Taxation Agreements into South African Domestic Law* PER/PELJ (2015)(18)4.p 1187.
279 58 of 1962.

(2) As soon as may be after the approval by Parliament of any such agreement, contemplated in Section 231 of the Constitution, the arrangements thereby shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as of enacted in this Act."

(ii) Section 231 of the RSA Constitution[280] provides the constitutional basis for the incorporation of international agreements, and reads as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3);

(3) An international agreement of a technical, administrative, or executive nature, or an agreement which does not require ratification or accession, entered into by the national executive, binds the Republic without the approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

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

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

Du Plessis,[281] Olivier and Honiball[282] agree that section 231 (2) of the Constitution[283] essentially implies that once a double tax agreement has been accepted by the National Assembly[284] and the National Council of Provinces[285] it means that the RSA is bound by such an agreement.

Du Plessis,[286] Olivier and Honiball[287] are of the opinion that DTA's concluded by the RSA are not regarded as agreements "*of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession."*

280 Of the RSA 108 of 1996.
281 I Du Plessis *The Incorporation of Double Taxation Agreements into South African Domestic Law* PER/PELJ (2015)(18)4 p 1187.
282 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 10.
283 Of the RSA 108 of 1996.
284 Hereinafter referred to as the "NA".
285 Hereinafter referred to as the "NCOP".
286 I Du Plessis *The Incorporation of Double Taxation Agreements into South African Domestic Law* PER/PELJ (2015)(18)4 p 1187.
287 Olivier, L & Honiball, M (2011) *International Tax: A South African Perspective*, p 10.

The wording of Section 108(2) of the ITA,[288] which also refers to section 231 of the Constitution[289] envisages parliamentary approval. Most authors agree that the RSA is bound to a DTA, on an international level, after a DTA has been accepted by both houses of Parliament.[290]

Section 231(4)[291] stipulates that an international agreement is considered to the part of the law in the RSA when it is endorsed into law by national legislation and furthermore states in the same provision that a self-executing provision of an agreement that has been accepted by Parliament is law in the RSA unless, it is inconsistent with the Constitution or an Act of Parliament.[292]

4.3.3 Status of DTA's

The status of DTA's in the south African context has been previously dealt with by the courts in the following two cases:

(i) Commissioner for the South African Service v Tradehold Ltd[293]

The court held that:

> "a double taxation agreement thus modifies the domestic law and will apply in preference to the domestic law of the extent that there is any conflict."

(ii) Commissioner for the South African Revenue Service v Van Kets[294]

The court held that:

> "It would thus appear as if the DTA provisions become part of domestic income laws. Given the manner in which the DTA stands to be treated in terms of Section 231 of the Constitution, its provisions must rank at least equally with domestic law, including the Act. For this reason, the provisions of the DTA and the Act, should, if at all possible, be reconciled and read as one coherent whole."

4.3.4 Interpretation of double tax treaties under general international law

It is crucial to understand the concept of the rules of interpretation under general international law. The two most important articles of the Vienna Convention on the Law of Treaties[295] are the following:[296]

---

288 Of the ITA 58 of 1962.
289 Of the RSA 108 of 1996.
290 Du Plessis '*The Incorporation of Double Taxation Agreements into South African Domestic Law*' PEJL 18 4 2015 1189.
291 The Constitution of the Republic of South Africa, 1996.
292 Du Plessis '*The Incorporation of Double Taxation Agreements into South African Domestic Law*' PEJL 18 4 2015 1189.
293 (132/11) (2012) ZASCA 61.
294 (2011) 74 SATC 9.
295 Hereinafter referred to as the "VCLT."
296 Tax Consulting South Africa (2019) 557.

(i) "Article 31 states that a treaty must be read "in good faith in accordance with its ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

(ii) Article 32 states that "recourse may have supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion".

These two articles form the basis for the interpretation of tax treaties as instruments in international law. In the court case *Krok v The Commissioner for the South Africa Revenue Service*[297] the court held that articles 31 and 32 of the VCLT are binding on the RSA and forms part of the rules of customary international law.[298]

Article 3(4) of the VCLT states that tax treaties should be interpreted in terms of the VCLT unless the contracting parties agree on a special meaning of specific terms therein. When a term is not defined in a country's domestic law, it is submitted that the term should be interpreted in the view of the VCLT.[299] The Organisation for Economic Co-operation and Development Model Tax Convention[300] and Commentary will generally be used as an additional interpretative mechanism.[301]

The Tax Court held in *AB LLC and BD Holdings LLC v The Commissioner for the South African Revenue Service* the following:[302]

> "The OECD Model, it seems, has served as a basis for many double taxation treaties concluded by South Africa and its trading partners. If any treaty contains the same article as that of the OECD Model, then it would not be uncommon to rely on the commentary of the OECD Model to interpret that model."

