

A COMPARATIVE ANALYSIS OF EMIGRATION TAXES FOR MIGRATING  
INDIVIDUALS

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## ABSTRACT

Emigration taxes have become increasingly relevant in a globalized world, where individuals frequently seek new opportunities abroad. When an individual taxpayer opts to relocate to another jurisdiction, effectively relinquishing their South African tax residence, a fiscal event is triggered. This event assumes the form of a deemed disposal of their assets, except for those that fall within specific exclusions, valued at their prevailing fair market value. Consequently, an exit tax liability ensues, tethered to the theoretical capital gain arising from this fictional disposition. It is imperative to note that the South African exit tax system mandates the immediate payment of this tax obligation. Worth highlighting is the notable exemption, as it stands currently, pertaining to an emigrant's interest in retirement funds. However, the fiscal landscape faced a proposed amendment in the year 2021 when the National Treasury, in its National Budget Speech, endeavoured to incorporate such retirement fund interests into the purview of exit taxation. This proposed inclusion encountered vehement opposition from tax professionals and media outlets alike.

The Canadian system's operative provisions are similar to the South African provisions in that when a Canadian resident becomes a non-resident for tax purposes, they are deemed to have disposed of certain types of property at their fair market value. This deemed disposition can result in a capital gain, which is subject to taxation. However, there are provisions in place to provide relief for certain assets, such as a principal residence and certain pension plans, to mitigate the tax burden on emigrants. Notably, the Canadian system provides for a deferral of payment of the exit tax as triggered on the date of cessation of tax residence.

This minor dissertation embarks on a thorough comparative examination of the emigration tax regimes in South Africa and Canada, aiming to elucidate critical aspects encompassing tax residence, system introduction, application, implications for emigrants, and the administrative processes involved in each jurisdiction. It will also seek to identify areas for possible double taxation that could occur due to the application of either respective system.

The study commences with an explanation of the fundamental concepts and determinants of emigration taxes, offering a comprehensive definition along with an explanation of the various types of emigration taxes. Furthermore, it delves into the temporal aspects associated with these taxes and explains the mechanisms employed for their recuperation. In light of the

aforementioned aspects, the study furnishes the overarching rationale that underlies the imposition of emigration taxes.

The research continues to delve into the core components of the two systems of emigration tax implemented by the respective jurisdictions, examining and comparing the mechanisms of each. It also briefly investigates the possible application of the emigration tax to retirement savings and the possible reason for its inclusion or exclusion.

Furthermore, the study explores the administrative processes and compliance requirements associated with emigration taxation in South Africa and Canada. It analyses the ease of understanding, reporting, and adhering to these tax regulations, considering the potential influence of administrative complexity on emigration decisions.

This comparative analysis aims to highlight key similarities and differences inherent in the two systems that form the subject of this minor dissertation. Following the aforementioned research and analysis, this dissertation will endeavour to compare the systems and accordingly discern potential advantages intrinsic to the Canadian framework that may offer pragmatic applicability within the South African context and vice versa.

## CHAPTER 1: INTRODUCTION

### 1.1 Background

As globalization continues to increase, individuals are becoming more mobile and are frequently relocating to different countries for a variety of reasons, be it personal or professional, tax-related or non-tax related.<sup>1</sup> The recent publication by the United Nations of the summary results of the world population prospects<sup>2</sup> further supports this contention by concluding that for the period between 2000 and 2020, high-income countries' population increase due to net migration inflows has surpassed the population increase attributable to natural causes.<sup>3</sup> It is not uncommon for an individual to own property in a number of jurisdictions, work in another jurisdiction and have a business in yet another jurisdiction. The lives of individuals have become far more global and to determine where such a global individual should be taxed has become a fairly complex matter.<sup>4</sup> The significance of migrating individuals for purposes of a country's taxation relates mainly to the demotion of the emigration country's taxing rights from a residence basis to a source basis, thereby reducing the emigrant country's tax base and potentially reducing its future tax inflows.<sup>5</sup>

To deter individuals from severing their fiscal residence purely for purposes of obtaining a tax benefit as a resident in another jurisdiction and to protect the principle of fiscal territoriality, many countries have implemented emigration taxes, being a tax triggered by reason of an individual's emigration from one jurisdiction to another.<sup>6</sup> In the instance of individuals, there are three main types, namely immediate exit taxes, trailing taxes and recoupment taxes. Such taxes can be general or limited. Each type of emigration tax is addressed briefly in chapter 2 of this paper. The use of the term 'emigration taxes' or 'departure taxes' will be used as umbrella terms to cover all instances of taxes that fall within these categories. These emigration taxes

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<sup>1</sup> Leandi Botha 'A critical analysis of whether the current legislated exit tax provisions of South Africa are proportional to the legitimate purpose of those provisions' (Minor Dissertation, University of Cape Town, 2018) 88.

<sup>2</sup> United Nations Department of Economic and Social Affairs, Population Division (2022) *World Population Prospects 2022: Summary of Results*. UN DESA/POP/2022/TR/NO 3.

<sup>3</sup> An amount that is determined by calculating the difference between the total number of deaths and the total number of births. A natural increase indicates that the net total population increase attributable to births exceeds the net increase of migration inflows.

<sup>4</sup> Giorgio Beretta 'Cross-Border Mobility of Individuals and the Lack of Fiscal Policy Coordination Among Jurisdictions (Even) After the BEPS Project' (2019) 47 *Intertax* at 91-112.

<sup>5</sup> J. (Jinyan) Li & F. Avella 'Article 13: Capital Gains - Global Tax Treaty Commentaries' *Global Topics* IBFD available online at [https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/gttc\\_article13\\_s\\_2](https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/gttc_article13_s_2), accessed on 25 February 2023 para 2.1.8.1.

<sup>6</sup> Specifically, South Africa, USA, Netherlands, Australia and certain countries of the European Union.

necessitate a fine balance between a jurisdiction defending its fiscal territoriality and an individual's right to the freedom of mobility or movement, an entitlement that is widely recognized by numerous international agreements and is incorporated into several constitutions worldwide.<sup>7</sup> Emigration taxes find application to corporations as well; however, this paper will focus on its application to individuals.

Generally, emigration taxes are applicable to a value appreciation on an asset that would have been taxable by the emigrant jurisdiction on disposal, had the disposer remained a tax resident of its jurisdiction. The application of emigration taxes to retirement savings has proven to be an uncertain and controversial issue, with concerns about the potential for double taxation and a potential breach of the good faith principle postulated by the Vienna Convention.<sup>8</sup> Considering the international aspect of emigration taxes, the fact that most double tax treaties of which South Africa is a party to are based on the Organisation for Economic Co-operation and Development's Model Tax Convention ('OECD Model Convention'),<sup>9</sup> this paper will focus on its provisions as opposed to the United Nations Model.<sup>10</sup>

The purpose of this dissertation is to conduct a comparative analysis of exit taxes of South Africa and Canada. South Africa and Canada, despite their geographical and socio-economic differences, share several key characteristics that make their emigration tax provisions comparable.<sup>11</sup> It is not uncommon for the South African courts to either refer to principles or interpretations confirmed by the Canadian courts.<sup>12</sup>

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<sup>7</sup> See, for instance, article 13(2) Universal Declaration of Human Rights; Article 2(2), Protocol 4, European Convention on Human Rights.

<sup>8</sup> J. F. Avery Jones & J. Hattingh 'Treaty Interpretation - Global Tax Treaty Commentaries' *Global Topics* IBFD at paragraph 3.4.3.

<sup>9</sup> OECD *Model Tax Convention on Income and on Capital: Condensed Version* (2017) OECD Publishing, Paris.

<sup>10</sup> United Nations *Model Double Taxation Convention between Developed and Developing Countries: 2017 Update* (2018) United Nations Publishing, New York.

<sup>11</sup> In terms of the World Bank's 'World Development Indicators' rankings, Canada is classified as a high income country and South Africa as an upper middle income (available online at <https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html>). A key difference is however the percentage of the population that earns \$2.15 per day or less. Of the South African population, as at 2014, 20.5% of the population is classified by the World Bank as living in poverty where Canada's poverty headcount has remained at a set 0.2% of the population (at 2014 and at 2018, the latter being the most recent data available). The aforementioned statistics for South Africa are available online at <https://data-worldbank-org.ezproxy.uct.ac.za/country/south-africa?view=chart> and for Canada at <https://data-worldbank-org.ezproxy.uct.ac.za/country/canada?view=chart>.

<sup>12</sup> B. Michel 'Report of the Proceedings of the Eighth Assembly of the International Association of Tax Judges Held in Helsinki on 6 and 7 October 2017' 72 Bull. Intl. Taxn. 7 (2018) *Journal Articles & Opinion Pieces* IBFD, available online [https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit\\_2018\\_07\\_int\\_5](https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2018_07_int_5) (accessed 30 October 2023) para 3.3.2.

As will be evident through the research set out below, both nations have well-established legal frameworks governing emigration taxation which are comparable in their mechanics and implications. Canada instituted their formal emigration tax system into their income tax legislation in 1972 and South Africa in 2001. Support for the comparability of the two jurisdictions can be found in the fact that both South Africa and Canada had been colonies of the British Empire and, accordingly, both systems of law have an influence of English common law to which both the courts in South Africa and in Canada referred to when deciding upon the meaning of the term residence for tax purposes.<sup>13</sup>

Both countries are known for their diverse populations.<sup>14</sup> South Africa has a history of emigrating individuals, with the number of emigrants from South Africa increasing by around 16.3% in five years over the period from 2015 to 2020.<sup>15</sup> It is submitted that one of the possible main driving factors for emigration from South Africa could be attributable to the fears of job security and the high unemployment rates prevalent in South Africa.<sup>16</sup> Conversely, Canada's statistics show an attraction for immigrants with immigrants constituting the largest share of the population and, as of 2022, being the main driver of population growth in Canada.<sup>17</sup> Canada is the fifth most popular destination for migrating South Africans.<sup>18</sup>

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<sup>13</sup> See the South African case of *Cohen v Commissioner for Inland Revenue* 1946 AD 174, 13 SATC 362 and the Canadian case of *Thomson v. Minister of National Revenue* [1946] SCR 209. Each judgment was delivered by the Supreme Court of the respective jurisdictions and are regarded as the authoritative decisions on the interpretation of residence and ordinary residence in each jurisdiction.

<sup>14</sup> Pertaining to the demographics and diversity in Canada, see the article by Statistics Canada 'The Canadian census: A rich portrait of the country's religious and ethnocultural diversity' available online at <https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026b-eng.htm>, accessed on 19 September 2023. As to South Africa, it boasts 11 official languages and a range of ethnicities, see South African government at <https://www.gov.za/about-sa/south-africas-people> (accessed on 19 September 2023) and see demographic statistics for South Africa at <https://www.statista.com/statistics/1116076/total-population-of-south-africa-by-population-group/>, accessed on 19 September 2023.

<sup>15</sup> Natalie Cowling 'Number of emigrants from South Africa 2000-2020' 26 April 2023 available at <https://www.statista.com/statistics/1238040/stock-of-emigrants-from-south-africa/#statisticContainer>, accessed on 19 September 2023.

<sup>16</sup> Statista Research Department 'Number of emigrants from South Africa 2020, by country of destination', available online at <https://www.statista.com/statistics/1238117/stock-of-emigrants-from-south-africa-by-country-of-destination>, accessed on 19 September 2023. It should be noted that the survey results upon which such deduction was made is qualified on the basis that the samples for South Africa were 'more urban, more educated, and/or more affluent than the general population. The survey results for these markets should be viewed as reflecting the views of the more "connected" segment of these populations.'

<sup>17</sup> Statistics Canada 'Immigrants make up the largest share of the population in over 150 years and continue to shape who we are as Canadians' 26 October 2022 available at <https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026a-eng.htm>, accessed on 19 September 2023.

<sup>18</sup> Ibid.

Both countries acknowledge the importance of international tax treaties and agreements, which can impact the taxation of emigrants. South Africa and Canada participate in such arrangements, highlighting their commitment to aligning their emigration tax policies with international standards.<sup>19</sup> In the context of Canadian law, international conventions must undergo a legislative process to attain legal authority.<sup>20</sup> Typically, these conventions are assimilated into the legal system through the enactment of implementation legislation.<sup>21</sup> Through section 231(2) of the Constitution of the Republic of South Africa, 1996 read with section 108 of the Act, South Africa's obligation to be bound by its international agreements along with incorporating the necessary into legislation is given effect to.<sup>22</sup> Section 108(2) of the Act, specifically with regard to tax treaties which are entered into by South Africa, provides that once a tax treaty has been published in the Government Gazette it shall have the effect as if it has been enacted in the Act. Accordingly, treaties are incorporated into the South African domestic legislation through publication in the Government Gazette.<sup>23</sup>

In light of these shared attributes, a comparative analysis of South Africa and Canada's emigration tax policies provides valuable insights into the broader dynamics of emigration taxation and its impact on individuals in diverse contexts.

The paper will begin with a general overview of emigration taxes. It will then move on to review of the legal framework for emigration taxes in each of the selected countries, including the types of assets that are subject to the tax, the temporal aspects of the applicable emigration tax and the method of collection.

Finally, the paper will highlight key differences between the two systems, identifying the effectiveness of each. It will postulate which elements of the Canadian system, specifically with regard to the collection of the emigration tax, could be beneficial in the South African system and vice versa. It will also touch on the potential for double taxation in the application of emigration taxes and address steps, if any, that South Africa or Canada have taken to address

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<sup>19</sup> South Africa is a party to more than 82 treaties (see <https://www.sars.gov.za/lapd-inta-dta-2013-01-status-overview-of-all-dtas-and-protocols/>) and Canada to 94 treaties (see <https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties.html>).

<sup>20</sup> Canada Revenue Authority 'Interpretation of Treaties and Domestic Law' (2022) available at <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/ouell/int2.html#edn34>, accessed on 30 October 2023.

<sup>21</sup> Ibid.

<sup>22</sup> Du Plessis I 'The Incorporation of Double Taxation Agreements into South African Domestic Law' (2015) 8 *PELJ* 1187 at 1189-1193.

<sup>23</sup> Ibid at 1194.

the risk. Through this comparative analysis, the study aims to provide a comprehensive understanding of the rationale and effectiveness of exit taxes within the specified jurisdictions.

## **1.2 Research Question and Scope**

This minor dissertation seeks to assess emigration taxes in general and to identify what the key similarities and differences between the South African emigration tax system and the Canadian emigration tax system are, and whether any differences identified that are present in the Canadian system could be beneficial to the South African system and vice versa.

The focus will be on conducting a comparative analysis of the emigration tax policies and mechanics of the systems in South Africa and Canada, respectively. The research scope includes a general overview of emigration taxes in general, their application and the different types of emigration taxes that are applied, including a brief paragraph on the overarching rationale behind countries instituting exit taxes before diving into each country's exit tax provisions and finally comparing the similarities and differences between each.

It combines a rigorous review of legal texts with a critical analysis of practical implications to provide valuable insights for policymakers, tax professionals, and researchers in the field of international taxation.

## **1.3 Research Methodology**

This master's level dissertation employs a mixed-method research approach that combines qualitative and comparative methods. The study comprises several distinct stages, starting with a general overview of exit taxes and culminating in a comparative analysis of the South African and Canadian exit tax systems.

The research begins with an extensive literature review focused on exit taxes, their historical development, and their significance within the realm of international tax law. It involves a comprehensive exploration of existing scholarly works, primary sources and relevant legal frameworks.

