

The tax implications for expatriates following the amendment of the Income Tax Act

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ABSTRACT

In South Africa income tax is levied at a progressive rate on any income earned. South Africa changed to a residence-based system after following a source-based system prior to 2001. Therefore, residency is a very important concept to the South African tax law. As South Africans are taxed on their worldwide income the amendment to section 10(1)(o)(ii) of the *Income Tax Act* could have various implications for South African expatriates living abroad. This section exempted natural persons who received remuneration outside of South Africa from paying tax on foreign employment remuneration. The National Treasury had the intention to repeal section 10(1)(o)(ii) of the *Income Tax Act* as a whole. However, the National Treasury decided to change only the wording of this section. The new wording exempts South African expatriates from paying tax on foreign employment income to the extent that the remuneration does not exceed R1 250 000 in a year of assessment. Because taxation of foreign employment income is a new concept to South Africa, the tax implications for expatriates following the amendment of section 10(1)(o)(ii) of the *Income Tax Act* is a question that arises. This study found that the amendment of the *Income Tax Act* will have various implications for expatriates, but only two of them are tax-related. Expatriates will have to pay up to 45% tax to South Africa on their foreign employment income and a capital gains exit tax if they financially emigrate to avoid the first tax implication.

Keywords

Expatriate Tax; Expat tax; Section 10(1)(o)(ii) of the Income Tax Act; tax implications for expatriates; amendment to section 10(1)(o)(ii) of the Income Tax Act; financial immigration; practicality of amending section 10(1)(o)(ii) of the Income Tax Act; physically present test; ordinarily resident test; tax; income tax; South African tax law; options to avoid the amendment of section 10(1)(o)(ii) of the Income Tax Act.

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LIST OF ABBREVIATIONS

BMW SA	Bavarian Motor Works South Africa
BTR	British Tax Review
CIR	Commissioner for Inland Revenue
COT	Commissioner of Taxes
CRS	Common Reporting Standard
DTA's	Double Taxation Agreements
ITA	Income Tax Act
JLTR	Journal of Legal Tax Research
PAYE	Pay-as-you-earn
PwC	PricewaterhouseCoopers Tax Services (Pty) Ltd
RNOR	Resident and not ordinarily resident
ROR	Resident and ordinarily resident
SAIPA	South African Institute of Professional Accountants
SARB	South African Reserve Bank
SARS	South African Revenue Service
SA Mercantile LJ	South African Mercantile Law Journal
TAA	Tax Administration Act

Chapter 1

1 Introduction and background

Taxation was introduced to South Africa in the 1600s, but income tax has been levied only since the 1800s.¹ The amendments made in the 1900s are what transformed South Africa's income tax system into what it is today.² To explain briefly, income tax is levied on the income that a person earns at a progressive rate.³ In other words, the more income a person earns the more tax will be levied as a result of a higher rate of tax being imposed. For a natural person his or her year of assessment will end on the last day of February and start on the first day of March of every year.⁴ Prior to 2001, South Africa followed a source-based tax system, which changed to a residence-based system⁵ for persons who are deemed to be ordinarily resident in South Africa.⁶ This means that South African residents are taxed on their worldwide income.⁷ Judicial interpretation has determined what "ordinarily resident" means. In *Cohen v Commissioner for Inland Revenue*⁸ the court held that a person is ordinarily resident in "the country to which he would naturally and as a matter of course return from his wanderings."

The courts furthermore held that a person is ordinarily resident in the country where his or her permanent home is situated,⁹ and that a person can be ordinarily resident in a country even if that person was absent from that country throughout the whole

¹ Stiglingh *et al Silke: South African Income Tax* 12.

² Stiglingh *et al Silke: South African Income Tax* 12.

³ Coetzee *et al A Student Approach to Income Tax Natural Persons* 3; Pollak 1961 *BTR* 313; SARS 2019 <http://www.sars.gov.za/Tax-Rates/IncomeTax/Pages/Rates%20of%20Tax%20for%20Individuals.aspx>.

⁴ Coetzee *et al A Student Approach to Income Tax Natural Persons* 55; Stiglingh *et al Silke: South African Income Tax* 22; Clegg and Stretch *Income Tax in South Africa* 52; SARS 2019 <http://www.sars.gov.za/Tax-Rates/Pages/default.aspx>.

⁵ *Income Tax Case No 1819 69 SATC* 159 para 4; Stiglingh *et al Silke: South African Income Tax* 782.

⁶ South African Revenue Service *Interpretation Note* 4 1.

