WILL THE STEPS TAKEN BY SOUTH AFRICAN EXPATRIATES TO CIRCUMVENT SECTION 10(1)(o)(ii) TRIGGER THE SOUTH AFRICAN GAAR?

by

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ABSTRACT

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Background: Prior to 1 March 2020, South African expatriates working abroad were exempt from paying tax in South Africa on remuneration earned abroad in terms of Section 10(1)(o)(ii) of the Income Tax Act No.58 of 1962 (referred to as 'the Act' from here forth). However, with effect from 1 March 2020, South African expatriates working abroad are now liable for tax in South Africa on remuneration earned abroad above the cap of R1.25 million. The reason for the amendment to the Act is to prevent double non-taxation. Double non-taxation arises when a South African expatriate is working in a tax-free jurisdiction, for example the United Arab Emirates (UAE; the country used as reference for the purposes of this study), where no tax is levied on remuneration earned. In this instance, the South African expatriate would not pay tax in South Africa nor the UAE on income earned in the UAE. The introduction of the amendment was introduced to curtail this. South African expatriates reacted with disapproval of the Section 10(1)(o)(ii) amendment and many have intentions of circumventing the Section 10(1)(o)(ii) amendment by ceasing South African tax residency.

Main purpose of study: Many South African expatriates are opting to cease residency in South Africa to circumvent the implications of the amendment to Section 10(1)(o)(ii). One of the ways that a South African expatriate is able to cease residency in South Africa is by invoking one of the tiebreaker clauses contained within the double tax agreement (DTA) between South Africa and the UAE. This study focused on the DTA tiebreaker clause of the 'centre of vital interest'. This study attempted to explore whether the actions taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest to cease

South African tax residency triggered the provisions of the South African General Anti-Avoidance Rules contained in Section 80A–80L of the Income Tax Act (GAAR).

Method: This study followed a doctrinal approach. Information on Section 10(1)(o)(ii) of the Act, DTAs and the South African GAAR was obtained from websites, journals, textbooks, and case law. This was then analysed and interpreted to help answer the research question.

Results: This study found that that the sole or main purpose of the actions taken by South African expatriates to cease South African residency is to obtain a tax benefit, as they would have to pay tax in South Africa on foreign earned remuneration post the Section 10(1)(o)(ii) amendment if they remain South African residents. Ceasing South African tax residency means that South African expatriates will not be taxed in South Africa on income earned in the UAE, resulting in double non-taxation, which is a tax benefit as defined in terms of Section 1 of the Act. As a result of this, the tainted elements were analysed to determine whether the GAAR will be triggered. None of the tainted elements were met and this study confirmed that the actions taken to cease South African residency do not contain any tainted element, resulting in the South African GAAR not applying to the arrangement.

Conclusions: The actions taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest and hence cease tax residency in South Africa will not result in the provisions of the South African GAAR being triggered.

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TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF ABBREVIATIONS, ACRONYMS AND PHRASES USED

Acronyms/Abbreviation/Phrases	Meaning
DTA	Double Tax Agreement
GAAR	General Anti-Avoidance Rules contained in Section 80A–80L of the Income Tax Act
MTC	Model Tax Convention
SAICA	South African Institute of Chartered Accountants
TAA	Tax Administration Act No.28 of 2011
SARS	South African Revenue Services
UAE	United Arab Emirates
OECD	Organisation for Economic Cooperation and Development
The Act	Income Tax Act No.58 of 1962 (as amended)
Expat	An individual living and/or working in a country other than their country of residence.
Expat tax	Tax paid by individuals in South Africa on remuneration earned in a foreign country.
Exit charge	A capital gains tax charge that is imposed on an individual that ceases to be a resident in South Africa. In terms of Section 9H of the Act, “the taxpayer is deemed to have disposed of their assets at market value immediately before ceasing to be a resident in South Africa”.

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

> *“The best things in life are free, but sooner or later the government will find a way to tax them” (Inc.,2015).*

This holds true to the topic of this study. Up until 29 February 2020, in terms of Section 10(1)(o)(ii) of Income Tax Act No.58 of 1962 (here after called ‘the Act’), South African residents who worked overseas for more than 183 days in a 12 month period (of which 60 days were consecutive) were fully exempt from paying income tax on their foreign earned remuneration (Botha, 2019).

In 2017, the Section 10(1)(o)(ii) exemption was re-examined in the budget review where Minister of Finance, Pravin Gordan, discussed his intention to amend the Section 10(1)(o)(ii) exemption (Louw, 2020a; National Treasury, 2017). The amendment to the Section 10(1)(o)(ii) exemption came into effect on 1 March 2020. The initial amendment resulted in the cap of the exemption at R1 million, but this limit was later increased to R1.25 million to provide additional relief (National Treasury, 2017; Van Zyl, 2020). The amendment was introduced to curb double non-taxation (Hutchon, 2020:2; National Treasury, 2017:138). Foreign earned income above the cap is included in the expatriate’s taxable income and therefore taxed, giving rise to ‘expat tax’ (Van Zyl, 2020). The R1.25 million cap may seem like a fair and reasonable amount; however, allowances and fringe benefits are included when calculating foreign remuneration, resulting in the R1.25 million cap being reached quite quickly (Sanders, 2020:3).

Figure 1 shows the requirements that need to be met to qualify for the Section 10(1)(o)(ii) exemption.

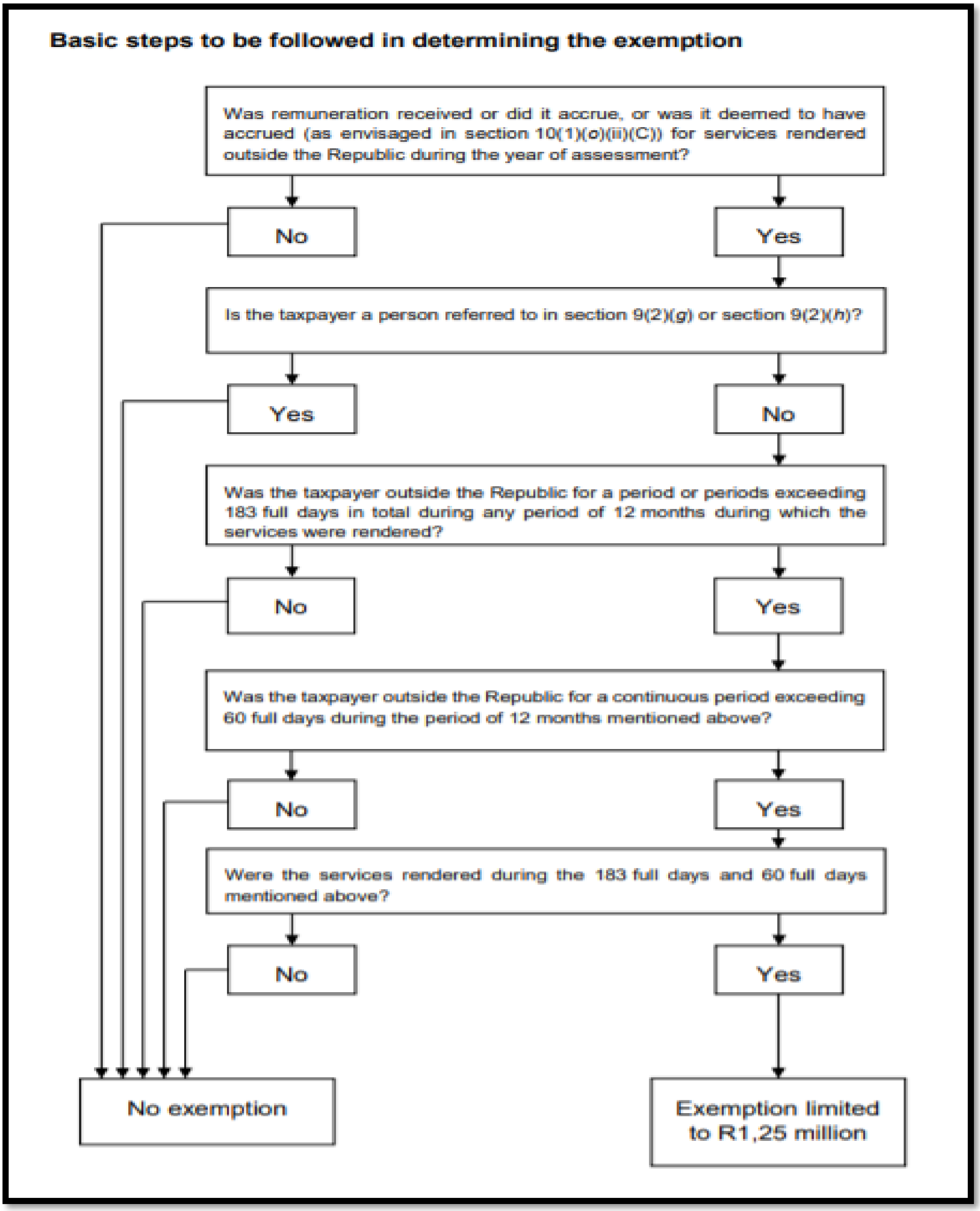

Figure 1: Steps to determine the Section 10(1)(o)(ii) exemption

Source: South African Revenue Services (SARS) Interpretation Note 16 (Issue 4):18 (2020)

South African expatriates working in low or no tax jurisdictions have disapproved of the Section 10(1)(o)(ii) amendment, as they will now be taxed on their foreign earned remuneration above R1.25 million (Cameron, 2017). South African expatriates living in a tax-free country, such as the United Arab Emirates (UAE), are not necessarily in a tax advantageous position (Cameron, 2017). There might be no income tax, but there are other hidden taxes applicable to expats and the cost of living is so high that funds must be ploughed back into the foreign country's economy (Cameron, 2017). Therefore, many expats opt to cease their South African tax residency to circumvent the impact of the Section 10(1)(o)(ii) amendment (Botha, 2021:31). One of the ways in which expatriates can cease their South African tax residency is by the application of a double tax agreement (DTA) (PricewaterhouseCoopers, 2017).

An individual that is employed outside South Africa does not necessarily become a non-resident for South African tax purposes (Hutchon, 2020:18). In some instances, when temporarily abroad, taxpayers sustain their property as well as their economic interests and family connections in South Africa. Therefore, in terms of the ordinarily residence test, they would remain tax residents in South Africa as South Africa would be the place where the individual will "return to from his wanderings" (Commissioner for Inland Revenue v Kuttel (349/90) [1992] ZASCA 60; 1992 (3) SA 242 (AD); [1992] 2 All SA 151 (A) (31 March 1992) ; Hutchon, 2020:18).

When a person is ordinarily resident in South Africa but also a tax resident in a foreign country due to a DTA, the person will be regarded as a resident in the country as determined by the tiebreaker clauses contained within the DTA (Hutchon, 2020:18). The relevant DTA then assigns taxing rights to either the foreign country or to South Africa or to both with relief in the case of double tax (Hutchon, 2020:18).

The OECD is the predominant body that governs the international development of DTAs (Holmes, 2014). The OECD is an international organisation that stimulates economic progress and world trade that are represented by member countries (Loyson, 2010:19; OECD, 2017). Although South Africa is not a member of the OECD, it has observer status and follows the OECD guidelines when signing DTAs with other countries (Loyson, 2010:19).

As indicated in the OECD Model Tax Convention (MTC) and a large proportion of DTA agreements, residency is defined in Article 4(1) of the OECD MTC (Hutchon, 2020:3; OECD, 2017:32). When a DTA is signed between two countries, it is essential to refer to Article 4(1), because if the residency definition is different to that used in domestic legislation, the resident definition per the DTA will take preference (OECD, 2017; TTT Group, n.d.).

Section 108 of the Act states that an agreement may be entered into between the national executive and the government of any foreign country with the effect of preventing, mitigating or discontinuing the levying of tax on the same income, profits or gains. As soon as such an agreement is approved by parliament, the arrangement will be notified by publication in the Government Gazette. Thereafter, it will have the effect as if enacted in this Act. In terms of Section 231 of the Constitution of the Republic of South Africa (108/1996), the provisions contained within a DTA in most instances override domestic law (Loyson, 2010:24). This principle was confirmed in the case of *Downing v SIR*, 37 SATC 249 (A) at 257, which states that "*as long as the Convention is in operation, its provisions, so far as they relate to immunity, exemption or relief in respect of income tax in the Republic, have effect as if enacted in Act 58 of 1962*" (Loyson, 2010:24).

