



The amended foreign employment income exemption

The amendment to the foreign employment income exemption contained in section 10(1)(o)(ii) of the Income Tax Act takes effect from 1 March 2020. There have been divergent and conflicting views by commentators and advisors on the effect of this amendment and related matters, such as the determination of tax residence of a natural persons affected by it. SARS recently published a frequently asked questions guide on the amendment. This article briefly highlights some pertinent matters addressed in this guide.

Since 2000, when South Africa changed from a source-based to a residence-based tax system, South African residents earning employment income for services rendered outside South Africa enjoyed an exemption of such income if:

- ▶ the person spend more than 183 days outside South Africa rendering the service, and
- ▶ this included a period at least 60 continuous days.

With effect from years of assessment commencing 1 March 2020, this exemption is amended to only apply to the first R1 million income earned from foreign employment. This amendment has resulted in divergent and conflicting views by commentators and advisors. SARS recently published a frequently asked questions guide ('FAQs') to provide clarity on the amendment. This article reviews some of the questions in the FAQs that deal with matters where divergent views seem to exist in practice.

Introduction of an expat tax

The amendment was widely labelled as an "expat tax" in the media. This created a perception of a new type of tax aimed South African expatriates. The FAQs make it clear that the amendment merely involve the limitation of the existing exemption. This limitation of the exemption is likely to affect South African expatriates who are South African tax residents.

Interaction between tax residence and the exemption

South Africa imposes income tax on South African residents on any income, irrespective of the source of the income. Persons who are not South African tax residents are only subject to South African income tax on South African sourced income. As only South African residents who earn income from foreign employment will be subject to income tax on such income, the exemption is arguably only relevant to them. The question of tax residence is therefore a critical one. Many varying views relate to this.

Tax residence of natural persons

A natural person is a tax resident of South Africa if he or she is ordinarily resident in South Africa. Alternatively, if a person is not ordinarily resident in South Africa, he or she may be deemed to be a resident based on regular physical presence in the country. This definition is however subject to the person not being deemed to be exclusively a resident of another country for purposes of a tax treaty entered into between South Africa and another country.

The FAQs highlight that tax residence is based on a person's ordinary place of residence. This is inherently a factual determination, as explained in Interpretation Note 3. Neither citizenship nor acquiring approval from the South African Reserve Bank to emigrate from a financial perspective is a deciding factor as to whether a person ordinarily resides in South Africa or not. This determination is based on the facts and circumstances of a person's mode of life, rather than being something that a person can elect into or out of. A person who has permanently moved away from South Africa without changing citizenship or without acquiring approval from the South African Reserve Bank to emigrate could be in a position where he or she is no longer ordinarily resident in South Africa based on his or her mode of life and intention.

Double tax

If foreign employment income is subject to tax in the country where the employment is exercised as well as in South Africa (i.e. foreign employment income exceeding R1 million), a rebate is available for the foreign tax payable on this income.

Employers who are required to withhold employees' tax (PAYE) on the income of employees who earn foreign employment income may apply to SARS for a directive to take the above rebate into account in determining the employees' tax to be withheld on a monthly basis.