GLACIER TAX WORKSHOP

2021

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THINK WORLD CLASS

GLACIER TAX UPDATE 2021

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<u>Disclaimer</u>

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NB: The information contained in the notes is specifically drafted, worded and used to illustrate only the key concepts presented, and as such is not to be regarded as a technical reference source by attendees

TAX RATES

NATURAL PERSONS

Taxable income (R)	2020/21 Rates of tax	Taxable income (R)	2021/22 Rates of tax
R0 - R205 900	18% of each R1	R0 - R216 200	18% of each R1
R205 901 - R321 600	R37 062 + 26% of the amount above R205 900	R216 201 - R337 800	R38 916 + 26% of the amount above R216 200
R321 601 - R445 100	R67 144 + 31% of the amount above R321 600	R337 801 - R467 500	R70 532 + 31% of the amount above R337 800
R445 101 - R584 200	R105 429 + 36% of the amount above R445 100	R467 501 - R613 600	R110 739 + 36% of the amount above R467 500
R584 201 - R744 800	R155 505 + 39% of the amount above R584 200	R613 601 - R782 200	R163 335 + 39% of the amount above R613 600
R744 801 - R1 577 300	R218 139 + 41% of the amount above R744 800	R782 201 - R1 656 600	R229 089 + 41% of the amount above R782 200
R1 577 301 and above	R559 464 + 45% of the amount above R1 577 300	R1 656 601 and above	R587 593 + 45% of the amount above R1 656 600
Rebates		**Rebates**	
Primary	R14 958	Primary	R15 714
Secondary	R8 199	Secondary	R8 613
Tertiary	R2 736	Tertiary	R2 871
Tax threshold		**Tax threshold**	
Below age 65	R83 100	Below age 65	R87 300
Age 65 and over	R128 650	Age 65 and over	R135 150
Age 75 and over	R143 850	Age 75 and over	R151 100

Rates of normal tax	
Retirement fund lump sum withdrawal benefits – 2021/22	
Taxable income	**Rates of tax**
R0 – R25 000	0% of taxable income
R25 001 – R660 000	18% of taxable income exceeding R25 000
R660 001 – R990 000	R114 300 + 27% of taxable income exceeding R660 000
R990 001 and above	R203 400 + 36% of taxable income exceeding R990 000

Rates of normal tax	
Retirement fund lump sum benefits and severance benefits – 2021/22	
Taxable income	**Rates of tax**
R0 – R500 000	0% of taxable income
R500 001– R700 000	18% of taxable income exceeding R500 000
R700 001 – R1 050 000	R36 000 + 27% of taxable income exceeding R700 000
R1 050 001 and above	R130 500 + 36% of taxable income exceeding R1 050 000

Annual local interest exemption for:		
	Rand	
	2022	2021
Persons under 65	23 800	23 800
Persons 65 and above	34 500	34 500

CGT		
	2022	2021
Inclusion rate	40%	40%
Annual exclusion	R40 000	R40 000
Exclusion in year of death	R300 000	R300 000
Primary residence exclusion	R2 000 000	R2 000 000

Section 12T Tax free Investment		
	Rand	
	2022	2021
Annual contribution	36 000	36 000
Lifetime contribution	500 000	500 000

TAX FORMULA

<u>GROSS INCOME</u> (Section 1-“resident”-worldwide, non-resident SA source, special inclusions)

LESS EXEMPT AMOUNTS (sections 10, 10B, 10C and 12T)

<u>INCOME</u>

LESS DEDUCTIONS (Sections 11 etc *but not* 11F or 18A)

LESS ASSESSED LOSS (Sections 20, 20A)

ADD AMOUNTS TO BE INCLUDED IN TAXABLE INCOME

- ALLOWANCES (taxable portion eg Travel allowance)
- TAXABLE CAPITAL GAINS (Net capital gain x 40% inclusion rate - indiv)

LESS

Section 11F (Retirement fund contributions)

Section 18A (Donations to qualifying PBO’s)

<u>TAXABLE INCOME</u> (**excluding qualifying lump sums*)

(multiply by tax rate in tax table)

TAX PAYABLE

Less rebates (section 6 and 6quat)

ADD Tax payable on qualifying lump sums (see lump sums tax tables)

Less medical rebates (sections 6A and 6B)

<u>FINAL TAX PAYABLE</u>

NB: *Taxable income will not include qualifying lump sums (lump sums from retirement funds and severance lump sums).

SEVERANCE BENEFIT

The concept “severance benefit” was introduced with effect from 1 March 2011 and includes any amount (other than a lump sum benefit from a fund) received by or accrued to a person by way of a lump sum from the person’s employer in respect of the relinquishment, termination, loss, repudiation of the person’s appointment, if:

- Such person has attained the age of 55 years; *or*
- The loss of employment is due to sickness, accident, injury or incapacity through infirmity of mind or body; *or*
- Such termination or loss is due to the employer having ceased to carry on the trade or the person having become redundant (general personnel reduction).

Severance benefits are included in gross income (in terms of par (*d*)) if it is received/ accrued by way of a **lump sum AND one** of the above requirements are met, but do NOT form part of taxable income

GROSS INCOME

The definition of the term ‘gross income’ in s 1 of the Income Tax Act is central to the whole of the Income Tax Act.
Once the residence of a taxpayer has been established, the taxpayer’s gross income must be determined in relation to the year of assessment or period of assessment of the taxpayer. If the taxpayer is a resident, gross income will be determined on a worldwide basis. If the taxpayer is a non-resent then only amounts from a SA source may be included into the taxpayer’s gross income.
As far as is here relevant, gross income will include:

- the total amount, in cash or otherwise,
- received by or accrued to a person
- during such a year or period of assessment,
- excluding receipts or accruals of a capital nature, but including, without limitation of the scope of the definition, certain amounts, whether of a capital nature or not, commonly referred to as the ‘special inclusions’.

ELEMENTS OF DEFINITION

‘the total amount, in cash or otherwise’

‘Gross income’ is the total amount received by or accrued to the taxpayer whether in cash or otherwise. Even without the words ‘whether in cash or otherwise’, the definition of ‘gross income’ would include, by virtue of the term ‘amount’, ‘not only money, but the value of every form of property earned by the taxpayer.
For example, a person who renders services in return for shares instead of cash will have included in his gross income the value of the shares.
The value to be placed upon the asset other than cash received or accruing as income is the amount that could be obtained for it on the open market if it were to be sold under some reasonable method of sale.

‘Received by or accrued to’

The reference in the definition of the term ‘gross income’ in s 1 to the total amount ‘received by or accrued to or in favour of’ a person during a particular year or period of assessment makes it clear that the definition applies both to ‘receipts’ and to ‘accruals’. However an amount which has been taxed as an accrual cannot again be taxed when it is received, and an amount which has been taxed as a receipt cannot again be taxed when it accrues.
It is also clear that, despite the frequent use of the word ‘profits’, it is not profits but (gross) receipts and accruals that are included in gross income. There must be either a receipt or an accrual, and, in the absence of special provisions, when a person neither receives anything nor has anything accrued to him, there can be no amount to be included in his gross income. For example, an unrealized appreciation in the value of his assets or the rental value of the residence he owns and occupies cannot lead to an inclusion in his gross income, since the benefit arising does not constitute a receipt or an accrual.
Generally, the time of accrual of income derived from a foreign source is no different from the time of accrual of income from a source within the Republic.

Meaning of ‘received by’

In *Geldenhuys v CIR* [1] it was held that the words ‘received by or accrued to or in favour of any person’ in the definition of ‘gross income’ in s 1 relate to the taxpayer, and that the words ‘received by’ must mean ‘received by the taxpayer on his own behalf for his own benefit’. Therefore rent received by an attorney on behalf of a client forms part of the gross income of the client, since the attorney has not received it on his own behalf and for his own benefit.

Meaning of ‘Accrued to’

[1] (14 SATC 419) (1947 (3)SA 256(C))

In *Lategan v CIR* [2] it was held that the meaning of the words 'has accrued to' in the definition of the term 'gross income' meant 'to which [any person] has become entitled'. That is, as soon as an amount becomes unconditionally and uncontingently due to a taxpayer, it must be recognized as income. In other words, at the time that a taxpayer obtains a vested right to a future payment, the amount accrues to the taxpayer.

Not in taxpayer's hands or SA

It is often difficult for taxpayers to understand that an amount can be included into "gross income" despite the taxpayer having had no physical receipt of the amount and in certain instances, the amount may not even have been repatriated to SA.

NB Legal and illegal trade: The Act is not concerned with the legality or illegality of a transaction. Receipts and accruals from an unlawful business are taxable if there is a scheme of profit-making involved.

'excluding receipts or accruals of a capital nature'

There is no definition in the Act of receipts and accruals 'of a capital nature'.

- Amounts received by a taxpayer for allowing the use of an asset to some other person, for example, interest, rental, royalties, all partake of the nature of income (revenue) and fall within the definition of gross income. As long as the amount is received for the right of use of an asset without any change in ownership of the asset, it is usually in the nature of income.
- Amounts received for services rendered clearly partake of the nature of income.
- Fortuitous accessions to capital, such as lump-sum legacies and gifts, and isolated lottery, betting or sweepstake wins, are of a capital nature and fall outside the definition of gross income.
- The proceeds derived from the sale of ordinary income-producing investments or from the sale of assets by a person who does not trade in such assets, for example, a private dwelling, rental property and shares are of a capital nature. On the other hand, if the taxpayer makes it their business to buy and sell the same assets, the proceeds derived from the sale would be of an income nature.

Capital vs Revenue

What is a receipt of a capital nature in the hands of one taxpayer may therefore be of an income nature in the hands of another. How do the courts ascertain whether a particular receipt or accrual is 'of a capital nature'?

Capital amount

Generally speaking, amounts of a capital nature are excluded from "gross income" (subject to the special inclusions). This does not mean that the amount is free from tax, but rather that the consequences of capital gains tax (CGT) must be considered. The effective rates of are

- Natural person: 7.2%-18%
- Company: 22.4%
- Trust: 36%

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[2] (2 SATC 16) (1926 CPD 2013)

Revenue amount

An amount that is revenue in nature, will be included in "gross income". Qualifying expenses may be deducted and the resulting taxable amount taxed at the rates relevant for the particular taxpayer:

- Natural person: 18-45%
- Company: 28%
- Trust: 45%

The differing tax treatment of capital vs revenue amounts makes it clear why this issue has resulted in decades of dispute between taxpayers and SARS and a multitude of court decisions.

Onus of proof

The first point to note is that in terms of s 102 of the Tax Administration Act the burden of proof that an amount is of a capital or revenue nature rests upon the taxpayer.

No "one size fits all"

Secondly, the inquiry whether an amount is of an income or a capital nature is a question of law, which has to be decided upon the facts of each case.

Intention — the golden rule

The most important 'test' employed by the courts in deciding whether the proceeds arising upon the disposal of an asset are in the nature of income or capital is the test of 'intention': with what intention did the taxpayer:

- acquire,
- hold and
- dispose of the asset?

It is well settled law that the test of intention is subjective and its application involves a consideration of all the circumstances surrounding the acquisition of and method of dealing with an asset.

Scheme of profit making-revenue

The proceeds will be in the nature of income if the asset was acquired and held for the purpose of resale at a profit in a scheme for profit-making (the asset is then regarded as trading stock).

Investment intention-capital

The proceeds will be in the nature of capital and not included in gross income, if the asset was acquired and held not for the purpose of resale at a profit but, for example, in order to produce an income in the form of rent, interest or dividends.

The taxpayer's intention may change between the acquisition and disposal of the asset, with the consequence that the character of the asset, as income or capital, also changes.

It follows that the taxpayer's intention must be investigated not only at the time he acquired the asset, but during the whole period over which he held the asset and at the time he disposes of the asset.

The taxpayer's own evidence about his intention and his credibility will be considered by a court but, because of subjectivity, self-interest, the uncertainties of recollection and the possibility of mere reconstruction, it will test that evidence against the surrounding facts and circumstances in order to establish his true intention.

One must consider:

- the *ipse dixit* (say so) of the taxpayer as to his intent and purpose
- objective review of all the relevant facts and circumstances
- the course of conduct of the taxpayer in relation to the transactions in issue,
- the nature of the taxpayer's business or occupation and
- the frequency or otherwise of the taxpayer's past involvement or participation in similar transactions.

