glacier
by Sanlam

# TAX WORKSHOP 2021

**Glacier by Sanlam gathered responses to some of your more pertinent questions below**

Contents



- *DTA = double taxation agreement*
- *RA = retirement annuity fund*
- *SARS = South African Revenue Services*
- *CGT = capital gains tax*
- *Non-resident = not resident in South Africa for taxation purposes*



## CRYPTO ASSETS

Diane Seccombe, National Head of Taxation at Mazars Academy, responds to your questions on this topic.

### 1. How will SARS determine your trading transactions within an E-Wallet in terms of cryptocurrencies?

In respect of these transactions, the onus of proof will rest with the taxpayer to provide information regarding the transactions to SARS. Should interest be payable by the crypto platform based on the balance in the wallet, then the interest amount will be taxed in terms of the normal rules for interest (a portion will be tax free if local interest, and the full amount will be taxable if foreign interest). When the crypto asset is liquidated/disposed of, then an examination will be made into the capital/revenue nature of the amount received for the disposal as discussed in our session. If the taxpayer is completing a statement of assets and liabilities as part of their annual tax return, the amount contained in the wallet must be disclosed. SARS is tracking the movement of monies out of SA and internationally a framework is being created to classify crypto platforms so revenue authorities can directly request information from them.

2. **How will SARS know about your cryptocurrency? There is no reporting to SARS on these accounts. It is the taxpayer's responsibility to disclose, but for those people who don't - how will SARS be able to find out about this?**

   SARS is tracking the movement of monies out of SA and asking taxpayers what the monies are being used for when this can't be determined by looking at the taxpayer's statement of assets and liabilities. Locally and internationally, a framework is being created to classify crypto platforms so all revenue authorities can request information directly from them and then check this information against that disclosed in the taxpayer's return. For example, a Moneyweb article dated 1 June 2021 states that "AltCoinTrader, Luno, and VALR say they have been approached by SARS for information on a small number of customers."

3. **Referring to the example of MTI who was placed under sequestration. Will the loss of the cryptocurrency be tax deductible for their clients?**

   Only if the taxpayer had disclosed a trade in crypto and is still trading. The loss would have to meet the requirements of the general deduction formula. Should the loss be deductible, then SARS may attempt to ring-fence the loss to future crypto taxable income (refer seminar notes, section 20A).

4. **If investment intention is difficult to prove, why is cryptocurrency specifically included in the question on capital gains tax on the ITR12? The question regarding capital gain/loss on the ITR12 specifically includes the wording "including cryptocurrency". This creates the impression that SARS will not have a problem if crypto "income" is declared as gains. If not, why will it be included here and excluded in the question on income?**

   I don't think an investment intention is difficult to prove, if crypto assets are part of an investment portfolio and not being actively traded. The reference to "cryptocurrency" is also strange as this term was specifically redefined in the Income Tax Act to crypto assets. If a taxpayer shows the disposal as a CGT event, they must be prepared to supply the information to SARS to back this up when requested to do so. The format of a tax return is of no relevance or indication of SARS's view sadly. For example: The trust tax return asks what foreign dividends accrued to the trust and then provides a specific line item for the deduction of expenses incurred in respect of the foreign dividends. However, the deduction of any expense against a foreign dividend is <u>expressly disallowed</u> in terms of section 23(q) for all taxpayers.

# ESTATE DUTY

Diane Seccombe, National Head of Taxation at Mazars Academy, responds to your questions on this topic.

1. **If a South African non-resident has South African property (a house) when they die, can they receive the primary residence exemption?**

   There is no prohibition against this due to the fact the taxpayer is non-resident. However, your primary residence is the property where you "ordinarily reside" and one can only "ordinarily reside" in one property at a time, so I think it would be unlikely that they could prove this in respect of the SA property when the taxpayer most likely ordinarily resides in their property in their country of



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residence. However, if the taxpayer resided in the property for a period as a primary residence, e.g. before emigration (or otherwise ceasing to be resident) then we will apportion the capital gain on disposal/deemed disposal of the property and the portion relating to the period of primary residence use, will be reduced by the R2 million exclusion.