A 'doctrinal' or 'black letter law' methodology is employed to examine the exit tax provisions of South Africa and Canada in isolation. This method involves an in-depth analysis of legal texts, including tax laws, regulations, related statutes, case law, administrative guidance, and official publications issued by tax authorities in both countries.

The study culminates in a chapter that applies a comparative approach to juxtapose the exit tax systems of South Africa and Canada provides a detailed comparative evaluation of the South African and Canadian exit tax systems. This analysis involves identifying commonalities, differences, and nuances within the two systems. It includes an assessment of the practical implications for taxpayers and the administrative processes involved. It also provides a critical analysis of the potential benefits that each system could hold for the other, briefly exploring the feasibility of adopting successful elements from one system into the other.

This research methodology enables a comprehensive examination of the South African and Canadian exit tax systems while offering a platform for an in-depth comparative analysis that sheds light on potential areas of improvement, harmonization, and knowledge sharing between the two countries.

#### **1.4 Structure of the Paper**

This dissertation is structured into six chapters, each dedicated to exploring and presenting specific aspects of the research. Chapter two commences with a comprehensive examination of departure or emigration taxes in general, offering a fundamental understanding of the concepts involved. It explains the two main bases of taxation, namely residence and source-based taxation, elucidating the underlying principles and their relevance. An investigation into the array of exit tax systems adopted across various jurisdictions follows, delving into their characteristics and applications. The temporal considerations of these exit tax systems are explained, elucidating when and how they are imposed.

Chapter 3 is a comprehensive summary of South Africa's emigration tax system. It starts off with explaining the basis of taxation employed as well as a brief history into the introduction of South Africa's emigration tax provision. It continues to explain the operative provision governing South Africa's departure tax within the framework of a thorough summary of the concept of tax residence as recognised in South Africa, whereby the different bases are explained. With the different bases of taxation in mind, it sets out the temporal aspects of the exit tax when triggered dependent on the basis that an individual had been a South African tax resident. Once these foundations are laid down, the chapter explains the methods of collection of the exit tax implemented by South Africa. The chapter then delves into the potential extension of the exit tax's application to individuals' retirement interests in light of National Treasury's recent proposed amendments, which were ultimately withdrawn. It concludes with a summary encapsulating the key aspects of the chapter.

This chapter mirrors the structure of Chapter 3, offering a comprehensive summary of the Canadian emigration tax system. However, it does not include a section on the potential extension of the Canadian exit tax to retirement interests, as these interests are explicitly exempt from Canada's departure tax. The chapter provides a summary of the bases for tax residence in Canada, focusing on factual residence and deemed residence based on an individual's physical presence in Canada, covering the principles established through years of Canadian case law. It continues to explain and review the temporal aspects of the charge, the methods of collection employed by the Canadian Revenue Authority, and concludes with the author's summarizing remarks.

Against the backdrop of Chapters 3 and 4, Chapter 5 embarks on a comparative analysis, beginning with a comprehensive review of similarities and differences between the two systems. It proceeds to provide input on the potential shortcomings of one system that could be addressed by features of the other. The chapter concludes with a brief discussion of the potential for double taxation resulting from the implementation of emigration tax, highlighting how Canada has sought to address the issue. The chapter concludes with a recommendation on whether the solutions implemented by Canada could inform potential solutions for South Africa.

The final chapter encapsulates the summary remarks on the research as a whole and provides a conclusion on the findings identified in the study.

## CHAPTER 2: EMIGRATION TAX IN GENERAL

This chapter provides an overview of emigration or departure taxes in the general sense. It specifically addresses the types of emigration taxes that exist, the different temporal approaches, methods of recovery of the departure tax and a brief comment on the potential for double taxation in the context of exit tax applicable to migrating individuals.

### 2.1 Introduction

Emigration taxes refer to taxes imposed by a country on individuals or businesses leaving its jurisdiction.<sup>24</sup> The concept of exit taxes is rooted in the principle that a country should have the right to exercise its powers of taxation in relation to activities carried on within its territory or jurisdiction, i.e. the protection of fiscal territoriality.<sup>25</sup>

The principle of territoriality is a legal concept that asserts that a state has exclusive jurisdiction and sovereignty over the territory within its borders.<sup>26</sup> This means that a state has the right to exercise authority over the people, property, and activities that occur within its territory, and to control who or what enters or exits its territory. It is a fundamental principle of international law, and forms the basis for the relationships between states. Under this principle, a state has the right to enforce its laws within its territory and to prevent other states from interfering in its internal affairs. Overall, the principle of territoriality is a crucial component of the modern international legal system, as it helps to ensure that states have the ability to regulate and control activities within their borders, and that they can protect their citizens and maintain order within their societies.

Emigration taxes provide a state with the ability to tax some of the tax revenue that might otherwise be lost when someone leaves the country.<sup>27</sup> This is based upon the fact that when an individual ceases their residence in the departing jurisdiction, that country's taxing rights change from a comprehensive, residence base of taxation to a source basis of taxation. The

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<sup>24</sup> V. Chand 'Exit Charges for Migrating Individuals and Companies: Comparative and Tax Treaty Analysis' 67 *Bull. Intl. Taxn.* 4/5 (2013) Journal Articles & Opinion Pieces IBFD (accessed 7 March 2023) para [1].

<sup>25</sup> Ibid.

<sup>26</sup> A. Becker 'The Principle of Territoriality and Corporate Income Taxation – Part 1: What Territoriality Means and Whether or Not It Guides Country Practice' 70 *Bulletin for International Taxation* (2016) 70 IBFD available online at [https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/bit/html/bit\\_2016\\_04\\_int\\_4](https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/bit/html/bit_2016_04_int_4), accessed on 22 September 2023.

<sup>27</sup> AP de Koker & RC Williams 'Change of Residence, Ceasing to be a CFC or Becoming a Headquarter Company' in Aubrey Silke (ed) *Silke on South African Income Tax* (2021) at 14.2.

different bases of taxation are set out below. In many instances, a source base of taxation loses out to a residence base of taxation in apply double tax treaties.<sup>28</sup> Generally, exit taxes can be classified as a 'dry tax' meaning that no actual disposal of the assets upon which the tax is charged is triggered, rather the tax is triggered by way of an operation of law.<sup>29</sup>

The exact rules and rates for emigration taxes vary from country to country. Some countries, such as the United States, have relatively complex rules for exit taxes that can apply to both citizens and non-citizens who are leaving the country. Other countries, such as Australia, only impose exit taxes on certain types of assets or for certain types of taxpayers.

The imposition of emigration taxes is not without controversy. Arguments are posed that they unfairly penalize individuals and businesses who are simply exercising their right to free movement or that its imposition might cause double taxation of pre-emigration gain specifically if the immigrant jurisdiction's domestic tax law does not recognise the exit tax of the emigrant country or an application double tax treaty does not provide for a step up in base cost.<sup>30</sup> An opposing view postulates that the imposition of emigration taxes are a necessary tool for states to ensure that individuals and businesses pay their fair share of taxes and do not simply evade their obligations by leaving the country.<sup>31</sup>

## **2.2 Basis of taxation**

A basis of taxation is a regime which a country applies in terms of which it imposes its taxes. This can be based on an individual's residence, nationality, domicile or on a source basis. A taxation system based on residence levies taxes on individuals who are considered tax residents on their income and gains from around the world.<sup>32</sup> Conversely, a source-based tax system taxes individuals only on income and gains that have a source within its jurisdiction and is primarily based on the principle of territoriality.<sup>33</sup> A country that taxes on a nationality basis will tax its citizens regardless of whether they are resident in its jurisdiction or not. With a domicile basis of taxation, a state which applies this basis of taxation tends to tax individuals

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<sup>28</sup> By way of example, article 13(5) of the OECD Model Convention and article 13(6) of the UN Model Convention affords sole taxing rights to the country of residence upon disposals giving rise to a capital gain. Similarly, article 18 of the OECD Model Convention and article 18 of the UN Model in the first instances grants sole taxing rights to the country of residence on pension and annuity income payments.

<sup>29</sup> De Koker & Williams op cit note 27.

<sup>30</sup> Li & Avella op cit note 5 para 2.1.8.1.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> De Koker & Williams op cit note 27.

domiciled in its jurisdiction on their worldwide income and gains where individuals that are not domiciled are taxed only on their sourced income and gains within its territory. Residence and source-based taxation are the two most prominent bases of taxation. The United States is practically the only jurisdiction remaining that utilizes the citizenship basis of taxation.<sup>34</sup>

### 2.3 Types of exit taxes

Exit taxes can take many forms, however, for individuals three main categories are relevant, namely immediate exit taxes, trailing exit taxes or recoup charges.

An immediate exit tax is a tax that is levied on the value accrual of an individual's assets immediately prior to their emigration.<sup>35</sup> The charge can either apply to all assets held by the individual, termed a general exit tax, or be limited to specific assets such as substantial shareholdings, termed a limited exit tax.

Trailing taxes or extended tax liabilities is a tax liability upon income or gains that do not remain subject to the departing state's source rules but whereby that state retains the right to tax such income or gains even after the relocation.<sup>36</sup> As with immediate exit taxes, it can be limited or unlimited. Unlimited trailing taxes is a regime where the originating state deems an individual to remain tax resident in that jurisdiction and continues to tax that individual on that basis.<sup>37</sup> A limited trailing tax recognises the cessation of fiscal residence but retains taxing rights on certain disposals or on certain streams of income sourced from its jurisdiction for a specified period.<sup>38</sup> The length of the trailing period and the scope of the tax liability can vary depending on the country's tax laws and treaties.

A claw-back charge entails the recapture of certain benefits, deductions, or deferrals that the emigrant enjoyed while being a resident of the particular jurisdiction.<sup>39</sup> A common occurrence

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<sup>34</sup> Beretta op cit note 4 at 94. The only other jurisdiction that imposes tax on this basis is Eritrea which has been subject to severe criticism by both the United Nations and the European Union. In this regard, see articles 10 and 11 UN Resolution 2023, UN Doc. S/RES/2023 (5 Dec. 2011); European Parliament, Resolution on the Situation in Eritrea, 2016/2568(RSP) (10 Mar. 2016).

<sup>35</sup> Chand op cit note 24 para 2.1.1.

<sup>36</sup> Ibid.

<sup>37</sup> L. de Broe 'The Tax Treatment of Transfer of Residence by Individuals, General Report' (2002) *IFA Cahiers* at 23; R. Betten 'Income Tax Aspects of Emigration and Immigration of Individuals' (1998) *IBFD*; European Commission, Report of Expert Group 'Ways to Tackle Cross-Border Tax Obstacles Facing Individuals within the EU' (2016) available online at <https://publications.europa.eu/en/publication-detail/-/publication/4bf9e942-ca41-11e5-a4b5-01aa75ed71a1/language-en>, accessed 15 September 2018.

<sup>38</sup> J.C. Wheeler 'Time in Tax Treaties - Global Tax Treaty Commentaries' *Global Topics* IBFD at para 5.3.5.2.2.

<sup>39</sup> Ibid.

of a claw-back charge is in the instance of pension benefits.<sup>40</sup> Generally, the domestic law of the departing jurisdiction provides a preferential deduction for individuals for contributions to pension schemes to incentivise saving for retirement.<sup>41</sup> This deduction is provided on the premise that the tax will be recouped on a future withdrawal or drawing from the pension savings subsequent to retirement.<sup>42</sup> Accordingly, in the event that an individual relocates at a time prior to retirement to a jurisdiction where that jurisdiction's double tax agreement provides that the state of residence enjoys sole taxing rights on pension and annuity payments, the source state will have to abide by the provisions of its treaty and therefore is no longer entitled to tax the benefit which it had granted to the emigrant during their residence.

## 2.4 Temporal aspects

There are two important temporal aspects in light of exit taxes, the first being the triggering event and the second being the timing of the payment of the tax so triggered.

The timing of triggering an exit tax is important to ensure the departing or emigrating jurisdiction retains its power to tax wealth that has been generated within its territory, without encroaching upon the immigration jurisdiction's taxing rights.<sup>43</sup> This conflict has come up in a few cases whereby the courts had to decide whether a country was entitled to levy their exit tax at a time when the person (be it an entity or an individual) had already taken up tax residence in their new jurisdiction under its domestic tax laws.<sup>44</sup> This would be the case should the emigrating state apply the exit tax upon the day which the individual has already taken up tax residence in the immigrating jurisdiction. An exit tax can either be immediate or trailing.

An immediate exit tax will trigger the taxable event on the day of or, more appropriately, the day immediately preceding the cessation of tax residence. On the other hand, trailing taxes, also known as 'capital gains taxes on former residents',<sup>45</sup> will be imposed at a time when the individual receives the income or disposes of the relevant asset within that specified time period. The term 'trailing' is used because the potential trigger of the tax liability lingers or trails behind the individual and applies to any future income or assets they have, including gains or

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<sup>40</sup> Wheeler op cit note 38 para 5.3.4.2.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid para 5.3.4.3.

<sup>43</sup> Li & Avella op cit note 5 para 2.1.8.1.

<sup>44</sup> In the South African case of *C:SARS v Tradehold Ltd* 2013 (4) 184 (SCA) and in the United Kingdom case of *Holbrook R Davis v Her Majesty. The Queen* 80 DTC 6056 (1980).

<sup>45</sup> Chand op cit note 24 para 2.3.1.

appreciation in value.<sup>46</sup> Lastly, the claw-back charge is only triggered upon the emigrant returning to the originating jurisdiction within a specified period of time.<sup>47</sup>

With all emigration taxes, the timing that payment becomes due can differ between states. Ordinarily, in the instance of an immediate exit tax, the tax liability that is triggered becomes due and payable upon the date that the tax is triggered.<sup>48</sup> Some jurisdictions provide the possibility of deferral of the payment, normally accompanied by the provision of security for payment.<sup>49</sup> With trailing taxes, the tax can become due and payable upon the disposal of a relevant asset, receipt of relevant income or upon the relinquishment of citizenship.<sup>50</sup>

## 2.5 Methods of recovery

There are two main methods by which the exit country could collect the taxes which become due in terms of a specific exit tax. The first is an immediate recovery and the second a deferral method. South Africa, in terms of its current exit tax provision,<sup>51</sup> which seeks to tax unrealized income or gains on assets held by the emigrant on cessation of residence,<sup>52</sup> utilizes the immediate recovery method whereby the tax is due and payable upon its trigger. Accordingly, an individual emigrant from South Africa is required to settle the tax triggered upon the deemed disposal on the day before he factually ceases their tax residence.<sup>53</sup>

A deferred method of recovery entails triggering the tax upon departure, but payment is deferred for a set period or upon actual realization of the asset upon which the exit tax was calculated. The deferred method is employed by a number of foreign jurisdictions, of specific mention certain member states of the European Union.<sup>54</sup> The proportionality<sup>55</sup> of exit tax and

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<sup>46</sup> De Koker & Williams op cit note 27 para 3.2.1.

<sup>47</sup> Ibid para 2.1.1.

<sup>48</sup> As is the case in South Africa.

<sup>49</sup> Canada, the United States and the Netherlands. The Netherlands does not require provision of security for the tax triggered on exit.

<sup>50</sup> As is the case in the United States.

<sup>51</sup> Section 9H of the Act.

<sup>52</sup> Ibid. Its application deems an individual to have disposed of their worldwide assets on the day before cessation of residence to another resident at market value and then to have reacquired those assets the following day at the same value as a non-resident. This deemed disposal triggers any unrealized gains upon assets which are subject to this provision.

<sup>53</sup> Section 9H of the Act, in addition to the deemed disposal, deems an individual's South Africa year of assessment to have come to an end on the same day which the deemed disposal is triggered. A second, non-resident, year of assessment commences on the day of cessation. Because the individual's year of assessment is deemed to end, all taxes which have accrued from 1 March of the relevant year up until the date of exit becomes due and payable.