Change of intention

An original intention to use an asset as an investment may be changed to one to use it in the carrying out of a scheme of profit-making. Conversely, an original intention to acquire an asset for the purpose of resale at a profit may be changed into one to hold it as an investment.

If the original intention of buying land is not to buy it in order to sell again but to work it, and subsequently the owner changes his intention, decides to become a land-dealer and, in pursuance of that intention, cuts up the land into plots and merges them into the general profit-making scheme of buying and selling land, any proceeds derived from the sale of the land would be of an income nature, since the owner has changed his intention from one of investment to a profit-making scheme. Conversely, if the land was originally acquired for resale at a profit, that is, to carry out a scheme of profit-making, and subsequently the owner changes his intention and decides to use the land for the erection of buildings in which he will run a factory, any proceeds derived from a subsequent sale of the land would be of a capital nature since the owner has changed his intention from one of a profit-making scheme to one of investment, so that the proceeds have resulted from the realization of an investment.

In deciding whether a taxpayer has changed his original intention in regard to a particular asset and has gone over to the business of selling that asset for profit, the courts will consider the history and activities of the taxpayer.

A change of intention requires something more than the mere decision to dispose of a capital asset, notwithstanding the fact that there may be protracted negotiations or hard bargaining in order to obtain the maximum price on a realization.

CRYPTO ASSETS

SARS'S STANCE ON THE TAX TREATMENT OF CRYPTOCURRENCIES

PRETORIA, 06 April 2018 - The South African Revenue Service (SARS) will continue to apply normal income tax rules to cryptocurrencies and will expect affected taxpayers to declare cryptocurrency gains or losses as part of their taxable income.

The onus is on taxpayers to declare all cryptocurrency-related taxable income in the tax year in which it is received or accrued. Failure to do so could result in interest and penalties.

Taxpayers who are uncertain about specific transactions involving cryptocurrencies may seek guidance from SARS through channels such as Binding Private Rulings (depending on the nature of the transaction).

Increased attentiveness and speculation regarding the future of cryptocurrencies has prompted calls for SARS to provide direction as to how cryptocurrencies should be treated for tax purposes. However, as indicated in this media statement, there is an existing tax framework that can guide SARS and affected taxpayers on the tax implications of cryptocurrencies, making a separate Interpretation Note unnecessary for now.

Cryptocurrency (typified by Bitcoin) is an internet-based digital currency that exists almost wholly in the virtual realm. A growing number of proponents support its use as an alternative currency that can pay for goods and services much like conventional currencies.

In South Africa, the word "currency" is not defined in the Income Tax Act (the Act). Cryptocurrencies are neither official South African tender nor widely used and accepted in South Africa as a medium of payment or exchange. As such, cryptocurrencies are not regarded by SARS as a currency for income tax purposes or Capital Gains Tax (CGT). Instead, cryptocurrencies are regarded by SARS as assets of an intangible nature.

Capital asset or trading stock

Whilst not constituting cash, cryptocurrencies can be valued to ascertain an amount received or accrued as envisaged in the definition of "gross income" in the Act. Following normal income tax rules, income received or accrued from cryptocurrency transactions can be taxed on revenue account under "gross income". Alternatively such gains may be regarded as capital in nature, as spelt out in the Eighth Schedule to the Act for taxation under the CGT paradigm.

Determination of whether an accrual or receipt is revenue or capital in nature is tested under existing jurisprudence (of which there is no shortage).

Taxpayers are also entitled to claim expenses associated with cryptocurrency accruals or receipts, provided such expenditure is incurred in the production of the taxpayer's income and for purposes of trade. Base cost adjustments can also be made if falling within the CGT paradigm.

Gains or losses in relation to cryptocurrencies can broadly be categorised with reference to three types of scenarios, each of which potentially gives rise to distinct tax consequences:

(i) A cryptocurrency can be acquired through so called "mining". Mining is conducted by the verification of transactions in a computer-generated public ledger, achieved through the solving of complex computer algorithms. By verifying these transactions the "miner" is rewarded with ownership of new coins which become part of the networked ledger.

This gives rise to an immediate accrual or receipt on successful mining of the cryptocurrency. This means that until the newly acquired cryptocurrency is sold or exchanged for cash, it is held as trading stock which can subsequently be realized through either a normal cash transaction (as described in (ii) or a barter transaction as described in (iii) below.

(ii) Investors can exchange local currency for a cryptocurrency (or vice versa) by using cryptocurrency exchanges, which are essentially markets for cryptocurrencies, or through private transactions.

(iii) Goods or services can be exchanged for cryptocurrencies. This transaction is regarded as a barter transaction. Therefore the normal barter transaction rules apply.

Value-Added Tax (VAT)

With effect from 1 April 2019, the "acquisition, collection…buying..selling" of any cryptocurrency was included in the definition of a 'financial service' in section 2 of the VAT Act and as such will be regarded as an exempt supply for VAT purposes, meaning output VAT will not be levied on the relevant transactions and no input VAT can be claimed.

Capital Gain / Loss

(Excluding amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7)

Did you dispose of any local assets attracting capital gain or loss (including Cryptocurrency)? Y ◯ N ◯

How many disposals (shares to be combined as one disposal) took place? [Number of disposals]

Did you dispose of any foreign assets attracting capital gain or loss (including Cryptocurrency)? Y ◯ N ◯

How many disposals (shares to be combined as one disposal) took place? [Number of disposals]

Local Business, Trade and Professional Income

(Excluding amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7)

Did you derive income from local business, trade or profession other than rental income from the letting of fixed property(ies)? Y ◯ N ◯

How many separate trading activities did you carry on? [Number of partnerships]

RETIREMENT FUNDS

SECTION 11F

(1) Notwithstanding section 23*(g)*, for the purposes of determining the taxable income of a natural person in respect of any year of assessment there must be allowed as a deduction from the income of that person any amount contributed during a year of assessment to any pension fund, provident fund or retirement annuity fund in terms of the rules of that fund by a person that is a member of that fund.

(2) The total deduction allowed in terms of subsection (1) must not in a year of assessment exceed the lesser of—

(a) R350 000; **or**

(b) 27,5 per cent of the higher of the person's—

(i) remuneration (other than in respect of any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) as defined in paragraph 1 of the Fourth Schedule; or

(ii) taxable income (other than in respect of any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) as determined before allowing any deduction under this section and section 18A ***or***

(c) the taxable income (other than in respect of any retirement lump sum benefit, retirement lump sum withdrawal benefit or severance benefit) of that person before—

(i) allowing any deduction under this section *and section 18A; and*

(ii) the inclusion of any taxable capital gain.

Effective date

The amendments will be deemed to have come into effect on 1 March 2016, the 2017 year of assessment.

(TLAB 2018 effective 1 March 2019)

Section 11F

(a) Any excess disallowed can be carried forward and treated as a contribution in the succeeding year (and so on), provided:

1. it has not otherwise been deducted, taken into account in the taxable amount of a lump sum benefit under the Second Schedule, or
2. exempted under s 10C in the payment of a compulsory annuity.

(b) Any contribution by an employer which has been taxed as a fringe benefit in the member's hands, is treated as having been contributed by the member.

(c) For purposes of the deductions, a partner is treated as an employee of his partnership (and the partnership is treated as an employer).

Disallowed contributions: rollover excess qualifying contributions pre 1 March 2016

Qualifying fund contributions for the purposes of section 11F include any amount contributed to a pension, provident or RAF in a previous year of assessment which was disallowed solely because the amount that was contributed exceeded the amount of the deduction that was allowable *in respect of that year of assessment.*

The effect of this is that contributions to RAF's or pension funds (*not* provident funds) made pre-1 March 2016 that were not deductible in terms of sections 11(k) (pension funds) and 11(n) (RAF's) must be considered for deduction in terms of section 11F in a current year and any amount not deductible in a current year of assessment can be carried forward, subject to the limitations discussed above.

Tax Exemption Section 10(1)(d)

There is exempt from income tax the receipts and accruals of any pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or a beneficiary fund defined in s 1 of the Pension Funds Act which has been approved by the Commissioner

Tax exemption against compulsory annuities Section 10C

'Compulsory annuity' means the amount of the remainder of the retirement interest of a person payable in the form of an annuity as contemplated in:

(*a*) the definition of pension fund in s 1;

(*b*) the definition of pension preservation fund in s 1;

(*c*) the definition of retirement annuity in s 1;

(*d*) from 1 March 2016, the definition of provident preservation fund.

In respect of the aggregate compulsory annuities payable to a person, there will be exempt from tax an amount equal to so much of that persons own contributions to any pension, provident or retirement annuity fund that did not rank for deduction against that persons income under s 11F in respect of any prior year of assessment as has not previously been allowed under the Second Schedule or exempted from tax.

TLAA 2020

Excess Fund Contributions and Estate Duty

(1) Section 3 of the Estate Duty Act, 1955, is hereby amended by the addition in subsection (3) of paragraph (*e*):

''*(e)* so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was allowed as a deduction in terms of paragraph 5 of the Second Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), to determine the taxable portion of the lump sum benefit that is deemed to have accrued to the deceased immediately prior to his or her death;''.

(2) Subsection (1) is deemed to have come into operation on 30 October 2019 and applies in respect of—

(a) the estate of a person who dies on or after that date; and

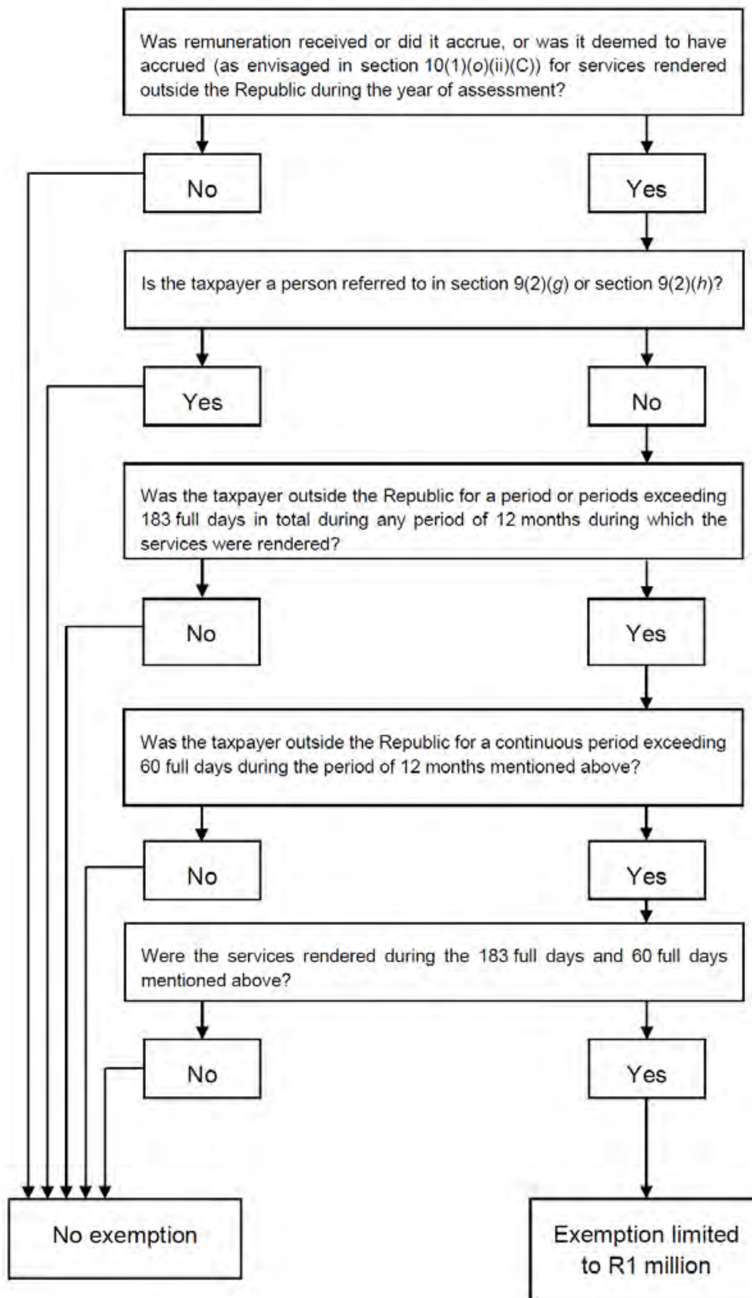
(b) any contributions made on or after 1 March 2016.