When a person is a resident of both countries under Article 4(1) of the OECD MTC, residency is based on the tiebreaker rules contained within Article 4(2) (OECD, 2017). Tiebreaker rules are a test based on facts and circumstances, and no regard is given to the number of days an individual is in a particular country (TTT Group, n.d.). The DTA provides a detailed guide for analysing and interpreting an individual's circumstances to determine which country is seen as the country of residence for the purposes of the DTA (TTT Group, n.d.).

Therefore, South African residents working abroad are able to circumvent Section 10(1)(o)(ii) of the Act by invoking any of the tiebreaker clauses contained within a DTA. Should the outcome of the tiebreaker clause be that the expats are tax residents of the foreign country and not of South Africa, they will be regarded as non-residents for South African tax purposes and taxed on a source basis (Van Zyl, 2020). As the source of remuneration is where the services are rendered, foreign remuneration is from a non-South African source and will not be included in their gross income. This concept has been illustrated in the case of *CIR v Lever Bros and Unilever Ltd*, 1946 AD 441 (14 SATC 1), where it was established that the source of income is where the originating cause is located.

As such, South African expatriates who invoke the DTA tie-breaker clauses will not need to rely on the Section 10(1)(o)(ii) exemption anymore as they will only be taxed on South African source income. This will be discussed in detail as part of the literature review below.

1.2 BACKGROUND/RATIONALE FOR THE STUDY

With the shift from a source basis to a residence basis of taxation for years of assessment commencing on or after 1 January 2001, South African tax residents became liable to tax in South Africa on their worldwide income, including foreign-sourced employment income (Duvenhage, 2019). Section 10(1)(o)(ii) was introduced as a remedy for this,which indicated that foreign earned remuneration would remain fully exempt from tax in South Africa if all the requirements as indicated in Section 10(1)(o)(ii) were met (Duvenhage, 2019). The expat tax environment changed substantially when the amendment to the exemption was promulgated, which means that from 1 March 2020 expats are liable for tax in South Africa on their foreign earnings that exceed R1.25 million (Smith, 2019).

The National Treasury first proposed repealing the exemption, but finally decided to limit it to a specific amount. The main purpose for proposing this repeal was to prevent double non-taxation, which arises as a result of individuals working in low or no tax jurisdictions (Govender, 2019:3; National Treasury, 2017). An example of such a jurisdiction is the UAE, where no income tax is levied.

Expats working in low or no tax jurisdictions reacted with outrage to the introduction of the amendment, and it soon became clear that they are unwilling to pay expat tax (Cameron, 2017). A financial revolt is being led by expats as a result of the Section 10(1)(o)(ii) amendment as they display despondency in the tax system and are disinclined to pay tax in South Africa on the excess of their remuneration earned above R1.25 million. Expatriates breaking South African tax residency can have disastrous consequences for South Africa's tax base (Smith, 2019). This is concerning as statistics show that for the 2021/22 tax year, it is forecasted that South Africa will obtain 38% of its tax revenues from personal income tax, which is almost half of the total tax that SARS will collect (BusinessTech, 2021a). Over the years, there has been a substantial increase in the contribution that personal income taxes make to total tax revenue, and a smaller portion of taxpayers have become accountable for an increasingly large portion of personal income tax. It has been estimated that 25% of individuals who pay tax contribute to 80% of all personal income tax that is collected (BusinessTech, 2021a).

The amendment to Section 10(1)(o)(ii) could result in the collection of taxes being under threat as South African residents working abroad will seek to cease tax residency in South Africa which could deprive the government of much needed cash flow to pay for vital services. The government has already predicted a cash shortfall of R42.8 billion collection in taxes (Smith, 2019). One of the ways that South African residents can circumvent the application of the Section 10(1)(o)(ii) amendment is through a DTA (Louw, 2020b).

In terms of Section 1 of the Act, the definition of resident excludes any natural person who is deemed to be exclusively a resident in terms of a DTA (SARS Interpretation Note 3 [Issue 2],2018). In the case of the UAE, if the natural person becomes exclusively a resident of the UAE under the tiebreaker clause of the DTA with South Africa, their excess foreign remuneration income will not be taxed in South Africa. Further, employment income will also be free from tax in the UAE (Naidoo, 2019:29). This will result in double non-taxation.

Actions taken by South African expatriates to invoke the DTA tiebreaker clauses in order to defeat Section 10(1)(o)(ii) and to obtain a double non-taxation benefit may be seen as tax avoidance or even “impermissible tax avoidance” under the provisions of the South African General Anti-Avoidance Rules contained in Section 80A–80L of the Income Tax Act (here after referred to as GAAR).

SARS (2006:4) states that impermissible tax avoidance refers to ‘general’ or ‘contrived’ arrangements with minimal economic effect on the taxpayer designed to exploit loopholes in tax laws that conflict with the intention of the revenue authorities. Impermissible tax avoidance triggers the provisions of the South African GAAR (Rotley, 2016:1). South Africa introduced the GAAR contained within Section 80A–80L of the Act, and it is aimed at curbing impermissible tax avoidance arrangements as defined (Rotley, 2016:1).

As a result of the South African GAAR being invoked, a general remedy in terms of Section 80B of the Act can be applied. In terms of this general remedy, the commissioner may determine the liability for tax as if the transaction was not entered into. The provisions contained in Section 80 may apply to any part of an avoidance arrangement or to the arrangement as a whole. If the South African GAAR is applied to the actions taken by South African expatriates to invoke the DTA tiebreaker clauses, then the remedy would result in the tax authorities treating the transaction as if the DTA tiebreaker clauses were not invoked, resulting in the South African expatriate paying tax in South Africa on all foreign income earned above R1.25 million (SARS, 2021).

This study therefore aimed to determine whether the actions taken by expatriates to invoke the DTA tiebreaker clauses and hence circumvent Section 10(1)(o)(ii) will result in impermissible tax avoidance and hence trigger the provisions of the South African GAAR. Focus is placed on the tiebreaker clause of the centre of vital interest. Many South African expatriates are uncertain as to whether the actions taken by them to invoke the DTA tiebreaker clauses and defeat Section10(1)(o)(ii) will trigger the South African GAAR. This study therefore seeks to provide guidance in this regard.

1.2.1 Assumptions and scope of the study

A hypothetical scenario containing the following assumptions are used for this study:

- An individual (who will be referred to as Mr. Blue) is ordinarily resident in South Africa, and therefore, a tax resident of and taxed on a worldwide basis in South Africa. Mr. Blue visits South Africa for three weeks per year for a holiday and to visit family and friends.
- Apart from personal use assets and a small amount of cash, Mr. Blue's only asset is immovable property situated in South Africa.
- Mr. Blue is employed by a foreign employer and earns a salary.
- Mr. Blue lives and works in the UAE. The UAE was chosen as the country of study for the following reasons:
    - The UAE is a tax-free jurisdiction;
    - There are many South Africans living and working in the UAE; and
    - There is a tax treaty between South Africa and the UAE.
- Mr. Blue's annual salary in the UAE in dirhams is equal to more than R1.25 million, and therefore above the cap of the Section 10(1)(o)(ii) exemption.
- The Section 10(1)(o)(ii) exemption of R1.25 million is available to Mr Blue to be used against remuneration earned in the UAE as he meets all the requirements for the exemption
- Mr. Blue is also a resident in the UAE as it is assumed that he meets all the residency requirements of the UAE and is in possession of a tax residency certificate to prove this.
- Mr. Blue has a permanent home available to him in both South Africa and in the UAE.

1.2.2 Limitations of the study

The following limitations have been imposed to the study:

- The scenario of a person working for a South African employer or as an independent contractor is not considered.
- As it is assumed that Mr. Blue remains ordinarily resident in South Africa, the physical presence test is not considered.
- Mr. Blue’s only asset is immovable property situated in South Africa, which will not trigger capital gains tax upon him ceasing to be a resident (so-called exit tax). Therefore exit tax is not discussed and considered and does not play a role in Mr.Blue’s decision to break tax residency.
- The requirements of Section 10(1)(o)(ii) are not discussed and analysed.
- The meaning of ‘permanent home’ is not discussed and analysed.

1.3 RESEARCH PROBLEM

South African residents are seeking ways to avoid expat tax being levied on their foreign employment income, especially residents working in low tax or no tax jurisdictions, as they now have to pay tax on foreign-sourced remuneration in South Africa where initially no tax was levied thereon (PricewaterhouseCoopers, 2019). This creates a tax benefit as it results in double non- taxation and may therefore trigger the provisions of the South African GAAR. Currently no research has been undertaken to determine whether the actions taken by South African residents to invoke the DTA tiebreaker clause of the centre of vital interest and hence defeat Section 10(1)(o)(ii) will trigger the provisions of the South African GAAR. There is therefore a knowledge gap that this study addresses.

1.4 RESEARCH QUESTION

Will the actions taken by expatriates to invoke the DTA tiebreaker clause of the centre of vital interest to defeat Section 10(1)(o)(ii) trigger the provisions of the South African GAAR?

1.5 RESEARCH OBJECTIVES

The following research objectives helped answer the research question:

- To analyse and interpret the meaning of ‘resident’, with emphasis on ordinarily resident as well as the application of Section 10(1)(o)(ii), commonly referred to as ‘expat tax’;
- To analyse and interpret the DTA tiebreaker clause and the meaning of the ‘centre of vital interest’;
- To analyse and interpret the South African GAAR requirements;
- To discuss the actions that can be taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest and hence cease South African tax residency. The actions taken by expats to invoke the DTA tiebreaker clause were obtained through webinars, internet articles, journals, and books; and
- To apply the principles contained in the South African GAAR to the actions taken by South African expatriates to invoke the centre of vital interest tiebreaker clause to determine whether the provisions of the South African GAAR will be triggered.

1.6 RESEARCH DESIGN AND METHODOLOGY

Research is a process that entails the collection of data, though various platforms, documentation of critical information and analysis and interpretation of that data or information with the specific academic disciplines (Hampshire College, n.d.). The research methods and design used in this study are discussed in the following section.

1.6.1 Methodological approach

This study applied a doctrinal research method. This research method identifies, analyses and synthesises the content of the law with the aim to contribute to the body of knowledge in a specified field (Hutchinson, 2013). This study analysed, applied and synthesised the rules and law contained within Section 10(1)(o)(ii), the DTA tiebreaker clauses and the South African GAAR to contribute to answering the research question. This approach is reasonable based on the objectives of the study.

1.6.2 Data collection: Secondary data

Secondary data entails the collection of data from previous studies and existing sources (Johnston, 2014:619; Patton, 2015). This study involved the understanding, analysis, interpretation and application of existing data obtained from articles, journals, previous dissertations, SARS interpretation notes, case law and income tax legislation on the meaning of ‘ordinarily resident’, Section 10(1)(o)(ii), the South African GAAR and the DTA tiebreaker clauses.

1.6.3 Data nature: Qualitative

Research on ordinarily resident, Section 10(1)(o)(ii), S80A–S80L of the South African GAAR and the DTA tiebreaker clauses were conducted using books, journals, articles and webpages. There was no numerical or statistical analysis. This research was then analysed, interpreted and applied to the research question to achieve the purpose of this study. The actions taken by expats to invoke the DTA tiebreaker clause were obtained through webinar notes, internet articles, journals, discussions with an expert in the field, and books.

1.6.4 Unit of analysis

The unit of analysis is explained as the major entity that is being analysed in a study (Igwenagu, 2016:7). The unit of analysis for the purposes of this study is literature regarding ordinarily resident, Section 10(1)(o)(ii), DTA tiebreaker clauses and the South African GAAR.

1.7 STRUCTURE OF THE MINI-DISSERTATION

This mini-dissertation comprises of five chapters, and the breakdown of the chapters are as follows:

1.7.1 Chapter 1: Introduction

Chapter 1 lays down the foundation for the mini-dissertation. This chapter introduces the topic and provides background to the mini-dissertation. This chapter discusses the research problem and research objectives, defines the scope and assumptions of the study, and elucidates the knowledge gap. The research design and methodology used in this study are also discussed in this chapter.

1.7.2 Chapter 2: Expat tax and double tax agreements

Chapter 2 introduces and analyses ordinarily resident and Section 10(1)(o)(ii) of the Act. The DTA tiebreaker clauses are discussed with specific focus on the centre of vital interest tiebreaker clause with a link to defeating Section 10(1)(o)(ii) of the Act.

1.7.3 Chapter 3: The South African GAAR

Tax avoidance and tax evasion are discussed briefly, and then the chapter delves into impermissible tax avoidance, leading to the discussion on the South African GAAR. Chapter 3 provides all the theoretical knowledge relating to the GAAR and analyses each provision contained within the GAAR.

1.7.4 Chapter 4: Actions taken to invoke the centre of vital interest double tax agreement clause measured against the South African GAAR

Chapter 4 contains the application of the literature review. This chapter analyses the possible steps taken by South African residents to invoke the DTA tiebreaker clause of the centre of vital interest and discusses whether these steps will trigger the South African GAAR.