<sup>54</sup> Countries including Germany, France, Denmark, Austria and the Netherlands.

<sup>55</sup> In terms of the Principle of Proportionality which is recognised as a legal principle within the European Union (see Kosta Vasiliki 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy' Forthcoming, J.

its implication has been considered in a number of European jurisprudences<sup>56</sup> in which the European Court of Justice ('ECJ') found that an exit tax may not be levied in unrestricted manner, especially considering the financial constraints placed upon the taxpayer in the instance that the tax is immediately recoverable.

## 2.6 Rationale of an exit tax

The issues that emigration taxes aim to address are two-fold. Firstly, the allocation of taxing rights between an emigrant jurisdiction and an immigration jurisdiction and secondly, the reduction in the emigrant jurisdiction's tax base and revenues in the form of prior untaxed income or the appreciation of latent gains on property that the emigrant country will not retain a source basis of taxation, normally movable property.<sup>57</sup> To address these potential issues, countries have opted to introduce emigration taxes as a way to preserve their taxing rights in respect of unrealised capital gains or untaxed benefits that accrued to the individual during their residence or citizenship tenure<sup>58</sup> the basis being that the value that accrued or the benefits that were obtained are attributable to the country of residence.<sup>59</sup> Additionally, emigration taxes serve as a disincentive to individuals who purely seek to change their tax residence to attain a tax benefit.<sup>60</sup>

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Mendes, *EU Executive Discretion and the Limits of Law*, (Oxford University Press), 2019 , available at SSRN: <https://ssrn.com/abstract=3368867> at 1).

<sup>56</sup> See Case (c-470/04) *N v Inspecteur*, ECR I-7409 (2006); Case-C-269/09 *Commissioner v Spain* (2012) and specifically *Supreme Court of Appeal Netherlands*: ECLI:NL:PHR:2017:417.

<sup>57</sup> Li & Avella op cit note 5 para 2.1.8.1.

<sup>58</sup> South African Revenue Service ('SARS') 'Comprehensive Guide to Capital Gains Tax' (Issue 9) 119.

<sup>59</sup> Li & Avella op cit note 5 para 2.1.8.1.

<sup>60</sup> Ibid.

### CHAPTER 3: SOUTH AFRICA

Individuals considered as tax residents in South Africa are obliged to pay taxes on their global income and gains, with certain exceptions, deductions, and conditions as specified in the Act and relevant tax treaties.<sup>61</sup> Conversely, individuals who are not tax residents in South Africa are subject to source-based taxation within the country.

Upon the cessation of an individual's tax residence, the tax implications are determined by Section 9H of the Act. If triggered, the operative part of the section deems the individual to have disposed of their assets to another resident on the day immediately preceding the day they so cease to be a resident.<sup>62</sup> The deemed disposal is valued at the market value of the assets.<sup>63</sup> Subsequently, the individual is deemed to have reacquired the same assets on the following day as a non-resident, again at the market value.<sup>64</sup> This deemed disposal realizes any inherent capital gains or recoupment income, potentially resulting in a liability for capital gains tax ('CGT') or income tax, depending on whether the taxpayer categorizes the specific asset subject to the disposal as capital or trading stock.

Moreover, the migrating individual's tax year is deemed to conclude on the day immediately preceding their departure from South Africa and their new tax year is deemed to commence the next day.<sup>65</sup> Section 9H(4) of the Act lists the assets that are excluded from this deemed disposal and acquisition, being immovable property situated in South Africa, assets of a permanent establishment within South Africa, and specific restricted equity instruments that have not vested, granted by reason of employment. The disposal of currency, whether local or foreign, is not subject to capital gains tax<sup>66</sup> and therefore does not give rise to any taxable capital gains or losses. Personal use assets, including motor vehicles, personal and household effects, insurance policies and art collections, are also not subject to capital gains tax.<sup>67</sup>

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<sup>61</sup> See the definition of 'gross income' in section 1 of the Act.

<sup>62</sup> Section 9H(2)(a)(i) of the Act.

<sup>63</sup> Ibid.

<sup>64</sup> Section 9H(2)(a)(ii) of the Act.

<sup>65</sup> Section 9H(b) and (c) of the Act.

<sup>66</sup> Currency is excluded from the definition of 'asset' in paragraph 1 of the Eighth Schedule. However, gold and platinum coins are specifically included.

<sup>67</sup> Paragraph 53 of the Eighth Schedule.

The deemed disposal of an individual's interests in South African retirement funds does not give rise to a taxable capital gain or loss upon cessation of tax residence.<sup>68</sup> However, it is important to note that, normally, income tax will be levied in South Africa on any future lump sum payment or annuity payments received from these retirement benefits.<sup>69</sup>

### **3.1 History and introduction**

As confirmed, South Africa taxes its residents on a worldwide basis and non-South African tax residents are subject to South African income tax on a source basis.<sup>70</sup> With regard to taxing the capital gains of an individual, of the net capital gains realized, only 40 per cent is included in taxable income.<sup>71</sup>

South Africa imposes an immediate exit tax that was introduced on 1 October 2001 when a comprehensive system of capital gains tax in terms of paragraph 12(2)(a) of the Eighth Schedule to the Act ('Eighth Schedule') was introduced. The introduction followed South Africa's change from a purely sourced-base of taxation to a residence basis of taxation. In 2012, the exit tax charge provided for in paragraph 12(2)(a) of the Eighth Schedule was moved into the main body of the Act through its replacement by section 9H of the Act to provide for a single set of consolidated rules regulating the tax implications upon cessation of tax residence for individuals and corporates.<sup>72</sup>

### **3.2 Application**

The operative provision of section 9H of the Act are triggered at the point and time when a person no longer meets the requirements of the definition of 'resident' in section 1 of the Act or is deemed to be a sole tax resident of another jurisdiction by virtue of the application of a double tax treaty entered into between South Africa and that other jurisdiction.<sup>73</sup> In order to

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<sup>68</sup> Paragraph 54 of the Eighth Schedule disregards retirement benefit lump sum payments, both domestic and foreign funds (on the condition that said retirement fund provides similar benefits under similar conditions as domestic retirement funds) in determining a capital gain or loss.

<sup>69</sup> Section 9(2)(i) of the Act classifies funds received as a lump sum, pension, or annuity from a South African retirement fund for services rendered within South Africa as originating from a South African source. If South Africa maintains the authority to tax this sum under an applicable treaty, it will be subjected to taxation as outlined in the Second Schedule to the Act.

<sup>70</sup> Subparagraph (i) of the definition of 'gross income' in section 1 of the Act read with paragraph 2(1)(a) of the Eighth Schedule.

<sup>71</sup> Paragraph 10(1)(a) of the Eighth Schedule.

<sup>72</sup> Inserted by section 26(1) of the Taxation Laws Amendment Act 24 of 2011 with an effective date of 1 April 2012.

<sup>73</sup> The first proviso to the definition of 'resident' in section 1 of the Act.

consider the implications of section 9H, it is imperative to understand the requirements for tax residence in terms of the Act.

### 3.2.1 Tax residence in South Africa

A 'resident' as defined in the Act is a person who is either ordinarily resident in South Africa or who has spent sufficient days physically present in South Africa as prescribed by the Act ('physical presence test').<sup>74</sup> Of importance is that these two tests are not mutually exclusive. Even if an individual does not meet the physical presence test, they may still be considered a resident based on their place of ordinary residence.

The definition contains a provision that stipulates individuals who are considered the sole residents of another country based on a tax treaty between South Africa and that particular country will be excluded as South African residents, even if they meet the criteria of the local test.<sup>75</sup> Therefore, in situations where an individual meets the criteria of either of the aforementioned tests, they will not qualify as a South African tax resident if they hold tax residency status in another country that has an active tax treaty with South Africa and the treaty-breaker provisions broke in favour of the other jurisdiction.

#### *(a) Ordinarily resident*

The Act does not contain a definition of 'ordinarily resident' and therefore it was up to the courts to provide clarity as to its meaning. In this regard *Cohen v Commissioner for Inland Revenue*<sup>76</sup> and *Commissioner for Inland Revenue v Kuttel*<sup>77</sup> are the two authoritative decisions delivered by the Appellate Division on this matter.

In *Cohen*, the court had to decide whether a taxpayer who had not been physically present in South Africa throughout the year of assessment remained a South African tax resident by virtue of South Africa being his ordinary residence.<sup>78</sup> In this regard, the court held that the determination had to be one of fact,<sup>79</sup> that a person could indeed be ordinary resident in a jurisdiction during a particular year of assessment without having been physically present in

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<sup>74</sup> Section 1 of the Act.

<sup>75</sup> SARS op cit note 58.

<sup>76</sup> *Cohen v Commissioner for Inland Revenue* 1946 AD 174, 13 SATC 362.

<sup>77</sup> *Commissioner for Inland Revenue v Kuttel* 1992 (3) SA 242 (A).

<sup>78</sup> *Cohen* supra note 76 at 367.

<sup>79</sup> *Ibid.*

the country during the year in question<sup>80</sup> and that, in the event that an individual is resident in more than one jurisdiction, he could only be ordinarily resident in one.<sup>81</sup> With regard to the latter, Schreiner JA held that:

*'... ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings, as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.'*<sup>82</sup>

In coming to his conclusion, Schreiner JA considered a number of English court cases,<sup>83</sup> but most notably that of *IRC v Lysaght*<sup>84</sup> and *Levene v CIR*.<sup>85</sup> In referring to *Lysaght* and *Levene*, he concludes that the question of residence or ordinary residence does not have a special or technical meaning ascribed to it but rather is a question of degree based on factual considerations and deciphering the weight which should be afforded to each relevant factor in making the determination.<sup>86</sup> The principles laid down by these two cases have proved influential in determining the meaning of 'ordinarily resident'. Both cases were referred to in *Cohen*, which, when read with *Kuttel*, is regarded as the foundational South African court case for the meaning of ordinary resident, and in *Thomson v Minister of National Revenue*,<sup>87</sup> which is the authoritative Canadian court decision on the meaning of the term. The details and relevance of the *Thomson* case are discussed in the following chapter.

Following *Cohen*, the Income Tax Court in ITC 1170<sup>88</sup> applied the principles laid down in *Cohen* and held that the taxpayer in that specific case retained his status as ordinarily resident in South Africa.<sup>89</sup> This determination was based on an analysis of the taxpayer's facts and circumstances. Despite his employer sending him on a 14-month assignment to the United States, the evidence did not support his claim that he no longer considered South Africa as his place of ordinary residence. The court considered the fact that he retained bank accounts in

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<sup>80</sup> Ibid at 368.

<sup>81</sup> Ibid at 371.

<sup>82</sup> Ibid.

<sup>83</sup> At the time of the decision, South Africa had been a self-governed union and colony of the British Empire. In 1961, South Africa gained its independence from the British empire and became the Republic of South Africa.

<sup>84</sup> [1928] AC 234.

<sup>85</sup> [1928] AC 217.

<sup>86</sup> *Cohen* supra note 76 at 366 and 369-371.

<sup>87</sup> *Thomson v. Minister of National Revenue* [1946] SCR 209.

<sup>88</sup> *Income Tax Case No 1170* (1971) 34 SATC 76 (C).

<sup>89</sup> Ibid at 78.

South Africa, let out his home in South Africa for exactly the period of his absence, his parents remaining in South Africa and that his permanent employment remained in South Africa to be determinative that he remained ordinarily resident in South Africa.<sup>90</sup> It held that even though a permanent relocation was considered, at the time in question he had not made a definite decision giving effect to this consideration by severing his links to South Africa to a sufficient extent.<sup>91</sup>

In *Kuttel*, the court further confirmed and adopted the principles set out by Schreiner JA in *Cohen*. In doing so, Goldstone JA concluded that a person is ordinarily resident '*where he has his usual or principal residence, ie what may be described as his real home.*'<sup>92</sup>

Adopting the principles set forth in *Cohen* and *Kuttel*, SARS issued an interpretation note<sup>93</sup> stipulating that, in order for an individual to meet the criteria of being ordinarily resident, they need to possess an intention to maintain ordinary residence in South Africa and must have demonstrated actions consistent with this intention.<sup>94</sup> It further confirms that the enquiry is one of fact and each case should be decided on its own facts and merits.<sup>95</sup> In determining an individual's true intention, the court in *ITC 1185*<sup>96</sup> provided useful principles in making such a determination.<sup>97</sup>

Based on the above, a person's ordinary residence, from a South African tax point of view is a broad enquiry which includes weighing up all facts and circumstances of an individual. The enquiry can extend beyond the year of assessment in question in analysing an individual's mode of life to determine their 'real' home.<sup>98</sup> Therefore, even though the determination is based on an individual's subjective intention, that intention must be backed by objective facts and circumstances.<sup>99</sup> The court held that a taxpayer's *ipse dixit* must not be outright accepted as

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid at 79-80.

<sup>92</sup> *Kuttel* supra note 77 at 20.

<sup>93</sup> SARS Interpretation Note 3 (Issue 2) issued on 20 June 2018.

<sup>94</sup> Ibid at 5.

<sup>95</sup> Ibid.

<sup>96</sup> *ITC 1185* (1972) 35 SATC 122 (N).

<sup>97</sup> SARS Interpretation Note 3 op cit note 93 at 6. SARS in Interpretation Note 3 further confirms that the principles as laid out in *ITC 1185* as to the determination of a taxpayer's intention finds application to such a determination in confirming a person's intention to be ordinarily resident in South Africa.

<sup>98</sup> *Cohen* supra note 76 at 373.

<sup>99</sup> As held in *ITC 1185* (1972) 35 SATC 122 (N).

decisive without measuring such stated intention against the objective facts and circumstances that support such stated intention.<sup>100</sup>

*(b) Physical presence*

If an individual's ordinary residence is South Africa, the ordinary residence test supersedes the physical presence test and further enquiry is not required. However, should an individual's facts and circumstances lead to the conclusion that their ordinary residence is not in South Africa, they may still qualify as a 'resident' based on of the number of days they have physically spent in South Africa over a period of six years of assessment.<sup>101</sup> The intention of the person is irrelevant under this test. When calculating the number of days, a 'day' includes a part of a day spent in South Africa but does not include any time spent in transit between two offshore jurisdictions.<sup>102</sup>

Under the physical presence test, an individual will be considered a tax resident in South Africa if: (i) they spend more than 91 days in total in South Africa during the current year of assessment; (ii) they have spent more than 91 days in South Africa in each of the preceding five years of assessment; and (iii) they have accumulated a total of over 915 days in South Africa during the past five years of assessment.<sup>103</sup> Since the criteria are accumulative, failing to meet any one of them results in a person not being considered a tax resident in South Africa under the physical presence test. If the individual qualified as a tax resident under the physical presence test, they can terminate their tax residence based on this test by staying outside South Africa continuously for a period of at least 330 full days.<sup>104</sup> The person would be treated as non-resident with effect from the date of his departure from South Africa.

*(c) Dual tax residence*

In the event that an individual satisfies the local tax residence requirements of their new jurisdiction and falls under the purview of either of the residence tests in South Africa, the

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<sup>100</sup> Ibid at 123-124.

<sup>101</sup> Subparagraph (a)(ii) of the definition of 'resident' in section 1 of the Act.

<sup>102</sup> Ibid at sub-paragraph (a)(ii)(A).

<sup>103</sup> Ibid at sub-paragraph (a)(ii)(aa) and (bb).

