An analysis on taxation of South African residents who are employed and working outside the territorial borders of South Africa

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Abstract

I am an Operational Specialist in the learning and development department at my company and I am often faced with questions on the tax treatment of employed individuals working abroad. It is for this reason that I have chosen to dedicate my research in this area.

South African tax legislation on the exemption of foreign employment income has been amended with effect from 1 March 2020. These amendments affect the taxation of South African tax residents who are employed and working outside the territorial waters of South Africa. Furthermore, these amendments do not consider the exemption of non-employment foreign income. This analysis has only considered employed individuals who are tax resident in South Africa and who have not formally emigrated from South Africa.

The aim of this analysis is focused on the equitable and neutral tax treatment between employment income and income earned from other services rendered following the amendments. I have centred my analysis around equity and neutrality by comparing the different tax treatment of employment income and other forms of income. This analysis seeks to answer whether the amendments to the tax legislation support equity and neutrality.

The key findings from this analysis have given me a better understanding of the rules and regulations around the amendments. I am now able to offer sound advice to my clients who in turn will make more informed decisions when planning their international employment assignments.

In addition to the above, I hope that my analysis below will contribute towards any future research that may be done in this area.

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1 Chapter 1: Introduction and background

1.1 Introduction

The globalization of the world economy requires that the labour force be more flexible and open to the idea of working abroad.[1] Working abroad however poses many challenges for an organization and their employees. These challenges include dealing with tax rules and the administration process of both the local and foreign tax authorities for both the employee working abroad and the employers providing this employment.[2]

The growing population of international migrants seeking employment outside their country of origin, was noted by Mr. Wu Hongbo, UN Under-Secretary-General for Economic and Social Affairs in the statement that

> '[t]he rise in the number of international migrants reflects the increasing importance of international migration, which has become an integral part of our economies and societies. Well-managed migration brings important benefits to countries of origin and destination, as well as to migrants and their families'[3]

The United Nations statistics in 2015 recorded more than 244 million people living outside of their home countries.[4] The above statistics represented a 41 percent increase compared to the year 2000.

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[1] J Byrne 'Crowe' *International mobility and payroll services*, November 2018, available at https://www.crowe.com/ie/services/tax/employers-advisory-and-solutions/global-mobility, accessed 30 May 2019.
[2] J Byrne 'Crowe' *International mobility and payroll services*, November 2018, available at https://www.crowe.com/ie/services/tax/employers-advisory-and-solutions/global-mobility, accessed 30 May 2019.

[3] F Harrigan 'United Nations' 244 million international migrants living abroad worldwide, new UN statistics reveal, 12 January 2016, available at https://www.un.org/sustainabledevelopment/blog/2016/01/244-million-international-migrants-living-abroad-worldwide-new-un-statistics-reveal/, accessed 30 May 2019.
[4] F Harrigan 'United Nations' *244 million international migrants living abroad worldwide*, new UN statistics reveal, 12 January 2016, available at

South African employers who engage in international trade activities are accustomed to assigning their employees to perform work tasks globally, which mean that their employees are assigned to perform work tasks outside of the territorial boundaries of South Africa. In addition, many South Africans seek employment opportunities in other countries as result of growing unemployment in South Africa or simply because there are better prospects to further their careers in another country.[5]

There are many reasons for wanting to work abroad, but irrespective of the reasons, the tax treatment of income earned abroad should be taxed in a neutral and equitable manner. It is in this context that the tax implications of employment assignments must be considered whether working for a South African employer abroad or for a foreign employer in another country.

A tax system should aim to treat any form of business activity in an equitable and neutral manner.[6] Tax neutrality refers to a system of taxation that yields revenue while reducing discrimination in favour of, or against, any particular economic choice.[7]

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https://www.un.org/sustainabledevelopment/blog/2016/01/244-million-international-migrants-living-abroad-worldwide-new-un-statistics-reveal/, accessed 30 May 2019

[5] Ann Kennedy-Perkins 'Stats New Zealand' *International migration: September 2020*, 11 November 2020, available at https://www.stats.govt.nz/information-releases/international-migration-september-2020#:~:text=Year%20ended%20September%202020%20(compared,from%2059%2C400%20(%C2%B1%20200), accessed 29 Jan 2021

Debra Leaker 'Office for National Statistics' *Employment levels by nationality (16+) - South Africa national,* 10 November 2020, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/timeseries/jjs4/lms, accessed 29 Jan 2021

[6] OECD (2014), 'Fundamental principles of taxation', in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, available at https://doi.org/10.1787/9789264218789-5-en, 30, accessed 29 January 2022

[7] OECD (2014), 'Fundamental principles of taxation', in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, available at https://doi.org/10.1787/9789264218789-5-en, 30

A further important factor to consider in a good tax policy is equity.[8] Equity consists of 2 legs – namely, horizontal equity and vertical equity. Horizontal equity refers to taxpayers who are in similar circumstances share a similar burden of tax, for example, taxpayers earning a similar amount of income should pay a similar amount of tax. Vertical equity refers to taxpayers who are not in similar circumstances and should bare a different burden of tax, for example, a taxpayer earning more income should pay more tax in comparison to a taxpayer who is earning less income and who should pay less tax.

1.2 Objective and research question

Employees working abroad are subject to different tax systems. It is critical that employees plan effectively before contracting to foreign employment so that the employees have a thorough understanding of their tax paying responsibilities.

Several authors and students have written on the tax implications of a South African tax resident working abroad[9] given the change to the South African Income Tax legislation[10] on the taxation of South African individuals employed abroad. I would like to contribute toward research that has been done by previous authors and students by doing an analysis on taxation of South African residents who are employed and working outside the territorial borders of South Africa. While considering the general tax implications of an individual South African tax resident employed outside South Africa, this paper will focus on South African tax resident individuals who are employed in a foreign tax jurisdiction such as New Zealand and

[8] OECD (2014), 'Fundamental principles of taxation', in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, available at https://doi.org/10.1787/9789264218789-5-en, 31
[9] Olivier & Honiball International Tax A South African Perspective 5ed (2011), International Bureau of Fiscal Documentation (also referred to as the IBFD), L Naidoo *An analysis of the effect of the amendments to the taxation of foreign non-South African employment income* (2019), T van Wyk *Critical analysis of the taxation of South African employees working abroad* (2012), T Gutuza *An analysis of the methods used in the South African domestic legislation and in double taxation treaties entered into by South Africa for the elimination of international double taxation* (2013).
[10] Income Tax Act No.58 of 1962, hereafter referred to as the Act

the United Kingdom. I have chosen New Zealand and the United Kingdom because these countries follow a similar world-wide basis of taxation system like South Africa.[11] I will analyse the amendments to s10(1)(o)(ii) of the Act and the tax effects, if any, that may arise from the amendment for South African tax resident individuals who are employed and working in New Zealand and the United Kingdom.

The aim of the analysis is to look at the different tax treatment between employment income and income earned from other services rendered following the amendments to s10(1)(o)(ii) of the Act.

My discussion will centre around equity and neutrality by comparing the different tax treatment of employment income and other forms of income. This will form the basis of my analysis – namely, do the amendments to s10(1)(o)(ii) of the Act support equity and neutrality?

I would like to achieve a better understanding of the rules and regulations around the amendments to s10(1)(o)(ii) and by doing so I would be able to offer sound advice to my clients who will in turn make more informed decisions when planning for their international employment assignments.

To limit the ambit of the analysis, this paper will only consider employed individuals who are tax resident in South Africa and working outside the territorial borders of South Africa. Furthermore, this analysis will not consider employed individuals who have emigrated. Lastly, this analysis will only consider the tax legislation of South Africa, New Zealand and the United Kingdom; and no further analysis will be done on any other countries. Below is a brief layout of each chapter

[11] Tax on foreign income, available at https://www.gov.uk/tax-foreign-income, accessed 06 January 2022; Overseas Income, available at https://www.ird.govt.nz/income-tax/income-tax-for-individuals/types-of-individual-income/overseas-income, accessed 06 January 2022

follows. This brief layout will provide the necessary structure to answer my research question - do the amendments to s10(1)(o)(ii) of the Act support equity and neutrality?

Chapter 2 will discuss the relevant South African tax legislation dealing with foreign employment income and the amendment of s10(1)(o)(ii) of the Act.

Chapter 3 will consider the role of DTAs and its relationship to domestic tax law. This chapter will also focus on the Organisation for Economic Co-operation and Development[12] (OECD) commentary and interpretation of DTAs based on the OECD model.

Chapter 4 will focus on the relevant New Zealand tax legislation on foreign employment income. This chapter will also focus on the DTA between South Africa and New Zealand and the specific articles in the DTA that refer to employment income. This chapter will conclude by looking at the tax effect of the change to s10(1)(o)(ii), on an employed individual from South Africa working in New Zealand.

Chapter 5 will focus on the relevant United Kingdom tax legislation on foreign employment income. This chapter will also focus on the DTA between South Africa and the United Kingdom and the specific articles in the DTA that refer to employment income. This chapter will conclude by looking at the tax effect of the change to s10(1)(o)(ii), on an employed individual from South Africa working in the United Kingdom.

Chapter 6 will conclude by analysing on the impact of s10(1)(o)(ii) of the Act and its change as of 01 March 2020 and how this impact will affect South African individuals employed abroad. This analysis will assist in answering the research question - do the amendments to s10(1)(o)(ii) of the Act support equity and neutrality?

[12] Organisation for Economic Co-operation and Development, hereafter referred to as the OECD

2 Chapter 2: Overview of South African Tax legislation

The South African income tax legislation on income from foreign employment has changed since the introduction of residence-based taxation in 2001.[13] The change from a source to a residence basis of taxation effectively meant that South African tax residents are now taxed on their worldwide earnings as opposed to only their South African sourced based income as was the case prior to 2001. In this chapter I will focus on:

- The change from a source basis of taxation to a residence basis of taxation in South Africa.
- The tax implications for employed individuals who lose their tax residency in South Africa.
- The tax treatment of tax resident South African employed individuals in a foreign tax jurisdiction.
- The tax treatment of South African tax residents who are not employed in a foreign tax jurisdiction but is receiving foreign income.

2.1 From source basis of taxation to a residence basis of taxation

The definition of 'gross income' in s1 of the Income Tax Act[14] now includes all worldwide receipts and accruals. Effectively this means that an individual who was previously taxed only on income received by or accrued to from a South African source or deemed source is now be taxed on their worldwide income.

Prior to the introduction of a residence basis of taxation, the South African income tax system was based on a source basis of taxation. Effectively this meant that all income which was generated, or deemed to be generated in South Africa,

[13] Revenue Laws Amendment Act, 2000, Act No. 59 of 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 8 January 2022
[14] Income tax Act No. 58 of 1962 (the Act)

was taxable in South Africa in terms of the Act. All income located outside of South Africa was not taxed in terms of the Act prior to 2001.

In 1997 changes were introduced to the Act, just prior to the introduction of the residence or worldwide basis of taxation, to impose income tax on the worldwide investment income on tax residents of South Africa.[15] The introduction of these changes to the Act in 1997 was to protect the South African tax base as a result of the relaxation of exchange control measures which came into effect in July 1997.[16] These changes to the Act however only focused on specific types of passive income such as interest, annuities, rentals and royalties.[17] The 1997 amendments did not apply to active income, for example, foreign employment income.

A residence basis of taxation connects the country and the income to the person who received the income or to whom the income is accrued too. Taxation rights are given to the country in which the person is resident in. The person would be taxed on his or her worldwide income under this system of residence-based tax.[18]

With a residence basis of taxation, all those who qualify as South African tax residents have to declare all income received by or accrued to them from all sources. For example, a rental income received by a taxpayer in another country would have to be declared in South Africa if the taxpayer is tax resident in South Africa.

The change to a worldwide basis of taxation in 2001 required a change in the definition of a 'resident' in s1 of the Act.[19] The definition of a 'resident' in s1 of the Act

[15] Income Tax Act No. 28, 1997, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 8 January 2022
[16] Explanatory Memorandum on The Income Tax Bill, 1997, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 8 January 2022
[17] Section 9C of the Income Tax Act No.58 of 1962
Section 9D of the Income Tax Act No.58 of 1962
[18] Olivier & Honiball International Tax A South African Perspective 5ed (2011), 19
[19] Revenue Laws Amendment Act, 2000, Act No. 59 of 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 8 January 2022

defines a natural person to be a 'resident' if he or she is ordinarily a resident of South Africa or if the requirements of the physical presence test have been met.[20] The physical presence test can determine whether a natural person, who is not ordinarily a resident, would be tax resident of South Africa depending on the number of days that the person was physically present in South Africa.

The reasoning for residence-based tax, as stated by Honiball and Olivier,[21] is that a resident enjoys the protection of a particular government when he or she is paying taxes to that said government where they are resident. This protection extends further in that residents may return to their country for protection from their government or they may seek protection from their government even when they have exited the country.

The reason for the change in the definition of 'gross income' in 2001, which introduced a residence-based tax system, was to protect the tax base of South Africa.[22] Applying a principle of residence basis of taxation allows for neutral treatment of residents who invest both locally and abroad.[23] In contrast to residents, non-residents (who are not defined as 'resident' in s1 of the Act) are taxed on a source-basis in South Africa. This means non-residents are only taxed on receipts and accruals received from a source within South Arica.[24]

2.2 The definition of a resident

The definition of a 'resident' makes a distinction between natural persons and persons other than natural persons.[25] As the focus of this paper is the employment

[20] Section 1 of the Income Tax Act No.58 of 1962
[21] Olivier & Honiball International Tax A South African Perspective 5ed (2011), page 19
[22] Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 8 January 2022
[23] Olivier & Honiball International Tax A South African Perspective 5ed (2011), page19
[24] Section 1 of the Income Tax Act No.58 of 1962; Stiglingh-Koekemoer et al SILKE: South African Income Tax 21ed (2019), page 28
[25] Section 1 of the Income Tax Act No.58 of 1962

relationship, the paper will only consider natural persons (individuals). In particular, the focus will be on employed natural persons (employee/employees) who are working abroad.[26]

The definition of a 'resident' further states that a person will not be tax resident in South Africa if that person is exclusively tax resident of another country in terms of a double taxation agreement.[27]

It is important for an employee to note that from this 'resident' definition the employee, who is tax resident in South Africa, either by being 'ordinarily resident' or resident in terms of the 'physical presence test', working abroad will be taxed on their worldwide receipts but a non-resident will only be taxed on South African sourced income.[28] I will discuss the 2 tests for tax residency in South Africa in the paragraphs that follow.

