TAX - A VITAL COMPONENT OF A COMPANY’S SOCIAL LICENSE TO OPERATE

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TAKING MONEY OUT OF SOUTH AFRICA – THE RESERVE BANK’S PROCESS

ETHICS FOR TAX ACCOUNTANTS AND TAX PRACTITIONERS
The modern accounting landscape is more than just a number crunching game. It transcends traditional career boundaries and expands into all facets of the South African financial context and beyond. Today, a Professional Accountant (SA) aims for value creation for businesses, wealth creation for investors/owners and of course, the ultimate goal of sustainable economic growth. SAIPA encompasses those objectives across private practices, corporate, public and education sectors. The South African Institute of Professional Accountants has more than 35 years of experience to make meaningful contributions to your career, as well as the accountancy profession as a whole.

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With the heightened focus on corruption within the accountancy and finance world, ethics in business is becoming more critical than ever. The function of a tax practitioner is to serve in the interests of the public as detailed in the professional Code of Conduct enforced by SAIPA.

Tax practitioners apply tax legislation and judicial rulings to specific transactions to determine the tax consequences of the taxpayer by ensuring tax equity and equality. It is vital that the work done by a tax practitioner can be trusted by clients, stakeholders and society at large.

SAIPA-member Tax Practitioners are required to uphold five fundamental principles of ethics for professionals:

1. To work with integrity.
2. To always remain objective.
3. To maintain professional competence and due care.
4. Comply with confidentiality.
5. Maintain professional service, knowledge and standards.

Fundamentally, ethical behaviour is not limited to upholding of an industry code of conduct. Professional ethical behaviour is the result of the interaction of personal morality, social responsibility, business ethics, and other general ethical standards of the individual tax professional.

Taxation is a critical enabler of domestic resource mobilisation and is essentially how businesses contribute to wealth creation in the countries in which they operate. This contribution of tax revenue provides essential public funding for governments to meet economic and social objectives. Other key contributions to the economy include, creating jobs and employment, investment in infrastructure, creating value through the supply chain and corporate social responsibility initiatives. A business’ tax contribution is a key part of its corporate social responsibility efforts.

In this edition Ine-Lize Terblanche gives insight into tax as a component of a company’s license to operate. We also examine the South African Reserve Bank requirements when cash and foreign exchange are taken out of South Africa. This entails a discussion on the Reserve Bank’s currency and exchange regulation when funds are taken out of the country.

Enjoy the read!

Faith

Faith Ngwenya - Technical & Standards Executive
ANNUAL

BUDGET BREAKFAST

GAUTENG

Diarise Thursday 27 February 2020
to join us to discuss the impact of the
2020 Budget Speech with our hand-picked
panel of experts.

VENUE: Wanderer’s Club
TIME: Registration from 07h00
      Breakfast and presentations
          08h00 – 11h00
CPD HOURS: 3 CPD hours – Category Tax
COST: R400 per person, including VAT
ETHICS FOR TAX ACCOUNTANTS AND TAX PRACTITIONERS

With the recent spate of debacle in the accountancy profession and the heightened focus on corruption, ethical considerations are rapidly gaining ascendancy in all professions throughout the world as citizens are becoming more informed.

By Mahomed Kamdar, Tax Specialist, SAIPA
Tax accountants and practitioners have the primary goal of serving the public interest as outlined in the professional Code of Conduct. The work done by a tax accountant or a practitioner must be trusted by clients, stakeholders and society at large. The work done by these professionals does not only reflect on themselves individually but more importantly, on the accounting profession. Hence, International accounting organisations, such as IFAC (International Federation of Accountants), are rapidly developing codes for their members who provide tax advice.

The role of a tax practitioner and professional accountant is to apply the tax legislation and judicial rulings to specific transactions to determine the tax consequences to the taxpayer by ensuring tax equity and equality.

The tax professional must observe five principles of ethics (to be discussed later). This brief will discuss the important provisions from the Tax Administration Act 28 of 2011 (TAA) governing the conduct of the tax professional. A tax professional who is expected to prepare or submit tax returns is licensed to participate in tax-related professional services as per sections 240 – 243 of the TAA. Hence to obtain the status of a Tax Professional a person must first meet the requirements of the TAA in order to register with SARS.

The tax professional must ensure that the client is tax compliant. The professional is expected to receive pertinent information and then to submit a tax return.

1) TAX PROFESSIONAL: REQUIREMENTS AS PER THE TAX ADMINISTRATION ACT

Registration with a professional body
It is only natural persons and not firms that can register as a tax practitioner with SARS. When a firm renders tax service, it is individuals who are registered as tax professional.

Every natural person who provides advice to another person with respect to the application of a tax acts; or completes or assists in completing a return by another person, must register with or fall under the jurisdiction of a ‘recognised controlling body’ (RCB, such as SAIPA and SAICA) within 21 business days after the date on which that person, for the first time provides the advice or completes or assists in completing the return.

Persons not eligible to register as a tax professional
However, a person may not register as a tax practitioner or SARS may deregister a registered tax practitioner if the person or the registered tax practitioner, as the case may be:

(a) During the preceding five years has been removed from a related profession by a ‘controlling body’ for serious misconduct;
(b) During the preceding five years has been convicted (whether in the Republic or elsewhere) of:
   (i) Theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); or
   (ii) Any other offence involving dishonesty, for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act 101 of 1991);
(c) During the preceding five years has been convicted of a serious tax offence; or
(d) During the preceding 12 months has for an aggregate period of at least six months not been tax compliant and has failed to:
   (i) Demonstrate that he or she has been compliant for that period; or
   (ii) Remedy the non-compliance, within the period specified in a notice by SARS.

The individual can only be registered as a tax professional if he/she is tax compliant for, at least, seven months in the preceding 12 months. This requirement also applies to businesses owned by the tax professional and to business in which the tax professional has shares. The tax professional must demonstrate that they have taken active step to remedy this non-compliance.

RCBs and that includes SAIPA are receiving communication from SARS that tax professionals are not compliant with the TAA. The affected tax professional will first be contacted by SARS.

Thus far 31 SAIPA members are affected and the names of these tax practitioners will be communicated to SAIPA soon.

After receiving the communication from SARS, SAIPA is expected to address the matter in terms of its internal policies and procedures on matters affecting its members. SAIPA has internal structures that will deal with matters affecting its members. There is an internal investigations committee, and an affected member will firstly be invited to appear before this committee. Both SARS and the affected members will present their cases to SAIPA (to be handled by the investigations committee). Based on the outcome of the investigations committee, the matter will be handed over to the disciplinary committee.

“"The role of a tax practitioner and professional accountant is to apply the tax legislation and judicial rulings to specific transactions to determine the tax consequences to the taxpayer by ensuring tax equity and equality.”"

1 The term is used to refer to both the tax accountant and the tax practitioner.
“The tax positions taken by tax professional must meet certain standards with respect to advice given, that is, the tax professional must take reasonable care, or have reasonable and not reckless grounds for tax position taken on tax return.”

2) SARS PRACTICAL REQUIREMENTS FOR PROFESSIONAL CONDUCT

Tax professionals are prohibited from charging contingent fees—the fee is based on a percentage of the refund on a tax return or a fee is a percentage of tax ‘saved’.

Generally, SAIPA does not prescribe what fee a tax professional should charge in terms of Rands and cents. However, there are a few general principles that a tax professional should be mindful of. These are as follows:

- The fee to be charged should be based on the reputation of the tax professional (a tax professor based at a university is likely to charge a higher fee),
- The region where the professional is based, and whether the location of the tax professional is in a rural or urban area.
- A tax professional should not charge a fee that is unreasonable when compared to a standard, giving rise to an over-priced fee. For example, a professional cannot charge a fee of R10,000 to an unsophisticated taxpayer (such as an elderly person) for simple tax work that most tax practitioners charge R500.
- SAIPA in its official publication, Professional Accountant2, argues the point that the professional fees ought to be based on the value and quality of services rendered. The focus is on value-pricing for the services rendered.

Hence a fee charged should be based on the integration of the abovementioned factors.

It is further noted that a tax professional may not submit a tax return via the taxpayer’s profile as this transfers risk of errors to the taxpayers. The TAA was established to protect the taxpayers from rogue professionals.

The SARS logo cannot be used in advertising material (more on advertising later in this article).

3) IFAC CODE OF ETHICS FOR PROFESSIONALS3

The International Federation of Accountants (IFAC) is a global organisation representing the accounting profession. Only two organisations from RSA, that is, SAIPA and SAICA, are full members of this global organisation. Others are affiliates of international parent bodies. The five fundamental principles of ethics for professionals:

- **Integrity:** A tax professional is expected to be straightforward and honest in all professional and business relationship. A professional shall not knowingly be associated with reports, returns, communications or other information where the professional believes that the information (a) contains a materially false or misleading statement (b) contains statement or information provided recklessly. The professional should include the requirements of integrity in their letters of engagement with their clients.

