A critical analysis of the recent change to the unilateral foreign employment income tax exemption in South Africa and its cross-border interaction

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I was thrust without warning or previous training, into a role as home-school teacher to my kids for two full terms, while still being expected to perform & deliver on my actual full-time job, all from a desk in my bedroom.

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To my late dad, I wish I could share this with you but with faith I know that you are smiling from above.

Finally, I thank my 'God' through faith and prayer, *"Be strong and courageous; do not be afraid or lose heart",* I have completed this thesis with pride in my heart.

(ii) ABSTRACT:

South Africa is at the forefront of implementing the Multilateral Convention to Implement Tax Treaty Related Measures of the OECD to prevent base erosion and profit shifting (MLI), the Base Erosion and Profit Shifting Project (BEPS) recommendations and the tackling of double non-taxation. In 2017, the National Treasury announced that the tax exemption for South African expatriates would be changing. The section would be amended so that foreign employment income would no longer be fully exempt in the hands of a resident.[1]

The section 10(1)(o)(ii) exemption in its original form was the relief mechanism for residents to prevent the possibility of double taxation on the employment income derived from working outside the republic. This being when South Africa converted from a source based to a residence-based tax system on 1 March 2001, and all South African residents became subject to tax on their world-wide income. Residents working abroad were at the risk of being subject to taxation on their employment income derived in two or more jurisdictions. Residents making use of the full tax exemption in terms of Section 10(1)(o)(ii) of the Income Tax Act and rendering services in countries where no employment tax was imposed or imposed at significantly low rates has therefore resulted in double non taxation.

In 2017, South Africa's National Treasury published the Draft Taxation Laws Amendment Bill, initially repealing the foreign employment income exemption entirely. However, as a result of strong criticism in the form of public commentary, National Treasury proposed and later enacted an alternative amendment by reverting to the partial repeal of the foreign employment income exemption in the form of an 'exemption threshold'.

As per the enactment of the Taxation Laws Amendment, Act, No.17 of 2017[2] which has revised the Income Tax Act No.58 of 1962 (IT Act), specifically with reference to the wording of section 10(1)(o)(ii) to allow for R1 million of foreign remuneration to be exempt from tax in South Africa if the individual is outside of the Republic for a stipulated number of days. The legislative amendment came into effect on 1 March 2020 and states that South African tax residents abroad will be required to pay tax up to 45% on their foreign employment income, where it exceeds the R1million threshold. With the recent budget speech in 2020, the specific tax exemption has been increased to R1.25 million.

This 'exemption threshold' primarily aims to target high net worth individuals and thus still provide the relief to middle and lower income earners.[3] The effect of the amendment would be that all residents working outside of the Republic and who derive foreign employment income in excess of R1.25million and who have previously enjoyed the benefit of the section

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[1] As defined in section 1(1) of the Income Tax Act No 50 of 1962

[2] Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 6 available at http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf,

[3] Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 8, available at

10(1)(o)(ii) exemption will now be subject to taxation and possibly double taxation and would need to seek relief elsewhere if necessary.

In this minor dissertation we have considered the effect of the Section 10(1)(o)(ii) amendment and what this will mean for the individual working abroad in relation to domestic tax legislation and any double tax treaties (DTC's) in place.

A key finding arising from the research in the minor dissertation is that many South African's have hastily made a decision to formally emigrate through the South African Reserve Bank (SARB) procedures in an effort not to pay income tax in South Africa on foreign remuneration earned overseas. However, in considering alternate mechanisms, such as applying the rebate afforded in section 6quat of the IT Act or applying a DTC if in place, may be a simpler and more cost-effective solution instead of taking a more drastic decision to emigrate.

Further, the fact that an individual potentially could be subject to tax on the full remuneration if they make the decision to formally emigrate as opposed to maintaining South African residency and only paying tax on the excess remuneration above the threshold should be considered in any future tax planning.

1. CHAPTER ONE: INTRODUCTION

1.1 Background, rationale & purpose of the study

Globalisation as we understand is the spread of products, technology, information and jobs across national borders and cultures. On one hand, globalization has created new jobs and economic growth through the cross-border flow of goods, capital and labour. On the other hand, this growth and this job creation is not distributed evenly across countries[4]. The effect of globalisation is that many South African's are making the decision to move out of South Africa for both work related and personal reasons[5]. Many companies are, also as a result of global markets, operating in such a way that they are giving South African employees the opportunity to gain experience in international markets.

International exposure has always been viewed as an attractive option for South African nationals. However, the downside of South African individual's moving out of South Africa is potentially placing a strain on revenue tax collection and it could be viewed as a contributing factor to a decrease in revenue collection over the years. Revenue collections prior to the Global Financial Crisis of 2008/9 rose exponentially and peaked at a 17.8% growth rate. Subsequent to that, and especially over the past 5 years, saw a steady decline in the growth rate of overall receipts[6].

Year	Tax Collection	% Increase on prior	ZAR increase on prior
2014/15	986,300,000,000	9.6	86,300,000,000.0
2015/16	1,070,000,000,000	8.5	83,700,000,000.0
2016/17	1,144,100,000,000	6.9	74,100,000,000.0
2017/18	1,216,500,000,000	6.3	72,400,000,000.0
2018/19	1,287,700,000,000	5.9	71,200,000,000.0

With the above said, although this is a contributing factor, it is submitted that the main reason for the Section 10(1)(o)(ii) amendment, is that South Africa is making an effort to address the position of double non-taxation on SA resident's employment income earned abroad arising as a result of where employment income is neither taxed in the foreign country nor in South Africa or where taxes are imposed which are negligible, being imposed at significantly reduced rates on employment income earned from work performed outside South Africa.

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[4] Globalisation Economics/Macroeconomics: Carol M Klopp and Brian Barnier, accessed 10 August 2020

[5] Ibid

[6] https://www.sars.gov.za/All Docs/Documents/Tax Statistics and https://www.treasury.gov.za/documents/national/budget review, accessed 31 May 2020

The original purpose of Double Tax Convention's (hereinafter referred to as DTC's) is to eliminate double taxation. It is where two contracting states commit themselves to relinquishing or restricting their taxing rights. This would normally eliminate double taxation. According to some DTC rules, certain income or capital can be taxed only in one of the two contracting states. Other income or capital can be taxed by both states proportionately: the right to tax for the source state, however, is limited to a certain percentage. Whether the application of the credit method (rebate for foreign tax paid) or exemption method (no tax on the income) the state of residence has to avoid double taxation for its residents.

Prior to the Base Erosion and Profit Shifting Project (BEPS) of the OECD Model Tax Convention on Income and on Capital (hereinafter referred to as OECD) and the Multilateral Convention to Implement Tax Treaty Related Measures of the OECD to prevent base erosion and profit shifting (MLI), double non taxation was accepted. Michael Lang confirmed that the original purpose of DTC's is to eliminate double taxation. In DTC's the contracting states bind themselves not to raise any taxes with respect to taxing rights that are given to the other contracting state under the tax convention. The DTC rule applies even if one of the contracting states to which the right has been given does not impose taxes. In this respect, the application of the DTC can lead to double non-taxation.[7]

The above view however changed when companies such as Facebook, Google and Netflix started shifting profits to low –or no tax jurisdictions. Double non-taxation was therefore no longer considered acceptable.

There is no universal definition of double non-taxation.[8] A view held by scholars is that double non-taxation arises if there are unjustified tax benefits, either from exploiting international tax rate differentials without matching the economic interest or advantageous mismatches between domestic tax laws giving rise to qualification conflicts[9]. Double non-taxation occurs where a taxpayer is neither taxed in the resident or the source country for a variety of underlying reasons, including the application of a bilateral DTC. [10]

The OECD's view in terms of Action 6 of the OECD/G20 Base Profit Erosion and Profit Shifting Project (BEPS) supports the above view as well. [11] BEPS was therefore introduced to exploit the gaps and mismatches in tax rules to shift profits by multinational companies to low tax regimes. BEP's Action 6 and Action 7 is aimed at preventing the abuse of treaties and seek to clarify that DTC's are not intended to generate double non-taxation. [12]

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[7] M. Lang: Introduction to the Law of Double Tax Conventions, (Linde Lehrbuch) 2nd edition, page 21 of 208, paragraph 42, accessed 10 August 2020

[8] M.Helminen, General Report, Cashiers de droit fiscal international 2016 Madrid Congress- The notion of tax and the elimination of international double taxation or double non-taxation, vol. 101b (The Netherlands 2016), p.67, section 2.4.1, para 1.

[9] F. Molina, DTCs and Double Non-Taxation, In D Blum and M. Seiler (eds.), Preventing treaty abuse, 1st ed., vol. 101, (Austria2016), p.72, s.2, para. 1.

[10] Supra note 6, p.67, s.4.1, para 1

[11] According to paragraph 72 of point b of the OECD BEPS Action 6 (i.e. clarification that treaties are not intended to be used to generate double non-taxation) considering the issue of double non-taxation, states that; it has decided to state clearly, in the title recommended by the OECD Model, that the prevention of tax evasion and avoidance is a purpose of tax treaties'.

[12] M. Lang op cit note 7

This was echoed in the MLI which incorporates the recommendations from the OECD/G20 BEPS Project.[13] The final OECD/G20 BEPS October 2015 report on BEPS Action 6 states in the introduction paragraph that the aim and purpose of BEPS action 6 are clarified in a reformulation of the title and preamble of the Model Tax Convention. Article 6(1)[14] of the OECD/G20's MLI is modelled on BEPS Action 6 with the intention of confirming that the existing DTCs are interpreted to eliminate double taxation concerning taxes covered by those agreements without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

As South Africa is at the forefront of implementing the MLI, the BEPS recommendations and tackling double non taxation, in 2017 the National Treasury announced that the tax exemption for South African expatriates would be changing. The section would be amended so that foreign employment income would no longer be fully exempt in the hands of a resident.[15]

The section 10(1)(o)(ii) exemption in its original form was the relief mechanism for residents to prevent the possibility of double taxation on the employment income derived from working outside the republic. This being when South Africa converted from a source based to a residence-based tax system. On 1 March 2001, all South African residents became subject to tax on their world-wide income. Residents working abroad were at the risk of double taxation on their employment income. Therefore, by residents availing of the full tax exemption in terms of Section 10(1)(o)(ii) and in countries where no employment tax was imposed or imposed at significantly low rates this resulted in double non taxation.

In 2017, South Africa's National Treasury published the Draft Taxation Laws Amendment Bill, initially repealing the foreign employment income exemption entirely. However, as a result of strong criticism in the form of public commentary, National Treasury proposed and later enacted an alternative amendment by reverting to the partial repeal of the foreign employment income exemption in the form of an 'exemption threshold'.

As per the enactment of the Taxation Laws Amendment, Act, No.17 of 2017[16] which has revised the Income Tax Act No.58 of 1962 (IT Act), specifically with reference to the wording of section 10(10(o)(ii) to allow for R1 million Rand of foreign remuneration to be exempt from tax in South Africa if the individual is outside of the Republic for a stipulated number of days.[17] The legislative amendment came into effect on 1 March 2020 and states

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[13] *OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, (2016)*

[14] See Note, 10: Article 6(1) modifies the preamble text of a Covered Agreement to include the following preamble text as a minimum standard to address double non-taxation or avoidance, '[intending to eliminate double taxation with respect to taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)'.

[15] As defined in section 1(1) of the Income Tax Act No 50 of 1962

[16] Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 6 available at http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf,

[17] Taxation Laws Amendment Act, No17 of 2017 of the Republic of South Africa, p. 26, s.16(1)(g).

that South African tax residents abroad will be required to pay tax up to 45% on their foreign employment income, where it exceeds the R1million threshold. With the recent budget speech in 2020, the specific tax exemption was increased to R1.25 million.

This 'exemption threshold' primarily aims to target high net worth individuals and thus still provide the relief to middle- and lower-income earners. The effect of the amendment would be that all residents working outside of the Republic and who derive foreign employment income in excess of R1.25million and who have previously enjoyed the benefit of the section 10(1)(o)(ii) exemption will now have to seek relief elsewhere.

The effect of the Section 10(1)(o)(ii) amendment will be considered and what this will mean for the individual working abroad in relation to domestic tax legislation and the DTC's in place.

In terms of the MLI modifications as mentioned above these can only apply if both signatories choose the DTC in force between the two countries to be covered under the MLI. The MLI's clauses modify the DTCs through a process whereby signatories must notify the clauses in selected DTCs indicating those that will be subject to the reservations in the MLI.[18]

The application of the MLI clauses to the clauses of the SA- UK, Australia, New Zealand and the United Arab Emirates would apply, as both South Africa and the respective countries have listed the DTC as an agreement covered by the MLI[19]. However, for the purpose of this dissertation Article 6 and 7 of the MLI will be mentioned but not covered in detail.

1.2 Research Questions

1.2.1 Country Selection

1.2.2 What impact will the section 10(1)(o)(ii) exemption have on a South African resident person employed in the United Kingdom (hereinafter referred to as UK), Australia, New Zealand and the United Arab Emirates (hereinafter referred to as UAE)?

In answering the main research question the following will be addressed:

1.2.3 The consideration of emigration (formal) by the employee and what impact this will have on the South African employee and potentially on the Tax Collection in South Africa.
1.2.4 What is the tax effect on the South African person working in the countries mentioned above and with this South African Income tax change how will the application of the DTC's in UK, Australia, New Zealand and the UAE be interpreted and applied?
1.2.5 How will a South African employee who has changed their tax status to non-resident due to the amendment, communicate this to SARS and what tax implications will arise as a result thereof.

[18] J. Hattingh, The Multilateral Instrument from a Legal Perspective: What may be the challenges? Bulletin for International Taxation, vol. 71, No. 3,4, (The Netherlands 2017), p4, n. 4.2, para. 2.
[19] OECD BEPS MLI position-United Kingdom, Australia, New Zealand and UAE, Article 2 and BEPS MLI Position –South Africa, Art 2 https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm, accessed 15 October 2020.

1.3 Research Methods

1.3.1 Analytical study

1.3.1.1 This study will follow a doctrinal legal research method paradigm together with an analytical and explanatory quantitative method of analysis of the trends within South Africa in relation to South African employees living abroad, specifically, the United Kingdom (UK), Australia, New Zealand and the United Arab Emirates (UAE).

1.3.1.2 As this study examines a recent change, this study aims to analyse section 10(1)(o)(ii) and the position of the SA employee living abroad. The study will consider the position prior and subsequent to the legislative amendments, specifically analysing whether the amendments will achieve the desired result.

1.3.1.3 Further, this study will analyse South African and International literature, DTC's; in relation to the tax change to Section 10(1)(o)(ii) of the ITA and the interpretation and practical implication thereof. This will be supported by case studies to address and conclude on the research question.

1.4 Delimitations and Assumptions

1.4.1 Delimitations

1.4.1.1 The study will have three delimitations. Firstly, it will be limited to natural persons and not include any legal entities (companies or trusts). This study will be restricted to South African residents. This study will focus on South African legislation and DTCs between South Africa and the UK, Australia, New Zealand, and the UAE; no focus on, or comparison of legislation regarding this topic in other countries will be made.

1.4.1.2 The MLI will be considered briefly in relation to Article 6 and Article 7 but no other considerations will be made as this falls outside the scope of this dissertation.

1.5 Assumptions

1.5.1 The following assumptions are made in the study:
1.5.2 That a literature review is the appropriate research approach
1.5.3 That the data collected is accurate.

1.6 Outline of Chapter Headings

1.6.1 Country Selection

Australia, New Zealand, the United Arab Emirates (hereinafter referred to as the UAE) and the United Kingdom (hereinafter referred to as the UK). This selection was made in terms of a hypothesis of trends in relation to South African employees formally emigrating from South Africa. This was supported by external sources from a recognised authorised dealer. In terms of the trend analysis, it has been identified that the most popular destinations were the UK (around 30%); followed by Australia (around 23%) and the Canada/US and New Zealand (were joint with (6%-10%)). The UAE was selected as it is a tax-free jurisdiction, and no

foreign taxes are imposed on any income which is exactly the reason for the enactment of this amendment.

1.7 Chapters:

Chapter 1 identifies the problems that may arise when South African employees work for employers abroad. Secondly, the importance of the study, the assumptions and delimitations of the study follow. Thirdly, the key terms and definitions in the study are explained.

In Chapter 2 the relevant South African legislation and the effect of the changes in the legislation are examined. A detailed analysis of Section 10(1)(o)(ii) as per the Income Tax Act No. 58 of 1962 will be presented.

In Chapter 3, the concept of formal emigration in relation to the South African Reserve Bank, the potential effect on the SA tax collections and the misinterpretations of what it means for SA employees living abroad will be discussed.

In Chapter 4, the focus will be on the objectives of the DTC agreements, the relation between domestic law, the DTC's and the interpretation of relevant articles in the DTC based on the OECD or the UN model, specific to the following countries:

- South Africa and Australia;
- South Africa and New Zealand;
- South Africa and United Arab Emirates; and
- South Africa and United Kingdom

Reference will be drawn from foreign legislation, specific to the Income Tax Acts of the UK, Australia, New Zealand and the UAE together with the detailed analysis of the DTC's entered into by South Africa and the respective countries.

In Chapter 5, the study will conclude in summarising the importance of the discussed legislation and give recommendations for future research.

2 CHAPTER TWO: SOUTH AFRICAN TAX LEGISLATION AND THE EFFECTS OF THE CHANGE IN THE LEGISLATION:

2.1 Introduction to Section 10(1)(o)(ii) of The Income Tax Act

As mentioned in Chapter one and in terms of the current South African Tax legislation[20], South African individuals are taxed on their worldwide income and capital gains, regardless of the source of such income and gains. Under a residence basis of taxation, the connecting factor between the country and the income is the person who receives the income or to whom it has accrued.

In the year 2000, to prevent double taxation of an individual's income between South Africa and a host country, section 10(1)(o)(ii) of the Income Tax Act[21] was introduced into the Act. It has been recognised that the unfortunate outcome is contrary to the purpose for which the exemption was originally introduced. This exemption for some persons working in countries where no taxes are imposed are exploiting this exemption resulting in no foreign tax on foreign employment income being imposed.

Prior to 1 March 2020, Section 10(1)(o)(ii) contained an exemption for remuneration received by or accrued to any person in respect of services rendered outside South Africa for any employer, if the employee rendering the services was outside South Africa: "*(aa) for a period or period exceeding 183 full days in aggregate during any 12 months; and (bb) for a continuous period exceeding 60 full days during that period of 12 months , and those services were rendered during that period or periods*.."

Effective from 1 March 2020 and in respect of years of assessment commencing on or after that date, foreign employment income earned by a tax resident of South Africa will no longer be fully exempt as the exemption under section 10(1)(o)(ii) of the Income Tax Act will be limited to R1.25 million. Any foreign employment income earned over and above R1.25 million will be subject to normal tax in South Africa, applying the normal tax rates for the particular year of assessment.

Residents employed in low-tax or tax-free jurisdictions will therefore be negatively affected by the section 10(1)(o)(ii) amendment, particularly South African residents working in the UAE where there is no income tax levied on an individual's employment income. Similarly, even people in relatively high tax jurisdictions will be negatively affected due to the steepness of the South African tax brackets versus other countries and cash flow issues (determined by the timing of the credits being permitted).

As a result of this tax amendment, these South African residents will become subject to a normal income tax liability. The only way that a reduction in their normal tax lability can be achieved would be to obtain a section 6quat rebate, if applicable, or make the more drastic decision to formally emigrate which will be discussed in chapter three.

[20] Income Tax Act No 58. of 1962

[21] Supra note no.1

The requirements of this section are discussed briefly below.

2.1.1 Qualification criteria for the exemption:

In order for a taxpayer to qualify for the section 10(1)(o)(ii) exemption, the following requirements as highlighted above will need to be met[22], namely:

1) The taxpayer must be a **tax resident** of South Africa;
2) The taxpayer must earn certain types of **remuneration**;
3) The taxpayer must be in **employment**;
4) The remuneration must be **in respect of services rendered**; and
5) The **services must be rendered outside the Republic**.

2.1.1.1 Overview of Tax Residency:

The starting point is that the natural person must be a South African tax resident.

In terms of Section 1 of the Income Tax Act[23], a resident is defined as a person who is 'ordinarily resident' in South Africa. If that person was not at any stage during the relevant tax year 'ordinarily' resident in South Africa but that person meets the required number of days test, then that person will be physically present in South Africa[24]. Both these tests will result in the person being a South African resident for tax purposes.

Ordinarily resident test

The term 'ordinarily resident' is not defined in the Income Tax Act and consequently the interpretation thereof is followed in terms of the application of local and international case law. The courts in considering the meaning, have established guidelines which set out the principles necessary in order to determine if someone is ordinarily resident in South Africa.

In the *Cohen Case*[25], it was held "that a natural person's ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principle residence and it would be described more aptly than other countries as his real home."

A further approach in *Cohen's Case*[26] was followed in *ITC1170*[27], in which a taxpayer who was sent by his employer to the US on a 14-month assignment to obtain experience to be

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[22] SARS Interpretation Note: No. 16, point 4.1, page 2 available at https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-16%20-%20Exemption%20Foreign%20Employment%20Income.pdf, accessed on 23 April 2020.