1.7.5 Chapter 5: Conclusion

Chapter 5 summarises and concludes the mini-dissertation. This chapter answers the research question, addresses the research problem and fills the gap in knowledge. Thereafter, it provides recommendations for future research.

CHAPTER 2: EXPAT TAX AND DOUBLE TAX AGREEMENTS

2.1 EXPAT TAX

2.1.1 Introduction

On 1 March 2001, South Africa moved from a source to a residence basis of taxation, which meant that South African residents would be taxed on their worldwide income in terms of the gross income definition which is contained within Section 1 of the Act (Naidoo, 2019:5; Sanders, 2020:1). Due to the residence system of taxation, South African residents working abroad were at the risk of being taxed in South Africa and abroad on the same remuneration, resulting in double taxation (Duvenhage, 2019). The Section 10(1)(o)(ii) exemption was introduced to prevent the instance of double taxation (SARS Interpretation Note 16 [Issue 3]; National Treasury, 2017).

2.1.2 Legislation

(SARS Interpretation Note 16 [Issue 4], 2021) states the following:

> *"Section 10(1)(o)(ii) applies to a South African tax resident who is an employee and renders services outside South Africa on behalf of an employer (South African or foreign) for longer than 183 full days in any 12-month period which includes a continuous period exceeding 60 full days" (SARS, 2021).*

The 183 full days requirement has been adjusted to 117 days for the 2021 year of assessment due to travel restrictions during the COVID-19 pandemic (National Treasury, 2021:29). The result of this exemption was that remuneration earned by an individual for services rendered outside South Africa on behalf of the employer was fully exempt from South African tax (SAICA, 2018).

Effective from 1 March 2020, in terms of the amended Section 10(1)(o)(ii) of the Act, only the first R1.25 million of foreign earned remuneration is exempt from South African Income Tax (Chambers, 2019; SARS Interpretation Note 16 [Issue 4], 2020).

Per SARS Interpretation Note 16 (Issue 4), for an individual to qualify for the R1.25 million exemption, the resident must:

- "Be a tax resident of South Africa;
- Earn certain types of remuneration income as listed in the section;

- In respect of employment services;
- Rendered outside the republic;
- During specified qualifying periods; and
- None of the exclusions apply."

Before delving into the detail of the Section 10(1)(o)(ii) exemption, it is worth mentioning when an individual will be considered a tax resident in South Africa. South African tax residents are taxed on a worldwide basis, while non-residents are taxed on a source basis (Ferreira, 2020:15). The following subsections discusses the tests used to determine South African residency.

Resident

A resident is defined in Section 1 of the Act as either an individual who is ordinarily resident in South Africa (as interpreted by case law) or an individual who meets the physical presence test. Ordinarily resident is the first test to be applied. If the requirements of this test are met, the physical presence test is not applicable (Ferreira, 2020:15). Each of these tests are discussed in detail below.

Ordinarily resident test

The term 'ordinarily resident' is not defined in the Act, and therefore, the courts have interpreted this term to mean the place where a person would "naturally and as a matter of course return from his/her wanderings" (*Cohen v CIR*, 1946 AD 174:371; SARS Interpretation Note 3 [Issue 2]). In the Canadian case of *Thompson v Minister of National Revenue*, 2 DTC 812 (SCC), it was held that a person is ordinarily resident in the place "where in the settled routine of his life he regularly, normally or customarily lives" or "at which he in mind and in fact settles into or maintains or centralises his ordinary mode of living with its accessories in social relations, interest and conveniences" (SARS Interpretation Note 3 [Issue 2]:2). It is established in SARS Interpretation Note 3 that a physical presence is not a necessity to be ordinarily resident in South Africa. The following two requirements need to be met for a person to be ordinarily resident in South Africa:

- "An intention to become ordinarily resident in a country; and
- Steps indicative of this intention having been or being carried out".

The following factors need to be considered in determining if an individual is ordinarily resident in South Africa:

- “Most fixed and settled place of residence;
- Habitual abode i.e. present habits and mode of life;
- Place of business and personal interest;
- Status of individual in country i.e. immigrant, work permit periods and conditions, etc.;
- Location of personal belongings;
- Nationality;
- Family and social relations;
- Political, cultural, or other activities (schools, church, etc.);
- Application for permanent residence;
- Period abroad, purpose and nature of visits; and
- Frequency of and reasons of visits” (SARS Interpretation Note 3 [Issues 2
-], 2018:5).

This list is, however, not all-inclusive and should only be used as a guide (SARS Interpretation Note 3, 2018:5). When ordinarily resident in South Africa, the individual will be liable for tax in South African on worldwide income earned. After ceasing to be a South African tax resident, the individual is only taxed on South African source income (SARS Interpretation Note 3 2018:6).

In terms of Section 1 of the Tax Administration Act No.28 of 2011 (here after referred to as the TAA), the burden of proof lies with the taxpayer to prove that they are not ordinarily resident in South Africa.

Physical presence test

In terms of Section 1 of the Act, all of the requirements below need to be met for the taxpayer to be considered a South African tax resident in terms of the physical presence test:

- “91 days in aggregate during the year of assessment under consideration;
- 91 days in aggregate during each of the five years of assessment preceding the year of assessment under consideration; and
- 915 days in aggregate during the five preceding years of assessment”.

A natural person who meets all the requirements referred to above is a South African tax resident for the entire year of assessment under consideration (SARS Interpretation Note 4, 2018:2).

Remuneration in respect of employment

The foreign earned remuneration that qualifies for the Section 10(1)(o)(ii) exemption includes remuneration received by or accrued to an employee by way of salary, wages, leave pay, bonus pay, overtime, commission fee, gratuity, emolument, or allowance for services rendered (SARS Interpretation Note 16 [Issue 4], 2021: 2).

As indicated earlier, the policy intent of the Section 10(1)(o)(ii) exemption was introduced to prevent double taxation of an individual's remuneration in South Africa and the foreign country (National Treasury, 2017). This exemption, in some instances resulted in double non-taxation, which is contrary to the original intent of the Section 10(1)(o)(ii) exemption (National Treasury, 2017).

The amendment to Section 10(1)(o)(ii) will have a negative impact on a South African resident earning in excess of R1.25 million and who is working in tax-free or low tax jurisdictions, for example, the UAE, as they would now have to pay tax on their foreign earned remuneration where they were previously not liable for (Naidoo, 2019:6). These individuals therefore opt to cease their residency to circumvent the implications of the amendment (Botha, 2021:31). If there is a DTA between South Africa and the foreign country, South African expatriates working outside South Africa can apply the relevant articles of the DTA between South Africa and the source country to cease South African tax residency. The individual will then be taxed only on a source basis in South Africa, which will exclude the foreign remuneration (Botha, 2021:31; Sanders, 2020:2).

Figure 2 illustrates how the application of the residency test and the DTA provisions can be relied upon to successfully circumvent expat tax. The result is indicated by the red circle in the diagram, namely being taxed as a non-resident in South Africa.

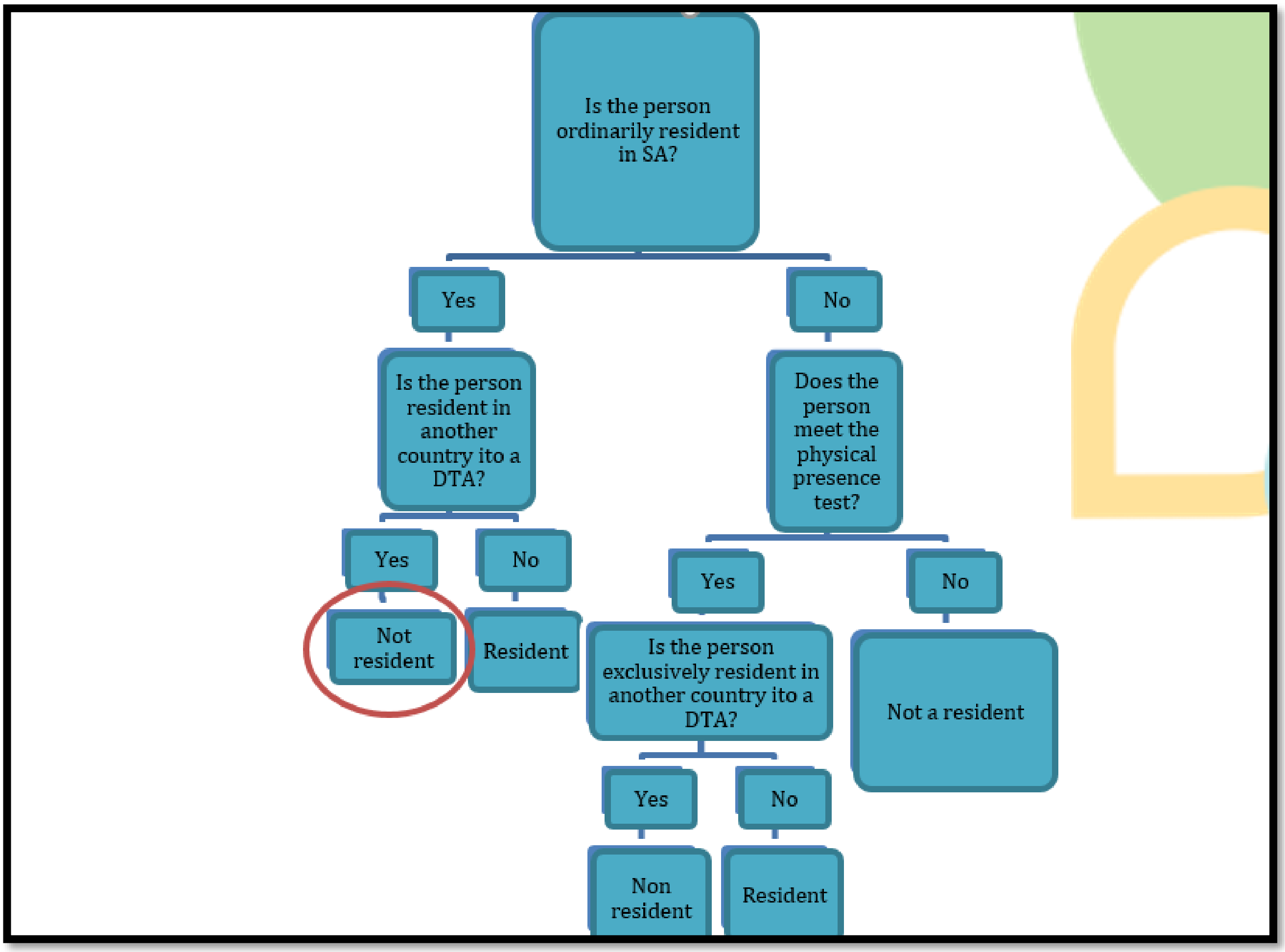

Figure 2: Illustration of the residency test

Source: SAICA, 2018

2.2 DOUBLE TAX AGREEMENTS

2.2.1 Introduction

A DTA prevents double taxation by ensuring that a taxpayer is not unjustly taxed in both South Africa and the foreign country as stated in the DTA (Using a DTA to protect your foreign income). DTAs are recognised in South African domestic law and are housed within Section 108(2) of the Act (Naidoo, 2019:20), and therefore, “the result of Section 108(2) of the Income Tax Act is that once a DTA is enacted, it has the same standing as other domestic tax law provisions” (*AB LLC and BD Holdings LLC v Commissioner of SARS*, 2015 (13276) ZATC 2; Naidoo, 2019:20).

A DTA becomes pertinent when a person is a tax resident in one country and earns remuneration from a source in another country. For example, a person is a tax resident of

South Africa and earns income from a foreign source (Tax Consulting. n.d.). South African expatriates may therefore need to consider the implications of the DTA between South Africa and the relevant country. They will be able to circumvent paying tax in South Africa if they invoke any of the DTA tiebreaker clauses (Tax Consulting. n.d.).

Double taxation results when income tax is paid in two countries on the same source of income (Kagan, 2020). Section 6*quat* is the relief mechanism under South Africa's domestic law which provides relief from double taxation where remuneration is earned in a foreign country and is subject to tax in both South Africa and that foreign country (SARS, 2021). It allows a tax credit to be claimed against South African tax payable, which may not exceed the normal tax payable in South Africa (Tax Consulting. n.d.).

Double non-taxation may also arise if the foreign employment income is not subject to tax in the foreign country, for example the UAE, and no income tax is levied in South Africa (Van Schalkwyk, 2017). This was the case before the capping of the Section 10(1)(o)(ii) exemption.