2. **If a taxpayer has a South African last will & testament and a Dubai last will & testament, will the taxpayer's assets be taxed according to South African estate duty?**

   A will does not dictate tax residence. If the taxpayer is ordinarily resident in SA, they will be subject to estate duty here.

Glacier responds to your questions on this topic.

3. **Please could the issue of SITUS tax be discussed. If an estate is finalised in SA and 20% duty applied, would a client also be subject to Probate/Situs tax on foreign assets equating to double estate duty (SA and foreign)?**

   'Situs' refers to the location of one's assets. In terms of the law of the situs, your foreign assets valued at over $60 000 in the US could trigger estate tax whilst, when valued at over £325 000 in the UK, could trigger inheritance tax when you die. The situs tax could be as high as 40%. The deceased estate of a South African tax resident therefore may be subject to situs tax on the foreign assets in addition to the South African estate duty charged on the worldwide assets. The heirs of a South African tax resident may claim a credit, in terms of a double taxation agreement, in South Africa for the situs taxes paid. These credits are, however, limited to the value of the South African estate duty payable on the asset.

# TAX RESIDENCE, DTAS AND FOREIGN EMPLOYMENT

Diane Seccombe, National Head of Taxation at Mazars Academy, responds to your questions on this topic.

1. **Where an individual is employed by a South African based company operating in another jurisdiction and is a non-resident due to a DTA (Africa - DRC), what happens when he/she retires or gets retrenched? How are lump sum benefits treated?**

   If the employment (i.e. paid by employer not a retirement fund) lump sums relate to employment services physically rendered by a non-resident outside of SA, then they cannot be sourced in SA and a non-resident is taxed on an SA sourced basis.

2. **Where are realised capital gains taxed after deemed disposal at emigration?**

   These will be taxed in terms of the CGT rules of the country where the taxpayer is resident. The market value used to calculate the proceeds for the deemed disposal will be the new base cost of the asset when calculating the realised gain. Remember immovable SA property was excluded from the deemed disposal, and as a result the full realised gain will be taxed in SA.

3. **Section 9H specifically excludes immovable property from the "deemed disposal" provision for CGT purposes. We have many clients that own shares in companies, that in turn own property. Will the shares in the company be deemed to be disposed of on the day before the person ceases to be a resident?**

Immovable property in SA is excluded. When you look at the section, immovable property includes an “interest in immovable property”. So where a taxpayer owns at least 20% of the shares in a company and the company has SA immovable property as its sole or main asset/s (essentially 80% of company’s assets) then this shareholding is regarded generally as an “interest in immovable property” and will be excluded from section 9H. Full CGT is triggered on actual disposal of the shares and if sold for over R2 million, the purchaser must withhold a percentage of the purchase price in terms of section 35A.

4. **How will a South African tax resident be taxed if they were working offshore (actually living in a foreign country and renting a property and being paid in the currency of the country into a foreign banking account) for two years and then returned to SA (and are physically living in SA) whilst still working (online) for an offshore establishment that is based in a foreign country and are being paid from the foreign country?**

One would have to ascertain the tax residence of the taxpayer. If tax resident in SA, the question is what was paid for <u>employment</u> services physically performed outside SA and whether the section 10(1)(o)(ii) R1 250 000 exemption is available. Income from services physically performed in SA is taxable here regardless of tax residence (subject to the DTA if the taxpayer performing the services in SA is not resident here). The bank account the monies are paid into is not relevant.

5. **A client that resides in South Africa, is employed by an international company located in Africa and this client travels in Africa for work. The client receives their income into an RSA bank account but they’re taxed in another country on the income. The client did not spend 183 consecutive days outside SA. Will the client still be held accountable to pay tax in RSA?**

Yes. The client would have to see if they can get a rebate in SA for some of the foreign taxes paid in terms of section 6*quat* or a deduction of the foreign taxes in terms of section 6quat(1C) depending on where they physically rendered the services.