<sup>104</sup> Sub-paragraph (a)(ii)(B) of the definition of 'resident' in section 1 of the Act.

determination of exclusive taxing rights between the two countries will be made through the tie-breaker provisions outlined in the relevant tax treaty, if applicable.<sup>105</sup>

These tie-breaker provisions are applied sequentially and consider specific factors, starting with the jurisdiction in which the person has a permanent home available to them. Should they have a permanent home available in both jurisdictions, the enquiry looks to which jurisdiction the individual has closer personal and economic ties to i.e. his centre of vital interests. If the individual's connections cannot be said to be closer to either jurisdiction, the enquiry looks to the jurisdiction in which they have their habitual abode. If they have an habitual abode in both, the individual's citizenship will be determinative. Should they be a national of both jurisdictions, the enquiry shall be settled through the mutual agreement procedure between the two contracting states. Should the tie break in favour of the other jurisdiction and not South Africa, for purposes of, the said individual will be deemed a non-resident in South Africa.<sup>106</sup>

### 3.2.2 Temporal aspects

As confirmed above in Chapter 1, the timing of the triggering event and the timing of the payment of the exit tax triggered is important when implementing an exit tax. As to the timing of the deemed disposal, an important amendment to the South African exit tax provision was brought about as a result of a decision of the SCA in *CSARS v Tradehold Limited*.<sup>107</sup>

In *Tradehold*, the taxpayer, Tradehold Limited, was an investment holding company incorporated in South Africa and listed on the Johannesburg Stock Exchange<sup>108</sup> and was effectively managed in South Africa both factors which caused it to be a South African tax resident.<sup>109</sup> Its sole asset consisted of a 100% shareholding in Tradegro Holdings Limited, a company incorporated in Guernsey.<sup>110</sup>

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<sup>105</sup> The residence article of the treaties to which South Africa follows the format of article 4 of the OECD's Model Convention.

<sup>106</sup> Per the first proviso to the definition of 'resident' in section 1 of the Act.

<sup>107</sup> *Commissioner for the South African Revenue Service v Tradehold Ltd* 2013 (4) SA 184 (SCA).

<sup>108</sup> *Ibid* para [2].

<sup>109</sup> Per sub-paragraph (b) to the definition of 'resident' in section 1 of the Act whereby any person other than an individual will be a South African tax resident should they be incorporated, established or formed in South Africa or their place of effective management is situated in South Africa subject to the proviso that any person to which a tax treaty applies and where the treaty deems said person to be a sole resident of the other jurisdiction. Under the proviso, such a person will not be a South African tax resident.

<sup>110</sup> *Tradehold* supra note 107 para [2].

On July 2, 2002, during a board meeting held in Luxembourg, the company's board resolved to hold all future board meetings in Luxembourg. This decision shifted the place of effective management of the taxpayer to Luxembourg.<sup>111</sup> Regardless of the change, the company remained South African tax resident based on having been incorporated in South Africa. However, the definition of 'resident' was modified to include a proviso that individuals exclusively considered residents of another jurisdiction under a relevant tax treaty between that jurisdiction and South Africa would not be regarded as South African tax residents, even if they met the domestic test for tax residence.<sup>112</sup> Consequently, with effect from 26 February 2006, the taxpayer ceased to be a South African tax resident in accordance with the South Africa/Luxembourg tax treaty.<sup>113</sup>

Due to the taxpayer's cessation of tax residence, paragraph 12 of the Eighth Schedule (as applicable at the time) caused the company to be deemed to dispose of its assets. In terms of this disposal, the taxpayer realized a capital gain on its shareholding in Tradehold Holdings.<sup>114</sup> The taxpayer, relying on Article 13(4) of the South Africa/Luxembourg, argued that the capital gain realized is only taxable in Luxembourg as the taxpayer's country of residence.<sup>115</sup> The issue *in casu* was whether 'alienation' as used in Article 13(4) included a deemed disposal or whether the article only applied to actual disposals.<sup>116</sup> In this regard, the court held in favour of the taxpayer and held that Article 13(4) did apply to the capital gains realized under the deemed disposal and therefore South Africa did not have the right to tax said capital gains.<sup>117</sup>

In response to this decision, SARS, in an effort to align the South African exit tax to international norms,<sup>118</sup> amended section 9H to provide that the deemed disposal is deemed to occur on the day immediately before the cessation of residence occurs and that a taxpayer's South African year of assessment as a resident is deemed to end on the day of the deemed disposal and a new, non-resident year of assessment is deemed to begin on the day that the

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<sup>111</sup> Similar to 'ordinary residence' there is no definition for 'place of effective management' in the Act. Per SARS's Interpretation Note 6 (Issue 3) published on 30 June 2023, the place of effective management must be given its 'ordinary meaning, taking into account international precedent and interpretation' and is the place where 'key management and commercial decisions necessary for the conduct of its business as a whole are in substance made'. In Tradehold's case, this place was held to be where its board met.

<sup>112</sup> Per section 33 of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003.

<sup>113</sup> *Tradehold* supra note 107 para [4].

<sup>114</sup> *Ibid* para [8]-[10]

<sup>115</sup> *Ibid*.

<sup>116</sup> *Ibid* para [23].

<sup>117</sup> *Ibid* para [25].

<sup>118</sup> Explanatory Memorandum to the Taxation Laws Amendment Bill, 2012.

taxpayer so ceases their South African tax residence.<sup>119</sup> In enacting this amendment, the deemed disposal is guaranteed to occur at a time when the taxpayer is still a sole South African tax resident and treaty relief would not be available.

Accordingly, pinpointing an individual's date of cessation of tax residence is an important determination which has a direct influence on their tax bill, most notably for those individuals that hold assets of which the values fluctuate on a daily basis.

In terms of the definition of 'resident' in the Act, an individual can cease their South African tax residence with effect from any date throughout the year of assessment depending on their facts and circumstances. Had they been ordinarily resident in South Africa, they would cease their tax residence on the date which they no longer regarded South Africa as their place of ordinary residence i.e. the place to which they return to from their wanderings or their 'real home'. If they were a tax resident due to the physical presence test, an individual ceases their residence under this test should they remain physically outside South Africa for a period of at least 330 full days immediately after the day they departed South Africa. In terms of the Act, they will be treated as a non-resident with effect from the date that they departed South Africa. Should an individual be dual tax resident, their cessation of South African tax residence will be triggered as soon as they seek to rely on the provisions of an applicable treaty and upon the residence article of that treaty, the tiebreaker breaks in favour of the other contracting state.

In the case of ordinary residence and dual tax residence, a specific date of cessation could prove difficult to determine objectively due to the nature of the tests. The former is based on a taxpayer's intention and the latter upon a list of factors reliant on an individual's facts and circumstances which could change vicariously and cause a swing in the pendulum of the tiebreaker, effectively ceasing an individual's South African tax residence potentially unbeknownst to the individual. Conversely, the Act is clear on the effective date of an individual cessation of tax residence had they been a tax resident by reason of their days spent in South Africa. Currently, the onus lies on the taxpayer to inform SARS of their cessation of tax residence and to furnish an effective date.<sup>120</sup>

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<sup>119</sup> Section 17 of the Taxation Laws Amendment Act 22 of 2012.

<sup>120</sup> Section 23 of the Tax Administration Act 28 of 2011 ('TAA') requires a taxpayer to inform SARS within 21 business days of a change in a list of their specific particulars. However, a change in residence status is not one of these listed particulars. The SARS website merely notes that a taxpayer must notify it when residence is ceased.

### 3.3 Method of collection

Income tax in South Africa is collected by way of various withholding mechanisms, by provisional tax payments or through a year-end assessment. South Africa uses an immediate exit tax system and does not allow for a deferral of payment of the tax.<sup>121</sup> However, certain administrative burdens make complying with such immediate payment difficult especially for non-provisional taxpayers as is expanded on below. As such, in light of collecting the exit tax triggered by section 9H, the relevant collection method depends on the basis upon which a taxpayer is required to account for tax.

In South Africa, individuals are either classified as normal or non-provisional taxpayers or are provisional taxpayers. For non-provisional taxpayers, the tax on their income is normally collected by way of withholding taxes with the balance becoming due and payable when an assessment is issued at the dates set out in the public notice issued by the Commissioner on a yearly basis. Such individuals are those who derive mainly remuneration<sup>122</sup> from a person that is registered for employees' tax,<sup>123</sup> who do not derive income from the carrying on of any business whereby such income derived exceeds the tax threshold and the taxable income which they derive from other sources<sup>124</sup> does not exceed R30,000.<sup>125</sup> If an individual derives income other than in the aforementioned circumstances, they are required to account for tax as a provisional taxpayer.<sup>126</sup>

#### 3.3.1 Provisional taxpayers

Provisional tax is an advance payment of tax.<sup>127</sup> Provisional taxpayers are obligated to make two tax payments in a year of assessment.<sup>128</sup> The first payment is due within six months of the start of the taxpayer's year of assessment<sup>129</sup> and the second is payable by no later than the last day of that year of assessment.<sup>130</sup> If an individual provisional taxpayer's year of assessment is less than six months in total, only the second payment is due as at the end of that year of

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<sup>121</sup> Brought about by the deemed end of a taxpayer's year of assessment.

<sup>122</sup> As defined in paragraph 1 of the Fourth Schedule to the Act ('Fourth Schedule') which provides that remuneration includes any amount derived by a person as a result of an employment relationship (i.e. wages, salary, overtime, pension etc.).

<sup>123</sup> See the definition of 'provisional taxpayer' in paragraph 1 of the Fourth Schedule.

<sup>124</sup> Being income in the form of interest, dividends, foreign dividend and rental from letting of fixed property.

<sup>125</sup> Op cit note 123.

<sup>126</sup> Ibid.

<sup>127</sup> SARS Interpretation Note 1 (Issue 3) published on 20 February 2019 at 3.

<sup>128</sup> Paragraph 17 of the Fourth Schedule.

<sup>129</sup> Paragraph 21(1)(a).

<sup>130</sup> Paragraph 21(1)(b).

assessment.<sup>131</sup> These payments are coupled with filing a provisional tax return in which the individual provides an estimate of their taxable income for the year of assessment.<sup>132</sup>

Due to the deemed cessation<sup>133</sup> of an individual's year of assessment on the day before the date of cessation of tax residence, in the case of a provisional taxpayer who is required to account for tax on their estimated taxable income for the year of assessment, the second provisional tax payment and return is accelerated to the day before cessation of tax residence.<sup>134</sup> The provisional taxpayer is required to file a return, which includes the deemed disposal of all assets as a result of their cessation of tax residence, and make payment of any tax due in terms of that provisional return.<sup>135</sup>

### **3.3.2 Non-provisional taxpayers**

For a non-provisional taxpayer, making payment of the potential tax triggered by section 9H is less certain compared to provisional taxpayers. Normally, an individual is required to file a return accounting for income tax over the 12 month period ending on the last day of February with the exception where an individual ceases their tax residence.<sup>136</sup> The return must be filed during a time and in a prescribed form and manner as announced by the Commissioner in a public notice on a yearly basis. If an individual's year of assessment is less than the full 12 months, specifically in the instance where they have ceased their tax residence at a point during the year of assessment, they are required to file a return accounting for income tax for the period starting on 1 March and ending on the day before they cease their tax residence.<sup>137</sup>

Despite this legislative requirement, the current system does not provide for a non-provisional taxpayer to file more than one return during a 12 month period even though the 12 months will cover two years of assessment by virtue of the legislation. As such, practically, they can only account for the tax triggered in terms of the deemed disposal once during the tax filing season as announced by the Commissioner by way of government notice on a yearly basis.<sup>138</sup>

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<sup>131</sup> Paragraph 21(1A) of the Fourth Schedule.

<sup>132</sup> Calculated in accordance with paragraph 17 of the Fourth Schedule.

<sup>133</sup> See paragraph 3.2 of this paper.

<sup>134</sup> SARS op cit note 127 at 7.

<sup>135</sup> Ibid regarding the requirement to file the return and the calculation of the estimated tax.

<sup>136</sup> Section 66(13)(a) and (a)(iii) of the Act.

<sup>137</sup> Ibid.

<sup>138</sup> In accordance with section 25 read with section 66 of the Act.

### 3.4 Potential extension to retirement interests

Currently, an emigrant's interest in retirement funds are not included under the deemed disposal triggered by section 9H of the Act due to the fact that the deemed disposal did not give rise to a 'lump sum benefit' as defined in the Second Schedule, on which a capital gain or loss for purposes of capital gains tax must be disregarded.<sup>139</sup> However, it is submitted that their exclusion was on the general basis that receipts from the funds would be taxable in South Africa upon a source basis.<sup>140</sup>

Following the National Budget Speech delivered on 24 February 2021 by the Minister of Finance at the time, Mr Tito Titus Mboweni,<sup>141</sup> the National Budget Review ('2021 Budget Review'), published by National Treasury, included a tax policy proposal regarding the tax treatment of retirement funds upon the cessation of tax residence.<sup>142</sup> This proposal identified a potential loss of tax revenue for the South African fiscus in the event that an individual ceases their South African tax residence, having an interest in a South African retirement fund, before he or she has retired in terms of that retirement fund and subsequently withdraws from the fund but an applicable tax treaty, concluded between South Africa and the new country of tax residence to avoid the application of double taxation, provides that the country of residence enjoys sole taxing rights.<sup>143</sup> But, as confirmed by the 2021 Budget Review,<sup>144</sup> this is not necessarily the case due to the application of certain double tax treaties. Accordingly, the Draft Taxation Laws Amendment Bill, 2021 ('2021 Draft TLAB') provided for an amendment to section 9H through an additional exemption from the deemed disposal, being an emigrant's interest in retirement funds<sup>145</sup> and the addition of Section 9HC to the Act which would deem an emigrant individual to have disposed of their interests in retirement funds and such disposal to be treated as a withdrawal.<sup>146</sup>

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<sup>139</sup> Paragraph 54 of the Eighth Schedule.

<sup>140</sup> National Treasury 'Draft Explanatory Memorandum on the Taxation Laws Amendment Bill, 2021' at 12.

<sup>141</sup> Tito Titus Mboweni 'Minister of Finance, Tito Titus Mboweni, Member of Parliament 2021/22 National Budget Speech' 24 February 2021 available at <http://www.treasury.gov.za/documents/National%20Budget/2021>, accessed on 31 October 2021.

<sup>142</sup> National Treasury, Annexure E to the 2021 Budget Speech at 114.

<sup>143</sup> National Treasury op cit note 142.

<sup>144</sup> National Treasury op cit note 141.

<sup>145</sup> Section 11(1)(a) of the 2021 Draft TLAB. The existing exemptions are contained in section 9H(4) of the Act and generally relate to assets which remain within the taxable jurisdiction of South Africa and onto which future tax can be charged.

<sup>146</sup> Section 12 of the 2021 Draft TLAB.

### 3.4.1 Policy reasons for the preferential tax treatment of retirement funds and the application of an exit tax on retirement funds

The first and foremost policy reason for retirement fund tax incentives is the encouragement of individuals to accumulate private savings for their retirement in order to ease the burden on the public purse.<sup>147</sup> This would enable individuals to have sufficient savings to maintain their standard of living after retirement from employment without having to heavily rely upon the social security system of the country or prematurely running out of savings.<sup>148</sup> The increasing life expectancy and an ageing population has placed a great strain on the public to provide social welfare to those who no longer earn a salary or who are unable to find work.<sup>149</sup>

Moreover, taxation reduces the purchasing power of retirement savings as there is less money available to sustain one's life after retirement.<sup>150</sup> Essentially, government wants to promote longevity as opposed to immediate access which could lead to over-spending and mismanagement, resulting in a reliance upon the social welfare system.<sup>151</sup> The policy objective can be illustrated by the more favourable treatment of withdrawal benefits received on retirement as opposed to pre-retirement lump sum withdrawals. This incentivizes members to rather elect receiving a third as a lump sum and the remainder being invested in an annuity.