The UAE is seen as a lucrative destination for individuals to seek employment because of the enticing remuneration packages provided as well as being a tax-free jurisdiction (Naidoo, 2019:20). In a foreign jurisdiction where no tax is levied, like the UAE, Section 6*quat* of the Act will not apply as there will be no double taxation. Consequently, after the capping of the exemption, there will be no relief under Section 6*quat* towards the tax payable in South Africa on foreign remuneration income exceeding R1.25 million. Therefore, South African expatriates have to search for alternative ways to reduce their normal tax liability, such as applying a DTA (Naidoo, 2019:20).

In instances where there is a DTA between South Africa and the foreign country, South Africans may be able to break their South African residence by invoking the DTA tiebreaker clauses (PricewaterhouseCoopers, 2017). Where an individual can successfully break South African tax residency by virtue of the DTA and become a so-called 'treaty resident' of the overseas country, the foreign remuneration is not taxable in South Africa and Section 10(1)(o)(ii) does not need to be considered as the individual will only be taxed on South African sourced income (PricewaterhouseCoopers, 2017).

Being a treaty resident of the overseas country does not happen automatically (SAICA, 2004). SARS has to be notified of the fact that the tiebreaker clause applies and that the expat is regarded a resident of the foreign country for tax purposes (SAICA, 2004).

Supporting documentation is required to confirm that the expat is a resident of the other country, such as a Tax Domicile Certificate issued by the Tax Authorities of the UAE (Van Zyl, 2021). A nil assessment will be issued by SARS, indicating that the DTA relief applies (SAICA, 2004; Van Zyl, 2021).

2.2.2 Tiebreaker clauses

Article 4(2) of the OECD MTC (OECD, 2017) states that when individuals are tax residents in both countries, their status shall be determined by the tiebreaker clauses, namely:

a) "The individual shall be deemed to be resident only of the State in which he has a permanent home available to him. If he has a permanent home available to him in both states, he shall be deemed to be a resident only of the state with which his personal and economic relations are closer (centre of vital interests);
b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either state, he shall be deemed to be a resident only of the state in which he has a habitual abode;
c) If he has a habitual abode in both States and 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 in neither of them, the competent authorities of the contracting states shall settle the question by way of mutual agreement."

It is important to state that the tiebreaker clauses must be applied in the order as set out in Article 4(2) of the OECD MTC (SAICA, 2018:11). The first test is to determine in which country the individual has a permanent home.

Permanent home

The permanent home test has three parts that must be satisfied: "It must be a home; it must be permanent, and it must be available on a continuous basis" (Masito, 2010:186). Each case has to be decided on its own facts. Cases where tax planning is suspected will usually be subject to an in-depth enquiry, whereas cases where the departure to another country appears to be genuine and not tax motivated may well have the change of permanent home to the other country accepted at face value (Masito, 2010:186).

An individual who is unwilling or unable to sell their family home or at least lease it to strangers will have more difficulties showing that the home is not available to them on a continuous basis than a taxpayer who is genuinely prepared to make their home available for letting (Masito, 2010:186).

The meaning of permanent home is not the focus of this study and will therefore not be analysed further.

Centre of vital interest

The centre of vital interest is the second preference criterion to be applied. If an individual has a permanent home available in both contracting countries, their residency cannot be determined under the permanent home test, and therefore, the second criteria, the centre of vital interest, must be analysed (Amaranth, 2019). In terms of this tiebreaker clause, the individual is considered a resident of the country in which their personal and economic relations are closer (Amaranth, 2019).

The centre of vital interest test includes establishing the family location, social ties, positions held, participation in political and cultural events, places of business and management of family assets (OECD MTC , para 15:87, 2010; Deloitte, 2019). The circumstances should be examined unitedly; however, the personal acts of the individual should receive more consideration (OECD MTC, para 15:87, 2010).

If an individual owns a home in one country and establishes a new home in another country while retaining ownership of the first, the fact that they retain the home in the place where they have always lived, where they have worked, and where they have family relations, can indicate that they have retained their centre of vital interests in the first mentioned country (OECD, 2017). This is of course assuming that the home in the first country is not a "permanent home" anymore, because, for example, it is rented out.

In determining the centre of economic interests, the authorities look at where the individual is employed and creates their 'new' wealth. The centre of economic interests is where an individual chooses to create their own wealth and not where the wealth is inherited (Du Toit. F, 2019). It is emphasised that new wealth carries more weight than old/inherited wealth (Van Zyl, 2021). If Mr. Blue is employed by a non-South African resident in the UAE, this is where he creates his new wealth, and therefore, this is indicative that the UAE is Mr. Blue's centre of economic interests. If, however, Mr. Blue is seconded to perform work in the UAE by a South African company, then it can be argued that his centre of economic interests remain in South Africa (Van Zyl, 2021). The centre of family/social relations are where the individual's family and friends reside (Du Toit.F, Van Zyl, 2019). If Mr. Blue's wife and children reside in the UAE, then his centre of family/social interests is in the UAE. If Mr. Blue's centre of economic as well as family/social interests are in the UAE, the tie to South Africa is broken and he is considered solely a resident of the UAE for the purposes of the DTA.

It is clear that the centre of vital interest tiebreaker is a facts and circumstances test, which requires an assessment of the external occurrences of the taxpayer to determine the outcome of the tiebreaker (Baker, 2015:174). As a test which is based on facts and circumstances, it is harder to manipulate, but also harder to apply in practice (Baker, 2015:174). In principle, the facts and circumstances of an individual's life should be those that are externally observable, and therefore, ideally the test should depend on an objective criterion without any subjective elements (Baker, 2015:174). However, this is not always the instance, as indicated in the case of *Hertel v Minister of national Revenue*, 1993 2 C.T.C. 2050, 93 D.T.C. 721 (T.C.C.): "It is not enough to simply weigh or count the number of factors or connections on each side. The depth of one's roots of one's centre of vital interests is more important than their number".

This introduces a subjective element to the test and the facts and circumstances of each case may tip the balance, and therefore, more weight should be given to the factors chosen by the individual as opposed to ones the individual has no control over (Baker, 2015:175). This factor is emphasised in Article 4, paragraph 15 of the OECD MTC (OECD, 2017). The OECD does not provide sufficient guidance on deciding whether the objective or subjective approach should be applied, and therefore, this should be assessed on a case-by-case basis (Baker, 2015:175).

Section 102(1)(a) of the TAA states that the onus of proof rests upon the taxpayer to prove that an amount is not taxable, in other words, that the requirements of the tiebreaker clause have been met (Tax Consulting. n.d.). They have to prove this on a balance of probabilities, which means they have to prove that cessation of residency was more likely than not (Davies, 2009). A further case that dealt with the meaning of balance of probabilities is *Bloch V SIR,* 1980 42 SATC. It was held that to discharge the onus on a balance of probabilities, the taxpayer had to show that the dominant purpose of holding the shares was to produce income. However, the Special Court held that the onus of proof is in fact higher than on a balance of probability and that the taxpayer's case must also be stronger than SARS's case.

This principle was held in ITC 43, (1925) (2 SATC 115. (NA)). "*All things being equal we are bound to decide in favour of the Commissioner*".

To illustrate the application of the 'centre of vital interest test', it is helpful to refer to the case of *Allchin v. Canada, 2004 DTC , 2004 FCA 206*. The issue in this case was whether Ms Allchin was resident in Canada, and therefore, taxed in Canada. Ms Allchin had a permanent home in both the USA and Canada. Accordingly, the court had to consider the second test in Article 4(2), namely the question of Ms Allchin's centre of vital interest. The court held that Ms Allchin had her centre of vital interest in both Canada and the USA. It was noted that the majority of Ms Allchin's economic activities were carried out in the USA, while her personal relations were more closely linked to Canada. Since the court was not able to determine the centre of her vital interests, the court decided that she was resident in the state of her habitual abode. The court used a chart to graphically show the number of days spent by Ms Allchin in Canada and the USA. Ms Allchin's lifestyle and activities in the USA and the information contained in the chart provided clarity to the court that her habitual abode for the years under consideration was the USA and she was therefore deemed to be a resident in the USA (*Pamela Allchin v Her Majesty the Queen*, 2004 DTC 6468; De Koker & Williams, 2021:Chapter 7).

The meaning of habitual abode is not the focus of this study and will therefore not be explored further.

2.2.3 Capital gains tax consequences of ceasing to be a South African resident

In terms of Section 9H of the Act, when an individual breaks South African residency, they are deemed to have disposed of all their assets at market value to a resident on the date immediately before they cease to be a resident. This is commonly referred to as an 'exit charge'. Certain assets are excluded from the deemed disposal net, such as immovable property situated in South Africa. The reason for the exception is that the immovable property remains in the tax net as it will be subject to capital gains tax in South Africa upon future disposal as the capital gain will be from a South African source (SAICA, 2013).

In terms of the eighth schedule to the Act, any capital gains can be reduced by a R40 000 annual exclusion and the net amount is then included in taxable income at an inclusion rate of 40%. There is a playoff between the 'exit charge' and not paying expat tax in South Africa upon ceasing to be a South African tax resident. The exit charge may often be more exorbitant than meets the eye, especially for high income earners that have a large amount of assets outside South Africa (Van Zyl, 2020). There will, however, be no trade-off discussed in this study, as Mr. Blue’s only asset is immovable property situated in South Africa. Therefore, he will not be subject to the exit charge when he invokes the DTA tiebreaker clause and becomes a non- resident for tax purposes.

CHAPTER 3: THE SOUTH AFRICAN GAAR

3.1 INTRODUCTION

For the purposes of this study, the difference between tax avoidance and tax evasion is discussed, as there is a very fine line distinguishing them (Kay, 2015). Tax avoidance is defined as taking actions within legal parameters to reduce the amount of tax paid (Kumarasingam, n.d.). In the case of *Duke of Westminster v Commissioners of Inland Revenue*, 1936 A.C. 1; 19 TC 490, it was held that "*every man is entitled to order his affairs so that the tax attaching under the appropriate act is less than it otherwise would be*". Therefore, a taxpayer may legally arrange their fiscal matters to minimise taxes by taking with the effect of deferring income from one year to the next (SARS, 2006:5). The OECD defines tax evasion as "illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities" (OECD, n.d). Tax evasion does not fall within the scope of our study and will therefore not be discussed further.

Tax avoidance consists of two elements, being permissible and impermissible tax avoidance (Bodlo, 2015:7). Permissible tax avoidance is allowed in terms of the law, and a taxpayer has a right to pay the least amount of tax within legal parameters. In the case of *CSARS v NWK*, (73 SATC 55), it was found that "a *taxpayer is entitled to manage his affairs in a manner that reduces the tax, but that simulated transactions would make the exercise impermissible".*

Another case that dealt with the taxpayer's right to structure their affairs in the most tax efficient manner is *CIR v Conhage*, 1994 (4) SA 1149; 61 SATC 391 (Langenhoven, 2016:2). In CIR v Conhage the following is stated:

> *"Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimize his tax liability by arranging his affairs in a suitable manner. If e.g. the same commercial result can be achieved in different ways, he may enter into the type of transaction which does not attract tax or attracts less tax".*

Although taxpayers are entitled to structure their affairs in the most tax efficient manner, all tax efficient transactions must pass the scrutiny of the South African GAAR (Krebs, 2015:1).

Contrarily, impermissible tax avoidance is prohibited (Bodlo, 2015:2). The effects of impermissible tax avoidance are extensive as it erodes the tax base of a country and result in an adverse impact on revenue authorities' ability to collect tax due to them (Barker, 2009; Langenhoven, 2016:3). Due to the disastrous effects that impermissible tax avoidance has on the revenue authorities, revenue authorities seek ways to curb impermissible tax avoidance, such as the application of the provisions contained within the South African GAAR (Langenhoven, 2016:3).

Section 80A–80L is the anti-avoidance legislation that is intended to curtail impermissible tax avoidance (Bodlo, 2015:9; SARS, 2006:1). SARS (2006:6) describes the GAAR as follows: "The GAAR is perceived legislatively as an essential pillar of the tax system designed to protect the tax base and the general body of knowledge from what are considered to be unacceptable tax avoidance devices". However, the GAAR must split the difference between permissible and impermissible tax avoidance (Bodlo, 2015:9).

It is important to allude to the fact that the GAAR is not a charging provision (SARS, 2006:6). While the application of the GAAR eliminates impermissible tax avoidance and may combat revenue loss as a result of impermissible tax avoidance, the purpose of the GAAR is not to raise additional revenue (SARS, 2006:6). The use of the GAAR is intended to preserve the tax base of the country and not to expand it (SARS, 2006:6).

Figure 3 illustrates the requirements that need to be met for the commissioner to apply the GAAR to an arrangement.