6. **If Mr Dubai stays in Dubai, will he pay withdrawal tax on his emigration withdrawal from a retirement fund? This year seems like this is the last time he can, but we were warned not to rush into it.**

One would have to examine the DTA with the UAE and determine whether he meets the requirements which prevent SA from taxing the amount. This issue was raised specifically in the budget speech and we don’t know if tax amendments to address this matter will be backdated to 1 March 2021.

7. **What happens when a non-tax resident returns to South Africa and becomes a tax resident again?**

Section 9H dictates that they reacquire their relevant CGT assets for an amount equal to their market value when the taxpayer again becomes tax resident, so this establishes a new base cost and the taxpayer will move back to a residence (worldwide) basis of taxation.



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**8. The scenario of Mr Dubai refers, who worked in Dubai in terms of a DTA since 2017. He needs to confirm on the ITR12 that he ceased to be a resident of SA during 2017. On the ITR12, amounts accruing to him as an exclusive deemed resident of another country, in terms of a double taxation agreement between RSA and that other country, are declared under amounts received that the taxpayer considers to be non-taxable. Are you not only deemed to dispose of your assets the day before you leave when you emigrate?**

No, the year you cease being tax resident. The issue being addressed here was regularising with SARS the year you ceased being tax resident (DTA or emigration, whichever is applicable first).

**9. If a client works in Dubai for 10 years, but continues receiving rental income from an SA property, does this mean only the rental income will be taxed in SA and at which rate?**

If the client is no longer tax resident in SA, they will be taxed on SA sourced amounts, the SA rental income referred to. A non-resident is taxed in terms of the SA income tax tables like every other taxpayer on their taxable rental.

**10. If you are non-resident for income tax purposes, but have SA sourced income (such as a living annuity) do you then complete a tax return as a non-resident taxpayer?**

Yes, and the amounts should be pre-captured on the return due to the fact that an IRP5 was issued. As a non-resident you will only disclose the relevant SA sourced amounts, and you will have applied the relevant DTA to the SA sourced annuities.

**11. The application of Section 9H to Mr Dubai refers. He might not have had any property at the time that he ceased to be resident, but what if he bought property after that date in SA and then rented it out in SA and earned an income on that? Would he have to pay tax in SA on that income? When Mr Dubai broke residency, he was under the impression that he was no longer tax resident in SA and therefore did not see himself as needing to pay tax on his newly-acquired property after he broke tax residency.**

Mr Dubai will now have to examine the consequences of the SA sourced rental in SA. He didn't break out of the SA tax net, he simply moved to a source basis.

**12. What happens if Mr Dubai returns to SA and becomes tax resident after having withdrawn his retirement annuity fund?**

Then he is a taxpayer who again becomes tax resident and he moves back to a residence (worldwide) basis of taxation. Nothing stops what happened in the past when he was not resident to SA, for tax. Please remember whenever we do something only for the reason of saving tax and nothing else, there are strong anti-avoidance provisions built into the Tax Act to combat this.

Glacier responds to your questions on this topic.

**13. Does the following client qualify as ordinarily resident in SA – a Nigerian client currently working in the USA and who previously worked in SA (during which time he took out an SA retirement annuity fund membership).**

The ordinarily resident test in SA is subjective and dependent on a natural person's intention and specific circumstances. SARS Interpretation Note 3 provides guidance on determining whether a natural person is "ordinarily resident" in South Africa. https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes/in-1-20/



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**14. What is the tax situation for South Africans earning foreign income in Iraq and Australia, for example?**