⁷ Oliver 2007 *SA Mercantile LJ* 97.

⁸ *Cohen v CIR* 13 SATC 362 371.

⁹ *H v COT* 23 SATC 292 296.

year of assessment.¹⁰ According to the South African Revenue Service¹¹ the question whether a person is ordinarily resident must be decided on its own merit as it is a question of fact. Non-residents, however, are taxed only on their income from a source within South Africa's borders.¹² This way of taxation is fair in the sense that if one enjoys the benefits of South Africa one must pay tax, and if one does not enjoy the benefits one does not have to pay tax, unless one has a source of income within the Republic.

That said, imagine you are given an amazing job opportunity which leads you to emigrate to Dubai. You have no assets in South Africa as you sold everything because you do not plan on returning. However, even though you have cut yourself off from your life in South Africa you still have to pay tax to South Africa even though you are no longer receiving any benefits from the country. This situation is the reality that expatriates will face with the new amendment¹³ of section 10(1)(o)(ii) of the *Income Tax Act* 28 of 1962.¹⁴ At first the National Treasury intended to repeal section 10(1)(o)(ii) of the *ITA*, which exempted natural persons who receive remuneration outside of South Africa from paying tax on foreign employment income.¹⁵ However, the National Treasury has decided not to repeal this section as a whole but to change the wording so that expatriates are exempt from paying tax to South Africa on remuneration received from countries outside of South Africa. However, that applies only to the extent to which that remuneration does not exceed R1 250 000 in respect of a year of assessment.¹⁶ R1 250 000 may seem reasonable and one may think that only the wealthy would have to pay tax on remuneration received outside the Republic, but allowances and fringe benefits are included in employment income.¹⁷ Therefore, the R1 250 000 exemption will be

¹⁰ *Cohen v CIR* 13 SATC 362 373.

¹¹ South African Revenue Service *Interpretation note* 3 5(hereinafter referred to as *SARS*).

¹² Stiglingh *et al Silke: South African Income Tax* 28.

¹³ Section 16(1)(g) of the *Taxation Laws Amendment Act* 17 of 2017.

¹⁴ Section 10(1)(o)(ii) of the *Income Tax Act* 58 of 1962 (hereinafter referred to as the *ITA*).

¹⁵ Section 10(1)(o)(ii) of the *Income Tax Act* 58 of 1962.

¹⁶ Section 6(1)(g) of the *Taxation Laws Amendment Act* 17 of 2017.

¹⁷ BusinessTech 2019 <https://businesstech.co.za/news/wealth/301694/south-africas-big-expat-tax-here-are-your-options/>.

reached easily, which may result in most expatriates having to pay tax, and not only the wealthy.

South Africa is not the first country to tax its expatriates. In Canada, for example, expatriates will have to pay tax if they are factual or deemed residents.¹⁸ The former means that even if a person has left Canada s/he is still resident in the country and the latter means that the person does not have residential ties to Canada but is not considered a resident in another country.¹⁹ Non-residents of Canada will not be liable to pay tax to the country.²⁰ South Africa, however, makes no distinction between factual, deemed or non-residents, and even if you are a non-resident you will be liable to pay tax to South Africa.²¹ This new amendment to the *ITA*, which commences in March 2020, has many expatriates worried and grappling with many questions and uncertainties. Thus, the question that arises is what the tax implications are for expatriates following the amendment of section 10(1)(o)(ii) of the *ITA*.

This dissertation aims to give an answer to the research question: What are the tax implications for expatriates following the amendment of section 10(1)(o)(ii) of the *ITA*? This will be done by first giving a brief background to the current position regarding expatriates and the taxation of foreign employment income, and then considering what the position will be after the amendment of section 10(1)(o)(ii) of the *ITA*. Secondly, it will be determined why South Africans leave South Africa, and what the different implications will be for different expatriates in different countries, as some expatriates pay tax in foreign countries and some do not. Other implications for South African expatriates will also be discussed as well as the implications for employers. Thirdly, options such as financial immigration and double tax agreements²² will be discussed, which will help expatriates legally to avoid the

¹⁸ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

¹⁹ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/deemed-residents.html>.

²⁰ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²¹ Van Eeden 2019 *Money Marketing* 8.