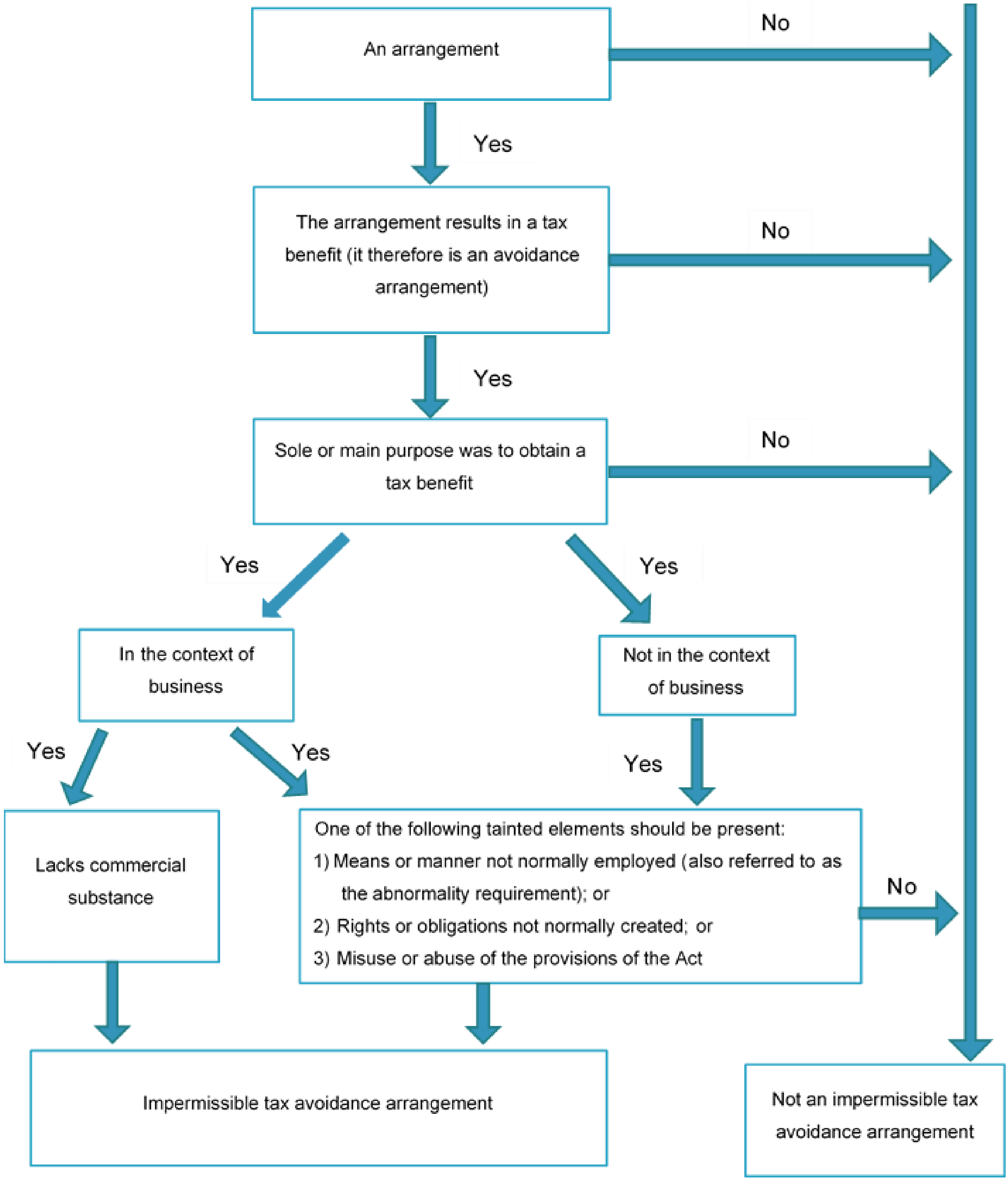

Figure 3: Steps within the South African GAAR

Source: (Stiglingh & Koekermoer, 2020 (adapted))

3.2 LEGISLATION

Section 80A of the Act defines the term impermissible avoidance arrangement. Based on this, if the arrangement falls within the definition of an impermissible avoidance arrangement in terms of Section 80A, the provisions of the GAAR will apply.

Following the definition of Section 80A, the requirements of the GAAR are discussed, along with analysis and interpretation of each requirement of the GAAR. Thereafter, case law is examined and interpreted to provide more context to the requirements of the GAAR. Ultimately, the latest court case that applies the application of the 'new GAAR' is discussed and analysed.

Section 80A of the act defines impermissible tax avoidance arrangements as follows:

> *"An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and*
>
> *a) in the context of business –*
>
> *i) it was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purpose, other than obtaining a tax benefit; or*
>
> *ii) it lacks commercial substance, in whole or in part, taking into account the provisions of Section 80C;*
>
> *b) in a context other than business, it was entered into or carried out by a means or in a manner which would not normally be employed for bona fide purpose, other than obtaining a tax benefit; or*
>
> *c) in any context—*
>
> *i) it has created rights or obligations that would not normally be created between persons dealing at arm's length; or*
>
> *ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part)".*

3.2.1 Requirements contained in the South African GAAR

There are four requirements contained in Section 80A–80L of the Act, and all four must be met before the provisions of the South African GAAR can apply. The requirements are:

1) *“There must be an arrangement”:* Section 80L defines an arrangement as “any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property”.

2) *“The arrangement results in a tax benefit and will therefore constitute an avoidance arrangement”*: Section 80L of the Act defines an avoidance arrangement as “any arrangement that, but for this Part [the GAAR] results in a tax benefit”. Section 1 of the Act defines a tax benefit to include “… any avoidance, postponement or reduction of any liability for tax”. In order to become subject to the GAAR, the arrangement furthermore needs to be an impermissible avoidance arrangement as defined in Section 80L, namely “any avoidance arrangement described in Section 80A”. This means that the requirements listed in Section 80A must also be met.

3) *“The sole or main purpose must be to obtain a tax benefit”:* Section 80A states that “an avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit”. Section 80G(1) states the following:

> *“An avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit, unless the party obtaining the tax benefit proves that obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement”.*

4) *One of the following tainted elements need to be present in the arrangement for it to constitute an impermissible avoidance arrangement in the context other than business, as is the case in this study* (Bodlo, 2015:21):
   - “Means or in a manner not normally applied (S80A(b));
   - Rights or obligations not normally created between persons in an arm’s length transaction (S80A(c)(i)); or
   - A misuse or abuse of the provisions of the Act (S80A(c)(ii)”).

Requirement 1: Arrangement

Section 80A of the Act states that in order for the provisions of the GAAR to apply " there must be an arrangement". In the case of *Revenue v Bodat and others*, 2003 (67 SATC 47), the term arrangement is defined as "precisely the transaction, operation or scheme (whether enforceable or not), or to which steps or part of a scheme, the commissioner has applied the general anti-avoidance rule". De Koker (2011:Chapter 19 para 4) states that the word 'arrangement' can be described as following:

> *"requiring a conscious involvement of two or more participants who arrive at an understanding. It cannot exist in a vacuum and presupposes a meeting of minds, which embodies an expectation as to future conduct between the parties. That is, an expectation by each that the other will act in a particular way".*

There should some documented evidence that the parties entered into an arrangement, which would avoid any disputes between the parties involved (Museka, 2011:3).

Smaller steps within larger arrangements are also included in the definition of an arrangement, and thus allows the commissioner to apply the GAAR to smaller steps within the larger arrangement (Liptak, 2017).

Requirement 2: Tax benefit

The next step contained in Section 80L of the Act is to assess whether there is a tax benefit. Tax is defined in Section 80L as "… includes any tax, levy or duty imposed by the Act or any other Act administered by the commissioner". Further, Section 1 of the Act defines a tax benefit to include "any avoidance, postponement or reduction of any liability for tax". The following was held in *CIR v Smith*, (65 SATC 6):

> *"… to avoid liability in this sense is to get out of the way of, escape or prevent an anticipated liability, GAAR will find application when a taxpayer enters into an arrangement which has the effect of avoiding liability or an anticipated liability which will result in a tax benefit".*

Another case that deals with the definition of tax benefit is the case of *CIR v King*, 1947 (2) SA 196 (A), (14 SATC 184 at 194), where the following was held:

> *"A tax benefit occurs when there are transactions and operations which if a taxpayer carries them out would have the effect of reducing the amount of his income to something less than it was in the past or freeing himself from taxation from some part of this future income".*

The courts have also pointed out that the 'but for' test should be used when determining whether a tax benefit exists. This test asks the following question: Would the taxpayer have been liable for tax, but for this transaction? (Pidduck, 2017:81). This simply means that a tax benefit would exist if the transaction resulted in the reduction of tax or no liability to pay tax.

The onus of the burden of proving that a tax benefit exists rests upon the commissioner. However, this should be an effortless task as the presence of tax avoidance in a tax benefit is one of the main initiators in applying the GAAR (Kujinga, 2013:109).

Requirement 3: Sole/main purpose

Section 80A of the Act states that the sole/main purpose of the avoidance arrangement must be to obtain a tax benefit for the provisions of the GAAR to be invoked. Sole/main purpose is not defined in the Act, and therefore, reference is made to court cases to ascertain the meaning of these words.

In the case of *Revenue v Bodat and others*, 2003 (67 SATC 47) the 'main purpose' was defined as "one which must be dominant over any other, because in ordinary language 'mainly' means for the most part, principally or chiefly". In the case of *SBI v Lourens Erasmus Bpk*, 1966 28 SATC 233 at 245, it is defined as follows:

> *The word 'mainly' establishes a purely quantitative measure of more than 50% and the associated use of the word 'solely or mainly' is inserted, ex abundante cautela, to circumvent the possibility that what may be described as being 'solely' of a particular character would not qualify as being 'mainly' of that character.*

The courts came to the conclusion that the word 'solely' does not have the same meaning as 'mainly'. Solely means the purpose of the taxpayer, while mainly depicts a quantitative threshold above 50% (Museka, 2011:29)

In terms of Section 80G, there is a rebuttable presumption that the sole or main purpose of an avoidance arrangement was to obtain a tax benefit (Langenhoven, 2016:37). The onus of proving that the sole/main purpose was not to obtain a tax benefit falls upon the taxpayer. The taxpayer must be able to provide autonomous information to discharge the onus that satisfies the court upon a balance of probability and “reasonably considered in light of the relevant facts and circumstances” that obtaining a tax benefit was not the main/sole purpose (De Koker & Williams, 2021:Chapter 19).

The case of Secretary for Inland Revenue v Gallagher 1978(2) SA 463(A) illustrates the difference between objective and subjective tests as follows:

> *By an objective test in this context is evidently meant a test which has regard rather to the effect of the scheme, objectively viewed, as opposed to a subjective test which takes as its criterion the purpose which those carrying out the scheme intend to achieve by means of the scheme”.*

De Koker and Williams (2021) states that the purpose should be determined objectively, and that “the requisite purpose is of the arrangement itself, and not the subjective purpose of the taxpayers who entered into it”. The taxpayer would have to provide objective evidence to prove the sole/main purpose. Some of the objective factors that would need to be considered in terms of SARS Interpretation Note 3 regarding the centre of vital interest is mode of life of the taxpayer, place of business and personal interest, location of personal belongings, family and social relations (De Koker & Williams, 2021:Chapter 19; SARS Interpretation Note 3 [Issue 2]).

To prove the sole/main purpose was not to obtain a tax benefit, the taxpayer must have the relevant documentary evidence and audit trail, which is usually an onerous task from the taxpayer’s perspective (Van Zyl, 2021).

If the taxpayer is able to prove that the sole or main purpose of the avoidance arrangement was not to obtain a tax benefit, then the arrangement will not fall foul of the GAAR, and it is no longer required to assess the tainted elements as requirements 1–3 in the GAAR provisions have not been met. If, however, the taxpayer is unable to prove that the sole or main purpose of the avoidance arrangement is not to obtain a tax benefit, each of the tainted elements contained within the GAAR would need to be assessed against the facts and circumstances of the arrangement. This is in terms of Section 80A–80L of the Act.

Requirement 4: One of the three tainted elements should be present

From a taxpayer's perspective, it may be difficult to prove that the sole or main purpose was not to obtain a tax benefit because of the assortment of information required. Therefore, the GAAR may be invoked if any of the three tainted elements is present. For the purposes of this study, the tainted elements contained in the context other than business are considered. In terms of Section 80A(b), it is stated that "in a context other than business, it was entered into or carried out by a means or in a manner which would not normally be employed for a bona fide business purpose".