Similar to the rationale of an exit tax upon inherent untaxed gains on assets, an exit tax upon retirement benefits aims to recoup the tax concessions provided to the member on the contributions to the fund prior to the individual's emigration considering that these concessions by way of deductions from the member's income up until retirement will be recouped once the member retires and receives a withdrawal and or annuity payments from the fund.<sup>152</sup> Therefore, if an individual were to cease their tax residence prior to retirement, and that retirement interest is not subject to the section 9H deemed disposal, South Africa might lose its future taxing rights on the withdrawal or retirement benefits provided to the member in terms of an applicable tax treaty.<sup>153</sup>

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<sup>147</sup> See National Treasury Discussion Paper *Retirement Fund Reform* (2004) at 4 as well as National Treasury Technical Discussion Paper E *Improving tax incentives for retirement savings* (2012) at 6.

<sup>148</sup> Ibid.

<sup>149</sup> National Treasury Discussion Paper *Retirement Fund Reform* (2004) at 11.

<sup>150</sup> National Treasury Technical Discussion Paper E *Improving tax incentives for retirement savings* (2012) at 6.

<sup>151</sup> National Treasury op cit note 149 at 36.

<sup>152</sup> E Kemmeren 'Chapter 22: Netherlands: Exit Taxation and Pensions: Tax Treaty Override? NL: Supreme Court (Hoge Raad, HR)' (2013) *Tax Treaty Case Law around the Globe 2012* IBFD para 22.1.

<sup>153</sup> National Treasury op cit note 140 at 12.

### 3.4.2 The proposed section

Section 9HC<sup>154</sup> provided that a resident individual will be deemed to have disposed of their interest in any retirement funds on the day before they cease their tax residence.<sup>155</sup> The value of the interest in the retirement funds, as determined on the date of disposal, must be treated as a lump sum withdrawal benefit<sup>156</sup> that accrued to the emigrant.<sup>157</sup> Payment of the tax on the deemed withdrawal would then be deferred until an actual withdrawal of the fund is made in future. A withdrawal lump sum benefit is taxed at higher rates compared to a retirement lump sum withdrawal benefit.<sup>158</sup> The tax so determined on the date of the deemed disposal must be increased by the SARS official rate of interest for interest payable to SARS<sup>159</sup> until the tax is paid in full.<sup>160</sup>

Conversely to section 9H, the payment of the tax due on the withdrawal benefit (being the tax on the lump sum withdrawal plus the accrued interest) is deferred until the date and to the extent that an amount is receivable from the emigrant's retirement fund. Finally, sub-paragraph (d) provides as follows:

*'an amount equal to the amount of tax contemplated in paragraph (b)<sup>161</sup> must be deducted by way of rebate from any tax payable by the person... in respect of amounts receivable under paragraph 2 of the Second Schedule or a qualifying annuity as defined in section 10C, from a fund referred to in subsection (1)<sup>162</sup>.'*

Sub-paragraph (d) supposes that when the individual eventually is able to receive payments from the fund, tax will be calculated on the entire value as at that time per the prevailing lump sum tax tables but will be reduced by way of rebate of the deemed withdrawal tax and associated interest.

From the above, several issues were identified through public comments submitted to SARS in response to the 2021 Draft TLAB. However, of these points put forward, this paper focuses

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<sup>154</sup> Section 12(1) of the 2021 Draft TLAB.

<sup>155</sup> Draft section 9HC(1) of the 2021 Draft TLAB.

<sup>156</sup> In terms of paragraph 2(1)(b)(ii) of the Second Schedule to the Act.

<sup>157</sup> Draft section 9HC(2)(a).

<sup>158</sup> A withdrawal lump sum benefit is taxed in terms of paragraph 2(1)(b)(ii) of the Second Schedule and a retirement withdrawal lump sum benefit is taxed in terms of paragraph 2(1)(a) and (c) of the Second Schedule. The tables are provided for in paragraph 8 of Schedule I of the Tax Rates provided by National Treasury on a yearly basis.

<sup>159</sup> Section 189 of the TAA.

<sup>160</sup> Draft section 9HC(2)(b).

<sup>161</sup> Being the withdrawal tax plus any interest.

<sup>162</sup> These are all South African retirement funds in which the emigrant holds an interest.

on three specific points such as (i) the charge of interest on the deemed withdrawal, especially considering that members of preservation funds<sup>163</sup> and retirement annuities are precluded from making a pre-retirement lump sum withdrawal of the full value of the fund for a minimum of three years;<sup>164</sup> (ii) the differential treatment of emigrants; and (iii) the potential for double taxation or treaty override on the eventual receipt of a withdrawal or retirement benefit.

### **3.4.3 The interest charge**

The proposal of an interest on the amount determined in terms of the lump sum withdrawal benefit table can be viewed as problematic on the basis that emigrants who ceased their tax residence after 1 March 2021 are unable to withdraw the value of their preservation funds or retirement annuities in terms of a pre-retirement withdrawal for a minimum of three years.<sup>165</sup> Practically, the interest on the lump sum withdrawal benefit that was deemed to accrue on the day before cessation would continue to run for a minimum of three years without the section providing for a mechanism by which the emigrant could settle the tax at an earlier date.

Additionally, the 2021 Draft TLAB did not propose or seemingly did not consider other necessary amendments to other legislative provisions to give effect to the proposed amendment. By way of example, the interest that would have been charged in terms of section 189 of the Tax Administration Act 28 of 2011 ('TAA') is only, in terms of that section, chargeable once a debt is due and payable. However, in terms of the then proposed section 9HC, the tax calculated on the deemed withdrawal would not have yet been treated as 'due and payable' until such time as the individual actually made a withdrawal of their retirement interest. Effectively, the proposed provision sought to charge interest on the deferred tax in terms of a section that requires a tax to be 'due and payable' but the proposed section specifically provided that the deemed withdrawal tax would not be due and payable for the deferral period. No provision was made at the time to the provisions of section 189 of the TAA to address this anomaly.

### **3.4.4 Differential treatment of emigrants**

Practically, emigrants who ceased their tax residence prior to 1 March 2021 would not have been affected by this proposed provision were it to have been enacted in its form at the time

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<sup>163</sup> Only members of these funds who have utilized their previous once-off withdrawal.

<sup>164</sup> See the definitions of 'pension preservation fund', 'provident preservation fund' and 'retirement annuity fund' in section 1 of the Act.

<sup>165</sup> Ibid.

thereby affording them the opportunity to withdraw their retirement benefit in full and still claim the treaty relief in terms of that withdrawal, thereby depriving South Africa of its taxing rights and of the tax which it aims to recoup by way of this section. They would also not have been required to bear an interest charge until such point as they receive a benefit as opposed to post-1 March 2021 emigrants.

Additionally, had the provision been enacted in its form at the time, it could have served as a deterrent to residents to relocate abroad or potential immigrants or returning immigrants for the fear of their retirement savings being taxed in a punitive way should they want to relocate offshore again. Such a deterrent could be argued as being a too strict, therefore potentially unjustifiable and unreasonable, limitation on a resident's freedom of movement<sup>166</sup> in light of the legitimate purpose of the provision.<sup>167</sup> However, this paper does not extend to a discussion on the possible constitutional challenges to the provision and therefore it is only mentioned as a potential issue on which the validity of the provision could be challenged.

Furthermore, the provision did not provide for the instance of an emigrant who returns to South Africa and becomes a tax resident again before withdrawing or retiring from the fund. This scenario would obviate the purpose of the provision, being that a future withdrawal will not be subject to tax in South Africa should a tax treaty apply, as the individual would end up paying South Africa tax upon retirement or withdrawal.

### **3.4.5 The potential for double taxation or treaty override**

In terms of non-South Africa tax residents, where the country of residence of the non-resident imposes tax on that same benefit on a residence basis, this scenario could give rise to double taxation whereby the same benefit is taxed on a source and residence basis. If the country of residence and South Africa have concluded a tax treaty, the provisions of the tax treaty will determine which state has taxing rights in terms of the benefit. The relevant article in South Africa's tax treaty network has been mainly modelled upon Article 18 of the OECD Model Convention,<sup>168</sup> which deals with the taxation on pensions and other similar remuneration. The Commentary on the OECD Model Convention on Article 18 provides that the general accepted notion, in light of policy and administrative considerations, is that the country of residence is

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<sup>166</sup> As enshrined in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>167</sup> Per the limitation clause contained in section 36 of the 1996 Constitution.

<sup>168</sup> The Model Convention upon which the majority of South Africa's tax treaties are based upon.

best placed to tax pensions or other similar remuneration.<sup>169</sup> Therefore the point of departure in most treaties modelled upon this article provides sole taxing rights to the country of residence on receipts of this nature. Should the non-resident individual receiving the withdrawal benefit be a resident of a country with which South Africa has concluded a tax treaty and that tax treaty provides sole taxing rights to the country of residence, South Africa is precluded from levying tax upon the withdrawal benefit.

Once an emigrant either retires or withdraws from the fund, that individual might be subject to double tax seeing that not all tax treaties provide sole taxing rights to the country of residence. In this regard, the amount would be subject to both South African tax and tax in the foreign jurisdiction. It is not a given that the country of residence will acknowledge the imposition of the tax imposed on the deemed withdrawal at departure, on the basis that such tax would have been triggered on the day immediately preceding the individual's date of cessation of tax residence and could insist on taxing the entire fund value as opposed to only the untaxed portion.

### **3.4.6 The response from SARS**

The deadline for public comments on the 2021 Draft TLAB, among other documents, was the 28th of August 2021. A total of 76 organizations and individuals submitted written comments to both National Treasury and SARS. As a result, workshops were organized to engage with stakeholders and further delve into their written feedback regarding the 2021 draft tax bills. Subsequently, the Standing Committee on Finance was briefed on these bills, and taxpayers and tax advisors provided oral presentations during hearings conducted by the Standing Committee on Finance. On the 10th of November 2021, National Treasury and SARS jointly published the 2021 Draft Response Document. This document comprises a condensed summary of responses from Treasury and SARS officials in reaction to the public comments received. It also outlines the proposed actions to address the primary concerns raised during the consultation phase.<sup>170</sup> Of the issues raised through the public participation process, SARS noted the comments pertaining to the potential of treaty override. In the initial draft response document,<sup>171</sup> SARS officially announced the withdrawal of the proposed section, while also

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<sup>169</sup> Per paragraph 1 of the Commentary on Article 18 of the OECD Model Convention.

<sup>170</sup> National Treasury 'Final Response Document on the 2021 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2021 Draft Taxation Laws Amendment Bill and 2021 Draft Tax Administration Laws Amendment Bill' published on 25 January 2022 available online at <https://www.sars.gov.za/legal-counsel/preparation-of-legislation/response-documents/>, accessed on 22 September 2023.

<sup>171</sup> National Treasury 'Draft Response Document on the 2021 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2021 Draft Taxation Laws Amendment Bill, 2021 Draft Tax Administration Laws

acknowledging the need for further revisions to tackle the raised complexities in the upcoming legislative cycle. However, in the ultimate response document presented, SARS altered its stance. It indicated that it would initiate the process of treaty negotiation, recognizing that attempting to resolve the issue through domestic legislation would probably result in a treaty override.<sup>172</sup>

### 3.5 Summary remarks

This chapter constitutes a comprehensive analysis of the South African exit tax system, offering an understanding of its historical evolution, the intricacies of tax residence, the implications for emigrants, methods employed to collect the exit tax, the temporal aspects and its intricacies, and provides insight into the potential extension to retirement interests.

A notable highlight within this chapter is the exploration of the potential extension of the South African exit tax to retirement interests, emphasizing the complexity and impact on taxpayers' fiscal responsibilities. Although initially suggested by the South African Treasury, this proposal was met with fervent opposition, with which the author agrees, from various stakeholders, ultimately leading to its withdrawal due to public comments. It is evident that the proposed provision sought to move an administrative burden, being the renegotiation of bilateral treaties that could cause South Africa to lose its right to taxing retirement savings, to the taxpayer by attempting to include a provision of which the mechanics would heavily prejudice the taxpayer and expose them to double taxation, without regard to how their new residence jurisdiction might provide domestic relief for the tax that South Africa would have sought to impose. The ultimate decision to withdraw the provision was well-received in the opinion of the author.

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Amendment Bill and the Second Batch of the 2021 Draft Taxation Laws Amendment Bill and 2021 Draft Tax Administration Laws Amendment Bill' published on 10 November 2021 available online at <https://www.treasury.gov.za/documents/mtbps/2021>, accessed on 27 September 2023.

<sup>172</sup> Ibid.

## CHAPTER 4: CANADA

Canada imposes tax on a federal and a provincial level<sup>173</sup> and an individual's residence is relevant in both respects. However, due to the brief nature of this paper, this chapter and paper will focus on the federal tax considerations and determinations for tax residence in Canada.

Similar to South Africa, Canadian tax residents are subject to Canadian tax<sup>174</sup> on their worldwide income<sup>175</sup> where, generally, non-residents are taxed only upon income from a Canadian source.<sup>176</sup> As to an individual's taxable capital gains, an individual's net capital gains realized is reduced by 50 per cent to arrive at their taxable capital gain.<sup>177</sup>

Subsection 128.1 within the Canadian Income Tax Act addresses the tax consequences when an individual, trust, or corporation either establishes tax residency or relinquishes it. Subsection 128.1(4)(b) includes a provision that deems the disposal of all assets owned by a taxpayer at a specified time right before they cease their tax residency. This deemed disposal is made on the assets' fair market value, with specific assets held by an individual at the time of residency cessation being excluded from this presumption.<sup>178</sup> Different to South Africa, section 128.1 does not cause an individual's fiscal period to cease on the day immediately preceding the date of cessation of tax residence.<sup>179</sup> However, part-year residence is recognised and an individual is only subject to Canadian tax on their worldwide income for the part of the year which they were a Canadian tax resident.<sup>180</sup>

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<sup>173</sup> Canada Revenue Agency ('CRA') 'Income Tax Folio S5-F1-C1, Determining an Individual's Residence Status' at para 1.1 and 1.2 available at <https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-5-international-residency/folio-1-residency/income-tax-folio-s5-f1-c1-determining-individual-s-residence-status.html#p1.10>, accessed on 3 October 2023.

<sup>174</sup> Both federal and provincial.

<sup>175</sup> Subsections 2 and 3 of the Canadian Income Tax Act R.S.C., 1985, c. 1 (5th Supp.), as amended.

<sup>176</sup> Subsections 3 and 115(1) of the Canadian Income Tax Act.

<sup>177</sup> Subsection 38(a) of the Canadian Income Tax Act.

<sup>178</sup> Subsection 128.1(4)(b)(i) to (v) of the Canadian Income Tax Act.

<sup>179</sup> Subsection 128.1(4)(a) and (b) of the Canadian Income Tax Act only deems the end of a taxpayer's year of assessment where the taxpayer is a corporation or a trust (subsection (4)(a)) or an individual ceases their residence at a time where they are carrying on a business otherwise than through a permanent establishment in Canada (subsection (4)(b)). In the latter instance, the fiscal period of the business is deemed to cease on the day before cessation of the individual's residence and a new fiscal period to have begun on the date of cessation.

<sup>180</sup> CRA op cit note 173 para 1.1.