²² Double tax agreements; hereinafter referred to as DTAs.

impact of the amendment of section 10(1)(o)(ii) of the *ITA*. Lastly the situation in South Africa will be compared with those in India and Canada. India and South Africa have similar tax systems but differ in the taxation of foreign employment income. India does not tax non-resident expatriates on foreign employment income whereas South Africa is proposing to do so. This will give insight into how two countries with similar tax systems approach certain aspects differently. South Africa and Canada differ quite a lot in the taxation of foreign employment income. Comparing these two countries might give insight into how South Africa should approach the taxation of the foreign employment income of expatriates, as South Africa has not yet implemented such taxation. As the taxation of foreign employment income is a new concept for South Africa, this dissertation is needed to give expatriates some clarity as to what the implications will be for them after the amendment of section 10(1)(o)(ii) of the *ITA*. The next chapter will do this by explaining what the position currently is regarding the taxation of foreign employment income and what the position will be after the amendment to section 10(1)(o)(ii) of the *ITA*.

Chapter 2

2 Section 10(1)(o)(ii) of the *ITA* before and after the amendment

South Africans are able to rely on domestic law as well as *DTAs* to prevent double taxation under specific conditions.²³ South African tax law, more specifically section 10(1)(o)(ii) of the *ITA*, provides an exemption which prevents foreign employment income received outside of South African borders from being taxed in both the foreign country where the expatriate is working and in South Africa, subject to certain conditions being met.²⁴ This chapter aims to explain what the current position is regarding the exemption that section 10(1)(o)(ii) of the *ITA* affords to expatriates and then also what the position will be after the amendment of this section in March 2020. As this concept is new to South Africa, the practicality of the amendment to the *ITA* will also be discussed. Before going into detail on section 10(1)(o)(ii) of the *ITA*, which determines when an expatriate does not need to pay tax to South Africa, it is important to know when a person does indeed need to pay tax. A person will pay tax to South Africa if he or she is a resident of the country.²⁵ In order to be a resident of the country a person has to comply with the ordinarily resident or the physical presence test.²⁶ Having stated that, there are two tests determining residency in South Africa. Paragraph 2.2 below will discuss these two tests in detail.

2.1 *Ordinarily resident and physically present test*

The phrase "ordinarily resident" is not defined in the *ITA*, the interpretation of the courts is therefore used to determine its meaning.²⁷ It was stated in chapter 1 above that a person is ordinarily resident in "the country to which he would naturally and

²³ Grant Thornton 2019 <https://www.grantthornton.global/en/insights/articles/foreign-remuneration-exemption-for-south-africa-tax-residents-working-abroad/>.

²⁴ Stiglingh *et al Silke: South African Income Tax* 96; Grant Thornton 2019 <https://www.grantthornton.global/en/insights/articles/foreign-remuneration-exemption-for-south-africa-tax-residents-working-abroad/>.

²⁵ South African Revenue Service *Interpretation Note 3* 1.

²⁶ Section 1 of the *ITA* 58 of 1962; Stiglingh *et al Silke: South African Income Tax* 29.

²⁷ Stiglingh *et al Silke: South African Income Tax* 28; Jadezwi 2016 *Tax Professional* 28.

as a matter of course return from his wanderings."²⁸ However, there are various other judicial precedents describing when a person is ordinarily resident in South Africa. In *Soldier v Commissioner of Taxes*²⁹ the court held that a person is ordinarily resident when his home is settled and sure, not when it is temporary and informal. In *H v Commissioner of Taxes*³⁰ the court held that a person is ordinarily resident in the country where his permanent home is situated. In *Levene v IRC*³¹ the court held that a person is ordinarily resident in the place where he lives with a reasonable degree of permanence. Therefore, it can be said that being a person ordinarily resident in South Africa means that your permanent home is situated in South Africa, as the country to which you will return after your wanderings. When the SARS assesses whether or not a person is ordinarily resident in South Africa they will take the following factors into consideration: the intention to be ordinarily resident in South Africa; the person's most fixed and settled place of residence; employment and economic factors; the person's nationality; political, cultural or other activities and the status of the individual in the Republic and in other countries.³² It is important to note that the list of factors given is not an exhaustive one; it is merely a guideline. A person will become a resident in South Africa on the date that s/he becomes ordinarily resident.³³ This date will not necessarily be at the beginning of a year of assessment.³⁴ Therefore, no tax will be payable by a person before the date he or she becomes ordinarily resident in South Africa.³⁵

A person who is not ordinarily resident at any time during the relevant year of assessment will be a resident if s/he meets the requirements of the physically present test.³⁶ This test is applicable only to persons who are not ordinarily resident

²⁸ *Cohen v CIR* 13 SATC 362 371.

²⁹ *Soldier v COT* 1943 SR 130

³⁰ *H v COT* 1960 2 SA 695 SR

³¹ *Levene v IRC* 1928 AC.