2.3 The ordinarily resident test

The Act does not provide a formal definition for 'ordinarily resident' and the South African courts have interpreted the term in the leading cases of C*ohen v CIR*[29] and *CIR v Kuttel*[30]*.*

In the *Cohen* case, the taxpayer, Mr Cohen, was a director of a company OK Bazaars Limited and at a directors meeting on the 11th of June 1940 it was decided that Mr Cohen would have to travel overseas. The reason for Mr Cohen's travel overseas was to maintain certain supplies from abroad by acting as a buyer on behalf of the company. Mr Cohen arrived in the United States at the end of October

[26] For purpose of this paper a 'person' or 'persons' refers to natural person or employed individuals.
[27] Section 1 of the Income Tax Act No.58 of 1962
[28] Stiglingh-Koekemoer et al *SILKE: South African Income Tax* 21ed (2019) 28, also see https://www.mylexisnexis.co.za/Index.aspx?permalink=Q2qgMSBwYXlgMS44JDQ3OTA1NSQ3JExpYnJhcnkkSkQkTGlicmFyeQ, accesses 21 January 2022

[29] *Cohen v CIR* (13 SATC 362)(1946 AD 174)
[30] *CIR v Kuttel* (54 SATC 298) (1992 (3) SA 242 (A))

1940 where he then established himself, his wife and his family in New York apartment and then proceeded with the buying of supplies on behalf of OK Bazaars Limited which was based in South Africa. Mr Cohen remained in the United States and neither Mr Cohen nor his family had returned to South Africa by the end of the year of assessment ending 30 June 1942. During Mr Cohen's stay in the United States he still derived income from South Africa such as his director's salary as well as salaries from various other South African companies, interest and dividends.[31]

The Commissioner was of the view that Mr Cohen should be taxed on his dividend income on the basis that he was ordinarily a resident of South Africa.[32] The Act[33] at the time allowed for an exemption of super tax on dividends from a public company in South Africa, received by or accrued to or in favour of an individual who is not ordinarily a resident nor carrying on business in South Africa.[34] The Commissioner maintained that Mr Cohen was ordinarily a resident of South Africa and carried on business in South Africa and therefore was not entitled to the exemption of the dividend income received from a South African company.

The matter went on appeal by Mr Cohen to the Special Court. The Special Court found that Mr Cohen was ordinarily a resident of South Africa but did not carry on business in South Africa. The special court referred the matter to Witwatersrand Local Division and the court confirmed the finding of the Special Court. The matter then went on appeal, by Mr Cohen, to the Appellate Division. Schreiner JA held[35]

> 'But his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with

[31] Emslie & Davis *Income Tax Cases & Materials* 4ed (2012), 169
[32] South Africa was formerly referred to as the Union
[33] Income Tax Act No.31 of 1941
[34] Section 30(1)(a) of the Income Tax Act No.31 of 1941
[35] *Cohen v CIR (13 SATC 362)(1946 AD 174) [184]*, *Obiter*

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.'

The Appeal was dismissed. The court held that Mr Cohen was 'ordinarily resident' of South Africa and was not eligible for the exemption of the dividend income.

In *Cohen* the court had to consider whether Mr Cohen was ordinarily resident in South Africa during the time that Mr Cohen was in the United States. The important principles of this judgement gave better insight on the determination of the term 'ordinarily resident'. One of those principles being that ordinary residence would be the country to which you would naturally and as a matter of course return from your wonderings.[36] The second principle is that one should not only take into account the actions of a person during the tax year when determining whether the person is ordinarily resident in South Africa. The third principle from *Cohen* is that the person's physical absence is not the deciding factor in determining whether a person is 'ordinarily resident' in South Africa. A person may be absent from South Africa for the entire tax year and may still be considered ordinarily resident of South Africa for tax purposes.[37]

In *Kuttel,* the taxpayer, Mr Kuttel, was a majority shareholder in a South African based company. Mr Kuttel agreed to move to New York to open an office for the company and to oversee the company in America. Mr Kuttel and his family, after receiving a permanent residence permit in the United States of America, emigrated to the United States of America in July 1983. Mr Kuttel established himself in New York by renting an apartment, opening bank accounts, purchasing a car, acquiring an office, registered with United States social security and became a member of a

[36] *Cohen v CIR* (13 SATC 362)(1946 AD 174), 371
[37] RC Williams Income *Tax in South Africa Cases & Materials* 4ed (2015) 19

church. Mr Kuttel worked in the United States of America continuously apart from times when he visited South Africa and other countries. From July 1983 to 28 February 1986 Mr Kuttel made 9 visits to South Africa to attend to business and family related matters. These visits were for short periods and did not exceed more than 2 months. During Mr Kuttel's visits to South Africa he stayed in a home in Cape Town owned by a company of which Mr Kuttel and his wife were the sole shareholders. The house was available to Mr Kuttel at any time and was not let out in his absence. Mr Kuttel later acquired immovable property in the United States of America, established his permanent home in San Diego and acquired American citizenship.[38]

The Commissioner taxed Mr Kuttel on interest and dividend income for the 1984, 1985 and 1986 years of assessment. Mr Kuttel disagreed to these assessments on the grounds that he was not ordinarily a resident of South Africa and was eligible for the exemption of interest under s10(1)(h) and the exemption of dividend income under s10(1)(k). Mr Kuttel was successful on his appeal to the disallowance of his objection in the Special Court. The matter went to the Appellate Division on appeal by the Commissioner.

The Appellate court dismissed the appeal by the Commissioner. The court held that Mr Kuttel was not ordinarily a resident of South Africa. The court applied the principle which was formulated in the case of *Cohen* in which the court had held that a taxpayer's ordinary residence is the country to which he would naturally and as a matter of course return from his wanderings.[39] Furthermore, the court held that the fact that Mr Kuttel kept his house in South Africa was not inconsistent with him having a usual or principle home in the United States of America. The fact that Mr

[38] Emslie & Davis *Income Tax Cases & Materials* 4ed (2012), page 177; RC Williams Income *Tax in South Africa Cases & Materials* 4ed (2015) 20
[39] *Cohen v CIR* (13 SATC 362)(1946 AD 174), 371

Kuttel had retained his immovable property in South Africa did not mean he was ordinarily a resident of South Africa. Mr Kuttel had valid financial reasons for retaining the immovable property in South Africa.

The principles and the application of the principles, that have been set out in the cases of *Cohen v CIR* and *CIR v Kuttel* are important for individuals who leave South Africa for employment purposes.

The South African Revenue Service issued Interpretation Note 3 setting out their interpretation of the term 'ordinarily resident'.[40] Although SARS Interpretation Notes are neither binding on the courts or taxpayers, the interpretation notes may not offer persuasive explanations to the interpretation of legislation.[41] In terms of s1 of the Tax Administration Act[42] an Interpretation Note forms part of the definition of 'Official Publication'[43] and is considered to be a practice generally prevailing in terms of the Tax A Administration Act.[44] The effect of practice generally prevailing may lead a taxpayer, in this case an employee, to believe that the South African Revenue Service will apply a practice generally prevailing to their tax affairs but that may not always be the case. Therefore, an employee, or any taxpayer for that matter, should be mindful of the use of Interpretation Notes when planning their tax affairs.

South African Revenue Service Interpretation Note 3[45] reiterates that the fact of each case must be dealt with on its own merits. It sets out a number of factors to

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[40] SARS Interpretation Note 3 (issue 2) (June 2018), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 12 November 2021

[41] *Marshall and Others v Commission for the South Africa Revenue Service* (CCT208/17) [2018] ZACC 11

[42] Tax Administration Act No. 28 of 2011

[43] Definition of 'Official Publication' in Section 1 of the Tax Administration Act No.28 of 2011

[44] Section 5 of the Tax Administration Act No. 28 of 2011; also see SARS Guide to the Tax Administration Act No.28 of 2011, Version 3, page 7, available at https://www.sars.gov.za/lapd-tadm-g01-short-guide-to-the-tax-administration-act-2011/, accessed 15 January 2022

> '*This means a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner. This is to distinguish SARS publications that are binding on SARS and taxpayers from those that are not, for example SARS guides. It is also particularly relevant for purposes of what constitutes a practice generally prevailing,..*'

[45] SARS Interpretation Note 3 (issue 2) (June 2018), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 12 November 2021

be used as guidelines when determining whether a natural person is ordinarily resident. These factors include[46]

- fixed or settled place of residence;
- steps taken (intention) to become ordinarily a resident in the Republic;
- habitual abode;
- place where one's interest and business is;
- the status of the person in the country, for example if he/she is an immigrant;
- where the person's personal belongings are located;
- the nationality of the person;
- where the person's family and social relations are located;
- did the person apply for permanent residency;
- political or other activities;
- how long has the person been abroad and what is the reason for his/her visits;
- how frequent does he enter the country and his/her reasons for entering the country?

2.4 The physical presence test

The physical presence test is used to determine tax residency when the natural person is not 'ordinarily resident' in terms of the definition of a 'resident' in s1 of the Act. South African Revenue Service issued Interpretation Note 4[47] which details the manner in which the physical presence test, also known as the 'day test' or 'time rule', may be applied.

[46] SARS Interpretation Note 3 (issue 2) (June 2018), page 5, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 12 November 2021

[47] SARS Interpretation Note 4 (issue 5) (Aug 2018), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021

The requirements, as per the definition of a 'resident' in s1 of the Act, state that the individual must be physically present in the Republic for a period or periods exceeding[48] –

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

A natural person who fulfils all the requirements referred to above will be a resident of the Republic, for tax purposes, for the year under consideration.

A person is considered to be physically present in South Africa if he or she has immigrated through a port of entry into South Africa (not while he/she is in transit) even if he/she was only present for a part of that day it will be counted as a full day. Therefore, if a person immigrates through a port of entry into South Africa at 23:00 on a day then that day would be considered a full day even though the person was only present in South Africa for 1 hour of that day.

Example 3, from Interpretation Note 4, gives us a practical representation of the application of the physical presence test:[49]

[48] Section 1 of the Income Tax Act No.58 of 1962
[49] SARS Interpretation Note 4 (issue 5) (Aug 2018), page 5, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021

Example 3 – Date on which a person becomes resident

Facts:

Y, who is not ordinarily resident in the Republic, was physically present in the Republic for the following number of days:

Year of assessment	Number of days
2013	113
2014	147
2015	208
2016	202
2017	305

During the 2018 year of assessment, Y was physically present in South Africa from 15 April 2017 until 31 July 2017, that is, 108 days.

Result:

(i) Y was physically present in South Africa for more than 91 days in the current year of assessment, 2018 (108 days).

(ii) Y was physically present for more than 91 days in 2013 (113 days), 2014 (147 days), 2015 (208 days), 2016 (202 days) and 2017 (305 days).

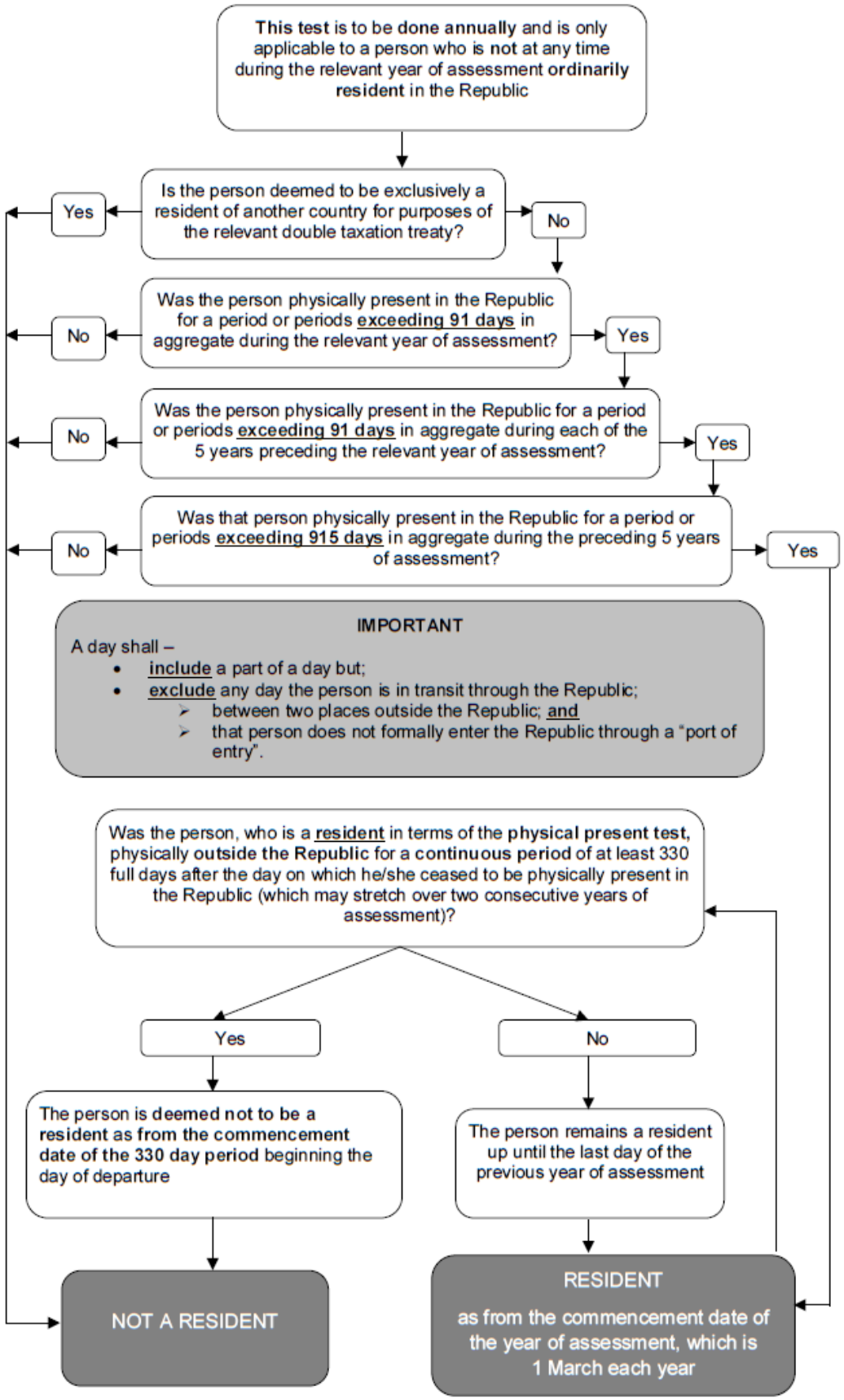
(iii) Y was physically present for a period exceeding 915 days in aggregate during those preceding 5 years of assessment (113 + 147 + 208 + 202 + 305 = 975 days).