[23] Supra note 1

[24] The physical presence test would apply if the person has spent more than 91 days in aggregate in each of the current and previous five years plus more than 915 days in aggregate during the previous five tax years. It is understood that for purposes of the application of this test, neither the 91 days, nor the 915 days need to be consecutive.

[25] *Cohen v CIR* [1946]13 SATC 362; *CIR v Kuttel* [1992] 54 SATC 298

[26] Ibid

applied in South Africa, was held to be ordinarily resident in South Africa. The taxpayer retained his house in South Africa and rented it out for the exact period of his assignment overseas. The taxpayer's wife and two children accompanied him, but his parents remained in South Africa, his permanent employment was in South Africa and he had bank accounts in South Africa. Although he entertained the possibility of remaining overseas, there was no definite decision in this regard and no other country was regarded as his ordinary residence. [28]

In the *Soldier Case*[29], it was stated that ordinary residence is one which must be "settled and certain and not temporary and casual". It was further noted by the court that each case had to be considered on its own merits.

In summary in terms of the case law above, Courts have decided that the concept of ordinarily resident is as follows:

- Living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person's ordinary regular course of life to live in a particular place with a degree of permanence, he or she must be regarded as ordinarily resident;
- It is the place to which he or she will return to after their 'wanderings'.
- The place where his or her permanent place of abode is where his or her belongings are stored, which he or she leaves for temporary absences and to which he or she regularly returns to after these absences;
- A residence that is settled and certain and not temporary and casual; or
- Where a person normally resides, apart from occasional absences.

Therefore, to assess whether a natural person is ordinarily resident in a country is one of fact[30] and each case must be decided on its own merits, taking into account the principles outlined in the domestic and international case law. This was supported by Meyerowitz[31] who expressed the view that "The determination of the country in which a natural person is ordinarily resident is a factual determination."

Further, the South African Revenue Service (SARS) Interpretation Note 3[32] provides guidance on the factors[33] to be considered in determining residence. It is further understood

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[27] *ITC1170* [1971] 34 SATC 76(C)
[28] Ibid
[29] *Soldier v Commissioner of taxes*, [1943] SR 131 at 133
[30] Supra note 25
[31] D, Meyerowitz, Meyerowitz on Income Tax 2003- 2004, The Taxpayer in subsection 5.17
[32] South African Revenue Service Interpretation Note 3 (Issue 2): 20 June 2018, accessed 02 April 2020
[33] SARS Interpretation Note 3[33]- 'An intention to be ordinarily resident in the Republic
- The natural person's most fixed and settled place of residence
- The natural person's habitual abode, that is, the place where that person stays most often, and his or her present habits and mode of life.
- The place of business and personal interests of the natural person and his or her family
- Employment and economic factors
- The status of the individual in the Republic and in other countries, for example, where he or she is an immigrant and what the work permit periods and conditions are
- The location of the natural person's personal belongings
- The natural person's nationality

that the above list is not intended to be exhaustive and it is merely a guideline. The circumstances of the natural person must be examined as a whole, taking into account the year of assessment concerned and that person's mode of life before and after the period in question.

Foreign remuneration derived by a South African person from a source outside South Africa will only be subject to tax if the person is ordinarily resident in South Africa. Therefore, if the person is employed in a country abroad, e.g. Australia and the intention is to return to South Africa after the project or employment is completed. The tax effect is that the remuneration derived in Australia will be subject to normal tax in South Africa.

For a person to be ordinarily resident in Australia would require that the South African person has a permanent place of abode in Australia, that all their belongings are in Australia and therefore any absences from Australia are temporary. Therefore, the person will not be ordinarily resident in South Africa and will not be subject to tax in South Africa on their world-wide income but will only be subject to tax on their income from a South African source. Section 10(1)(o)(ii) will therefore not apply in this instance.

In Chapter four, case studies are presented to illustrate the practical application of various scenarios.
If not ordinarily resident in South Africa the physical presence test could apply in certain instances. This is discussed below.

Physical Presence

The physical presence test is a time-based test (the 91 day/915 day test) and only applies if an individual was not at any time during the tax year ordinarily resident in South Africa. It is based on the number of days[34] during which a person is physically present in the Republic[35].

Under this test, a natural person must be physically present in South Africa for period (s) exceeding: (i) 91 days in aggregate during the current tax year; (ii) 91 days in aggregate

- Family and social relations (for example schools, places of worship and sports or social clubs)
- Political, cultural or other activities
- That natural person's application for permanent residence or citizenship
- Periods abroad, purpose and nature of visits
- Frequency of and reasons for visits.'

[34] https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-04%20-%20Resident%20definition%20natural%20person%20physical%20presence.pdf, accessed 31 May 2019; "It must be noted that a day includes a part of a day. Thus, both the day of arrival and departure are included in the count. This test is also known as the day test or the time rule. A day is regarded to start at 00:00, therefore a person who arrives in South Africa at 23:55 would be regarded to be present in South Africa for a full day. However, any day that a person is in transit through South Africa between two places outside South Africa and that person does not formally enter South Africa through a port of entry, 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, is excluded in the count".

[35] Supra note 34 at section 4.1

during each of the five tax years preceding the current tax year under consideration; and (iii) 915 days in aggregate during the above five preceding tax years.

A natural person will need to meet all three criteria (i)-(iii) before he or she will be regarded as a resident and will cease to be a resident if he or she is physically outside South Africa for a continuous period of at least 330 full days.

Where a natural person has given up their South African tax residency referred to as 'tax emigration', this person would then be classified as not being ordinarily resident in South Africa. The natural person should also ensure that they do not meet the three requirements for physical presence as this is the only test that would be applied to test residency for persons that are not ordinarily resident.

Any natural person who is deemed to be exclusively a resident of another country, with which South Africa has entered into a double taxation agreement, is excluded from the definition of a "resident".

Therefore, in any other country, if there are any natural persons working outside of South Africa, for example in the UK, UAE, Australia, and New Zealand and if they become exclusively a resident of those respective countries through the application of DTC's (to be discussed in Chapter 4), those natural persons will be excluded from being a tax resident of South Africa and their foreign income will not be taxed under South African tax law. Should there be natural persons that intends to give up their South African tax residency they would be required to notify the South African Revenue Service in order that the administrative position can be correctly dealt with in terms of managing the status of their tax returns, this will be discussed with tax emigration in chapter three.

2.1.1.2 Section 10(1)(o)(ii)- Remuneration:

Secondly, only certain types of remuneration will qualify for the exemption and with reference to the legislation[36] only remuneration received by or accrued to an employee "by way of" the following amounts, namely salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered will qualify for this exemption. Amounts contemplated in paragraph (i) of the definition of "gross income" in section 1(1) are also included[37], as too amounts referred to in sections 8[38] 8B[39] or 8C[40].

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[36] Supra note 22 section 4.1.1. 'Section 10(1)(o)(ii) of the Income Tax Act No 58 of 1962 – the term remuneration is not "remuneration" as per the Fourth Schedule to the Act'.

[37] Ibid fn 4 'The cash equivalent of the value of any taxable benefit as calculated under the Seventh Schedule; and the amount of any gain made by the exercise, cession or release of a right to acquire a marketable security, under section 8A' – Interpretation Note 16 (Issue 3), dated 31 January 2020, accessed 11 April 2020

[38] Ibid fn 5 'In the context of section 10(1)(o)(ii), this refers to allowances, advances and reimbursements.

[39] Taxation of amounts derived from broad-based employee share plans.'

[40] Section 8C of the Income Tax Act No 58 of 1962 and Interpretation Note: No 55 (Issue 2); https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-55%20-%20Taxation%20Directors%20Employees%20Vesting%20Equity%20Instruments.pdf, accessed 04 July 2020 – 'Section 8C applies to 'any person who acquired equity instruments by virtue of employment or office of director of any company). It is triggered by vesting of an equity instrument. Section 8C taxes gains and allows a deduction in respect of losses when equity instruments vest in the employee or office holder'.

2.1.1.3 Employment Relationship:

Thirdly, the exemption under section 10(1)(o)(ii) will only apply if an employment relationship exists. The services that are rendered on behalf of the employer[41] must be rendered under an employment contract.

The term "employee" is not defined in the main body of the Act and so it must be given its ordinary meaning.[42]. Under common law this excludes an independent contractor or self-employed person. Directors in their capacity as directors are holders of an office, and not employees, and to the extent that they earn director's fees, such fees do not qualify for exemption under section 10(1)(o)(ii). [43] Therefore, without an employee-employer relationship a resident will not be able to claim a tax exemption for remuneration earned outside the Republic. The employment contract is therefore the mandatory document to attest to this employer and employee relationship.

For purposes of brevity 'services rendered' and 'outside the republic' will be discussed together.

2.1.1.4 Services rendered outside the republic:

The remuneration must be received in respect of services rendered outside South Africa[44] for the exemption to apply and as has been discussed above there has to be an employment contract in place. In terms of section 1(1) of the Act[45], Republic is a defined term and should be considered when determining whether a person renders services in the Republic or outside the Republic, for purposes of section 10(1)(o)(ii). The most general types of services rendered in the free or low tax foreign jurisdictions are in various industries such as aviation, construction, information technology etc. It could also include services on a cruise ship or patrol boat. The exemption for these residents are contained in section 10(1)(o)(i) which is not discussed in this dissertation. However, where these residents are denied a section 10(1)(o)(i) exemption, they may apply the provisions of section 10(1)(o)(ii) to obtain the exemption, provided all the applicable requirements are met to claim a valid section 10(1)(o)(ii) exemption.[46]

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[41] Supra note 22 section 4.1.2, 'The term "any employer" means that services rendered to a resident or non-resident employer could qualify for exemption'.

[42] The definition of employee as defined in the Oxford English Dictionary "is someone who is paid to work for someone else"

[43] Supra note 41.

[44] Supra note 22 section 4.1.4

[45] Supra note 1 - the definition of republic, "includes South Africa and when used in a geographical sense, includes the territorial sea thereof as well any other area outside the territorial sea which has been or may be designated, under international law and laws of South Africa, as areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources"

[46] SARS Interpretation Note 34 (Issue 2), available at https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-34%20-%20Exemption%20Remuneration%20Officer%20Crew%20Member%20Ship.pdf, accessed on 29 May 2020

If there are any payments received outside of the services being rendered such as for relinquishment, termination loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right to be appointed) to an office or employment but not in relation to any services rendered, these amounts will not be exempt under section 10(1)(o)(ii).

In addition, any services rendered in South Africa will still be subject to tax in South Africa with no exemption applying. In instances where a resident has earned remuneration within and outside of South Africa, there is a requirement that the resident will need to apportion the remuneration in order to determine the portion that will be subject to the exemption. In referring to SARS Interpretation Note 16, SARS accepts the following method to calculate the exempt portion of the remuneration:

$$\frac{\text{Work days outside the Republic for the period}}{\text{Total work days for the period}} \times \text{Remuneration received during the period}$$

Following from the *Marshall Case*[47] "Accordingly, it is now settled law that courts should not have regard to SARS interpretation notes when interpreting legislation, but may have regard to interpretation notes where the practice of SARS is evidenced by an interpretation note which has been recognised by SARS and the taxpayer".[48] SARS relies on interpretation notes issued when auditing taxpayers and when responding to objections and it has become a practice prevailing in SARS to rely on interpretations notes issued, which therefore means that SARS is bound (but not the taxpayer)

In terms of the Interpretation note[49], it is said that "Taxpayers must be in a position to substantiate their absences from the Republic and that the absences were under an employment contract and to render services, and may thus be required to provide some form of documentation when claiming the exemption."[50] This supporting documentation may include, without limiting the scope of what could be requested by SARS, letters of secondment, employment contracts for foreign services, travel schedules and copies of passports to verify the period or periods worked outside the Republic.

2.1.1.5 Specific qualifying periods:

[47] *Marshall NO and Others v Commissioner for SARS* (CCT208/17)[2018]ZACC11(25 April 2018), page 6: "Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning given to a statutory provision? It might be conceivably justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliance precepts. It is best avoided."

[48] Status of SARS Interpretation Notes, available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status of sars-interpretation-notes-.html, accessed on 12 July 2020

[49] Ibid

[50] Section 46(4) of the Tax Administration Act 28 of 2011.

2.1.1.5.1 Period or periods exceeding 183 full days in aggregate:

There are qualifying periods for the exemption to apply. In order to qualify, a person must be in employment outside the Republic, for at least 183 full days during any 12-month period. [51]

In addition to the 183 day full day's requirement, the resident must also have rendered services outside the Republic for a continuous period exceeding 60 full days in the same period of any 12 months. Therefore the 183 day's requirement does not need to be continuous, but the 60 day requirement has to be continuous.[52]

There may be instances where South African residents are employed on a contractual basis over certain periods of a year. This may arise where there are broken periods of employment, where the South African resident is unemployed and not in a contractual agreement but that he or she then physically remains outside of South Africa. These days cannot be used in determining the exemption as the resident is unemployed and the exemption only applies to South African residents that are employed. [53]

On the other hand, there could be South African residents who have mandatory rest periods as per their contract of employment, these rest periods can be used in the "days test". Where a resident is in transit between two places such as the point of departure and the point of entry of a country, these days are considered to be days outside South Africa. [54]

In terms of Section 10(1)(o)(ii), Proviso B[55], the following two categories of employees are specifically excluded from the exemption:

- In terms of Proviso B (AA), a public office holder, as contemplated in section 9(2)(g), who must be appointed or deemed to be appointed under an Act of Parliament. [56]

- In terms of Proviso B (BB) employees of employers, as contemplated under section 9(2)(h), in the national, provincial or local sphere of government, certain constitutional institutions, national and provincial public entities listed in schedules 2 and 3 of the Public Finance Management Act, and municipal entities. [57]

[51] Supra note 22, section 4.1.5 - 'A 'Full day" means 24 hours (from 0h00 to 24h00). The 183 full days do not have to be consecutive or continuous but, in order to meet the exemption requirements, a total of 183 full days in any 12-month period must be exceeded. It is not necessary to exceed this period by a full day. Any amount of time in excess of 183 full days, such as a few hours, will be sufficient'.

[52] Ibid s 4.1.5 - 'Calendar days may be looked at, not only working days, when calculating whether a person has been outside of the Republic for 183 full days. Weekends, public holidays, annual leave days, sick leave days and rest periods (as required under the specific terms of a contract of employment) that are spent outside the Republic are taken into account for calculating the period or periods outside the Republic'.

[53] Ibid s 4.1.5

[54] Proviso (A) to section 10(1)(o)(ii) of the Income Tax Act No.58 of 1962

[55] Proviso (B) to section 10(1)(o)(ii) of the Income Tax Act No.58 of 1962

[56] Under section 9(2)(g) of the Income Tax Act No 58 of 1962

[57] Supra note 22 section 4.1.6

2.1.1.6 Section 10(1)(o)(ii) Amendment: Limitation of the exemption:

As discussed above, the foreign employment will no longer be fully exempt but only R1.25 million will be exempt in respect of each year of assessment during which the requirements of section 10(1)(o)(ii) are met. It is understood that the qualifying criteria as discussed above will remain the same.

Therefore, any foreign remuneration earned by a South African tax resident in relation to services rendered outside of South Africa, above the R1.25 million limit will now be taxed in South Africa as opposed to previously, where the full amount of the foreign remuneration would have been fully exempt in South Africa.

Double taxation may arise in respect of the portion of the remuneration earned over and above the R1.25 million. This could happen where there is no DTC or where a DTC does not provide a sole taxing right to one country, which means that both countries will have the right to tax the income. The country of residence; in our case South Africa, will need to provide double tax relief.

There are a few alternatives available to residents who are affected by Section 10(1)(o)(ii) and who would like to claim relief from double taxation on their employment income. These relief mechanisms are section 6quat (domestic tax relief), to consider the possibility of tax emigration (discussed in Chapter three) or the application of a DTC if there is one (discussed in chapter four).
In terms of domestic law, residents employed in a foreign country, may be granted the section 6quat[58] relief which is a unilateral tax credit[59] in respect of foreign taxes on income. It is subject to section 6quat (2) which provides that the credit shall not be granted in addition to any relief provided under a double tax treaty. It may however be granted in substitution for double tax treaty relief. The rebate is deducted from the normal tax payable of a resident in whose taxable income there is included specific categories of income.
This credit (rebate) may be claimed on assessment when an individual submits an income tax return, provided that certain requirements are met.

In terms of section 6quat (1A)[60], the rebate shall be claimed to the extent that the relevant income in terms of section 6quat (1) is included in taxable income and normal tax payable.

Further, section 6quat (1B)[61] of the Act provides that the rebate shall not in aggregate exceed an amount which bears to the total normal tax payable the same ratio as the total taxable

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[58] Of the Income Tax Act No.58 of 1962; Section 6quat (1C), Section 6quat (3)(4) and (5) will not be discussed as it goes beyond the scope of this dissertation.
[59] Unilateral relief is the granting of relief from the effects of international double taxation on the basis of domestic legislation rather than the provisions of a double tax agreement.
[60] Section 6quat(1A) – For the purposes of section 6quat(1), 'the rebate shall be an amount equal to the sum of any taxes on income proved to be payable to any sphere of government of any country other than the Republic, without any right of recovery by any person (other than a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment prior to such year of assessment by such resident in respect of any income which is included in that residents taxable income'.

income attributable to the specific category of income in respect of which the rebate may be claimed, bears to the total taxable income. The formula to determine the section 6quat credit is

Taxable Income derived from all foreign sources (A) x Normal Tax payable on (B)
Taxable Income derived from all sources (B)

Therefore, South African residents working abroad and where foreign tax has been levied on their foreign source income, will be in a position to reduce their South African normal tax liability by claiming a rebate in respect of foreign taxes paid on their foreign income. This will however not apply to South African residents earning income in the UAE as this is a tax free jurisdiction and there would be no foreign tax levied on their foreign remuneration.

An employer may assist the employee at his or her discretion, under paragraph 10 of the Fourth Schedule of the Income Tax Act, to apply for a directive from SARS to avail of this section 6quat credit on a monthly basis to determine the employee's tax liability[62].

It should be noted that as the amount referred to in section 10(1)(o)(ii) is exempt up to the R1.25 million the employer need not apply to SARS for a directive, provided that the employer is comfortable that the conditions will be satisfied (ie the amount is exempt) it need not withhold employees tax on that amount.
The South African Revenue Service frequently asked questions[63] indicates that it sees the R1.25 million exempt amount as accruing to the employee first and then the taxable amounts thereafter. Thus, the employer need not deduct the PAYE up to the first R1.25 million paid to the employee that qualifies. The employer may apply for a directive for the rest if tax is paid elsewhere and the correct documentary evidence can be provided per the interpretation note[64] to show that a credit will apply.
Another alternate mechanism available to South African residents to obtain some relief from having to pay income tax on the excess foreign remuneration would be to apply the relevant articles of a Double Tax Convention, (DTC) to seek relief for juridical taxation or to consider emigration and to becoming tax non-resident.

Conclusion:

The Section 10(1) (o) (ii) amendment will only affect South African tax residents working abroad; who have employment contracts in place with employers and who have earned foreign remuneration in excess of R1.25 million rand. For any remuneration above the exemption threshold this will now be subject to normal income taxation. Where foreign

[61] of the Income Tax Act No.58 of 1962- 'Notwithstanding the provisions of subsection (1A); (a) the rebate or rebates of any tax proved to be payable as contemplated in subsection 1A, shall not in aggregate exceed an amount which bears to the total normal tax payable the same ratio as the total taxable income attributable to the income, proportional amount, taxable capital gain or amount, as the case may be, which is contemplated in subsection (1), bears to the total income.'

[62] https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Foreign-Employment-Income-Exemption.aspx , accessed 20/02/2020

[63] https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G29-PIT-FAQs-Foreign-Employment-Income-Exemption.pdf

[64] SARS Interpretation note 18 (Issue 4), page 85, section 9

taxes are being paid on this remuneration, the South African resident may elect to apply for relief in terms of section 6quat. However, for the South African resident employed in a country where there is no DTC or where there is no sole taxing right, this amendment may have a negative effect. Tax Emigration and the application of Double Tax Agreements will be discussed in Chapters 3 and 4 respectively.

3 CHAPTER THREE: EMIGRATION AS A RESULT OF SECTION 10(1)(o)(ii) AMENDMENT:

Due to the implementation of the change to the foreign employment exemption, many South African's have made the decision to leave South Africa by "formal emigration". This being a term referred to by the South African Reserve bank (SARB) and has now been branded as "financial emigration". In the discussion below the technically correct term "formal emigration" will be used.

The common misconception is that "to escape the tax consequences of the March 2020 amendment the only solution would be to formally emigrate from South Africa".

A contributing factor to this misconception is that many South African's are not aware of the differences in relation to emigration as result of giving up one's citizenship (emigrating), formal emigration and tax emigration.

It is necessary therefore to discuss briefly the different forms of emigration elected by South African's in this regard.