## 4.1 History and introduction

Canada's exit tax regime was introduced in 1972, on recommendation by the Report of the Canadian Royal Commission on Taxation ('Carter Report'),<sup>181</sup> specifically section 128.1(1) of the Canadian Income Tax Act R.S.C., 1985, c. 1 (5th Supp), as amended ('Canadian Income Tax Act'), coinciding with its introduction of the taxation of capital gains to its tax base.<sup>182</sup>

The Carter Report submitted that the rationale for the introduction of an exit tax, specifically with regard to individuals, was to tax gains that accrued to a taxpayer's property during their time as Canadian tax residents.<sup>183</sup> It strongly held that 'it should not be possible for a taxpayer to escape tax on property gains that accrued during Canadian residence by becoming a non-resident.'<sup>184</sup> This notion was echoed by the Canadian Minister of Finance at the time, Edgar Benson, in a government published summary of the 1971 legislation,<sup>185</sup> known as the Raspberry Book. In relation to the introduction of the exit tax he postulated that 'if it is a sound principle to require taxpayers to meeting their income tax obligations when leaving the country, it is no less fair in principle to tax capital gains enjoyed while the taxpayer has shares the rights and responsibilities of residence in Canada.'<sup>186</sup>

## 4.2 Application

Much like the South African departure tax, the effective clauses outlined in section 128.1(4)(b) of the Canadian Income Tax Act deems the individual to have disposed of their assets on the date immediately preceding the day that they cease their tax residence for a value equal to fair market value. Excluded from the deemed disposal is immovable property located in Canada, Canadian resource or timber resource property, capital assets connected to a business conducted by the emigrant through a permanent establishment in Canada, as well as specific rights or interests acquired by the emigrant in connection with employment services, such as employee stock options.<sup>187</sup> Notably, any pension or retirement fund savings or interests are specifically

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<sup>181</sup> Carter Report *Report of the Royal Commission on Taxation* vol. 3 Ottawa, Roger Duhamel, F.R.S.C., Queen's Printer and Controller of Stationary, 1966.

<sup>182</sup> Refer to page 5 of the Canadian Budget Speech delivered by E.J Benson being the Minister of Finance of Canada at the time on 18 June 1971.

<sup>183</sup> Carter Report op cit note 181 at 354.

<sup>184</sup> Ibid at 376.

<sup>185</sup> E.J. Benson Minister of Finance "The Summary of the 1971 Tax Reform Legislation "Raspberry Book"" available at [https://publications.gc.ca/collections/collection\\_2016/fin/F2-241-1971-eng.pdf](https://publications.gc.ca/collections/collection_2016/fin/F2-241-1971-eng.pdf), accessed on 29 September 2023.

<sup>186</sup> Ibid at 34.

<sup>187</sup> See the definition of 'excluded property' in subsection 128.1(10).

excluded from the charge.<sup>188</sup> Emigrants are afforded the option to elect that certain excluded property be included in the deemed disposal, such as immovable property situated in Canada.<sup>189</sup> This offers the taxpayer the option to trigger any inherent losses in relation to the excluded property that the taxpayer can utilize to off-set any other capital gains.<sup>190</sup> The same relief does not apply to any other assets that were subject to the deemed disposal. If an emigrant were to return to Canada and re-establish tax residence, any deferred departure tax that has not been triggered at that point will be reversed.<sup>191</sup> The Canadian Income Act does provide an exception to the departure tax for short-term resident individuals. Property held at the time of establishing residence or acquired during the residence period is excluded from the deemed disposal if the individual's tax residency in Canada was less than 60 months within the previous 120-month period ending on the cessation date.<sup>192</sup>

To understand the implications of the deemed disposal, it is important to set out on what basis an individual can be a Canadian tax resident. It is relevant to note that an individual's residence status is relevant for both federal and provincial tax residence purposes and the factors to determine federal residence as explained below are equally applicable in determining their provincial residence. However, this paper will focus on the federal tax considerations and implications.

#### **4.2.1 Canadian tax residence**

Under the charging provision of the Canadian Income Tax Act, individuals residing in Canada are liable to Canadian taxation on their worldwide income and gains, as calculated in accordance with the Canadian Income Tax Act.<sup>193</sup> Subsection 2(1) does not provide a definition for 'a person resident in Canada'.<sup>194</sup> However, subsection 250(3) provides that 'a reference to a person resident in Canada includes a person who was at the relevant time ordinarily resident in Canada.' Nowhere in the Canadian Income Tax Act does it define the terms 'resident' or

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<sup>188</sup> Ibid. These include rights under various retirement plans, educational savings plans, employee profit share plans, pension or superannuation funds (including governmental), retiring allowance and annuity rights as well as rights in a testamentary trust that were not acquired for consideration.

<sup>189</sup> Subsection 128.1(4)(d) of the Canadian Income Tax Act.

<sup>190</sup> Geoffrey J R Dyer & Yager J 'The Tax Treatment of Transfer of Residence by Individuals, Canada' (2002) *IFA Cahiers* at 194, available at [https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/data/ifacahier/pdf/ifacahier\\_2002\\_volume2\\_canada.pdf](https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/data/ifacahier/pdf/ifacahier_2002_volume2_canada.pdf), accessed on 27 October 2023.

<sup>191</sup> Subsection 128.1(6) Canadian Income Tax Act.

<sup>192</sup> Subsection 128.1(4)(b)(iv).

<sup>193</sup> See subsection 2(1) of the Canadian Income Tax Act which provides for the liability to tax in Canada.

<sup>194</sup> Subsection 248(1) defines a non-resident as meaning 'not resident in Canada.'

'ordinarily resident' in Canada.<sup>195</sup> As such, determining the meaning of 'residence' for Canadian tax purposes, requires a review of the common law meaning as developed by the Canadian courts<sup>196</sup> coupled with certain deeming rules, in terms of which a non-resident, in terms of the factual enquiry of residence, of Canada could be deemed resident, found in subsection 250(1)<sup>197</sup> and the tie-breaker rules under an applicable treaty. Subsection 250(1) contains a list of additional circumstances in which an individual can be deemed to be a Canadian tax resident. However, this paper will focus on subsection 250(1)(a) which provides for the circumstances under which a non-resident individual can be deemed a tax resident of Canada as a result of their physical presence in Canada during a tax year on the basis that this subsection relates closely to South Africa's physical presence test and can prove to be comparable.

Derived from the principles established in Canadian jurisprudence, an individual's Canadian tax residence hinges on two key aspects: firstly, whether they are factually resident in Canada; and secondly, if not factually resident, whether they are deemed residents under subsection 250(1)(a) due to having spent 183 days or more in Canada (i.e., 'sojourners'). If an individual is considered a Canadian tax resident, either as a factual resident or as a deemed resident (sojourner), and is also a tax resident in another jurisdiction with a relevant tax treaty, subsection 250(5) dictates that if the treaty's tie-breaker rules break in favour of the other jurisdiction, that individual is deemed a non-resident of Canada.

The recent decision of the Canadian Tax Court in *Elliot v. R*<sup>198</sup> provides a useful, recent application of the different components of Canadian fiscal residence explained above on the basis that the facts of the appellants *in casu* required the court to make a determination on their factual residence, then whether they were sojourners and ultimately the application of the Canadian/United States tax treaty.

*(a) Elliot v R: Factual circumstances*<sup>199</sup>

The case concerned three appeals that were heard together on the basis of common evidence.<sup>200</sup> The three taxpayers were American-born citizens who were all long-time acquaintances and

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<sup>195</sup> CRA op cit note 173 para 1.5.

<sup>196</sup> The leading authority being the Supreme Court of Canada's decision in *Thomson*.

<sup>197</sup> Subsection 250(1)(a) of the Canadian Income Tax Act.

<sup>198</sup> 2013 TCC 57.

<sup>199</sup> *Ibid* para [5]-[26].

<sup>200</sup> *Ibid* para [5].

colleagues. They were qualified and certified cost and estimating professionals with a long history in the cost engineering field and all worked together at the same company a point early in their careers. In addition to their consulting work, they each held prominent roles on boards and panels at the AACE.<sup>201</sup> The period in question were the years of 2004 through 2008 during a time which they provided consultancy services to a Canadian company, Syncrude, based in Alberta through their consultancy firm, CCG, that they established together as a result of the Syncrude-opportunity.<sup>202</sup> CCG's business office, records and bank accounts were all US-based and all effective management functions were performed by the appellants at times while they were present in the US.<sup>203</sup>

Before 2004, their entire professional careers were in the United States ('US'). Except for 2004 to 2008, they resided in the US where they married, raised children, and owned substantial family homes.<sup>204</sup> Their family ties, including adult children and extended families, were US-based.<sup>205</sup> They retained personal belongings typical for their age and maintained certain financial holdings, which encompassed substantial retirement and investment accounts held with prominent US financial institutions.<sup>206</sup> These assets remained in the US throughout the relevant period. They also maintained US health and life insurance, US cell phone numbers with US carriers, and all their US banking, US investments as well as pensions, and retirement savings.<sup>207</sup>

They arrived in Canada with suitcases and briefcases, receiving Canadian work permits at the airport. Virtually all of their assets remained in the US. They each opened a single Canadian checking account for daily expenses.<sup>208</sup> They each leased 2-bedroom apartments in the same complex with short termination notices and equipped them with basic furnishings. Each leased a vehicle, kept their US driving licenses, and retained American car insurance.<sup>209</sup> When their work with Syncrude ended in 2008, they donated or discarded their Canadian furnishings, taking only their clothes, files, and books back to the US.<sup>210</sup> While in Canada, they visited the

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<sup>201</sup> Association for the Advancement of Cost and Engineering International.

<sup>202</sup> *Elliot* supra note 198 para [13]-[17].

<sup>203</sup> *Ibid* para [17].

<sup>204</sup> *Ibid* para [8].

<sup>205</sup> *Ibid* para [9].

<sup>206</sup> *Ibid* para [8].

<sup>207</sup> *Ibid* para [21]-[22].

<sup>208</sup> *Ibid* para [22].

<sup>209</sup> *Ibid* para [19].

<sup>210</sup> *Ibid* para [17].

US monthly and had infrequent family visits in Alberta.<sup>211</sup> They also scheduled time off with Syncrude to return to the US to attend to the other work commitments of CCG. All three appellants spent more than 183 days physically present in Canada in both 2005 and 2006, being the two relevant Canadian tax years under consideration.<sup>212</sup>

*(b) Resident or ordinarily resident*

*Thomson v Minister of National Revenue*,<sup>213</sup> is regarded as the leading Canadian authority on determining an individual's factual residence.<sup>214</sup> The Supreme Court of Canada ('SCC')'s decision serves as the point of departure in the majority, if not all, of Canadian cases on determining the factual residence of an individual. The SCC's decision held that, to determine an individual's 'residence', the question to be answered is to what degree:

*'... a person in mind and in fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interest and conveniences at or in the place in question.'*<sup>215</sup>

As to the meaning of 'ordinarily resident', the SCC held as follows:

*'Residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to the question of its application.'*<sup>216</sup>

Similar to the SCA in *Cohen*, the SCC held the determination of an individual's fiscal residence is a question of fact and that the terms 'resident' and 'ordinarily resident' have no special or technical meaning.<sup>217</sup> The court also confirmed that an individual could be 'resident' in more than one place.<sup>218</sup>

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<sup>211</sup> Ibid para [23]-[24].

<sup>212</sup> Ibid para [25].

<sup>213</sup> [1946] SCR 209.

<sup>214</sup> *Elliott v. R.* 2013 TCC 57 para [28]. See also Lefebvre, P 'Canada's Jurisdiction to Tax: Residency and the Thomson Decision 60 Years Later' (2006) 54 *Canadian Tax Journal* 3 at 762-780.

<sup>215</sup> *Thomson* supra note 213 at 225.

<sup>216</sup> Ibid at 224 & 231.

<sup>217</sup> Ibid at 223.

<sup>218</sup> Ibid at 213.

The principles set out in *Thomson* have been confirmed and applied upon numerous occasions in Canadian jurisprudence on fiscal residence in Canada, including in *Elliot*.<sup>219</sup> The Federal Court, Trial Division decision in *The Queen v Reeder*<sup>220</sup> identified material factors for assessing an individual's factual residence, including (i) their historical and current lifestyle habits, (ii) the frequency and duration of visits to Canada, (iii) connections to Canada, (iv) ties to other locations, and (v) the enduring or transient nature of their overseas stay objectives.<sup>221</sup>

Notably, in *Gaudreau*, the Court, in adopting the reasoning in *Reeder*, held that during the taxpayer's absence from Canada, he retained all of his Canadian ties save for those that he had to take up in Egypt 'which were necessary to permit him and his wife to enjoy an acceptable and expected lifestyle while in Egypt'<sup>222</sup>. Thereby the court confirmed that when a person retains close and personal economic ties with Canada, a temporary absence is unlikely to lead to a conclusion of cessation of residence. The Canadian Federal Court of Appeal subsequently upheld the court *a quo*'s decision in *Gaudreau*, affirming the significance of an individual's Canadian ties as a key determinant when assessing their factual residency.

Applying the aforementioned principles, the court in *Elliot* found that the appellants had and maintained deep-rooted business, family, personal, and financial ties to the US, none of which they gave up when they went to Canada for the Syncrude-opportunity and therefore they were found to not be resident or ordinarily resident in Canada through the period of 2004 to 2008.<sup>223</sup> It stressed the importance of determining factual residence based on the individual's specific circumstances and overall details. The fact that the appellants seemed, from an external perspective, to live in Edmonton, Alberta, like other residents, was not the test or an automatic indication of their factual tax residency in Canada.<sup>224</sup>

Residential ties with Canada are regarded, by the CRA, as the most important in making a determination of factual residence within Canada.<sup>225</sup> In this respect, the CRA, based on the

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<sup>219</sup> See most notably *Beament v Minister of National Revenue* [1952] 2 S.C.R. 486, *The Queen. v. Reeder* [1975] C.T.C. 256, *Fisher v. R* [1995] 1 C.T.C. 2011, *McFadyen v. R.* 2002 CAF 496, *Gaudreau v. The Queen* 2005 D.T.C. 66, *Johnson v. R.* 2007 TCC 288, *Mahmood v. The Queen* 2009 TCC 89, *Elliott v. R.* 2013 TCC 57, *Biya v. The Queen* 2020 TCC 113.

<sup>220</sup> [1975] C.T.C. 256.

<sup>221</sup> *Elliot* supra note 198 para [29].

<sup>222</sup> *Gaudreau v. The Queen* 2005 FCA 288 para [34].

<sup>223</sup> *Ibid* para [33].

<sup>224</sup> *Ibid* para [34].

<sup>225</sup> M.N. Kandev & O Khazam 'The Family Office of Tomorrow: A Canadian Perspective' (2021) 75 *Bulletin for International Taxation* 8 para 3.2.

decisions of the Canadian courts on residence, differentiates between significant residential ties, secondary residential ties and other residential ties.<sup>226</sup>

There are three recognised significant residential ties which are the respective locations of the individual's dwelling place or places, their spouse or common-law partner and their dependents.<sup>227</sup> Regarding a dwelling or dwellings retained by the individual, the tie allocated to such place will only be considered by the CRA as potentially severed if the dwelling is leased to a third party on arm's length terms and conditions.<sup>228</sup> Even in the aforementioned scenario, the CRA will take into consideration the individual's relationship with the third-party lessee, the real estate market when they left, and the purpose of their overseas stay when deciding whether the tie is severed or not.<sup>229</sup>

Regarding the whereabouts of an individual's spouse or common-law partner, if this spouse or partner stays in Canada while the departing individual resides abroad, the departing individual will be regarded as having a significant residential tie in Canada.<sup>230</sup> The same principle is applied to the location of a departing individual's dependents.<sup>231</sup> An individual's spouse or partner will only be excluded as a significant residential tie for the departing individual in Canada if the individual is separated from their spouse or common-law partner due to the relationship's breakdown.<sup>232</sup>

Secondary residential ties to Canada are listed as the individual's personal property in Canada, landed immigrant status or appropriate work permits, social ties, economic ties, a driving license and vehicle registration in a Canadian province, hospital and medical insurance coverage, a seasonal or leased dwelling place, Canadian citizenship and any memberships of Canadian unions or professional organisations.<sup>233</sup> These secondary ties are to be considered as a whole and it is unlikely that a singular secondary residential tie on its own strength could lead to an individual being factually resident in Canada.<sup>234</sup> As to the other residential ties, these include retaining a Canadian mailing address, postal office box, safety deposit box or similar

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<sup>226</sup> CRA op cit note 173 para 1.10-1.15.