SARS IN 16 (Issue 3)

NB The 2020 Budget Speech increased the R1million exempt amount to R1.25million

Annexure B – Diagram

Basic steps to be followed in determining the exemption



EXEMPTION FOREIGN REMUNERATION

TLAA 2020 PAGE 18

Exemption section 10(1)(o)(ii)

In terms of section 10(1)(o)(ii):

In order for the **R1 250 000** exemption to be enjoyed (from the 2021 year of assessment) against remuneration from employment services rendered outside of SA two requirements must both be met. The employee was outside the Republic:

1. for a period exceeding 183 full days in aggregate during any period of 12months; and
2. For a continuous period exceeding 60 full days during that period of 12 months

And the employment services were rendered during the above periods.

TLAA 2020 COVID amendment (wef 29 February 2020):

The first requirement [see (1) above)] has been amended to read:

a) for a period exceeding 183 full days in aggregate during any period of 12months; or
b) For a period exceeding 117 full days in aggregate during any period of 12 months in respect of any year of assessment ending on or after 29 February 2020 but on or before 28 February 2021

There has been no amendment to the second requirement of a continuous period exceeding 60 days (see above)

Period exceeding 117 days

The 12 month period under examination to assess the 117 days must end between 29 February 2020 ("o*n or after"*) and 28 February 2021 ("*on or before"*). Should the 12 month period under review not end between these dates, then a period exceeding 183 days in aggregate must again be utilised.

TAX RESIDENCE

The concept of 'resident' is fundamental to the worldwide or residence-based system of taxation. A person who qualifies as a 'resident' as defined in s 1 is subject to tax in the Republic on worldwide receipts and accruals.

A non-resident, that is, a person who does not qualify as a resident, is subject to tax in the Republic only on receipts and accruals from a source within or deemed to be within the Republic.

In determining the tax liability of "residents" and non-residents the effect of a double tax agreement between the Republic and the relevant foreign country must be borne in mind.

The following persons are defined as being 'resident':

- A natural person who is ***ordinarily resident*** in the Republic.
- A natural person who is not at any time during the year of assessment ordinarily resident in the Republic, if such person is physically present in the Republic for certain periods.
- A person other than a natural person that is incorporated, established or formed in the Republic.
- A person other than a natural person that has its place of effective management in the Republic.

Meaning of 'resident': natural persons

The term 'resident' is defined in s 1, in relation to a natural person, as

'(a) a person who is

(i) ordinarily resident in the Republic; ***or***

(ii) meets the requirements of the physical presence test'

A natural person qualifies as a resident, therefore, if he is ordinarily resident in the Republic ***or*** if he meets the requirements of the 'physical presence' test. <u>These two tests are mutually exclusive.</u>

Expressly not *included* (rather than expressly excluded) as a 'resident' is

'any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation.'

This effective exclusion applies only if the person is deemed to be *exclusively* a resident of the other country that is a party to the agreement.

Natural persons — Ordinarily resident

In determining whether a natural person is a resident, therefore, the first test is the common law concept of 'ordinarily resident'. The term 'ordinarily resident' has no special or technical meaning and there is also no definition in the Act of the term 'ordinarily resident'. The reason no doubt being that it is not possible to define satisfactorily the qualities that will determine whether or not a person is ordinarily resident in the Republic. But it could be said that the adverb 'ordinarily' in the expression 'ordinarily resident' should be taken as the converse of 'extraordinarily'; not 'casual and uncertain' but in the ordinary course of the person's life.

As a general rule, 'one is ordinarily resident in the country where, in the settled routine of his life he regularly, normally or customarily lives'. Put somewhat differently, a person's ordinary residence will, essentially, be the country that he regards as his home and to which he would naturally and as a matter of course return from his wanderings.

The question whether a person is 'ordinarily resident' in a country is one of fact. Consequently, it is for the courts to decide on the particular facts of each case whether a person is ordinarily resident in the Republic or not.

Interpretation Note 3 (Issue 2)

When assessing whether a natural person is ordinarily resident in the Republic, the following factors will be taken into consideration:

- 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, whether 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
- 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

The above list ***is not intended to be exhaustive*** and 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. It is not possible to specify over what period the circumstances must be examined. The examination must cover a sufficient period in the context of the specific case for it to be possible to determine whether the natural person is ordinarily resident in the Republic. The conduct of that person over the entire period of examination must receive special attention.

The effect of the above requirements is that a natural person may be resident in the Republic even if that person was not physically present in the Republic during the relevant year of assessment. A physical presence at all times is not a prerequisite to being ordinarily resident in the Republic. The purpose, nature and intention of a natural person's absence must be established and considered as part of all the facts in determining whether that person is ordinarily resident.

SECTION 9H: CEASING TO BE RESIDENT

Section 9H provides for a single charge when a person ceases to be a resident.

When a natural person ceases to be a resident, that person is deemed to have disposed of all their assets at market value on the day before that person ceases to be a resident and reacquired all those assets at an expenditure equal to that same market value on the day that person ceases to be a resident. This could trigger either a capital or a revenue gain. Subsection 9H(7) stipulates that the market value of such assets reacquired will be in the same currency in which the assets were originally acquired.

SA immovable property

In terms of section 9H(4), certain assets are excluded from this deemed disposal, the most relevant being immovable property situated in the Republic.

Year of assessment

In terms of section 9H, when a taxpayer ceases to be tax resident, their year of assessment is deemed to have ended on the date immediately before the day on which the taxpayer ceased to be resident. The next succeeding year of assessment will be deemed to start on the day the taxpayer ceases to be resident.

NON-RESIDENTS AND SOURCE

Source basis of taxation

In terms of the Act, tax is levied only on income derived from a source within the Republic.

SOURCE

The definition of 'gross income' in the Act reads as follows:

'"[G]ross income", in relation to any year or period of assessment, means–

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident, or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person *from a source within the Republic*,

during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely. . . .'

(Emphasis added.)

From this definition of 'gross income' it is clear that South Africa subjects foreigners (persons other than a resident) to taxation on a source basis.

SECTION 9 SOURCE RULES

The “new” section 9 uniform source rules largely reflect tax treaty principles (with a few added built-in protections) as set out in the OECD model, so that the South African system is globally aligned. The common law will remain as a *residual* method (the “originating cause” test) for categories of income not specifically addressed in terms of section 9.

Type of income	Section	Source within the Republic i.t.o section 9
Dividends	9(2)(*a*)	Any dividend received or accrued. Foreign dividends are now excluded from the definition of a dividend and seperately difined in the Act.The “share register” concept of the common law is no longer relevant.
Interest received	9(2)(*b*)	Interest received if the debtor is a resident OR if the funds are utilised in the Republic.
Royalties	9(2)(*c*)	If the person paying the royalty is a resident.
	9(2)(*d*)	If the intellectual property is used or the right to use is granted in the Republic.
Scientific, technical, industrial or commercial (STIC) knowledge or information	9(2)(*e*)	If the person paying for the STIC knowledge or information is a resident.
	9(2)(*f*)	If the STIC knowledge or information is used or the right to use is granted in the Republic.
Public office	9(2)(*g*)	Amounts received in respect of the holding of a public office to which that person has been appointed in terms of an Act of Parliament.
	9(2)(*h*)	Amounts received in respect of services rendered or work or labour performed on behalf of an employer who is a government entity etc, without any regard to where it is rendered.
Pensions, lump sums, annuities from pension, pension preservation, provident and provident prservation funds	9(2)(*i*)	The *pro-rata* portion of pensions and annuities received connected to the number of years of service rendered within the Republic. Ie: The source of these amounts depends on where the services in respect of which the amounts are received were rendered.
Capital gain – immovable property	9(2)(*j*)	If the immovable property is situated in the Republic.
Capital gain – moveable property	9(2)(*k*)	If the person who disposes of the movable property is a resident.
Exchange differences	9(2)(*l*)	If the person is a resident and the exchange item is not attributable to a permanent establishment situated outside the Republic OR the person is a non-resident and the exchange item is attributable to a permanent establishment situated in the Republic .

Residual doctrine of originating cause

As a result of section 9(4) in the case of foreign: dividends, interest, royalties, and gains from the disposal of assets and exchange gains, the doctrine of originating cause no longer applies. Therefore, items of income of this kind that fall outside the South African sourced categories listed above will be explicitly treated as foreign source income.

Otherwise, the doctrine of originating cause (initiated in *CIR v Lever Brothers & Unilever Ltd* (1946 AD)) will implicitly remain as a residual category. In other words, this doctrine will remain in respect of any residual item of income falling outside the main categories described above (e.g. rental income and insurance premiums).

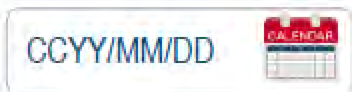
The doctrine of originating cause involves and inquiry into two matters:

- What is the originating cause of the income?
- Where is the originating cause located?

Regularising Tax Residence with SARS New ITR12 (2021 YOA)

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

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



NON-RESIDENTS: WITHHOLDING TAXES

DIVIDEND WITHHOLDING TAX

Section 64D – 64N

A resident company (or regulated intermediary) that pays a cash dividend to a beneficial owner (the party entitled to the dividend stream) is generally required to withhold the amount of dividend tax the beneficial owner is liable for, from the dividend paid. Dividend tax is levied at a rate of 20% of the dividend paid.

Written declaration and undertaking

The company (or regulated intermediary) may have to withhold tax at a lower rate if the beneficial owner is a non-resident. A lower rate of dividend tax must be withheld if the non-resident beneficial owner has by the date set by the company (or regulated intermediary) or if no such date was set, by the date the dividend was paid, furnished the company (or regulated intermediary) with a written declaration and undertaking. In the written declaration and undertaking the non-resident beneficiary will indicate their country of residence and refer to the relevant DTA SA has with that country and the reduced rate of dividend tax as set out in the DTA.

Exemption from normal tax (section 10(1)(k)

In terms of section 10(1)(k) the dividend will be generally be exempt in the hands of the non-resident.

INTEREST WITHHOLDING TAX (WTI)

Section 50A-H

With effect from 1 March 2015 a 15% withholding tax will be applied to South African sourced amounts of interest paid to a non-resident.

Exemption from <u>normal tax</u> (section 10(1)(h)

In terms of section 10(1)(h) the interest will be exempt in the hands of the non-resident *unless:*

- The non-resident is a natural person and is physically present in the Republic for more than 183 days during the 12 months before the interest was received or accrues, or
- The debt claim in respect of which the interest is paid is effectively connected to a permanent establishment of that non-resident in the Republic.

Date of payment

The deemed date of the payment of the interest amount to the non-resident will be the earlier of the date of payment and the date the amount is due and payable.

The withholding tax is a final tax and the tax withheld must be paid over to SARS by the last day of the month following the month in which the interest is regarded as paid.

Double taxation agreement relief

The withholding of the tax at 15% is subject to double taxation agreement relief and the non-resident must submit a written declaration

in this regard.

Exemption from withholding tax (section 50D(1))

Amounts of South African sourced interest paid to non-residents that will not be subject to the 15% withholding tax include interest paid to the non-resident by:

- The government
- SA Bank
- Interest paid in respect of listed debt

Exempt Non-residents (section 50D(3))

- Non-resident who is a natural person and who was physically present in SA for more than 183 days in the 12 month period before the date on which the interest is paid
- If the debt claim respect of which the interest is paid is effectively connected to a permanent establishment of that non-resident in the Republic.

WITHHOLDING TAX ON FIXED PROPERTY SALES (SECTION 35A)

Non-resident taxpayers are subject to capital gains tax (CGT) in South Africa (SA) but only on the disposal of immovable property and any interest in immovable property situated in SA, and assets attributable to a permanent establishment through which the non-resident carries on business in SA.

In determining whether a non-resident has an interest in immovable property, ownership via a company or ownership of any other entity or *any* vested interest in a trust is taken into account. For example, where a non-resident holds (alone or together with a 'connected person') at least 20% of the equity shares in a company, and 80% of the market value of the shares, ownership or interest is attributable directly or indirectly to immovable property (which is not trading stock) in South Africa, then an interest is held in that property by the non-resident. Note that the interest can be held 'indirectly', typically through the medium of another company. It is not completely clear whether the company must itself be 'situated' ie. incorporated, in South Africa. Clearly if the provision extends to foreign companies it will be difficult if not impossible to police but on balance the wording appears intended to apply to foreign companies as well as South African ones.