3.1 The meaning of 'Emigration':

In referring to the Oxford English dictionary, "emigration is the act of leaving a resident country or a place of residence[65] to settle permanently in another[66]". This could be achieved through giving up or intending to give up one's citizenship and this would be regulated through the Department of home affairs. The other form of emigration would be when someone decides to formally emigrate as referred to in the South African Reserve Bank manuals, this being exchange control emigration.

Should a person decide to formally emigrate with SARB he/she would be able to retain their citizenship with South Africa and therefore retain his/her passport. Formal emigration is merely formalising ones exit for exchange control purposes. It is not true that formal emigration corrects non-compliance of South African requirements and this new tax amendment. Tax Emigration and not formal emigration dictates an individual's SARS exposure.

3.2 "Exchange Control Emigration- Formal Emigration"

South African residents, including legal entities and individuals, have been subject to some form of exchange control since 1939, the foundation thereof being the Currency and Exchanges Act[67] and the Exchange Control Regulations[68] which were promulgated in 1961.

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[65] Definition of emigrate- Miriam Webster Dictionary, en.m.wikipedia.org, accessed 29 May 2020

[66] https://www.oxfordlearnersdictionaries.com/definition/english/emigration

[67] Act 9 of 1933, https://www.gov.za/documents/currency-and-exchanges-act-8-mar-1933-0000#:~:text=9%20of%201933.%20The%20Currency%20and%20Exchanges%20Act,relating%20to%20legal%20tender%2C%20currency%2C%20exchanges%20and%20banking , accessed 17 July 2020

[68] https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Legislation/Documents/Exchange%20Control%20Regulations,%201961.pdf, accessed 17 July 2020

Whilst there has been significant relaxation of the rules over time, certain limits and restrictions remain in place, and all cross-border transactions are reported via SARB's Cross-Border Reporting System[69].

It is important for South African resident individuals living abroad or looking to move abroad to understand what the Exchange Control (Excon) implications are especially given that the definition of a South African resident for Excon purposes differs to that applied for tax residency.

In terms of the SARB Exchange control policy, private individuals or persons who reside permanently abroad or who intend to do so, will be required to complete a MP336(b) form and this form must be sent to an Authorised Dealer for processing and for onward transmission if need be to the South African Reserve Bank. An Authorised Dealer is a commercial bank in South Africa that is authorised to buy and sell foreign exchange.

As part of the completion of the formal emigration process, a tax clearance application would need to be submitted to the South African Revenue Service (SARS). This application can only be submitted to SARS once the Form MP336 (b) has been completed and signed by the applicant and verified by the Authorised Dealer.

The MP336(b) form is a SARB form which essentially covers the applicant individual or family's personal statement of South Africa assets and liabilities, together with proof provided in support thereof (Refer to an Extract in terms of Annexure E[70],[71]).

With the process of formal emigration, the applicant must be able to show that they have been granted permanent residence in the country that they are emigrating too. A copy of this needs to be included in the application. If permanent residence has not been granted yet, the applicant must at least show a path to permanent residence and confirm their intention to settle abroad permanently.

Where a person has been living abroad for more than 5 years and has no assets in South Africa other than insurance policies or inheritance (local assets that an emigrant may become entitled to as an heir or beneficiary of an estate), the tax clearance requirement mentioned above would be waived[72].

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[69] Ibid, page 34 and 239

[70] MP336(b) (form): As an example, if the resident has a fixed property/ies. The original title deeds would need to be provided, and if there is still a bond on the property, the applicant would need to advise what their intentions are, i.e will it be rented out or will it be sold. If it is being rented out, a copy of the lease agreement will need to be provided. If the property is not being rented out, the bank would require a letter of undertaking from the individual advising how he will be servicing the debt on the property.

[71] MP336 (b) form: if the individual has listed investments, an updated statement will need to be provided showing the current values of the investments. The applicant can either liquidate the portfolio and remit the proceeds offshore in line with the foreign capital allowance or retain it in South Africa. Any related dividends would be transferable offshore. Should the value exceed the foreign capital allowance, a special application can be made to SARS and SARB to externalise these funds.

[72] https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Documents/

In terms of the current SARB rules, family units emigrating to any country outside the common monetary area of South Africa will qualify, at the time of emigration and after all their assets have been brought under the administration of an authorised dealer, to be accorded the following facilities[73]:

- A foreign capital allowance of up to R20 million per calendar year after all liabilities including the cost of the relevant passenger tickets and the applicable travel allowances in (b) below have been provided for;

- In addition a travel allowance applicable to each member of the family unit on the basis and subject to the prescribed limits- which is a single discretionary allowance within a limit of R1 million per calendar year available to all South African residents who are 18 years and older, and in possession of a valid South African Identity document or smart identity document ; individuals, who are under the age of 18 may not avail of a single discretionary allowance as outlined above, but may avail of a travel allowance not exceeding an amount of R200 000 per calendar year;

- Individuals may not avail of a travel allowance more than 60 days prior to their departure and must present a valid passenger ticket when travelling by air, rail or ship; and

- A widow or a widower or a single parent with accompanying dependant(s) may also be regarded as a family unit.

- Single persons may be accorded a foreign capital allowance of up to R10 million per calendar year after all liabilities including the cost of the relative passenger ticket and the applicable travel allowance, have been provided for. Currently, South African residents may take more than R10 million, subject to a 4–6-month SARS tax clearance process (SARS performs a full audit).

- Quoted and unquoted securities may be exported as part of or in lieu of the applicable foreign capital allowance based on the market value thereof at the time of availing of the applicable allowance. The relevant securities must be endorsed by the authorised dealer as 'non-resident'.

- Provided that the prescribed SARS Customs Declaration is completed any household and any personal effects, motor vehicles, caravans, trailers, motorcycles, stamps, coins, and minted gold bars (excluding coins that are legal tender in South Africa (per family unit or single person, within the overall insured value of R2 million may be exported.

Currency%20and%20Exchanges%20Manual%20for%20Authorised%20Dealers.pdf Currency and Exchanges Manual for Authorised dealers – section B.2 (K) and B.2 (J), Pages 84 and 91, accessed 29 May 2020.

[73] Ibid-sec B.2 (J)(vii)(a)(hh)

- Further, in terms of formal emigration, a resident may only send funds offshore once their emigration has been approved by SARB. An emigrant will then have a capital account (a blocked account[74] and a transferable account[75] remaining in South Africa).

3.3 Tax Emigration:

For the purposes of tax emigration, a person will be considered to be non-resident based on one of the following:

- In terms of a Double Taxation Agreement (to be discussed further in Chapter 4);
- A person who has decided to emigrate, meaning a person who goes to a country to take up permanent residence, to become ordinarily resident of that country; and
- A natural person who is resident by virtue 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. Residence will therefore cease from the day that the person left the Republic.

Interpretation Note 4 (issue 5) states that "the continuous period of 330 full days cannot be observed over a single year of assessment, because the person must have been physically present in South Africa for at least 92 days during that year in order to qualify as a resident during that year of assessment. The continuous period of at least 330 full days will therefore always extend over two years of assessment"[76].

In terms of section 9H of the Income Tax Act[77], if a person ceases to be a tax resident of South Africa by relocating to another country in any year of assessment, the individual will be subject to an exit tax in the form of capital gains tax. Section 9H (2) [78] provides that the person must be treated as having disposed of all of their assets on the date immediately before the day on which they cease to be resident. In terms of Section 9H (4), the person will be deemed to have disposed of all their assets with the exception of immovable property, , an asset of a permanent establishment in South Africa, a section 8B share within the first five years of acquisition, a section 8C share or equity instrument that has not yet vested in the person and a section 8A option to acquire a share. This means that capital gains tax will apply to all qualifying assets except for immovable property and share options in respect of equity instruments. The basic calculation for calculating a capital gain is to establish the market value of the assets on the day preceding the date on which they cease to be resident and deducting from that value the base cost of the asset. Capital gains tax will apply regardless of the fact that no cash is received as there is no actual sale. This can lead to liquidity problems for the individual.

[74] Authorised Dealer, (Investec Bank), information obtained via email on 08 April 2020: "A Blocked account is an account opened for any sale proceeds derived from any remaining assets in South Africa for example, surrendering a retirement annuity or selling a property."
[75] Ibid : "A Transferable account is an account opened for the deposit of income related funds, for example, interest or dividend income."
[76] https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-04%20-%20Resident%20definition%20natural%20person%20physical%20presence.pdf, dated 3 August 2018, accessed 29 May 2020
[77] Section 9H of the Income Tax Act no.58 of 1962
[78] Section 9H Paragraph 2 of the Income Tax Act no.58 of 1962

With the above said the person's year of assessment is deemed to end on the date immediately before the day that he or she ceases to be a resident- there would a requirement for the person to submit a 'year-end' provisional tax return on the day before he or she becomes non-tax resident.

3.4 The Impact of Formal Emigration in relation to the South African Reserve Bank on South African tax collections:

From a trend perspective, for the period 2017 to 2019 there have been a number of formal emigration applications. Between 2017 and 2018 there was a 13% increase in the number of applications and a 7% increase in 2019, on an extrapolated basis.

In terms of the trend analysis, it has further been identified that the most popular destinations were the UK (around 30%), followed by Australia (around 23%) and then Canada /US and New Zealand (were joint with 6%-10%)[79]

In terms of the UK's office for national statistics[80], an estimated 7300 persons emigrated from South Africa to the UK in 2017. There is released data, which reflects that South Africa is currently ranked eighth on a list of foreign nationals living in the country, with an estimated 246 000 nationals currently living in the United Kingdom.

In terms of Australia's Department of home affairs (DOHA), the focus is on people who have obtained a permanent visa onshore, the number of persons arriving during a given time period, and the number of people who have been granted a permanent protection visa onshore. Combined this added to a total of 5,397[81] South African's over the time period 2016/2017 and 2907 South Africans over the 2017/2018 period.

In terms of the latest data from Stats New Zealand[82] there has been a sharp rise in South African migrants, with 11 400 people moving to the country between April 2019 and December 2019. Stats New Zealand classifies migrants as overseas residents who arrive in New Zealand and cumulatively spend 12 of the next 16 months in the country. The duration of stay is based on observed travel histories from linked arrival and departure records.

Further, in terms of these increased emigration statistics above, it has been highlighted that emigration is accelerating. There has also been an increase in skilled employees leaving South Africa for those countries mentioned above.

"It is said around 25000 skilled people are leaving South Africa each year, with around 1000-2000 of these people also being extremely wealthy people who are able to buy their way into other countries. This averages out to around 68 skilled people, and between two and five

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[79] Authorised Dealer, (First National Bank), information obtained via email on 08 April 2020
[80] www.ons.gov.uk/national statistics/January 2019- accessed 29 May 2020 and https://businesstech.co.za/news/lifestyle/349577/this-is-how-many-south-africans-have-moved-to-the-uk/
[81] https://immi.homeaffairs.gov.au/visa/working-in-australia
[82] https://www.stats.govt.nz/information -releases/international margin-April 2019

ultra-wealthy South African's leaving the country every day. "These are potentially very high-quality taxpayers that South Africa is losing"[83]

It is worth considering whether these emigrants leaving South Africa have subsequently eroded the tax base. It is acknowledged that SARS derives its revenue from multiple sources, including VAT, Company income tax, fuel levies, dividends, customs & excise duties as well as other direct & indirect taxes. The single biggest contributor is Personal Income tax at just under 40% of the total receipts[84]. Further, it is submitted that the revenue collections prior to the Global Financial Crisis of 2008/9 rose exponentially and peaked at a 17.8% growth rate. Subsequent to that, and especially over the past 5 years, saw a steady decline in the growth rate of overall receipts as derived in the table below[85]:

Year	**Tax Revenue Collection per annum**	**Total Revenue Collection growth as a % per annum**	**Total Revenue Collection growth per annum**	**Personal Income Tax revenue collection percentage in relation to total revenue collection**
2014/15	986,300,000,000	9.6	86,300,000,000.0	33.8%
2015/16	1,070,000,000,000	8.5	83,700,000,000.0	36.4%
2016/17	1,144,100,000,000	6.9	74,100,000,000.0	37.2%
2018/19	1,287,700,000,000	5.9	71,200,000,000.0	38.3%
2019/2020	1,358,935,000,000	5.5	71,235,000,000.0	38.8%

The government has mentioned in the National Budget Speech 2020, that the government wants to encourage all South African's working abroad to maintain their ties to the country.

Therefore, with the government raising the cap on the foreign remuneration exemption by South African tax residents to R1.25 million per year from 1 March 2020, we will need to see how this will impact the total revenue collection for the South African economy.

[83] https://businesstech.co.za/news/lifestyle/337531/4-scary-facts-about-emigration-in-south-africa
[84] https://www.sars.gov.za/AllDocs/Documents/Tax%20Stats/Tax%20Stats%202019/Tax%20Stats%202019%20Full%20doc.pdf, accessed 31 may 2019 and http://www.treasury.gov.za/documents/national%20budget/2015/review/chapter%204.pdf; http://www.treasury.gov.za/documents/national%20budget/2016/review/chapter%204.pdf; http://www.treasury.gov.za/documents/national%20budget/2017/review/chapter%204.pdf http://www.treasury.gov.za/documents/national%20budget/2018/review/chapter%204.pdf http://www.treasury.gov.za/documents/national%20budget/2019/review/chapter%204.pdf and http://www.treasury.gov.za/documents/national%20budget/2016/review/chapter%204.pdf, accessed 31 May 2020
[85] Ibid

3.5 The Impact of Formal Emigration on Tax Residency:

As we have discussed above formal emigration has no impact on the tax residency of a person[86]. There is absolutely no correlation between the two, acquiring approval from SARB to emigrate formally is not connected to an individual's tax residency. An individual's tax residence is not automatically broken when he or she formally emigrates.

Prior to the 2019 budget speech, the formal emigration process was seen as an important part of showing intent of the person i.e. strengthening the position with SARS in determining the residency of an individual or person.

As a result of this many South Africans opted to emigrate formally and to relocate to nations such as the UK, the UAE, Canada, Australia and New Zealand.

However, during the 2020 National Budget speech it was acknowledged that this formal emigration process is "administratively burdensome"[87] and that it will need to be phased out for individuals.

The intention behind this change is to allow individuals who work abroad more flexibility, provided funds are legitimately sourced and the individual is in good standing with SARS. Individuals who transfer more than R10 million offshore, which is what is currently allowed under the foreign investment allowance as discussed above, will be subject to an even more stringent verification process.[88] Such transfers will also trigger a risk management test that will include certification of tax status and the source of funds, and assurance that the individual complies with anti-money laundering and countering terror financing requirements prescribed in the Financial Intelligence Act (2001). This will be phased in from 1 March 2021.

Furthermore, under the new system natural person emigrants and natural person residents will be treated identically. Additional restrictions on emigrants, such as the restriction on emigrants being allowed to invest, and the requirements to only operate a blocked account are being repealed. The concept of emigration as recognised by the SARB will be phased out and replaced by the verification process.

The aim with this phasing out of exchange control regulations will result in persons no longer being able to apply for formal emigration. The determination of tax residency for emigrants will continue to be based solely on the ordinarily residence or the physical presence tests.

'*It is said that this proposed modernisation will likely be welcomed by South Africans living both locally and abroad as well as by the South African business community'*. [89] The changes are awaited in the 2021 tax year.

[86] It could be an indicator of intention to end tax residency.
[87] https://www.treasury.gov.za/documents/national/2020 Budget review, accessed 29 May 2020
[88] http://www.treasury.gov.za/documents/national%20budget/2011/review/Annexure%20e.pdf
[89] https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/tax/budget-speech-alert-2020-the-time-has-arrived-proposed-modernisation-of-south-africas-exchange-control-regime.htm; accessed 29 May 2020

Conclusion:

For the period 2017 to 2019 there have been a number of formal emigration applications. With the implementation of the section 10(1)(o)(ii) amendment and the misconception around formal emigration and tax emigration many South Africans have made the decision to leave South Africa to escape the adverse cash flow consequences of having to pay taxes in both countries. It can be seen above that formal emigration and tax emigration are two independent processes and the overall result of taxpayers choosing the option of formal emigration will not necessarily result in the avoidance of having to pay tax in South Africa. Time will tell as to how the March 2021 changes will unfold in relation to the proposal to phase out the option of formal emigration' and the introduction of the verification process.

4. CHAPTER FOUR: DOUBLE TAXATION AGREEMENTS:

4.1 Introduction:

As was discussed previously, the Section 10(1) (o) (ii) amendment will only affect South African tax residents working abroad, who have an employment contract in place, services are to be rendered outside South Africa, and foreign remuneration is greater than R1.25 million rand. Any remuneration above this exemption threshold will now be subject to normal income tax. In countries where foreign taxes are not being paid, such as the UAE and in the case where SA residents have not made the decision to tax emigrate , the only other alternative for a South African tax resident to obtain some form of relief from the application of the Section 10(10(o)(ii) amendment would be to apply section 6quat (see chapter two, reference 2.1.1.6) and then compare this to the applicable article of a double tax Convention (DTC) between South Africa and the source country, where the services are rendered, in order to seek relief for juridical double taxation.

As was addressed in Chapter One, the original intention of the DTC is to eliminate double taxation. As with BEPS Action 6 and now the MLI it is being clarified that DTC's were never intended to generate double non-taxation.

Therefore, with this amendment it is necessary to then consider whether this section 10(1)(o)(ii) amendment will provide relief for South African tax residents working abroad as well as whether this amendment will eliminate non-double taxation.

We will therefore analyse the cross-border tax treaty arrangements with South Africa in order to determine in which jurisdiction the income from employment will be taxed.

It is possible that even if the individual is said to be a resident of a foreign country for tax purposes, a tie-breaker provision in a double taxation agreement may override this conclusion and treat the individual as tax resident solely in their home country. This will change the tax consequences in the foreign country.

This chapter provides a brief overview of the 'Income from Employment' article and terminology for the purpose of a case study approach to illustrate the income tax consequences applicable to a South African resident in light of the section 10(1)(o)(ii) amendment.

For the domestic tax laws analysis, reference is made to Chapter two and Annexures A-D for the domestic tax laws in South Africa and the source countries, Australia, New Zealand, the UAE and the UK respectively.

The case studies consider the overall income tax consequences for a South African national receiving foreign remuneration for services rendered in countries abroad. Hereinafter referred to as the following: Australia (Case Study 1); New Zealand (Case Study 2); The UAE (Case Study 3) and the UK (Case study 4). The case studies consist of the following:

- The current South African income tax consequences with the exemption threshold – Section 10(1)(o)(ii) amendment;
- The current Australian, New Zealand, the UAE and UK income tax consequences. The allocation of taxing rights in terms of the employment article of the DTC's in force
- The overall income tax consequences after applying the DTC's above.

The purpose of structuring the tables this way is to firstly illustrate the domestic income tax consequences of the resident country and the source country prior to the application of the relevant DTC and then secondly, the overall tax consequences of a SA resident's foreign remuneration after applying the respective DTC's allocation of taxing right rules.

4.2 Overview of the DTCs and Terminology under South Africa's DTCs in force:

4.2.1 Interpretation of Treaties:

In determining whether domestic law overrides the DTC, one view is that the DTC takes precedence over domestic law as the DTC obligation has the same force as the Constitution. [90] The Supreme Court of Appeal in the *Tradehold* case viewed that a DTC modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.[91]

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[90] J. Hattingh, "Elimination of International Double Taxation", para 36.14

[91] *Commissioner for South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61; [2012] 3 All SA 15 (SCA); 2013 (4) SA 184 (SCA) (8 May 2012)

In the recent case, *Fowler v HMRC*[92] and the decisions in the case to date echoes the Tradehold case as mentioned above in that the DTC will take precedence over domestic law.

This case involved a South African resident who undertook diving engagements in the waters of the UK's continental shelf for the year 2011/2012 and 2012/2013 tax years.

HMRC's arguments were that Mr Fowler was liable to pay UK income tax for this period. In terms of their argument, Mr Fowler's liability was dependent on the application of the DTC between the UK and South Africa. Article 7 of the Treaty provides that self-employed persons are taxed only where they are resident (i.e. South Africa), whereas Article 14 provides that employees may be taxed where they work (i.e. the UK). For the purpose of the appeal, the parties assumed that Mr Fowler was an employee.

Mr Fowler contended that he was not liable to pay tax in the UK. His case was centred on a "deeming provision" within UK's domestic law, section 15 of the UK's Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), which treats the performance of duties of employment as a diver as trading in the UK for income tax purposes.

Mr Fowler argued that since he is treated as self-employed for income tax purposes, he must be treated as self-employed under the Treaty and would therefore only be taxable, if at all, in the UK in terms of business profits (Article 7 of the DTC).

This issue divided the courts. The First-tier Tribunal was persuaded by My Fowler's argument but the Upper Tribunal (UT) allowed HMRC's appeal. The court of appeal was divided on the question, with the majority agreeing with Mr Fowler which was that the income derived was income from trade, to be dealt with under article 7 of the DTC, *and ('there can be no room for doubt about the answer to the question…'*

HMRC then appealed to the Supreme Court and by a unanimous judgement the Supreme Court came to an opposite conclusion. It upheld HMRC's appeal and it was held that Mr Fowler should be treated as an employee and will be subject to tax in the UK in accordance with article 14 (Income from employment) and not article 7 (business profits). The court therefore overturned the decision of the Court of Appeal.