RSA DTA's with other countries usually reflect the provisions of the OECD Model Tax Convention for the allocation of taxing rights in respect of income and capital in specified circumstances.[303]

For this study only the following two articles of the OECD Model Tax Convention are relevant:

1. Article 1 – Persons covered

"(i) This convention shall apply to persons who are residents of one or both of the Contracting States.

(ii) For the purposes of this Convention, income derived from by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be

297 2015 (6) SA 317 (SCA).
298 Tax Consulting South Africa (2019) 557.
299 Tax Consulting South Africa (2019) 558.
300 Hereinafter referred to as the OECD Model Tax Convention.
301 Tax Consulting South Africa (2019) 558.
302 (2015) ZATC 2.
303 Tax Consulting South Africa (2019) 558.

considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that state, as the income of a resident of that State."

2. Article 4 – Residence

"(i) 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 as well as a recognised pension fund of that State. This term, however does not include any person who is liable to tax in that State in respect of only income from sources in that State or capital situated therein.

(ii) Whereby reason of the provisions of paragraph 1 and 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;

(b) If the State in which he has his centre of vital interests cannot be determined, or of 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 questions by mutual agreement."

The OECD Model Tax Convention provides for its own definition of a resident for the purposes of a DTA which also takes into consideration the domestic laws of the contracting countries thereto.[304] In short, the individual will only be regarded as resident under a DTA where that person is a resident under the domestic laws of either treaty country concerned.[305] Article 4(2)[306] provides for a tie-breaker test when there is an event of conflict to establish the residence of an individual taxpayer for purposes of a DTA that will not be discussed in detail for the purposes of this study.

304 Tax Consulting South Africa (2019) 561, Oguttu, AW (2008) "Resolving double taxation: the concept 'place of effective management" analysed from a South African perspective', *Comparative and International Law Journal of South Africa,* vol 41, pp -104, references the case CIR v Downing (1975) 37 SATC 249 where the court held that RSA is bound to take cognisance of interpretational guidelines laid down by the OECD.
305 Tax Consulting South Africa (2019) 561.
306 OECD Model Tax Convention.

4.3.5 Relief from international double taxation in DTA's

In the instance where the identical income is taxable in both the country of residence and source, the DTA should be used to determine which country will have the taxing right thereupon.[307] If both the country of residence and country of source have a taxing right, the DTA will specify which country will receive the first taxing right, which will normally be the country of source. The other country, which will normally be the country of residency will have the secondary taxing right and must give relief to the taxpayer for the taxes paid in the country of source.[308]

It is important to note that the relief mechanisms differ from treaty to treaty and the DTA must be examined in detail to determine the relief mechanisms available for the taxpayer. There are generally two types of methods available under a DTA:

i. The exemption method, which is provided for in Article 23A of the Model Tax Convention, paragraph 1, which states that "where a resident of a contracting country is subject to tax in income or capital in the other country, the other country of residence must exempt that amount."[309]
ii. The credit method is provided for under Article 23B of the Model Tax Convention and determines that "a taxpayer may deduct that portion of the taxes paid in the source country from the tax which is payable in the country of residence." This deduction is only allowable to the extent of the tax payable in the country of source.[310] A tax credit in short is a form of relief from tax liability that would otherwise apply to a taxpayer.

In the RSA, the following three different rebate methods are provided for in its domestic laws to preclude the double taxation of income:[311]

i. Section 6*quat,*[312] which provides for relief for foreign taxes verified to be payable on foreign sourced income that forms part of the taxable income of a resident;
ii. Section 6*quat*(1C),[313] provides relief for foreign taxes paid on South African-sourced income obtained from the carrying on a trade; and
iii. Section 64N,[314] offers relief for foreign taxes paid on foreign dividends by a foreign company listed on the JSE to a resident.