³² South African Revenue Service *Interpretation Note* 3 5.

³³ South African Revenue Service *Interpretation Note* 3 5.

³⁴ South African Revenue Service *Interpretation Note* 3 7.

³⁵ South African Revenue Service *Interpretation Note* 3 7.

³⁶ Stiglingh *et al Silke: South African Income Tax* 30; Coetzee *et al A Student Approach to Income Tax Natural Persons* 39.

in South Africa at any time during the year of assessment but are physically present in South Africa for a period or periods exceeding:

- (i) 91 days in aggregate during the year of assessment under consideration;
- (ii) 91 days in aggregate during each of the five years of assessment preceding the year of assessment under consideration; and
- (iii) 915 days in aggregate during the five preceding years of assessment.³⁷

Therefore, a person can become a resident in terms of the physically present test only in the year after five consecutive years of assessment, in which the person is physically present for the qualifying period or periods.³⁸ A few rules apply to the physically present test. Firstly, a day includes part of a day.³⁹ Secondly, if a person spends a day in transit through South Africa, that day is not included as a day, provided that the person does not formally enter South Africa through a port of entry.⁴⁰ Lastly, the periods of more than 91 days and more than 915 days of physical presence in South Africa do not need to consist of consecutive days. Only an aggregate of days is required.⁴¹ A person will be deemed a resident on the first day of a year of assessment in which all the requirements of the physically present test have been met.⁴² It has been determined that a person becomes a resident by fulfilling the ordinarily resident and physically present test. When the requirements of these two tests have been fulfilled, the person fulfilling them will have to pay tax to South Africa. The paragraphs below will determine the requirements that need to be met in order for an expatriate to not pay tax to South Africa, and how this position will change. In March 2020 South African expatriates will be exempt from paying tax to South Africa on remuneration received from countries outside of South Africa, but only to the extent to which that remuneration does not exceed R1 250 000 in respect of a year of assessment.⁴³

³⁷ Section 1 of the *ITA* 58 of 1962.

³⁸ Stiglingh *et al Silke: South African Income Tax* 30.

³⁹ South African Revenue Service *Interpretation Note* 4 2.

⁴⁰ Stiglingh *et al Silke: South African Income Tax* 31.

⁴¹ Stiglingh *et al Silke: South African Income Tax* 31.

⁴² Coetzee *et al A Student Approach to Income Tax Natural Persons* 40; South African Revenue Service *Interpretation Note* 4 2.

⁴³ Section 6(1)(g) of the *Taxation Laws Amendment Act* 17 of 2017.

2.2 Section 10(1)(o)(ii) of the ITA before the amendment

The exemption afforded in Section 10(1)(o)(ii) of the *ITA* was introduced into South African tax law in 2001 when South Africa's basis of taxation changed to a residence-based system.⁴⁴ Section 10(1)(o)(ii) of the *ITA* states the following:

There shall be exempt from normal tax any form of remuneration received by or accrued to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in section 8, 8B or 8C in respect of services rendered outside the Republic by that employee for or on behalf of any employer, if that employee was outside the Republic for a period or periods exceeding 183 full days in aggregate during any period of 12 months; and for a continuous period exceeding 60 full days during that period of 12 months.⁴⁵

In other words, when remuneration is received by an employee for services rendered outside South African borders on behalf of an employer, the remuneration is exempt from normal tax under certain requirements.⁴⁶ These requirements are that the taxpayer must earn certain types of remuneration; in respect of services rendered by way of employment; outside the Republic; during specified qualifying periods; and not be subject to an exclusion.⁴⁷ Each requirement will be discussed in more detail in the paragraphs below.

2.2.1 Employment relationship

Section 10(1)(o)(ii) of the *ITA* will afford a person an exemption on remuneration received outside the Republic only if there is an existing employment relationship.⁴⁸ There needs to be an employment contract for this exemption to apply.⁴⁹ The *ITA* makes reference to any employer, which means that services rendered to non-residents or residents' employers could qualify for the exemption of section

⁴⁴ PWC *Foreign Employment Income: Proposed Repeal of Exemption in Section 10(1)(o)(ii)* 1.

⁴⁵ Section 10(1)(o)(ii) of the *ITA* 58 of 1962.

⁴⁶ Stiglingh *et al* *Silke: South African Income Tax* 96.

⁴⁷ South African Revenue Service *Interpretation Note* 16 2.

⁴⁸ South African Revenue Service *Interpretation Note* 16 3.

⁴⁹ South African Institute of Professional Accountants *South Africans Working Abroad: The tax Implications* 14.