This case and the unanimous decision of the Supreme Court brought clarity around treaty interpretation which saw conflicting judgements from the first-tier tribunal and the Upper tribunal. A tax dispute expert at law firm Pinsent Masons said: "The decision is useful in terms of clarifying how terms will be interpreted in a double tax treaty and therefore confirms that when a fiction is created under one of the signatory's tax codes this will sometimes be disregarded so as not to lead to a result which appears contrary to the purpose of the treaty"[93]

In terms of the judgment, it was clear that all parties were in agreement with the general approach to the interpretation of the Treaty which was in accordance with the article 31(1) and

[92] [2020] UKSC 22 (20 May)
[93] https://www.pinsentmasons.com/out-law/news/deeming-provision-uk-not-apply-to-treaty-supreme-court

(4) of the Vienna Convention[94] together with Article 3(2) of the Treaty[95]. Therefore, it was understood between the parties that the general approach to the interpretation of the Treaty would be as follows:

(1) If the term is defined in the treaty, the treaty definition is to be applied;
(2) If the term is undefined, a reference to its domestic tax law meaning is required by article 3(2)[96], unless the context requires otherwise;
(3) If the article 3(2)[97] does not lead to a reference to domestic tax law, the autonomous meaning must be determined in accordance with the rules in the Vienna Convention.

Therefore, this case highlighted that there was no definition of employment in article3(1)[98]. In terms of article 3(2), it was established that this would apply with "*full force*"[99]

In applying article 3(2)[100]and in referring to UK income tax law, Fowler believed that in application of section 15 of the ITTOIA that "*Section 15 of ITTOIA compelled the court to treat a qualifying diver as carrying on a trade for all purposes under UK income tax law and therefore also under the Treaty as required by article 3(2) with the result that article 7 rather than article 14 applied to the taxation of his earnings.*"[101]

However, the Supreme Court in terms of the judgment came to the opposite conclusion as we have established above. The reason provided by Lord Briggs in giving the judgment of the Supreme Court for this is that "the starting point is the question of which articles 7 and 14 of the article applies to Mr Fowler's diving activities depends upon the true construction of those articles, in the context of the Treaty as a whole and its purposes, with the meaning of the terms within those articles ascertained as required by article 3(2) by reference to the Income tax law. The relevant terms are, in article 7, "profits" and "enterprise of a contracting state" and in article 14, salaries, wages and other similar remuneration" and "employment".

The guidance on how the Treaty was interpreted as a whole was found in the Vienna Convention on the Law of Treaties, concluded in May 1969, in the OECD commentaries on the OECD Model Tax Convention (the MTC")", with specific reference to Article 31(1)[102] and (4)[103], together with the application of article 3(2) which required reference to domestic UK tax law.

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[94] On the Law of Treaties, concluded in May 1969
[95] DTC South Africa and the United Kingdom No 172- Article 3 paragraph 2
[96] Ibid
[97] Ibid
[98] *Fowler v HMRC* [2020] UKSC 22 (20 May), paragraph 7, page 4
[99] Ibid, paragraph 9, page 4
[100] Supra, note 93
[101] Supra note 96
[102] Of the Vienna Convention on the Law of Treaties, concluded in May 1969- "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given in terms of the treaty in their context and in the light of its object and purpose…"
[103] Ibid- "A special meaning shall be given to the term if it is established that the parties so intended."

In applying article 3(2)[104] and referring to domestic legislation for interpretation, the Supreme court stated that "the meaning of employment is laid down in section 4 of ITEPA and his remuneration plainly constitutes employment income within section 6 and 7 of the ITEPA. UK tax law would not regard Mr Fowler as making profits from trade, or his business as that of an establishment.

"So, the question was whether section 15 gave a different meaning to the relevant terms. It was stated that section 15(1) uses employment and employment income in exactly the same way as prescribed by section 4, 6 and 7 of ITEPA and the phrase "performance of the duties of employment" in section 15(2) again uses employment in the same way".

Further, it was established that "*nothing in the Treaty required article 7 and 14 to be applied to the fictional, deemed world which may be created by UK income tax legislation"*, Lord Briggs said giving the judgment of the Supreme Court. Lord Briggs further said that *"If one asks, as is required, for what purposes and between whom is the fiction [that employed divers are self-employed] created, it is plainly not for the purpose of rendering a qualifying diver immune from tax in the UK, nor adjudicating between the UK and South Africa as the potential recipient of tax. "It is for the purpose of adjusting the basis of accounting UK income tax liability which arises from the receipt of income".* "*To apply the deeming provision…so as to alter the meaning of the terms in the Treaty with the purpose of rendering a qualifying diver immune from UK taxation would be contrary to its purpose. It would produce an anomalous result"*

The Supreme Court therefore said that "the Treaty should not be construed as to bring a qualifying diver within the business profits article of the treaty rather than the employment income article". "To do so would be contrary to the purpose of the Treaty. This is as recognised by article 2(1)[105], the Treaty is not concerned with the manner in which taxes falling within the scope of the Treaty are levied, "the judgement said.

Therefore, this case reaffirmed that a statutory fiction created by a deeming provision of the UK tax law did not affect how the terms of a bilateral tax treaty should be applied. The Supreme court held that "although the UK deeming provision in question applied to treat (the employed) taxpayer in question as if they were carrying on a trade, it did not change the fact that for the purpose of the treaty, the taxpayer derived "income from employment" and hence the income from employment article was applicable"[106].

Therefore, this case, provided a clarification of the interpretation of terms of DTC's in cases of conflict with the UK's income tax legislation and the DTC took precedence over the domestic tax legislation.

A DTC is classified as an international agreement[107] and under section 231 of the Constitution; all international agreements are to be incorporated as part of South African law. DTC's are

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[104] Supra note 93
[105] Supra note 93
[106] https://hsfnotes.com/pwtd/2020/05/26/tax-treaty-interpretation-the-limits-of-fiction/
[107] Section 231 of the Constitution of the Republic of South Africa, 1996

recognised into South African domestic law under section 108(2) of the Income Tax Act. The result of section 108(2) of the Income Tax Act, is that once a DTC is enacted it has the same standing as other domestic tax law provisions[108].

It is submitted that DTCs override domestic law because of the provisions of the Constitution and the way in which these provisions have been interpreted by the Constitutional Court, namely that ordinary obligations are created when an international agreement is domesticated. It is further submitted that section 108(2) of the Income Tax Act provides that a gazetted DTC shall have effect as if enacted in the Income Tax Act, conforms to the Constitution in this regard.[109]

Therefore, in support of the above, the approach to be followed in the interpretation of treaties will have regard to section 31 and 32 of the Vienna Convention of the Law of Treaties, 1969 (hereinafter referred to as the "VCLT") which is accepted as a codification of customary international law. Therefore, South Africa DTC's will have to be interpreted in accordance with those articles. Article 31 of the VCLT states to interpret DTC's in such a way that double taxation is avoided. By virtue of section 232 of the Constitution[110] Customary International Law is law in South Africa and has been acknowledged as such in previous treaty disputes[111].

4.2.2 The MLI Considerations:

The MLI will be considered briefly in the interpretation of DTC's as it is understood that the MLI may potentially modify the application of DTCs worldwide.[112] The intention of the MLI is to modify DTC's which have been concluded to eliminate double taxation.[113] As stated in Chapter 1, Article 6(1) and Article 6(3) of the OECD/G20's MLI is modelled on BEPS Action 6 with the intention of confirming that existing DTCs are interpreted to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. In terms of the application of Article 6(1)[114] and 6(3), UK, Australia, New Zealand, the UAE and South Africa have indicated that they do not reserve the right for Article 6(1) to not apply in terms of article 6(4) of the MLI, therefore replacing the existing preamble text of the DTC. Additionally, they have elected the optional wording of article 6(3) to apply.

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[108] *AB LLC and BD Holdings LL v Commissioner of the South African Revenue Services* (13276) [2015] zatc 2 (15 May 2015), point 5.
[109] I. Du Plessis, - The Incorporation of double taxation agreements into South African domestic law, 2015, vol. 18, n.4, page 1188-1204
[110] The Constitution of the Republic of South Africa,1996
[111] *Krok v CSAR* [2016](6)SA 317 (SCA)
[112] OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting, (2016). (OECD MLI 2016)
[113] Ibid
[114] http://www.oecd.org/tax/treaties/beps-mli-position-united-kingdom.pdf; http://www.oecd.org/tax/treaties/beps-mli-position-australia.pdf; http://www.oecd.org/tax/treaties/beps-mli-position-new-zealand-instrument-deposit.pdf; http://www.oecd.org/tax/treaties/beps-mli-position-united-arab-emirates-instrument-deposit.pdf

From the perspective of South Africa, regarding the interpretation changes to the preamble of a DTC, reference is made to *SIR v Downing* [115] which provided an explanation of the interpretation of treaties. This case provided the clarification of the legal hierarchy of DTCs in cases of conflict with SA's income tax legislation. In the Downing's case, the SA Special Income Tax court in 1972 was required to determine whether a condition existed in the 1967 Switzerland –SA DTC that would imply that relief in the source country (SA) was dependent on the taxpayer actually being subject to tax in the country of residence (Switzerland) where no such provisions in the DTC existed for such condition to apply.[116] SARS argued that the DTC was for the avoidance of double taxation in the preamble text of the DTC. Therefore it was implicit that the DTC could not be applied because the DTC could only apply when there was indeed double taxation applicable to a subject matter by reason of each country's domestic legislation.[117] The court disagreed with SARS and held that: '*the avowed object of the [treaty] is to avoid double taxation…It appears to me to be implicit in a purpose to enter into an agreement to avoid, or to prevent double taxation, that such agreement need not be confined to therapeutic measures but may include prophylactic measures as well. An agreement between two States which determines which of them shall have the sole right to levy or claim tax in specially defined circumstances, whatever their respective internal laws on the subject might be, would be effective prophylaxis against double taxation in those particular circumstances.*[118]

Therefore, in application of the principles as laid down in the above case to the changes made to the preamble of the DTC by the MLI's Article 6, the MLI will modify the purpose and objective of an existing DTC. The above case also implies that double non-taxation is legally permissible in the absence of any express, 'subject to tax clause' in a DTC that mitigates instances of double non-taxation. A DTC will therefore override domestic law in instances of a conflict between a DTC and South African domestic tax legislation.

Article 7 of the MLI[119] provides an additional mechanism to mitigate instances of treaty abuse by introducing a general anti-avoidance rule in the form of a principle purpose test (PPT). The PPT provides for the denial of treaty benefits under the DTC obtained directly or indirectly because of any arrangement or transaction having regard to all the relevant facts and circumstances. The benefit will only be granted if the underlying reason aligns with the purpose and objective of the preamble wording of the covered agreement (DTC). Tax authorities may attempt to apply Article 7(1) under the MLI as a method of tackling double non-taxation of foreign employment remuneration by attempting to prove an arrangement or transaction existed purely for deriving benefits under a DTC. However, such an attempt by tax authorities may appear aggressive and difficult to prove because of various underlying

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[115] *SIR v Downing* [1975], (4) SA 518 (A), 37 SATC 249

[116] J. Hattingh, T. Hageman and C. Kahlenberg, South Africa-Recent Developments Regarding the Taxation of Pensions under Tax Treaties from a German and South Africa perspective', Bulletin for International Taxation, vol. 71 No.1, (The Netherlands 2016), page 7-8, n.2.3.3.3, para.2

[117] Ibid, page 8, n.2.3.3.3, para 4

[118] *SIR v Downing* [1975], (4) SA518 (A), 37 SATC 249.

[119]OECD MLI 2016, Article 7(1)- 'Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.'

factors affecting an individual's decision to emigrate or to work in another country rather than a decision purely for tax planning purposes.

In terms of the application of Article 7(1), UK, Australia, New Zealand, the UAE and South Africa have not indicated that they reserve the right for Article 7(1) not to apply and it has been confirmed that Australia, New the UAE and the UK have chosen to apply Article 7(4)[120].

4.2.3 The OECD Commentary in South Africa

South African courts have accepted that the OECD MTC Commentary may be used in the interpretation of tax treaties despite South Africa not being an OECD member state. In terms of *SIR v Downing*[121] this has been upheld. It is therefore submitted that the same will apply in respect of those words and phrases normally found in a tax treaty which have been expressly incorporated into domestic law.

The authority for taking the OECD Commentary into account in interpreting a specific tax treaty can be found in article 32 of the Vienna Convention as was discussed above. However, article 32 only allows the supplementary means of interpretation (which includes the OECD MTC Commentary) to be taken into account to confirm the ordinary meaning of a term as established under the rules laid down in article 31 of the Vienna Convention if it is ambiguous, obscure, absurd or unreasonable.

As the wording of the SA DTC's in relation to countries, Australia, New Zealand, the UAE and the UK are the same and reliance is placed on the OECD Model and its commentary in the interpretation thereof an overview of the income from employment article and terminology will be discussed as it is applicable to all the countries selected (Australia, New Zealand, UAE and the UK) concerned.

The Remuneration article, Income from Employment', referenced as article 14 in the DTC specifically for the UAE, the UK and New Zealand provisions align closely to Article 15 of the Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital Model (hereinafter referred to as the "the OECD MTC").

[120]OECD MLI 2016, Article 7(4)-' Where a benefit under a Covered Tax Agreement is denied to a person under provisions of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, the competent authority of the Contracting jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting Jurisdiction to which a request has been made under this paragraph by a resident of the other Contracting Jurisdiction shall consult with the competent authority of that other Contracting Jurisdiction before rejecting the request'

[121] 37 SATC 249 and *ITC 1503* 53 SATC 342

The above DTC's are post the OECD MTC 2000 Model, where the Article 14- Independent Personal Services) was deleted from the Model Tax Convention on 29 April 2000 and replaced with Article 14- Income from Employment as described above.

In terms of the Australian DTC, this was prior to the 2000 OECD MTC Model amendment as discussed above and therefore the remuneration Article 15, 'Dependent Personal Services' of the DTC are aligned closely to Article 15 of the Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital Model (hereinafter referred to as the "the OECD MTC").

In accordance with the OECD Commentary[122], it was stated that this change in the model (year 2000) as discussed above was not intended to affect the scope of article 15 (Income from Employment). The clauses within article 15 of the OECD Commentary and the article 14 in the DTC specifically with references to the UAE, UK and New Zealand has therefore remained the same.

Therefore, having regard to the paragraphs of article 15 of the OECD MC[123], where it is necessary to consult Commentaries in order to aid in the interpretation of the provisions to be analysed which are identical to the OECD MC, the OECD MC Commentaries will be relied upon.

4.2.3.1 Income from Employment

The article dealing with remuneration derived from employment in SA's DTC's mostly use the following wording[124]:

'(1) 'Subject to the provisions of Articles 16, 18 and 19, salaries and wages[125] and other similar remuneration derived[126] by a **resident** of a Contracting state in respect of employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised such remuneration as is derived therefrom may be taxed in that other State"

(2) Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a contracting state in respect of employment exercised in the other contracting State in respect of an employment exercised in the other contracting state shall only be taxable in the first-mentioned state if:

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[122] OECD MC: Commentary on Article 15, footnote 1, page 175 (29 April 2000)

[123] OECD, Model Tax Convention on Income and on Capital 2017- The OECD wording and it's commentaries for the respective years in relation to the SA DTC's with United Arab Emirates, United Kingdom, Australia and New Zealand are the same therefore for general discussion on the wording reference is made to the 2017 OECD Model and in discussion of the countries specifically the OECD reference pertaining to the year the DTC was enforced is used.

[124] OECD, *Model tax Convention on Income and on Capital - Article 15, Paragraph 1 and 2 2017 – Volume A 2018/2019 Materials on International TP& EU Tax Law-Kees van Raad*

[125] P. Pistone, Article 15: Income from Employment 2.1.2., Global Tax Treaty Commentaries IBFD (Accessed 05 July 2020) – 'Domestic law does not define the term, "salaries and wages". It is understood that the OECD Commentary, Article 15: Paragraph 2.1 (2017) is in relation to benefits in kind received in respect of an employment (eg stock-options, the use of a residence or automobile, health or life insurance coverage and club memberships)

[126] OECD Model Commentary, Article 15: Paragraph 2.2 (2017) – 'Derived from is not defined, it essentially puts the emphasis on the fact that it is placed at the disposal of the recipient and linked to a source that is in fact, the employment, a payment not being indispensable for income to be derived'.

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned,
(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other contracting state; and
(c) the remuneration is not borne[127] by a permanent establishment which the employer has in the other State'

As discussed earlier, to determine which country has the right to tax the foreign remuneration income received, it is necessary to first determine in which country the individual/ person[128] is a resident.

4.2.3.2 Resident

This will be determined in terms of Article 4(1) of the OECD[129]. Therefore, in determining whether a person qualifies as a resident of a contracting state, regard must therefore be made to the domestic law of that State[130]. It could be said if two independent contracting states are applying their own respective domestic tax laws, a taxpayer might end up being classed as a resident in both states. "Absent, any further provision, the taxpayer, would face full liability to tax in both contracting states."[131]

In terms of Article 4(2) of the OECD it provides that "Whereby reason of the provisions of paragraph Article 4(1) an individual is resident of both Contracting Status, then this status shall be determined as follows:

(a) He shall be deemed to be resident only of the State in which he has a permanent home[132] available to him; if he has a permanent home available to him in both states, he shall be

[127] OECD Model Commentary, Article 15: Paragraph 7 (2017) - The OECD Commentary interprets 'borne by' as meaning deductible for income tax purposes and states that the proper test is not whether the remuneration was actually deducted, but whether it was allowed as a deduction'.[127] There is a discussion whether in article 15(2)(b) and (c) of the OECD Model where the "expression borne by" is in fact a synonym for "paid by" or on behalf of or has a different meaning. Accordingly, as indicated on the commentary on Article 15 of the OECD Model, 'the expression borne by should be interpreted in line with the obligation of the activity state to give a deduction under article 7 of the OECD Model in respect of remuneration'.
[128] B. Obuoforibo, Article 4: Resident 3.1.1., Global tax Treaty Commentaries IBFD (Accessed 05 June 2020) – "In terms of Article 3(1)(a) of the OECD MTC it provides that a "person" includes an individual, company and any other body of persons. This absent any limiting provision contained elsewhere, individuals are clearly contemplated as persons for the purpose of a "resident of a Contracting State".
[129] OECD, Model tax Convention on Income and on Capital - Article 4, Paragraph 1 – Volume A 2018/2019 Materials on International TP& EU Tax Law-Kees van Raad - "For the purpose of this Convention, the term "resident of a Contracting State" means any person who, under the laws of the State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein".
[130] Ibid, section 4.1 on Page 44
[131] Supra, note112
[132] OECD MC Commentary, Article 4 Paragraph 2, section 11, page A-164. 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 has a permanent home in one Contracting State and has made a stay of some length in the other Contracting State, "the permanent home criterion"

deemed to be resident only of the State with which his personal and economic relations are closer (centre of vital interests)[133];

(b) If the State in which he has a centre of vital interests cannot be determined, or if he has not a permanent home available to him in either state, he shall be deemed to be a resident only of the State in which he has an habitual abode[134][135];

(c) If he has a habitual abode in both states or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

(d) If he is a national of both States or neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

4.2.3.3 Analysis of Income from employment

In analysing Article 15(1) of the OECD MTC above, there are two main rules. The first main rule allocates exclusive taxing rights to the residence state and operates when the employee exercises his activity in such state. The second main rule in Article 15(1), "unless *the employment is exercised in the other Contracting State. If the employment is so exercised in the other Contracting State, such remuneration as is derived therefrom may be taxed in that other State*", therefore allocated shared taxing rights, with primary taxing rights being given to the state where the service is rendered and an obligation to relieve tax being imposed on the residence state.

Therefore, should South African residents render services and earn remuneration in any contracting state offshore and should the activity state exercise its taxing rights together with South Africa concurrently exercising its taxing rights as a result of the section 10(1)(o)(ii) of the IT Act amendment, this may give rise to the exposure of the individual to international juridical double taxation.