- **Objectivity:** A tax professional shall comply with the principle of objectivity, which requires an accountant not to compromise professional or business judgment because of bias, conflict of interest or undue influence of others. Tax professionals should seek to advance their client’s position to the extent that the tax position (advice given to clients) taken must comply with applicable professional standards, laws and regulations.

The tax positions taken by tax professional must meet certain standards with respect to advice given, that is, the tax professional must take reasonable care, or have reasonable and not reckless grounds for tax position taken on tax return. Simply said, the tax submission must be based on facts or information that was verified. Tax positions taken should not result in a conflict of interest for the professional, compromise the credibility of the professional or subordinate the judgement of the tax professional to that of their client. A tax professional must sign a tax return only if he or she believes that it contains a position which has a likely chance of succeeding during an audit or that it will have a more than 50% chance of succeeding a litigation process that is when the matter appears in court. The tax position must be taken by a reasonable and well-informed person (knowledgeable in tax law) and would lead to such person concluding that the position has a greater than 50 percent chance of being successful during an audit or if taken to court. The position must not be frivolous. Tax position or opinion must not jeopardise or harm the tax profession.

A tax professional must not give written advice (including electronic communications) based on unreasonable factual or legal assumptions;

a) The tax professional must not take the word of a taxpayer for granted – authentic supporting documents must be supplied to the tax practitioner – confirming all events in a tax return. A tax professional must not submit a tax return on behalf of the taxpayer without confirming all the facts in a tax return – the tax professional must be in possession of authentic information on all events in a tax return before clicking on the send button on e-filing.

b) Tax professionals must consider all relevant facts that the tax practitioner knows or should know.

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2 Changing the mindset of pricing in the accounting profession – issue 30 of 2017 page 24 & page 25. implemented by IFAC
3 This narrative is based on IFAC on the IESBA codes as adopted and
c) Adopt a tax position assuming that the taxpayer will not be audited, or that the issue can be resolved through the instalment payment agreement (s 167 of TAA).

d) Tax professional must not create false or unjustified expectations of favourable results.

   iii) Professional competence and due care: A tax professional must comply with the principle of professional competence and due care, which requires a professional

   (a) To attain and maintain professional knowledge and skill at the level required to ensure that a client or the employing organisation receives competent professional service, based on current tax legislations; and

   (b) To act diligently in commensurate with professional standards.

   “Professional competence” recognises the need for tax professional to continuously participate in CPD program of professional development, learning, and improvement. Professional competence is commensurate with the concept of ‘due professional care’.

   A tax professional should not undertake professional work which they are not competent to perform unless the professional has the necessary assistance from an appropriately qualified specialist.

   iv) Confidentiality: A tax professional must comply with the principle of confidentiality which requires him/her to respect the confidentiality of information acquired as a result of professional and business relationship. A tax professional shall continue to comply with the principle of confidentiality even after the end of the relationship between the tax professional and a client or employing organisation. When changing employment or acquiring a new client, the tax professional is entitled to use prior experience but shall not use or disclose any confidential information acquired or received as a result of professional or business relationship.

   v) Professional behaviour: A tax professional must comply with the principle of professional behaviour, which requires tax professional to comply with the relevant laws and regulations and avoid any conduct that the tax professional knows or should know might discredit the profession. A tax professional must not tolerate and aid or encourage tax evasion which is illegal. The tax professional must advise client not to enter into any arrangement that the tax professional reasonably believes that could result in tax evasion. If the client elects to ignore the tax professional’s advice, tax professional must withdraw the letter of engagement with the client.

ADVERTISING BY TAX PROFESSIONALS

Advertising by tax professionals requires a special emphasis. Whilst it is legal to advertise, there are ethical issues that a tax professional must be mindful of when placing advertisements. Advertisers on behalf of tax professional, may use public communication platform to obtain clients. Examples of public communication platforms includes television, radios telephones, WhatsApp, News24 channel, billboards, telephone, books, and advertisements.

However, such public communications must not contain false, fraudulent, unduly influencing, coercive, or unfair statements or claims. Advertising must be done in a professional manner, examples of items that a practitioner may communicate to the public include:

   a) Name, address, and telephone number,
   b) Factual description of services offered,
   c) Credit cards accepted,
   d) Language preferences
   e) Membership to professional organizations,
   f) Only SAIPA members may use SAIPA designations
   g) Do not use the SARS logo

Briefly, all services by a tax professional must be rendered with objectivity and integrity, avoiding any conflict of interest - exercise due professional care in the performance of all professional services – must not follow blindly the needs of a taxpayer.

Tax professional must be aware of the following:

- Ethical behaviour is not limited to the mere implementation of code of conducts of professional bodies, such as SAIPA and SAICA, and

- Professional ethical behaviour is the result of the interaction of personal morality, social responsibility, business ethics, and other general ethical standards of the individual tax professional. The perceptions (worldview) of a tax professional influences the ethical standards upheld by the tax professional.

The ethical consideration of a tax professional does not compromise the taxpayers’ rights to arrange his/her tax affairs in an efficient in order to limit tax consequences. Tax efficient strategies may be undertaken within the legal paradigm thereby retaining its creditability. The Supreme Court of Appeal in CIR v Conhage (Pty) Ltd 1999 (4) SA 1149, 61 SATC 391 confirmed a taxpayer’s right to mitigate or even eliminate tax liability through legitimate tax-planning.
TAX - A VITAL COMPONENT OF A COMPANY’S SOCIAL LICENSE TO OPERATE

Business leaders need to manage a fine balance between profit and purpose. Acting responsibly and having sustainability and transparency as key business objectives are becoming one of the key performance indicators for business.

By Ine-Lize Terblanche, Director at inFidi and a tax transparency, stakeholder engagement & governance specialist
PURPOSE VERSUS PROFIT

Recently, Tim Mohin, Chief Executive of the Global Reporting Initiative made a strong statement towards business leaders, stating that they need to take off the blinders and realise that corporate (and investor) interests are served only when companies consider, and meet, the needs of all its stakeholders and not just its shareholders.1

This means that business leaders need to manage a fine balance between profit and purpose. Acting responsibly and having sustainability and transparency as key business objectives are becoming one of the key performance indicators for business.

Larry Fink, who heads up the investment firm BlackRock gave an interesting perspective on what “purpose” means for an organisation in today’s business environment. He wrote that “purpose is ... a company’s fundamental reason for being – what it does every day to create value for its stakeholders. It drives ethical behaviour and creates an essential check on actions that go against the best interests of stakeholders. Companies that fulfill their purpose and responsibilities to stakeholders reap rewards over the long-term. Companies that ignore them stumble and fail.”2

Each business will probably define its purpose in a different way. A common consideration however, should be how the organisation impacts on the world (and economies) around it, rather than only focusing on shorter-term impacts on the business itself. On 19 August 2019 the Business Roundtable3 issued an open letter titled “Statement on the Purpose of a Corporation”, with a key message that each stakeholder of a business is essential and there is a need to commit to deliver value to all of them, for the future success of companies, communities and the country.

TAX AND CORPORATE SOCIAL RESPONSIBILITY

Taxation is one of the most important enablers of domestic resource mobilisation and clearly part of the economic dimension, and how companies contribute to the creation of wealth in the countries in which it operates. An organisation’s contribution to the tax base through the taxes borne directly as a result of its business, taxes collected on behalf of the government and other non-tax payments and levies, provide essential public revenues for governments to meet economic and social objectives.

Other key contributions to the economy include, creating jobs and employment, investment in infrastructure, creating value through the supply chain and its corporate social responsibility initiatives. Some organisations have come to realise that its tax contribution is a key part of its corporate social responsibility efforts. These organisations recognise that its tax contribution to the Government is about far more than just raising revenue – it is inextricably linked with the process of nation-building.

Being socially responsible includes being a responsible and transparent taxpayer. In the words of the King IV Code on Corporate Governance4 - the governing body should oversee and monitor how the consequences of the organisation’s activities and outputs affects its status as a responsible corporate citizen, which includes having targets and measures agreed with management, related to a responsible and transparent tax strategy. Simply paying tax ‘that is due’ is not enough, if a business’ behaviour does not stack up to public expectations. Organisations need to take steps to demonstrate their commitment to adding value and build trust in societies where they operate.

PRINCIPLES THAT DEMONSTRATE CORPORATE RESPONSIBILITY

Newspapers are saturated with tax-related scandals and fraud allegations. While companies have been punished for tax practices deemed as immoral, others who have taken leadership on tax transparency and responsibility have garnered praise and legitimacy.