Section 35A provides a mechanism for the collection of the CGT arising from the disposal of the immovable property (including an interest in the immovable property).The amount withheld in terms of section 35A is not a final tax. The section only applies to property with a purchase price that exceeds R2million.

Where any purchaser of immovable property in South Africa makes any payment to a non-resident in that respect, then, subject to the Commissioner's directive that a reduced amount may be withheld, the purchaser must withhold:

- 7, 5% of the amount payable where the seller is an individual; or
- 10% where the seller is a company; and
- 15% where the seller is a trust.

TAXATION OF FOREIGN INCOME AND SET-OFF OF FOREIGN LOSSES

Due to the residence basis of taxation SA residents are taxed on foreign sourced income. A Double tax Treaty will in many instances alter this general principle and therefore must always be considered.

Foreign investments

The SA Reserve bank's exchange control provisions currently permit SA resident natural persons to transfer a maximum of R11 million out of SA for investment purposes each year, subject to certain provisions and tax clearances from SARS. Special provisions apply to companies.

The foreign investments may be divided into four broad categories:

- Deposits in foreign financial institutions producing foreign interest
- Fixed property producing foreign rental (see Foreign trade below)
- Shares producing foreign dividends
- Collective investment schemes/funds

Foreign interest

There is no exemption from normal tax in respect of foreign interest.

Section 6quat provides a special rebate for foreign taxes payable, deductible from South African normal tax payable by a resident whose taxable income includes foreign interest. The rebate is limited to the amount of South African tax payable on that income.

Foreign trade (eg rental)

A SA resident carrying on trade as a sole proprietor outside SA will be liable for tax in the same way as if the trade were carried on in SA. The foreign trade income is converted in SA rands in terms of section 25D.

Should the income from the foreign trade not be capable of being remitted to SA (due to the laws of the country in which the foreign trade income was produced), section 9A ensures that the amount of foreign trade income will not be taxed in SA until it is remitted.

If the foreign trade results in an assessed loss, the foreign loss may be set off against other foreign trade income but not against any income form the carrying on of a trade in SA.

Taxation of dividends paid by foreign companies

Foreign dividends may be received from direct holding of shares in a foreign company by a taxpayer or through investing in a local CIS through which foreign dividends are earned

As a general rule, foreign dividends are included in the recipient's *gross income* and any portion of the amount that is not exempt will be taxed at the marginal/tax rates relevant to the specific recipient (that is, 28 percent for companies, up to 45 percent for individuals and 45 percent for Trusts).

Partial exemption section 10B(3)

The partial exemption formula rates are (wef 1 March 2017):

- the 25/45 exemption for natural persons and trusts and
- the 8/28 exemption for companies
- the 10/30 exemption where the person is an insurer in respect of its individual policyholder fund

Total exemption section 10B(2)

Foreign dividends are now subject to four total exemptions, the most relevant participation exemption is listed below:

- *10B(2)(a):* Under this exemption, foreign dividends will be exempt if received by or accrued to a person who holds at least ***10 percent*** of the equity shares and voting rights in the company declaring the foreign dividend.

Expenses to produce foreign dividends disallowed

In terms of section 23(q) the deduction of any expenses incurred to produce foreign dividends is disallowed. As a result, no deductions will be allowed for expenses incurred in relation to the acquisition of the foreign shares.

DOUBLE TAXATION AGREEMENTS (DTAS)

Section 108 Income Tax Act vs DTA

Section 108(1) of the Act empowers the National executive to enter into DTA's. Section 108(2) provides that when a DTA becomes effective it must be regarded as though the DTA was enacted in the Income Tax Act. A DTA may override provisions of the Income Tax Act but the DTA cannot levy more tax than the Income Tax Act.

DTA EXTRACTS: SA and UAE

ARTICLE 4 RESIDENT

1. For the purposes of this Agreement, the term "resident of a Contracting State" means:

   (a) in South Africa, any person who, under the laws of South Africa, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature, but this term does not include any person who is liable to tax in South Africa in respect only of income from sources therein;

   (b) in the United Arab Emirates:

      (i) any individual who, under the laws of the United Arab Emirates is considered a resident thereof by reason of that individual's domicile, residence, place of management or any other criterion of a similar nature;

      (ii) any company or other legal entity which is incorporated or created under the laws of the United Arab Emirates by reason of its residence, domicile, place of management or any other criterion of a similar nature;

   (c) that State itself and any political subdivision, local authority, local government or governmental institution thereof.

2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then that individual's status shall be determined as follows:

   (a) the individual shall be deemed to be a resident only of the State in which a permanent home is available to the individual; if a permanent home is available to the individual in both States, the individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);

   (b) if the State in which the individual has a centre of vital interests cannot be determined, or if the individual has not a permanent home available in either State, the individual shall be deemed to be a resident only of the State in which the individual has an habitual abode;

   (c) if the individual has an habitual abode in both States or in neither of them, the individual shall be deemed to be a resident only of the State of which the individual is a national;

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

3. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the Contracting State in which its place of effective management is situated.

DTA SA AND AUSTRALIA

ARTICLE 18

Pensions and Annuities

1. Subject to the provisions of paragraph 2 of Article 19, pensions and annuities from sources in one Contracting State and paid to a resident of the other Contracting State shall be exempt from tax in the first mentioned Contracting State to the extent that such pensions and annuities are included in taxable income in the other State.

2. Notwithstanding the provisions of paragraph 1, an annuity paid to an individual who is a former resident of a Contracting State which has been purchased by that individual by way of a lump sum cash consideration from an insurer in the course of that insurer's insurance business carried on in that State, may be taxed in that State.

The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth

Retirement Funds

In terms of the Income Tax Act, periodic annuities and pensions are taxed in full in South Africa, regardless of tax residency.

South Africa is party to many DTA's. A non-resident taxpayer 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.

RST01

To qualify for such tax relief in South Africa, a RST01 application must be made to the South African Revenue Services. An RST01 is an application by a tax non-resident for a directive for relief from South African tax for pension and annuity income, in terms of a Double Taxation Agreement. This application must be renewed annually.

RST02

If tax has been paid on South African annuity and pension income in South Africa (administrators will usually withhold Pay as You Earn (PAYE) from the income before paying it across to a member, unless the directive mentioned above has been issued), the taxpayer may be eligible to claim a refund for the tax paid by submitting a RST02.

An RST02 is an application by a tax non-resident for a refund of South African tax for pension and annuity income in terms of a Double Taxation Agreement.

Purchased Annuities

Purchased annuities are often treated differently in terms of a DTA

CESSATION FINANCIAL EMIGRATION

SARS WEBSITE

Government will be modernising the foreign exchange control system

As outlined in Annexure E of the 2020 Budget Review, Government will be modernising the foreign exchange control system. The Foreign Exchange Control changes, together with the amendments in the Taxation Laws Amendment Act, 2020, will impact the TCS requests for FIA and Emigration as well as the withdrawal of retirement funds as follows:

The concept of “emigration” and the South African Reserve Bank’s approval process via the MP336(b) form will be terminated. Thereafter, for tax purposes, only the event of an individual “ceasing to be a resident for tax purposes” in South Africa, will be relevant.

All applications, where the applicant had their MP336(b) attested by an Authorised Dealer on or before 28 February 2021, will still be able to apply for a Tax Compliance Status (TCS) in respect of “Emigration”, during the period until 28 February 2022, in terms of the current procedure dealing with emigration for exchange control purposes.

All applications for TCSs for individuals ceasing to be a tax resident, from Monday, 1 March 2021 onwards, other than those under the previous bullet, will be processed by SARS based on a new dispensation where SARS will confirm that the taxpayer has ceased to be a resident for tax purposes. An MP336(b) will no longer be required as part of the TCS application process. The taxpayer must still apply via the SARS TCR01 “Emigration “Application

From 1 March 2021 onwards, taxpayers will be able to access their applicable retirement benefits if they can prove, to the fund, that they have been non-resident for tax purposes for an uninterrupted period of three years and an applicable Tax Directive is issued to the fund by SARS. Taxpayers must provide the applicable Tax Compliance Status (TCS) to the Authorised Dealers, as well as documentation from the fund that indicates or confirms the final amount paid to the taxpayer, before any transfers can be effected.

The current process of controlling or blocking an emigrant's remaining assets in a special “blocked funds account” will fall away and all transfers from these will be handled as normal fund transfers in line with any other FIA transfer.

A TCS in respect of FIA will be required for all transfers of listed securities from a securities register in South Africa to a securities register outside South Africa (The effective date of this will be communicated by the South African Reserve Bank).

WITHDRAWING RETIREMENT FUNDS UPON EMIGRATION

Pre 1 March

RAF

In terms of the rules of a RAF, the payment of the full retirement interest in the RAF as a lump sum was possible when the member was a resident who emigrated from the Republic and that emigration was recognized by the SA Reserve Bank for the purposes of exchange control.

Pension preservation and provident preservation

In respect of pension preservation or provident preservation funds, one method to access all of the retirement interest in the Fund as a lump sum was for the member who was a resident to emigrate from the Republic and for that emigration to be recognized by the SA Reserve Bank for the purposes of exchange control

CHANGE 1 MARCH 2021:

3 years non-resident

As of 1 March 2021, the RAF, Pension preservation and provident preservation fund rules have been amended. In order to access the retirement monies as a lump sum (described above) fund members will now have to prove to SARS that on or after the 1 March 2021, they have not been tax resident for at least three consecutive years in a row. The concept of tax resident will be reliant only on the definition of "resident" in the Income Tax Act, which includes the effect of a double taxation agreement where relevant.

Tax rates

The lump sums withdrawn from a RAF, Pension preservation or Provident preservation Fund when the member has proven they have met the 3 year rule will be taxed in terms of the withdrawal lump sum table, once any disallowed section 11F contributions have been taken into account

SARS

From 1 March 2021:

- Fund member bears onus of proving to Fund that member non-resident for at least three consecutive years
- SARS directive to retirement fund required
- Fund member applies for SARS TCR01 "Emigration "Application
- Fund member must provide the applicable tax clearance and documentation from fund to the Authorised Dealers before transfer of funds

BUDGET SPEECH 2021

***Proposed* Deemed withdrawal from Retirement Fund on cessation of tax residence**

- At issue is the tax treatment of a retirement interest when an individual ceases to be a South African tax resident but retains his/her investment in a South African retirement fund, and only withdraws from the retirement fund at a later date
- S9(2)(i) deems amounts withdrawn to be from a South African source
- When that individual at a later date receives payment/s from the retirement fund, due to the application of the tax treaty between South Africa and the other country, the payment/s may be subject to tax in the other country, where the individual is now tax resident
- The provisions of the tax treaty between South Africa and the new resident country will result in South Africa forfeiting its taxing rights
- The individual will be deemed to have withdrawn their full retirement interest from the fund on the day before he/she ceases to be a South African tax resident
- The retirement withdrawal tax will be calculated in terms of the withdrawal lump sum table and payment will be deferred until payments are received from the retirement fund at a later date
- When the individual eventually receives payments from the fund, the tax will be calculated based on the prevailing lump sum tables. A tax credit will be provided for the deemed retirement withdrawal tax as calculated when the individual ceased to be a South African tax resident

(Extracts from the Budget Speech 2021 supplementary material released by Treasury)

DTA'S AND LUMP SUMS

ARTICLE 21

Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from real property as defined in paragraph 2 of Article 6, derived by a resident of a Contracting State where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In that case the provisions of Article 7 or Article 14, as the case may be, shall apply.
3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of the Agreement from sources in the other Contracting State may also be taxed in the other Contracting State.

DTA SA and Israel

ARTICLE 22

Income not Expressly Mentioned

Any income not dealt with in the foregoing provisions of this Convention derived by a resident of a Contracting State who is subject to tax there in respect thereof shall be subjected to tax only in that State.

