

# Tax matters and emigration

By Annalise De Meillon Muller, Manager: Distribution and Sales Support

During the month of November, we were fortunate enough to secure Diane Seccombe, National Head: Tax Training and seminars at Mazars, to discuss the upcoming changes on 1 March 2021 regarding access to retirement savings in retirement annuity funds (RA) and preservation funds prior to retirement, in a series of webinars.

Diane shared valuable insights during these sessions and her message can be summarised with the slogan '*forget financial emigration and understand tax residency!*'.

Below we provide a brief overview of the session.

## Remember the basics

- Financial emigration is not a tax concept, it is a SARB process.
- We follow a residence-based tax system that means that when a South African qualifies as a tax resident, they are taxed on their worldwide income, wherever it is earned. Non-residents for tax purposes are in principle taxed on their SA source income.[\[1\]](#)
- A retirement fund member's retirement date triggers the tax consequences linked to the event as well as the annuitisation rules provided for in the Income Tax Act.

## Before and After

	Until 1 March 2021		After 1 March 2021	
	Access prior to retirement (excluding disability, ill-health events as per fund rules)	At retirement	Access prior to retirement (excluding disability, ill-health events as per fund rules)	At retirement
<i>Retirement annuity fund</i>	<ul style="list-style-type: none"> <li>▪ formal emigration (for SA tax residents) or</li> <li>▪ the expiry of a visa (for non-SA tax residents).</li> </ul>	The 1/3-2/3 annuitisation rule applies	<ul style="list-style-type: none"> <li>▪ after a continuous disruption of three years in tax residency or</li> <li>▪ the expiry of a visa (for non-SA tax residents)</li> </ul>	The 1/3-2/3 annuitisation rule applies
<i>Pension preservation fund</i>	<ul style="list-style-type: none"> <li>▪ limited to one withdrawal plus</li> <li>▪ via formal emigration (for SA tax residents) or</li> <li>▪ the expiry of a visa (for non-SA tax residents)</li> </ul>	The 1/3-2/3 annuitisation rule applies	<ul style="list-style-type: none"> <li>▪ limited to one withdrawal plus</li> <li>▪ after a continuous disruption of three years in tax residency or</li> <li>▪ the expiry of a visa (for non-SA tax residents)</li> </ul>	The 1/3-2/3 annuitisation rule applies
<i>Provident preservation fund</i>	<ul style="list-style-type: none"> <li>▪ limited to one withdrawal plus</li> <li>▪ via formal emigration (for SA tax residents) or</li> <li>▪ the expiry of a visa (for non-SA tax residents)</li> </ul>	The 1/3-2/3 annuitisation rule does <u>not</u> apply	<ul style="list-style-type: none"> <li>▪ limited to one withdrawal plus</li> <li>▪ after a continuous disruption of three years in tax residency or</li> <li>▪ the expiry of a visa (for non-SA tax residents)</li> </ul>	The 1/3-2/3 annuitisation rule applies

[1] <https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Tax-and-Non-Residents/Pages/default.aspx>

#### Access to RAs and preservation funds after 1 March 2021

The new test proposed in the Draft Taxation Laws Amendment Bill 2020 is no longer dependant on a process or procedure as is currently the case. The new test has no relation to the process of emigration and the member must provide evidence that they have not been tax resident for at least three consecutive years, before access prior to retirement will be granted to the retirement annuity or preservation fund. However, access to the full retirement benefit is still available via the one permitted withdrawal in a preservation fund. This access being referred to is thus still connected to the principle of leaving South Africa but the indicator of emigration that now exists is being removed and replaced with an indicator of tax residency.

*Recap of the existing process with an emigration indicator: the financial emigration process requires a lot of supporting documentation to start the process. Completed documentation is filed with an authorised dealer that acts on behalf of the South African Reserve Bank (SARB). The approved documentation is then used for*

*an application for tax clearance and this is popularly called the emigration tax clearance. Clearance usually takes about 21 business days at SARS if the amount clearance is required for, is less than R10m. Any amount more than R10m is normally thoroughly audited and then the process can take up to twelve months.*

The above process is still available to gain access to retirement benefits, prior to retirement, in a retirement annuity fund and preservation fund on condition that the completed application is lodged with the SARS by the end of February 2021. The proposed amendments provide a twelve-month period for the completed application to be approved i.e. until 1 March 2022, whereafter this approval will trigger the release of the retirement benefits to the member. One must keep in mind that the release of the retirement benefits will be taxed as a 'retirement fund lump sum withdrawal benefit', which means the withdrawal benefit tax table applies, which is the very punitive R25 000 tax table.