Globally there is a significant effort towards establishing frameworks or concrete guides on responsible and transparent tax behavior:

The Global Reporting Initiative (GRI) has published a Draft Tax Standard (expected to be released at the end of 2019) to help companies, report transparently and evenly on their tax strategy and payments. The draft Standard makes a pioneering stride in tax transparency by combining management approach disclosures on tax strategy, with country-by-country reporting of an organisation’s business activities and taxes paid. It is suggested that greater disclosure on tax and payments to Governments will allow for more informed public debate, creating an environment for better policy development and investment decisions. At the same time, improved transparency could promote trust and credibility in the taxation system while discouraging organisations from engaging in aggressive tax avoidance practices.5

Similarly, the B Team6 pursues an approach to encourage more dialogue between corporates and tax authorities, advocating adherence to a series of principles, that may serve to demonstrate their corporate responsibility and help to create a stable, secure and sustainable society. The B Team principles essentially encourage businesses to make boards accountable for tax policy; publish a tax strategy and be transparent about its implementation; be transparent about the entities owned within the corporate group around the world and why; and provide

3 An association of chief executive officers of America’s leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy.
5 The International Centre for Tax and Development (ICTD). (2019). Is responsible tax behaviour the next frontier of CSR? - [online] Available at: https://www.ictd.ac/blog/is-responsible-tax-behaviour-the-next-frontier-of-csr/
6 An independent international organisation that has pioneered sustainability reporting since 1997. Helping businesses and Governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being.
8 A not-for-profit initiative formed by a global group of business leaders to catalyse a better way of doing business, for the wellbeing of people and the planet.
“Co-operative compliance could be a powerful tool that is a cost-effective and efficient solution for the benefit of both business and tax administrations.”

Information on the company’s overall effective tax rate, and on the taxes paid where they do business. They see tax as a core part of corporate responsibility and governance that must be overseen by a company’s board of directors and they seek to develop cooperative relationships with tax authorities based on mutual respect, transparency and trust, and engage in dialogue with Governments, business groups and civil society to support the development of effective taxation.9

Transparency and purpose driven values always pays off. However, if these systems are in place only for the benefit of the organisation and not for all its stakeholders, it does not inspire trust.

It has been suggested that companies with high levels of purpose outperform the market by 5%–7% per year, on par with companies with best-in-class governance and innovative capabilities. They also grow faster and have higher profitability. However, the link between purpose and profitability is present only if senior management has been successful in diffusing that sense of purpose further down in the organisation, especially in middle management, and in providing strategic clarity throughout the organisation on how to achieve that purpose.10

TAX, SDGS AND ESGS

Now is an opportune time for organisations to drive the way they do business to support the United Nation’s Sustainable Development Goals (SDGs). Companies that align themselves with the SDGs and can communicate clearly how their business assists governments to achieve these goals are likely able to gain trust and differentiate themselves from competitors. To achieve this state, cooperation and collaboration between governments and organisations are needed.

Co-operative compliance could be a powerful tool that is a cost-effective and efficient solution for the benefit of both business and tax administrations. It could also help in enhancing certainty for business, which is an important driver for trade and investment.11

Examples of how an organisation paying its taxes due, aligns with the purpose of the SDGs include:

- Supporting key government-funded poverty-focused services such as education, health and infrastructure and social protection schemes;
- Avoiding using tax avoidance mechanisms including transfer pricing and the use of secrecy jurisdictions or so-called “tax havens”;
- Engaging in responsible tax practices from tax planning and public transparency to undertaking impact assessments of corporate tax policy and practice;
- Creating decent jobs, integrating environmental and social issues within core business operations, generating tax revenues through the value chain and providing innovative solutions to tackle development challenges;
- Progressively aligning economic activities with tax liabilities by justifying tax planning choices against the reality of operations and improving the international equity of tax payments;
- Assessing the impact of business decisions on tax liabilities, including the adverse impact of tax avoidance on government revenue and other stakeholder’s;
- Considering the dependence of the country’s economy on all taxes, paying the correct amount of tax timely and responsibly;
- Being transparent about tax practices through country-by-country reporting; and
- Being transparent about interactions with tax authorities and refraining from seeking unfair tax incentives.

Environmental, social, and governance (ESG) criteria is an increasingly popular way for investors to evaluate companies in which they might want to invest. It regards the concept that long-term value is created by companies that embed ESG issues into their strategy. Organisations can utilise sustainable tax principles, either as part of a broader entity-wide ESG programme, or as a stand-alone effort to establish a good working relationship with stakeholders.

Trust is crucial to productive relationships and the approach an organisation takes to engaging with stakeholders on tax has the potential to influence its reputation and position of trust. This includes how the organisation engages with tax authorities and other stakeholders on the development of tax systems, tax policy, legislation, and administration. Organisations can consider taking a proactive approach to stakeholder engagement, seeking to influence and shape the future of tax in ways that balance the taxpayer interest and the needs of the economy.

Truth, accountability and responsible actions lead to trust.

Mobile: +27 83 253 8090
E-mail: ine-lize.terblanche@infidi.co.za
LinkedIn: /ine-lize-terblanche
Twitter: @InelizeT

Accrual principle for income tax purposes: application of case between Milnerton Estate Limited and SARS

By Mahomed Kamdar, Tax Specialist, SAIPA

Taxable income is determined at the end of the year of assessment and it is necessary that gross income and deductions actually incurred during the year of assessment are included in the tax return. The onus is placed on the taxpayer to determine which transactions should be included for the year of assessment.
The accounting conventions which are governed by the accounting standards (such as IFRS) must not be confused with tax principles as prescribed in tax legislations. More particularly, the accounting concept of accrual must not be confused with the income tax principle of accrued to. These terms cannot be used interchangeably.

CASH BASE AND ACCRUAL BASE ACCOUNTING

A cash basis of accounting recognises revenues when cash is received, and expenses incurred when they are paid. This method does not recognise accounts receivable or accounts payable. Accrual accounting is a method of accounting where revenues and expenses are recorded when they occur (when the recognition criteria are satisfied), regardless of when the money is actually received or paid. Revenue for the sale of goods is generally recognised when the seller fulfils its obligation, namely the delivery of goods or the transfer of property.

ACCRUED TO – FROM AN INCOME TAX PERSPECTIVE

Gross income is recognised on the earlier of cash receipt by or accrued to the taxpayer.

From an income tax purposes, ‘accrued to’ implies that a taxpayer becomes entitled to a legal and enforceable right – an amount, that is, the taxpayer obtains a vested right to a future payment. The court further argued that an amount does not have to be due and payable (reflects the accrual principle) to a taxpayer for the amount to accrue to a taxpayer. The taxpayer acquires a right during the year of assessment to receive payment of an amount in the future. Since the right vested (unconditionally entitled to) in the taxpayer in the year of assessment, it accrues to the taxpayer in that tax year. This accrued to principle must be understood in the context of unconditional and conditional sale agreements.

SALES AGREEMENT: UNCONDITIONAL SALE AGREEMENTS VERSUS CONDITIONAL SALE AGREEMENTS

In the cited tax court case, the argument is focused on unconditional sale agreements versus conditional sale agreements. An understanding of the differences between these two types of agreements is crucial for the application of the tax legislation.

A conditional sale postpones the fulfilment of the obligation under a contract and renders it dependent on an uncertain future event. A clause which states that a sale will be confirmed only if a mortgage bond of a specified amount is obtained by a specified future date or which states that the sale is subject to the buyer being able to dispose of an existing residence by a future date are typical conditional sale.

However, in the case of an unconditional sale agreement, it is assumed that both parties have the capacity to honour the terms and conditions of the agreements on the date on which the agreement is concluded. Thus, the delivery of goods or transfer of property does not affect the ‘accrued to’ principle for tax purposes.

“From an income tax purposes, ‘accrued to’ implies that a taxpayer becomes entitled to a legal and enforceable right – an amount, that is, the taxpayer obtains a vested right to a future payment.”

ILLUSTRATIVE EXAMPLE

Facts: A sale is subject to a condition. The seller, as estate agent, sells a townhouse situated in an upmarket suburb to the purchaser on 28 February 2018, subject to the purchaser obtaining a bond of R5 million by 30 June 2018. On 15 June 2018, the purchaser obtained the bond, and on 15 August 2018 the property was transferred into the purchaser’s name.

Question: On what date did the sale occur?

Answer: The date of disposal is 15 June 2018 when the condition was fulfilled

FACTS OF THE MILNERTON ESTATE COURT CASE

The taxpayer, the Milnerton Estates Limited, is a property developer. In 2013 Milnerton Estates concluded twenty-five sale agreements of erven in the Parklands Residential Estate. The purchasers were required to pay a nominal deposit and the balance of the purchase price was payable against transfer.

