

New tax laws for expats

The laws around tax for South Africans who live and work abroad have changed and it's important to work out whether or not you are now expected to pay tax on income you earn outside of the country. Carla Rossouw tackles this complex topic.

As of 1 March 2020, South African tax residents living and working abroad are required to pay tax of up to 45% on their foreign employment income, if they earn more than R1.25 million per year – although they may qualify for some tax relief. This legislative change, along with the negative sentiment prevalent in our country at the moment, has led to an uptick in the number of South Africans considering formal or financial emigration. If you find yourself in this situation, it is important to distil the facts from the noise before acting.

Who is impacted?

A South African tax resident who is an employee and renders employment services outside South Africa for 183 full days (which includes a continuous period of 60 days) during any 12-month period will be caught in the tax net. Effective 1 March 2020, any remuneration received in excess of R1.25 million is now subject to normal tax in South Africa, irrespective of whether tax is paid in another country. Previously, a salary received for work performed abroad was completely exempt from South African tax. This was very attractive for South African tax resident employees working in countries where no personal income tax is levied on their salaries, such as the UAE or other Middle Eastern countries, because it meant that the individual paid no tax on their employment income in South Africa or in the foreign host country. This free ride is over.

The R1.25 million exemption may seem like a generous concession but, in reality, will be quickly exhausted given that it includes fringe benefits such as accommodation, travel allowances, security, etc.

Understanding the way forward

There is no one-size-fits-all solution when considering what you should do. Here are some key questions to ask in determining whether this tax amendment impacts you:

1. Am I a South African tax resident?

As the amendment only impacts South African tax residents, if you are currently working outside of the country, you should first determine whether or not you are considered a "tax resident" in South Africa.

You are a tax resident in South Africa if either of the following tests applies to you:

- You are "ordinarily resident" in South Africa (see more detail below); or
- You are **not** ordinarily resident in South Africa in a

specific tax year, but you meet the requirements of the "physical presence" test.

You are "ordinarily" resident in South Africa, and therefore a tax resident, if you consider South Africa your real home and you intend to return. "Ordinarily resident" is not a clearly defined concept; instead, it relies on a factual enquiry and must be evaluated on a case-by-case basis. If you claim not to ordinarily reside in South Africa, all your surrounding actions and circumstances must support this claim. South African Revenue Service (SARS) Interpretation Note 3 "Resident: Definition in relation to a natural person – ordinarily resident" provides guidance by listing the factors which may be taken into account by officials to determine whether an individual is ordinarily resident for tax purposes in South Africa. These include your most fixed and settled place of residence, place of business and personal interests, family and social relationships (schools, places of worship, etc.).

You are "physically present" in South Africa, and therefore a tax resident, if you have been inside South Africa for more than 91 days in that tax year, and each of the five preceding tax years, as well as for a total of more than 915 days in those preceding five years. The latter "days" test only applies if you are not considered ordinarily resident in South Africa.

2. Am I earning foreign employment income?

The amendment only applies to individuals earning foreign employment income, i.e. an employer/employee relationship must exist. This therefore excludes independent contractors or individuals who are self-employed and earning income outside South Africa.

3. Does financial emigration change my tax residency?

Your tax residency is not automatically broken when you financially emigrate. SARS makes no reference to financial emigration in its Interpretation Note, thus getting approval from the South African Reserve Bank (SARB) to financially emigrate doesn't automatically mean that you will no longer be considered a tax resident. Financial emigration is merely one factor that may be taken into account when determining whether or not you have broken your tax residency. It can, together with the above-mentioned factors, substantiate your evidence, but on its own it is not sufficient or conclusive. You will need to take proactive steps to confirm your intention with SARS.

4. How do I break my South African tax residency?

You stop being a South African tax resident when:

- You are no longer ordinarily resident in South Africa (i.e. you state that you want to become ordinarily resident in another country and you take steps that confirm your stated intention).

- You are not a tax resident according to the physical presence test (i.e. you leave South Africa and stay physically outside of the country for a continuous period of at least 330 full days).

5. Do I need to notify SARS if I cease to be a South African tax resident, and if so, how?

You need to notify SARS when you cease to be a tax resident in South Africa, otherwise you may still be seen as a tax resident in their eyes. If your tax residency changed in the current tax year, you can answer the relevant question via the wizard on your income tax return to indicate you have "ceased to be a tax resident". If your tax residency changed in a prior tax year, and a capital gain was triggered but not declared, you can declare it through the Voluntary Disclosure Programme to eliminate any potential penalties and prosecution.

Alternatively, if you choose to emigrate from South Africa, you can notify SARS when applying for a tax clearance certificate via eFiling that your intention is also to cease to be ordinarily resident in South Africa.

6. Will I still have tax obligations in South Africa if I break my tax residency?

You may still have tax obligations when your South African tax residency ends. You are regarded as having sold all your assets at market value, excluding immovable property, for capital gains tax purposes when you break your tax residency. The tax cost can be substantial. Once a non-resident, you will continue to be liable for tax on any South African-sourced income such as rental income, investment income, etc., and will be required to complete a tax return in South Africa each year. If you are no longer a tax resident and earned no income in South Africa, you do not need to file a return.

7. I am a tax resident in more than one country – what now?

If you are a tax resident in more than one country, you must find out whether South Africa has a double taxation agreement (DTA)

with the country in question. A DTA is an agreement between two countries to prevent an individual paying double tax. You can only be ordinarily resident for tax purposes in one country at a time, so you must determine in which country you are ultimately a tax resident, and which country must provide tax relief for the tax already paid in the other country.

8. Can you get relief from double tax if no DTA exists?

If you earn foreign employment income in excess of R1.25 million and the DTA between South Africa and the foreign country does not provide a sole taxing right to one country, or the host country does not have a DTA in place with South Africa, both countries may have a right to tax the income. The portion of the income in excess of R1.25 million may end up being double taxed, however you may be able to claim relief through your South African income tax return, provided certain requirements are met.

Seek advice

It is important to understand the differences between emigration and tax residency, and that you do not necessarily need to financially emigrate from South Africa if you are concerned about the new tax amendment.

SARS has released guidance in the form of two documents, draft Interpretation Note 16 and a "Frequently Asked Questions – Foreign Employment Income Exemption" document dealing with this matter. It has also created a dedicated email address (ForeignEmployment@sars.gov.za) available to affected stakeholders to submit any questions not addressed in the FAQ document.

Determining your tax residency is complicated and depends on your unique circumstances and intentions, which means it is best discussed with your independent financial adviser or tax practitioner. If you are contemplating emigrating, consider seeking advice from a South African financial emigration specialist. You should also consult the SARS website.

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