10(1)(o)(ii) of the *ITA*.⁵⁰ This exemption is not applicable to any holder of office who is a director of a company or a member of a closed corporation.⁵¹ A holder of office can also be classified as an employee, however, if he can apply for leave, is liable for pay-as-you-earn,⁵² or is in receipt of an IRP5.⁵³ For the purposes of tax exemption, the *ITA*⁵⁴ defines an employee as the following:

any person (other than a company) who receives any remuneration or to whom any remuneration accrues; any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker; any labour broker; any person or class or category of person whom the Minister of Finance by notice in the Gazette declares to be an employee for the purposes of this definition; any personal service provider.⁵⁵

It is clear from the above definition that partners and sole proprietors do not fall within the definition of an employee. Therefore, partners and sole proprietors would not benefit from the section 10(1)(o)(ii) of the *ITA* exemption.⁵⁶ Government employees also do not enjoy the benefit of section 10(1)(o)(ii) of the *ITA* and will still have to pay income tax to the SARS even if they are physically based outside of South Africa.⁵⁷

2.2.2 Remuneration

Not all types of remuneration qualify for the exemption that section 10(1)(o)(ii) of the *ITA* affords to expatriates. The only types of remuneration that qualify for this exemption are remuneration by way of salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered.⁵⁸ Amounts that are contemplated in paragraph (i) of the definition of gross income in

⁵⁰ South African Revenue Service *Interpretation Note 16 3*; South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 589.

⁵¹ Section 10(1)(o)(ii)(B) *ITA* 58 of 1962.

⁵² Pay as you earn (Hereinafter referred to as PAYE)

⁵³ South African Institute of Professional Accountants *South Africans Working Abroad: The Tax Implications* 14.

⁵⁴ Section 1 of the fourth schedule of the *ITA* 58 of 1962.

⁵⁵ Section 1 of the fourth schedule of the *ITA* 58 of 1962.

⁵⁶ South African Institute of Professional Accountants *South Africans Working Abroad: The Tax Implications* 14.

⁵⁷ South African Institute of Professional Accountants *South Africans Working Abroad: The Tax Implications* 14.

⁵⁸ Section 10(1)(o)(ii) of the *ITA*; Stiglingh *et al Silke: South African Income Tax* 96.

section 1(1) of the *ITA* are also included,⁵⁹ as well as amounts referred to in sections 8,⁶⁰ 8B⁶¹ or 8C⁶² of the *ITA*. When no remuneration is received for periods outside the Republic this falls beyond the ambit of section 10(1)(o)(ii) of the *ITA*.⁶³ Remuneration that is received for services rendered in the Republic during a qualifying period does not qualify for the exemption.⁶⁴

2.2.3 Services rendered

The remuneration received must be for services rendered; therefore, amounts that are paid to the employee by the employer that are not associated with services rendered are not included in the ambit of the exemption.⁶⁵ The following payments also do not fall within the ambit of the exemption: termination, relinquishment, repudiation, loss, cancellation or variation of any office or employment or of any appointment to an office or employment that is received by way of such termination, loss, repudiation, cancellation or variation, not in respect of services rendered.⁶⁶

2.2.4 Outside the Republic

A person can qualify for this exemption only if the services are rendered outside the Republic. The Republic, as defined by the *ITA*:⁶⁷

means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea which has been or may be designated, under international law and the laws of South Africa, as areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources.⁶⁸

⁵⁹ The cash equivalent of the value of any taxable benefit as calculated under the Seventh Schedule; and the amount of any gain made by the exercise, cession or release of a right to acquire a marketable security, under section 8A.

⁶⁰ In the context of section 10(1)(o)(ii) of the *ITA*, this refers to allowances, advances and reimbursements under section 8(1).

⁶¹ Taxation of amounts derived from broad-based employee share plans.

⁶² Taxation of directors and employees on vesting.

⁶³ South African Revenue Service *Interpretation Note 16 2*.

⁶⁴ South African Revenue Service *Interpretation Note 16 2*.

⁶⁵ South African Revenue Service *Interpretation Note 16 3*.

⁶⁶ South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 589.

⁶⁷ Section 1(1) of the *ITA* 58 of 1962.

⁶⁸ Section 1(1) of the *ITA* 58 of 1962.