Avoidance arrangements in the context other than business

'In the context other than business' can be interpreted as arrangements that are entered into or carried out in a manner contrary to what would have been done in a business context (De Koker and Williams, 2021). For the purposes of this study, the scenario indicated that the South African expatriate, Mr. Blue, who works in the UAE is employed by an employer. The intention is not to make a profit but to earn a salary/remuneration. Based on this interpretation, only the tainted elements contained within Section 80A(b) "in the context other than business" are discussed.

Section 80A(a)(i) and (ii) that refer to tainted elements of a "bona fide business purpose" and "lack of commercial substance", respectively, are therefore not relevant to this study as these requirements relate to 'in context of business'.

Tainted element 1: "It was entered into or carried out by a means or in a manner which would not normally be employed for a bona fide purpose, other than obtaining a tax benefit" (Section 80A(b)).

The term 'bona fide purpose' that is used in Section 80A(b) is ambiguous; however, it presumably means the methodology required by the taxpayer to achieve a personal, family or charitable result (De Koker and Williams, 2021). De Koker and Williams (2021) expresses that the normality of the means or manner used is not indispensable; however, it should be carried out in a means or manner that is normally used by persons outside of a business context to achieve, presumably family, personal or charitable objectives.

In the case of C*ommissioner for South African Revenue Service v Knuth and Industrial Mouldings (Pty) Ltd*, (62 SATC 65), it is noted that if an arrangement or scheme is not carried out in an abnormal manner, the GAAR cannot be applied even if tax avoidance was the taxpayer's main purpose. Similarly, it is noted that even though the arrangement resulted in a tax benefit, if it was not the sole or main purpose of the arrangement, then the GAAR may not be applied as one of the essential requirements is absent (Pidduck, 2017:73).

The abnormality requirement has frequently been referred to as the Achilles heel of the GAAR as there is no clear guidance on normality, which has also been the case in the 'old' GAAR contained in Section 103 of the Act (Pidduck, 2017:65; SARS, 2006:15). It is worth noting that once a specific transaction/arrangement becomes widely used, it becomes normal based on the substantial use of such a transaction (SARS, 2006:39). Based on this, if a specific transaction becomes a common occurrence, then it cannot fall foul of the GAAR. Olivier (1997:742) also stated that "the commercial acceptability of a transaction would result in the abnormality test not being satisfied, regardless of the fact that the transactions may have been entered into solely for the avoidance of tax".

Tainted element 2: "Rights or obligations that would not normally be created between persons at arm's length" (Section 80A(c)(i)).

In order to understand this tainted element, the meaning of the terms "parties dealing at arm's length" need to be understood (Bodlo, 2015:22). This term is not defined in the Act, and we therefore turn to case law to attribute the meaning of the term. In the case of *Hicklin v SIR*, 1980 (1) SA 481 (A) (41 SATC 179 at 192) the following is prescribed:

> *"The expression at arm's length connotes that each party is independent of the other and in so doing will strive to get the outmost possible advantages out of the transaction for himself".*

The fact that the parties are not dealing at arm's length and that a transaction creates rights and obligations that would not normally be created for individuals dealing at arm's length may be an indication of an impermissible avoidance arrangement and the GAAR could be invoked (Museka, 2011:64). The court furthermore concluded that if an agreement is at arm's length, then the rights and obligations resulting therefrom would be regarded as normal as opposed to abnormal (Museka, 2011:65).

It important to emphasise that this tainted element is an objective test (SARS, 2010:par 6.2) and that substance over form is pertinent in determining whether rights and obligations are normally created (Stiglingh & Koekermoer, 2020).

In the case of *CIR v Louw,* 1983 (3) SA 551 (45 SATC 113), it is established that where parties are independent, each party seeks to obtain the greatest advantage for themselves (Loof, 2013:31). Therefore, if the parties act in a way that benefits themselves, it is unlikely that this tainted element will be met.

A further statement made in the case of *Hicklin v SIR* relates to the meaning of "normally created" as follows:

> *"What may be normal because of the presence of circumstances surrounding the entering into or carrying out of an agreement in one case may be abnormal in an agreement of the same nature in another case because of the absence of such circumstances".*

A practical example of the above statement made in the *Hicklin v SIR* case is the providing of physical security services for employees working in Nigeria. Due to the unsafe conditions and high crime rate prevalent in Nigeria, an employer providing security services to an employee in Nigeria would not be regarded as an abnormal right as all employees working in Nigeria will be given this right (Van Zyl, 2021).

Tainted element 3: "It would result directly or indirectly in the misuse or abuse of the provisions of the Act" (Section 80A(c)(ii)).

Section 80A(c)(ii) of the Act mentions that "an avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and … it would result directly or indirectly in the misuse or abuse of the provisions of this Act".

The misuse or abuse tainted element was drawn up based on Canadian law (Kujinga, 2013:5) and was referred to in the SARS discussion document that was released in 2005 and which resulted in the 2006 amendments to the South African GAAR (Pidduck, 2017:8).

In the Canadian case of *Canada Trustco Mortgage Company v Canada,* Canada Trustco Mortgage Co., 2004 FCA 67

it was held that the terms misuse and abuse are synonyms and that parliament could not have intended two different inquiries that would result in ambiguity as to how one can abuse the Act without misusing any provisions of the Act (Bodlo, 2015). Further, it emphasises that the GAAR does *not* apply to a transaction where it can reasonably be considered that the transaction would *not* result directly or indirectly in a misuse or abuse of the Act. The issue noted by the courts is the double negative (Pidduck, 2017:138).

In the South African GAAR an avoidance arrangement is an impermissible arrangement if its sole or main purpose is to obtain a tax benefit and, among other requirements, “it would result directly or indirectly in the misuse or abuse of the provisions of the Act”. It is evident that based on the wording contained in the misuse or abuse provision of the South African GAAR, the provision is written in the positive, which is contrary to Canadian law (Pidduck, 2017:157).

It is worth mentioning that Canada does not use the ‘interpretative approach’ as in the case of South Africa. This explains why Canada used a double negative, namely, to enforce the use of the interpretative approach for the misuse/abuse provision. This involves a two-part inquiry:

> *[The] “first is to interpret the provisions giving rise to the tax benefit to determine their object, spirt or purpose. The second is to examine the factual context of a case in order to determine whether the avoidance arrangement defeated the object, spirit or purpose of the provisions in issue” (Museka, 2011:68).*

Therefore, in Canada, when the court is faced by an instance where it has to determine whether there has been misuse or abuse of the provisions of the Act, the provision that deals with the misuse or abuse provisions needs to be interpreted (Museka, 2011:68). This simply means that firstly, the relevant provisions of the Act should be identified, and thereafter, the facts must be analysed to determine whether the transaction results in the misuse or abuse of the Act (Bodlo, 2015:49).

It is important to allude to the fact that the primary difference between the South African and Canadian GAAR relates to the misuse or abuse tainted element. In Canada, the concept of misuse or abuse is stated in the negative, indicating that the GAAR would not apply where the transaction will not result in the misuse or abuse of the legislation, therefore, following a negative application of the test (Pidduck, 2017:138,157). The South African GAAR, on the other hand, follows the positive application of the test (Pidduck, 2017:157).

It therefore appears as if the misuse or abuse tainted element refers to the frustration, manipulation or exploitation of the purpose of a provision of the Act, or results in a situation that was not intended by the provisions of the Act (Pidduck, 2017:101). It follows that if a taxpayer has created situations or has used a loophole in the Act, it will not be considered an abuse of the Act as the loophole would have been allowed and will still be considered compliant with the provisions of the Act (Pidduck, 2017:151).

3.3 RECENT COURT CASE DEALING WITH THE APPLICATION OF THE SOUTH AFRICAN GAAR

The latest court case where Section 80A–80L of the Act, commonly referred to as the 'new GAAR', were dealt with is the case of *ABSA Bank Limited and another v CSARS*, (2019/21825 [P]) [2021] ZAGPPHC (11 March 2021). Although this case mainly dealt with Section 105 of the TAA, it provides valuable guidance on the provisions of the GAAR. Figure 4 illustrates the facts of the case.

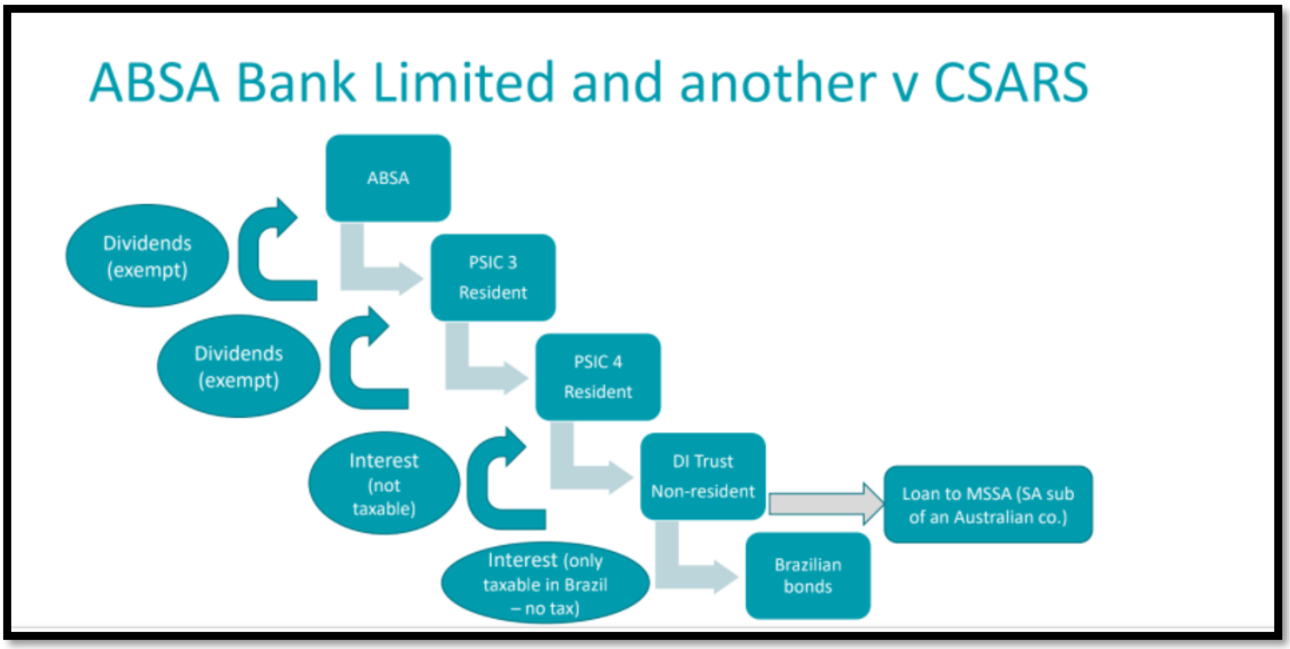

Figure 4: Flow of the transactions of the court case of *ABSA Limited and another v CSARS*

Source: Arendse Monthly tax update April 2021

The facts of the case are as follows, as illustrated in Figure 4:

1. ABSA acquired preference shares in a South African company (PSIC 3), and this entitled ABSA to dividends when declared (Kotze, 2021);
2. Thereafter, PSIC 3 bought shares in another South African company (PSIC 4) (Kotze, 2021);

3. In addition, PSIC 4 invested in an offshore trust (DI trust). This trust loaned money to MSSA, a South African resident company and a subsidiary of an Australian company (Macquarie Group);
4. The DI trust also invested in Brazilian government bonds, on which the DI trust earned income (Kotze, 2021).

The result of this series of transactions was that PSIC 4 received interest on its capital investment in DI trust and PSIC 4 could declare dividends to PSIC 3. PSIC 3 then declared dividends to ABSA. As the dividend was declared by two South African resident companies, the dividend received by ABSA was exempt from normal tax and dividends tax (Kotze, 2021).

In SARS' view, ABSA was party to an impermissible avoidance arrangement as the dividends should not have been tax-free, but rather a receipt of interest that attracts tax (Kotze, 2021). SARS provided reasons why it believed ABSA entered into an impermissible avoidance arrangement (Kotze, 2021). ABSA provided reasons to SARS on why the provisions of the GAAR should not apply. It argued that PSIC 3 and MSSA had a back-to-back relationship which had the result that the funds would flow directly to MSSA to settle its debt with the parent company (Kotze, 2021).

ABSA was unaware of the intermediary role of PSIC 4 and the DI trust and claimed ignorance in this regard (Kotze, 2021).The court held that the definition of 'party' in Section 80L requires the taxpayer to take part in the arrangement. Therefore, the following was found: "To this end, the court held that a taxpayer who is an unwitting recipient of a benefit derived from an impermissible tax avoidance arrangement cannot be construed as the taxpayer taking part in an arrangement" (Kotze, 2021).