IMPORTANT FUND RELATED DEFINITIONS IN THE ITA

NORMAL RETIREMENT AGE

a) In the case of a pension or provident fund, the date the member becomes entitled to retire from employment (not due to sickness, accident, injury or infirmity of body or mind);
b) In the case of a member of an RAF, pension preservation fund or provident preservation fund the date on which the member attains the age of 55;
c) In the case of a member of any fund, the date on which that member becomes permanently unable to carry on their occupation due to sickness, accident or incapacity through infirmity of body or mind

RETIREMENT INTEREST

Means a member's share of the value of the pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as determined in terms of the rules of the fund on the date on which he or she ***elects*** to retire or transfer to a pension preservation fund, provident preservation fund or retirement annuity fund.

RETIREMENT DATE

Means the date on which

a) A member of a pension fund, pension preservation fund, provident fund, provident preservation fund or a retirement annuity fund, ***elects*** to retire in terms of the rules of the fund, ***becomes entitled*** to an annuity or a lump sum benefit on or after attaining normal retirement age; or
b) A nominee or dependant of a deceased member of a pension fund, pension preservation fund, provident fund, provident preservation fund or a retirement annuity fund, in terms of the rules of that fund, becomes entitled to an annuity or a lump sum benefit on the death of the member.

Pension and RAF funds and the one third single payment limitation

On retirement date a member of a retirement annuity fund, pension fund or pension preservation fund has a right to commute not more than one third of their retirement interest in the relevant fund to a single lump sum payment. At retirement date a member must therefore ***elect*** to commute a part of the retirement interest to a lump sum and until such election is made no lump sum benefit is payable by the fund and no tax consequences can arise. Once the election is made the tax consequences will be triggered. The one third limitation does not apply on the death of a fund member.

De minimus exception: Where the total value of the retirement interest at retirement date does not exceed R247 500, full retirement interest can be accessed.

PROVIDENT FUNDS Post 1 March 2021.

Members of a provident/provident preservation fund will as of 1 March 2021:

- not be able to commute more than 1/3 of their retirement interest for a lump sum, and
- be forced to take a compulsory annuity in respect of the remaining 2/3's of the retirement interest.

The existing retirement interests (and growth thereon) up to 28 February 2021 will be protected. In the case of members who are 55 years or older on 1 March 2021, the 1/3 limitation is not applicable at all irrespective of when they elect to retire.

2/3's R165 000 EXCEPTION

For all retirement funds (including provident and provident preservation funds after 1 March 2021), where the total value of the retirement interest does not exceed R247 500 (or alternatively 2/3's of the total value of the retirement interest doesn't exceed R165 000), then members are able to take the full retirement interest as a lump sum.

Pension/Provident Fund to RAF/Pension Preservation/Provident preservation

Pension and provident fund members: The fund member elects to transfer the retirement interest to a pension preservation, provident preservation (wef 1 March 2019) or retirement annuity fund (wef 1 Match 2018) after reaching normal retirement age but before retirement date.

Financial emigration (pre 1 March 2021)

Pension preservation, provident preservation and RAF members: The relevant fund members may withdraw their full retirement interest when the member was a resident who emigrated and their emigration is recognised by the SARB, before retirement date.

LOANS TO TRUSTS- DEEMED DONATION

Insertion of section 7C in Act 58 of 1962

7C. Loan or credit advanced to a trust by a connected person.—(1) This section applies in respect of any loan, advance or credit that—

(a) a natural person; or

(b) at the instance of that person, a company in relation to which that person is a connected person in terms of paragraph (*d*)(iv) of the definition of connected person,

directly or indirectly provides to—

(i) a trust in relation to which—

(*aa*) that person or company; or

(*bb*) any person that is a connected person in relation to the person or company referred to in item (*aa*),

is a connected person; or

(ii) a company if at least 20 per cent of—

(*aa*) the equity shares in that company are held, directly or indirectly; or

(*bb*) the voting rights in that company can be exercised,

by the trust referred to in subparagraph (i) whether alone or together with any person who is a beneficiary of that trust or the spouse of a beneficiary of that trust or any person related to that beneficiary or that spouse within the second degree of consanguinity [*Sub-s. (1) amended by s. 5 (1) (a) of Act No. 17 of 2017 deemed to have come into operation on* <u>*19 July, 2017*</u> *and applicable in respect of any amount owed by a trust or a company in respect of a loan, advance or credit provided to that trust or that company before, on or after that date*.]

(1A) If a person acquires a claim to an amount owing by a trust or a company in respect of a loan, advance or credit referred to in subsection (1), that person must for purposes of this section be treated as having provided a loan, advance or credit to that trust or company—

(a) on the date on which that person acquired that claim; or

(b) if that person was not a connected person on that date in relation to—

(i) that trust; or

(ii) the person who provided that loan, advance or credit to that trust or company,

on the date on which that person became a connected person in relation to that trust or person, that is equal to the amount of the claim so acquired.

[*Sub-s. (1A) inserted by s. 5 (1) (b) of Act No. 17 of 2017 deemed to have come into operation on* <u>*19 July, 2017*</u> *and applicable in respect of any amount owed by a trust or a company in respect of a loan, advance or credit provided to that trust or that company before, on or after that date*.]

(1B) Where—

(a) a natural person; or

(b) at the instance of a natural person, a company that is a connected person in relation to that natural person in terms of paragraph (d)(iv) of the definition of 'connected person',

subscribes for a preference share in a company in which 20 per cent or more of the equity shares are held (whether directly or indirectly) or the voting rights can be exercised by a trust that is a connected person in relation to that natural person or to that company, whether alone or together with any person who is a beneficiary of that trust—

(i) consideration received by or accrued to that company for the issue of that preference share shall be deemed to be a loan for the purposes of subsection (3); and

(ii) any dividend or foreign dividend accrued in respect of that preference share shall be deemed to be interest in respect of the loan contemplated in paragraph (i).

(TLAA 2020 WEF 1 January 2021, applicable to any dividend of foreign dividend accruing during any year of assessment commencing on or after that date)

(2) No deduction, loss, allowance or capital loss may be claimed in respect of—

(a) a disposal, including by way of a reduction or waiver; or

(b) the failure, wholly or partly, of a claim for the payment,

of any amount owing in respect of a loan, advance or credit referred to in subsection (1).

(3) If a trust or company incurs—

(a) no interest in respect of a loan, advance or credit referred to in subsection

(1) , (1A) or (1B)

(b) interest at a rate lower than the official rate of interest,

an amount equal to the difference between the amount incurred by that trust or company during a year of assessment as interest in respect of that loan, advance or credit and the amount that would have been incurred by that trust or company at the official rate of interest must, for purposes of Part V of Chapter II, be treated as a donation made to that trust by the person referred to in subsection (1) (*a*), (1A) or (1B) on the last day of that year of assessment of that trust.

(4) If a loan, advance or credit was provided by a company to a trust or another company at the instance of more than one person that is a connected person in relation to that company as referred to in paragraph (*b*) of subsection (1), each of those persons must be treated as having donated, to that trust or company, the part of that amount that bears to that amount the same ratio as the equity shares or voting rights in that company that were held by that person during that year of assessment bears to the equity shares or voting rights in that company held in aggregate by those persons during that year of assessment.

(5) Subsections (2) and (3) do not apply in respect of any amount owing by a trust or company during a year of assessment in respect of a loan, advance or credit referred to in subsection (1) if—

(a) that trust or company is a public benefit organisation approved by the Commissioner in terms of section 30 (3) or a small business funding entity approved by the Commissioner in terms of section 30C;

(b) that loan, advance or credit was provided to that trust by a person by reason of or in return for a vested interest held by that person in the receipts and accruals and assets of that trust and—

(i) the beneficiaries of that trust hold, in aggregate, a vested interest in all the receipts and accruals and assets of that trust;

(ii) no beneficiary of that trust can, in terms of the trust deed governing that trust, hold or acquire an interest in that trust other than a vested interest in the receipts and accruals and assets of that trust;

(iii) the vested interest of each beneficiary of that trust is determined solely with reference and in proportion to the assets, services or funding contributed by that beneficiary to that trust; and

(iv) none of the vested interests held by the beneficiaries of that trust is subject to a discretionary power conferred on any person in terms of which that interest can be varied or revoked;

(c) that trust is a special trust as defined in paragraph (*a*) of the definition of a special trust;

(d) that trust or company used that loan, advance or credit wholly or partly for purposes of funding the acquisition of an asset and—

(i) the person referred to in subsection (1) (*a*) or the spouse of that person used that asset as a primary residence as contemplated in paragraph (*b*) of the definition of ―primary residence‖ in paragraph 44 of the Eighth Schedule throughout the period during that year of assessment during which that trust or company held that asset; and

(ii) the amount owed relates to the part of that loan, advance or credit that funded the acquisition of that asset;

(e) that loan, advance or credit constitutes an affected transaction as defined in section 31 (1) that is subject to the provisions of that section;

(f) that loan, advance or credit was provided to that trust or company in terms of an arrangement that would have qualified as a sharia compliant financing arrangement as contemplated in section 24JA, had that trust or company been a bank as defined in that section;

(g) Loan advance or credit subject to section 64E(4)

(h) ………………………………………….

OFFICIAL RATE OF INTEREST

The “official rate” is now defined in section 1 of the Income Tax Act is specifically linked to the repurchase rate (repo rate). The official rate is adjusted at the beginning of the month following the month during which the Reserve Bank changes the repurchase rate.

- ***Debt in Rands:***

  Rate of interest equal to the SA Repo rate <u>plus 100 basis points</u>

  - 1 Aug 2017-31 March 2018: **7.75%**
  - 1 April 2018-30 November 2018: **7.5%**
  - 1 December 2018-31 July 2019: **7.75%**
  - 1 August 2019 – 31 January 2020 **7.5%**
  - 1 February 2020 -31 March 2020 **7.25%**
  - 1 April 2020 – 30 April 2020 **6.25%**
  - 1 May 2020 – 31 May 2020 **5.25%**
  - 1 June 2020 – 31 July 2020 **4.75%**
  - 1 August 2020 – until the repo rate changes **4.5%**

- ***Debt in foreign currency***

  Rate of interest that is the equivalent of the SA repo rate applicable in that currency plus 100 basis points

<u>Example</u> deemed donation 2021 YOA

Assume a resident natural person made an interest free loan to a Trust of R5 million. The natural person is a connected person to the trust. Assume the natural person made no other donations during the 2021 YOA.

Deemed donation at 28 February 2021:

5000 000 x 7.25% x 1/12 = 30 208

5000 000 x 6.25% x 1/12 = 26 041

5000 000 x 5.25% x 1/12 = 21 875

5000 000 x 4.75% x 2/12 = 39 583

5000 000 x 4.5% x 7/12 = 131 250

Total	<u>248 957</u>
(Less (s56(2)(b))	100 000)
Total deemed donation	**<u>148 957</u>**

Donations tax payable by 31 March 2021

EXPLANATORY MEMORANDUM ON TAXATION LAWS AMENDMENT BILL 2016 (15 Dec 2016) pages 11-12

The proposed rules will apply only in respect of loans advanced or provided by a natural person or, at that person's instance, by a connected company. An amount that is vested irrevocably by a trustee in a trust beneficiary and that is used or administered for the benefit of that beneficiary without distributing or paying it to that beneficiary will not qualify as a loan or credit provided by that beneficiary to that trust if

- the vested amount may in terms of the trust deed governing that trust not be distributed to that beneficiary, e.g. before that beneficiary reaches a specific age; or
- that trustee has the sole discretion in terms of that trust deed regarding the timing of and the extent of any distribution to that beneficiary of such vested amount.

An amount vested by a trust in a trust beneficiary that is not distributed to that beneficiary will, however, qualify as a loan or credit provided by that beneficiary to that trust if that non-distribution results from an election exercised by that beneficiary or a request by that beneficiary that the amount not be distributed or paid over, e.g. if the beneficiary has reached the age at which a vested amount must be paid over or distributed to him or her and

- the trustee accedes to a request by that beneficiary that this not be done; or
- the beneficiary enters into an agreement with the trustee in terms of which the amount may be retained in the trust.

B. Treatment of interest forgone as a donation

Interest foregone in respect of low interest loans or interest free loans that are made to a trust will be treated as an ongoing and annual donation made by the natural person to the trust on the last day of the year of assessment of that trust. For purposes of this anti-avoidance measure, interest foregone will be determined as the difference between the interest charged by the lender or holder of the loan and the interest that would have been payable by the trust had the interest been charged at the official rate of interest as defined in the Seventh Schedule to the Act).