In sixteen instances, the condition for the purchaser was to raise finance and furnish a bank guarantee for the sale to be concluded. The contracts contained a suspensive condition providing for the eventuality of the finance not being obtained. In all of them the suspensive condition was fulfilled before the end of the 2013 tax year. In the other nine sales the purchaser either deposited the purchase price in cash with the conveyancers or provided a guarantee from a financial institution for the payment of the price. The net result was that in all twenty-five cases the purchase price was fully secured before the end of the 2013 tax year.

In such situation, a question arose whether the purchase price is to be brought to account in the earlier year for income tax purposes, that is, 2013 tax year, rather than the later year when payment is received and when the property is transferred in deed’s office.

Essentially, the issue was whether the sale should be included in the 2013 year of assessment. The taxpayer argued that the sale is only concluded when the properties were transferred to the buyer and this has not occurred during the 2013 year of assessment.

1 Lategan case
2 The Milnerton Estates limited (appellant) and the commissioner for the South
3 The Milnerton Estate case number 1159/2017. South African Revenue service (respondent)
SARS held the view that by fulfilling of suspensive condition, the contracts were immediately concluded. Accrued to occurs when conditions are satisfied, that is, when the bank guarantee loans were awarded. Thus, the full value of the consideration must be recognised as gross income with effect from the date when the conditions were satisfied. Hence the court rules in favour of SARS applied the accrued to principle and rejected the view of the taxpayer, which was based on the date delivery of goods, an accounting convention.

The Eight Schedule of the ITA deems delivery to have occurred on conclusion of the agreement, any delay in the actual delivery will not delay an accrual of proceeds or the incurred of expenditure because fulfilment of the term is deemed to have occurred. This explanation provides the central thrust of the Court conclusion in the Milnerton Estate LTD tax case.

In another tax case law\(^4\) (not cited in the Milnerton Estates Ltd court case) the issue was whether the amounts received or accrued in respect of the disposal of 25 immovable properties had to be included in the taxpayer's gross income in the 2013 or 2014 years of assessment. The court stated that a right to payment in respect of immovable property under the Lategan principle vested in the taxpayer, and had a value in its hands, as soon as it was able to tender transfer to the purchasers under the agreements. The court refused to accept that the accrual took place only upon transfer when payment occurred.

In the Milnerton Estate tax case, the sale was conditional, that is, the requirement and an availability of a bank guaranteed loan. Once the loan, was confirmed, the conditions were fulfilled. The contracts were immediately concluded.

**VAT IMPLICATIONS IN THE CONTEXT OF ‘ACCRUED TO’ PRINCIPLE**

The general rule for the time of supply for VAT is the earlier of, the date of the invoice, or the date the payment is received by the supplier. The accrued to principle does not apply to VAT.

However, it is understood, that an invoice is a notice of an obligation to pay, and therefore, includes a contract (an-agreed-upon-contract). Hence, once a contract is finalised, that is, the conditions to a contract are fulfilled, VAT will be triggered on the full amount of the contract price.

**CONCLUSION**

There are quite a few tax case laws which demonstrate that when conditions in a contracts are honoured, the contracts are (immediately) concluded and the subsequent sale is accrued to for income tax purposes and must be included in the gross income of the taxpayer in the tax-year when the conditions are fulfilled.

However, the seller of erven could claim a debtors’ allowances which relates to the amounts that are deemed to have accrued under qualifying agreements but have not been received at the close of the taxpayers’ financial year-end. The Milnerton Estates Ltd court case was concluded in November 2018 in the Supreme Court of Appeal but refers to the 2013 taxpayer’s year-end. However, the rules for debt allowances have changed with effect from 1 January 2019. The change in rules for debtors’ allowance are in line with the new IFRS 9.

\(^4\) ITC 1900 (2017) 79 SATC 341 (C)
FOREIGN DIVIDENDS
- INCOME FROM INVESTMENT IN FOREIGN COMPANIES

By Mahomed Kamdar, Tax Specialist, SAIPA

WHAT IS A FOREIGN COMPANY?
A foreign company is any company which is not a resident of South Africa. A foreign company will only be liable for normal tax in South Africa if it receives income from a South African source. A foreign company must not be confused with a South African branch of a foreign company. A South African branch of a foreign company will be subject to 28% normal tax on its RSA sourced income.

WHAT IS A FOREIGN DIVIDEND?
An investment in a foreign company usually results in the South African resident (company or individual) receiving a foreign dividend. A foreign dividend is defined by the Income Tax Act as an amount paid by a foreign company in respect of a share in that foreign company. In addition, the amount paid or payable must be treated as a dividend in terms of the foreign country’s legislation.

Specifically excluded as a foreign dividend are any amounts that constitute the redemption of a participatory interest in a foreign portfolio of collective investment schemes (widely known as unit trust) or amounts that are deductible by the foreign company in the determination of its own tax liability in the country in which it has its place of effective management.

A South African resident (company or individual) is taxed on worldwide receipts and accrual which is included in gross income. Accordingly, dividend and foreign dividend is included in gross income and is subsequently exempt from normal tax.

EXCLUSION FROM FOREIGN DIVIDENDS
Section 10B(2) of the Income Tax Act is crucial because it specifically states that a foreign dividend is exempt from dividend tax under the following circumstances:
- If the shareholder holds, at least 10% of the total equity shares and voting rights and the shares are held as equity shares;
- If the dividend is received by a shareholder from a foreign company, and the foreign dividend is paid or declared by another foreign company that is a resident in the same country as the company in which the shares are held.
- The dividend paid is out of profits from a controlled foreign company[^1];

[^1]: A controlled foreign company is a foreign company where more than 50 per cent of the total participation rights in that foreign company are, directly or indirectly held, or more than 50 per cent of the voting rights in that foreign company are, directly or indirectly exercisable, by one or more persons that are RSA residents other than persons that are headquarter companies.
Foreign dividends paid by dual listed companies; and
- Assets distributed by the foreign company are in specie.

Taxpayers would recall that for the 2012 year of assessment the first R3 700 of foreign dividends and foreign interest received by or accrued to a natural person was exempt from normal tax under section 10(1)(i)(xv) (2011: R3 700; 2010: R3 500). The exempt amount was first applied against foreign dividends and then against foreign interest.

Section 10(1)(i)(xv) was, however, deleted with effect from the 2013 year of assessment and a new method of exempting a portion of foreign dividends was introduced under section 10B(3). The exempt portion of the dividend is determined by multiplying the foreign dividend that is not otherwise exempt under section 10B(2) by the following proportions:
- 25/45\(^2\) for natural persons, deceased estates, insolvent estates and trusts;
- 8/28 for companies, and long-term insurers in respect of their company policyholder funds, corporate funds and risk policy funds;
- 10/30 for long-term insurers in respect of their individual policyholder funds.

As a result of the above formula, all types of shareholders receiving foreign dividends will be subject to a maximum rate of tax of 20% thus giving a result similar to that produced by shareholders receiving dividends from a domestic source.

The following example clarifies the exemption from normal tax in relation to foreign dividends:

**ILLUSTRATIVE EXAMPLE 1 – FOREIGN DIVIDENDS**

Sechaba (Pty) Ltd, a South African resident company, received the following dividends from non-resident companies. The tax year-end is December 2018.

**TRANSACTIONS**

A dividend of R300 000 from Tineke (Pty) Ltd (Tineke), a company based in London. Sechaba holds 7% of the shares and voting rights in Tineke.

A dividend of R400 000 received from Iceland (Pty) Ltd (Iceland). Sechaba holds 13% of the shares and voting rights in Iceland. The dividend received from Iceland was allowed as a deduction when calculating Iceland’s taxable income. It is given that Iceland (Pty) is not a controlled foreign company.

A dividend of R500 000 from Helie (Pty) Ltd, a company based in the USA. Sechaba holds 8% of the shares and voting rights in Helie (Pty) and Makhaya (Pty) Ltd, which forms part of the same group of companies as Sechaba, holds 7% of the shares and voting rights in Helie. Helie is not a controlled foreign company.