In order to determine the tax consequences, it is firstly necessary to establish the tax residency of the South African under question. If a client is tax resident in more than one country and there is a Double Tax Agreement (DTA) in place between the two countries, they will need to apply the relevant tie-breaker rules to determine the country of residence in terms of the DTA. The DTA will stipulate the country in which the income or capital gain may be taxed. Please refer to the relevant DTA which can be found on https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/

**15. Will the withdrawal tables always apply when the member wants to withdraw after a three-year continuous break in tax residency, regardless of the client being older than 55?**

**If I am 55 or older and financially emigrating, do withdrawals from retirement annuity funds or preservation funds still fall within the withdrawal tax table or the retirement table?**

The three-year break in South African tax residency rule does not have an age restriction. Any pre-retirement withdrawal from a retirement fund is taxed according to the withdrawal tax table. Any pre-retirement withdrawal from a retirement fund, including a withdrawal due to emigration (if approved prior to 28 February 2022) or a three-year break in South African tax residency, will be taxed according to the withdrawal tax table. Only retirement benefits, death claims, severance benefits and retrenchment benefits will be taxed according to the retirement tax table.

**16. May a member of a preservation fund withdraw prior to retirement upon the three-year continuous break in tax residency even if the member has already used their one allowable withdrawal from the fund?**

A member who has ceased to be tax-resident in South Africa for an uninterrupted period of three years may elect to withdraw from a preservation fund even if they have already used their one allowed withdrawal from the fund.

**17. If a client is a member of two different retirement annuity funds where the one membership has already matured, is this client allowed to withdraw from the other retirement annuity fund after the three-year continuous break in tax residency?**

Yes, a member who has ceased to be tax-resident in South Africa for an uninterrupted period of three years may withdraw from a second retirement annuity fund, even if they have previously retired from another retirement annuity fund.

**18. If a retirement annuity fund member is 56 years old after having been non-resident for the three-year continuous period, will the member be forced to retire from the fund, or will they still be able to withdraw?**

The member of a retirement annuity fund does not have to retire from the fund when they reach the retirement age of 55, they may elect a pre-retirement withdrawal, subject to the specific fund rules. If the member elects to withdraw the full benefits from the fund before retirement due to a three-year break in tax residency, the lump sum taken will be taxed according to the withdrawal tax table even if he/she has reached retirement age.

**19. Do you have access to the capital in your living annuity when you emigrate?**

An annuitant may only commute the remaining value of a living annuity when the value falls below R125 000 as per the definition of a living annuity in the Income Tax Act. Where the remaining value



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of the living annuity is above R125 000, no commutation is allowed on emigration or three-year break in South African tax residence. The annuity income will continue to be paid into a South African bank account.

### 20. What are the options for the beneficiaries of an SA tax resident living annuitant upon the annuitant's death? Can they then opt to take the cash amount, pay the tax and take the proceeds offshore?

On the death of a living annuitant, the beneficiaries have the option of commuting the benefit, transferring the benefit to a living annuity in their own name or a combination of a commutation and living annuity. In terms of legislation, any amount of the living annuity that is commuted by a nominated beneficiary will be taxed, according to the retirement tax table, in the hands of the deceased. A non-resident beneficiary can take the benefit received offshore.

### 21. Do non-resident living annuitants pay income tax in SA on the annuity income?

Non-resident taxpayers might be eligible for tax relief in South Africa in terms of a DTA, resulting in the annuity or pension income being taxable only in the new country of tax residence. Non-residents may apply to SARS for a tax directive for relief from South African tax for pension and annuities in terms of a DTA between South Africa and the non-resident annuitant's country of residence. This directive should be applied for annually and submitted to the insurer. If the tax directive is not submitted to the insurer, the insurer will deduct PAYE tax from the annuity according to the South African income tax tables. Please refer to https://www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/tax-and-non-residents/relief-from-south-african-tax-for-pension-and-annuity-income/ for more information.