I. Effective date

The amendments will come into operation on 1 March 2017 and apply in respect of any amount owed by a trust in respect of a loan, advance or credit provided to that trust before, on or after that date.

EFFECT ON DEBTOR WHEN SECTION 7C DEBT DONATED/BEQUEATHED

Exclusions to the debt reduction provisions para 12a(6)

Para 12A(6) of the Eighth Schedule

In terms of para 12A(6), the paragraph (and therefore consequences for the debtor that the paragraph would trigger) must *not apply* to any debt owed by a person

a) that is an heir or legatee of a deceased estate to the extent that

(i) the debt is owed to that deceased estate

(ii) the debt is reduced by that deceased estate , and

(iii) the amount by which the debt is reduced by the deceased estate forms property of the deceased estate for the purposes of the Estate Duty Act

(NB There is no requirement that the debt must have been subject to Estate duty, merely that the debt in the creditor's hands have been regarded as "property" of the deceased estate for Estate Duty purposes)

b) to the extent that the debt is reduced by way of

(i) donation as defined in section 55(1); or

(ii) any transaction to which section 58 applies,

in respect of which donations tax is payable (wef 1 January 2019 and years of assessment starting on or after that date)

RESIDENT TRUSTS AND NON RESIDENT BENEFICIARIES

Non Resident beneficiary

A non-resident beneficiary of a trust will be treated as a non-resident for tax purposes and be liable for the relevant SA tax on SA sourced amounts.

CGT and attribution of capital gains (para 80)

The capital gains of a trust, subject to the para 80 attribution rules are taxable as follows:

- When there is a vesting of a capital asset, or a vesting of a capital gain, by the trustees of a trust in a ***resident beneficiary***, it constitutes a disposal of that asset or gain, which triggers a tax liability in the hands of the resident beneficiary concerned. In other words, when a resident beneficiary acquires a vested right to the asset in respect of which there is a gain or a vested right only to the gain, the gain is disregarded in the hands of the trust and must be accounted for by the resident beneficiary. This rule applies only to capital gains and there is no attribution of capital losses to a beneficiary. The effective consequence is that a capital loss is 'locked in' the trust only to be taken into account for the purpose of ascertaining the aggregate capital gain or aggregate capital loss of the trust. If all the gains vest in resident beneficiaries, the trust will remain with whatever losses may have been incurred.

In the absence of a vesting in a resident beneficiary, both the capital gains and losses on disposal of any asset must be accounted for in the trust as the taxable entity. When there is a vesting of an asset, or only the gain, in a non-resident beneficiary, the gain remains taxable in the trust.

Anti-avoidance: Attribution provisions (para's 68-72)

Para 80 is subject to the anti-avoidance rules (para's 68-72) that may have the effect of attributing the capital gain to the person who disposed of the assets to the trust.

Effective CGT rates

- Individual taxpayer: 7.2%-18%
- Trust: 36%

TRUST DISTRIBUTIONS and EXCON

Capital and/or income transfers from an inter vivos trust

A special application will have to be made to the South African Reserve Bank (SARB) to establish the transferability of any income or capital distributions therefrom. Consideration must be given as to whether the trust will be classified by SARB as either an own asset trust or a third-party trust. Depending on the classification of the trust, it will then be decided whether capital and/or income distributions will be eligible for transfer abroad.

It is imperative that beneficiaries planning to emigrate, who wish to continue to receive trust distributions seek specialist exchange control advice to ensure their trust distributions can be transferred out of SA. In some instances the collapsing of the Trust, with all the attendant CGT and normal tax consequences prior to emigration is preferable

OFFSHORE TRUSTS

Tax residence company or trust

For a person other than a natural person, a resident is an entity that is incorporated, established or formed in the Republic or which has its place of effective management in the Republic.

This means that to be a non-resident, the entity must not be

- incorporated,
- established or formed, or
- have its place of effective management in the Republic.

All three of these requirements must be performed outside the Republic.

Residence of trusts

The place of establishment or formation of a trust will, logically, be the place at which the founding document was signed (in the case of an *inter vivos* trust) or, it is submitted, the location of the probate or other authority having jurisdiction over the last will of the deceased, in terms of which a will trust was established.

The place of effective management (POEM) of a trust is the place where the key management and commercial decisions that are necessary for the conduct of the trust as a whole are in substance *made*. SARS has issued an updated Interpretation Note 6 (issue 2) in this regard.

The New Interpretation Note confirms that the POEM is the place where strategic decisions are taken or adopted, as opposed to the place where strategic decisions and policies are executed and implemented. This approach is consistent with the OECD Model Tax Convention and its accompanying commentary

Simply by attending to all establishment and formation requirements of a trust outside the Republic, a creator should be able to satisfy the requirements that it is not established or formed in the Republic. But to be a non-resident trust it must also have its place of effective management outside the Republic.

The definition of “resident” in the Income Tax Act will always be subject to the relevant Double Tax Agreement that SA has in place with the trust’s country of residence.

Source

If the trust is not a resident of the Republic, then being a so-called non-resident, it will be subject to normal tax in the Republic on only its receipts and accruals that are from a Republic source in terms of section 9. Being ‘offshore’ it is likely that its investments will be made offshore and that the resulting returns from these investments are therefore unlikely to be from a Republic source. It would, however, need to avoid

- investing in resident companies,
- lending funds to residents who use the borrowed funds in the Republic, and
- investing in rent-producing properties situated in South Africa

because these investments could all give rise to receipts and accruals that are from a Republic source.

SA Dividends

As a non-resident shareholder, the trust receiving dividends from a SA source will be subject to dividend tax as of the 1 April 2012. The trust will be subject to dividend tax at the rate of tax stipulated in the double tax agreement (DTA) between SA and the country

where the trust is resident. Should the trust be subject to dividend tax at a rate lower than the prescribed 20% withholding tax, the trust will be required to submit a written undertaking and declaration to the dividend distributing SA entity (SA company or regulated intermediary). The written declaration and undertaking will stipulate the relevant DTA rate of dividend tax to be withheld. The dividend tax withheld is a final tax.

SA Interest

The non-resident trust in receipt of SA source interest will be subject to a 15% withholding tax as of the 1 March 2015. Interest received by the trust from SA government bonds, SA listed debentures and from deposits held with a SA bank will generally be exempt from the 15% withholding tax in terms of section 50A-H. Currently a non-resident trust in receipt of SA source interest, where the trust does not carry on business in SA through a permanent establishment, enjoys an exemption in terms of section 10(1)(h) from normal tax.

An offshore trust with no receipts or accruals from a Republic source will therefore not be liable for normal tax in South Africa.

But what of its beneficiaries, or even its ‘creator’?

Normal Tax Provisions

Section 25B(1) and (2)

The combined application of the provisions of section 7 and section 25B ensure that the receipts and accruals of a trust are going to be included in the gross income (or income) of any one, or more, of

- its ‘creator’, to the extent that the provisions of section 7 apply,
- its beneficiaries, if the provisions of section 25B(1) or (2) apply, or
- itself, again if the provisions of section 25B(1) apply.

In terms of section 25B(3) the deductions and allowances that the trust is entitled to, are then granted to its ‘creator’, its beneficiaries, or itself, on exactly the same basis as its receipts and accruals have been allocated.

If the ‘creator’ of the trust is a resident, and if the receipts and accruals of the trust accrue or are deemed to accrue to him in terms of section 7, then despite these receipts and accruals being from a non-South African source, they will be included in his income. Being a resident his world-wide receipts and accruals are included in his gross income (or income).

If a beneficiary of the trust is a resident, and if the receipts and accruals of the trust accrue or are deemed to accrue to him in terms of section 25B(1) or (2), then despite these receipts and accruals being from a non-South African source, they will be included in his income. Being a resident his world-wide receipts and accruals are included in his gross income (or income).

As indicated above, if the receipts and accruals of the offshore trust are deemed to be its own receipts and accruals in terms of section 25B(1), then because they are deemed to accrue to a non-resident, and because they are from a non-South African source, they will not be included in its gross income. For a non-resident to include an amount in his gross income it must be from a Republic true or deemed source.

The provisions of section 25B(1) provide that when any amount is received by or accrues to or in favour of any person in his capacity as the trustee of a trust fund, it is deemed to be an amount that has accrued to an ascertained beneficiary with a vested right to it, to the extent that it has been derived for his (the beneficiary’s) immediate or future benefit.

In terms of section 25B(2), when a beneficiary has acquired a vested right to any amount referred to in section 25B(1) in consequence of the exercise by the trustee of a discretion vested in him in terms of the trust deed, agreement or will, this amount is for the purposes of section 25B(1) deemed to have been derived for his (the beneficiary’s) benefit.

To the extent that any amount received by or accrued to or in favour of the trustee has not been derived for the immediate or future benefit of an ascertained beneficiary with a vested right to it – in other words, the beneficiary has only a contingent right to it – it will be deemed to be an amount that accrues to the trust (section 25B(1)). The trustee will be liable for the tax on this amount in a representative capacity.

Section 25B(1) is made subject to the provisions of section 7. This provision deems the income derived by a trustee in consequence of a 'donation, settlement or other [similar] disposition' to be the income of the donor. It should be noted that the provisions of section 7 are unlikely to apply to a testamentary trust as in most instances a donation, settlement or other similar disposition would not have taken place.

From the above discussion, it follows that the receipts and accruals of an offshore trust will not be taxed in South Africa provided that

- they are not deemed to accrue to a resident 'creator' in terms of the provisions of section 7, and
- no resident beneficiary has a vested right to them (section 25B(1)), or has acquired a vested right to them in terms of section 25B(2) because the trustees of a discretionary trust have now exercised their discretion and have agreed to award an amount to the beneficiary.

It would not be difficult for the 'creator' to ensure that the provisions of section 25B(1) or (2) do not apply to a resident beneficiary. The trust deed must make it clear that a resident beneficiary does not have a vested right to the receipts and accruals of the trust. And then the provisions of section 25B(2) can easily be avoided by ensuring that the trustees do not exercise their discretion and award an amount to a resident beneficiary.

How the 'creator' avoids the provisions of section 7 applying to him is not at all clear. It is likely that the receipts and accruals of the offshore trust are not going to vest in a beneficiary. And it is also likely they are not going to be awarded to a beneficiary. They are simply going to be retained in the trust for the benefit of some future beneficiary. It would therefore seem that this is the precise situation that will bring the provisions of section 7(5) into operation.

Section 7(5)

Section 7(5) provides that if any person (a 'creator') has made any donation, settlement or other similar disposition that is subject to a stipulation or condition, whether made or imposed by him or anybody else, to the effect that a beneficiary will not receive the income or some portion of it until the happening of some event, whether fixed or contingent, so much of any income as would, but for this stipulation or condition, in consequence of the donation, settlement or other similar disposition be received by or accrue to or in favour of the beneficiary, must, until the happening of that event or his death (the 'creator's' death), whichever takes place first, be deemed to be his (the 'creator's') income.

Included in section 7(5) is the term 'any donation, settlement or other [similar] disposition'. This term is not defined in the Act but the following principles have been laid down:

- The term 'any donation, settlement or other [similar] disposition' as used in section 7 excludes any disposal of property made for due consideration.
- The word 'disposition' means any disposal of property made wholly or to an appreciable extent gratuitously out of the liberality or generosity of the disposer.
- When there is a settlement or other disposition for some consideration but there is also an appreciable element of gratuitousness, the resulting income may be apportioned between these two elements. If no apportionment is possible, or if the taxpayer fails to produce evidence to justify an apportionment, the whole of the income must be regarded as having been derived by the beneficiary by reason of a gratuitous disposition.[3]

3 *Ovenstone v SIR* 1980 (2) SA 721 (A), 42 SATC 55.