In terms of Article 15(2), it contains the general exception to the rule in Article 15(1) which allocates to the resident state (South Africa) the taxing right over the cross-border contracting state, provided that all three conditions are met:

- The employee is not physically present for more than 183 days in the source state in a 12-month period beginning or ending in a year of assessment;

[133] OECD Commentary, Article 4, Paragraph 2, section 15-(1) 'If an 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. (2) Thus, regard will be had to his family and social relationships, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property etc"

[134] OECD Commentary, Article 4, paragraph 2, section 16-(2) 'The habitual abode is activated in two situations: (a) where a dual resident has a permanent home in two contracting states in which he/she is a resident, but is not possible to determine his CVI; and (b) where a dual resident individual does not have a permanent home in either of the contracting states in which he is resident. In terms of (a) one must identify the state where the individual stays more frequently'. In terms of case law, *Georgi Trieste v Her Majesty the Queen*, [2012] TCC 91, Tax Treaty Case Law IBFD, "where the TCC found the taxpayer to be habitually resident in Canada, as he lived there regularly, customarily, or usually." Therefore, it could be said that all stays within each state should be taken into account whether or not at the permanent home. To determine the individual's habitual abode under (b) account should be taken of all his stays in each contracting state. The reasons for the days are immaterial

[135] OECD Commentary, Article 4, paragraph 2, section 16-(2)

- The remuneration is not paid by, or on behalf of, an employer that is resident of the source state;
- The remuneration is not borne by a permanent establishment which the employer has in the other State"

The term remuneration is frequently used in its ordinary meaning to indicate compensation for work or services performed[136]. The OECD meaning of the term remuneration is narrower than the definition which is used in the South African domestic law.[137] The question here is whether income from employment which would be remuneration for South African domestic law purposes would fall outside of Article 15. In terms of Vogel, which states that any consideration received from the performance of a dependent service is income for purposes of article 15.[138]

In terms of the employment relationship, Article 15 of the OECD MTC, explicitly refers to employment but is silent as to whether or not dependent personal activity is to be exercised within the framework of a formal legal relationship. In theory it is understood that insofar as there is an employer and an employee, there is a legal relationship of employment for treaty purposes, even in the absence of an employment contract. It is however noted, that in practice a slightly more complex situation arises.[139]

Due to complexities arising as to the interpretation of the employment relationship, there have been commentaries included in the OECD Model which acknowledges that in some states, a formal contractual relationship would not be questioned for tax purposes unless there were some evidence of manipulation and these States, as a matter of domestic law, would consider that employment services are only rendered where there is a formal employment relationship[140]

The existence of a formal employment relationship constitutes the usual reference framework for carrying out subordinated activities. As the Commentary of Article 15 of the OECD Model indicates, the requirement for an employment relationship remains essentially a matter for domestic law to determine.[141]

Further, Article 15(2)(b) of the OECD MC refers to the term 'employer' but does not define it. As with the term employment, there is no definition of the concept of employer in any other provision of tax treaties and therefore its boundaries are to be reconstructed, together with those of employment on the basis that it gives relevance to domestic law.

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[136] This usage corresponds to the Latin etymology of the word, according to which "remuneratio" relates to compensation for a function, i.e. "munus"

[137] Income Tax Act No. 58 of 1962, Paragraph 1 of the Fourth schedule- remuneration is defined as "any amount of income which is paid or is payable to any person by way of any salary, leave pay, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered, including-…'

[138] Vogel 'Double Tax Treaties and their Interpretation' Volume 4, Article 15 paragraph 14

[139] IBFD- Article 15 Income from Employment – Global Tax Treaty Commentaries

[140] Para 8.2 OECD Model Commentary on Article 16 (2017)

[141] Ibid Para 8.2.

There is a lack of treaty definition for employer in the treaty or in domestic law[142]. Article 15(2)(b) refers to the employer but it is not defined.
The concepts of employment and employer are in general, to be combined together.[143]

In terms of the meaning of employer relevant to article 15(2)(b) and Section 10(1)(o)(ii), I will briefly address the critical issues which could arise in respect of (i) the international hiring out of labour; (ii) the cross-border secondment of employees and (iii) the concept of economic employer. With international hiring out of labour, the user does not recruit its workforce directly but, rather through one or more intermediaries with whom it concludes service agreements.

It is understood that intermediaries, acting in the capacity as employers, conclude contracts with employees and remunerate them. However, they do not bear the business risk associated with employment contracts nor exercise the powers linked to the status of employers.[144]

In the case of cross-border secondment, employees provide their services for a temporary period to a third party which has agreed with the employer to receive these services. This may include where the employee works for the company of origin and the other company of the secondment at the same time or that employee works for one or that other company in different parts of the year. In both scenarios in terms of Article 15(2)(b) the recipient of the services can be characterised as an employer if this can be qualified as an employer under the domestic law of the residence state.

Therefore, in such cases, the person on whose behalf the salary is paid is characterized as "an employer" for the purpose of Article 15(2)(b) of the OECD Model. This employer is normally characterised as an "economic" or a "real employer".

For the economic employer, in terms of the Commentary on Article 15 of the OECD Model it addresses a clarification according to which difficulties can arise as to whether or not services are provided in the exercise of employment.[145] The OECD Commentary on Article 15[146] indicates that the key difference is that the intermediary is responsible for the labour and the employer bears the risk for the result of the work.

Eight additional relevant factors contribute to determining the nature of services. In particular, the elements indicated in the Commentary on Article 15 of the OECD Model[147] which would be relevant for the purpose of determining whether an individual is providing services to the employer with whom the employee has signed a contract or the employee's

[142] F. Potgens, Proposed Changes to the Commentary on Article 15(2) of the OECD Model and their effect on the Interpretation of "Employer" for Treaty Purposes, 61 Bull. Intl. Taxn 11 (2007), Journal and Articles IBFD
[143] Supra, no. 27 page 46 of 72
[144] P. Pistone, Article 15: Income from Employment-Global Tax Treaty Commentaries IBFD (GTTC IBFD)
[145] OECD Model 2017, Commentary of Article 15 at paragraph 1, page A-479 Volume A: Materials on International TP&EU Tax Law: Kees van Raad
[146] Ibid at paragraph 8.13, page A-493-Volume A
[147] Ibid at paragraph 8.14- page 593 Volume A

activity is to be framed within the activities supplied by the employer to another enterprise. [148]

These elements are: (i) the authority to instruct employees in respect of their work; (ii) the power to control the employees and to be responsible for the place of work;(iii) the payment of remuneration; (iv) making tools and materials available; (v) determining the number and qualifications of employees; (vi) selecting the employees and having the right to terminate their contracts; (vii) having the right to impose sanctions; and (viii) being able to determine the holidays of the employees.[149]

It is noted that Article 15 of the OECD Model refers four times to the exercise of an employment, twice in Article 15(1), once in article 15(2) which will be discussed below and once in article 15(3) without defining it. According to the OECD Commentary[150], employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid. This corresponds with the finding in *FL Smith & co v F Greenwood*[151]. This outcome corresponds with several South African court cases. It is therefore reasonable to deduce that the place of physical activities is where the employment is exercised in terms of South African DTC's and domestic law.

In Article 15(2)(b), the expression "paid to" in terms of the OECD commentaries is interpreted in its broadest sense in a way that includes the fulfilment of the obligations to place funds at the disposal of the individual entitled to receive them.

It is however seen that Article 15(2)(b) is the only provision in the DTC that strengthens the reference to payment by using the additional expression "or on behalf of" [152] It is said that this element clearly indicates the clear intention to go beyond the payment and look through it to determine the 'economic' employer rather than the formal source of the payment. Given that the two expressions are linked with an "or", this can be realised alternatively, as appropriate.[153]
Having dealt with all the applicable sections and articles pertaining to cross border employment, case studies are now presented to illustrate the tax effects in the selected countries.

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[148]P. Pistone: Article 15 Income from Employment-Global Tax Commentaries, section 5.1.3.4.4, page 47 of 72
[149] OECD Model 2017 Commentary on Article 15 at paragraph 8.4 – Volume A: Materials on International TP&EU Tax Law: Kees van Raad
[150] Ibid at paragraph 1, page A-479- Volume A
[151] (Surveyor of Taxes) 8 TC 193 204 (UK). This case did not deal with the place of exercise of employment, but rather with the place of exercise of trade, but is arguably similarly applicable. While the High Court found it unnecessary to define exactly what constitutes an 'exercise of trade', it held that the place of conclusion of contracts, as well as the place of delivery of goods, are the most important factors to take into account to determine where a trade was exercised.
[152] OECD Model: Commentary Article 15, Paragraph 49 (2017) indicates that the interpretation includes payments made by another person for the benefit of the individual entitled to the pension.
[153] P. Pistone, Article 15 GTTC IBFD Article 15, Page 55

4.3 CASE STUDIES:

4.3.1 Cross border Income Tax Consequences applicable to a South African Resident's Australian Remuneration:

Case Study 1: Refer to Appendices A1:

A South African resident, employed with an international audit firm, is seconded to Australia on a work permit, from 1 May 2020 to 19 December 2020. He is to commence work on 2 May 2020. An employment contract was entered into stipulating that the individual would be remunerated by the South African audit firm. The individual will be returning to South Africa on 20 December 2020.

The individual returned to South Africa to fulfil employment obligations during the following periods:

- 30 August 2020 to 7 September 2020;
- 11 November 2020 to 20 November 2020

The total remuneration that the individual will receive for the services rendered for the period 2 May 2020 to 19 December 2020 will be R1750 000.

Reference 1A: Remuneration	Reference: 1B: South Africa Domestic Tax Application	Reference 1C: Australian Domestic Tax legislation	Reference 1D: Allocation of Taxing Rights in terms of the SA/Australia and discussion in 4.2.3 et sequence above	Reference: 1E: Overall Income Tax Consequences after application of SA/Australia DTC and discussion in 4.2.3 et sequence above
Salary	Section 10(1)(o)(ii) will apply to the South African resident. The individual is ordinarily resident in South Africa. Foreign remuneration above the exemption threshold of R1250 000, in the amount of R500 000 will be subject to normal tax	The individual will be considered to be a non-resident of Australia. The statutory, common law and temporary Australian test will not be met as the individual's employment contract is only for seven months; although he has been in Australia for 211 days (Appendix A) his family, the location of his assets	Foreign Australian 'income from employment' remuneration falls within article 15 of the DTC, referred to as Dependent Personal Services[154]. Article 15 paragraph 1[155] has a first rule which allocates exclusive taxing rights to South Africa. Article 15(1)'s second rule states that 'unless the employment is exercised in the other Contracting State, such	If the DTC takes precedence over the domestic law as we have discussed above (*Tradehold*[157] *and the latest case Fowler v HMRC*[158] and in application of article 15 (1) and 2 of the DTC, the source state, Australia will be granted primary taxing rights as the requirements in terms of Article 15(2) have not been met. In support of the above the following is noted: In applying the second allocation rule within Article 15 paragraph 1 and the OECD Commentary on Article 15[159],

[154] Supra note 142 - Article 15(1) provides; 'subject to the provisions of Articles 16, 18 and 19 salaries, wages and other similar remuneration derived by an individual who is resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State'.

[155] Ibid

[157] Supra note 89

[158] Supra note 90

[159] OECD Model 2017, Commentary of Article 15 at paragraph 1, page A-479 Volume A: Materials on International TP&EU Tax Law: Kees van Raad

Reference 1A: Remuneration	Reference: 1B: South Africa Domestic Tax Application	Reference 1C: Australian Domestic Tax legislation	Reference 1D: Allocation of Taxing Rights in terms of the SA/Australia and discussion in 4.2.3 et sequence above	Reference: 1E: Overall Income Tax Consequences after application of SA/Australia DTC and discussion in 4.2.3 et sequence above
	in South Africa. **Refer to Appendices A1**. As the taxpayer will be taxed on his world-wide receipts as a resident of South Africa and he would be taxed in Australia on his source income, the taxpayer may elect Section 6quat on the foreign taxes paid in Australia or he could apply the alternative as relief and apply the DTC. Refer to the columns, referenced as **1D** and **1E.**	and the individual has no intention of taking up residence in Australia. His contract is only for the 7 months and then he will return to South Africa. Refer to **Appendices B2** et sequence. The employment income received by the non-resident for services performed in Australia is taxable at the rates applicable to non – residents. Refer to **Appendices B 2.4B.**	remuneration as is derived therefrom may be taxed in the other State", therefore allocated shared taxing rights is given to the state where the service is rendered and an obligation to relieve tax being imposed on the residence state, South Africa. Article 15 paragraph (2)[156] contains the general exception to the rule in Article 15(1) which allocates the resident state (South Africa) the taxing right over the cross-border contracting state, provided that all three conditions are met: - The employee is not physically present for more than 183 days in the source state in a 12-month period beginning or ending in a year of assessment; -The remuneration is not paid by, or on behalf of, an employer that is a resident of the source state; - The remuneration is not borne by a	the individual has exercised his employment in Australia for an Australian employer. The individual has been physically present in Australia for 211 days. (Refer to **Appendices A1**). Further, in applying Article 15 paragraph (2)[160]. Article 15(2)(a), the individual has been in Australia for 211 days, therefore in excess of 183 days. (Refer to **Appendices A1**). This requirement has not been met. Article 15(2)(b), the South African employer is paying the remuneration. This requirement has been met. Article 15 (2)(c) there is no permanent establishment in Australia This requirement has been met. Therefore, as only two requirements of the three have been met, Article 15(2) will not apply to the resident state and South Africa will not have an exclusive taxing right. The full remuneration earned in Australia will be subject to Australian tax based on the Australian non-resident tax tables. (Refer to **Appendices B: 2.4B.** If South Africa taxes the excess remuneration in terms of section 10(1)(o)(ii) of the Act and in applying Article 15 paragraph 1,to obtain any relief, the taxpayer will need to apply the provisions of Article 23 paragraph 3[161] of the DTC and will be in a

[156] Article 15(2) of the SA and Australia DTC: "Notwithstanding the provisions of paragraph 1, remuneration derived by an individual who is a resident of a Contracting State in respect of employment exercised in the other Contracting State shall be taxable only in the first mentioned State if: (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the year of income or year of assessment of that other State; and (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and (c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in the other State".

[160] Ibid.

[161] Article 23(3) of the SA and Australia DTC provides that in the case of South Africa, Australian tax paid by a resident of South Africa in respect of income taxable in Australia in accordance with the Agreement, shall be deducted from the taxes due according to South African fiscal law. The deduction shall not, however, exceed an

Reference 1A: Remuneration	Reference: 1B: South Africa Domestic Tax Application	Reference 1C: Australian Domestic Tax legislation	Reference 1D: Allocation of Taxing Rights in terms of the SA/Australia and discussion in 4.2.3 et sequence above	Reference: 1E: Overall Income Tax Consequences after application of SA/Australia DTC and discussion in 4.2.3 et sequence above
			permanent establishment which the employer has in the other State.	position to claim a credit in terms of section 6quat on the remuneration in excess of the exemption threshold. (Refer to Chapter 2).

4.3.2 Cross border Income Tax Consequences applicable to a South African Resident's New Zealand Remuneration:

Case Study 2: See Appendix A2:

A New Zealand national is employed by a South African subsidiary of a multinational company and has been residing in South Africa for 7 years with his wife and his three children. Due to the individual's specialist knowledge, the individual was requested to assist with an Information Technology project for the period 01 April until 30 November 2020 and then in terms of a renewed employment contract with the same employer has been requested to continue with his services and to finish the project from 15 December to 31 December 2020. In terms of the break in service the employee will take annual leave in New Zealand. The subsidiary company in New Zealand will be remunerating the individual during these periods. The individual will return to South Africa on 1 January 2021.
He will return to South Africa to fulfil employment obligations during the period 1 June 2020 to 07 July 2020, which will include travel days.

Reference 2A: Remuneration	Reference: 2B: South Africa Domestic Tax Application	Reference 2C: New Zealand Domestic Tax legislation	Reference 2D: Allocation of Taxing Rights in terms of the SA/New Zealand DTC and discussion in 4.2.3 et sequence above	Reference: 2E: Overall Income Tax Consequences after application of SA/New Zealand DTC and discussion in 4.2.3 et sequence above
	Section 10(1)(o)(ii) will apply. The individual will be ordinarily resident in South Africa and should it be contended that the individual is not ordinarily resident,	In referring to **Appendices A2**, the individual has been in New Zealand for 237 days, therefore as New Zealand has the requirement that an individual has to be in New Zealand	The individual will be a dual resident as discussed in Columns referenced as 2B and 2C before the application of the DTC. The tie breaker rules as we have discussed above will determine residence	If the DTC takes precedence over the domestic law as we have discussed above (*Tradehold*[167] *and the latest case Fowler v HMRC*[168]) and in application of article 14 (1) and 2 of the DTC[169], the source state, New Zealand will be granted primary taxing rights. In support of the above, we note the

amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income.

[167] Supra note 89

[168] Supra note 90

[169] Supra note 162 and 163

Reference 2A: Remuneration	Reference: 2B: South Africa Domestic Tax Application	Reference 2C: New Zealand Domestic Tax legislation	Reference 2D: Allocation of Taxing Rights in terms of the SA/New Zealand DTC and discussion in 4.2.3 et sequence above	Reference: 2E: Overall Income Tax Consequences after application of SA/New Zealand DTC and discussion in 4.2.3 et sequence above
	he would meet the requirements of the physical presence test as well. **Refer to Appendices A2.** The Foreign remuneration will be subject to 10(1)(o)(ii). The amount to be exempted in terms of Section 10(1)(o)(ii) will be R1 084 813. **See Calculation as per Appendices A2**. The residual liability in excess of the exemption threshold, in the amount of R295 187 will remain subject to normal tax in South Africa. (See Appendices A2 and Appendices B.1) As the taxpayer will be taxed on his world-wide receipts as a resident of South Africa and New Zealand, the taxpayer may elect Section 6quat[162] or apply the DTC[163] to	for more than 183 days during the 12-month period to be a New Zealand resident. (**Refer to Appendices B 3.1),** we submit that the individual would be New Zealand tax resident. (**Refer to Appendices A2 and B3.1**) As a New Zealand tax resident will be subject to New Zealand tax on their worldwide income, whether the income is earned or remitted to New Zealand. The Employment income in connection with his employment services are taxable in the hands of the employee. The New Zealand employer is required to withhold and remit income taxes to IR when paying an individual's employment income. **Refer to Appendices B3.5**	both for South African domestic legislation (the residence definition) and the DTC. As the individual's family resides in South Africa, he would therefore be a South African resident for DTC purposes. Foreign New Zealand 'income from employment' falls within article 14 of the DTC[164]. In applying Article 14 paragraph 1[165] and 2 of the DTC[166], refer to the discussion on Australia, referenced as 1D above. The same will apply to New Zealand.	following: In applying the second allocation rule within Article 14 paragraph 1[170] and the OECD Commentaries on Article 15[171], the individual has exercised his employment in New Zealand and the individual has been physically present in New Zealand for 237 days. (**Refer to Appendices A2**). Further, in applying Article 14 paragraph (2) of the DTC[172], the requirements in terms thereof have not been met. Article 14 (2)(a)[173], the individual has been in New Zealand for 237 days and not less than 183 days. (**Refer to Appendices A2**). Article 14(2)(b)[174], the New Zealand employer will be remunerating the individual. This requirement has not been met. Article 14(2)(c)[175] there is no permanent establishment in New Zealand. The requirement has been met. Therefore, as only one requirement of the three have been met, Article 14(2)(b) will not apply and the resident state will not have an exclusive taxing right, therefore only article 14(1) will apply. The full remuneration will be subject

162 Income of the Income Tax Act no.58 of 1962
163 Double Taxation Convention No.1094 between the Republic of South Africa and New Zealand
164 Article 14(1) of the SA and New Zealand DTC- 'Income from employment'
165 Article 14(1) of the SA and New Zealand DTC: "Subject to the provisions of Articles15, 17 and 18, salaries and wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration is derived therefrom may be taxed in that other State".
166 Ibid and Article 14(2) of the SA and New Zealand DTC: "Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned state if:

a) the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the year of assessment of that other State; and
b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
c) the remuneration is not deductible in determining the taxable profits of a permanent establishment which the employer has in the other State".

Reference 2A: Remuneration	Reference: 2B: South Africa Domestic Tax Application	Reference 2C: New Zealand Domestic Tax legislation	Reference 2D: Allocation of Taxing Rights in terms of the SA/New Zealand DTC and discussion in 4.2.3 et sequence above	Reference: 2E: Overall Income Tax Consequences after application of SA/New Zealand DTC and discussion in 4.2.3 et sequence above
	obtain relief from double taxation.			to normal income tax in New Zealand based on the New Zealand resident tax tables. **Refer to Appendices, B. 3.6A.** If South Africa taxes the excess remuneration in terms of applying Article 14 paragraph 1[176] for the individual to obtain any relief, he will need to apply the provisions of Article 21 paragraph 2[177] of the DTC. The individual will be required to claim a credit in terms of section 6quat on the remuneration in excess of the exemption threshold. (Refer to Chapter 2 for the section 6quat discussion).

4.3.3 Cross border Income Tax Consequences applicable to a South African resident's United Arab Emirates Remuneration:

Case Study 3: See Appendices A3 and A3:3A:

A South African national is employed with the United Arab Emirates airline ("Emirates") as a cabin crew member. She has been employed with the airline for 20 years and 8 months as at 31 December 2019. She signed a renewed contract on 1 January 2019. She operates 35 flights into South Africa annually and her stay is for 24 hours at a time. The UAE provides a salary and accommodation. She has a resident work visa which is renewed once the employment contract is signed.

She is married to a French national and they both reside in the UAE. Her mother still resides in South Africa. Annually she visits her mother for the period 1 September to 15 September, this will be as annual leave. All her belongings while residing in the UAE are in the UAE and she has confirmed that she considers the UAE to be her permanent home.

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[170] Supra note 163
[171] Supra, note 157
[172] Supra note 164
[173] Ibid
[174] Ibid
[175] Ibid
[176] Supra note 163
[177] Article 21(2) of the SA and New Zealand DTC provides– "In South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa, New Zealand tax paid by residents of South Africa in respect of income tax payable in New Zealand, in accordance with the provisions of this Agreement, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income".