**TAX CONSEQUENCES**

<table>
<thead>
<tr>
<th>Transactions</th>
<th>Gross income</th>
<th>Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>The dividend received from Tineke is a foreign dividend because it is received from a foreign company. It is included in gross income.</td>
<td>R300,000</td>
<td>R Nil</td>
</tr>
<tr>
<td>The dividend received from Iceland is a foreign dividend because it is declared by a non-resident company and it is included in gross income in terms of paragraph (k) of the definition of gross income.</td>
<td>R400,000</td>
<td>R Nil</td>
</tr>
<tr>
<td>The dividend received from Helie is a foreign dividend and will be included in the gross income of Sechaba</td>
<td>R500,000</td>
<td>(R500,000)</td>
</tr>
</tbody>
</table>

**RATIO EXEMPTION**

Foreign dividend not exempt:

- Foreign dividend received from Tineke: R300 000
- Foreign dividend received from Iceland: R400 000
- Total: R700 000

\[ \text{Ratio exemption} = \frac{R700 000 \times 8/28}{25/45} = \frac{R200 000}{25/45} = R500 000 \]

\[ \text{Taxable Income} = R1 200 000 - (R500 000 + R200 000) = R500 000 \]

\[ ^2 \text{With effect from 1 March 2017 – (Previously the ratio for a natural person, deceased estate, insolvent estate and trust was 26/41, 13/28 for companies and 15/30 for long-term insurers.} \]
TAKING MONEY OUT OF SOUTH AFRICA – THE RESERVE BANK’S PROCESS

By Mahomed Kamdar, Tax Specialist, SAIPA

The purpose of this brief is to discuss Reserve Bank requirements when cash and foreign exchange are transferred from RSA. This entails a discussion on the Reserve Bank’s currency and exchange regulation when funds are taken out of RSA.
This brief does not discuss tax implications and does not refer to financial emigration. This brief discusses foreign exchange guidelines for both:

i) Individuals, and,
ii) Business Entities.

All foreign exchange transactions must be directed to an Authorised Dealer (AD) - approved by the Reserve Bank (SARB). The SARB has approved 25 banks in RSA to act as Authorised Dealer (AD).

### I) RSA RESIDENTS – INDIVIDUALS

#### Single discretionary allowance
A single discretionary allowance is available to all RSA residents and is limited to a R1 million per person per calendar year provided that the RSA residents are:

- 18 years and older, and
- in possession of a valid South African identity document or smart identity document card.

The single discretionary allowance may be used for any legitimate purpose (including for investment purposes abroad as well as the sending of gift parcels instead of cash excluding gold and jewellery) at the discretion of the individual without any documentary evidence having to be produced to the Authorised Dealer.

#### Travel allowance
Individuals may also use the single discretionary allowance for international travel purposes – outside the CMA (consists of Lesotho, Namibia, South Africa, and Swaziland) – foreign currency obtained from an Authorised Dealer:

(a) Individuals, who are under the age of 18 years may not use the single discretionary allowance but may obtain a travel allowance not exceeding an amount of R200 000 per calendar year;

(b) Individuals may not obtain their travel allowance more than 60 days before their departure and must present a valid passenger ticket when traveling by air, bus, rail or ship;

(c) foreign currency may be obtained either in foreign currency notes or as a traveler’s cheques.

The travel allowance may be transferred abroad to the traveler’s bank account and/or spouse accounts, but not to the account of a third party.

Minors traveling with parents may have their travel allowances transferred to their parents’ bank account abroad;

The foreign currency amount is for each individual and any unused foreign currency
- Must be resold within 30 days to an Authorised Dealer upon return to RSA, or

“...may be used for any legitimate purpose at the discretion of the individual without any documentary evidence having to be produced to the Authorised Dealer.”

- If the traveller undertakes business trips abroad on recurring basis, where the next business trip is to commence within 90 days after returning from a previous business trip, any unutilised foreign currency may be retained by the traveler for use during subsequent business trips.

Please note that Rand notes up to R25 000, per person, may be taken in addition to the travel allowance when proceeding on visits outside the CMA to meet the travelers’ immediate needs on return to RSA.

#### Study Allowances
Individuals proceeding abroad for study purposes may utilise the R1 million single discretionary allowance. Spouses accompanying students also qualify for the single discretionary allowance.

Students may also export any household and personal effects, including jewellery (but excluding motor vehicles), up to a value of R200 000 per student under cover of the prescribed SARS Customs Declaration. In addition to the foregoing, Authorised Dealers may transfer directly to the institution concerned the relative tuition and academic fees for the academic year, against documentary evidence confirming the amount involved. Students under the age of 18 years also qualify for a study allowance to pay for costs associated with their studies abroad as well as a travel allowance of R200 000 per calendar year. Individual residents keen on utilising this facility must produce to an Authorised Dealer documentary evidence.

#### Residents temporarily abroad
A resident proceeding abroad temporarily, may on departure and annually thereafter, through an Authorised Dealer utilise the R1 million single discretionary allowance and the R10 million foreign capital allowance (refer to section on foreign capital allowance) without returning to South Africa.

The green barcoded identity document or Smart identity document card must be presented to an Authorised Dealer before the resident traveling temporarily abroad. In addition, with regard to the R10 million foreign capital allowance, a duly electronically completed Tax Clearance Certificate – Foreign Investment Allowance issued by SARS bearing the SARS logo and specific background watermark obtained via the SARS Tax Compliance
“Residents temporarily abroad may further receive pension and retirement annuity income, but no other foreign currency may be obtained without the specific approval of the Financial Surveillance Department.”

Status System must be presented to an Authorised Dealer every 12 months where a resident temporarily abroad and intends to access this facility.

Residents temporarily abroad may further receive pension and retirement annuity income, but no other foreign currency may be obtained without the specific approval of the Financial Surveillance Department.

However, it is necessary to be mindful of the tax consequences – the individual is still a South African tax resident and will still be taxed on pensions and retirement annuity income – as per RSA tax legislation.

Any household and personal effects, motor vehicles, caravans, trailers, motorcycles, stamps, and coins (excluding coins that are legal tender in South Africa) per family unit or single person, where the insurance value does not exceed R1 million may be exported against the prescribed SARS Customs Declaration.

The annual limit of the R1 million single discretionary allowance and the R10 million foreign capital allowance dispensations may not be exceeded without prior Financial Surveillance Department approval.

Residents temporarily abroad may use their local debit and/or credit cards whilst temporarily abroad within the overall single discretionary allowance limit of R1 million per applicant during a calendar year.

Foreign capital allowance
A foreign capital allowance may be available through an Authorised Dealer, which may be transferred to a foreign currency account or invested abroad, within a limit of R10 million per calendar year per individual who is in possession of a Tax Clearance Certificate and green bar-coded South African identity document or Smart identity document card and is 18 years and older.

It is noted that Individuals can participate:
- in offshore share incentive or share option schemes, or
- take up new shares in foreign companies that have accrued by way of rights on existing holdings of shares

Provided that such participation is financed under the R10 million foreign capital allowance and/or the R1 million single discretionary allowance.

Individuals can invest without restriction in locally managed investment products that have foreign exposures, such as collective investment schemes and long-term insurance policies.

Resident importers
Resident importers making import payments must have a valid customs client number (CCN) issued by Customs.

The registration code number 70707070 may be used only in cases where the value of goods imported is less than R50 000 per consignment, subject to the limitation of three such consignments per calendar year. Should such consignment not be received within the four months, the importer must within 14 days of the expiry of such period advise the Authorised Dealer through whom foreign currency was purchased. Documentary evidence\(^2\) is required when payments are made.

Krugerrand coins
In addition to the single discretionary allowance, residents may export Krugerrand coins or the equivalent in fractional Krugerrand coins up to an amount of R30 000 as gifts to non-residents, subject to the completion of the prescribed SARS Customs Declaration.

Emigrants
Family units emigrating to any country outside the CMA will qualify, at the time of emigration and after all their assets have been brought under the administration of an Authorised Dealer, to be accorded the following facilities:

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

(b) In addition, a travel allowance applicable to each member of the family unit on the basis and subject to the prescribed limits; and

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

Single persons may be accorded a foreign capital allowance of up to R10 million per calendar year after all liabilities including the cost of the relative passenger ticket and the applicable travel allowance, have been provided for.

However, a RSA resident before taking up permanent residence in any country outside the CMA must have a duly completed Form MP336(b) signed by the applicant, together with a duly electronically completed ‘Tax Clearance Certificate – Emigration’ obtained via the SARS TCS.

Such payments will not be deducted from an individual’s single discretionary allowance limit of R1 million per calendar year.

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II) RSA RESIDENTS – BUSINESS ENTITIES

General rules
South African registered private, public and listed companies but not sole proprietorships, partnerships, close corporations and trusts – and mandated state-owned enterprises as defined in Schedule 2 of the Public Finance Management Act, 1999 (Act No.1 of 1999), are allowed to transfer capital for foreign direct investment purposes to any country outside the CMA (Common Monetary Area, which consists of Lesotho, Namibia, South Africa and Swaziland).

Requests for investments not exceeding R1 billion per entity per calendar year must be submitted to an Authorised Dealer who will assess the application for compliance with the stated conditions for approved outward investments.