In addition the court has held that the word 'disposition' as used in section 7 is *ejusdem generis* with the word 'donation' and 'settlement' in the provision and does not include a transaction made for full value.[4]

Trollip JA who delivered the judgment in *Ovenstone v SIR* said the following on what is meant by the word 'disposition' when it is used in section 7:[5]

> 'Hence, the words "donation, settlement or other disposition" all have this feature in common: they each connote the disposal of property to another otherwise than for due consideration, i.e. otherwise than commercially or in the course of business. "Donation" and "settlement" have this further feature in common: the disposal of property is made gratuitously or (occasionally in the case of a "settlement") gratuitously to an appreciable extent. Since "disposition", the general word that rounds off the critical phrase, was not intended to have its wide, unrestricted meaning, I think that this is an appropriate situation in that to circumscribe its scope by extending that common element of gratuitousness to it too by the *ejusdem generis* or *noscitur a sociis* rule. The critical phrase should, in other words, be read as "any donation, settlement or other similar disposition".
>
> 'So construed, "disposition" means any disposal of property made wholly or to an appreciable extent gratuitously out of the liberality or generosity of the disposer.'

As this expression covers any disposal of property made wholly gratuitously out of liberality or generosity it must cover all situations when a transaction contains an element of gift.

It would therefore seem that the only way that the 'creator' could stop the provisions of section 7(5) from applying is to ensure that there has not been a donation, settlement or other 'similar' disposition. As the 'creator' has set up the offshore trust, it seems inevitable that an element of a gift would exist.

Section 7(8)

The provisions of section 7(8)(*a*) apply when

- there has been a donation, settlement or other similar disposition (other than a donation, settlement or other similar disposition to an entity that is not a resident and is similar to a public benefit organisation contemplated in section 30);
- the donation, settlement or other similar disposition was made by a 'resident', as defined;
- in consequence of which an amount is received by or accrued to a person who is not a resident (other than a controlled foreign company in relation to the resident).

When these requirements are met, the resident must include in his income so much of the amount of any income as is attributable to the donation, settlement or other similar disposition.

Section 7(9) deems a donation to arise in certain circumstances for the purposes of section 7. It provides that when an asset has been disposed of for a consideration that is less than its market value, the amount by which its market value exceeds the consideration will for the purposes of section 7 be deemed to be a donation. What this means in the context of section 7(8), is that a donation will be deemed to arise when an asset is disposed of by a resident to a non-resident for less than its market value.

Section 7(8) does not deem the amount to be received by or accrued to the resident donor, to be the income of that donor. The section merely requires that the amount be included in the income of the resident donor. This means that for tax purposes the amount still accrues to the non-resident to whom it goes, and as such, if the amount is income from a South African source, the non-resident will also be subject to tax on that amount. This is regarded as an economic double tax from which there is no relief.

Paragraph (*b*) was introduced as an amendment in 2005, to allow the resident donor deductions in respect of the amount that is

4 *Joss v SIR* 1980 (1) SA 674 (T), 41 SATC 206.
5 At SATC 55.

deemed to be included in the income of the resident donor due to provisions of section 7(8)(*a)*.

Section 7(8)(*b*) provides as follows:

- Any amount incurred by the person contemplated in section 7(8)
- in relation to the amount received or accrued to that person
- must be deemed to have been incurred by the resident in whose income the amount is included.

Therefore where the amount is included in the income of the resident donor in terms of section 7(8)(*a*), section 7(8)(*b*) deems the amount to be incurred by the resident donor. The normal deduction rules must then be applied to claim a deduction.

SECTION 25B(2A)

If the receipts and accruals of an offshore trust are not caused by a donation, settlement or other similar disposition then the provisions of section 7 will not apply. Then provided the receipts and accruals are not from a South African source and provided no resident beneficiary has a vested right to them, they may escape Republic taxation.

The word 'may' is used because if the provisions of section 25B(2A) then apply, a resident beneficiary is going to be taxed in the Republic on the receipts and acruals (or some form of them).

The provisions of section 25B(2A) apply when a resident acquires a vested right to any amount representing capital of a non-resident trust if

- this capital arose (directly or indirectly) from any receipts or accruals of the trust that would have constituted income had the trust been a resident, during any previous year of assessment in which the resident had only a contingent right to that amount, and
- that amount was not previously subject to tax in the Republic.

When a resident acquires a vested right to an amount of capital, then in terms of section 25B(2A), the amount is included in the income of the resident in the year of assessment in which the resident acquires this vested right.

ITR12 DISCLOSURE

Was any income distributed to you / vested in you as a beneficiary of a trust, or deemed to have accrued in terms of s7 ? Y ◯ N ◯

Indicate the number of trust(s) applicable? [Number of trusts]

Trust Income – Income distributed to you / vested in you as a beneficiary of a trust or deemed to have accrued in terms of s7

Trust Details

Trust Name		
Trust Registration Number	Trust Tax Reference Number	

Details of Local Income

Field	Code	Field	Code	Field	Code
R Local Remuneration	Source Code	R Distributions from Real Estate Investment Trust/s (REIT)	4238	R Local Business and Trading Income (excluding Rental Income from letting of fixed property(ies) and income from Farming Operations)	Source Code

Details of Local Income

Field	Code	Field	Code	Field	Code
R Local Annuities	Source Code	R Local Capital Gain / Loss	Source Code	R Income from Local Farming Operations (IT48)	Source Code
R Local Interest	4201	R Local Rental Income from the letting of fixed property(ies)	4210	R Deemed Annuity	3611
R SARS Interest	4237	R Dividends deemed to be income in terms of s8E and s8EA	4292	R Other Local Income	Source Code

Details of Foreign Income

Field	Code	Field	Code	Field	Code
R Foreign Interest	4218	R Foreign Capital Gain / Loss	Source Code	R Imputed Net Income from Controlled Foreign Companies (CFC)	4276
R Foreign Tax Credits on Foreign Interest	4113	R Foreign Tax Credits i.r.o. Capital Gain / Loss	4114	R Foreign Tax Credit on Imputed Net Income from Controlled Foreign Companies (CFC)	4122
R Foreign Dividends	4216	R Foreign Farming	0192	R Other Foreign Income	4220
R Foreign Tax Credits on Foreign Dividends	4112	R Foreign Tax Credits on Foreign Farming Income	4119	R Foreign Tax Credits on other Foreign Income	4110

AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION

EXCHANGE OF INFORMATION CONVENTIONS / AGREEMENTS

South Africa is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. It has been confirmed that South Africa has undertaken to exchange information automatically in relation to new accounts and pre-existing individual high value accounts by the end of September 2017.

The Exchange of Information Conventions/Agreements/Standards are divided into these categories:

- USA FATCA Intergovernmental Agreement
- Multilateral Mutual Administrative Assistance (MAA) Conventions / Agreements
- Bilateral Tax Information Exchange Agreements (TIEAs)
- Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS)

The **USA FATCA Intergovernmental Agreement** is an agreement between the governments (tax administrations) of the United States of America and the Republic of South Africa to exchange information automatically under the provisions of the double taxation agreement between these countries.

The **Standard for Automatic Exchange of Financial Account Information in Tax Matters** (also referred to as the Common Reporting Standard or CRS) is the Global Model for automatic exchange of information under the Multilateral Competent Authority Convention to which South Africa is a signatory.

The **CRS** is a standardised automatic exchange model, which builds on the FATCA Inter Governmental Agreement to maximise efficiency and minimise costs, except that the ambit is now extended to all foreign held accounts and not only those of US citizens. South Africa is also one of the early adopters of the CRS and is committed to commence exchange of information automatically on a wider front from 2017, together with over 90 other jurisdictions.

THE COMMON REPORTING STANDARD

The Common Reporting Standard means that the holding of funds off-shore that have not been declared to SARS will no longer be an option for SA residents. The principle of bank-secrecy is being terminated as a result of measures being taken to prevent offshore tax-evasion.

Common Reporting Standard (CRS)

The Standard for Automatic Exchange of Financial Account Information in Tax Matters (also referred to as the Common Reporting Standard or CRS) is the Global Model for automatic exchange of information under the Multilateral Competent Authority Convention to which South Africa is a signatory.

The CRS is a ‘universal code’ of reporting aimed at incorporating as many jurisdictions possible on a mutually beneficial basis. Jurisdictions will each disclose information to each other. For example, if SA, France and the UK are all signatories to the CRS, the

UK would have to report to SA or France on any accounts held by SA or French tax residents with financial institutions situated in the UK and vice-versa.

Early adopters

The CRS was initially adopted by over 40 jurisdictions, known as the “Early Adopters”. The Early Adopters group will start reporting in terms of the CRS in September 2017. SA is included in this group. Other jurisdictions which form part of this group include Luxembourg, Liechtenstein, Malta, Cyprus, the UK, the UK’s Crown Dependencies of Isle of Man, Guernsey and Jersey, the UK Overseas Territories, France, Germany, Greece, India, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden.

The rest of the signatory states will start reporting in 2018. This second-phase group includes Switzerland, UAE, Mauritius, Hong Kong, Singapore, Macao, Monaco, Antigua and Barbuda, the Bahamas, as well as Australia, New Zealand and Canada.

Reportable information

Reportable information will be required to be exchanged with other countries under the agreement is as follows:

- the name, address, tax identification number and date and place of birth in the case of an individual
- the account number
- the name and identifying number of the reporting financial institution
- the account balance or value as of the end of the relevant calendar year or other appropriate reporting period
- ·the total amount paid or credited to the account holder with respect to the account during the calendar year or other period as the case may be

The CRS defines the information that is required to be shared, the financial institutions required to report, the types of people that are subject to information exchange and defines the procedures that financial institutions must follow.

The scope of ‘reportable accounts’ information extends beyond offshore bank or investment accounts and includes information relating to beneficiaries and settlors of offshore trusts.

Establishing a trust in a state which is not party to the CRS is also no guarantee of escape, since any account held by such trust with a bank situated in a CRS-signatory state, for example, will require the trustees to disclose the identity of the trust’s beneficiaries, settlors and protectors to the bank, which in turn will disclose the information under the CRS.

Unlike settlors, however, discretionary beneficiaries who have no further interest in the trust do not automatically fall into the reporting net. They would only be caught if a distribution was made to them within the relevant reporting calendar year.

Implications for SA residents

The implementation of the CRS will have many implications for SA tax residents.

- Focuses mostly on SA tax resident individuals holding investments and having accounts with a “financial institution” in a foreign signatory country
- SARS is likely to discover any undeclared offshore funds, which could result in criminal prosecution and understatement penalties of up to 200% in terms of the Tax Administration Act.
- SARS will gain access to an excessive amount of information relating to SA residents’ offshore transactions and structures. Residents with such structures must ensure they are tax and excon compliant.
- SARS in terms of Vision 2024 will have the IT capacity using artificial intelligence, “super computers” and specifically trained staff to process and utilise the information to address non-compliance.

RING-FENCING OF ASSESSED LOSSES OF CERTAIN TRADES (SECTION 20A)

This section applies to individuals in the top tax bracket only. Section 20 (set-off of assessed losses) is subject to the provisions of section 20A.

- In terms of section 20A(2), the **'taxed at the maximum marginal tax rate-requirement'** should be tested for by comparing the following amounts:
  - **the sum of the taxpayer's taxable income** (as defined in section 20A(2)) **(determined without having regard to any other provisions of this section) and any assessed loss and balance of assessed loss which were set off in terms of section 20 in determining that taxable income** and
  - the amount at which the maximum marginal tax rate for individuals for the year under review becomes applicable

  Thus, we look at taxable income after deducting the current years and previous years' assessed losses. Assessed losses so deducted, are then added back again. Thus, the net effect is that losses from other trades are in essence ignored for the purposes of the "taxed at the marginal rate-requirement". It is however taken into account for the purposes of calculating as the qualifying donation deduction (section 18A).

- Once an assessed loss is ring-fenced, it stays ring-fenced even if the person is not taxed at the maximum marginal tax rate in a subsequent year of assessment (section 20A(5)).

- Any balance of an assessed loss carried forward, to which section 20A applied in any prior year of assessment, may not be set off against any income other *than income derived from that specific trade*. Income derived from any trade includes: recoupment's in terms of section 8(4) and any amount derived from the disposal, after the cessation of that trade, of any asset used in carrying on that trade (section 20A(6)).

- All farming activities carried on by a taxpayer shall be deemed to constitute a single trade (section 20A(7)).

- If the provisions of section 20A(2) (being "taxed at the maximum marginal rate-requirement") apply, the taxpayer must indicate the nature of the business in his tax return (section 20A(8)).

- It is a commonly held view that separate business activities (other than farming) will constitute separate trades.