Y is resident in South Africa for the 2018 year of assessment. Even though Y was only present in South Africa from 15 April 2017, Y will be resident in South Africa from the first day of the year of assessment that he or she became resident, that is, 1 March 2017.

A natural person, who is deemed to be a resident by way of the physical presence test, ceases to be a resident when that person is physically outside the Republic for a continuous period of at least 330 full days.[50]

[50] Definition of 'Resident' in section 1(1) Income Tax Act No.58 of 1962

South African Revenue Service issued a physical presence test diagram that one may follow to determine whether a person is a tax resident; as seen below:[51]



It is important for a natural person who is employed and living outside the boarders of South Africa to consider the 'ordinarily resident' tests and its application. If a natural person ceases to be 'ordinarily resident' in South Africa, s9H of the Act will be triggered.[52] Section 9H triggers an exit tax by way of a capital gain or an income gain in the case of resident who ceases to be a resident of South Africa during a year of assessment. The effect of s9H is a deemed disposal of all the assets of the natural person at market value. Market value refers to the price which could be obtained upon the sale of the asset between a willing buyer and a willing seller dealing at an arm's length in an open market. Effectively, in the case of an employed individual, s9H will deem the disposal of all assets at market value the day prior to cessation of residency and the reacquire of all the assets from the day the employed individual ceases to be a resident of South Africa.

Prior to the amendment of s9H a foreign tax jurisdiction may have had taxing rights to the capital gains on immovable property.[53] This taxing rights to capital gains on immovable property may give rise to a double taxation situation. The amended s9H[54] however states that a deemed disposal will occur prior to the natural person ceasing to be a resident and therefore should not give rise to a double taxation situation.

An asset for purposes of s9H of the Act is an asset as defined in paragraph 1 of the Eighth Schedule to the Act but specifically excludes the following assets:[55]

- Immovable property located in South Africa that is held by the person.

[51] SARS Interpretation Note 4 (issue 5) (Aug 2018), page 10, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021
[52] Section 9H of the Income Tax Act No.58 of 1962
[53] *CSARS v Tradehold Limited* (132/11) (2012) ZASCA 61
[54] Taxation Laws Amendment Bill 39 of 2013
[55] Eighth Schedule to the Income Tax Act No.58 of 1962

- Any assets which will, after the person ceases to be a resident, be attributable to a permanent establishment of that person in South Africa.
- Any qualifying equity shares in terms of s8B of the Act which were granted to the person less than 5 years prior to the date on which that person ceased to be a resident.
- Any equity instruments in terms of s8C of the Act which were not yet vested at the time that the person ceased to be a resident.
- Any right of that person to acquire any marketable security as contemplated in S8A of the Act.

2.5 Tax exemption for foreign employment income

In this chapter, I will focus is on the tax relief for South African employment income, for natural persons working abroad, in the form of an exemption found in s10(1)(o)(ii) of the Act.[56] Section 10(1)(o)(ii) was brought into the South African tax system in

[56] Section 10(1)(o) of the Act provides for exemption on foreign employment income for:
any form of remuneration—
• as defined in paragraph 1 of the Fourth Schedule, derived by any person as an officer or crew member of a ship engaged—
• in the international transportation for reward of passengers or goods; or
• (bb) in the prospecting, exploration or mining (including surveys and other work of a similar nature) for, or production of, any minerals (including natural oils) from the seabed outside the Republic, where such officer or crew member is employed on board such ship solely for purposes of the "passage" of such ship, as defined in the Marine Traffic Act, 1981 (Act No. 2 of 1981),

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

• as defined in paragraph 1 of the Fourth Schedule, derived by any person as an officer or crew member of a South African ship as defined in section 12Q (1) mainly engaged—
• in international shipping as defined in section 12Q (1); or
• in fishing outside the Republic; or
• to the extent to which that remuneration does not exceed R1,25 million in respect of a year of assessment and is received by or accrues to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in section 8, 8B or 8C, in respect of services rendered outside the Republic by that employee for or on behalf of any employer, if that employee was outside the Republic—
• for a period or periods exceeding 183 full days in aggregate during any period of 12 months; or
• for a period or periods exceeding 117 full days in aggregate during any period of 12 months in respect of any year of assessment ending on or after 29 February 2020 but on or before 28 February 2021; and

2001 when South Africa changed from a source basis of taxation to a residence basis of taxation.

A South African tax resident is subject to tax on his or her worldwide income and may also be subject to tax in another tax jurisdiction where the person is earning income. Both non-employment income and employment income earned by South African tax residents in a foreign tax jurisdiction, and who is paying tax in that tax jurisdiction, are eligible for general relief from double taxation in the form of a rebate under of s6quat of the Act.[57] The s6quat rebate is deducted from the normal tax paid by the South African tax resident. The South African Revenue Service has issued Interpretation Note 18[58] which may be used as a guide to assist with calculation of the s6quat rebate. It is important to note that s6quat relief is available to all South African tax residents but the exemption under s10(1)(o)(ii) the Act is only available to South African tax residents who are earning employment income in a foreign tax jurisdiction.

The Act provides tax relief to tax residents of South Africa, who are employed abroad, in the form of a tax exemption in terms of s10(1)(o)(ii). In order to qualify for this exemption certain requirements have to be met. The South African Revenue

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- for a continuous period exceeding 60 full days during that period of 12 months, and those services were rendered during that period or periods: Provided that—
- for purposes of this subparagraph, a person who is in transit through the Republic between two places outside the Republic and who does not formally enter the Republic through a port of entry as contemplated in section 9 (1) of the Immigration Act, 2002 (Act No. 13 of 2002), or at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act, shall be deemed to be outside the Republic;
- the provisions of this subparagraph shall not apply in respect of any remuneration—
- derived in respect of the holding of a public office contemplated in section 9 (2) (g); or
- received by or accrued to any person in respect of services rendered or work or labour performed as contemplated in section 9 (2) (h); and
- for the purposes of this subparagraph, where remuneration is received by or accrues to any employee during any year of assessment in respect of services rendered by that employee in more than one year of assessment, the remuneration is deemed to have accrued evenly over the period that those services were rendered;

[57] Section 6quat of the Income Tax Act No.58 of 1962

[58] SARS Interpretation Note 18 (issue 4) (June 2020), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021

Service issued Interpretation Note 16[59] to explain their application of s10(1)(o)(ii). Interpretation Note 16 echoes the criteria found in the Act and states that a taxpayer must[60] –

- earn certain types of remuneration;
- in respect of services rendered by way of employment;
- outside of South Africa (the Republic);
- during specified qualifying periods;
- not be subject to an exclusion; and
- limited to a certain amount.

The requirements stated above will be discussed in detail in the paragraphs that follow.

Section 10(1)(o)(ii) of the Act was introduced to prevent the double taxation of an individual's employment income between South Africa and the host country. The host country may charge little or no tax on employment income and this may result in a natural person being tax exempt in both South Africa and in the host country where the person is employed. Effectively this might lead to a situation of double non-taxation which contradicts policy's intent for this exemption.[61] The tax relief under the exemption of s10(1)(o)(ii), as opposed to the tax rebate under s6quat, will exempt the actual income from tax whereas s6quat is a foreign tax rebate for foreign taxes paid. In other words, you can only claim a s6quat rebate if you have paid foreign taxes whereas s10(1)(o)(ii) will exempt the income irrespective of foreign taxes paid.

[59] SARS Interpretation Note 16 (issue 4) (June 2021), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021
[60] SARS Interpretation Note 16 (issue 4) (June 2021), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 21 November 2021
[61] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, page 7, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021

The National Treasury of South Africa[62], in the Explanatory Memorandum of 2000[63], announced that s10(1)(o)(ii) would be an extension of s10(1)(o) which was an exemption only afforded to officers or crew members who were employed on a South African ship abroad. By revising s10(1)(o) and including s10(1)(o)(ii) all other employed residents working abroad, who are now taxed on their worldwide income, would be eligible to the tax relief provided that certain requirements have been met. Treasury further stated that s10(1)(o)(ii) will be monitored to establish whether taxpayers are abusing the tax relief by earning foreign employment income and not paying foreign tax.[64] Section 10(1)(o)(ii) prior to 01 March 2020 did not have an exemption threshold. The policy reason for the introduction of a threshold was to provide for an exemption for lower to middle income earning South Africans working abroad.[65]

In December 2017 National Treasury of South Africa proposed an amendment to this s10(1)(o)(ii).[66] Treasury indicated that the reason for the exemption was to minimise the case of double taxation but in turn the exemption also created opportunity for situations of double non taxation.[67] According to Treasury, the double non taxation of income is a contradiction of policy's intent for the introduction of

[62] The National Treasury of South Africa, hereafter referred to as Treasury
[63] Explanatory Memorandum on the Revenue Laws Amendment Bill , 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[64] Explanatory Memorandum on the Revenue Laws Amendment Bill , 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[65] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[66] Taxation Laws Amendment Act, 2017
[67] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021

s10(1)(o)(ii). [68] In 2000 Treasury cautioned against the undue exploitation of this exemption by stating that "*the effect of this relief measure will be monitored to determine whether certain categories of employees abuse it to earn foreign employment income without foreign taxation*".[69] However tax practitioners have criticized this 17 yearlong monitoring of this portion of law by Treasury to the extent that this might be another veiled attempt by Treasury at creating a 'tax revenue generator' to collect more revenue.[70]

The amended s10(1)(o)(ii) now includes a threshold of R 1 000 000, effective 1 March 2020. The exemption will only apply to the first R 1 000 000, thereafter the person will be liable for tax on the remuneration received outside South Africa in excess of R 1 000 000. The Minister of Finance in his budget speech on 26 February 2020 did however indicate that the threshold would be increased to R 1 250 000.

Various commentators gave their views on the proposed amendment to section 10(1)(o)(iii), including the initial proposal to repeal the entire exemption.[71]

The initial Draft Taxation Laws Amendment Bill 2017 proposed to repeal the entire s10(1)(o)(ii) employment income exemption in respect of South African residents. Commentators responded by indicating the removal of the exemption and the subsequent taxation on the foreign sourced income of these residents will have a severe negative impact on finances, and remittances to South Africa, especially for those on relatively lower incomes. The tax that would occur because of the removal

[68] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[69] Explanatory Memorandum on the Revenue Laws Amendment Bill , 2000, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[70] https://www.thesait.org.za/news/477740/Expat-Taxes--Whats-New--Whats-Coming.htm accessed 11 February 2021
[71] Draft Response Document on Taxation Laws Amendment Bill, 2017 and Tax Administration Laws Amendment Bill, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/response-documents/, accessed 15 December 2021

of s10(1)(o)(ii) would make it difficult for funding the cost of living of family members living in South Africa, investing of foreign income into family run businesses and the costs for visits to South Africa. Treasury accepted the response and amended the proposal to allow an exemption of the first R 1 000 000 of foreign sourced remuneration if the natural person was outside of South Africa for more than 183 days, of which 60 days must have been continuous, during a 12 month period. Furthermore, Treasury stated that the introduction of the threshold would reduce the impact of the amendment for lower to middle class South African tax residents who are earning remuneration abroad. The amendment would also cater to South African tax residents in high income tax countries for the unlikely need for additional top up payments to the South African Revenue Service.

Another comment referenced the higher cost of living in certain foreign countries and that this higher cost of living should be taken into account in the design of the tax. In response, Treasury responded by stating that the tax system does not usually cater for variances in cost of living. Treasury stated further that other countries do not include consumption taxes and other indirect taxes and charges when granting a foreign tax credit. Treasury is of the view that the introduction of the exemption threshold would be a cleaner and simpler solution in comparison to making country-by-country cost of living adjustments.

Commentators also expressed their concern for individuals and households who made decisions to work and live outside the borders of South Africa based on the residence-based tax system which has been in place since 2001. It was also stated that this seemed unfair to have such a sudden and large tax liability, in one year, in particular to those taxpayers who have made 3 to 5 year employment commitments. Treasury partially accepted the comment and responded by extending

the proposed effective date to 1 March 2020 to allow individuals time to adjust their contracts or their circumstances and to finalise their tax status.

A comment was made which stated that only 2 out of 196 other countries have implemented such a proposal and that this amendment was unduly harsh and places South Africa apart from comparator countries. Treasury rejected this comment and responded by stating that the policy in these 2 countries is to tax individuals based on citizenship. The proposed amendment is not based on citizenship but instead it is based on tax residency which is the common principle found in the other countries where a system of residence-based tax is applied.

From the above commentary we can see that there was great concern raised by the taxpaying community with the projected amendments to s10(1)(o)(ii).

According to Treasury this R 1 250 000 (initially R1 000 000) limitation will aid in the process of vertical and horizontal equity.[72] This means that taxpayers will be taxed in an equal manner as they have the same ability to bear the tax burden (horizontal equity) and taxpayers with better circumstances must pay more tax in relation to their income (vertical equity).[73] The application of s10(1)(o)(ii) may be considered less equal if we consider the taxation of residents employed in South Africa who are earning income from an employer based in South Africa. A South African resident, employed in South Africa, who is earning income to the amount of R1 250 000 would have a tax liability calculated at the higher end of the marginal tax rate for the respective tax year in comparison to a resident of South Africa who is earning employment income outside of South Africa who would receive an

[72] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, page 7 and 8, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 17 December 2021

[73] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 17 December 2021

exemption of R1 250 000 on employment income earned outside of South Africa and potentially have zero tax liability. This may not be considered to be equitable tax treatment for the same grouping of taxpayers, the same grouping of taxpayers being 'tax resident employed individuals' of South Africa. Furthermore, in my view, the exemption of s10(1)(o)(ii) is not fair and equitable because it does not apply at all to South African tax residents earning non-employment income outside of South Africa. Section 10(1)(o)(ii) of the Act exclusively exempts income earned from employment.