307 Tax Consulting South Africa (2019) 600.
308 Tax Consulting South Africa (2019) 600.
309 Tax Consulting South Africa (2019) 600.
310 Tax Consulting South Africa (2019) 601.
311 Tax Consulting South Africa (2019) 612.
312 Of the ITA 58 of 1962.
313 Of the ITA 58 of 1962.
314 Of the ITA 58 of 1962.

Section 6*quat* is the most important section for a taxpayer to consider when it comes to deductions on all foreign taxes paid by the taxpayer in the country of source, without any right of recovery on any income from the country of source.[315]

4.3.6 Conclusion

The taxpayer who seeks to emigrate to another country and to earn foreign employment income must consider to either financially emigrate or to depend on a DTA. When such a taxpayer chooses to finally emigrate the taxpayer must ensure that he/she complies with the new guidelines as issued by SARS and SARB. The taxpayer will then cease to be tax resident for exchange control purposes. The taxpayer will however still be subject to normal tax rules for example if a taxpayer moves all his or her financial affairs abroad but be sufficiently physically present in the RSA the individual will still be classified as a tax resident. It is crucial for the taxpayer to understand how financial emigration works and should be aware that financial emigration alone does not end tax residency, to ensure that the taxpayer does not get caught in pitfalls on moving abroad.

The operation of a DTA is a fundamental consideration when determining the appropriate strategy to adopt for purposes of both the avoidance and resolution of double taxation of income. As mentioned above treaties differ from each other and it is important for the taxpayer to be informed about the DTA and make sure that he/she understands the taxing rights of the resident and source country and have knowledge of any relief options available to the taxpayer when both the resident and source country has the right to tax the income received.

315 Tax Consulting South Africa (2019) 612.

CHAPTER 5: CONCLUSION

The purpose of the mini dissertation was to provide in depth research of the amendment of section 10(1)(o)(ii) of the ITA, to determine the influence it will have on tax residents earning foreign income abroad, the probability that more expats will emigrate to foreign states for tax purposes and the increase in tax residents ceasing their residency status of the RSA.

The amendment of section 10(1)(o)(ii) is only applicable to tax residents and not to non-residents as RSA's income tax system was changed in 2001 from a source-based system to a residence based-system. Therefore, one can argue that the determination of an individual's residency status is the most crucial factor as it forms the building block on which an individual's tax liability is calculated. Only residents of the RSA are taxed on their worldwide income earned abroad. The individual can determine the residency status by either the 'ordinarily resident' test in terms of the ITA or the physical present test by meeting the objective test and being physically present in the RSA for a specific period.

Before 1 March 2020, foreign employment earned by a tax resident was fully exempt. This position has since changed that any foreign income above R1.25 million will now be subject to normal taxes for the year of assessment. The exemption under section 10(1)(o)(ii) applies to the RSA tax residents who renders services outside the RSA on behalf of an employer and in terms of an employment agreement. The services must be rendered for a period longer than 183 full days in a 12-month period as well as a continuous period exceeding sixty full days outside the RSA in the same period of 12-months. It is important to understand that the exemption only applies to residents of RSA. Only once all the requirements are met will the resident qualify for the exemption of R1.25 million on any foreign employment income earned outside of the RSA.

The burden of proof rests on the taxpayer to prove that the exemption applies to his/her facts and the taxpayer needs to familiarise him/herself with the content of the exemption before planning to move overseas and to earn foreign income as the foreign income will be subject to tax in the RSA.

The amendment of section 10(1)(o)(ii) will have a significant impact on taxpayers in that it will increase the probability that more expats will emigrate to foreign states for tax purposes. Furthermore, SARS faces a tremendous challenge implementing and administering the amendment as we can see from the recent amendment of the process of financial emigration and taxpayers who want to cease their tax residency. The stringent process by SARB places a huge burden on tax residents who are desirous to financially emigrate to understand the new rules and processes to adhere to. Once again this is proof that indicates that SARS realises that more tax residents are choosing the emigration option and they are finding themselves in a situation where the amendment

will have a negative impact on the country's economy eventually as more and more tax residents are withdrawing their capital to invest abroad.

In general, the proposed amendment created substantial uncertainty of what is going to happen and how it will really affect the RSA overall. Taxpayers who want to become expats in the future are overall uncertain about what their options are and whether they will be able to limit their tax liability. The main reason for South Africans to consider financial emigration is to ensure that their foreign earned income and assets are protected.