### The new test

As of 1 March 2021, evidence will have to be provided to SARS of a disruption in tax residency for three consecutive years. What is important to remember is that the three-year period can potentially start before 1 March 2021.

In order to be tax resident in SA, the *ordinarily resident* test is applied firstly. This is a subjective test that looks at the subjective factors of each case. Factors that influence the outcome of this test include, but are not limited to, where the person's true home, family and social connections are located. The eventual intent of the person is taken into consideration. If the person is proven to be ordinarily resident, then they are an SA tax resident. Should this test fail because it is clear that SA is no longer the person's true home, the *physical presence test* is applied. The physical presence test is applied annually and measures the total days present in SA in a twelve-month period. SARS provides the requirements of the physical presence test and clear guidance in this regard on their website.

### Double taxation

Where it happens that a person is tax resident in more than one country because they comply with the tax residency tests of both countries, any double taxation agreement between the said countries will provide what is referred to as *tie breaker rules*. For the purposes of taxation, a person cannot be tax resident in more than one country and double taxation agreements contain rules that will determine in which country tax residency is definitive, in relation to a specific tax topic. Tie breaker rules therefore override the application of tax residency tests and consequently the Income Tax Act.

The moment that a person becomes tax resident in more than one country, the tie breaker rules of the double taxation agreement, apply.

Example: Mr A is 45 years old and has been working in country X for the last four years. His home

and family is still in SA, but he also owns a permanent residence in country X. He visits SA a few times per year. Mr A is still a SA retirement annuity fund member and he continues to contribute to this fund. Mr A is ordinarily resident in SA in terms of the Income Tax Act. However, in country X the tax residency test determines that when a person is present in that country for at least 183 days in a twelve-month period, then the person becomes tax domiciled there and therefore is a tax resident.

The effect is therefore that after the first six months in year one of employment in country X, Mr A was both a tax resident in SA and in country X. The tie breaker rules of the double taxation agreement between SA and country X will therefore determine where Mr A has been tax resident for the past three and a half years.

Let's assume the applicable tie breaker rules determine that Mr A is tax resident in country X and not in SA as from the second half of the first year of employment in country X. After 1 March 2021 when the new test applies, Mr A can gain access to his retirement benefits in the retirement annuity fund. Mr A will be able to provide evidence of breaking tax residency in SA three and a half years ago as he has been tax resident in country X for this period in terms of the double taxation agreement and a person cannot be tax resident in more than one country at a time.

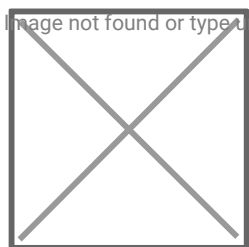
Had there been no double taxation agreement between SA and country X, the standard rules apply. Mr A is tax resident in SA in terms of the ordinarily resident test and on 1 March 2021, should he require access to the said retirement benefits, he will have to provide evidence of not being tax resident for a continuous period of three years.

## Conclusion

Complying with the new test in order to gain access to retirement benefits in a retirement annuity fund or preservation fund, will have other consequences as well such as the disposal of all worldwide assets (except for immovable property in SA) for the purposes of capital gains tax.

It is clear that the complexity of these issues requires careful consideration and the guidance of a financial adviser and possibly even a tax expert.

## Annalise De Meillon-Muller



Annalise is responsible for support of the Business Development team with respect to product entrenchment, legal expertise, regulatory compliance, financial planning principles, digital communication, and strategic project collaboration. Her role is key to ensuring the fulfilment and maintenance of the competency and expertise of the team and selected partners. Annalise joined Glacier in 2015 as a Sales Training Manager looking after the competency and expertise of the Glacier Distribution and Sales team. Before Glacier, Annalise's career spanned almost two decades as a technical professional in the fields of law, financial planning, development, business development and marketing at the Road Accident Fund, Bowline Fulfilment, Bowman Gilfillan Attorneys and Milpark Education. Annalise obtained a B. Proc degree and Postgraduate LLB degree from the University of Johannesburg (1993 to 1999), Postgraduate Diploma in Financial Planning (CFP®) from the University of the Free State (2008) and an Advanced Postgraduate Diploma in Financial Planning (Advanced CFP®) in Estate Planning and Personal Risk Management from the University of the Free State (2010)

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