2.5.1 Services rendered to employer outside South Africa

Only remuneration received outside of South Africa, that is the Republic, will be considered for the exemption in terms of s10(1)(o)(ii) of the Act.

The term 'Republic' is defined in s1 of the Act and includes the landmass of South Africa and its territorial waters (12 nautical miles beyond the baselines of South Africa).[74] However, there is an exclusion of specific economic zones which extends up to 200 nautical miles from the baselines of South Africa.[75] These specific areas are earmarked as areas where South Africa have sovereign rights to explore or exploit resources and South African employees receiving remuneration for services rendered for exploration or exploitation of resources in these areas will not be afforded the exemption of s10(1)(o)(ii) of the Act.[76]

2.5.2 South African resident must be outside of South Africa for given period

A person in South Africa who is in transit between countries and does not immigrate (enter) through an official port of entry into South Africa is considered to be outside of the Republic for the purposes of s10(1)(o)(ii) of the Act.[77]

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[74] Section 4 of the Maritime Zones Act 15 of 1994, definition of 'territorial waters'
[75] Section 8 of the Maritime Zones Act 15 of 1994; Article 76(1) United Nations Convention on the Law of the Sea
[76] Section 10(1)(o)(ii) of the Income Tax Act No.58 of 1962; Olivier & Honiball International Tax A South African Perspective 5ed (2011) 421
[77] Proviso A to section 10(1)(o)(ii) of the Act

A person must be employed outside the republic for more than 183 full days in aggregate during any 12 month period, of which 60 days must be continuous, in order to qualify for the exemption. The 12 month period need not be in one tax year but may run over two tax years. When looking at 'days' here it makes reference to calendar days and not only work days. Calendar days includes public holidays, sick leave, annual leave and rest periods outside the republic during the employment contract. As discussed before, a person who is in transit and who has not formally immigrated into the Republic through a port of entry is considered to be outside the Republic for the purpose of calculating the 'days' above.

Temporary relief, with reference to qualifying periods, have been granted to individuals for the 2020 and 2021 tax years. Due to the worldwide COVID 19 pandemic, travel bans have caused adverse effects on individuals' ability to travel to and from South Africa and as a result s10(1)(o)(ii) was amended to accommodate for these unforeseen circumstances.[78] The amendment only focused on the qualifying periods. The 183 full days in aggregate requirement was reduced to an aggregate of 117 full days.[79] However, the individual must still meet the requirement of 60 consecutive days during the 117 full days in aggregate. This amendment of 117 full days in aggregate specifically applies to any 12 month period for tax years ending 29 February 2020 to 28 February 2021.

It is important for employees to note the exact days of their absence because s10(1)(o)(ii) of the Act specifies the periods of absence in order to qualify for the exemption.

[78] Explanatory Memorandum on the taxation Laws Amendment Bill, 2020, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 17 December 2021

[79] The Taxation Laws Amendment Act 23 of 2020, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/bills/, accessed 17 December 2021

The following paragraphs will look at current legislation regarding employment income. In particular, it will consider the definitions of remuneration, employee and employer as provided for in the Act and how they compare to the application s10(1)(o)(ii) of the Act in relation to employment income.

2.5.3 Exclusions from s10(1)(o)(ii)

There are certain types of foreign employment income that is not exempt in terms of s10(1)(o)(ii).

Provisio B to s10(1)(o)(ii) specifically excludes certain remuneration, namely:[80]

- remuneration from persons in terms of s9(2)(g) - persons who are holders of a public office as per appointed in terms of an Act of Parliament; or
- remuneration from persons in terms of s9(2)(h) – for services rendered (or work/labour) on behalf of an employer in:
    - local, national or provincial government (listed in the Public Finance Act);
    - a constitutional institution; or
    - a municipal entity

The above Provisio B excludes employees who receive remuneration for services rendered outside of South Africa for any employer in the public sector. Employees who are holders of a public office to which that employee was appointed or deemed to have been appointed under an Act of Parliament is also specifically excluded from the exemption of s10(1)(o)(ii) of the Act.

[80] Proviso B to section 10(1)(o)(ii) of the Act

2.5.4 The employment relationship requirement

Employees' tax is deducted from remuneration, on behalf of an employee, by an employer. The deduction of employees' tax is ultimately an advance payment toward the final tax liability for normal tax of a particular tax year. South African Revenue Service, in the Guide for Employers in Respect of Employees' Tax, speaks of the three elements in the Fourth Schedule to the Act which must exist before the deduction of employees' tax.[81] The three elements being, *'namely, an employer paying remuneration to an employee'*. South African Revenue Service in Interpretation Note 16, also emphasises the fact that an employment relationship must exist before one may apply the exemption under s10(1)(o)(ii).[82] There must be an employment relationship in order for s10(1)(o)(ii) to apply. Services rendered must be under an employment contract. It is this employment contract that forms the relationship between the employee and employer. The employment contract would connect the employee who is performing services on or behalf of the employer.

Section 10(1)(o)(ii) of the Act makes reference to 'any employer'. This effectively means that services rendered by an employee may be rendered to an employer who is resident in South Africa or to a non-resident employer outside of South Africa.

The term 'employee' is not defined in s1 of the Act and a wider definition of the term 'employee' is found in the Fourth Schedule to the Act which excludes independent contractors and self-employed persons.[83] The term 'employee' is defined as:[84]

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[81] Fourth Schedule to the Income Tax Act No.58 of 1962
[82] SARS Interpretation Note 16 (issue 4) (June 2021), available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 19 January 2022
[83] Fourth Schedule to the Income Tax Act No.58 of 1962; Olivier & Honiball *International Tax A South African Perspective* 5ed (2011) 414
[84] Par 1 of the Fourth Schedule to the Income Tax Act No.58 of 1962

- A person other than company who receives remuneration or to whom remuneration accrues to.
- A person who receives remuneration for services rendered to or on behalf of a labour broker.[85]
- Labour brokers. Personal service providers.[86]
- Any person declared by the Minister of Finance of South Africa to an employee.

A labour broker and personal service providers are specifically included in the definition of employee therefore the employer is obliged to deduct employees' tax from amounts paid to the labour broker.

A labour broker, for purposes of employees' tax provisions, is a natural person who, for a reward, provides a client with other persons (or procures the person) to render a service to or to perform work for the client.[87] A labour broker may be in possession of an exemption certificate which absolves the labour broker from deducting employees tax from the employees.[88]

Generally stated, a labour broker either makes available his own employees to perform work for a client or he/she sources workers for the client in exchange for monetary reward. Typically, a labour broker arrangement would involve three parties, that is:

- The client (whom workers are provided or procured for).
- A labour broker (provides or procures workers for client).

[85] The term 'labour broker' is defined in par 1 of the Fourth Schedule to the Income Tax Act No.58 of 1962
[86] The term 'personal service provider' is defined in par 1 of the Fourth Schedule to the Income Tax Act No.58 of 1962
[87] Part I of the Fourth Schedule to the Income Tax Act No.58 of 1962
[88] Employers may apply to the South African Revenue services for an IRP30 exemption certificate. If an employer is in possession of a valid exemption certificate then that employer is exempt from deducting employees tax for from the workers who have been procured to the client.

- A worker (provided or procured by the labour broker for client)

A personal service provider is either any company or any trust where services are rendered personally by any connected person in relation to such company or trust. The following requirements in order to qualify as a personal service provider, namely:

- The person rendering the service would be regarded as an officer or employee of the client, had such service been performed directly to the client; or
- Those duties must be performed mainly at the premises of the client and the person rendering the service is subject to the control or supervision of the client as to the manner in which the duties are performed in rendering such service; or
- More than 80% of the income of the company or trust is derived during the tax year from a single client.

If any of the above scenarios apply, then that employee would be considered to be a personal service provider. A company or trust will not meet the requirements of a personal service provider if:

- The company or trust who employs throughout the tax year three or more full-time employees; and
- Who are not shareholders, members or connected persons; and
- Who are on a full-time basis engaged in the business of the company or trust of rendering any service.

The above definition of ‘employee’ is not the same when compared to the term ‘employee’ referred to in s10(1)(o)(ii) of the Act. The term ‘employee’ in s10(1)(o)(ii) of the Act only makes reference to natural persons. Both the employees

in the Fourth Schedule to the Act and s10(1)(o)(ii) of the Act may be tax residents of South Africa but only one of the two employees is eligible to an exemption of their income up to an amount of R 1 250 000. In my view, the tax treatment of an 'employee' in terms of s10(1)(o)(ii) of the Act is unfair and does not meet the principles of equity and neutrality when compared to the tax treatment of 'employee' as defined in par 1 of the Fourth Schedule to the Act.

The concept of 'remuneration' is important because the Fourth Schedule defines 'remuneration' to be an amount of 'income'. Therefore, an amount must first be 'income' as per section 1 of the Act in order for it to be considered as remuneration. The term 'remuneration' is also found in the definitions of 'employee' and 'employer' in the Fourth Schedule. Stiglingh-Koekemoer et al considers the term 'remuneration' as a fundamental point of departure for the topic of employees tax.[89]

The term 'remuneration' in Part I of the Fourth Schedule to the Act includes an amount of income:[90]

> 'by way of'.. salary, leave pay, wages, overtime payment, bonuses, gratuities, commissions, fees, emoluments, pensions, superannuation allowances, retiring allowances or stipends.

'Remuneration' in its entirety will not be exempt in terms of s10(1)(o)(ii) of the Act. Only qualifying remuneration will be exempt. This qualifying remuneration includes remuneration received by an employee or accrued to and employee[91] –

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[89] Stiglingh-Koekemoer et al *SILKE: South African Income Tax* 21ed (2019) 257; also see https://www.mylexisnexis.co.za/Index.aspx?permalink=Q2ggMjAgcGFyIDIwLjEkNDgzOTgzJDckTGlicmFyeSRKRCRMaWJyYXJ5

[90] Definition of 'Remuneration' Part I of the Fourth Schedule to the Income Tax Act No.58 of 1962
[91] Section 10(1)(o)(ii) of the Income Tax Act No.58

> 'by way of' the following amounts, namely, salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered. Amounts contemplated in paragraph (i) of the definition of "gross income" in section 1(1) are also included, as too are amounts referred to in sections 8, 8B or 8C.

By comparison, the definition of 'remuneration' in the Fourth Schedule is a wider definition compared to the specific types of remuneration which will only be considered for the exemption in terms of s10(1)(o)(ii) of the Act. This too, in my view, is unfair tax treatment and does not meet the principles of equity and neutrality which should be the foundation of good tax policy.[92]

In terms s10(1)(o)(ii) of the Act, any remuneration received by or accrued an employee for services rendered in South Africa during a qualifying period will not be exempt. In cases where remuneration is received during 'qualifying periods' both from a source in South Africa and from a source outside of South Africa then an apportionment must be applied to determine the exempt income. The following example, similar to that found in Interpretation Note 16, illustrates how the apportionment may be calculated:[93]

> A natural person is employed by the South African subsidiary of a multi-national company. Due to specialised knowledge, the person was requested to assist a New Zealand subsidiary and will be leaving the Republic on 1 May 2020 to commence work on 2 May 2020. The person was contracted to work in New Zealand until 19 December 2020. The subsidiary company in New Zealand will be remunerating the

[92] OECD (2014), 'Fundamental principles of taxation', in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, available at https://doi.org/10.1787/9789264218789-5-en, 30, accessed 29 January 2022

[93] Example 2 in SARS Interpretation Note 16 (issue 4) (June 2021), page9, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 19 January 2022

person during this period. The person will be departing New Zealand on 20 December 2020 to return to the Republic.

For purposes of the example, it is assumed that the person will be returning to the Republic to fulfil local employment obligations during the following periods, which will include travel days:

- 22 June 2020 to 6 July 2020
- 30 August 2020 to 7 September 2020; and
- 11 November 2020 to 20 November 2020

The number of calendar days for which remuneration will be derived for services rendered in New Zealand in the 2021 year of assessment will be as follows:

Periods in New Zealand	May	June	July	August	September	October	November	December	Total
2 May 20 to 21 June 20	30	21							51
7 July 20 to 29 Aug 20			25	29					54
8 Sept 20 to 10 Nov 20					23	31	10		64
21 Nov 20 to 19 Dec 20							10	19	29
									198

The total remuneration that the person will be receiving for services rendered during the period 2 May 2020 to 19 December 2020 will be R1 500 000.

For purposes of this example, the person will satisfy the requirements of the 183-day and 60-continuous-day tests within a period of 12 months.[94] The taxpayer will have two easily identifiable qualifying periods:

- 2 May 2020 to 1 May 2021; and
- 20 December 2019 to 19 December 2020.

The following table sets out the work days outside the Republic for the period 2 May 2020 to 19 December 2020:

Work days during period	Total work days during period	Actual work days outside the Republic	Actual work days in the Republic
2 May 20 to 21 Jun 20	34	34	
22 Jun 20 to 6 Jul 20	11		11
7 Jul 20 to 29 Aug 20	38	38	
30 Aug 20 to 7 Sep 20	6		6
8 Sep 20 to 10 Nov 20	45	45	
11 Nov 20 to 20 Nov 20	8		8
21 Nov 20 to 19 Dec 20	19	19	
Total	161	136	25

The person will not be required to work over weekends, and weekends have thus been excluded from the total work days and actual work days calculations. Possible public holidays in New Zealand have not been taken into account in this example. Section 10(1)(o)(ii) states that only remuneration *received or accrued in respect of services rendered outside the Republic during the qualifying period of 12 months* will qualify for the exemption. It is accepted that no apportionment is required if the result of any services rendered inside of the

[94] This days requirement must be met in order to qualify for the exemption in terms of s10(1)(o)(ii) of the Act.