Reference 3A: Remuneration	Reference: 3B: South Africa Domestic Tax Application	Reference 3C: UAE Domestic Tax legislation	Reference 3D: Allocation of Taxing Rights in terms of the SA/UAE DTC and discussion in 4.2.3 et sequence above	Reference: 3E: Overall Income Tax Consequences after application of SA/UAE DTC and discussion in 4.2.3 et sequence above
	Section 10(1)(o)(ii) will not apply. The individual is deemed not to be a resident of South Africa. **Refer to Appendices A3.** As a non-resident individual deriving remuneration in South Africa she will be subject to tax in South Africa based on a source basis. Therefore, for the remuneration derived in respect of the services rendered in South Africa will be required to be included in the non-resident taxpayer's gross income. The South African tax payable may however be modified in terms of the provisions of the DTC in place. Refer to the columns referenced as 3D and 3E.	**Refer to Appendices B: B4,**	Foreign 'income from employment' falls within article 14 of the DTC. The DTC will be applied in relation to the foreign income of employment derived in South Africa. In applying Article 14 paragraph 1[178] it has a first rule which allocates exclusive taxing rights to the resident country. Article 14(1)'s second rule states that ' unless the employment is exercised in the other Contracting State, such remuneration as is derived therefrom may be taxed in the other State", therefore allocated shared taxing rights is given to the state where the service is rendered and an obligation to relieve tax being imposed on the residence state, Article 14 paragraph 2[179] contains the	If the DTC takes precedence over the domestic law as we have discussed above (*Tradehold[180] and the latest case Fowler v HMRC[181]*) and in applying article 14 (1) and 2 to both the scenarios as discussed below, the following is submitted: **Scenario 1:** As the individual is a UAE resident and therefore a non-resident of South Africa, the DTC will be applied as the resident state being the UAE and the source state being South Africa. In applying the second allocation rule within paragraph 14(1) of the DTC[182] and the OECD commentary on article 15[183], the individual is a resident of the UAE and the individual has been physically present in the UAE and she has exercised her employment in the UAE as well as in South Africa. (**Refer to Appendices A3**). Her total remuneration derived from the exercise of employment in the UAE amounted to R 1 399 231 and her remuneration derived from the exercise of employment in South Africa amounted to R228 846 (**Refer to Appendices A3**). Therefore, the foreign employment derived in the UAE as being exercised in the UAE will be taxed in the UAE. The South African remuneration which is exercised from the performance of services rendered in South Africa by an individual may be taxed in South Africa. Further, in applying Article 14 paragraph 2. Article 14(2)(a) the individual has been in South Africa for 46 days, therefore not in excess of 183 days. (**Refer to Appendices A3**). This requirement has been met. Article 14(2)(b), the remuneration is paid by

[178] Double Taxation Agreement No 618. between the Republic of South Africa and the United Arab Emirates – Article 14 paragraph 1 provides that 'subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State'.

[179] Article 14(2) of the SA and UAE DTA: "Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned state if:

(a) the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and

Reference 3A: Remuneration	Reference: 3B: South Africa Domestic Tax Application	Reference 3C: UAE Domestic Tax legislation	Reference 3D: Allocation of Taxing Rights in terms of the SA/UAE DTC and discussion in 4.2.3 et sequence above	Reference: 3E: Overall Income Tax Consequences after application of SA/UAE DTC and discussion in 4.2.3 et sequence above
			general exception to the rule in Article 14(1) which allocates the resident state (the UAE) the taxing right over cross-border contracting state, provided that all three conditions are met: - The employee is not physically present for more than 183 days in the source state in a 12-month period beginning or ending in a year of assessment; -The remuneration is not paid by, or on behalf of, an employer that is a resident of the source state; and - The remuneration is not borne by a permanent establishment which the employer has in the other State.	the UAE employer and it is not paid by a South African employer. This requirement has been met. Article 14(2)(c) the remuneration is not borne by a permanent establishment which Emirates has in South Africa. This requirement has been met. Therefore, as all three requirements have been met, Article 14 paragraph 2 will apply to the resident state and the UAE will have an exclusive taxing right. As the UAE is a tax-free jurisdiction this remuneration will therefore not be subject to taxation in the UAE. It should be noted that if the DTC is applied and South Africa levies any tax on the above remuneration, this may result in SARS being faced with an Income Tax Objection and Appeal[184] via the Tax Administration Act No.28 of 2011
	Refer to Appendices A3:3A: (If the Individual was a resident):	Refer to **Appendices B: B4,**	Refer to the discussion above.	If in the scenario, the individual was a resident of South Africa reference made to **Appendices A3:3A** and as we have established in **column 3B** that section 6quat would not apply as no foreign taxes are paid in the UAE, the only

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment which the employer has in the other State."

180 Supra note 89

181 Supra note 90

182 Supra note 176

183 Supra note 157

184 Section 104 of the Tax Administration Act No.28 of 2011

Reference 3A: Remuneration	Reference: 3B: South Africa Domestic Tax Application	Reference 3C: UAE Domestic Tax legislation	Reference 3D: Allocation of Taxing Rights in terms of the SA/UAE DTC and discussion in 4.2.3 et sequence above	Reference: 3E: Overall Income Tax Consequences after application of SA/UAE DTC and discussion in 4.2.3 et sequence above
	If in the scenario, the individual was ordinarily resident or met the physical presence test in South Africa, then section 10(1)(o)(ii) would have applied and the foreign remuneration above the exemption threshold of R1 250 000, in the amount of R450 000 will be subject to normal tax in South Africa. **Refer to Appendices A3:3A.** would be subject to normal income tax. However, as the UAE is a tax free jurisdiction, section 6quat would not be available as a relief mechanism. The DTC or tax emigration would be the only alternative for relief.			mechanism to obtain relief would be to apply the article in the SA/UAE DTC[185]. Therefore, in application of Article 14 paragraph 1 and 2 of the DTC[186] and should South Africa have the exclusive taxing right in meeting the requirement in terms of paragraph 2 of Article 14 of the DTC[187], then South Africa will have the exclusive taxing right to levy normal income tax on the amount in excess of the exemption threshold. Article 22(a) of the DTC[188] will not apply and the individual would not be able to claim a Section 6quat credit as [189] no foreign taxes have been paid in the UAE.

[185] Supra note 176 and 177
[186] Ibid
[187] Supra note 177
[188] Article 22 (a) of the SA and UAE DTC provides 'that double taxation shall be eliminated in South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa, United Arab Emirates tax paid by residents of South Africa in respect of income taxable in the United Arab Emirates, in accordance with the provisions of this Agreement, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income'.
[189] Income Tax Act No.58 of 1962

4.3.4 Cross-border Income Tax Consequences applicable to South African resident's United Kingdom remuneration:

Case Study 4: See Appendices A4: Scenario's 4.1A and 4.1B

A South African resident, aged 40 years, worked for a South African subsidiary of a multinational company. Effective 1 April 2020, the individual formally emigrated to the UK with his spouse. He will continue to work for the multinational company but for the United Kingdom subsidiary. He commenced with his employment contract in the UK on 3 April 2020. He is based in the UK on a spousal visa allowing him access to a biometric residence permit. For the period 01 August to 30 August 2020, he returned to South Africa for annual leave. The individual has a permanent home in the UK, but he still has a furnished apartment in Cape Town as well as a plot of land. His family and all his other belongings are with him in the UK. On the 31 August 2020 he returned to the UK to return to his employment obligations. The total remuneration earned in the UK is R1800 000.

Remuneration	Reference: 4B: South Africa Domestic Tax Application	Reference 4C: United Kingdom Domestic Tax legislation	Reference 4D: Allocation of Taxing Rights in terms of the SA/United Kingdom DTC and discussion in 4.2.3 et sequence above	Reference: 4E: Overall Income Tax Consequences after application of SA/United Kingdom DTC and discussion in 4.2.3 et sequence above
	Refer to Appendices A: **Appendices A4: Scenario 1A:** Individual formally emigrated through SARB and declared himself non-resident with SARS. Section 9H will apply to the taxpayer and he will be required to submit a provisional tax return to SARS reflecting the exit tax position the day before he ceased to be a resident of South Africa. The remaining columns referenced as 4D and 4E won't apply in this regard. If he was to derive any income in South Africa as a non-resident individual in South Africa, he will be subject to tax in	**Applicable to Scenario:** **Appendices A4: Scenario 1A:** In referring to Appendices A4, the individual has been in the United Kingdom for 334 days, therefore for more than 183 days during the 12 month period. The person is deemed to be a UK resident. (**Refer to Appendices: B5.2**) As a United Kingdom tax resident an individual will be subject to New United Kingdom tax on their worldwide income. The Employment income in connection with his employment services are taxable in the hands of the employee. The UK employer is required	**Appendices A4: Scenario 1A:** DTC not considered in this scenario as the individual only derived remuneration from performing services in the UK. Refer to column 4B	**Appendices A4: Scenario 1A:** DTC not considered in this scenario as the individual only derived remuneration from performing services in the UK. Refer to column 4B

Remuneration	Reference: 4B: South Africa Domestic Tax Application	Reference 4C: United Kingdom Domestic Tax legislation	Reference 4D: Allocation of Taxing Rights in terms of the SA/United Kingdom DTC and discussion in 4.2.3 et sequence above	Reference: 4E: Overall Income Tax Consequences after application of SA/United Kingdom DTC and discussion in 4.2.3 et sequence above
	South Africa based on a source basis. As the taxpayer has not derived any remuneration from South Africa, we will not then consider the effect further from a domestic or a DTC perspective.	to withhold and remit income taxes to IR when paying an individual's employment income, via PAYE.		
	Refer to Appendices A4: Scenario 1B: If it is contended that the individual is still ordinarily resident in South Africa. In terms of section 10(1)(o)(ii) application, in terms of the foreign remuneration earned by the employee of R1800 000 will be eligible for the exemption. The amount of R1 800 000 is in excess of the R1 250 000 and therefore the full R1 250 000 will be exempted. The amount above the exemption threshold of R550 000 will remain subject to normal tax in South Africa. As the taxpayer will be taxed on his world-wide receipts as a resident of South Africa, the taxpayer may elect Section 6quat [190]or apply the DTC between SA and the UK[191] to obtain	**Refer to Appendices A4: Scenario 1B:** In referring to Appendices A4, the individual has been in the United Kingdom for 334 days, therefore for more than 183 days during the 12-month period. The person is deemed to be a UK resident. (**Refer to Appendices: B5.2**) As a United Kingdom tax resident an individual will be subject to New United Kingdom tax on their worldwide income. The Employment income in connection with his employment services are taxable in the hands of the employee. The UK employer is required to withhold and remit income taxes to IR when paying an individual's	**Scenario: Appendix A4: Scenario 1B:** Foreign United Kingdom income from employment remuneration falls within article 14 paragraph 1[192] and 2 [193]of the DTC between SA and the UK. In applying Article 14 paragraph 1 and 2 of the DTC[194], refer to the discussion on Australia, New Zealand and the UAE above, referenced as 1D and 2D and 3D above. The same will apply to the UK.	**Scenario: Appendix A4: Scenario 1B:** If the DTC takes precedence over the domestic law as we have discussed above (*Tradehold*[195] and the latest case *Fowler v HMRC*[196]) and in application of article 14 (1) and 2 of the DTC[197], the source state, the United Kingdom will be granted primary taxing rights. In support of the above, we note the following: In applying the second allocation rule within Article 14 paragraph 1[198] and the OECD Commentaries on Article 15[199], the individual has exercised his employment in the United Kingdom and the individual has been physically present in the United Kingdom for 334 days. **See Appendices A4** Further in applying Article 14 paragraph 2 of the DTC[200], the requirements in terms thereof have not been met. Article 14(2)(a), the individual has been in the UK for more than 183 days (334 days); Article 14(2)(b), the UK employer will remunerate the individual. This requirement has not been met. Article 14(2)(c) there is no permanent establishment in United Kingdom. The requirement has been met. Therefore, as only one requirement has been met, Article 14(2) will not apply and

[190] Income Tax Act No.58 of 1962

[191] DTC South Africa and United Kingdom No. 172- Article 14 'Income from Employment'

[192] Article 14 paragraph 1 provides "Subject to the provisions of Article 15, 17 and 18 of this Convention, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting

Remuneration	Reference: 4B: South Africa Domestic Tax Application	Reference 4C: United Kingdom Domestic Tax legislation	Reference 4D: Allocation of Taxing Rights in terms of the SA/United Kingdom DTC and discussion in 4.2.3 et sequence above	Reference: 4E: Overall Income Tax Consequences after application of SA/United Kingdom DTC and discussion in 4.2.3 et sequence above
	relief from double taxation.	employment income, via PAYE.		the resident state will not have an exclusive taxing right over the foreign remuneration, therefore only Article 14 paragraph 1[201] will apply and the UK will have the primary taxing right. The full remuneration will be subject to United Kingdom normal tax based on the United Kingdom resident tax tables. Refer to **Appendices B5.3.** If South Africa taxes the excess remuneration in terms of applying Article 14 paragraph 1[202] for the individual to obtain any relief he will need to apply the provisions of Article 21 paragraph 1 of the DTC.[203] The individual will be required to claim a credit in terms of section 6 quat on the remuneration in excess of the exemption threshold. (Refer to Chapter 2 for the section 6quat discussion).

4.4 Conclusion remarks on the case studies:

If a South African resident derived foreign remuneration from services performed in a foreign country, they may be subject to double taxation which is taxation in South Africa and

State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State".

[193]Article 14 paragraph 2 provides " notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and (c) the remuneration is not borne by a permanent establishment which the employer has in the other State".

[194] Supra note 190 and 191

[195] Supra note 89

[196] Supra note 90

[197] Supra note 190 and 191

[198] Supra note 190

[199] Supra note 157

[200] Supra note 191

[201] Supra note 190

[202] Ibid

[203] of the DTC between South Africa and the United Kingdom

in that foreign country. From a South African perspective, the section 10(1)(o)(ii) amendment will apply to the foreign remuneration derived in the foreign country and any amount in excess of the R1 250 000 will now be subject to normal income taxation. South Africa would provide relief from double taxation in its domestic law via section 6quat of the Act[204]. This relief would be in respect of the remuneration in excess of the exemption threshold of R1 250 000.

It should however be noted that although section 6quat will be the primary mechanism in which a South African resident person may claim relief in respect of foreign taxes paid, countries such as the UAE which is a tax free jurisdiction and where there are no foreign taxes paid, the South African resident would not be able to avail of the section 6quat credit. The only alternative to obtain relief is for the resident to apply the relevant article, Article 15 of the SA and Australia DTC and Article 14 of the DTC for SA and New Zealand, UAE and UK, 'Income from employment' in order to determine which jurisdiction has the taxing right to the income.

If a person is a non-resident of South Africa, as the section 10(1)(o)(ii) amendment is only applicable to South African residents deriving foreign remuneration in a foreign country, this will not apply. However, the non-resident providing services and deriving foreign remuneration in South Africa will be subject to tax on a source basis in South Africa and potentially on a world-wide basis in a foreign country. This foreign remuneration will be taxed in full in the foreign country subject to allowable deductions and allowances. Tax on the foreign remuneration will be withheld by the employer and paid over to the respective tax authorities. This goes beyond the scope of this dissertation and therefore will not be discussed any further.

The remuneration derived in South Africa will be required to be included in the individual's South African gross income. The application of a DTC will provide relief in determining which jurisdiction has the taxing right to the income.

However, as we have discussed in the Case Study 3, if the individual is a non-resident of South Africa and a resident of the UAE. The UAE resident will be subject to taxation on its world-wide receipts and on South African income based on source. However, the UAE is a tax-free jurisdiction. As the section 10 (1)(ii) amendment will only be applicable to South African residents this will therefore not apply but the non-resident will be subject to tax on a source basis in South Africa. Therefore, the provisions of a DTC will be required to be applied to determine in which country the remuneration will be subject to taxation.

As we have established in the case studies and in applying the DTC's. In the case of where the source country exercises its right to tax the foreign remuneration in terms of Article 14(1) or 15(1) depending on the DTC and in respect of where the employment is exercised and where the requirements in terms of Paragraph 2 of Article 14 have not been met, therefore the source country will be given primary taxing rights and the full remuneration will be subject to taxation in the foreign country. This is evidenced in the case studies, referenced as Case

[204] Income Tax Act No.58 of 1962

study 1:1E; Case Study 2:2E and Case Study 4:4E. The source countries, Australia, New Zealand and the United Kingdom will be given the primary taxing right and the foreign remuneration will be subject to tax in the foreign country.

The resident state (South Africa) will tax the remuneration above the exemption threshold of R1.25 million but will grant a tax credit in terms of Section 6quat if foreign taxes have been paid in the foreign country on the excess remuneration. This credit shall however not exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income.

If the requirements of Paragraph 2 of Article 14 have been met, refer to Case study 3:3E, and the source state (South Africa) exercises its taxing right as well, the resident state (the UAE), will be granted exclusive taxing rights to levy the income tax on the remuneration derived in the country of source. The source country (South Africa) will have no taxing right to impose any tax on the remuneration. The effect of this could result in double non-taxation as the UAE has the exclusive right and the source country (SA) will not impose taxation on the foreign remuneration.

A further consideration is that in applying the DTC's if we have a situation where the source state is the foreign country and the resident state is South Africa, if the source state does not exercise its taxing right in terms of Article 14(1) (or 15(1) and the resident state (South Africa's) requirements in terms of Article 14(2) have been met, this could potentially still result in partial double non-taxation as tax will only be levied on the excess amount above the exemption threshold and the source country will not impose taxation on the remuneration.

Secondly, if the source state does not exercise its taxing right in terms of Article 14 paragraph 1 (or 15(1)) and where the requirements in terms of Article 14/15 paragraph 2 have not been met, the requirements of Article 14/15 paragraph 1 will still apply, and the resident state will have the primary taxing right. The resident state will tax remuneration above the threshold but will allow a tax credit in terms of section 6quat but only if taxes were levied in the source state.

5. CHAPTER FIVE: CONCLUSION:

The study aimed at answering the main question: "What impact will this amended tax legislation, Section 10(1)(o)(ii) have on a South African resident person employed in Australia, New Zealand, UAE and the UK.

The impact of this amendment will be that South African residents, who are subject to tax on a world-wide basis, who currently have employment contracts for working abroad and who have earned in excess of an exemption threshold of R1.25 million, will now be subject to normal income tax.

In the foreign country, where the services are rendered and the foreign remuneration is paid to the South Africa resident, the resident will have an option to elect as a mechanism of relief, a credit in terms of Section 6quat on the remuneration above the exemption threshold or the application of a DTC. This domestic tax credit will however not apply to a South African resident that is employed in a foreign country where no foreign taxes have been paid, like the UAE. This means that South African employees working temporarily in the UAE will now be subject to tax on the excess remuneration above the threshold without any relief. Considering that these employees have for many years not paid any tax on this type of remuneration and that double non-taxation is now considered no longer acceptable this is a reasonable outcome.

An employer may assist the employee at his or her discretion, under paragraph 10 of the Fourth Schedule of the Income Tax Act, to apply for a directive from SARS to avail of this section 6quat credit on a monthly basis to determine the employee's tax liability[205].

Many South Africans have been under the misconception that 'formal emigration with the SARB is the only solution for them to mitigate the risk of having to pay taxes on the same income in South Africa and in the foreign country. Many South African's have made the decision to formally emigrate to countries such as Australia, New Zealand, UK and the UAE. It has to be made clear to South African residents that formal emigration and tax emigration are two different concepts. In my view it will be a step in the right direction to remove the option of formal emigration with SARB.

Regarding the Section 10(1)(o)(ii) enactment, South African residents, need to consider whether formal emigration is necessary if an elective such as a section 6quat credit or the application of a DTC is still available.

In terms of South African's tax emigrating, if a South African person has changed its status to non-resident due to this section 10(1)(o)(ii) amendment, in terms of section 9H of the Income Tax Act, that person will be required to pay an exit tax in the form of capital gains tax. Capital gains tax will apply to all qualifying assets except for immovable property and share options in respect of equity instruments. The basic calculation for calculating a capital

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[205] https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Foreign-Employment-Income-Exemption.aspx , accessed 20/02/2020

gain is to establish the market value of the assets on the day preceding the date on which they cease to be resident and deducting from that value the base cost of the asset. Capital gains tax will apply regardless of the fact that no cash is received as there is no actual sale. This can lead to liquidity problems for the individual. Further, there would a requirement for the person to submit a 'year-end' provisional tax return on the day before he, she becomes non-tax resident.

In applying the DTCs, we have established that in the case of where the source country exercises its taxing right and where the requirement in terms Article 14/15 paragraph 2 have not been met and the resident state is not granted an exclusive taxing right, the source state will tax the full remuneration as they will have the primary taxing right. The resident state (South Africa) will tax the remuneration above the threshold but will allow a tax credit in terms of section 6quat.