Natural person carrying on a **trade** that incurred an **assessed loss**

Yes

"Taxed at the maximum marginal rate-requirement" - Taxable income for current year exceeds the amount at which maximum marginal tax rate for individuals becomes applicable. (s 20A(2))

Yes

"3 out of 5 year-rule"
During the previous 5 years of assessment (current and previous 4 years) incurred an assessed loss in at least 3 of the years of assessment in carrying on that trade (do calculation separately for each year without taking into account an assessed loss from the previous year) (s 20A(2)(*a*))

OR

Suspect trade
The trade in respect of which the assessed loss was incurred, constitutes one of the following so-called suspect trades (s 20A(2)(*b*))

1. Any sport practiced by taxpayer or relative
2. Dealing in collectables by taxpayer or relative
3. Rental of residential accommodation, unless at least 80% is not used by relatives for at least 6 months of the year of assessment
4. Rental of vehicles, aircraft or boats as defined in the Eighth Schedule, unless at least 80% are not used by relatives for at least 6 months of the year of assessment
5. Animal showing by taxpayer or relative
6. Farming or animal breeding, unless it is carried on, on a full-time basis
7. Any form of performing or creative arts practised by taxpayer or relative.
8. Any form of gambling or betting practised by taxpayer or relative
9. ***The acquisition or disposal of any crypto asset***

Yes

Assessed loss incurred is in respect of a ***business*** that has a ***reasonable*** **prospect of deriving taxable income** (excluding a taxable capital gain) **within a *reasonable* period** (s 20A(3)). (R*easonable* will be evaluated based on the stipulations in section 20A(3)(*a*) – (3)(*f*))

No

Yes

Ring-fencing (section 20A(1)) **applies➔** The assessed loss incurred from the trade cannot be set-off against income from any other trade.

Is it a **suspect trade (excluding farming)** which meets the "**6 out of 10 year-requirement**"? It is if during the 10 years ending at the end of the current year of assessment, an assessed loss was incurred in carrying on that trade in at least 6 of the 10 years (s 20A(4)).

(*Remember:* Exclude any balance of assessed losses carried forward when doing a specific year's calculation. Only 2005 and later years of assessment are taken into account.)

Yes

No

Loss from trade **not ring- fenced**

PROVISIONAL TAX

Every provisional taxpayer is required to make provisional tax payments in respect of their liability for normal tax in respect of each year of assessment.

Persons other than companies

Who is a Provisional Taxpayer?

Any person who receives income (or to whom income accrues) other than a salary, is a provisional taxpayer. Most salary earners are therefore non-provisional taxpayers, if they have no other sources of income. It is important to note that receiving exempt income, as follows, does not make you a provisional taxpayer:

- If you receive interest of less than R23 800 if you are under 65; or
- If you receive interest of less than R34 500 if you are 65 and older or;
- You have income in a tax free savings account.

Excluded from being a provisional taxpayer as defined:

- Any natural person who does not earn any income from carrying on any business – provided that person's taxable income will not be more than the tax threshold (for 2021 tax year: for taxpayers below age of 65 R83 100; age 65 to below 75 – R128 650 and age 75 and over – R143 850); or the taxable income of that person (earned for example from interest, foreign dividends, rental from letting of fixed property, remuneration from unregistered employer) will not be more than R30 000

As a result of some of the thresholds above, a taxpayer can inadvertently become a "once-off" provisional taxpayer. If there is a sale of assets, including the taxpayer's primary residence, and the profits are in excess of the capital gains tax exclusion, it may be prudent to register for that tax year as a provisional taxpayer and to deregister the year after. Taxpayer's not registering for provisional tax as required and not making timeous payments will result in penalties being raised by SARS

In the case of persons other than companies, provisional tax is payable in the following manner:

(*a*) within the period of six months reckoned from the commencement of the year of assessment in question, one half of an amount equal to the total estimated liability for normal tax (dealt with below) in respect of that year, less the total amount of any employees' tax deducted from remuneration received by or accrued to the taxpayer during such period; and

(*b*) not later than the last day of the year of assessment in question, an amount equal to the total estimated liability for normal tax in respect of that year, less the sum of the amounts of any employees' tax deducted from remuneration received by or accrued to the taxpayer and the amount paid under (*a*) above.

GENERAL DEDUCTION FORMULA

The main sections of the Act dealing with deductions are s 11 to s 19 and s 23.

Sections 11 to 19, which are the positive sections relating to deductions, enumerate a list of items that may be deducted from income.

Section 23, which is the negative section, sets out a list of items that may not be deducted from income.

Expenditure under s 11 deductible only if 'trade' is carried on

In its opening words, s 11 provides as follows:

'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived . . . .'

The term 'trade' is given a very wide meaning in s 1, and includes

'every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act [57 of 1978], or any design as defined in the Designs Act [195 of 1993], or any trade mark as defined in the Trade Marks Act [194 of 1993], or any copyright as defined in the Copyright Act [98 of 1978], or any other property which is of a similar nature.

In the terms of s 11 that the Act contemplates the carrying on of more than one trade and deductions should be made from each trade as a unit by itself. Should the allowable deductions in any particular trade exceed the income, then, as regards that particular trade, there is an assessed loss which, in terms of s 20(1)(*b*), may be set off against other income derived by the taxpayer.

The losses created from each trade may be ring-fenced by s20A, which is of application to natural person taxpayers in the highest tax bracket.

Pensions, annuities, interest or dividends

In spite of its wide meaning, the term 'trade' *does not* embrace income in the form of interest, dividends, annuities or pensions.

A person who accumulates his savings and invests them in interest-bearing securities or shares held as assets of a capital nature does not derive the income from carrying on any trade. Nevertheless, the scale and nature of the investment in securities or shares held as assets of a capital nature may, it is submitted, be such as to amount to the carrying on of a trade. A business of speculation in securities or shares held as assets of a revenue nature constitutes the carrying on of a trade.

A taxpayer who was not carrying on the business of investing in equities and interest-bearing securities but was merely watching over his investments was held not to be carrying on a trade. The expenses he so incurred were accordingly disallowed.

On the other hand, the earning of rentals from the letting of any property and the receipt of royalties or similar payments from the use of copyrights or patent rights amount, by definition, to the carrying on of a trade.

Venture

For the word 'venture', it has been held that it refers to a transaction in which a person risks something with the object of making a profit, that is, a financial or commercial speculation.

In a sense very many investments by way of loan are attended with risk but it would be going much too far to suggest that whenever risk is run in a loan the lender has engaged in a venture.

SARS Practice Note 31

In practice SARS accepts that 'if capital is borrowed specifically to reinvest, such a transaction results in trade income and the expenditure is, therefore, allowable'. On this basis it will allow as a deduction under s 11(*a*) interest incurred in order to earn interest income. The Commissioner's practice is set out in Practice Note 31,the relevant portion of which reads:

'While it is evident that a person (not being a moneylender) earning interest on capital or surplus funds invested does not carry on a trade and that any expenditure incurred in the production of such interest cannot be allowed as a deduction, it is nevertheless the practice of Inland Revenue [now SARS] to allow expenditure incurred in the production of interest to the extent that it does not exceed such income. This practice will also be applied in cases where funds are borrowed at a certain rate of interest and invested at a lower rate. Although, strictly in terms of the law, there is no justification for the deduction, this practice has developed over the years and will be followed by Inland Revenue.'

General deduction formula

Most deductions are allowed by virtue of a so-called general deduction formula comprising s 11(*a*), which sets out what may be deducted, namely, the positive test, and s 23(*g*), which stipulates what may not be deducted, namely, the negative test.

The courts have laid down that s 11(*a*) and s 23(*g*) must be read together when one considers whether an amount is capable of deduction.

The current general deduction formula comprised by ss 11(*a*) and 23(*g*) may therefore be broken down into the following elements:

- The expenditure and losses
- must be actually incurred
- during the year of assessment
- in the production of the income:
- they must not constitute expenditure and losses of a capital nature, and
- if they are claimed as a deduction against income derived from trade, they must, either in part or in full, constitute moneys that are laid out or expended for the purposes of trade.

SECTION 23

Section 23 acts to disallow certain expenses. Section 23 will disallow and expense, despite the expense fulfilling the conditions of the general deduction formula or any of the specific deductions of the Act. Of relevance are:

- **Section 23(a)**
  No deduction shall be permitted in respect of costs incurred in the maintenance of any taxpayer, his family or establishment

- **Section 23(b)**
  Domestic expenses, including the rent of, cost of repairs, or expenditure in connection with any dwelling not occupied for "trade" will not be allowed as a deduction, "except in respect of such part as may be occupied for the purposes of trade". Importantly, a part of any dwelling will be deemed not to be occupied for trade (and as such the expenses in relation to this part will not be deductible) unless that part is:

    - Specifically equipped for the purposes of the taxpayer's trade, *and*
    - Regularly and exclusively used for those purposes

- **Section 23(f)**
  No deduction is permitted of any expenses incurred in respect of any amounts received or accrued which do not constitute "income" (gross income less exemptions) as defined in section 1 of the Act. An example would be expenses incurred to produce local dividend that are exempt in terms of section 10(1)(k).

- **Section 23(q)**
  No deduction is permitted of expenses incurred in the production of income of the form of foreign dividends

- **Section 23(o)**
  No deduction of expenses permitted:
    - The payment of the expenditure or the agreement or offer to make that payment constitutes activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004
    - Which constitute a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic
    - Incurred as "fruitless and wasteful expenditure" as defined in section 1 of the Public Finance and Management Act

Previously section 234 enabled SARS to take action when an administrative non-compliance error was committed “wilfully and without just cause” by the taxpayer. In other words, the law required an element of intent. Where the taxpayer could show negligence or ignorance caused the administrative non-compliance, the remedy available to SARS was must less severe than imprisonment and or a fine.

The amendment whereby the section now encompasses actions that are “wilfully *or negligently*” committed by the taxpayer means the intention of the taxpayer in respect of the non-compliance does not matter. A taxpayer can now “negligently” fail to comply or make certain mistakes on their tax returns and commit an imprisonable criminal offence and or be subject to a fine.

Mistakes for taxpayers to avoid include:

- Failure to register their details with Sars or to notify it of any changes to their details;
- Failure to appoint a representative taxpayer or to notify Sars of such appointment or a change in representative taxpayer;
- Taxpayer received compensation for assisting someone with their taxes and failed to register with Sars as a tax practitioner;
- Failure to submit a return when required to do so;
- Failure to retain all relevant substantiating records;
- Failure to provide any information as and when requested by Sars to do so;
- Failure to appear and comply when requested by Sars to attend a meeting or a hearing to give evidence;
- Taxpayer is issued with a directive or instruction by Sars and fails to comply with it;
- ***Taxpayer fails to disclose any material information to Sars or fails to provide Sars with any notification as required under any tax act;***
- Taxpayer is notified by Sars to pay an amount on another taxpayer’s behalf in settlement of a tax debt and fails to do so; or
- Taxpayer has a withholding obligation and fails to withhold or deduct the tax correctly and pay it over to Sars.

VOLUNTARY DISCLOSURE PROGRAMME (VDP)

Permanent VDP (normal)

The SARS permanent Voluntary Disclosure Programme (VDP) is administered under the Tax Administration Act, 2011 with effect from 1 October 2012.

Voluntary disclosure relief

Voluntary disclosure relief is limited to defaults disclosed for which relief is granted as per the VDP agreement. The following relief is available:

- Sars will not pursue criminal prosecution for a tax offence arising from the ‘default’
- Relief in respect of understatement penalties to the extent referred to in column 5 or 6 of the understatement penalty percentage table in terms of section 223 of the Act;
- 100% relief in respect of an administrative non-compliance penalty that was or may be imposed under Chapter 15 of the Act, or a penalty imposed under a tax Act, but excluding penalty for the late submission of a return.

Applications can be submitted via eFiling or Branch offices using the Voluntary Disclosure Application Form (VDP01)

Special VDP

For the period 1 October 2016 until 31 August 2017 a Special Voluntary Disclosure Programme (SVDP) gave non-compliant taxpayers an opportunity to regularise their unauthorised foreign assets and income by voluntary disclosing this information. Individuals and companies could apply during the window period from 1 October 2016 until 31 August 2017. The SVDP was meant for individuals and companies who did not in the past disclosed tax and exchange control defaults in relation to offshore assets. Taxpayers who missed this deadline can still make use of the normal VDP process to disclose offshore income.

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