### 22. A member of a pension preservation fund emigrated to the UK more than three years ago. The member will be retiring soon and needs to choose between withdrawing the full benefit in the preservation fund and being taxed thereon or retiring in SA. Where will the annuity or pension income be taxed if the member chooses to retire in SA whilst ordinarily resident in the UK?

If the member elects to withdraw from the pension preservation fund, the cash lump sum will be taxed according to the withdrawal tax table. If the member purchases a compulsory annuity with the retirement benefit, the annuity income received will be taxed according to the South African income tax tables by default, but the client can apply for a tax directive for relief from South African tax for pension and annuities in terms of the DTA between South Africa and the UK. This tax directive will confirm the amount of the annuity that may be exempt from income tax in SA.

### 23. A member of a preservation fund now lives in Dubai and has no assets in SA. What are the tax consequences should he retire out of the preservation fund and draw an income?

A member who retires from a pension preservation fund will be obliged to purchase an annuity with 2/3's. If the annuitant is non-resident for tax purposes, he can apply for a tax directive for relief from South African tax for pension and annuities in terms of a DTA between South Africa and his tax country of residence. This tax directive will confirm the amount of the annuity that may be exempt from South African income tax.

### 24. What happens to a sinking fund investment when the policyholder emigrates?

A sinking fund is taxable in the policyholder fund, therefore in the hands of the investment life company. There should be no income tax implications or deemed disposal upon emigration of the policyholder. The capital gains tax exemption that applies in respect of long-term insurance policies, as per paragraph 55(1) of the Eighth Schedule to the Income Tax Act, if the requirements



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are met, should also apply to a sinking fund policy. This means that any gain or loss from the deemed disposal on the day prior to breaking tax residency, will be disregarded in terms of paragraph 55.

# OFFSHORE TRUSTS

Diane Seccombe, National Head of Taxation at Mazars Academy, responds to your questions on this topic.

1. **If some of the beneficiaries of an offshore trust are resident and some are non-resident, can a part of any gain still vest in resident beneficiaries?**

   Yes, provided this is allowed in terms of the trust deed.

2. **Where a non-resident creates an offshore trust funded by foreign earnings or savings (X) prior to becoming an SA tax resident, how will capital distributions from the trust be taxed? Does section 25B(2A) come into play?**

   Section 25B(2A) applies to tax accumulated/retained earnings in the offshore trust when they are vested in a resident and not pure trust capital (like the “X” in your example).

3. **How does Section 25B(2A) fit in with the bucket system of taxation for offshore trusts? Do distributions retain their original nature?**

   They don’t, the amounts lose their identity if you are looking at the accumulated/retained earnings in the trust. Original capital placed into the trust is not affected by Section 25B(2A).

4. **How does the letter of wishes apply on a normal offshore discretionary trust in terms of Section 25B(2A)? Does it still apply, and will the South African resident be taxed on any asset/income vested?**

   SA doesn’t recognise a letter of wishes currently, so a vested right is obtained in a trust deed or by way of the exercise of trustee discretion. This is what SARS wants to look at changing, they want some way for “letters of wishes” to be regarded as a “right” in SA (possibly for estate duty purposes).

# GENERAL/ SARS-RELATED

Diane Seccombe, National Head of Taxation at Mazars Academy, responds to your questions on this topic.

1. **We all know SARS will start to look for offshore assets that have not been declared. What we don’t know is how SARS will go about looking for these. "Fishing expeditions" are not entertained by various countries. How will SARS start to look for these assets?**

   They are looking at these assets, using foreign bank account information being sent to them annually in terms of reciprocal agreements entered into, between SA and 87 other countries. Our clients started receiving enquiry letters from SARS in respect of their offshore accounts in December 2020.

2. **If a taxpayer has assets overseas in a bank, how do they declare this?**

You disclose these assets in your statement of assets and liabilities in your tax return. If the assets have been held for a while, I suggest you get a tax practitioner to assist with correspondence to SARS in this regard.