The other option available for tax residents in the RSA earning foreign income, and which option will become more significant going forward with the exemption, is a DTA. The status of a DTA in RSA is determined by section 231 of the Constitution of the RSA and section 108(1) of the Income Tax Act. Section 108(2) of the ITA provides that once the DTA is approved by Parliament such DTA will assume equal status with the domestic tax laws of the RSA. If there is any conflict between the DTA and the ITA, then the DTA must take preference above the ITA and its provisions must be given effect to.

It is important for the two contracting States to consistently follow DTA interpretations as inconsistencies can lead to double taxation. DTA's form part of the international public law regime and the principles of treaty interpretation are laid down in the VCLT, which also forms part of the RSA law though our Constitution.

The interpretation of a DTA should not differ from the treaty interpretation principles in Articles 31 to 33 of the VCLT as most of the RSA DTA's are built on the OECD Model Tax Convention. It is crucial to remember that a RSA DTA must be understood in good faith and in unity with the ordinary meanings given to the terms of the DTA in their context and in the light of their objective and intention.

It is important for a tax resident to understand that if both contracting States have a right to tax the income earned, the tax resident can apply for tax relief in terms of section 6*quat* of the ITA to avoid double taxation of the foreign income. It is the responsibility of the taxpayer to understand the amendment of section 10(1)(o)(ii) of the ITA, to consult his/her employment agreement to determine if it must be adjusted, to determine if there is an existing DTA between the country of source and the country of residence and if there is any relief available for the tax resident to avoid double taxation. If no DTA exists between the country of source and the country of residence, then the tax resident must determine if there is any tax relief available in respect of tax credits and how the tax resident can apply for the necessary relief available.

Bibliography

6.1 Books

A de Koker, A Koekemoer & RC Williams *Silke on South Africa Income Tax* LexisNexis: South Africa (2016).

Arnold BJ & McIntyre MJ International Tax Primer 2nd Edition Kluwer Law International (2002).

Croome B (Ed) *Tax Law: An Introduction* Juta: Cape Town (2013).

Meyerowitz D, *Meyerowitz on Income Tax* Cape Town (2003 -2004).

Olivier, L & Honiball, M *International Tax: A South African Perspective* 4th Edition Cape Town (2011).

Stiglingh M; Koekemoer AD; van Heerden L; Wilcocks JS & van der Zwan P *Silke South African Income Tax* LexisNexis: Cape Town (2019).

Tax Consulting, *Expatriate Tax, South African Citizens Working Abroad and Foreigners in South Africa* LexisNexis: South Africa (2019).

6.2 Explanatory Memorandums

The Explanatory Memorandum on the Revenue Laws Amendment Bill (2000)..

The Explanatory Memorandum on the 2017 Taxation Laws Amendment Bill (19 July 2017).

6.3 Case Law

AB LLC and BD Holdings LLC v The Commissioner for the South African Revenue Service (2015) SATC 2.

Commissioner for Inland Revenue v Downing (1975) 37 SATC 249

*Cohen v Commissioner for Inland Revenue (*1946) 13 SATC 362.

Commissioner for Inland Revenue v Kuttel (1992) 13 SATC 298.

Commissioner of Tax (SR) v Shein 1958 (3) SA 14 (FC) 22 SATC 12.

Commissioner for the South African Service v Tradehold Ltd (132/11)(2012) ZASCA 61.

Commissioner for the South African Revenue Service v Van Kets (2011) 74 SATC 9.

H v Commissioner of Taxes 1960(2) SA 695 (SR), 23 SATC 292.
ITC 77 3 SATC 72.
Krok v The Commissioner for the South African Revenue Service (2015) 6 SA 317 (SCA).

6.4 Interpretation Notes

Interpretation Note 16: (Issue 2) *Exemption from Income Tax: Foreign Employment Income,* published by the South African Revenue Service Issued 2 February 2017.
Interpretation Note 3: *Resident: Definition in relation to natural person – ordinarily resident,* published by the South African Revenue Service Issued 4 February 2002,
Interpretation Note 4: *Resident: Definition in relation to natural person – physical presence test,* published by the South African Revenue Service Issued 3 August 2018.
Interpretation Note 16: (Issue 4) *Exemption from Income Tax: Foreign Employment Income 1*, published by the South African Revenue Service Issued 28 June 2021.
South African Reserve Bank Exchange Control Circular No 6/2021 *Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank,* Issued 26 February 2021.
South African Revenue Service *Cease to be a resident* Issued 16 July 2021.