South Africa by the employed individual is merely casual or accidental and such employment income would be wholly from a source outside of South Africa.[95]

The portion of the person's remuneration that will be exempt from normal tax in South Africa under section 10(1)(*o*)(ii) is calculated as follows:

Workdays outside of South Africa for the period X Remuneration received during the period

Total work days for the period

= Remuneration that may qualify for the exemption under s10(1)(o)(ii)

= 136/161 X R1 500 000 = R1 267 081, however the exemption is limited to R1 250 000

Therefore, R250 000 will be subject to tax in South Africa.

Of the R1 500 000 remuneration that the person will be earning during the New Zealand assignment, R1 267 081 relates to services rendered in New Zealand during the 2021 year of assessment, and of that amount R1 250 000 will be exempt from normal tax in South Africa. The person will be remunerated during this period by the New Zealand subsidiary. R250 000 over and above the R1 250 000, which is made of the following two parts, will be subject to normal tax in South Africa:

• R17 081 that relates to services rendered outside South Africa will be subject to tax in South Africa, and may qualify for relief under section 6quat(1), provided

[95] *COT v Shein* 1958 (3) SA 14 (FC), 22 SATC 12, 1958

foreign taxes are proved to be payable on that amount and the requirements under that section are met.

• R232 919 that will be earned during that period will relate to services rendered in the Republic and will also be subject to normal tax in South Africa. No relief in the form of a tax credit will be applicable against this portion of the income.

Remuneration earned in the Republic during the 2021 year of assessment before the assignment in New Zealand commences (that is, for the period 1 March 2020 to 1 May 2020) and after the assignment terminates (for the period 20 December 2020 to 28 February 2021) will be unaffected by the section 10(1)(o)(ii) exemption and will be fully taxable in South Africa.

If we compare the above example to an employee who is tax resident in South Africa and is receiving non-foreign employment income in South Africa then this employee will not be eligible to an exemption. Even though both employees are tax resident of South Africa only one of the two is eligible for an exemption on their employment income. Similarly, a tax resident from South Africa earning non-employment income abroad would not be afforded the exemption of the apportioned income earned outside of South Africa.

An employed individual must also consider the tax implications on the gains which may result from the vesting of equity instruments. In terms of Section 8C of the Act, employees, as a result of their employment, may participate in various share incentive schemes which is offered by their employer. Any gains made on such incentive schemes may be subject to tax in South Africa but may qualify for an exemption from tax in terms of s10(1)(o)(ii) of the Act. Section 8C of the Act reads as follows:[96]

[96] Section 8C of the Income Tax Act No.58 of 1962

A taxpayer must include in or deduct from his or her income for a year of assessment any gain or loss in respect of the vesting during that year of any equity instrument, if that equity instrument was acquired by that taxpayer –

- by virtue of his or her employment or office of director of any company or from any person by arrangement with the taxpayer's employer;
- by virtue of any restricted equity instrument held by that taxpayer in respect of which this section will apply upon vesting thereof; or
- as a restricted equity instrument during the period of his or her employment by or office of director of any company from –
    - that company or any associated institution in relation to that company; or
    - any person employed by or that is a director of –
        - that company; or
        - any associated institution in relation to that company.

The gain made on the "vesting" of the equity instrument in the employee will be taxed in accordance with the provisions of s8C. As it is the services rendered by the employee which gives rise to the income and not the vesting of the equity instrument, the place where the services were rendered must be used to apply the correct apportionment of the gain between services rendered in the Republic and foreign services. The place where the right to participate was offered or accepted, or

the place where the employee was located when vesting took place is not relevant for the apportionment.[97]

The South African Revenue Service gives and illustrative example of how the apportionment of the exemption of s10(1)(o)(ii) is calculated on the taxable gain that has vested from an equity instrument. The details of the example are as follows:[98]

> Example 5 – Apportionment of gains made under section 8C
>
> Facts:
>
> On 1 July 2015, DG, an employee of a South African holding company, acquired 45 000 shares (at R5 each) from the South African company by virtue of employment. Under the agreement, DG is not permitted to dispose of the shares until 1 July 2020. The shares were granted solely to retain DG's services.
>
> DG rendered services to a Nigerian subsidiary company, during the period 1 April 2017 to 31 March 2020. DG met the 183-day and 60-continuous-day tests for this entire period, and thus any remuneration earned for services rendered outside the Republic during that period qualifies for exemption under section 10(1)(o)(ii).
>
> DG also rendered services outside the Republic, during the lock-in period but outside any qualifying period, from 1 October 2015 to 30 October 2015.
>
> It is assumed for purposes of this example that DG received in March 2020 a bonus of R900 000 and a salary of R400 000.
>
> On 1 July 2020, when DG will become entitled to dispose of the shares, they will vest under section 8C, and, it is assumed that they will have a market

[97] SARS Interpretation Note 16 (issue 4) (June 2021), page 13, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 19 January 2022

[98] Example 5 in SARS Interpretation Note 16 (issue 4) (June 2021), page 15, available at https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/, accessed 19 January 2022

value of R85 per share. DG will therefore make a gain of R3 600 000 [R45 000 × (R85 – R5)].

To simplify illustration in this example, any leave days taken are ignored.

Result:

The portion of the gain DG will make on the vesting of the equity instruments that relates to services rendered outside the Republic during the qualifying period of 12 months will be exempt from taxation under section 10(1)(o)(ii). The exempt portion must be calculated as follows:

Work days outside the Republic for the sourcing period X Section 8C gain
Total work days for the sourcing period

= The portion of the Section 8C gain that may qualify for exemption under section 10(1)(o)(ii).

Years of assessment during source period	Did section 10(1)(o)(ii) apply? (Y/N)	Total work days	Total work days outside the Republic	Section 10(1)(o)(ii) apportionment ratio	Deemed accrual for section 10(1)(o)(ii) purposes	Portion of the gain qualifying for the exemption in 2021
1/7/2015 – 28/2/2016 (2016)	N	169	0	No portion exempt	R3 600 000 × 169/1252 = R485 942,49	RNil
1/3/2016 – 28/2/2017 (2017)	N	250	0	No portion exempt	R3 600 000 × 250/1252 = R718 849,84	RNil
1/3/2017 – 28/2/2018 (2018)	Y	250	228	228/250	R3 600 000 × 250/1252 = R718 849,84	R718 849,84 228/250 = R655 591,05
1/3/2018 – 28/2/2019 (2019)	Y	250	250	250/250	R3 600 000 × 250/1252 = R718 849,84	R718 849,84 × 250/250 = R718 849,84
1/3/2019 – 28/2/2020 (2020)	Y	250	250	250/250	R3 600 000 × 250/1252 = R718 849,84	R718 849,84 × 250/250 = R718 849,84
1/3/2020 – 1/7/2020 (2021)	Y	83	22	22/83	R3 600 000 × 83/1252 = R238 658,15	RNil
TOTALS					R 3 600 000	R2 093 290,73

Since DG's remuneration for foreign services will exceed R1,25 million in March 2020, the full amount of R63 258,79 (R238 658,15 × 22/83) will be taxable. The total taxable gain to be included in the 2021 year of assessment is R1 506 709,27 (R3 600 000 – R2 093 290,73).

There are a total of 1 252 work days during the sourcing period, being from 1 July 2015 to 1 July 2020. The gain is deemed to be spread evenly over this period for purposes of the exemption under section 10(1)(o)(ii).

The gains attributable to periods where services were rendered outside the Republic, but that do not fall within a qualifying 12-month period, being the period of 1 to 30 October 2015, do not qualify as days outside the Republic under the formula, and the gains attributable to services rendered during those periods remain fully taxable in South Africa.

The above example, again, illustrates the unfair tax treatment of s10(1)(o)(ii) in relation to s8C of the Act. In this example we can see that a tax resident employed individual who employed outside of South Africa may be afforded an exemption in terms of s10(1)(o)(ii) of the Act, on their gains in terms of s8C of the Act, but a tax resident employed individual working in South Africa is not afforded the same or similar tax treatment.

The third element to be discusses for the employment relationship requirement is the term 'employer'. The term 'employer' is important because it must be present along with *remuneration* and an *employee* in order for exemption in terms of s10(1)(o)(ii) of the Act to apply.

The term 'employer' in Part 1 of the Fourth Schedule to the Act is defined as:[99]

[99] Part I of the Fourth Schedule to the Income Tax Act No.58 of 1962

- a person (with the exclusion of a person not acting as a principle but including a person acting in a fiduciary capacity, for example a trustee of an insolvent estate);
- who is liable to pay any person;
- any amount by way of remuneration

Section 10(1)(o)(ii) states that services may be rendered to 'any employer'. An employee must pay attention to the fact that 'any employer' refers to both employers based locally in South Africa and employers based outside of South Africa. In the case of an employer based outside of South Africa, who has a representative employer based in South Africa, the representative employer based in South Africa may deduct employees tax on behalf the employee and may pose as a simpler avenue to consult for obtaining information in South Africa, such as a statement of earnings.[100] An employee may find it more cumbersome to obtain information, such as a statement of earnings, from an employer based outside of South Africa who does not have a representative employer based in South Africa. An employer who is based outside of South Africa is not obliged to withhold employees' tax in the same way that a representative employer would be obliged to withhold employee's tax In South Africa. Furthermore, it is important to note that in terms of the Tax Administration Act an employed individual bears the onus of proof for any non-taxable income declared in South Africa.[101]

[100] A statement of earnings in South Africa is more commonly referred to as an 'IRP5'.
[101] Section 102 of the Tax Administration Act No. 28 of 2011

2.6 Conclusion

This chapter looked at South African tax legislation surrounding employment income as well as the tax relief mechanisms built into the South African tax legislation on employment income earned abroad.

My analysis of in this chapter identified certain aspects of the amended s10(1)(o)(ii) of the Act which I do not consider to be equitable and neutral tax treatment.

In my view, the exemption in terms of s10(1)(o)(ii) is unfair and does not follow the principles of equity and neutrality because it only affords the exemption to tax residents of South Africa who are employed in a foreign tax jurisdiction. The exemption excludes tax resident South Africans who are earning non-employment income in a foreign tax jurisdiction.

In the following chapter I will focus on the general application of double taxation agreements in relation to foreign employment income.

3 Chapter 3: Double Taxation Agreements and the role it plays in the South African tax system

3.1 Introduction

The previous chapter analysed South African tax law in respect of a resident employee working abroad. In this chapter we will analyse double taxation agreements[102] and the role that double taxation agreements play in the taxation of a resident employee working outside of South Africa.

3.2 Overview and purpose of a double taxation agreement

Double taxation agreements (or Treaties) are important role-players in the international tax arena[103]. South Africa has entered into a number of double taxation agreements with other countries and it is important to understand the taxing rights of other countries in which the resident employee of South Africa is working.

Section 108 of the Act[104] makes provision for South Africa to enter into an agreement with the government of another country with the view to prevent, mitigate or discontinue the levying of tax under the laws of South Africa and the other country on the same income or gains.

The purpose of a double taxation agreement is to avoid double taxation, or double non-taxation, of the same income or capital which is derived by the same person, by allocating taxation rights between the country of residence of the taxpayer and the country of source where the income or capital has arisen.[105] A double taxation agreement aims to provide tax relief when an amount has been taxed in both countries as a result of a person being deemed to be resident in both countries or the person is

[102] Double taxation agreement is also referred to as a DTA (or DTAs in plural)
[103] Olivier & Honiball International Tax A South African Perspective 5ed (2011) 268
[104] Section 108 of the Income Tax Act No.58 of 1962
[105] Organisation for Economic Co-operation and Development Model Tax Convention; Stiglingh-Koekemoer et al SILKE: South African Income Tax 21ed (2019) 787 and 791

taxed on their worldwide income in their country of residence and taxed at source in the foreign country.[106]

A double taxation agreement may be entered into between two countries or multiple countries. A bilateral treaty may be concluded between two countries or a multilateral treaty may be entered into between more than two countries.

Double taxation agreements also serve as a mechanism to assist countries with the sharing and exchange of information and prohibiting discrimination against non-residents.[107]

South Africa has entered into more than 79 Double Taxation Agreements (hereinafter referred to as DTAs) with various countries and the purpose of these DTAs are to avoid situations of double taxation between South Africa and a host country.[108]

3.3 Model tax conventions

Model tax conventions are used in an effort to achieve a degree of standardisation of the contents found in double taxation agreements.[109]Countries may use model tax conventions[110] (or MTCs) to draft or negotiate double taxation agreements. Model tax conventions contain commentary which provides guidance in the application of the provisions found in a double taxation agreement. A number of MTCs are available, for example the United Nations model double taxation convention and the OECD model tax convention. It should be noted that MTCs are not binding and only serve as a guideline.[111] For purposes of this analysis only the view of the OECD model tax convention on income and capital will be referred to. South Africa is not a member

[106] Olivier & Honiball International Tax A South African Perspective 5ed (2011) 277
[107] Olivier & Honiball International Tax A South African Perspective 5ed (2011) 276
[108] Explanatory Memorandum on the Taxation Laws Amendment Bill 24, 2017, available at https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/, accessed 15 December 2021
[109] Olivier & Honiball International Tax A South African Perspective 5ed (2011) 268

[110] Model tax conventions, hereafter referred to as MTCs
[111] Olivier & Honiball International Tax A South African Perspective 5ed (2011) 276

State of the OECD however South African courts have accepted the commentary by the OECD to interpret the provisions in DTAs.[112]

3.4 DTAs and their relation to domestic tax law in South Africa

A double taxation agreement must first be read together with the domestic tax law of a country. Effectively, one must first determine whether an amount is subject to tax under the domestic tax law in South Africa. Then one must determine if South Africa has the right to tax the income under the provisions of a DTA. If South Africa has a right to tax the income one must determine whether there are any limitations in the double taxation agreements which may prevent South Africa from imposing the tax.[113]

3.5 The relevant articles in DTAs which employees should consider when working abroad

The following paragraphs will analyse the interpretation of relevant articles by the OECD.

