

# **SOUTH AFRICA TAX RESIDENCY STATUS**

## **South Africa to amend foreign employment income exemption: time to formalise your tax residency status**

South Africa's tax system changed from a source-based system to one based on residence for years of assessment commencing on or after 1 January 2001. However section 10(1)(o)(ii) exempted South African tax residents from remuneration received outside South Africa, provided that the resident stayed outside South Africa for a total of more than 183 days in the year of assessment, of which 60 days had to be consecutive.

That is now set to change. The South African Treasury recently introduced a proposal to repeal this exemption on foreign employment income. Following public consultation, a revised version was issued on 25 October, which includes a concession to limit the annual exemption on foreign income to R1 million (approx. US\$75,000) per annum. As a result South Africans working abroad may become subject to tax on any income earned in excess of R1 million.

The Bill states that the amendment will come into operation on 1 March 2020 and will apply in respect of years of assessment commencing on or after that date. It is therefore now essential to obtain certainty on your tax residency because your tax liability or exposure may go beyond this proposed concession.

### **Tax liability**

The South African Revenue Service (SARS) may tax South African residents on their worldwide income and non-residents on their actual or deemed South African-sourced income. It should be noted that the taxing rights of SARS extends not only to your employment income, but all your assets unless you are relieved from taxation by means of a Double Taxation Agreement (DTA) between South Africa and the country of your dual tax residence or where your assets are held.

### **Tax Residency**


It is important to note that your tax residency is not necessarily linked to your passport or your place of residence. This is a commonly held assumption. In fact you can be a South African tax resident by means of being:

- **Ordinarily resident:**

The term 'ordinarily resident' is not defined but the courts have interpreted the concept to mean the country to which a person would naturally and as a matter of course return from his/her wanderings. It might therefore be called a person's usual or principal residence and it would be described more aptly, in comparison to other countries as the person's real home. The question whether a person is ordinarily resident in a country is one of fact and each case must be decided on its own facts having regard to principles already established by case law. There is no set time period. You may remain an ordinary resident of South Africa for tax purposes for as long as your intention remains to return there.

- **Physically present:**

A natural person who is not ordinarily resident in South Africa may be regarded as a South African tax resident if they are physically present in South Africa for certain periods of the year. The 'physical presence test' applies to an individual who is not ordinarily resident but who is present in South Africa for a period or periods exceeding:

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

If you work abroad, the physical presence test will most likely not be applicable, but you can still be regarded as a South African tax resident if you are found to be 'ordinarily resident' in South Africa. This may result in an individual being considered a dual resident for tax purposes in two different countries by virtue of being ordinarily resident in South Africa and meeting a test similar to the physical presence test in their country of employment.

- **Treaty Resident:**

If, however, you are tax resident in both South Africa and a country with which South Africa has a DTA in place, your liability for tax between the two countries may be determined by the 'tie-breaker' rules contained within the DTA. The outcome will be that the individual will be deemed to be resident in one of the countries for treaty purposes. 'Tie-breaker' tests generally examine personal and economic ties such as permanent home, centre of vital interest, habitual abode and citizenship.

But even if the 'tie-breaker' rules come down in your favour, you will still be considered to be a South African tax resident and will need to file a tax return even if you are not actually liable for any tax in South Africa. Failure to file a tax return may lead to some unwanted penalties upon your return to South Africa.

## **Conclusion**

South Africans living and working abroad have often ignored their tax residency status. Doing so may have a substantial impact on your financial and succession planning, and could result in a hefty tax bill and penalties upon your return to South Africa and even criminal sanctions.

The proposed changes now issued by the Treasury raise a number of questions for South Africans living and working abroad. The introduction of the global Common Reporting Standard (CRS) for automatic exchange of financial information means that your country of residence will likely be reporting on your income and assets to SARS on an annual basis.

We therefore strongly recommend that you should obtain an opinion to provide you with clarity on your tax residency status at the earliest opportunity. This will provide you with certainty and allow you to structure your wealth in a tax efficient manner, irrespective of whether you are deemed to be tax resident in South Africa or not. It will also assist you with your tax filing to SARS (if applicable) and ensure that you can avoid any unnecessary penalties upon your return to South Africa.

In conjunction with Renmere, a specialist tax advisory firm in South Africa, Sovereign can assist you to obtain a formal opinion on your tax residency and a tailored solution to ensure that your tax affairs are in order and effectively structured. Please [click here](#) to download our Tax Residence Indicator.