Requests for investments exceeding R1 billion per entity per calendar year must be referred to the Financial Surveillance Department via an Authorised Dealer.

To qualify for the dispensation, business entities must acquire at least 10 percent of the foreign target entity’s voting rights. Once approved, business entities may increase their approved equity interest and/or voting rights in the offshore target entity at any time, however, for classification purposes, should the applicants reduce or dilute their voting rights to below 10 percent such information must be reported to from the Financial Surveillance Department.

Loop structure
The foreign investment must not result in a loop structure is one whereby a South African resident will form an offshore company that will, in turn, reinvest into South Africa by acquiring shares or some other interest in a South African company or asset.

An example would be where South African residents hold all the shares in a company in Mauritius, which owns or acquires South African assets or shares in a South African company.

SARB will only approve a loop structure is when the South African resident shareholders will be allowed to continue to hold their shares in the Mauritian company if that entity applies for a listing (primary or secondary) on the JSE and the South African resident shareholders continue to hold their shares on the South African share register. For this reason, an inward listing of a non-resident company re-domicile without the specific prior approval of the Financial Surveillance Department.

- The financial statements, financial accounts or income and expenditure statements of the foreign target entities and holding companies, as well as salient details of benefits generated as a result of the investment, must be reported via an Authorised Dealer to the Financial Surveillance Department on an annual basis.

- In the event of the foreign investment being disposed of to non-residents, the net sale proceeds must be repatriated to South Africa under advice to the Financial Surveillance Department. Foreign investments to be disposed of to third party South African residents require the specific prior approval of the Financial Surveillance Department.

- South Africa must remain the place of effective management for the RSA company and under no circumstances may the company re-dominate without the specific prior approval of the Financial Surveillance Department.

- Dividends declared by the offshore subsidiaries of South African companies may be retained abroad. If the foreign dividends are repatriated to South Africa, they may be retransferred offshore at any time and used for any purpose without recourse to South Africa, subject to an annual report to the Financial Surveillance Department. However, profits earned by foreign branches and offices must be repatriated to South Africa annually.

Refer to the Reserve’s bank publication for additional rules.

FREQUENTLY ASKED QUESTIONS
The question is: what happens if the individual who emigrates from RSA has assets more than R10m in RSA?

(i) An emigrant’s capital account will be created to accommodate the ‘excess’ assets of the emigrant (taxpayer). It is an account to which exchange control restrictions would be applied. Once the individual emigration status has been recorded, all capital transfer must flow offshore via this account.

The remaining South African assets of the emigrant will be brought under the physical control of the commercial bank that finalised the emigration to ensure that all capital accruing after the date of emigration and the proceeds of any asset subsequently sold are placed to the credit of an emigrant’s capital account.

(ii) Such funds may be utilised locally for any purpose.

(iii) The South African Reserve Bank will, on the application, consider requests to transfer the emigrants’ remaining liquid assets or the export of quoted/unquoted securities in place of cash, exceeding the foreign capital allowance limits.

References:

THE EFFECT OF MARITAL REGIMES ON DECEASED ESTATES

By Ferdie Schneider, Head of Tax, BDO SA

South African law generally respects people’s ability to bequeath their belongings in a Will as they deem fit, but marital and other relationship regimes could limit a testator’s ability to make bequests. A number of tax implications come into play. Estate duty is levied at 20 percent of a deceased estate up to R30 million and 25% thereafter.

Assets bequeathed by the first dying to the surviving spouse is exempt from estate duty. The first R3.5 million of the net estate (after liabilities) is also exempt from estate duty. If the R3.5 million exemption is not used in full in the first-dying estate, the estate of the second-dying spouse may apply the unused portion. This could result in the estate of the second-dying spouse qualifying for an estate duty exemption of up to R7 million. Death also triggers a disposal for Capital Gains Tax (CGT) purposes, but rollover relief applies to assets transferred to the surviving spouse. The surviving spouse is deemed to have obtained the asset at the same time, cost, and currency, and for use in the same manner as the original owner. The Transfer Duty Act exempts a property transfer as a result of death. Donations between spouses are also exempt from donations tax and estate duty.

The legal implications of the marital property regime when drafting a Will and entering into a marriage is of importance, as it may impact the treatment of the assets. The most important forms of marriage include in community of property, out of community of property (without accrual), and out of community of property (with accrual). For Estate Duty purposes, a spouse is someone who was, at the time of death of the deceased, a partner of the person in a marriage or customary union recognised in South African law, in a union recognised as a marriage in accordance with the tenets of a religion, or in a same-gender or heterosexual union that the Commissioner for the South African Revenue Service (SARS) is satisfied is intended to be permanent.

Marriages in community of property, generally don’t have prior contractual arrangement exists, apart from the marriage. The spouses don’t have two distinct estates, but each have a 50%
share in all the assets (acquired before or during the marriage) in the joint estate. Spousal debts incurred in one spouse’s name bind the other and create a joint liability. A spouse cannot bequeath assets of the other without permission, and the surviving spouse has the right to reject (repudiate) the Will after death of the surviving spouse. Donation or inheritances that’s conditional that it should not form part of the joint estate, may also be excluded from the joint estate. On death of a spouse, the surviving spouse will have a claim of 50% against the value of the joint estate, which reduces the deceased estate value by 50%. The deceased estate is divided after all debts are settled (excluding burial costs and estate duty, as these form part of the obligations of the deceased).

Marriages out of community of property without accrual requires an ante-nuptial contract (ANC) drawn up before the marriage which stipulates the values of each spouse’s estate when getting married. In terms of the ANC, property owned by spouses before marriage remain the property of that spouse. Spouses control their own estates, although spouses must contribute to household expenses according to their means. Estates relating to marriages out of community of property without accrual is the easiest to administer, as there is no accrual. Estates relating to marriages out of community of property without accrual, or partners in religious unions or domestic partnerships, are dealt with separately and have no debts owed from one to another, unless in case of a maintenance obligation, claimed under the Maintenance of Surviving Spouses Act.

Marriages out of community of property are subject to accrual unless expressly excluded by the ANC. Accrual regulates the growth of each spouse’s estate from date of marriage. If the first dying spouse has a smaller accrual, a claim will be against the surviving spouse, unless the spouse inherits more than the amount of the claim. If the entire estate is bequeathed to someone else, administration is complicated if the surviving spouse cannot settle the claim. Marriages out of community of property with accrual, excludes inheritances or donations received during the marriage from accrual. Donations from one spouse to the other are excluded from the calculation of each spouse’s accrual, and are not included in the recipient’s growth, whilst the donor’s accrual is reduced by the donation. Spouses married out of community of property can create a joint Will, bequeathing their estates separately to their beneficiaries. The surviving spouse may have an accrual claim against the estate, which will be a liability against the estate that must be deducted before the distributing the estate to the beneficiaries.

Religious marriages do not legally recognise the partners as spouses (except under tax law), no community of property exists, and each party has the right to bequeath assets independently. South African courts have extended the claim under the Maintenance of Surviving Spouses Act to parties in religious marriages.

A person nominated to receive an inheritance, whether testate or intestate, may adiate (accept) or repudiate (renounce) the inheritance. Adiation can be express or implied through the acceptance of the benefit. Repudiation must be express and the Master will request proof. SARS ruled (13th of August 2013) that repudiation does not give rise to donations tax consequences and does not trigger donations tax or a disposal for CGT purposes. The estate duty will generally remain the same unless the repudiation benefited the surviving spouse, with a resultant reduced estate duty.

Massing occurs when two or more persons combine their estates (or their undivided half shares of the joint estate if married in community of property) into a joint estate, and the Will prescribes how the massed estate must be dealt with on the occurrence of a specific event, usually the death of the first dying testator. A beneficiary may adiate or repudiate a benefit. Adiation is the acceptance of a benefit from a deceased estate in terms of testate or intestate succession. Repudiation is the rejection of a benefit to inherit from a deceased estate either under testate or intestate succession. Adiation normally does not require further formalities, although repudiation must be in writing. Obligations attached to adiation will require written execution. Two forms of massing exist, namely “statutory massing” and “common law massing”. In terms of statutory massing, the Master may, if one of two spouses, whether married in or out of community of property, dies, and the Will of the deceased did not provide to the contrary, and the major heirs and any claimants against the estate consent, and it appears that no person interested would be prejudiced, authorize the executor (subject to security given for payment of minors’ shares and conditions as the Master may determine, to make over some or all property of the deceased, or the whole or a part of that portion of his property in respect of which he has made no testamentary provision to the contrary, to the surviving spouse at a value made by an appraiser or another person approved by the Master, and to frame his distribution account on the basis of that value. Common law massing greatly resembles statutory massing. Two or more persons may join estates and dispose of the joint estate without granting the survivor a limited interest in the massed assets. The survivor may be awarded something else or nothing. Such construction will not qualify as “statutory massing” as the survivor obtains full ownership of an asset and not a limited interest. This is often termed “common law massing”, and the surviving testator would have to elect whether to adiate or repudiate. Common law massing could also have the effect that the survivor receives nothing from the massed estate.