3. **If regular money transfers are being made to a resident spouse's bank account in SA from the non-resident spouse based in another country, how will this be treated by SARS?**

There is no issue with these amounts. SARS will ensure the non-resident spouse has no tax obligations on the amounts here.

4. **Should a taxpayer make a profit on the sale of an asset such as a vintage vehicle, and this profit/gain is within the capital gains tax exemption, would the taxpayer still need to register as a provisional taxpayer? Does it make a difference if the profit is higher than the exemption?**

Assuming the exemption being referred to is the R40 000 annual exclusion – then only once the annual exclusion and assessed capital losses are taken into account will the taxpayer be able to calculate if there is a net capital gain for the tax year. Hereafter you apply the 40% inclusion rate to establish whether the taxpayer made a taxable capital gain. The taxable capital gain is what we look at in respect of potential provisional tax.

5. **Please clarify the issue of a CGT event and the requirement for Provisional Tax. It would seem that a non-provisional taxpayer should, in the event of a CGT event, register for provisional tax and submit a provisional tax return at the end of the tax year in which the CGT event took place. As taxable gains are added to taxable income, it is my understanding that a taxable gain does not fall into the definition of income, being gross income less exemptions.**

Correct.

6. **Is the inclusion of the capital gains in the 2nd provisional filing not subject to the usual basic amount 80% rule for earnings above R1 million?**

No. Firstly in terms of the law, no second provisional taxpayer is permitted to base their payment on the basic amount (which by definition excludes most lump sums and a taxable capital gain). The basic amount actually only applies to the first provisional payment. In order for a taxpayer with actual taxable income for the year (i.e. including a taxable capital gain) of more than R1 million to avoid the 20% penalty for underpayment of their second provisional, they must ensure that the taxable income on which they base their second provisional is not lower than 80% of actual taxable income for the year (including the taxable capital gain). There is no use of the basic amount for these taxpayers as a safe harbour to avoid the 20% penalty.

Glacier responds to your questions on this topic.

1. **Does SARS keep record of non-deductible RA contributions or does the onus rest upon the taxpayer?**

SARS keeps record of any retirement fund contributions submitted in the taxpayer's annual income tax return which were disallowed solely by reason of the fact that the amount that was contributed exceeds the amount of the deduction allowable in respect of that year of assessment. The SARS ITA34, issued to taxpayers after their annual tax return submission each year, will reflect the excess contributions on SARS' record. It is advisable for the taxpayer to also keep track of the disallowed contributions.

**2. Will the retirement tables be applied at voluntary retrenchment, should a withdrawal be made before transferring the provident fund capital to a provident preservation fund?**

Retrenchment withdrawals from occupational retirement funds are taxed according to the retirement benefits tax tables, taking into account previous taxable lump sums taken.

**3. Can the 2/3 go to a preservation fund prior to a living annuity?**

Upon retirement from a retirement fund, one-third of the non-vested retirement benefit and 100% of the vested retirement benefit can be taken in cash, the remaining two thirds must be used to purchase a compulsory annuity. The two-thirds cannot be transferred to a preservation fund after retirement.

**4. A client who has built up disallowed retirement fund contributions is retiring and decides to only take the R500k tax free at retirement. How will SARS know to deduct income tax from his living annuity when it starts?**

Upon retirement from the retirement fund, the excess contributions will be used to reduce the taxable amount of the cash lump sum taken by the client (the disallowed contributions will first be deducted from the cash lump sum before the retirement tax table is applied). If the client has any remaining excess contributions, the insurer will withhold PAYE tax from the annuity payments but the section 10C exemption will be applied against the qualifying annuity income by SARS when the taxpayer submits their annual tax return.

**5. What happens if a client had a go at forex trading and lost money? Will SARS allow that loss as a deduction?**

Section 24I of the Income Tax Act provides for the inclusion in, or deduction from, income of an 'exchange difference' on an 'exchange item', during a year of assessment. It is advisable to consult a specialised tax practitioner in this regard.



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