It is clear from the above definition that the Republic includes the landmass of South Africa and its territorial waters; as well as areas beyond the territorial sea which have been appointed under "international or domestic law as areas where South Africa may exercise sovereign rights" in regard to the exploration or exploitation of natural resources.⁶⁹ When determining whether a person renders services in or outside the Republic these factors need to be taken into consideration for the purpose of section 10(1)(o)(ii) of the *ITA* exemption.⁷⁰ When a person's employment is connected to the exploitation or exploration of natural resources beyond South Africa's territorial waters but within the exclusive economic zone or on the continental shelf, the person will not qualify for the section 10(1)(o)(ii) of the *ITA* exemption.⁷¹

2.2.5 Days test

2.2.5.1 Period or periods exceeding 183 full days in aggregate

In order for a person to qualify for the section 10(1)(o)(ii) of the *ITA* exemption it is necessary to be outside South African borders for the following periods:

for a period or periods exceeding 183 full days in aggregate during any period of 12 months and for a continuous period exceeding 60 full days during that period of 12 months.⁷²

A full day is 24 hours, which is from 00:00 to 24:00, which hours need not be consecutive or continuous.⁷³ As determined in the *ITA*, to meet the exemption requirement only a total of 183 full days in any 12-month period needs to be exceeded.⁷⁴ Calendar days should be taken into consideration when determining whether a person has been outside the Republic for a full 183 days and not only working days. Therefore, when a person spends weekends, public holidays, vacation

⁶⁹ South African Revenue Service *Interpretation Note 16 4*.

⁷⁰ South African Revenue Service *Interpretation Note 16 4*.

⁷¹ South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 589; South African Revenue Service *Interpretation Note 16 4*.

⁷² Section 10(1)(o)(ii)(aa) to (bb) of the *ITA* 58 of 1962.

⁷³ South African Revenue Service *Interpretation Note 16 4*; South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 589.

⁷⁴ South African Revenue Service *Interpretation Note 16 4*.

and sick leave outside the Republic these days considered to be part of the days during which services were rendered during the 183-day and 60-day periods of absence.⁷⁵ A distinction is made between two situations. The first situation is when a person is in employment and actually outside the Republic and the second situation is where a person is not in employment and outside the Republic.⁷⁶ Section 10(1)(o)(ii) of the *ITA* distinctly links employment with the days' test. Therefore, if a person spends time outside the Republic without being employed, those days will not be taken into account when determining the 183 days for the purposes of the exemption.⁷⁷ Furthermore, the time a person has been absent from the country should not be determined at the end of a tax period but when the ITR12 has been submitted.⁷⁸ This form allows the SARS to calculate how much tax you need to pay to the SARS or what tax refund the SARS needs to pay you.⁷⁹

2.2.5.2 Continuous period exceeding 60 full days

To add to the requirement that a person must have rendered services outside the Republic for a period or periods exceeding 183 full days in aggregate during any period of 12 months, a person also needs to have rendered services outside the Republic for a continuous period exceeding 60 full days in the same period of 12 months.⁸⁰ In order to exceed a continuous period of 60 full days, any amount of time is sufficient, and not only a full day.⁸¹ Taxpayers need to be able to prove that their absences from the Republic were under an employment contract to render services when claiming for the exemption and may be required to provide documentation.⁸² The documentation that could be requested by the SARS includes but is not limited to employment contracts for foreign services, copies of passports

⁷⁵ South African Institute of Professional Accountants *South Africans Working Abroad: The Tax Implications* 15.

⁷⁶ South African Revenue Service *Interpretation Note 16 5*.

⁷⁷ South African Revenue Service *Interpretation Note 16 5*.

⁷⁸ South African Institute of Professional Accountants *South Africans Working Abroad: The Tax Implications* 15.

⁷⁹ SARS 2019 <https://www.sars.gov.za/TaxTypes/PIT/Tax-Season/Pages/default.aspx>.

⁸⁰ Section 10(1)(o)(ii)(aa) to (bb) of the *ITA* 58 of 1962.

⁸¹ South African Revenue Service *Interpretation Note 16 5*.

⁸² Section 46(4) of the *Tax Administration Act* 28 of 2011 (hereinafter referred to as the *TAA* 28 of 2011).

and letters of secondment.⁸³ These documents will help a person who claims for the exemption to verify a period or periods worked outside the Republic.

2.2.5.3 During any period of 12 months

A person will qualify for this exemption if the days' test is met during any period of 12 months. A month is not defined in the main body of the *ITA* and the definition of the word month in paragraph 1 of the Fourth Schedule is not applicable in this instance.⁸⁴ The *Interpretation Act* 33 of 1957 states that in the context of law the word month means a calendar month.⁸⁵ The Oxford Dictionary⁸⁶ defines a month as "any of the twelve periods of time." In *Subbulutchmi v Minister of Police and Another*⁸⁷ the following was stated:

According to the Interpretation Act 33 of 1957 a month means a calendar month. In the absence of any clear indication to the contrary to be found in the words used in any particular legislation a calendar month running from an arbitrary date expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts. Thus, if a calendar month commences on the 10th of one month it will expire at the end of the 9th day of the succeeding month.