In instances where the requirements of Paragraph 2 of Article 14/15 have been met the resident state will be granted exclusive taxing rights to levy income tax on the amount in excess of the exemption threshold, in terms of Section 10(1)(o)(ii). The taxpayer, if invoking the DTC to apply would be taxed on the amount in excess of the exemption threshold and the foreign country will have no taxing right to impose any tax on the remuneration.

The downside of this amendment is that if the foreign remuneration is not taxable in the foreign country or the taxable value is lower than what it would have been in South Africa, there would be either no or less of a foreign tax credit to offset against the South African tax liability. This would result in a residual liability. The thought of losing a part of one's income to this residual liability would be a negative for a South African resident trying to manage the cost of living in a foreign country as well.

However, taxpayers should consider, prior to considering the emigration alternative, that in countries where the foreign taxes are paid such as in Australia, New Zealand and the United Kingdom, that they can avail of a section 6quat rebate to alleviate the double taxation on foreign remuneration in excess of the exemption threshold. This credit would not have been allowed in the past, ie before this amendment to section 10(1)(o)(ii) as the foreign remuneration would have been 100% exempt in South Africa. Therefore, the source state would tax the full remuneration and no credit would have been given at all. The benefit with this amendment to section 10(1)(o)(ii) is that if the source state taxes this remuneration in full, the taxpayer will now be able to benefit from a partial credit in terms of section 6 quat on the foreign taxes paid. This partial relief or credit will be offset against the excess income included in South Africa. The credit applicable to the balance up to the R1.25m in the source state will however not be permitted. The effect of this partial credit on the foreign taxes paid in the source state above the exemption threshold may reduce the taxpayer's residual liability which may not have any or may have a minimal effect on the resident's take home income.

Further, if South African elects to apply the DTC and the requirements of Article 14/15 paragraph 2 have been met the resident state will have an exclusive taxing right over the excess remuneration above the threshold and the source state will not be able to tax the foreign remuneration. This could be a much better result for a South African person as the tax

paid potentially could be less as opposed to the individual liable to tax in the foreign country on the full remuneration.

South African residents, in considering ‘emigration’, should keep in mind that although remuneration packages appear higher in the foreign country than in South Africa this may not mean more after-tax cash inflow. When one looks at the cost of living, a higher package in another country may afford the taxpayer the same standard of living with a lower package earned in South Africa and they would still enjoy the benefit of staying within their home country.

In the instance of employees being seconded to foreign countries, although this would be viewed as great international exposure and the remuneration packages would appear to be on the higher end of the remuneration scales, it should be highlighted that certain related benefits, specifically tax equalisation would potentially inflate remuneration without any real benefit to the assignee. However, with such benefits becoming taxable in South Africa, this would most likely be a higher cost for the secondee’s employer as he would be required to bear this cost.

In SARS effort to prevent double non-taxation, I am of the view that the enactment of this legislation and the application of the DTCs could still result in partial double non-taxation, foreign remuneration not being taxed in South Africa nor in the foreign country due to the application od the relevant DTC’s. Therefore, careful consideration should be made by South African individuals working in countries abroad in ascertaining whether they will be affected by this amendment and what relief mechanisms would apply to them, prior to hastily considering formal emigration.

Future Research:

- Further research on the interaction of the Section 10(1)(o)(ii) amendment and the interaction with the MLI.
- The consideration of whether tax residence of individuals can be used as an impartial criterion for determining the nexus with a particular jurisdiction.
- The current understanding of how employment is exercised needs to be relooked at.
- The terms ‘employment” and “employer” can no longer be used with certainty of meaning and it is not the difference in interpretation between the contracting states that is the main issue. We are facing a situation where we will not be able to say with certainty what they encompass from the perspective of each individual contacting state. Thus, the issue is not whether a particular state applied the appropriate article of a DTC but which article it should apply.
- Once Formal emigration with SARB has been phased out in March 2021 and replaced with the verification process to consider the effect that it will have on the South African resident earning foreign remuneration in countries abroad.

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APPENDICES A: CASE STUDIES:

Reference A1: SOUTH AFRICA AND AUSTRALIA:

A South African resident, employed with an international audit firm, is seconded to Australia on a work permit, from 1 May 2020 to 19 December 2020. He is to commence work on 2 May 2020. An employment contract was entered into stipulating that the individual would be remunerated by the South African audit firm. The individual will be returning to the Republic on 20 December 2020 to return to the Republic.
The individual returned to South Africa to fulfil employment obligations during the following periods:

- 30 August 2020 to 7 September 2020;
- 11 November 2020 to 20 November 2020

The total remuneration that the individual will receive for the services rendered for the period 2 May 2020 to 19 December 2020 will be R1750 000.
The taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in Australia have not been taken into account for this case study:

	May	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**Total**
2 May to 29 August 2020	28	30	31	29					118
8 September to 10 November 2020					23	31	10		64
21 November to 19 December 2020							10	19	29
									211 Refer to Case Study 1

South Africa: Section 10(1)(o)(ii) Application:
As the table indicates above and in relation to Chapter 2, the individual will satisfy the requirements of the 183 day and 60 continuous days test within a period of 12 months. 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 2019 to 19 December 2020:

Work days during the period	Total work days during the period	Actual work days outside the Republic	Actual work days in the Republic
2 May to 29 August 2020	85	85	
30 August to 7 September 2020	5		5
8 September 2020 to 10 November 2020	46	46	
11 November to 20 November 2020	8		8
21 November to 19 December 2020	20	20	
Total	**164**	**151**	**13**

The taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in Australia have not been taken into account for this case study:
The portion of the individual's remuneration that will be exempt from normal tax in South Africa under section 10(1)(o)(ii) is calculated as follows:

Work days outside the Republic for the period x Remuneration received during the period Total work days for the period

= Remuneration that may qualify for the exemption under section 10(1)(o)(ii):
151/164 x R1750 000 = R1 611 280, however the exemption is limited to R1250 000.
Thus, R500 000 will be subject to normal tax in South Africa. **(Refer to Case Study 1: column 1B) and also Refer to Individual Tax Tables (Refer to Appendices B.1)**

APPENDICES A2: SOUTH AFRICA AND NEW ZEALAND:

A New Zealand national, employed by a South African subsidiary of a multinational company and who has been residing in South Africa for 7 years with his wife and his three children. Due to the individual specialist knowledge, the individual was requested to assist with an Information Technology project for the period 01 April until 30 November 2020 and then in terms of a renewed employment contract with the same employer has been requested to continue with his services and to finish the project from 15 December to 31 December 2020. In terms of the break in service the employee will take annual leave in New Zealand. The subsidiary company in New Zealand will be remunerating the individual during these periods. The individual will return to South Africa on 1 January 2021.
He will return to South Africa to fulfil employment obligations during the period 1 June 2020 to 07 July 2020, which will include travel days.

Result:
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:

	April	May	June	July	August	September	October	November	December	Total
1 April to 31 May 2020	30	31								61
8 July to 30 November 2020				23	31	30	31	30		145
1 December to 14 December 2020									14	14
15 December to 31 December 2020									17	17
										237

The total remuneration that the individual will be receiving for services rendered during the period 1 April until 31 December 2020 is R1 380 000.

South Africa: Section 10(1)(o)(ii) Application:
The taxpayer is a permanent resident of South Africa. He has a permanent home in South Africa with his family. He also has a house in New Zealand but the home in South Africa is the home that he will return to after his 'wanderings'. All his other assets, motor vehicle, holiday houses and investments are in South Africa. It is therefore submitted that the individual is ordinarily resident in South Africa.
The taxpayer also meets the physical presence test, 91 days in each of the five years and a total of 915 days in South Africa. The taxpayer has also not been outside of South Africa for 330 days; therefore, he is still a resident of South Africa.
As the table indicates above and in relation to Chapter 2, the individual will satisfy the requirements of the 183 day and 60 continuous days test within a period of 12 months. The taxpayer will have two easily identifiable qualifying periods: 1April 2020 to 31 March 2021; and 30 December 2019 to 31December 2020.
The following table sets out the work days outside the Republic for the period 1 April 2020 to 31 December 2020:

Work days during the period	Total work days during the period	Actual work days outside the Republic	Actual work days in the Republic
1 April to 31 May 2020	43	43	
1 June -07 July 2020	27		27
8 July -30 November 2020	104	104	
1 December -14 December 2020 annual leave	10	0	0
15 December to 31 December 2020	13		13
Total	**197**	**147**	**40**

The taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in New Zealand have not been taken into account for this case study.
The 10 working days annual leave taken by the individual whilst outside the Republic reduces the number of work days in the apportionment calculation.
The portion of the individual's remuneration that will be exempt from normal tax in South Africa under section 10(1)(o)(ii) is calculated as follows:

Work days outside the Republic for the period x Remuneration received during the period Total work days for the period

= Remuneration that may qualify for the exemption under section 10(1)(o)(ii):
147/187 x R1 380 000 = R1 084 813. The amount of R1 084 813 is less than the R1250 000 and will be fully exempt from taxation in South Africa. The remainder of the individual's remuneration that is the R295 187 will remain subject to normal tax in South Africa. **Refer to Case Study2: Column 2B and the Individual Tax Tables** (**Appendix B.1**)

Note: As leave days are excluded in the apportionment calculation, the total of 197 work days and the total work days outside the republic as indicated above must be reduced by the 10 days annual leave in the total work days and the days outside of the republic.

Appendices A3: SOUTH AFRICA AND UNITED ARAB EMIRATES:

A South African national employed with the United Arab Emirates airline as a cabin crew member. She has been employed with the airline for 20 years and 8 months as at 31 December 2019. She signed a renewed contract on 1 January 2019. She operates 25-35 flights into South Africa annually and her stay is for 24 hours at a time. The UAE provides a salary and accommodation. She has a resident work visa which is renewed once the employment contract is signed.
She is married to a French national and they both reside in the UAE. Her mom still resides in South Africa. Annually she visits her mom for the period 1 September to 15 September, this

will be as annual leave. All her belongings while residing in the UAE are in the UAE and she has confirmed that she considers the UAE to be her permanent home. Her remuneration for 2021 was R1700 000.

Result:

<u>Residence:</u>
The South African national has been outside of South Africa for 20 year and 8 months. All her belongings are in the UAE. Her husband is also based in the UAE. She returns from her 'wanderings' to the UAE. It is submitted that she is ordinarily resident in the UAE and not in South Africa. If it is contended that the UAE has only issued her with a working visa which is renewed very three years and not a permanent resident visa and therefore, she cannot be resident of the UAE. It can be submitted that she has out of South Africa for 330 days and 60 continuous days and would therefore be deemed a non-resident of South Africa.

The number of calendar days that the South African national has been out of South Africa for the 2021 tax year:

	January	**February**	**March**	**April**	**May**	**June**	**July**	**August**	**Total**
1 January to 31 August 2020	26	28	31	29	26	30	26	27	223 A

	September	**October**	**November**	**December**	**Total**
16 September to 31 December 2020	15	26	30	21	92 B

- Total number of days: A+B = 315 days

<u>Non-Resident of South Africa:</u>
The term non-resident person refers to any person who is not a resident (as defined) in the Republic of South Africa. In the case of a person who is not a resident in South Africa, gross income includes only income which is from a South Africa source or which is deemed to be from a South African source.

Therefore, as we discussed in detail above the individual above will be a deemed non-resident of South Africa as she has been outside of South Africa for 20 years and 8 months. Therefore, if she derives any remuneration from South Africa by providing the services of the 35 flights into South Africa, she will be required to be taxed on the source basis in South Africa. The remuneration derived from South Africa will be required to be included in the non-resident taxpayer's gross income as income which is deemed to be from a South African source. It should however be noted that the South African tax payable by the non-resident may be if applicable be modified by the provision of the DTA in place.
The following table sets out the work days for the taxpayer for the 2021 tax year:

Work days during the period	Total work days during the period	Actual work days outside the Republic	Actual work days in the Republic
1 January to 31 August 2020	174	154	20
1 September to 15 September (annual leave)	11		11
16 September to 31 December 2020	86	60	15
Total	**271**	**214**	**46**

Therefore, the remuneration derived for the 35 days which excludes the 11 days annual leave will be required to be included in the individual's gross income which is deemed to be based on services performed in South Africa and which is deemed to be from a source in South Africa.

In terms of the remuneration derived in SA, the calculation is as follows:

Work days inside the Republic for the period x Remuneration received during the period Total work days for the period

= Remuneration earned in South Africa, 35/260 x R1 700 000 = R228 846. The annual leave of 11 days has been deducted from the republic days and the total days above of 46 and 271 respectively. **(Refer to Case Study 3: Column 3B and 3E)**

The Foreign remuneration of R1 399 231 was derived at as follows:

Work days outside the Republic for the period x Remuneration received during the period Total work days for the period

= Foreign remuneration: 214/260 x R1 700 000 = R1 399 231. **(Refer to Case Study 3: Column 3B and 3E)**

Section 9H 2020:

Consideration will need to be made when she ceased to be a tax resident of South Africa. Section 9H of the Income Tax Act[206] will be required to be applied which provides that a person ceases to be a tax resident of South Africa by relocating to another country in any year of assessment, the individual will be subject to an exit tax. In terms of Section 9H (2) [207]it provides that the person must be treated as having disposed of all of their assets on the date immediately before the day on which they cease to be resident.

[206] Section 9H of the Income Tax Act no.58 of 1962

[207] Section 9H Paragraph 2 of the Income Tax Act no.58 of 1962

South Africa: Section 10(1)(o)(ii) application:

As the table indicates above and in relation to Chapter 2, although the individual will satisfy the requirements of the 183-day and 60 continuous day test within a period of 12 months. For the 2021 tax year, she is not ordinarily resident of South Africa, therefore section 10(1)(o)(ii) amendment will not apply to the individual and the foreign remuneration as calculated above of R1 399 231 will not be subject to the section 10(1)(o)(ii) amendment.

Appendices A3:3A SOUTH AFRICA AND UNITED ARAB EMIRATES: Case Study amended as if person met South African residency test:

The following table sets out the work days outside the Republic for the period 1 January 2020 to 31 December 2020:

Work days during the period	Total work days during the period	Actual work days outside the Republic	Actual work days in the Republic
1 January to 31 August 2020	174	154	20
1 September to 15 September (annual leave)	11		11
16 September to 31 December 2020	86	60	15
Total	**271**	**214**	**46**

As per the table above, the taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in UAE have not been taken into account for this case study. The 11 working days annual leave taken by the individual whilst outside the Republic reduces the number of work days in the apportionment calculation.
The portion of the individual's remuneration that will be exempt from normal tax in South Africa under section 10(1)(o)(ii) is calculated as follows:

Work days outside the Republic for the period x Remuneration received during the period Total work days for the period

= Remuneration earned in South Africa, 35/260 x R1 700 000 = R228 846. The annual leave of 11 days has been deducted from the republic days and the total days above of 46 and 271 respectively.
The Foreign remuneration that may qualify for the exemption under section 10(1)(o)(ii): 214/260 x R1 700 000 = R1 399 231. The amount of R1399 231 is more than the exemption threshold of R1250 000, therefore the amount of R1 250 000 will be exempt and the remaining R450 000 will remain subject to normal tax in South Africa. Refer to Individual Tax Tables (**Appendix B.1**)

Note: As leave days are excluded in the apportionment calculation, the total of 271 work days as indicated above must be reduced by the 11 days annual leave in the total work days.

Appendices: A4: SOUTH AFRICA AND UNITED KINGDOM:

A South African resident, aged 40 years, working for South African subsidiary of a multinational company. Effective 1 April 2020, the individual formally emigrated to the UK with his spouse. He will continue to work for the multinational company but for the United Kingdom subsidiary. He commenced with his employment contract in the UK on 3 April 2020. He is based in the UK on a spousal visa allowing him access to a biometric residence permit. For the period 01 August to 30 August 2020 he took annual leave in South Africa. The individual has a permanent home in the UK, but he still has a furnished apartment in Cape Town as well as a plot of land. His family and all his other belongings are with him in the UK. On the 1 September 2020 he returned to the UK to return to his employment obligations. The total remuneration earned is R1800 000.
The number of calendar days for which remuneration will be derived for services rendered in the United Kingdom in the 2021 year of assessment will be as follows:

	April	**May**	**June**	**July**	**August**	**September 2020 to April 2021**	**Total**
1 April to 31 July 2020	30	31	30				91
31 August 2020 to 31 March 2021					1	242	243
							334

The following table sets out the work days outside the Republic for the period 1 April 2020 to 31 March 2021:

Work days during the period	**Total work days during the period**	**Actual work days outside South Africa**	**Actual work days in South Africa**
1 April to 31 July 2020	88	**88**	
1August 2020 to 30 August 2020	20	**0**	
1 September - 31 March 2020	152	**152**	
Total	**260**	**240**	**0**

The taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in the United Kingdom have not been taken into account for this case study.
The 20 working days annual leave taken by the individual in the Republic reduces the number of work days in the apportionment calculation. The Foreign remuneration derived would be the full R1800 000, which is calculated as follows:

Work days outside the Republic for the period x Remuneration received during the period Total work days for the period

240/240*R1 800 000 = R1 800 000. **Refer to Case Study 4: Column 4B.**

Appendices A4 Scenario 1A & 1B: Formal Emigration through SARB:
The individual would have completed a MP336(b) form[208] and this form would be sent to the authorised dealer for processing and onward transmission if need be to the South African Reserve Bank. (Refer to Chapter 3.2). This application as we have addressed in Chapter 3, can only be submitted to SARS once the form MP336(b) has been completed and signed by the applicant and verified by the Authorised Dealer. A part of the completion of the formal emigration process, a tax clearance application would need to be submitted to the South African Revenue Service (SARS). This application can only be submitted to SARS once the Form MP336(b) has been completed and signed by the applicant and verified by the Authorised Dealer. [209]
Therefore, consideration will need to be made whether the person is a tax non-resident as well. The individual has provided a biometric residence permit[210], which is provided by the HMRC, therefore the individual intends to work and stay in the UK for longer than 6 months.

Appendices A4 Scenario 1A: *Consideration – Formal Emigration and Tax Emigration: Individual indicated to SARS that he is a non-resident for tax purposes:*

- The person has decided to emigrate to settle in the UK, the biometric residence permit indicates that he can stay in the UK for longer than 6 months this will not be issued to persons with short-term visa's or visitors visas. Therefore, the intention of this individual could be viewed that the person has taken up permanent residence in the UK.
- His family and personal belongings other than the flat and the land would be in the UK. The UK would be the place where he would return to after his 'wanderings'[211]. This would be his principle residence.

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[208] Refer to Appendices C and Chapter 2, the MP336 (b) form is a SARB form which essentially covers the applicant, individual or family's personal statement of South Africa assets and liabilities.
[209] Refer to Chapter 3, section 3.2
[210] https://www.gov.uk/biometric-residence-permits- accessed on 18 April 2020- a biometric residence permit holds the biographic details of the holder, it includes the name, date, place of birth, as well as the biometric information of the holder. The Biometric residence permit is the proof of the holder's right to stay, work or study in the UK. The card shows the immigration status of the holder, together with entitlements or access to public services in the company. It is provided if the person applies to come to the UK for longer than 6 months; has extended their visa for longer than 6 months, applies to settle in the UK, transfers their visa to a new passport or applies for certain Home Office travel documents.
[211] *Cohen v CIR*[1946]13 SATC 362; CIR v Kuttel [1992]54 SATC 298

- This person is a South African national and therefore the physical presence test would not have applied to him in determining residency. He was ordinarily resident in South Africa. Therefore, with him formally emigrating to the UK, the '330 full day' requirement will not apply to him.
  Therefore, if we apply section 9H of the Income Tax Act[212], therefore the individual will be deemed to have disposed of all his assets on the date immediately before the day in which he ceased to be resident and he would be required to pay an exit tax.

Appendices A4 Scenario 1B: *Consideration – Formal emigration through SARB: Individual is still ordinarily resident in South Africa*

- It could be contended that the individual has still retained his home in South Africa and the BCP as mentioned above is not a permanent residence visa. He would still be required to apply for citizenship.
- It could further be submitted that the individual returns to South Africa for employment obligations (the 14 days above).
- The individual's parents and other extended family is all in South Africa and the nationality of the individual is South African.
- He has only been in the UK for 334 days (the '330-day physical presence requirement' will not apply as he was not resident by means of physical presence).
- It could be viewed that he is ordinarily resident in South Africa based on the domestic tax legislation as per Chapter 2. [213]

Appendices A4 Scenario 1B: South Africa: Section 10(1)(o)(ii) Application:

As we have established above that the taxpayer is ordinarily resident in the scenario above, Section 10(1)(o)(ii) will be applicable to the individual. The portion of the individual's remuneration that will be exempt from normal tax in South Africa under section 10(1)(o)(ii) is calculated as follows:

Work days outside the Republic for the period x Remuneration received during the period
Total work days for the period

= Remuneration that may qualify for the exemption under section 10(1)(o)(ii):
240/240 x R1 800 000 = R1 800 000. The amount of R1 800 000 is more than the exemption threshold of R1250 000, therefore the amount of R1 250 000 will be exempt and the amount of R550 000(R1 800 000-R1 250 000) R will remain subject to normal tax in South Africa. **Refer to Case Study 4 Column 4B** and the Individual Tax Tables (**Appendices B.1**)

[212] Refer to Chapter 3, section 3.3 – In terms of section 9H of the Income Tax Act[212], if a person ceases to be a tax resident of South Africa by relocating to another country in any year of assessment, the individual will be subject to an exit tax. In terms of Section 9H (2) [212]it provides that the person must be treated as having disposed of all of their assets at market value on the date immediately before the day on which they cease to be resident. In terms of Section 9H (4), the person will be deemed to have disposed of all his assets with the exception of immovable property, a right in immovable property, an asset of a permanent establishment in South Africa, a section 8B share within the first five years of acquisition, a section 8C share or equity instrument that has not yet vested in the person and a section 8A option to acquire a share.