<sup>227</sup> CRA op cit note 173 para 1.11.

<sup>228</sup> Ibid para 1.12.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid para 1.13.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid para 1.14.

<sup>234</sup> Ibid.

address-related factors. The latter ties are not conclusive and can only carry weight when taken into account with the significant and secondary residential ties.

In light of the above, being a factual resident of Canada requires an overview of an individual's ties to Canada, especially 'significant residential ties'.

*(c) Deemed resident: Sojourner rule*

Once it is determined an individual is not factually resident in Canada under the principles and rules set out above, they can still be regarded as Canadian tax residents under the deeming provision of section 250(1)(a) of the Canadian Income Tax Act as a sojourner.<sup>235</sup> Importantly, an individual that is deemed tax resident in terms of subsection 250(1) they will only be resident for federal tax purposes and not provincial tax purposes, with the exception of an individual that had been a resident of Quebec. A deemed resident individual is subject to the federal surtax, is not entitled to any provincial tax credits which might have been otherwise available nor are they entitled to any direct, tax-based, provincial benefits.<sup>236</sup>

The term 'sojourn' is also not defined in the Canadian Income Tax Act. It was defined in *Thomson*, in an obiter comment, as 'a place where [one] usually, casually, or intermittently visits or stays.'<sup>237</sup> The term 'sojourn' has been construed to indicate a state less permanent than full residence, signifying a temporary stay or visit during which an individual dwells or abides in a location for a duration that is not typical within their particular situation.<sup>238</sup> This type of stay is characterized by its temporary nature, and the sojourner typically reverts to their customary and ordinary residence once it concludes.<sup>239</sup> The aforementioned definition has been upheld by the Canadian Federal Court of Appeal.<sup>240</sup> The court in *Elliot* confirmed that a day trip or a series of day trips is not tantamount to sojourning but stressed that there is a difference between a 'daily border town commuter and living in Edmonton'.<sup>241</sup> The aforementioned court found that the appellants, on their facts, had fit squarely into the definition of sojourners.<sup>242</sup>

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<sup>235</sup> Ibid para 1.30.

<sup>236</sup> Ibid.

<sup>237</sup> *Thomson* supra note 213 at 231-232.

<sup>238</sup> Joanne E. Magee & Peter Hogg *Principles of Canadian Income Tax Law* 2 ed (1997) 120.

<sup>239</sup> See *Dixon v. R.* 2001 FCA 216 para [6] as well as *Elliot* supra note 198 para [36] and [37].

<sup>240</sup> In *Dixon v. R.* 2001 FCA 216.

<sup>241</sup> *Elliot* supra note 198 para [42].

<sup>242</sup> Ibid para [43]-[45].

Accordingly, an individual who spends 183 days or more physically present in Canada, with their stay being of a transitory nature coupled with a lack of regarding Canada as 'home' or an intention to remain indefinitely, would be regarded as a deemed resident of Canada for the entire tax year in question.<sup>243</sup> The days spent need not be consecutive and a day is a 24-hour period or any part thereof.<sup>244</sup>

*(d) Dual tax residence*

As had been the case for South African tax purposes, should an individual be a Canadian tax resident either as a factual residence or under the deeming provision and at the same time meet the requirements of another jurisdiction's domestic test for fiscal residence, rendering that person as 'liable to tax'<sup>245</sup> in the other jurisdiction, an individual should look to a tax treaty (if applicable) that Canada has with the other foreign jurisdiction to determine which country enjoys taxation on a residence basis and which only on a source basis. Subsection 250(5) of the Canadian Income Tax Act provides that if the tie-breaker provisions of a treaty were to break in favour of another country, the individual is deemed to be a non-resident of Canada for purposes of the Canadian Income Tax Act.

Similar to South Africa, Canada's treaties follow mainly the OECD Model Convention, especially in relation to the article governing residence.<sup>246</sup> As such, the tie-breaker clause of its treaty is identical to that of South Africa. The first determinant being the place where the individual has a permanent home available to them. Should they have a permanent home available to them in both jurisdictions, their centre of vital interests, being the country to which their personal and economic relations are closest, will determine which country they are a resident of. If their centre of vital interests is undeterminable, the tie will break in favour of the state in which they had their habitual abode. If a habitual abode cannot be determined in either jurisdiction, the individual will be a resident of the contracting state in which they are a citizen

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<sup>243</sup> Ibid para [39]-[40].

<sup>244</sup> K. Brooks 'Chapter 13 – Canada in Residence of Individuals under Tax Treaties and EC Law' *Books IBFD* 2010, available online at [https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ritt\\_c13](https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ritt_c13), accessed on 27 October 2023.

<sup>245</sup> In order to qualify as a 'resident' in the other jurisdiction for purposes of a Canadian treaty, the individual must be 'liable to tax' in that jurisdiction. The CRA (following the decision in *The Queen v Crown Forest Industries Limited* [1995] 2 SCR 802) acknowledges that 'liable to tax' means that an individual must be subject to the most comprehensive form of taxation in the other jurisdiction. It's not obligatory that an individual must actually pay taxes but rather that they should fulfill the liability to taxation requirement in that jurisdiction (see CRA op cit note 173 para 1.33).

<sup>246</sup> Ibid at para 14.3.

of. Should they be citizens of both or neither states, the matter is to be settled by mutual agreement between the two contracting states.

In *Elliot*, the court found that the appellants indeed had permanent homes available to them in both Canada and the US but found that their personal and economic ties were closer to the US compared to Canada and therefore the tie broke in favour of the US. The appellants were deemed non-residents of Canada for the periods in question in accordance with section 250(5) of the Canadian Income Tax Act.<sup>247</sup>

#### 4.2.2 Temporal aspects

Similar to South Africa, it is important for Canadian resident individuals to be able to determine the point at which they cease their Canadian tax residence due to the resultant consequences. However, such cessation, especially where an individual had been a factual resident in Canada, proves to be a fairly complex matter compared to South Africa. According to Canadian courts, ending Canadian residence is not a simple feat.<sup>248</sup>

In three separate cases, the Canadian courts have confirmed that despite the taxpayers' efforts to sever ties with Canada, they remained ordinarily resident as a result of not severing sufficient ties of significance.<sup>249</sup> In *McFadyen*, the court found that the appellant remained an ordinary resident as he did not sever his residential ties with Canada, despite his clear intention not to return and his significant efforts to give effect to that intention.<sup>250</sup> In *Biya*, the court provided that the question that had to be answered is to what degree the individual would have had to sever ties with Canada in order to cease his factual residence.<sup>251</sup> It notes that a definitive, objective test cannot be developed to answer the aforementioned but held that the *Reeder* factors could serve helpful in determining whether an individual has 'made a clean break' from Canada.<sup>252</sup> Reviewing the appellants' circumstances in the context of the factors, it becomes evident that their numerous ties, along with their 'substantial' time spent in Canada, took

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<sup>247</sup> Ibid para [74]-[76].

<sup>248</sup> See *Mullen v. R.* 2008 D.T.C. 3892 para [17] and *Biya v. The Queen* 2020 TCC 113 para [38].

<sup>249</sup> See *McFadyen, Johnson and Mullen*.

<sup>250</sup> Ibid *McFadyen* para [105].

<sup>251</sup> *Biya* supra note 248 para [39].

<sup>252</sup> Ibid para [40].

precedence in the analysis.<sup>253</sup> Consequently, the court held that the appellant had maintained ordinary residence in Canada while abroad.

Given the aforementioned, ceasing factual residence in Canada necessitates a substantial reduction in ties with the country, and a prolonged absence alone doesn't suffice to establish a clear fiscal break with Canada. According to the CRA, individuals will typically be considered factual residents unless they demonstrate a complete severance of all of their significant residential ties upon leaving.<sup>254</sup> Nevertheless, if a person were to leave Canada while maintaining residential ties to Canada, the CRA's consideration will involve assessing their intent to permanently sever these connections with Canada, the frequency and duration of their visits to Canada, and their residential affiliations outside Canada when establishing their residence status.<sup>255</sup> Importantly, the mere intention to return in the future is insufficient to maintain factual residence.<sup>256</sup> Compliance with the Canadian Income Tax Act, informing Canadian payers of non-resident status (potentially subject to withholding tax), establishing stronger residential ties to another jurisdiction, and keeping return visits to Canada infrequent are all factors, according to the CRA, that contribute to supporting a case of cessation of residence.<sup>257</sup>

The date of non-resident status, and accordingly the trigger event for the departure tax, is dependent on the facts and circumstances of an individual. The CRA generally recognizes cessation as the date when all significant residential ties are severed, typically coinciding with the latest of: (i) the individual's departure from Canada, (ii) their spouse or partner's and any relevant dependents' departure from Canada, or (iii) the individual becoming a resident of their destination country.<sup>258</sup> An exception applies if the individual previously resided in another country and is returning there, making them a non-resident upon leaving Canada regardless of the fact that their spouse or partner and dependents remain. This suggests a more lenient treatment for those returning to their home country than those who were always Canadian residents. Based on the CRA-guidance and in terms of section 128.1(4), the deemed disposal of the individual's assets will occur on the day immediately preceding the date upon which they

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<sup>253</sup> Ibid para [45].

<sup>254</sup> Ibid para 1.10.

<sup>255</sup> CRA op cit note 173 para 1.16.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid para 1.18-1.21.

<sup>258</sup> Ibid para 1.22.

cease their factual tax residence which would be the latest date of the above three listed occurrences.

Difficulty arises in the case of a sojourner as such an individual, once they have met the requirements of subsection 250(1)(a), is deemed to be a resident from the start of the tax year i.e. 1 January and to retain such residence throughout until the end of the tax year. Sojourners cannot take advantage of the part-time resident rule in terms of subsection 114. Accordingly, the position is unclear on the application of the departure tax rules to sojourners. Upon the basis that subsection 128.1(1) deems an immigrant individual taking up Canadian tax residence to have disposed of their assets (excluding the same assets as excluded on cessation) on the date immediately prior to taking up tax residence for fair market value and a re-acquisition of those on the date of acquisition of Canadian tax residence at fair market value, a sojourner would have received a step-up in the base cost of their relevant assets to fair market value on 1 January of the year in which they meet the sojourner rule requirements. There is little clarity as to the timing of the deemed disposal should you cease to meet the sojourner requirements and at what point such a determination must be made. In *Elliot*, the taxpayers were found to be sojourners but their cessation of tax residence was based upon the application of the tie-breaker rules in the US/Canada treaty. In the latter case, as soon as it is found that subsection 250(5) applies and therefore deems an individual to be a non-resident, the individual will cease to be resident from that time and the normal deemed disposal rules will apply.<sup>259</sup> The aforementioned provides an answer for the case of individuals who are resident in a treaty country, but uncertainty remains where an individual might relocate to a country that does not have a treaty with Canada.

A change in an individual's Canadian tax status, be it ceasing or acquiring residence, does not cause a fictitious end to the individual's taxation year and the start of a new taxation year on the following day as is the case under South African law.<sup>260</sup> However, the individual, to the exclusion of sojourners (see above explanation), is only subject to Canadian income tax on a worldwide basis during their residency period and on a source-basis for their non-resident

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<sup>259</sup> CRA op cit note note 173 para 1.37-1.38.

<sup>260</sup> Note that subsections 249(3.1) and (4) require consideration for corporations undergoing changes in Canadian-controlled private corporation status or experiencing a loss restriction event. These subsections trigger a deemed cessation, altering the corporation's taxation year to commence the day after the cessation. If an individual ceases their residence while conducting a non-permanent establishment business in Canada, the business's fiscal period ends the day before the tax residence cessation, with a new fiscal period commencing on the cessation date (see section 128.1(4)(a.1) of the Canadian Income Tax Act).

period of the year.<sup>261</sup> Should a departing individual retain Canadian bank accounts or is due to continue receiving payments from Canadian institutions, they are required to inform any Canadian payers and financial institutions that they are no longer a resident of Canada.<sup>262</sup>

### 4.3 Method of collection

In 1972 when the Canadian departure tax was introduced, predating the introduction of South Africa's exit tax provision by twenty-nine years, the Carter Report recognised the potential liquidity implications that such a deemed disposition could hold for a departing taxpayer by acknowledging that the disposition is a fiction and no actual disposal, giving rise to actual proceeds in the hands of the taxpayer, is triggered.<sup>263</sup> As such, the system, as described below, caters for such liquidity considerations.

For individuals, generally, the Canadian taxation year is defined as a calendar year, being 1 January to 31 December.<sup>264</sup> They are required to file a return by 30 April of the year following the taxation year or, if they were self-employed, by 15 June.<sup>265</sup> Individuals who receive income upon which either no tax or not enough tax was withheld for more than one taxation year and that total tax exceeds the instalment threshold, are required to pay tax by instalments.<sup>266</sup> Instalments are due on the 15<sup>th</sup> of March, June, September and December.<sup>267</sup> For all other individuals, the income tax on their taxable income is due on or before the due date for filing.

Emigrant individuals are required to file a return for their departing tax year at the normal filing date for a tax year, being 30 April of the year following their departure year. In this return, the emigrant provides the date upon which they ceased residence and declares any capital gain or loss triggered as a result of the deemed disposition in terms of section 128.1(4), listing the assets and values subject to the charge in a schedule. Only at the filing date is any departure

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<sup>261</sup> See subsection 114 of the Canadian Income Tax Act.

<sup>262</sup> CRA 'Leaving Canada (emigrants)' available at <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/leaving-canada-emigrants.html#becomenonresident>, accessed on 28 October 2023.

<sup>263</sup> Thomson supra note 213 at 228.

<sup>264</sup> As per subsection 249(1)(c) read with subsection 249(1.1).

<sup>265</sup> Subsection 150(1)(d) of the Canadian Income Tax Act.

<sup>266</sup> As prescribed by subsection 156(1) of the Canadian Income Tax Act. This usually occurs where an individual earns, *inter alia*, rental or investment income or income from self-employment. The instalment threshold for individuals is defined in subsection 156.1 and provides that for individuals resident in Quebec, the threshold is CA\$1,800 and for all other individuals CA\$3,000 for the taxation year.