The marital regime can have unintended consequences for the surviving spouse and requires careful consideration when drawing up a will, entering into a specific regime, or massing estates.
FOREIGN EMPLOYMENT INCOME EXEMPTION – THE NEW RULES

By Mahomed Kamdar, Tax Specialist, SAIPA

Many RSA citizens seek employment abroad, especially in countries that do not invoke personal income tax on their foreign employees (expats). With the global mobility of labour, there is a major concern about the loss of tax revenue as a result of RSA residents working in these countries.

Prior to the promulgation of the new amendment, (before 1 March 2020), the total remuneration for services rendered outside South Africa is fully exempt if all the requirements (see below) regarding the exemption are met.

The new rules that provides for an exemption for foreign employment income received for services rendered outside South Africa, comes into effect 1 March 2020 and will be recorded in the ITR12 (income tax returns for individual) in February 2021.

Effective from 1 March 2020, if all the requirements (see below) are met, the exemption is limited to R1 million. Any remuneration received in excess of R1 million will be subject to normal tax in South Africa.

The foreign employment exemption does not apply to RSA citizens that have been granted secondment and their remuneration is paid by the local RSA company.

REQUIREMENTS TO QUALIFY FOR THE FOREIGN EMPLOYMENT EXEMPTION

In order to qualify for the exemption, a taxpayer must:

- Be a tax resident of South Africa. The exemption only applies to a tax resident of South Africa who is an employee and renders employment services outside South Africa and is subject to tax on his or her worldwide income.
- Earn certain types of remuneration, such as, salary, taxable benefits, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, allowance (including travel allowances, advances and reimbursements), amounts derived from broad-based employee share plans, amounts received in respect of a share vesting¹.
- In respect of services rendered by way of employment outside South Africa;
- During specified qualifying periods, that is an employee who is a tax resident in South Africa must be outside South Africa for a
period or periods exceeding 183 full days (in aggregate) during any 12-month period, and a continuous period exceeding 60 full days during that 12-month period.

- And, lastly, not be subject to an exclusion: The following individuals are excluded from the exemption:
  
i) A public office holder appointed or deemed to be appointed under an Act of Parliament,

  ii) Employees who are employed in the national, provincial or local sphere of government, certain constitutional institutions, national and provincial public entities and municipal entities.

  iii) Independent contractors and individuals who are self-employed also do not qualify for the exemption as such persons are not in an employee/employer contractual relationship.

It must be mentioned in unqualified terms that none of the requirements that applied before 1 March 2020 have changed going forward. The only change, that is effective from 1 March 2020 is that the exemption is now limited to a maximum of R1 million resulting in the excess amount being taxed. The full amount of the individual taxpayer’s remuneration is no longer exempt if it exceeds R1 million.

THE ISSUES ARISING FROM THE NEW DISPENSATION

Three issues arise from the new rules coming into effect from 1 March 2020, these are:

1) Taxable fringe benefits

2) Travel allowance, and

3) Application of the tax table.

1) Taxable fringe benefits: A major concern amongst taxpayers is the treatment of taxable fringe benefits whilst rendering services outside RSA. It is noted that the Seventh Schedule taxable benefits are applicable and the cash equivalent of the value of the taxable benefit is calculated as per the Seventh Schedule. If paid in a foreign currency, the amount should be converted using the average exchange rate.

2) Travel allowance: The second major concern amongst taxpayers is the receipt of travel allowance that falls within the R1 million exemption. The question is whether an individual taxpayer’s taxable income be reduced in respect of his/her business kilometres travelled?

If the travel allowance is incurred where the foreign employment income exceeds the R1 million exemption, the allowance must be apportioned between the exempt amount and the excess amount.

For example, an employee receives total remuneration of R1,5 million which includes a travel allowance of R300 000. The exempt portion of the travel allowance is calculated as follows:

\[
\text{Travel allowance/Total remuneration} \times R1\,000\,000 \\
\text{R300 000/R1 500 000} \times R1\,000\,000 \\
= R200 000 \text{ of the travel allowance will be exempt from normal tax on assessment.}
\]

Thus, R100 000 will be included in taxable income.

3) Application of the tax table: The contentious issue is which tax rate should be used when taking the income exemption into consideration. It is noted that the income exemption is first deducted again taxable income and then followed by the appropriate application of the tax rate. This can only be explained by an illustrative example. The income in excess of R1 million will be taxed at the normal tax rate up to 45%, whichever is applicable to the excess portion of the income. In both scenarios below:

The individual taxpayer is below 65 years of age and earns foreign employment income -

The calculation of the tax liability is based on the tax rates applicable for the 2020 year of assessment

<table>
<thead>
<tr>
<th>FOREIGN EMPLOYMENT EARNED</th>
<th>R3 000 000</th>
</tr>
</thead>
<tbody>
<tr>
<td>R1500 000</td>
<td>R3 000 000</td>
</tr>
<tr>
<td>R500 000 is subject to normal tax and calculated as follows:</td>
<td>R2 000 000 is subject to normal tax and calculated as follows:</td>
</tr>
<tr>
<td>R100 263 + ([R500 000 - R423 300] × 36%)</td>
<td>R532 041 + (R2 000 000 – R1 500 000) * 45%</td>
</tr>
<tr>
<td>R100 263 + 36% × R76 700</td>
<td>R532 041 + 45% × R500 000</td>
</tr>
<tr>
<td>R100 263 + R27 612</td>
<td>R532 041 + R225 000</td>
</tr>
<tr>
<td>R127 875</td>
<td>R757 041</td>
</tr>
<tr>
<td>less the primary rebate of R14 220</td>
<td>less the primary rebate of R14 220</td>
</tr>
<tr>
<td>= R113 655</td>
<td>= R742 821</td>
</tr>
</tbody>
</table>

CONCLUSION

It must be reinforced that the taxable income used to calculate the tax liability is based on the amount after the income exemptions has been applied. The exemption can only be used to set-off the foreign income and therefore, cannot create a loss. The exemption is limited to the actual foreign income earned.

1 Remuneration as defined in the Fourth Schedule of the ITA.
SAIPA’S RESPONSE TO THE 2019 BUDGET TAX PROPOSAL: NAMIBIA

Submitted by SAIPA on 13 May 2019

TAX PROPOSAL: TAXING ALL INCOME EARNED FROM FOREIGN SOURCES (I.E. A RESIDENCE-BASED TAX SYSTEM AS OPPOSED TO SOURCE-BASED)
EXISTING LEGISLATION
Currently, gross income is made up of all amounts received by or accrued to a person from a source within Namibia but excluding amounts of a capital nature. In other words, the tax liability in Namibia is based on the source of the income concerned and not on the residence of the taxpayer. The implication of source-based tax liability is as follows:
- Non-residents employed in Namibia will be liable to tax on employment income in Namibia, whilst
- Namibians will not be taxed (exempt from tax) on foreign-sourced income.

DEFINITION OF NAMIBIA
A sourced-based tax system requires a territory to be carefully defined. Hence it is necessary to bear in mind what is meant by the territory of Namibia since a source of a transaction is critical for the determination of tax liability. Originally, the territory of Namibia was limited to 12 nautical miles. However, currently, the Namibian border is extended to 200 nautical mile and includes the Namibian exclusive economic zone. This implies that transactions occurring within 200 nautical miles will be subject to income tax on a source basis.

NEW PROPOSALS: NIPA’S RESPONSE
With the tabling of the new proposal on Budget Day, it was proposed that Namibians will also be taxed on income earned from both domestic and foreign sources; this is the hallmark of a residence-based tax system. The implication of this is that Namibians will be taxed on their worldwide income, irrespective of where their income was earned. The taxing of worldwide income must be accompanied with certain exclusions in the tax legislation to avoid double taxation of the same foreign income.

It is not clear whether the Namibian existing tax legislation adequately address these exclusions. Hence a well-structured foreign tax rebate system has to be in place to avoid double-taxation of a cross-border transaction. An international transaction cannot be taxed twice by two countries on the same transaction.

It is necessary to understand why countries have moved towards residence-based taxation. Some of the reasons are as follows;
- It is often difficulty to determine a source of a transaction. Parties to a transaction may physically resides in different countries but the contact is concluded at a venue foreign to all parties.
- Internationally more countries have moved towards residence-based system of taxation. If Namibia remains on the source-based system of taxation, then it will be disadvantaged by willingly narrowing its tax base.