3.5.1 DTAs and residency

It is important to determine which country the employee is resident in order to claim the benefits of a DTA and to determine which country has taxing rights on the employment income.[114] If a person is resident in both of the contracting states then the DTA may apply the 'tie-breaker rule' clause to resolve the dual residency conflict. After applying the tie-breaker rule clause one can determine in which country the person is resident for purposes of the DTA.[115] The tie-breaker rule clause consists of multiple questions which may be posed in order to determine to which country the

[112] *Fowler v HMRC* [2020] UKSC 22 (20 May) 27; Secretary for Inland Revenue v Downing 37 SATC 249
[113] *Mr X v the Commissioner for the South African Revenue Service*, Case No. 14218; Stiglingh-Koekemoer et al *SILKE: South African Income Tax 21ed* (2019) 788
[114] Stiglingh-Koekemoer et al *SILKE: South African Income Tax 21ed* (2020) 789
[115] Olivier & Honiball *International Tax A South African Perspective 5ed* (2011) 32

person has the most ties to for purposes of taxation, the tie-breaker rule in the OECD commentaries on the model tax convention states the following:[116]

- This paragraph relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States.
- To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State. The facts to which the special rules will apply are those existing during the period when the residence of the taxpayer affects tax liability, which may be less than an entire taxable period. For example, in one calendar year an individual is a resident of State A under that State's tax laws from 1 January to 31 March, then moves to State B. Because the individual resides in State B for more than 183 days, the individual is treated by the tax laws of State B as a State B resident for the entire year. Applying the special rules to the period 1 January to 31 March, the individual was a resident of State A. Therefore, both State A and State B should treat the individual as a State A resident for that period, and as a State B resident from 1 April to 31 December.
- The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual

[116] Commentary on Article 4, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 86, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022

has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.

- Subparagraph a) means, therefore, that in the application of the Convention (that is, where there is a conflict between the laws of the two States) it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.
- As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.).
- If the individual has a permanent home in both Contracting States, paragraph 2 gives preference to the State with which the personal and economic relations of the individual are closer, this being understood as the centre of vital interests. In the cases where the residence cannot be determined by reference to this rule, paragraph 2 provides as subsidiary criteria, first, habitual abode, and then nationality. If the individual is a national of both States or of neither of them, the question shall be solved by mutual agreement between the States concerned according to the procedure laid down in Article 25.
- If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two

States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

- Subparagraph b) establishes a secondary criterion for two quite distinct and different situations:
    - the case where the individual has a permanent home available to him in both Contracting States and it is not possible to determine in which one he has his centre of vital interests;
    - the case where the individual has a permanent home available to him in neither Contracting State.
- Preference is given to the Contracting State where the individual has an habitual abode.
- In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.

- The second situation is the case of an individual who has a permanent home available to him in neither Contracting State, as for example, a person going from one hotel to another. In this case also all stays made in a State must be considered without it being necessary to ascertain the reasons for them.
- In stipulating that in the two situations which it contemplates preference is given to the Contracting State where the individual has an habitual abode, subparagraph b) does not specify over what length of time the comparison must be made. The comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual and to determine also the intervals at which the stays take place.
- Where, in the two situations referred to in subparagraph b) the individual has an habitual abode in both Contracting States or in neither, preference is given to the State of which he is a national. If, in these cases still, the individual is a national of both Contracting States or of neither of them, subparagraph d) assigns to the competent authorities the duty of resolving the difficulty by mutual agreement according to the procedure established in Article 25.

The OECD commentary states that the person's home must be available on a permanent and continuous basis and not for short periods.[117] The home must be available for whenever the person wishes to use the home. The home may be in any form, for example, a house, a caravan, etc. The home does not need to be owned by the person.[118]

[117] Commentary on Article 4, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 86, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022
[118] Commentary on Article 4, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 86, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022; Olivier & Honiball International Tax A South African Perspective 5ed (2011) 33

In the case of a person who has a permanent home in both of the contracting states then the person would be regarded as resident in the state where his personal and economic relations are closer. This is also referred to as the 'centre of vital interests'. In order to determine the centre of vital interests one must look at certain facts such as:[119]

- The location of the person's family and social relations.
- The person's occupation.
- The person's political and other interest, etc.

The definition of a 'resident' in the Act[120] specifically states that a person will be excluded from the definition if that person is deemed to be exclusively a resident of another country for the purposes of a DTA entered into between South Africa and another country. The following example[121] illustrates the impact of residency in a DTA. For example, if an employed individual is ordinarily a resident of the United Kingdom and the person is considered to be tax resident of South Africa as a result of the physical presence test, then we may apply the above 'tie-breaker rules'. If this employed individual has a permanent home in the United Kingdom and stays at a guest house in South Africa, this employed individual may be considered to be exclusively a resident of the United Kingdom. This employed individual will then be excluded from being a tax resident in South Africa even though he or she met the requirements of the physical presence test.

[119] Commentary on Article 4, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 86, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022; Olivier & Honiball International Tax A South African Perspective 5ed (2011) 33
[120] Section 1 of the Income Tax Act No.58 of 1962
[121] Stiglingh-Koekemoer et al SILKE: South African Income Tax 21ed (2020) 805

3.5.2 Income from employment

Article 15 lays out the general rule that the source state has the right to tax the employment income if the employment was exercised in the source state.[122] The income may however not be taxed if the following conditions occur:[123]

- If an employee is present in the state where the employment activity is being exercised for a period or periods not exceeding 183 days in aggregate during any 12 month period commencing or ending in the respective year of assessment;
- if the employees remuneration is paid by or paid on behalf of a non-resident employer; and
- if the remuneration is not from and employer with a permanent establishment in the state where the employment is exercised.

The purpose of the physical presence in the state is irrelevant when applying the above 183 day exemption. The OECD states that all days, including holidays and part of a day, must be included when determining the physical presence.[124] This is considered to be straight forward in that the individual is either present in the country or not. Only two exceptions are referred to in the OECD commentary in determining the physical presence above, firstly days of sickness will not be included. The second

[122] Commentary on Article 15, Paragraph 1, Commentaries on The Articles of The Model Tax Convention, page 251, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022
[123] Commentary on Article 15, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 251, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022
[124] Commentary on Article 15, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 252, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022

exception is days spent in transit in the state of activity during the course of a journey to a point outside the state of activity.[125]

A South African tax court case looked at the issue of employment income in relation to Article 15 of the respective DTA.[126]

Briefly stated, the facts of the case were as follows:[127]

> Mr X was employed by ABC Incorporated ('ABC'), the South African branch of a company incorporated in the United States. Mr X's received a total amount of income from his employer, ABC, for the 2014 year of assessment to the amount of R10 437 708. Mr X made a declaration his tax return of an amount of R6 367 943 as income earned for services rendered in South Africa. Mr X contended that the difference in the amount was for services rendered outside of South Africa and therefore should not be included in his taxable income for the respective year of assessment.
>
> The South African Revenue Services raises and assessment on the full amount on grounds that the difference in the amount is also from a source within the South Africa. The South African Revenue Services based their argument on the fact that the originating cause of Mr X's total income was his

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Commentary on Article 15, Paragraph 2, Commentaries on The Articles of The Model Tax Convention, page 252, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022. The OECD states the following as the basis for this commentary: Although various formulas have been used by member countries to calculate the 183 day period, there is only one way which is consistent with the wording of this paragraph: the "days of physical presence" method. The application of this method is straightforward as the individual is either present in a country or he is not. The presence could also relatively easily be documented by the taxpayer when evidence is required by the tax authorities. Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family. However, days spent in the State of activity in transit in the course of a trip between two points outside the State of activity should be excluded from the computation. It follows from these principles that any entire day spent outside the State of activity,whether for holidays, business trips, or any other reason, should not be taken into account. A day during any part of which, however brief, the taxpayer is present in a State counts as a day of presence in that State for purposes of computing the 183 day period.

[126] *Mr X v the Commissioner for the South African Revenue Service*, Case No. 14218

[127] J du Toit, SARS Creates Tax Loopholes, available at https://www.taxconsulting.co.za/sars-creates-tax-loopholes/, accessed 21 January 2022

contract of employment, the South African Revenue Services argued that the employment contract was entered into and exercised in South Africa. The tax court gave a rundown of the South African Revenue Services argument and noted amongst other things, the following:

> '*The originating cause of appellant's disputed income is the contract of employment which was entered into in South Africa and exercised in South Africa for all days that he worked in S.A…*
>
> *Respondent's counsel submitted that the source of the remuneration is the employment and not the services rendered by appellant to individual clients of the employer outside of S.A.'*

Council on behalf of Mr X argued that the originating cause of his remuneration was the services rendered by him to his employer and that such originating cause for the services rendered was located a place outside of South Africa.

In his judgement, the learned judge focused on the double taxation agreement between South Africa and United States of America and the fact that this entire dispute hinged on the definition of 'where the employment is exercised' as per Article 15 of the double taxation agreement. The court applied the principles as laid out by the Vienna Convention on the Law of Treaties and came to the following conclusion:

> '*The place where: "…the employment is exercised…" ordinarily means the place where the employment agreement is implemented. The words are used for the purpose of describing events that occur in fulfilment of reciprocal rights*

and duties governed by an employment agreement, as they appear in the context of Article 15, in the DTA.'

The outcome of the tax court case resulted in that Mr X would be taxed on both income earned and exercised in South Africa and; income earned and exercised outside of South Africa.

This tax court judgement, of Mr X, is important to note for employees when entering into an employment contract because the outcome of this judgement flies in the face of years of jurisprudence on the matter of where services are physically rendered.[128]

3.5.3 Interpretation of language in DTAs

The OECD MTC serves as a template for many DTAs. As a result the 'language' used in DTAs is borrowed from the OECD MTC and accordingly, there are potential difficulties with the interpretation of the wording or language used in DTAs.[129] Article 3 in the OECD MTC gives assistance with the interpretation of terms found in the OECD MTC. Article 3 gives assistance by:[130]

- defining certain terms specifically; and
- by giving a reference point to the contracting states by which they may interpret an undefined term under their domestic law.

Article 3 states the following general definitions to terms such as:[131]

[128] *CIR v Lever Brothers & Unilever Ltd* 1946 AD
[129] SAICA, Interpreting double tax agreements, October 2016, available at https://www.saica.co.za/integritax/2016/2555._Interpreting_double_tax_agreements.htm, 2 December 2021
[130] Commentary on Article 3, Commentaries on The Articles of The Model Tax Convention, page 252, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm, accessed 21 January 2022
[131] OECD Model Tax Convention on Income and on Capital, condensed version, November 2017, available at https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm, accessed 21 January 2022

- “person”, which includes an individual, a company and any other body of persons.
- “enterprise” which applies to the carrying on of any business.
- “enterprise of a Contracting State” and “enterprise of the other Contracting State” which makes reference to an enterprise carried on by a resident of a
- Contracting State and an enterprise carried on by a resident of the other Contracting State.
- “international traffic” refers to any transport by a ship or aircraft except when the ship or aircraft is operated solely between places in a Contracting State and the enterprise that operates the ship or aircraft is not an enterprise of that State.
- “national”, in relation to a Contracting State, refers to any individual possessing the nationality or citizenship of that Contracting State; and any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State.
- “business”, this term includes the performance of professional services and of other activities of an independent character.

Article 3 states further that the application of the Convention at any time by a Contracting State on any term which is not defined in Article 3 shall:

> unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of

that State prevailing over a meaning given to the term under other laws of that State.

A recent tax court case in the UK, *MH Fowler v HMRC*,[132] looked at some of the difficulties around the interpretation of language in DTAs. The court had to deal with the issue of employment income and contracting income (or business profits), and the interaction between domestic tax law and DTAs. The primary issue in this case was for the court to decide under which Article of the DTA, between South Africa and the UK, the taxpayer should be taxed.[133]

The UK tax authorities[134] assessed Mr Fowler as an employed individual. Mr Fowler was a South African resident who was employed as a diver in the UK undertaking diving work on the UK continental shelf. The UK tax authorities raised a tax assessment for Mr Fowler on income derived from employment in terms of Article 14 of the DTA between South Africa and the UK.

Mr Fowler however argued that his earnings were not from employment income but were from business profits in terms of Article 7 of the DTA and should not be taxed in the UK.

Article 3(1) does not define the term 'employment' and the court had to apply Article 3(2) of the respective DTA. Article 3(2) states that the definition of the domestic tax law, of the state prevailing, should be applied if there is no definition in Article 3(1) of the DTA.

[132] *MF Fowler v HMRC* [2016] UKFTT 234 (TC
[133] UK Supreme Court Blog, available at http://ukscblog.com/new-judgment-fowler-v-commissioners-for-hmrc-2020-uksc-22/, accessed 23 January 2022
[134] Her Majesty's Revenue and Customs, hereafter referred to as HMRC

Mr Fowler presented section 15 of the UK Income Tax Act as part of his argument.[135] In terms of section 15 the remuneration received by a person employed as diver will be taxed in the same manner as business profits according to the UK Income Tax Act.

Mr Fowler placed emphasis on the fact that his employment income from diving should be recognised as business profits in terms of section 15 of the UK Income Tax Act when applying the DTA.

In the courts decision Brannan J placed particular emphasis on the words 'shall' or 'may' in the DTA.[136] The court furthermore expressed that the wording in the OECD MTC were generic in nature in that it was a guideline for a large variety of countries to use and that wording in the MTC should be seen as 'conceptual rather than precise'.[137] The court decided that the employment income received should be taxed as business profits and therefore Article 7 of the DTA was applicable.

Two important features is taken from the tax court case of Mr Fowler, one is the manner in which we apply the term 'employment' in domestic tax law and in DTAs. Secondly, how one interprets the 'language' used in DTAs and how it may affect the taxation of a particular income.

The matter, however, was taken on appeal before the UK Supreme Court where the court unanimously allowed the appeal by HMRC. The court held that Mr Fowler be treated as an employee and must be subject to tax in the UK. The court stated that the expressions in the treaty should be given their ordinary meaning. The court held that deeming provisions, as is the case in s15 of the UK Income Tax Trading and Other Income of Act 2005, create a "statutory fiction" which should be followed as far as

[135] Section 15 of the Income Tax (Trading and Other Income) Act of the UK, hereafter referred to as section15
[136] *MF Fowler v HMRC* [2016] UKFTT 234 (TC) 101
[137] *MF Fowler v HMRC* [2016] UKFTT 234 (TC) 108

required for the purposes for which the fiction was created and that this fiction be real and not produce unjust, absurd or anomalous results.[138]

3.6 Conclusion

It is important to determine the residency of the person and applying the respective Articles of the DTA to determine in which state the person will be taxed. By doing so, one is able to determine the tax implications before one considers employment outside of South Africa. In the case of a South African tax resident, all income earned abroad will be taxed in South Africa in terms of the 'gross income' definition.[139] If the requirements of s10(1)(o)(ii) of the Act are met then the person may be entitled to an exemption from tax in South Africa on the income earned abroad. In the case of a South African tax resident, it is not necessary to consider a DTA for South African tax purposes because the income earned abroad is not taxed in South Africa.[140] However, it is still important for a South African tax resident to consider DTA to determine whether the foreign tax authority was allowed to tax the income abroad.[141]

In the chapters that follow I will apply, in summary, the above Articles to the DTA between New Zealand and South Africa; as well as the DTA between the United Kingdom and South Africa; and consider the tax implications for an employed individual working in these countries.