In the case of *CIR v Louw*, it was established that an arrangement that comprises several distinct transactions must be regarded as a scheme. The scheme ties the several transactions into a deliberate chain. However, in the ABSA case, it was held that a mere series of subsequential events does not constitute a chain. Without a factual basis to allege ABSA was anything more than an investor in preference shares, no scheme was established that reaches ABSA, even if it extends to some or all of the other entities (Kotze, 2021).

It was confirmed that the purpose of tax avoidance must be established subjectively by reference to the taxpayer and not objectively by reference to the arrangement (Kotze, 2021). Furthermore, the court also commented on the meaning of a tax benefit and whether ABSA received a tax benefit. The court confirmed that "whether a tax liability is evaded by a taxpayer must be determined by applying the '*but for'* test to a future anticipated tax liability" (Kotze, 2021). The 'but for' test must be applied subjectively to determine the avoidance of tax, and therefore, "the court concluded there was no demonstration by SARS to prove that ABSA evaded a tax liability and therefore concluded that the 'but for' test was not met". SARS opposed this view; however, the court held that SARS' conclusion was unreasonable (Kotze, 2021). If a person would not have incurred a liability to tax through entering into the same transaction in other circumstances, it is difficult to assert that the person has derived a tax benefit.

The principles relating to the GAAR provisions addressed in the ABSA Bank Limited case can be summarised as follows (Arendse, 2021):

- A series of transactions occurring in a chronological order will only constitute an 'arrangement' if there is a unity indicating a deliberate chain.
- To 'participate or take part' in an arrangement requires more than merely being a party to a single transaction.
- The sole or main purposes of an arrangement must be established subjectively by reference to the taxpayer and not objectively by reference to the 'arrangement'.
- Whether or not a tax benefit was obtained, must be established subjectively using the 'but for' test.
- If a person would not have incurred a liability to tax through entering into the same transaction in other circumstances, it is difficult to conclude a tax benefit was obtained.

General remedy

Once all the conditions stipulated in terms of Section 80A are met, Section 80B empowers the commissioner to take certain actions to remedy the impermissible tax avoidance (Stiglingh & Koekermoer, 2020:1123). The general remedy provided for by the commissioner is set out in Section 80B(1)(f) of the Act. In terms of this general remedy, the tax consequences under the Act may be determined as if the transaction had not been entered into or carried out (Stiglingh & Koekermoer, 2020:1123).

Specific remedies

The commissioner is also provided with specific remedies to impermissible tax avoidance arrangements, as mentioned below (Stiglingh & Koekermoer, 2020:1123). The commissioner may in terms of S80B(1)(a)-(e) of the Act:

- *"Disregard or combine any steps in or parts of the impermissible avoidance arrangement;*
- *Disregard any accommodating or tax-indifferent party or deem the party and any other party as one and the same person for purposes of determining the tax treatment of any amount;*
- *Deem connected persons to the impermissible avoidance arrangement as one and the same person; or*
- *Re-allocate or reclassify any gross income, receipts or accruals of a capital nature, expenditure or rebates".*

The remedy most relevant to this study is the general remedy contained in Section 80B(1)(f) of the GAAR, which will result in SARS treating the arrangement as if the DTA tiebreaker clause of the centre of vital interest has not been invoked by the taxpayer. This will denote that the South African expatriate will be taxed in South Africa on income earned in the UAE that is above the cap of R1.25 million.

The purpose of the GAAR remedies is to eliminate any tax benefit that would have been acquired from any of the three tainted elements in an impermissible avoidance arrangement (Dlamini, 2011:71). It is the commissioner's decision to determine which of the remedies contained within the GAAR should be applied. However, the taxpayer may appeal this in terms of Section 104 of the TAA (Dlamini, 2011:71).

CHAPTER 4: ACTIONS TAKEN TO INVOKE THE CENTRE OF VITAL INTEREST CLAUSE MEASURED AGAINST THE SOUTH AFRICAN GAAR

4.1 INTRODUCTION

At this point, the study has attained most of the set objectives of analysing and interpreting the meaning of resident, with emphasis on ordinarily resident, as well as the application of Section 10(1)(o)(ii), analysed and interpreted the DTA tiebreaker clause of the centre of vital interest, and analysed and interpreted the South African GAAR requirements. The remaining objectives are to discuss the actions that can be taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest and whether these actions will trigger the provisions of the South African GAAR.

This chapter focuses on discussing the possible actions taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest to cease South African tax residency. Furthermore, this chapter tests these steps against each requirement of the GAAR to ascertain whether the GAAR could be invoked.

4.2 ACTIONS TAKEN BY SOUTH AFRICAN EXPATRIATES TO INVOKE THE DOUBLE TAX AGREEMENT TIEBREAKER CLAUSE OF THE CENTRE OF VITAL INTEREST

This study makes the assumption that the taxpayer has a permanent home in both South Africa and the UAE, and therefore, the second DTA tiebreaker, the centre of vital interests per Article 4(2)(a) of the OECD (2017), is the focus of the rest of the discussion.

There is a wide array of actions that can be taken by South African expatriates making the UAE their centre of vital interest to invoke the DTA tiebreaker clause. These possible actions were obtained from webinars, journal articles, discussions with an expert in the field and web pages, and include the following:

- Family ties
    - ➢ Mr. Blue can prove that his centre of family/social relations is the UAE if all his immediate family members are situated in the UAE (Van Zyl, 2021).
    - ➢ If Mr. Blue’s wife also works/lives in the UAE, it will become easier for Mr. Blue to prove that his centre of vital interests is the UAE. However, if his spouse commutes from South Africa to the UAE, it will be more difficult to prove that his centre of family/social relations is in the UAE as his immediate

family does not live with him in the UAE. No focus should be placed on extended family members in this regard (Van Zyl, 2021).

- Medical aid
  - ➢ By stepping down as the main member of a South African medical aid, Mr. Blue will be able to build a stronger case that his centre of vital interests is no longer in South Africa. Mr. Blue could still be a member of the South African medical aid but should not remain the principle member. Mr. Blue could remain as a dependant on the medical aid; however, the spouse should be the main member of the medical aid (Van Zyl, 2021). Many expats choose to remain members of a South African medical aid to avoid penalties upon their eventual return to South Africa. Emirati and expats are required by the UAE health authority to have medical insurance (Expat arrivals, 2021). Due to the compulsory nature of medical aid in the UAE, South African expatriates could end up being members of a medical aid scheme in both the UAE and in South Africa. This is not an unusual occurrence (Van Zyl, 2021). The last instance is that Mr. Blue could cease membership of a South African medical aid completely, providing stronger evidence that the centre of Mr. Blue's vital interest is no longer in South Africa (Van Zyl, 2021).

- Social interactions: By engaging in more social interactions in the UAE, it will build a stronger case for Mr. Blue to prove that his centre of vital interests is in the UAE. The following social interactions can be pursued by Mr. Blue in the UAE:
  - ➢ Becoming a member of a cultural or religious group and regular visits to a place of worship;
  - ➢ Becoming involved in community work;
  - ➢ Joining a sports club; and
  - ➢ Joining any sort of recreational club (Van Zyl, 2021).

- SHARIA law: If a will is drawn up and registered in the UAE, it will provide more evidence that Mr. Blue's centre of vital interests is the UAE (Van Zyl, 2021). As the UAE is a civil law jurisdiction, the Islamic law or Sharia law applies, which sets out strict inheritance laws that determine how a Muslim's estate is to be divided upon their death. Sharia law applies to all Muslims, and a non-Muslim foreign national may choose to have their estate administered under the law of their country of residence. However, this can only happen when a legally certified will is drawn up in the UAE. Therefore, it is imperative for non-Muslims to draw up a will (Elhais, 2019).

- Residency and work visas: A residence visa is required if a foreign individual wants to live in the UAE for a long period of time. A work permit is also a requirement for an individual to work in the UAE. Mr. Blue is already in possession of a work permit as he is employed by a company in the UAE. Having both a work permit and a residence permit will be a further indication that the centre of Mr. Blue's vital interests is the UAE (The UAE Government Portal, 2021; Van Zyl, 2021).

- Bank accounts and investments: Mr. Blue will be required to open a bank account in the UAE. However, if Mr. Blue's spouse opens a bank account in the UAE as well, this would provide evidence to build the case that the centre of Mr. Blue's vital interests is the UAE. If Mr. Blue cancels his South African bank accounts, this could provide additional persuasive evidence in favour of the UAE being his centre of vital interests. Mr. Blue can also take out investment policies in the UAE, which will provide further evidence that his centre of vital interest is the UAE as it displays the longevity of his intention to live in the UAE (Van Zyl, 2021).

- Life insurance and retirement annuity: Mr. Blue can enter into a life insurance policy as well as a retirement annuity policy in the UAE. This is an indication of the permanency of Mr. Blue's stay in the UAE and will corroborate that Mr. Blue's centre of vital interest is the UAE as opposed to South Africa (Van Zyl, 2021).

- General: Mr. Blue could take some other general measures, for example, cancelling his TV licence with the South African Broadcasting Company (SABC) in South Africa or converting his South African driver's licence to a UAE licence. These actions could provide more compelling evidence of him breaking ties in South Africa, demonstrating that his centre of vital interests is in fact in the UAE (Van Zyl, 2021).

The above possible scenarios are not exhaustive in nature but merely provide guidance for possible actions that could be taken by South African expatriates to prove that their centre of vital interest is no longer South Africa but the UAE, and that they should accordingly be a tax resident of the UAE and only taxed in South Africa on South African sourced income.

For the purposes of the application of the South African GAAR below, it is assumed that the centre of vital interest clause has been invoked and results in Mr. Blue being deemed a resident of the UAE for tax purposes. Subsequently, this study will assess whether the actions taken by Mr. Blue will invoke the provisions of the South African GAAR.

4.3 APPLICATION OF THE SOUTH AFRICAN GAAR

4.3.1 Arrangement

The transactions and operations, described above, taken to invoke the DTA tiebreaker clause of the centre of vital interest to defeat Section 10(1)(o)(ii) all constitute an arrangement. The parties to the arrangement are, among others, the South African expatriate, being the taxpayer, the employer, the UAE tax authorities, and SARS.

4.3.2 Tax benefit

Mr. Blue, who is currently ordinarily resident in South Africa, is liable for tax on a worldwide basis. He was, however, up until 29 February 2020, fully exempt from paying tax in both South Africa and the UAE on remuneration earned in the UAE in terms of Section 10(1)(o)(ii). As a result of the Section 10(1)(o)(ii) amendment, Mr. Blue has been liable for tax in South Africa from 1 March 2020 on all remuneration earned exceeding R1.25 million. However, if Mr. Blue proves that his centre of vital interests is in the UAE (economic and social), he will be able to invoke the DTA tiebreaker clause and cease South African residency for tax purposes, which in turn will circumvent the implications of the Section 10(1)(o)(ii) amendment. This will result in no tax being paid on remuneration earned in the UAE in either of the countries, as the UAE is a tax-free jurisdiction. Therefore, the circumventing of the Section 10(1)(o)(ii) amendment is seen as a tax benefit, as he would have had to pay tax in South African on remuneration earned above R1.25 million if he was not able to invoke the DTA tiebreaker clause.

4.3.3 Sole or main purpose

The Act assumes that the sole or main purpose of invoking the DTA tiebreaker clause, and hence circumventing Section 10(1)(o)(ii), is to obtain a tax benefit, unless the taxpayer can prove the opposite. The onus rests upon the taxpayer to prove that the sole or main purpose is not to obtain a tax benefit. It may not be as easy to prove this on a balance of probabilities (Van Zyl, 2021).

It is clear that South African expats had started a tax revolt because of the Section 10(1)(o)(ii) exemption, and research shows that many South African expatriates are choosing to cease their South African tax residency to circumvent the impact of the amendment (Du Toit. J, 2019). Furthermore, it can also be argued that the South African expatriates did not cease tax residency before the Section 10(1)(o)(ii) amendment, but only after its implementation, indicating that the sole or main purpose of invoking the DTA tiebreaker clause and ceasing South African tax residency is to obtain a tax benefit.

Assuming that the taxpayer is unable to prove the sole or main purpose test, the next step is to consider the tainted elements. If any of the three tainted elements are present, then the arrangement will fall foul of the GAAR (Kujinga, 2013:105).

4.3.4 Tainted elements

Means or manner not normally applied

The means or manner test has been previously referred to as the 'abnormality test'. Because of the recent tax revolt caused by the Section 10(1)(o)(ii) amendment, many South African expatriates have opted to cease tax residency in South Africa (Du Toit. J, 2019). As a result of this, it can be said that the act of ceasing tax residency in South Africa because of the Section 10(1)(o)(ii) amendment is a normal occurrence and thus cannot be considered abnormal.