[213] Chapter 2, section 2.1.1.1, page 42

The taxpayer will not be required to work over weekends and thus these days have been excluded from the total work days and actual work day calculations. Possible public holidays in the United Kingdom have not been taken into account for this case study.
The 20 working days annual leave taken by the individual in the Republic reduces the number of work days in the apportionment calculation.

APPENDICES B: OVERVIEW OF THE TAX LEGISLATION OF THE SELECTED COUNTRIES UNDER REVIEW AND TAX TABLES:

B1: SOUTH AFRICA: Personal Income Tax rates: Individuals[214]

RATES OF TAX FOR INDIVIDUALS

2021 tax year (1 March 2020 - 28 February 2021) - See the changes from t

Taxable income (R)	Rates
1 – 205 900	18% of taxable income
205 901 – 321 600	37 062 + 26% of taxable income above 2
321 601 – 445 100	67 144 + 31% of taxable income above 3
445 101 – 584 200	105 429 + 36% of taxable income above
584 201 – 744 800	155 505 + 39% of taxable income above
744 801 – 1 577 300	218 139 + 41% of taxable income above
1 577 301 and above	559 464 + 45% of taxable income above

2020 tax year (1 March 2019 - 29 February 2020) - No changes from the p

Tax Rebates - see changes from previous year

Tax Rebate					
	2021	2020	2019	2018	201
Primary	R14 958	R14 220	R14 067	R13 635	R13
Secondary (65 and older)	R8 199	R7 794	R7 713	R7 479	R7
Tertiary (75 and older)	R2 736	R2 601	R2 574	R2 493	R2

Tax Thresholds - see changes from previous year

Age				Tax

B2: AUSTRALIA:

[214] Income Tax Act No.58 of 1962

B2.1 Resident of Australia:

We understand per the Australian Tax Office[215] the following four tests are used to determine whether a person is an Australia tax resident and it is based on facts and circumstances in light of certain common law and statutory tests described below:

Common Law tests

An individual will be a resident of Australia is he/she resides in Australia according to the ordinary meaning of 'reside'[216]. The ordinary concept of residency takes into account a person's overall circumstances in the relevant income tax year, including:

- The intention or purpose of the individual's presence in Australia;
- The extent of the individual's family or business and employment ties within Australia;
- The maintenance and location of the individual's assets; and
- The individual's social and living arrangement.

Statutory tests

If an individual does not satisfy the common law test of residency, the individual is still considered to be an Australian tax resident of the individual satisfies one or more of three statutory residence tests[217].

- The person's domicile[218] is in Australia, unless the Commissioner is satisfied that he/she has a 'permanent place' of abode outside of Australia;
- The person is in Australia for more than half of the year in Australia, unless it is established that his 'usual place of abode' is outside Australia and he has no intention of taking up residence there; or
- The person is (or the spouse or child under 16 of) a contributing member of a superannuation fund for Commonwealth government officers (Public Sector Superannuation Scheme (PSS) or the Commonwealth Superannuation Scheme (CSS).

B2.2 Foreign Resident of Australia:

Foreign residents (non-residents) are taxed on income only from sources received or accrued within Australia. This will be including any capital gains on taxable Australian property in his or her Australian tax return. This would be in alignment with how South Africa would tax non-residents.

B2.3 Temporary Australian Resident

An individual will be considered a 'temporary resident' if the individual holds a temporary visa and neither the individual nor his/her spouse is an Australian resident within the Social

[215] http:www/ato.gov.au/law/ Subsection 6(1) of the Income Tax Assessment Act 1936 (ITAA 1936)), Tax Ruling 98/17, accessed 05 June 2020

[216] ATO.gov.au – "definition of reside: which means to dwell permanently, or for considerable time, to have a settled or usual abode, and to live in a particular place. Some of the factors that can be used to determine residency status include physical presence, intention and purpose, family and business/ employment ties, maintenance and location of assets, social and living arrangements".

[217] Supra, no.32

[218] ATO.gov.au- the definition of domicile, "is the place that is considered to be her/his permanent home by law. It may be a domicile by origin (where he/she was born) or by choice (where he/ she has changed their home with the intent of making it permanent. A permanent place of abode should have a degree of permanence and can be contrasted with a temporary or transitory place of abode".

Security Act 1991.[219] Generally, temporary residents have visa's that allow them entry to Australia for a restricted period (for example, an employee of an international firm who is transferred to the Australian branch for three years) and are subject to specific income tax, capital gains tax and superannuation consequences[220].
As a temporary resident, the individual will only need to declare income derived in Australia, including any income earned from employment or services performed overseas while the individual is a temporary resident of Australia. Other foreign income and other capital gains therefore do not need to be declared. [221] This is an inclusion which is not applied in the South African tax legislation.
The Personal Tax Rates will be applied to an Australian resident as per **Appendices B2.4A** below:

B2.4 Employment Income: Australian Domestic tax legislation overview:
Except where the terms of a Double Tax Agreement applies, employment income including allowances (other than living –away-from home allowance), bonuses, commissions and directors fees received by a non-resident for services performed in Australia is taxable on Australia at the rates of tax applicable to non-residents (see below)[222].

Appendices B2.4A:

Personal tax rates resident individuals – Year ending 30 June 2020

Taxable income (A$)	Tax on column 1 (1) (A$)	% on excess - ma
18,200	Nil (2)	19%
37,000	3,572	32.5%
90 000	20 797	37%

Appendices B2.4B:

Personal tax rates non-resident individuals – Year ending 30 June 20

Taxable income (A$)	Tax on column 1 (1) (A$)	%
Nil	Nil	32

B3: NEW ZEALAND:

B3.1 Residence: New Zealand Domestic tax legislation overview:
We understand per the New Zealand Tax Office[223] a person a will be New Zealand tax resident if:

[219] ATO.gov.au : (The individual is not an Australian citizen or permanent resident)
[220] https://www.oecd.org/tax/residency/Australia; http:www/ato.gov.au/law/ Subsection 6(1) of the Income Tax Assessment Act 1936 (ITAA 1936)), Tax Ruling 98/17, accessed 30 July 2020
[221] Ibid
[222] Ibid
[223] http:www/ato.gov.au/law/ Subsection 6(1) of the Income Tax Assessment Act 1936 (ITAA 1936)), Tax Ruling 98/17, accessed 05 June 2020

- The person has been in New Zealand for more than 183 days in any 12-month period and hasn't become a non-resident, or
- The person has a permanent place of abode in New Zealand, or
- The person is away from New Zealand in the service of New Zealand's government.

B3.1.1 183 day rule

If the person has been in New Zealand for more than 183 days in any 12 month period, then the person is considered to be a New Zealand tax resident from the first of the 183 days. The 183 days does not have to be consecutive. For example, if a resident comes to New Zealand for 10 days in April and then return for 20 days in September of the same year, it will be counted as 30 days. If a person is in New Zealand for part of the day, it is counted as being a whole day. That means that the days that you arrive or depart are treated as "days present" in New Zealand.

If you become a resident in New Zealand under the 183 day rule you remain a resident until you become a non-resident.

B3.1.2 A permanent place of abode in New Zealand

The Income Tax Act[224] states that a person, other than a company that has a "permanent place of abode" in New Zealand, is a New Zealand tax resident.

To have a "permanent place of abode" in New Zealand there must be somewhere in New Zealand (i.e. a house or other dwelling) where you habitually reside from time to time. Determining this requires an overall circumstance and the nature and quality of the use you habitually make of the place of abode.

If the individual has strong ties to New Zealand it's likely that one has a permanent place of abode in New Zealand. The permanent place of abode test overrides any rules about the number of days you're out of New Zealand.

So, one will still be a tax resident in New Zealand as long as the person has a permanent abode in New Zealand, even if he has gone for more 325 days. All circumstances in considering whether New Zealand is your permanent place of abode looked at including all of the following:

- Presence in New Zealand;
- Accommodation
- Family and social ties
- Economic ties
- Employment or business
- Personal Property

B3.2 Becoming a non –resident for New Zealand Tax purposes

If the person has a permanent place of abode in New Zealand, you will be a resident of New Zealand for tax purposes. However, if the person does not have a permanent place of abode in New Zealand, then the person can become a non-resident under the "325 day rule".

[224] Income tax Act 2007, section YD1, accessed 20 July 2020

The permanent place of abode test overrides any rules about the number of days you're out of New Zealand. So, one will still be a tax resident in New Zealand as long as the person has a permanent abode in New Zealand, even if he has gone for more 325 days. All circumstances in considering whether New Zealand is your permanent place of abode looked at including all of the following:

- Presence in New Zealand;
- Accommodation
- Family and social ties
- Economic ties
- Employment or business
- Personal Property

B3.2.1 325 day rule

A person would become a non-resident for tax purposes if:

- The person does not have a permanent place of abode in New Zealand, and
- The Person is away from New Zealand for more than 325 days in any 12-month period.
- The 325 days do not have to be consecutive. If you in New Zealand for only part of a day, it's counted as a whole day. Employment or business
- Personal Property

B3.3 Part year resident:

Where an individual is tax resident in New Zealand for part of the tax year and was not resident for another part of the tax year, the individual will be taxed on their worldwide income, usually on a received basis, for that part of the year that they were not resident. Income attributed to the period of non-residence will not normally be taxable in New Zealand unless it is derived from New Zealand sources.

B3.4 Taxation of New Zealand tax residents:

An individual who is a New Zealand tax resident is subject to New Zealand tax on their worldwide income, whether the income is earned in or remitted to New Zealand.

B3.5 Employment Income:

Amounts derived in connection with an individual's employment or services are taxable in the hands of the employee. This includes salaries, wages, bonuses, allowances and expenditure incurred on account of an employee.

Accommodation benefits an individual receives in connection with his/her employment or service are taxable unless an exemption applies. There are exemptions for employer provided accommodation in specific assignment related scenarios, provided that they are not salary sacrifice arrangement. Only employers can determine the tax treatment of employer provided accommodation or allowances and therefore employers should obtain specific advice in the structuring of inbound and outbound assignments.

Employers are required to withhold and remit income taxes to IR when paying an individual's employment income.

B3.6 Taxation of non-residents:

Non-residents of New Zealand will be taxed on employment income earned in New Zealand in the same manner as a resident of New Zealand. Personal Tax rates applied to the individual are set out as per below.

Appendices B3.6A:

Personal income tax rates

Tax rates applicable to individuals for the period 1 April 2018 – 31 March 2019 ar

Taxable income over	Not over	Tax on Col
0	14,000	
14,001	48,000	

B4: UNITED ARAB EMIRATES:

B4.1 Taxation of residents and non-resident individuals:
As per the official portal of the UAE Government[225], the UAE does not levy income tax on individuals.[226]

B5: UNITED KINGDOM:

B5.1 Residence: United Kingdom Domestic tax legislation overview:

UK Tax Residency will be determined based on the Statutory Residence Test (hereinafter referred to as SRT)[227]. There are two layers for the SRT: (i) the automatic residence test and (ii) the sufficient ties test. The SRT looks first to see whether or not you are automatically not resident by applying the 'automatic UK tests. If you do not meet the automatic UK tests, then the 'sufficient ties test' would be required to determine tax residence'.[228]

The '*Automatic residence test'*[229] is met if the individual meets any one of the four automatic UK tests:

(i) Being present in the UK for 183 days or more in a tax year (no other consideration is required if this test is met for the tax year).
(ii) The individual has a home in the UK available for all or part of a tax year, and, during the period when the individual has that home, there is a period of at least 91 consecutive days (30 of which fall within the tax year) when either (i) the individual has no home overseas; or (ii) the individual has a home (or homes) overseas, but spends no more than a permitted amount of time in that home (or homes). This refers to fewer than 30 days in the tax year.

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[225] The Official Portal of the UAE Government, UAE taxation, available at https://government .ae/en/information-and-services/finance-and-investment/taxation, accessed on 20 July 2020.
[226] UAE Tax system: The Official Portal of the UAE Government: https://uae/en/information-and services/finance-and investment/taxation, accessed on 20 July 2020
[227]https://www.gov.uk/government/publications/rdr3-statutuory-residence-test-srt
[228]https://www.gov.uk/guidance/residence and Narella Ferreira, United Kingdom Individual Taxation, IBFD – GTCC, Country Tax Guides, section 1.1.4.1.1(accessed 18 August 2020).
[229] [229]https://www.gov.uk/guidance/residence and Narelle Ferreira, United Kingdom Individual Taxation, section IBFD –GTCC, Country Tax Guides, section (accessed 18 August 2020).

(iii) Working sufficient hours in the United Kingdom over a period of 365 days without a significant break from work, and all part of the 365 days falls within the tax year. “UK work days” (i.e. days on which at least 3 hours is spent working in the United Kingdom) must account for at least 75% of the individual’s working days in the 365 day working period; and

(iv) Where the individual, having been treated as UK resident under one of the above automatic tests for each of the three preceding 3 tax years, dies while having a home in the United Kingdom.

Therefore, if the individual meets one of the automatic UK tests, it is then necessary to consider whether the automatic overseas tests apply to prevent the individual being UK resident:

Automatic Overseas tests[230]*:*

An individual will be treated as not UK resident if he comes within any of the scenarios below:

1) Where the individual spent fewer than 16 days in the UK, did not die during the year, and was UK resident for one of the preceding tax years;
2) Where the individual spends fewer than 46 days in the UK, and was not resident in any of the preceding 3 tax years;
3) Where the individual works sufficient hours overseas without a significant break from work. The individual must also have fewer than 31 UK work days in the year (i.e. days on which he does at least 3 hours’ work in the United Kingdom), and must spend fewer than
91 days in the UK in that tax year;
4) In the case of an individual who died during the tax year, where the individual spent fewer than 46 days within the United Kingdom and was either (i) non-UK resident for the 2 tax years preceding the tax year of death, and the tax year before that was a split year; and
5) In the case of an individual who died during the tax year, where the individual had already been non-UK resident under test (3) above: (i) for the 2 preceding tax years; or (ii) for the tax year preceding the tax year of death and the year before that was a split year.

The “Sufficient ties” test[231]*:*

Where an individual meets none of the automatic UK residence tests and none of the automatic overseas tests, he will be treated as UK resident if he has “sufficient ties” to the UK. The relevant ties depend on whether or not the individual was UK resident for one or more of the three years preceding the relevant tax year.

The ties to be considered are family ties, accommodation ties, work ties, 90 day tie (broadly presence in the United Kingdom for at least 90 days), and country tie (i.e. if the United Kingdom is the country in which the individual was present at midnight for the greatest number of days in that year. This will also apply where there is more than one such country where the taxpayer has spent the greatest number of days, and one of those countries is the United Kingdom).

[230] See note 17, Page 6 (Accessed 18 August 2020)
[231] See note 17, Page 6 (Accessed 18 August 2020)

Split year treatment:[232]

An individual who is resident in the United Kingdom for part of a tax year is treated as resident for the entire tax year. However, split –year treatment is available in any of the following cases, where the relevant event takes place during the tax year:

(1) for an individual commencing full-time work overseas;
(2) for an accompanying spouse or civil partner of an individual commencing full-time work overseas;
(3) for an individual ceasing to have a home in the United Kingdom;
(4) for an individual who acquires a home in the United Kingdom only;
(5) for an individual commencing full-time work in the United Kingdom;
(6) for an individual ceasing full-time work overseas;
(7) for the accompanying partner of an individual ceasing full-time work overseas; and
(8) for an individual who acquires a home in the United Kingdom.

B5.2 Income from Employment:

UK Resident:

The amount on which a UK resident individual is liable to income tax for any tax year is his total income for that year less any personal allowances and allowable deductions.[233]

In terms of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) defines "employment" to include any employment under a contract of service or contract of apprenticeship or any employment in the service of a crown.

An individual who is resident in the UK is, in principle, liable to UK income tax on his worldwide income. However, under the following circumstances relief may be obtained for offshore employment income:

(a) an individual who is resident but not domiciled in the United Kingdom is chargeable to UK income tax on a specially advantageous basis in respect of offshore employment income under an employment with an employer that is not resident in the United Kingdom, the duties of which employment are performed wholly outside the United Kingdom. [234]
(b) The individual is, in principle, liable to income tax on the earnings of employment, but the amount charged is the amount of the "chargeable overseas earnings" that the individual remits to the United Kingdom in the tax year in question. If he remits nothing, there is no charge to tax for that tax year. [235]

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[232] See note 17, Page 6, reference 1.1.4.1.2 (Accessed 18 August 2020)

[233] Ibid, page 8, reference 1.2.1, accessed on 18 August 2020

[234] Section 22 and 23 of the ITEPA

[235] Section 22 of ITEPA and https://www.gov.uk/guidance/residence and Narelle Ferreira, United Kingdom Individual Taxation, section IBFD –GTCC, Country Tax Guides, section 7.1.1.2 (accessed 18 August 2020). UK

UK Non-Residents: [236]

Non-residents are chargeable to tax on UK-based employments. The main rates of income tax below are applicable to such income.

UK Rates[237]:

The basic rate of income tax is 20% on income over £ 12 500 up to £ 50 000; you pay income tax at the rate of 40% on income over £ 50 000 (there is also a 45% rate for individuals earning over £ 150 000).

For the 2019/20 and 2020/21, the main rate structure (excluding dividend income) for the United Kingdom (excluding Scotland) is as follows (after personal allowance):

1.10.1. Income

For 2019/20 and 2020/21, the main rate structure (excluding dividend income) for the United Ki (after personal allowance):

	Income tax band (GBP): 2019/20			Income 2020/2
Basic rate (20%)	0	–	37 500	0

The employer must deduct income tax and National Insurance contributions (NIC) from the employer's pay before paying the net balance to the employee. This is known as Pay you earn (PAYE) system. The employer will provide the employee with a payslip each payday, whether weekly, monthly or otherwise. The payslip will show gross wages, the income tax and NIC deducted, and the net wages that the employee actually receives[238].

The payslip will show the PAYE tax code (this will tell the employer how much tax-free pay the employee is entitled to. The employee should check that the tax code on the payslip matches the tax code on the coding notice. HMRC should send the employee and the employer a copy of the coding notice. [239]

If the employee has not received a coding notice, it is probable that the employee is receiving a basic personal allowance for the year. For 2020/21 the basic personal allowance is £ 12 500, so the code should be 1250L.[240]

At the end of the tax year the employer must give the employee a form, P60. This shows the total wages, income tax and NIC for the tax year. [241]

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[236] https://www.litrg.uk/tax-guides/migrants/guides-and-factsheets

[237] Narelle Ferreira, United Kingdom Individual Taxation, section IBFD –GTCC, Country Tax Guides, section 1.10.1(accessed 18 August 2020).

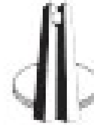
[238] See note 24

[239] Ibid

[240] Ibid

[241] Ibid

APPENDICES C: EXTRACT OF THE MP336 (b) FORM: SEE ATTACHED FOR THE FULL FORM.



South African Reserve Bank

Financial Surveillance Department

Emigration: Application for foreign capital

1. Details of applicant/family unit emigrating

Full names (Block letters)	Marital status	Identity n
1.1 Applicant		
Surname	....	....
First names	....	....
....	....	....
1.2 Spouse (if applicable)		
....	....	....
....	....	....
1.3 Children (if applicable)		
....	....	....
....	....	....
....	....	....
....	....	....

2. If married and spouse is not emigrating, furnish his/her full names ....
3. (a) Intended date of departure from South Africa ....
   (b) To which country are you emigrating? ....
   (c) Are you taking up permanent residence in the country mentioned above?..............
   (d) Have you been given permission by the appropriate authorities in the country residence there? .... If applicable attach copies of the relevant documentation, where available ....
   ....
   ....
   ....

4. Total amount you wish to transfer:

Foreign capital allowance	R

APPENDICES D: INDICATION ON THE INDIVIDUAL TAX RETURN THAT THE INDIVIDUAL IS A NON RESIDENT

Inbox
Notifications
Returns Issued
Returns History
Non-Core Taxes
Returns Search
Payments
Additional Payments
SARS Correspondence
Request For Reason
Disputes
Voluntary Disclosure
Special Links

Back | Save | Submit Return To SARS | Calculate | Print | Source codes | - 100 +

Is this declaration made by a Tax Practitioner? Y N

Mark with an "X" if you ceased to be a resident of the RSA during this year of assessment. X

Please state the date on which you ceased to be a resident:

Year | Month | Day

Please state the date on which you ceased to be a resident: is a mandatory field.