It is not clear in the context of section 10(1)(o)(ii) of the *ITA* that the more restrictive meaning of a calendar month was intended.⁸⁸ The use of the word "any" prior to the words "period of 12 months" is an indication that the meaning should be extended rather than restricted.⁸⁹ Therefore, the period of 12 months referred to in section 10(1)(o)(ii) of the *ITA* must be given a more extended meaning and does not need to start on the first day of a calendar month and end on the last day of a

⁸³ South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 590.

⁸⁴ South African Revenue Service *Interpretation Note* 16 6; In terms of paragraph 1 of the Fourth Schedule of the *ITA* "month" means any of the twelve portions into which any calendar year is divided.

⁸⁵ Section 2 of the *Interpretation Act* 33 of 1957.

⁸⁶ Hornby *et al Oxford Advances Learner's Dictionary* 958.

⁸⁷ *Subbulutchmi v Minister of Police* 1980 3 SA 396 (D) 177; *Minister of Police v Subbulutchmi* 1980 4 SA 768 (A) 180.

⁸⁸ South African Revenue Service *Interpretation Note* 16 6.

⁸⁹ South African Revenue Service *Interpretation Note* 16 6.

calendar month.⁹⁰ The period of 12 months is any period of 12 consecutive months and not necessarily a financial year, a year of assessment, or a calendar year.⁹¹

2.2.5.4 Persons in transit through the Republic

A person is considered to be outside the Republic when the person is in transit between two places outside the Republic and:

the person does not formally enter the Republic through a port of entry as contemplated in section 9(1) of the Immigration Act 13 of 2002; or the person does not formally enter the Republic at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs under the Immigration Act.⁹²

This means that the point of departure and the point of destination of the expedition that is undertaken must be outside the borders of the Republic.⁹³

2.2.6 Exceptions

The *ITA* has a provision to the exemption that section 10(1)(o)(ii) provides. This provision states that two categories of employees are excluded from the exemption namely those receiving remuneration from the holding of a public office and those receiving remuneration derived from services rendered or work or labour performed for or on behalf of an employer.⁹⁴

So far this chapter has determined what requirements need to be met in order to qualify for the foreign employment income exemption before the amendment of the *ITA*. The following paragraph will explain what the position of the foreign employment income exemption will be after the amendment to the *ITA*.

2.3 Section 10(1)(o)(ii) of the *ITA* after the amendment

Initially the proposal in the draft Taxation Laws Amendment Bill, 2017 was to repeal the foreign employment income exemption which section 10(1)(o)(ii) of the *ITA*

⁹⁰ South African Revenue Service *Interpretation Note 16 6*.

⁹¹ South African Revenue Service *Interpretation Note 16 6*.

⁹² South African Revenue Service *Interpretation Note 16 6*.

⁹³ South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 590.

⁹⁴ Proviso (B) to section 10(1)(o)(ii) of the *ITA* 58 of 1962.

afforded to expatriates.⁹⁵ The National Treasury consulted with various stakeholders on the proposed amendments and decided not to repeal section 10(1)(o)(ii) of the *ITA* as a whole but only to amend this section.⁹⁶ The reason for the National Treasury's at first wanting to repeal this section was that it came to the Government's attention that the exemption afforded to expatriates by section 10(1)(o)(ii) of the *ITA* created opportunities for double non-taxation.⁹⁷ These opportunities arise when the host country does not impose income tax on employment income or taxes on employment income are imposed at a very low rate.⁹⁸ Section 16(1)(g) of the *Taxation Laws Amendment Act* will amend section 10(1)(o)(ii) of the *ITA* by limiting the amount of foreign employment income earned that will be exempted. The section will now read as follows:

There shall be exempt from normal tax any form of remuneration received by or accrued to any employee during any year of assessment to the extent to which that remuneration does not exceed one million Rand in respect of a year of assessment and is received by or accrues to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in section 8, 8B or 8C, in respect of services rendered outside the Republic by that employee for or on behalf of any employer, if that employee was outside the Republic for a period or periods exceeding 183 full days in aggregate during any period of 12 months; and for a continuous period exceeding 60 full days during that period of 12 months.⁹⁹

It is clear from the above that all the requirements discussed¹⁰⁰ to qualify for this exemption are still applicable, but only the first R1 250 000 of foreign employment income will now be exempt from income tax. This amendment will result in South African tax residents working abroad having to pay up to 45% of their foreign

⁹⁵ National Treasury *Draft Taxation Laws Amendment Bill 17*; Mzizi and Botha 2018 <https://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>.