SARS (2006:39) also stated that if a specific transaction is widely used based on the substantial use of the transaction, then the transaction becomes normal. Based on this, this tainted element of the GAAR is not met. As a result, we delve into the next tainted element of the GAAR, being the rights or obligations not normally created.

Rights or obligations not normally created

Each of the parties to the arrangement will need to be considered to determine if there are any abnormal rights or obligations that are created. This will work as follows:

- Taxpayer: The abnormal right in the scenario of this study would be that no tax will be paid in either country once Mr. Blue ceases tax residency in South Africa as the UAE is a tax-free jurisdiction. However, Mr. Blue can argue that since many South African expatriates are ceasing residency in South Africa, the transaction does not create an abnormal right.
- Employer: No abnormal rights or obligations are created from the employer's perspective. The reason for employing the South African expatriate, Mr. Blue was so that the duties required by the employer are fulfilled by the employee. The employer pays Mr. Blue a salary for the work performed by him, and therefore, no abnormal right or obligation is created. The relationship is at arm's length.
- SARS: The abnormal liability for SARS would be that SARS will lose out on tax revenue for the tax that was meant to be paid by Mr. Blue had he not ceased South African tax residency. However, since many South Africans are ceasing tax residency in South Africa, it will be difficult for SARS to prove that Mr. Blue's arrangement created an abnormal obligation for SARS.

As this tainted element is not met, the last tainted element requirement of the South African GAAR is discussed next.

Misuse or abuse

As described earlier, misuse or abuse of the Act is when the taxpayer manipulates or exploits the provisions of the Act (Pidduck, 2017:101). There is no law prohibiting South Africans from ceasing tax residency. Furthermore, invoking the DTA tiebreaker clause to circumvent the Section 10(1)(o)(iii) amendment is within the law as it is catered for in the DTA and recognised in the definition of 'resident' in Section 1 of the Act. The taxpayers are using this loophole, which is within legal parameters, and therefore, it cannot be seen as misuse or abuse of the Act. This tainted element is therefore clearly not met.

4.4 CONCLUSION

Table 1 summarises the results of the actions taken to invoke the centre of vital interests DTA clause against the South African GAAR

Table 1: Summary of the results

Requirements of the GAAR	Met	Not Met	Uncertain
Requirement 1: Arrangement	✔		
Requirement 2: Tax benefit	✔		
Requirement 3: Sole or main purpose	✔		
Requirement 4: Tainted element			
Tainted element 1: Means or manner not normally employed		✔	
Tainted element 2: Rights or obligations not normally created		✔	
Tainted element 3: Misuse or abuse of the provisions of the Act		✔	
All four requirements		✔	
South African GAAR not invoked as none of the three tainted elements are met			

Source: Own design

It has been confirmed that the sole or main purpose of ceasing South African tax residency was to obtain a tax benefit. The Section 10(1)(o)(ii) amendment results in South African expatriates paying tax on remuneration earned above R1.25 million, but by invoking the DTA clause of the centre of vital interest the expatriate would not be liable for tax in South Africa or the UAE.

As the first part of the GAAR requirement is met, each of the three tainted elements was assessed to determine whether the provisions of the South African GAAR could be applied to the arrangement. Based on the assessment performed, the act of invoking the DTA tiebreaker clause of the centre of vital interest do not display characteristics of any one of the three tainted elements of the GAAR. Based on this, the South African GAAR cannot apply to Mr. Blue.

In general, although the actions and circumstances of each expatriate may be different, it appears that the actions taken by expats to cease South African tax residency by invoking the DTA tiebreaker clauses will never meet all the requirements of the GAAR, as indicated in Table 1.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

The amendment to Section 10(1)(o)(ii) has resulted in many South African expatriates opting to cease tax residency in South Africa because of the negative impact the amendment will have on their net earnings, especially for South African expatriates working in low or tax-free jurisdictions (Smith, 2019). This study assessed whether the actions taken by South African expatriates to cease South African tax residency will invoke the application of the GAAR. Based on the results of this study, it can be concluded that the actions taken by South African expatriates to invoke the centre of vital interest DTA clause and hence cease South African tax residency will not solicit the application of the South African GAAR.

This chapter rounds up the study and discusses the results of the study, assessing how each research objective was met and answering the research question. Thereafter, the gap in knowledge are filled, recommendations for future research are provided, and the concluding remarks surrounding this study are made.

5.2 RESEARCH OBJECTIVES ACHIEVED

The research objectives contained within this study were achieved and are discussed in the following subsections.

5.2.1 To analyse and interpret the meaning of 'resident', with emphasis on ordinarily resident as well as the application of Section 10(1)(o)(ii), commonly referred to as 'expat tax'

Section 1 of the Act mentions that there are two tests available that can be used to test residency, namely ordinarily resident and the physical presence test. These two tests are independent of each other. The study focused on the test of ordinarily resident. Per analysis and interpretation of case law, it was illustrated that ordinary residence is a state of mind and is the place where "a person would return from his wanderings" (*CIR v Kuttel*).

Section 10(1)(o)(ii), which formed a pivotal part of this study, was discussed and interpreted. Prior to 1 March 2020, South African expatriates were fully exempt from paying tax in South Africa for remuneration earned outside South Africa. The exemption was only applicable to South African expatriates that were employed outside of the Republic and was physically outside South Africa for a period exceeding 183 days in total, of which 60 were continuous (National Treasury, 2017). From 1 March 2020, this section was amended, and going forward only R1.25 million of remuneration earned by South African expatriates in a foreign county are exempt from tax in South Africa. Any remuneration above the R1.25 million threshold are subject to tax in South Africa (SARS Interpretation Note 16 [Issue 2]).

5.2.2 To analyse and interpret the DTA tiebreaker clause and the meaning of the 'centre of vital interest'

The centre of vital interest is the second clause contained in a DTA to determine the tax residency of a taxpayer and has been described as the country where the taxpayer's social and economic interests are closer. The centre of vital interests is a facts and circumstances test and not based on the number of days that a taxpayer spends in each country (Baker, 2015:175). It has also been accepted that more weight should be given to factors chosen by the individual than to factors the taxpayer is unable to control.

5.2.3 To analyse and interpret the GAAR requirements

All the South African GAAR requirements contained in Section 80A–80L of the Act were discussed. It was established that the transaction would need to constitute an arrangement with the sole or main purpose of that arrangement being to obtain a tax benefit. Once it has been established that the sole or main purpose was to obtain a tax benefit, any of the three tainted elements would need to be met for the arrangement to fall foul of the GAAR. The three tainted elements, which are means or manner not normally applied, rights or obligations not normally created between persons dealing in an arm's length transaction and a misuse or abuse of the provisions of the Act, were discussed in detail.

5.2.4 To discuss the actions that can be taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interests

A possible array of actions that are taken by expatriates to prove that their centre of vital interest is not in South Africa were discussed. Both economic and social aspects were discussed in detail.

5.2.5 To apply the principles contained in the South African GAAR to the actions taken by South African expatriates to invoke the centre of vital interest tiebreaker clause to determine whether the provisions of the South African GAAR will be triggered

Each requirement of the South African GAAR was applied in detail to the actions taken by expats to invoke the centre of vital interest clause to determine whether the actions will fall foul of the GAAR. It was confirmed that the actions taken by expats to invoke the DTA tiebreaker clause of the centre of vital interest would not trigger the provisions of the South African GAAR as none of the tainted elements were present.

5.3 RESEARCH QUESTION ANSWERED

The research question of this study was as follows: Will the actions taken by expatriates to invoke the DTA tiebreaker clause of the centre of vital interest to defeat Section 10(1)(o)(ii), trigger the provisions of the South African GAAR? By addressing each of the objectives, this study was able to provide an answer to the research question. The result is that, based on the assumptions made in this study, the actions taken by expatriates to invoke the DTA tiebreaker clause of the centre of vital interest and hence defeat the implications of the Section 10(1)(o)(ii) amendment will not trigger the provisions of the South African GAAR.

Each of the requirements of the South African GAAR were discussed in Chapter 3. Chapter 4 attempted to apply each of the requirements of the GAAR to the scenario of the study, with the result that the provisions of the GAAR was not triggered. This is largely due to the ambiguous wording of the misuse and abuse tainted element of the GAAR.

5.4 KNOWLEDGE GAP

The knowledge gap that was identified was that no research has been undertaken to date to determine whether the actions taken by South African expatriates to invoke the DTA tiebreaker clause of the centre of vital interest to defeat Section 10(1)(o)(ii) will trigger the provisions of the South African GAAR.

The results of this research could help South African expatriates who are considering ceasing tax residency in South Africa and are concerned about whether the actions that they take to cease tax residency could trigger the provisions of the South African GAAR. Furthermore, it could also help provide them with detail on what aspects could be challenged by SARS so that they are better prepared by collating all the necessary supporting documentation. This will result in more certainty for South African expatriates and help them make informed decisions.

5.5 FUTURE RESEARCH

This study focused on an expatriate that was ordinarily resident in South Africa. Future research could focus on a taxpayer that is resident in South Africa based on the physical presence test and whether the GAAR could possibly apply to actions taken by them to cease tax residency.

5.6 CONCLUDING REMARKS

Many South African expatriates are ceasing residency in South Africa because of the amendment of the Section 10(1)(o)(ii) exemption. This is causing an enormous decrease in the (expected) tax base of South Africa, and therefore, SARS may try to prove that the actions taken by South African expatriates to cease tax residency in South Africa will trigger the South African GAAR. Therefore, taxpayers that are planning to cease residency in South Africa by way of invoking the DTA tiebreaker clause between South Africa and the UAE should ensure that they have enough documentary evidence and an audit trail to make their case stronger and to prove that their actions are legit and do not result in impermissible tax avoidance, should SARS challenge their actions.

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APPENDIX A:
DECLARATION OF PLAGARISM

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

DEPARTMENT OF TAXATION

Declaration Regarding Plagiarism

The Department of Taxation emphasises integrity and ethical behaviour with regard to the preparation of all written assignments. Although the lecturer will provide you with information regarding reference techniques, as well as ways to avoid plagiarism (see the *"Guidelines on Referencing"* document), you also have a responsibility to fulfil in this regard. Should you at any time feel unsure about the requirements, you must consult the lecturer concerned before submitting an assignment.

You are guilty of plagiarism when you extract information from a book, article, web page or any other information source without acknowledging the source and pretend that it is your own work. This does not only apply to cases where you quote the source directly, but also when you present someone else's work in a somewhat amended (paraphrased) format or when you use someone else's arguments or ideas without the necessary acknowledgement. You are also guilty of plagiarism if you copy and paste information directly from an electronic source (e.g., a web site, e-mail message, electronic journal article or CD-ROM) without paraphrasing it or placing it in quotation marks, even if you acknowledge the source.

You are not allowed to submit another student's previous work as your own. You are furthermore not allowed to let anyone copy or use your work with the intention of presenting it as his/her own.

Students who are guilty of plagiarism will forfeit all credits for the work concerned. In addition, the matter will be referred to the Committee for Discipline (Students) for a ruling. Plagiarism is considered a serious violation of the University's regulations and may lead to your suspension from the University. The University's policy regarding plagiarism is available on the Internet at *http://www.library.up.ac.za/plagiarism/index.htm*.

For the period that you are a student at the Department of Taxation, the following declaration must accompany **all** written work that is submitted for evaluation. No written work will be accepted unless the declaration has been completed and is included in the particular assignment.

	Student
I (full names & surname):	DEVASHNI STACY PERUMAL
Student number:	05023883

Declare the following:

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this assignment is my own, original work. Where someone else's work was used (whether from a printed source, the Internet or any other source) due acknowledgement was given and reference was made according to departmental requirements.
3. I did not copy and paste any information directly from an electronic source (e.g., a web page, electronic journal article or CD ROM) into this document.
4. I did not make use of another student's previous work and submitted it as my own.
5. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his/her own work.

DEVASHNI STACY PERUMAL

Signature

APPENDIX A:

LANGUAGE EDITING CERTIFICATE

Wordplay Editing

WORDPLAY EDITING
Copy Editor and Proofreader
Email: karien.hurter@gmail.com
Tel: 071 104 9484
Website: http://wordplayediting.net/

26 August 2021

To Whom It May Concern:

This letter is to confirm that *Will the Steps Taken by South African Expatriates to Circumvent Section 10(1)(O)(Ii) Trigger the South African Gaar?* by Devashni Stacy Perumal was edited by a professional language practitioner.

Regards,

Karien Hurter