[138] *Fowler v HMRC* [2020] UKSC 22 (20 May) 27
[139] Section 1 of the Income Tax Act No.58 of 1962
[140] Stiglingh-Koekemoer et al *SILKE: South African Income Tax 21ed* (2020) 842
[141] Stiglingh-Koekemoer et al *SILKE: South African Income Tax 21ed* (2020) 842

4 Chapter 4: New Zealand

4.1 Introduction

The previous chapter analysed the relevant Articles in the OECD MTC with reference to employment income. In this chapter I will give a summary of the relevant New Zealand tax legislation on foreign employment income. I have chosen New Zealand because this country follows a similar world-wide basis of taxation system like South Africa.[142] This chapter will also focus on the DTA between South Africa and New Zealand and the specific articles in the DTA that refer to employment income. This chapter will conclude by looking at the tax effect of the change to s10(1)(o)(ii) of the Act, on an employed individual from South Africa, working in New Zealand.

4.2 New Zealand tax legislation in respect of a non-resident employee

Non-residents employed in New Zealand are subject to tax on their income received from a New Zealand source and residents are taxed on their worldwide income.[143] In the case of a resident, all employment income such as salaries, wages allowances and emoluments which are earned in New Zealand on behalf of any employer, whether or not that employer is resident in New Zealand, is deemed to be derived from New Zealand.[144] Therefore it is important to determine the residence of a South African employee working in New Zealand.

[142] Tax on foreign income, available at https://www.ird.govt.nz/income-tax/income-tax-for-individuals/types-of-individual-income/overseas-income, accessed 06 January 2022
[143] Section YD4(4) of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022 https://www.ird.govt.nz/international-tax/individuals/tax-for-non-resident-taxpayers
[144] Section YD4(4) of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022

4.3 The definition of a resident or domicile in New Zealand

In the below paragraphs I will set out the tax residency requirements of New Zealand and I will show how a tax resident of South Africa would be taxed on income earned from a source in New Zealand. An individual is regarded as a resident in New Zealand if:[145]

- the person has a permanent place of abode in New Zealand, irrespective of whether he has a permanent place of abode in another country, or
- he is present in New Zealand for more than 183 days during any 12 month period. Residence will start on the first day of such a period of presence in New Zealand.

From the above we can see that if a South African tax resident, who is deemed to be a tax resident of New Zealand, may be liable for tax on his or her worldwide income in New Zealand.[146] This is important to note for employed individuals working, or who intend to work, in New Zealand.

Furthermore, an individual will be regarded not to be a resident in New Zealand if he is absent for more than 325 days in any 12 month period. Non-residence will start on the first day of such period. If an individual is present in New Zealand for a part of the day then that part of the day is deemed to be a whole day.[147]

[145] Section YD1(2)-(4) of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022
[146] Section YD4(4) of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022
[147] Section YD1(6)-(8) of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022

4.3.1 The definition of 'permanent place of abode'

The New Zealand tax courts have considered the meaning of 'permanent place of abode' to be the place that is lasting or enduring instead of a place where a person usually lives.[148]

In the High Court decision of *Diamond v CIR*[149] the court held that the ordinary meaning of the words 'to have a permanent place of abode in New Zealand' is 'to have a home in New Zealand'. The court further stated that the appellant never lived at the property in question and therefore did not have a permanent place of abode in New Zealand. The court accepted that the person did have on-going personal connections with New Zealand but the court's decision remained unaltered by this because there was no permanent place of abode.

The above decision was upheld by the Court of Appeal.[150] The court held that the correct approach to establish a permanent place of abode should be an integrated factual assessment which would determine the nature and quality of the use the taxpayer habitually makes of a particular abode. The court dismissed the Commissioner's manner of determining a 'permanent place of abode' and instead the court set out the following, non-exhaustive, factors to determine a permanent place of abode:

- the continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling,
- the duration of that presence,
- the durability of the taxpayer's association with the particular place,

[148] *FCT v Applegate* 79 ATC 4, 307, Case N51 (1991) 13 NZTC 3,406 and Case Q55 (1993) 15 NZTC 5,313
[149] *Diamond v Commissioner of Inland Revenue* [2014] NZHC 1935
[150] *Commissioner of Inland Revenue v Diamond* [2015] NZCA 613

- the closeness of the taxpayer's connection with the dwelling, the situation before and after a period or periods of absence from New Zealand should be considered,
- the requirement for permanence is to distinguish merely transient places of abode, and
- the existence of another permanent place of abode outside of New Zealand does not preclude a finding that the taxpayer has a permanent place of abode in New Zealand.

A property in New Zealand must have the above factors in order to determine a permanent place of abode. Therefore, the taxpayer's other connections to New Zealand will not determine a permanent place of abode. The focus should be placed on the taxpayer and not the family members of the taxpayer.

4.3.2 The definition of 'absentee'

The term 'absentee' is defined as any person other than a person who is a resident of New Zealand during part of an income year. Therefore, if a person is a non-resident for the whole tax year, then he or she is considered to be an absentee.[151]

4.4 The DTA between South Africa and New Zealand

Article 14 in the DTA between South Africa and New Zealand deals with income from employment.[152]

The contracting state (i.e. New Zealand) has a right to tax employment income, such as salaries, wages or similar remuneration, if the employment was exercised in

[151] Section YA1 of the Income Tax Act 2007, New Zealand, available at https://www.legislation.govt.nz/act/public/2007/0097/latest/whole.html, accessed 22 January 2022; also see https://www.ird.govt.nz/international-tax/individuals

[152] DTA-New-Zealand-GG-26798 https://www.gov.za/documents/income-tax-act-agreement-between-south-africa-and-new-zealand-avoidance-double-taxation https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/

the contracting state unless the employment was exercised in the other contracting state (i.e. South Africa).[153] Employment income earned by resident of the contracting state for employment exercised in the other contracting state will be taxable in the contracting state if:[154]

- If an employee is present in the other contracting state where the employment activity is being exercised for a period or periods not exceeding 183 days in aggregate during any 12 month period commencing or ending in the respective year of assessment of that other contracting state;
- if the employees remuneration is paid by or paid on behalf of a non-resident employer of the other contracting state; and
- if the remuneration is not deductible in determining the taxable profits of a permanent establishment which the employer has in the other contracting state.

If the 3 above conditions have been met, then the contracting state may tax the employment income of the resident. A South African employee, who is employed in New Zealand and taxed in New Zealand, may make use of the foreign tax credit system under s6quat of the Act for tax relief on taxes paid abroad.

4.5 The tax effects of s10(1)(o)(ii) for a South African resident employed in New Zealand prior to the amendment.

As stated in chapter 2, in order to qualify for the exemption under s10(1)(o)(ii) a person must be employed outside the republic for more than 183 full days during any

[153] Article 14(1) AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF NEW ZEALAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME 6 February 2002, hereafter referred to as the DTA between South Africa and New Zealand
[154] Article 14(2) DTA between South Africa and the New Zealand

12 month period, of which 60 days must be continuous, in order to qualify for the exemption in terms of s10(1)(o)(ii) of the Act.

Prior to the amendment, if a person employed in New Zealand met all the requirements for s10(1)(o)(ii) of the Act then all his remuneration in relation to the foreign employment would be exempt from tax in South Africa but may still be liable for tax in New Zealand.

If, for example, a person earned R 3 000 000 employment income in New Zealand and met all the requirements of s10(1)(o)(ii) then the entire amount of R 3 000 000 would be exempt from tax in South Africa and may only be liable for tax in New Zealand.

Therefore, if we consider the 2021 year of assessment and we apply an average exchange rate to the New Zealand dollar of R 10.00, then effectively the South African employee would pay taxes in New Zealand to the value of R 899 200[155] on employment income of R 3 000 000 and no taxes payable in South Africa.

If the requirements of s10(1)(o)(ii) are not met then the person will be liable for tax in South Africa to the value of R 1 199 679 ([R1 422 700 x 45%] + R559 464)[156] and liable for tax in New Zealand to the value of R 899 200. The person would however be able to claim foreign tax credits against the foreign income.[157]

[155] New Zealand tax rates, available at https://www.ird.govt.nz/income-tax/income-tax-for-individuals/tax-codes-and-tax-rates-for-individuals/tax-rates-for-individuals, accessed 22 January 2022; also see Appendix A
[156] South African tax rates, available at https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/, 22 January 2022; also see Appendix A
[157] Section 6 quat Income Tax Act No.58 of 1962

4.6 The tax effects of section 10(1)(o)(ii) for a South African resident employed in New Zealand after the amendment.

As previously stated, the amended s10(1)(o)(ii) now includes a threshold of R 1 250 000. What this effectively means is the exemption will now only apply to the first R 1 250 000 of the employment income earned abroad, thereafter the person would be liable for tax on the remuneration received outside South Africa in excess of R 1 250 000.

Considering the above, if a person is employed in New Zealand and meets all the requirements of s10(1)(o)(ii) then only the first R 1 250 000 of his remuneration in relation to the foreign employment would be exempt from tax in South Africa but may still be liable for tax in New Zealand. Any foreign tax credits received in New Zealand may be offset against South African tax liability in terms of s6quat of the Act.[158]

Therefore, if we compare, by way of an example, a person who earned R 3 000 000 employment income in New Zealand during the 2021 year of assessment and has met all the requirements of s10(1)(o)(ii) then only the first R 1 250 000 would be exempt from tax in South Africa and the difference of R 1 750 000 would be taxable in South Africa. The entire amount of R 3 000 000 will be liable for tax in New Zealand.

If we consider the tax rates for 2021 year of assessment and we apply an average exchange rate to the New Zealand dollar of R 10.00 then effectively the South African employee would pay taxes in New Zealand to the value of R 899 200[159] (tax on 300 000 New Zealand dollars) on employment income of R 3 000 000

[158] Section 6 quat Income Tax Act No.58 of 1962
[159] New Zealand tax rates, available at https://www.ird.govt.nz/income-tax/income-tax-for-individuals/tax-codes-and-tax-rates-for-individuals/tax-rates-for-individuals, accessed 22 January 2022; also see Appendix A

and taxes payable in South Africa to the value of R 637 179 ([R172 700 x 45%] + R559 464).[160]

Prior to the amendment there would not have been any tax payable in South Africa. What this effectively means is that the South African employee would not be able to benefit from the tax credit difference of R 262 021 (R 899 200 less R 637 179) that has been paid.

The amended s10(1)(o)(ii) of the Act now places a tax burden on a South African employee which did not exist prior to the amendment. Furthermore, in my view, this amendment to s10(1)(o)(ii) of the Act is not good tax policy because it does not show horizontal equity. If we look at horizontal equity for a natural person who is tax resident of South Africa and earning employment income compared to non-employment income of the same value, then the non-employment income will not enjoy an exemption and will be taxed in full in South Africa. For example, a tax resident earning employment income of R 3 000 000 in New Zealand would be eligible for an exemption but a tax resident from South Africa earning non-employment income in New Zealand would not be afforded an exemption in terms of s10(1)(o)(ii) of the Act. This, in my view, is unfair and is not equitable and neutral tax treatment.

4.7 Conclusion

In this chapter we discussed the effects of the amended s10(1)(o)(ii) for an employed individual from South Africa working in New Zealand. In my view, based on the analysis I have done in this chapter, the amendments to s10(1)(o)(ii) of the Act do support equity and neutrality and the tax treatment under this exemption is unfair to

[160] South African tax rates, available at https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/, 22 January 2022

the same category of taxpayers[161] earning income in New Zealand. The next chapter will focus the effects of the amended s10(1)(o)(ii) for an employed individual from South Africa working in the United Kingdom.

[161] Tax residents of South Africa earning the same amount of income in New Zealand.

5 Chapter 5: The United Kingdom

5.1 Introduction

The previous chapter analysed the tax effect of the change to s10(1)(o)(ii), on an employed individual from South Africa, working in New Zealand. In this chapter I will give a summary of the relevant United Kingdom tax legislation on foreign employment income. I have chosen the United Kingdom because this country follows a similar world-wide basis of taxation system like South Africa.[162] This chapter will also focus on the DTA between South Africa and the United Kingdom and the specific articles in the DTA that refer to employment income. This chapter will conclude by looking at the tax effect of the change to s10(1)(o)(ii), on an employed individual from South Africa working in the United Kingdom.

5.2 UK tax legislation in respect of a non-resident employee

Non-residents employed in the UK are subject to tax on their income received from a UK source and residents are taxed on their worldwide income and gains in the UK.[163] Therefore it is important to determine the residence of a South African employee working in the UK. The UK applies a Statutory Residence Test[164] in order to determine the tax residence status of a person on an annual basis.[165] Therefore it is important to determine the tax residence status of a South African employee working in the UK

[162] Tax on foreign income, available at https://www.gov.uk/tax-foreign-income, accessed 06 January 2022
[163] Section 27 Income Tax (Earnings and Pensions) Act 2003
[164] Schedule 45 of the Finance Act 2013, United Kingdom, available at https://www.legislation.gov.uk/ukpga/2013/29/schedule/45/enacted, accessed 23 January 2022

[165] Statutory Residence Test (SRT) notes, January 2020, available at https://www.gov.uk/government/publications/rdr3-statutory-residence-test-srt/guidance-note-for-statutory-residence-test-srt-rdr3, accessed 23 January 2022

because the employee may be tax resident in one tax year and not in the next tax year.[166]

5.3 The Statutory Residence Tests

The Statutory Residence Test[167] was introduced in 2013[168] to assist with the determination of the residence status of an individual.