Hence Namibia is compelled to embrace the residence-based system of taxation in order to mitigate tax avoidance.

However, this briefing will demonstrate that the Namibian Inland Revenue Authority must simultaneously undertake other measures to ensure that a taxpayer is never taxed twice for the same cross-border transaction.

“Originally, the territory of Namibia was limited to 12 nautical miles. However, currently, the Namibian border is extended to 200 nautical mile and includes the Namibian exclusive economic zone.”

The legislative proposal to change from a sourced-based to a residence-based has the following consequences:
- Potential double taxation on foreign income, and
- A review of the classification of ‘resident’.

NIPA PROPOSAL 1: REVIEW OF THE MEANING OF RESIDENT AND ORDINARILY RESIDENT
In an increasingly global society where individuals travel more freely across borders and can hold assets in different countries, it becomes important for individuals with ties to Namibia to have certainty whether they are Namibian tax resident or not. If they are, their worldwide income may potentially be taxed in Namibia.

This new proposal critically hinges on the definition of residency for tax purposes. The definition of a resident with reference to individuals, is based on two issues:
- Ordinarily residence of a person in Namibia, or
- Physical presence of an individual in Namibia for a requisite period.

Moreover, the test of whether a taxpayer is ordinarily resident is a daunting task and is often a matter for the courts to intervene.

In both the RSA and the Namibians classification of ordinarily resident depends on two prehistoric court cases, that is, Cohen v CIR and CIR vs Kuttel court cases. The current test for residency requires an investigation of an individual circumstances and personal behaviour as a whole. These tests must be applied on a yearly basis and taking into account the factors that apply for a particular year and also considering factors that extend to future years. Hence the results could be a different conclusion on the classification of residence from year to year.

More importantly, labour has become intensely mobile across international borders; employees work in many countries that are vastly remote from their original country of residence. Individual employees are continuously on the move and earn employment income from many jurisdictions. The movement of labour is an international phenomenon and hence the question is; when does ordinarily residency end? Should the classification of residency be measured on a new set of criteria taking into account the relatively new globalisation of labour and its never-ending mobility? Examples, in this regard, are discussed later in this brief.
“NIPA’s proposal is that the existing definition of ordinarily resident should be interrogated to take into account the new realities and the Namibian tax legislation should re-define the term residency’ for tax purposes.”

NIPA’s proposal is that the existing definition of ordinarily resident should be interrogated to take into account the new realities and the Namibian tax legislation should re-define the term residency’ for tax purposes. It is given that ordinarily resident of a country is not the same as being domiciled in a country. Physical presence is not a pre-requisite for being ordinarily resident in Namibia (and in RSA as well).

Whilst the DTA¹ between Namibia and RSA, for example provides some measure of certainty as to what constitute a resident, the tie breaker rules deems a person to be a resident of a country in which such person has a permanent home, if a permanent home is available in both countries, then a person is a resident country in which the ‘centre of vital interest’ exist.

If the State in which a person’s centre of vital interests cannot be determined, or if the person does not have a permanent home available to him or her in either State, he or she shall be deemed to be a resident of the State in which he or she has an habitual abode.

If he or she has an habitual abode (refers to a period of time a taxpayer stays in a country) in both States or in neither of them, he or she shall be deemed to be a resident of the State of which he or she is a national.

If he or she is a national of both States or of neither of them, the competent authorities in Namibia and RSA shall settle the question by mutual agreement.

Although the rules in the DTA provides some certainty as whether a person is a resident of a country, these rules cannot adequately replace the inadequacy in Namibian’s national tax legislation. In addition, Namibia has DTA agreements with a few countries² only. The tax residency of an individual is still unclear. If an individual is born raised in Namibia but leaves Namibia for a certain period. The period of absence from Namibia could be for a decade or much longer or much shorter. It is under these circumstances that the question on the termination of ‘ordinarily residence’ are raised.

It is the high mobility of labour and long absences from country birth that questions the appropriateness and usefulness of the concept of ‘ordinarily residence’. Are there any other useful measures of residency for tax purposes? There are about four³ countries that have methods of measuring resident that is a substantial departure from the concept of ordinarily resident.

In Australia, ordinary residence is based on being domiciled unless a permanent place of abode exists outside of Australia. In New Zealand, ordinary residence ends when an individual has spent more than 183 days out of New Zealand and has an enduring relationship (such as accommodation, social ties, personal property and welfare benefit) with another country. In Canada, ordinary residence ends when a person has moved their routine of life and ordinary mode of living. The UK has a statutory test whereby a person who leaves the UK and lives and work in another country will cease to be a tax resident in the UK after a period of three year. In Germany⁴ ,a major determinant of an
individual’s status as a resident for income tax purposes is whether he or she is domiciled or maintains an abode in the state and are “present” in the state for 183 days or more (one-half of the tax year).

NIPA PROPOSAL 2: INCREASE THE NUMBER OF TREATIES CONCLUDED WITH OTHER COUNTRIES

As already mentioned, that an international transaction should not give rise to double transaction on the same transaction. However, the double taxation on the same cross-border could arise if the following exists:

- A weak foreign tax rebate system, (explained above), and
- An absence of a DTA agreement between the country where foreign-sourced income is located and Namibia.

If a Namibian residence earns income from a foreign-source and no DTA agreements exist between country in which the foreign-sourced income is located and Namibia, then both countries can tax the Namibian resident for the same foreign sourced-income. Both the foreign country and Namibia could tax the Namibian resident based on their respective national domestic tax legislation.

It is given that Namibia has DTAs with only 11 countries, hence increasing the likelihood that a Namibian resident could be tax twice for the same cross-border transaction given the fact that Namibia has DTA with so few countries. The likelihood of earning foreign-sourced income from non-DTA countries very probable.

NIPA PROPOSAL 3: REVIEW OF THE EXISTING TAX REBATE MECHANISM

The Namibian tax legislation currently awards tax rebates only under the following circumstances:

- Rebate in respect of non-resident shareholders’ tax,
- Rebate in respect of foreign income taxes on royalties and similar income, and
- Rebate in respect of diamond profit tax.

These tax rebates are available to a limited set of circumstances and do not prepare Namibians for the resident-based approach to tax.

Under a residence-based approach to tax, if foreign income earned by a Namibian resident is taxed in the foreign country, then a Namibian foreign tax rebate must set-off the foreign tax paid to the foreign country in respect of any income received by or accrued to that Namibian resident.

Hence, NIPA could propose the following options for foreign tax rebates:

i) The full foreign-sourced income be included in the Namibian gross income, but the foreign tax paid to the foreign company reduces the tax liability payable to the Namibians Inland Revenue Authority, or

foreign tax was paid to a foreign revenue authority.

CONCLUSION IN RESPECT OF RESIDENCE-BASED APPROACH TO TAXATION

Based on the above discussions, it is strongly suggested that the residence-based approach to taxation should be stalled until such time

i) The foreign tax rebate mechanisms are adequately overhauled, and secondly,

ii) DTA agreements should be concluded with at least 50 countries.

NIPA PROPOSAL 4: TRANSFER PRICING LEGISLATION

Section 94A of the Namibian tax legislation informs us what constitute ‘transfer pricing”. However, the section is still adequate in that it fails to articulate under what conditions transfer pricing will not apply.

The RSA legislation, for example, explain that the transfer pricing will not apply if:

(a) A resident company whether alone or together with another company that forma part of the same group of companies, directly or indirectly, forms part of the same group of companies, hold in the aggregate, at least, 10 per cent of the equity shares and voting rights deem that debt in full within 30 years from the date the debt is incurred;

(b) The redemption of the debt in full by the foreign company is conditional upon the market value of the assets of the foreign company not being less than the market value of the liabilities of the foreign company; and

(c) No interest accrued in respect of the debt during the year of assessment.

It is noted that the Namibian legislation fails to classify under what circumstances transfer pricing rules do not apply.

References:


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1 Article 4: DTA between RSA and Namibia: Notice No: 228: 19 February 1999
2 Botswana, France, Germany, India, Malaysia, Mauritius, Romania, Russian federation, RSA, Sweden and United Kingdom
3 The Cohen & Kuttel Stories: J Arendse, K. Stark and C Renaud
4 https://www.google.co.za/search?drd=1&source=hp&q=How+is+a+resident+defined+in+Germany+for+tax+purposes%3F+&oq= - accessed on 9 May 2019
5 Sections 9, 10 and 11 of the Namibian Tax Act No 24 of 1981, as amended 31 August 2017
6 It is necessary to bear in mind that RSA has DTA treaties with more than 150 countries.
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