6.5 Internet Resources

Businesstech *"South Africa's expat tax is coming- and there is only one way to legally avoid it"* 15 February 2019, available online at https://businesstech.co.za/news/finance/299926/south-africas-expat-tax-is-coming-and-theres-only-one-way-to-legally-avoid-it/ (accessed 18 September 2019).
Expats manual, available online at https://www.expatinfodesk.com/expat-guide/what-is-an-expat/ (accessed on 11 July 2019).
Final Response Document on Taxation Laws Amendment Bill, 2017 and Tax Administration Laws Amendment Bill, 15 December 2017, available online at http://www.treasury.gov.za/publications/RevenueLaws/2017%20Final%20Response%20Document%20-2017%20TLAB%20and%20TALAB-15%20December%202017.pdf (accessed on 11 July 2019).
Hugo *Unpacking-the-complex-and-costly-financial-emigration-process, 2019,* available at https://www.businesslive.co.za/bt/money/2019-04-07-unpacking-the-complex-and-costly-financail-emigration-process/ (accessed 16 August 2021).

H Ferrand *Legal and Tax Consequences of emigration* October 2016, available at https://www.withoutprejudice.co.za/free/article/5114/view (accessed on 16 August 2021).

Investec "Home and away – How new tax law will effect South Africans earning income abroad, 27 May 2019, available online at https://www.investec.com/en_za/focus/money/tax-south-africans-earning-abroad.html (accessed on 8 September 2020)

Jonty Leon *New Tax Laws: What are SA expats' options?* 3 May 2018 Available at https://www.bizcommunity.com/Article/196/710/176640.html (accessed 16 August 2021)

Joon Chong and Wesley Grimm *Significant changes in the pipeline – taxation of expats in South Africa* 27 May 2019, available online at https://www.webberwentzel.com/News/Pages/significant-changes-in-the-pipeline-taxation-of-expats-in-sa.aspx (accessed 10 July 2019).

KPMG *Thinking Beyond Borders* 31 January 2020, available at https://home.kpmg/xx/en/home/insights/2014/04/south-africa-thinking-beyond-borders.html (accessed on 8 September 2020).

Sars *Foreign employment income exemption* 15 July 2019, available online at https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Foreign-Employment-Income-Exemption.aspx (accessed 10 July 2021).

Tax Consulting *Massive Jump in the number of South Africans planning to financially emigrate* 7 June 201, available online at http://www.taxconsulting.co.za/massive-jump-in-the-number-of-south-africans-applying-to-financially-emigrate/ (accessed 10 July 2019).

6.6 Journal Articles

Breytenbach and Van Zyl 2017 Personal Finance Newsletter Breytenbach JP and Van Zyl H *"Formal Emigration Versus Relocation"* Personal Finance Newsletter 13-15 (2017).

Esther Geldenhuys, Robyn Berger and Aneria Bouwer *South Africa: Exchange Control – Emigration* (2021).

I Du Plessis *The Incorporation of Double Taxation Agreements into South African Domestic* Law PER/PELJ (2015).

J. Arendse, K. Stark & C Renaud *The Cohen and Kuttel stories: Is the place where I hand my hat still relevant to determine my residence for tax purposes?* (2015).

Louis Botha *Exchange control and emigration: The new dispensation* (2021).

Olivier, L, Residence Based Taxation, Journal of South African Law (2001).
Rohatgi, R (2005) Basic International Taxation, Volume 1, p 3. – journal

Vogel *'Double Tax Treaties and Their interpretation'* International Tax and Business Lawyer 4 (1986).

Oguttu, AW (2008) *"Resolving double taxation: the concept 'place of effective management" analysed from a South African perspective"*, Comparative and International Law Journal of South Africa, vol 41 (2008).

6.7 Publications and Other Reports

Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital (2017)

United Nations Convention on the Law of Sea (UNCLOS) (1982).

Vienna Convention on the Law of Tax Treaties (1969).

6.8 Statutes

Constitution of the Republic of South Africa 108 of 1996.

Financial Intelligence Act 38 of 2001.

Income Tax Act 58 of 1962.

Income Tax Act 31 of 1941.

Immigration Act 13 of 2002.

Maritime Zones Act 15 of 1994.

Revenue Laws Amendment Act 59 of 2000.

Revenue Laws Amendment Act 74 of 2002.

Tax Administration Act 28 of 2011.

Taxation Laws Amendment Act 17 of 2017.