<sup>267</sup> Ibid. However, this excludes farmers and fishers who have one due date on 31 December as per subsection 155 of the Canadian Income Tax Act.

tax due and payable.<sup>268</sup> In the event that the fair market value of an emigrant's 'reportable property'<sup>269</sup> is more than C\$25,000, their return must be accompanied by a report listing all of the properties that they owned immediately after the date that they ceased to be a resident of Canada.<sup>270</sup>

Taxpayers are afforded a chance to plan for the departure tax and any liquidity implications that it might have. This is achieved by not enforcing an immediate payment upon the date of the deemed disposal but only when the return is due,<sup>271</sup> an option to include otherwise excluded property to realize any inherent losses that can be set-off against any capital gains and providing a taxpayer the opportunity to defer payment until an actual disposal of the property subject to the departure tax against posting security for the tax payable.<sup>272</sup> The initial C\$100,000 of the departure tax does not require security posting.<sup>273</sup> No interest or penalties are levied while the tax remains deferred. If the taxpayer elects to defer the payment until an actual disposition and should property that was included in the deemed disposition be disposed of for an amount lower than the value as at the date of emigration, the taxpayer may elect to adjust the gain reported in their original return subsequent to emigration but only if such that is property disposed of is taxable Canadian property.<sup>274</sup>

#### 4.4 Summary remarks

This chapter provides a comprehensive overview of the Canadian departure tax system, beginning with its historical introduction as well as the policy considerations involved in its original inclusion.

It includes a thorough explanation of the development of the terms 'residence' and 'ordinarily resident' as developed by the extensive jurisprudence available on the matter, shedding light on the complexities of ceasing one's residence, especially factual residence. It requires a thorough

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<sup>268</sup> See the definition of 'balance-due day' in subsection 248(1).

<sup>269</sup> Excluding a list of certain assets. In this regard see the definition of 'reportable property' in subsection 128.1(10).

<sup>270</sup> As required in terms of subsection 128.1(9).

<sup>271</sup> *Op cit* note 268.

<sup>272</sup> Per subsection 220(4.5). However, security is only required should the total amount of departure tax calculated exceed C\$16,500.

<sup>273</sup> *Dyer op cit* note 190 at 195.

<sup>274</sup> *Ibid* at 192. Taxable Canadian property is defined in subsection 3(c) read with subsection 115(1) of the Canadian Income Tax Act. Typically, such assets encompass Canadian real estate, property utilized in conducting a business within Canada, shares in a privately held Canadian corporation, an interest in a partnership, shares in a non-Canadian corporation primarily holding Canadian assets, and a range of interests in trusts.

examination of one ties to Canada and ensuring that holistically the facts and circumstances support a contention of cessation of residence.

The methods employed by the Canadian Revenue Agency for collecting the departure tax are explored, emphasizing the deferred payment obligation of the departure tax. Additionally, it highlights the liquidity relief mechanisms in place to ease the financial burden on departing taxpayers as well as the available relief mechanisms should an individual have been a resident for a short period of time or if they return to Canada before disposing of all of the assets to which the deferred departure tax is applicable.

The chapter shows that Canada has a fairly sophisticated exit tax system and provides a number of avenues to taxpayers to ensure that they are compliant. The CRA website provides extensive guidance and easy to understand explanations on what to do if an individual is planning to leave Canada and cease their tax residence.

Together, these insights offer a thorough understanding of the Canadian exit tax system, ensuring that individuals and tax professionals are well-informed when navigating the intricacies of departing Canada for tax purposes.

## CHAPTER 5: COMPARATIVE ANALYSIS

Building upon the comprehensive summaries of the Canadian and South African exit tax systems, the subsequent chapter endeavours to conduct a comparative analysis of the two. This analysis will commence with a succinct examination of discernible similarities and differences between the two systems. Finally, the chapter will provide a concise overview of the potential for double taxation exposure inherent in both systems due to their respective exit tax frameworks.

### 5.1 Similarities and differences

Both Canada and South Africa apply a residence-based taxation system, relying on criteria such as an individual's ordinary residence and their physical presence within the country. Canada's legal precedents regarding the concept of being 'ordinarily resident' align with the decisions in *Cohen* and *Kuttel*, affirming that determining an individual's fiscal residence is a factual investigation necessitating a comprehensive analysis of all relevant facts and circumstances on a case-by-case basis. However, akin to the House of Lords' rulings in *Lysaght* and *Levene*, Canadian courts appear to recognize the possibility of an individual simultaneously maintaining ordinary residence in more than one location. Conversely, in South Africa, as expressed by Schreiner J.A in *Cohen* the consensus is that while an individual may be a fiscal resident of multiple jurisdictions, they can only be ordinarily resident in one.<sup>275</sup>

The numerous Canadian cases concerning factual residence and the apparent challenge faced by Canadian taxpayers in definitively discerning the extent of ties they must sever with Canada to cease being factually resident potentially stem from the fact that Canadian courts acknowledge an individual's capacity to be 'ordinarily resident' in multiple places.<sup>276</sup> This recognition could be a source of ambiguity for taxpayers, as there is no clear cut standard against which to gauge their connections, despite the guidance provided by the CRA, potentially leading to uncertainty in determining the cessation of factual residence. In an effort to provide greater clarity to taxpayers, emigrants have the option to request an advance determination of non-resident status by submitting a form to the CRA, in which they furnish a comprehensive account of their circumstances. This process offers an indication of whether

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<sup>275</sup> *Cohen* supra note 76 at 371.

<sup>276</sup> *Biya* supra note 248 para [38].

they have sufficiently severed their ties but, as submitted on the form, is not determinative and can still change subject to the assessment of the CRA.

Both countries employ a comparable deemed disposal of assets held by an individual on the day prior to their loss of resident status, driven by the rationale that departing individuals should account for gains derived during their tenure benefiting from the resources and infrastructure of their resident country. Similarly, both countries tax the emigrant as a resident for the part of the fiscal year running from its start up until the day before cessation and as a non-resident from the day of cessation until the year end. Similarly, both countries tax emigrants as residents from the start of the fiscal year until the day before their departure, and as non-residents from the departure day until the fiscal year concludes. The key distinction lies in South Africa's Section 9H, which terminates the taxpayer's year of assessment and commences a new year on the following day. Consequently, South African emigrants experience two tax years within a single 12-month period, whereas Canadian emigrants utilize the same tax year but calculate their tax liability based on the split.

Regarding excluded assets, despite sharing similarities in excluding immovable property or assets connected to a business that has a permanent establishment in the relevant jurisdiction, Canada's list of excluded 'rights or interests' is considerably more comprehensive compared to South Africa's. Canada categorically excludes the emigrant's rights in any retirement funds or retirement investments. In contrast, South Africa's system lacks an outright exclusion of such interests and is typically silent on their inclusion or exclusion. In practice, however, beneficial interests of an emigrant in retirement funds are generally not factored into the exit tax calculation.

A significant divergence between the two systems pertains to the required payment date of the exit tax. In South Africa, the exit tax becomes due and payable on the date that the deemed disposal is triggered, while Canada's system, even though the deemed disposal is triggered on the same day as in South Africa's system, only requires individuals to account for the departure tax when filing their return in the subsequent fiscal year. Moreover, Canadian individuals have the option to defer payment, albeit by posting security for the departure tax and even then only in the event that the deemed disposal gives rise to a departure tax bill in excess of \$C100,000. This flexibility allows emigrant individuals to plan for the intended liability and provides relief in cases where they may return to Canada without having disposed of their assets. In contrast,

South Africa does not offer a tax credit for any exit tax paid by a returning emigrant, nor does it provide relief when an asset is sold post-departure at a value lower than the date of cessation.

**Taxation of Capital Gains:** Both systems focus on taxing the capital gains that arise from the deemed disposition. The tax liability is typically determined based on the increase in the value of assets from the time of acquisition to the time of the deemed disposition.

Canadian jurisprudence holds that you can be 'ordinarily' resident in more than one jurisdiction. South African jurisprudence provides that although you can be a resident of more than one jurisdiction, you can only be ordinarily resident within one jurisdiction (Cohen at 371). Also, the intention of a taxpayer is much less relevant in Canadian jurisprudence compared to the South African test which relies on interrogating the state of mind of the individual and requiring the intention to be supported by objective facts.

### **5.3 Potential benefits**

The Canadian exit tax system encompasses several elements that have the potential to benefit the South African system, and vice versa. However, it's essential to recognize that each country's tax environment is distinctive, and any adaptation should carefully consider the specific context.

South Africa's definition of a resident, particularly regarding individuals not ordinarily resident in South Africa, stands out for its clarity and determinative nature. It offers unequivocal guidelines concerning what qualifies as a 'day' spent physically present in South Africa, the precise method for calculating such days, and the criteria for determining when and how an individual who falls under the category of resident based on the physical presence test can cease their South African tax residence. In the case of Canada, despite the CRA's acceptance that any part of a day spent sojourning in the country should be treated as a full day for calculating the number of days, the determination of whether an individual is, in fact, sojourning remains a 'question of fact.' The CRA specifies that an individual isn't automatically considered to be sojourning in Canada for every day (or part thereof) they spend there; instead, the nature of each specific stay must be assessed individually. This approach could potentially leave taxpayers uncertain about whether the CRA deems their stay as sojourning, commuting, or purely visitational. In contrast, South Africa's physical presence test is formalistic and does not necessitate external assessments of the nature of an individual's presence in the country.

Shifting the focus to the payment of the departure tax, Canada's deferral system, complemented by the relief mechanisms for returning individuals and exclusions for short-term residents, comprises a sophisticated framework that allows taxpayers to strategically manage their liquidity. It enables them to settle the tax obligation only when the asset generates the necessary liquidity upon an actual disposal. These provisions, while involving some additional paperwork, could serve as an incentivizing factor for Canadian taxpayers to willingly adhere to the departure tax regulations. The comprehensive guidance provided by the CRA, including instructions on completing income tax returns for the emigration year and outlining available options, contributes to facilitating compliance.

SARS has recently made improvements to its website, now offering a brief explanation of the concept of tax residence in South Africa, the implications of ceasing tax residence as well as a basic explanation on the administrative steps required to inform SARS of a change in residence status. However, the guidance, despite indicating that an exit tax is triggered, lacks clarity on how individuals should perform the requisite calculations or report any potentially owed tax to SARS.<sup>277</sup> The guidance provided by SARS pales in comparison to the wealth of information available to Canadian taxpayers through the Canadian Revenue Authority. As a result, many emigrating individuals, as observed by the author, may remain unaware of the existence of such a charge until they are required to file their returns in the subsequent year. Consequently, they may face an unforeseen and substantial tax liability upon filing. It could be advantageous for SARS to explore the feasibility of introducing a deferral mechanism for the payment of the exit tax. However, the author acknowledges that implementing such an amendment may require additional resources, which might be limited. Alternatively, efforts can be made by SARS to provide additional educational content on the implications that are practical and encourages compliance.

#### **5.4 Potential for double taxation**

As previously indicated, both jurisdictions employ the mechanism of a deemed disposition, essentially involving a fictitious disposal of assets. It is important to note the existing potential that an individual's new tax jurisdiction may not acknowledge this disposal, failing to provide a step-up in the base cost of the assets subject to the deemed disposition upon their eventual

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<sup>277</sup> See the webpage published by SARS titled 'Cease to be a Resident' available online <https://www.sars.gov.za/individuals/cease-to-be-a-resident/>.

resulting in the individual bearing capital gains tax (if relevant in the new jurisdiction) on the growth in value of the asset in both jurisdictions.

The above-mentioned scenario is recognised by the OECD as an inherent risk to the imposition of exit taxes by countries.<sup>278</sup> Despite identifying the issue and proposing a solution, the OECD did not refer to or address the departure tax conundrum in its amendments to the Commentary on Article 23 of the OECD Model.<sup>279</sup> Furthermore, it is argued that the suggested remedy, which has been proposed in relation to the taxation of employment income, is not applicable to emigration taxes due to the contradictory scopes of the pertinent articles.<sup>280</sup> A remaining option could be for the affected individual to rely on the mutual agreement procedure as provided for in article 25(3) of the OECD Model. But this does not provide much reprieve to an individual that has relocated to a country that does not form part of the treaty network of either South Africa or Canada, as relevant.<sup>281</sup>

Canada has recognised this potential for double taxation and accordingly, in its treaty policy, negotiates its treaties to ensure that a step-up in base cost of the assets subject to its departure tax is afforded by the individual's new jurisdiction.<sup>282</sup> Should a step-up in base cost not be provided for in a treaty, Canada does provide for a reverse credit with regard to any foreign tax paid.<sup>283</sup> It is evident that Canada has made efforts to provide relief for potential double taxation as a result of its departure tax.

Unfortunately, no similar provisions or efforts have been made in the South African system or in South Africa's treaty network. As such, it is suggested that the mechanisms applied by Canada could inform a review by the South African National Treasury of available relief which could be provided to taxpayers that are impacted by this issue.

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<sup>278</sup> OECD 'Cross Border Income Tax Issue Arising from Employee Stock Option Plans' (2004) para [37], available online at <https://www.oecd.org/tax/treaties/33700277.pdf>, accessed on 30 October 2023.

<sup>279</sup> Chand op cit note 24 para 4.3.2.2.

<sup>280</sup> Ibid para 4.3.2.3.

<sup>281</sup> Ibid.

<sup>282</sup> Chand op cit note 24 para 4.3.2.3.

<sup>283</sup> Ibid para 4.3.2.2.

## CHAPTER 6: SUMMARY REMARKS AND CONCLUSION

This dissertation undertook a comprehensive comparative analysis of emigration tax systems in Canada and South Africa, with a primary focus on the implications for individuals. By examining the relevant tax laws, jurisprudence, and administrative practices of both countries, this study sought to shed light on the distinct characteristics of these systems, as well as their potential benefits and challenges. Through the comprehensive evaluation of the two systems, it becomes evident that despite differences in their tax environments and mechanisms, there is potential for mutual enrichment and development.

Canada's deferred departure tax system, coupled with its consideration for returning individuals and exclusions for short-term residents, offers a sophisticated model for managing tax liquidity and easing the financial burden on taxpayers. On the other hand, South Africa's immediate exit tax system lacks the flexibility and relief measures afforded by the Canadian approach.

This study has also underscored the importance of clear and determinative criteria for tax residence, a criterion often characterized by uncertainty in Canada. The introduction of a more precise criterion to determine the degree to which an individual's ties should be severed to ensure cessation of factual residence in Canada could provide greater clarity for taxpayers. Furthermore, the lack of substantial guidance and resources for departing individuals in South Africa has been identified as an area where improvement could enhance taxpayer compliance and awareness.

Moreover, the study highlighted that the Canadian system offers more extensive exclusions for certain rights and interests, such as retirement funds and retirement savings, compared to South Africa which does not specifically exclude retirement interests from the charge but in practice does not require its inclusion in the departure tax calculation. However, the South African system provides a straightforward test for determining fiscal residence based on an individual's physical presence, offering a more straightforward approach when compared to the Canadian concept of sojourner.

The research further addressed the issue of potential double taxation and found that Canada firstly recognises this risk and secondly has made efforts to provide relief for instances where taxpayers could be prejudiced. As part of Canada's treaty negotiation policy, it works toward including a provision for the step up in cost of the assets subject to its departure tax, thereby ensuring the other contracting state recognises that the taxpayer to which such article or

provision were to apply, has already paid tax on the accumulation of value inherent in the assets subject to the disposal. The lessons drawn from Canada's approach in addressing double taxation issues provide valuable insights for South Africa, as they highlight the importance of well-conceived solutions.

The findings indicate that both countries have room for improvement in terms of providing clear and practical guidelines for taxpayers. The study also suggests that each system could benefit from adopting certain elements from the other, with Canada's deferral mechanism offering greater liquidity control and South Africa's clear guidelines on physical presence providing more certainty for taxpayers. Additionally, the research underscores the importance of addressing potential double taxation risks within these systems.

Ultimately, this dissertation contributes to the ongoing dialogue surrounding emigration tax systems and offers a framework for evaluating and understanding the mechanics and implications of emigration taxes. By fostering cross-jurisdictional understanding and potential cooperation, the study offers avenues for reform that could benefit taxpayers in both Canada and South Africa.

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