The SRT consist of 3 tests which must be applied consecutively until one part of the test has been fulfilled.[169] The 3 test are referred to as:

- The automatic UK tests,
- The automatic overseas tests, and
- The sufficient ties test.

An individual is considered to be a UK resident if the automatic UK residence tests or the sufficient ties have been met. The exception to automatic UK residence tests is when one of the tests for the automatic overseas tests have been met.

5.3.1 The automatic UK tests

An individual must meet at least one of the automatic UK residence tests and none of the automatic overseas tests to be considered a UK resident for tax purposes.

In summary, the tests are as follows:[170]

- The person must be present in the UK for 183 days or more during a tax year,

[166] Statutory Residence Test (SRT) notes, January 2020, available at https://www.gov.uk/government/publications/rdr3-statutory-residence-test-srt/guidance-note-for-statutory-residence-test-srt-rdr3, accessed 23 January 2022

[167] Statutory Residence Test, hereafter referred to as SRT
[168] Schedule 45 of the Finance Act 2013, United Kingdom, available at https://www.legislation.gov.uk/ukpga/2013/29/schedule/45/enacted, accessed 23 January 2022
[169] IBFD, Z.G. Kronbergs, United Kingdom – Individual Taxation sec.gthb, Country Surveys 2
[170] https://www.gov.uk/government/publications/rdr3-statutory-residence-test-srt/guidance-note-for-statutory-residence-test-srt-rdr3

- Having a home in the UK during the tax year of which the individual had that home for a consecutive period of 91 days and the individual has no home overseas or has a home overseas but spends less than 30 days in that home overseas,
- Having worked sufficient hours in the UK over a period of 365 days without a significant break during a tax year, and
- If the individual, while being treated as a resident based on one of the above tests for each of the 3 preceding tax years, dies while having a home in the UK.

5.3.2 The automatic overseas tests

In summary, the tests are as follows:

- Where the individual spent less than 16 days in the UK, did not die in the tax year, and was not resident in the UK in one of the 3 preceding tax year,
- Where the individual spent less than 46 days in the UK, and was not resident in the UK in one of the 3 preceding years of assessment,
- Where the individual works overseas for a sufficient number of hours without a significant break from work. The individual must also have spent less than 31 UK work days in the year (that is, days on which he does a minimum of 3 hours' work in the UK), and spent less than 91 days in the UK in that tax year.
- Where the individual had died during the tax year, and the individual spent less than 46 days in the UK, and was either (i) a non-UK resident for the 2 tax years preceding the tax year or death, or (ii) a non-UK resident in the tax year preceding the tax year of the death, and the tax year before that was a split year; and
- Where the individual died during the tax year, where that individual was already a non-UK resident under test 3 above: (i) for the 2 preceding tax

years, or (ii) for the tax year preceding the tax year when the individual died, and the year before was a split year

5.3.3 The sufficient ties test

In summary, the tests are as follows:

In the case of an individual who does not meet one of the automatic UK tests and does not meet one of the automatic overseas tests, he will be regarded as a UK resident if he has 'sufficient ties' to the UK. The relevant ties will depend on whether or not the individual was a UK resident for one or more of the 3 years preceding the respective tax year. The ties to be considered are:

- Family ties,
- Accommodation ties,
- Work ties,
- 90 day tie (being present in the UK for a minimum of 90 days), and
- Country tie (that is, if the UK was the country in which the individual was present for the greatest amount of days at midnight in that year). This will also apply in the case where the individual has spent the greatest number of days in more than one country and one of those countries is the UK.

An individual who is found to be a resident in terms of the Statutory Residence Test will be treated as a resident for the full tax year unless the individual meets certain requirements for 'split tax year treatment'. In the case of a split tax year the individual will be treated as UK resident for part of the year and non-UK resident for the remaining part of the year.[171]

[171] IBFD, Z.G. Kronbergs, United Kingdom – Individual Taxation sec.gthb, Country Surveys 22

5.4 The DTA between South Africa and the United Kingdom

Article 14 in the DTA between South Africa and the UK deals with income from employment.[172]

The contracting state (ie. the United Kingdom) has a right to tax employment income, such as salaries, wages or similar remuneration, if the employment was exercised in the contracting state unless the employment was exercised in the other contracting state (ie. South Africa).[173] Employment income earned by resident of the contracting state for employment exercised in the other contracting state will be taxable in the contracting state if:[174]

- If an employee is present in the other contracting state where the employment activity is being exercised for a period or periods not exceeding 183 days in aggregate during any 12 month period commencing or ending in the respective year of assessment;
- if the employees remuneration is paid by or paid on behalf of a non-resident employer of the other contracting state; and
- if the remuneration is not deductible in determining the taxable profits of a permanent establishment which the employer has in the other contracting state.

If the 3 above conditions have been met then the state where the employee is resident may tax the employment income.

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[172] DTA-United-Kingdom-GG-24335
Income Tax Act: Agreement between South Africa and New Zealand for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income | South African Government (www.gov.za)

[173] Article 14(1) CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS, No. 172, 31 January 2003, hereafter referred to as DTA between South Africa and the UK.

[174] Article 14(2) DTA between South Africa and the UK

5.5 The tax effects of s10(1)(o)(ii) for a South African resident employed in the UK prior to the amendment.

Prior to the amendment, if a person employed in the UK met all the requirements for s10(1)(o)(ii) then all his remuneration in relation to the foreign employment income would be exempt from tax in South Africa but may still be liable for tax in the UK.

If, for example, a person earned R 5 000 000 employment income in the UK and met all the requirements of s10(1)(o)(ii) then the entire amount of R 5 000 000 would be exempt from tax in South Africa and may only be liable for tax in the UK.

Therefore, if we consider the 2021 year of assessment and we apply an average exchange rate to the UK pound of R 20.00 then, then effectively the South African employee would pay taxes in the UK to the value of R 1 850 000[175] on employment income to the value of R 5 000 000 and no taxes payable in South Africa.

If the requirements of s10(1)(o)(ii) are not met, then the person will be liable for tax in South Africa to the value of R 2 099 679 ([R3 422 700 x 45%] + R559 464)[176] and liable for tax in the UK to the value of R 1 850 000. The person would however be able to claim foreign tax credits which may be offset against South African tax liability in terms of s6quat of the Act.[177]

[175] UK Tax rates, available at https://www.gov.uk/income-tax-rates, accessed 23 January 2022; also see Appendix A
[176] South African tax rates, available at https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/, 22 January 2022; also see Appendix A
[177] Section 6 quat Income Tax Act No.58 of 1962

5.6 The tax effects of s10(1)(o)(ii) for a South African resident employed in the UK after the amendment.

The amended s10(1)(o)(ii) now includes a threshold of R 1 250 000. What this effectively means is the exemption will now only apply to the first R 1 250 000 of the employment income earned abroad, thereafter the person would be liable for tax on the remuneration received outside South Africa in excess of R 1 250 000.

Therefore, if a person is employed in the UK and meets all the requirements of s10(1)(o)(ii) then only the first R 1 250 000 of his remuneration in relation to the foreign employment would be exempt from tax in South Africa but may still be liable for tax in the UK. The foreign tax credit may only be offset against foreign income which is taxed in South Africa.

Therefore, if we compare by way of an example, a person who earned R 5 000 000 employment income in the UK during the 2021 year of assessment and has met all the requirements of s10(1)(o)(ii) then only the first R 1 250 000 would be exempt from tax in South Africa and the difference of R 3 750 000 would be taxable in South Africa. The entire amount of R 5 000 000 will be liable for tax in the UK.

If we consider the tax rates for 2021 year of assessment, and we apply an average exchange rate to the UK pound of R 20.00 then effectively the South African employee would pay taxes in the UK to the value of R 1 850 000[178] (tax on 250 000 Great British pounds) on employment income to the value of R 5 000 000 and taxes payable in South Africa to the value of R 1 537 179 ([R2 172 700 x 45%] + R559 464)[179].

[178] UK Tax rates, available at https://www.gov.uk/income-tax-rates, accessed 23 January 2022; also see Appendix A
[179] South African tax rates, available at https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/, 22 January 2022; also see Appendix A

Prior to the amendment there would not have been any tax payable in South Africa. What this effectively means is that the South African employee would not be able to benefit from the tax credit difference of R 312 821 (R 1 850 000 less R 1 537 179) that has been paid.

The amended s10(1)(o)(ii) of the Act now places a tax burden on a South African employee which did not exist prior to the amendment. In light of the analysis done in this chapter, I further state that this amendment to s10(1)(o)(ii) of the Act is not good tax policy because it does not show horizontal equity. If we look at horizontal equity for a natural person who is tax resident of South Africa and earning employment income compared to non-employment income of the same value then the non-employment income will not enjoy an exemption and will be taxed in full in South Africa. For example, a tax resident earning employment income of R 5 000 000 in the UK would be eligible for an exemption but a tax resident from South Africa earning non-employment income in the UK would not be afforded an exemption in terms of s10(1)(o)(ii) of the Act. This, in my view, is unfair and is not equitable and neutral tax treatment.

5.7 Conclusion

In this chapter we discussed the effects of the amended s10(1)(o)(ii) for an employed individual from South Africa working in the United Kingdom. The next chapter will conclude the analysis of the amended s10(1)(o)(ii). In my view, based on the analysis I have done in this chapter, the amendments to s10(1)(o)(ii) of the Act do support equity and neutrality and the tax treatment under this exemption is unfair to the same category of taxpayers[180] earning income in the UK.

[180] Tax residents of South Africa earning the same amount of income in the UK.

6 Chapter 6: Conclusion

6.1 Introduction

It is important for South African employees working abroad plan effectively before contracting to foreign employment so that they have a thorough understanding of their tax paying responsibilities. South African tax residents employed in another country are subject to different tax systems and therefore it is critical that they analyse the respective DTA between South Africa and the contracting state to determine in which country the person will be resident for tax purposes.

Secondly, the person employed abroad must consider both the foreign and South African tax legislation to determine which countries will have the taxing rights for a specific income.

Thirdly, the employed individual must consider the taxing rights of South Africa and the foreign country and the impact that those taxing rights may have on the person's financial position. By applying the above analysis both an employed individual and an individual earning non-employment income can make an informed decision on whether he or she should accept or reject a contract to work abroad.

6.2 Conclusion

The aim of this analysis was to look at the different tax treatment between employment income and income earned from other services rendered following the amendments to s10(1)(o)(ii) of the Act.

I centred my discussion in this analysis around equity and neutrality by comparing the different tax treatment of employment income and other forms of income.

In chapter 2 I analysed South African tax legislation and the analysis showed us the unfair tax treatment of s10(1)(o)(ii) of the Act. This chapter illustrated that

s10(1)(o)(ii) of the Act is not applied in a neutral and equitable manner. A tax resident of South Africa earning non-employment income is not given the same tax benefit of an employed individual who is earning the same amount of foreign income outside of South Africa. Section 10(1)(o)(ii) of the Act, in my view, is unfair tax policy because it does not have an equitable and neutral tax basis.

In chapter 3 I analysed DTAs and the role that DTAs play in the taxation of a resident employee working abroad. In this chapter I found that the application of a DTA irrelevant for determining the tax liability of a South African tax resident working abroad because the income is not taxed in South Africa. However, it still remains important for the South African tax resident to determine if the foreign tax jurisdiction has right to tax the income earned in that jurisdiction in terms of a DTA.

In chapters 4 and 5 I analysed the application of s10(1)(o)(ii) of the Act and the tax effects of the amended s10(1)(o)(ii) of the Act for employed individuals working in New Zealand and the United Kingdom. The lessons I have learnt in both these chapters is that the impact of the amended s10(1)(o)(ii) of the Act creates a potential tax burden to South African tax residents which did not exist prior to amendment. In these chapters I also pointed out the fact that tax residents from South Africa working in the UK or New Zealand were not afforded the tax exemption in terms of s10(1)(o)(ii) of the Act if they earned non-employment income. Therefore, in my view, the amendment to s10(1)(o)(ii) of the Act is not good tax policy because it does not show horizontal equity.

After completing the above analysis, I have achieved the answer to the basis of my analysis – namely, do the amendments to s10(1)(o)(ii) of the Act support equity and neutrality? In my view, the amendments to s10(1)(o)(ii) of the Act do not support equity and neutrality and is not aligned to good tax policy.

6.3 Recommendation

It is critical for a South African employee to understand his or her tax paying responsibility before accepting an employment agreement abroad. I would strongly suggest that anyone who is considering a foreign employment assignment to go the extra mile and do the necessary tax research and planning before accepting employment abroad.

The opportunity to be employed abroad may come with a variety of possibilities such as a better quality of life, a better standard of living, better financial prospects and even better tax paying possibilities if the correct planning is put in place.

6.4 Future Research

Tax legislation is broad, complex and ever changing and it is for these very reasons that I find tax law interesting and exciting.

There are on-going amendments to legislation and DTAs and it is important for an employee, who is considering foreign employment, to research the latest information before accepting a foreign employment agreement.

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Appendix A

South African Tax Rates for 2021 Year of Assessment

Rates of Tax for Individuals

2021 tax year (1 March 2020 - 28 February 2021)

Taxable income (R)	Rates of tax (R)
1 – 205 900	18% of taxable income
205 901 – 321 600	37 062 + 26% of taxable income above 205 900
321 601 – 445 100	67 144 + 31% of taxable income above 321 600
445 101 – 584 200	105 429 + 36% of taxable income above 445 100
584 201 – 744 800	155 505 + 39% of taxable income above 584 200
744 801 – 1 577 300	218 139 + 41% of taxable income above 744 800
1 577 301 and above	559 464 + 45% of taxable income above 1 577 300

The United Kingdom Tax Rates for 2021 Year of Assessment

Band	Taxable income	Tax rate
Personal Allowance	Up to £12,500	0%
Basic rate	£12,501 to £50,000	20%
Higher rate	£50,001 to £150,000	40%
Additional rate	over £150,000	45%

New Zealand Tax Rates for the 2021 Year of Assessment

Income tax rates

For each dollar of income	Tax rate
Up to $14,000	10.5%
Over $14,000 and up to $48,000	17.5%
Over $48,000 and up to $70,000	30%
Remaining income over $70,000	33%