⁹⁶ Mzizi and Botha 2018 <https://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>.

⁹⁷ National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017 (draft)* 6.

⁹⁸ National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017 (draft)* 6.

⁹⁹ Section 16(1)(g) of the *Taxation Laws Amendment Act 17 of 2017*.

¹⁰⁰ See paragraph 2.3 above.

employment income to South Africa if it exceeds R1 250 000.¹⁰¹ R1 250 000 may seem like a lot, but when taking into consideration the fact that the employment income which expatriates receive includes fringe benefits and allowances, the R1 250 000 exemption seems a lot less. Most packages that expatriates receive from employers to work in a foreign country include houses, flights and security, which can quickly cause the R1 250 000 exemption to run out, as does the high cost of living in foreign countries.¹⁰² In *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service*¹⁰³ it was held that payment by an employer to tax consultants to provide assistance to expatriate employees constitutes a taxable benefit. Therefore, there are various different things that could constitute fringe benefits which could contribute to an expatriate's actually earning R1 250 000 in a year of assessment. Because the amendment to section 10(1)(o)(ii) of the *ITA* is a certainty it is necessary to consider the practical aspects of the enforcement of this amendment.

2.4 The practicality of the amendment to section 10(1)(o)(ii) of the ITA

As the amendment to section 10(1)(o)(ii) of the *ITA* has to do with foreign employment income it becomes necessary to consider whether or not the South African Government would be able to properly enforce the amendment to this section. This amendment is aimed at South African expatriates, who by definition are people who live in a country other than South Africa.¹⁰⁴ Because there are many South African expatriates all over the world and the world consists of 195 countries, a person needs to consider how the South African Government will ensure that South African expatriates will pay tax on their foreign employment income. This

¹⁰¹ Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

¹⁰² Mzizi and Botha 2018 <https://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>; Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

¹⁰³ *BMW South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* 2019 JOL 45649 (SCA) para 25.

¹⁰⁴ Hornby *et al Oxford Advances Learner's Dictionary* 513.

section will therefore aim to determine the practical aspects of enforcing the amended section of the *ITA*.

The first practical aspect to consider is how the SARS will know how much income a South African expatriate receives from the foreign country s/he now resides in. This aspect is relatively easy to answer, as South Africa joined the Common Reporting Standard¹⁰⁵ in June 2017.¹⁰⁶ This means that financial institutions and various banks from around the world now share people's global earnings with the SARS.¹⁰⁷ South Africa's being a part of the CRS makes it easy for the SARS to get information from other countries to determine whether or not a person exceeds the R1 250 000 threshold by cross referencing the person's tax returns with what they receive from the CRS.¹⁰⁸ However, this leads to the second practical aspect to consider. How will the SARS ensure that South African expatriates will file their tax returns to South Africa and pay tax on their foreign earnings? When a person is a resident of South Africa the person can be arrested for not submitting tax returns when they are due, as it is a criminal offence.¹⁰⁹ However, when a person does not reside in South Africa it would be more difficult to arrest and convict that person for this offence. The *TAA* makes it clear that a person who is charged with a tax offence must be tried by a court which has jurisdiction within an area where that person carries on business or resides.¹¹⁰ Extradition however, might be the answer to the need to ensure that South African expatriates pay tax on their foreign income. Extradition occurs when a state requests another state to physically surrender a person who is either convicted or accused of a crime by the requesting state.¹¹¹ The *Extradition Act* 67 of 1962¹¹² provides that:

¹⁰⁵ Common Reporting Standard (hereinafter referred to as the CRS).

¹⁰⁶ Tax Consulting South Africa *Comprehensive Tax Compliance Solutions for South Africans Abroad* 3.

¹⁰⁷ Tax Consulting South Africa *Comprehensive Tax Compliance Solutions for South Africans Abroad* 3.

¹⁰⁸ Tax Consulting South Africa *Comprehensive Tax Compliance Solutions for South Africans Abroad* 3.

¹⁰⁹ Section 234(d) of the *TAA* 28 of 2011.

¹¹⁰ Section 238 of the *TAA* 28 of 2011.

¹¹¹ Moolla 2019 <http://www.derebus.org.za/does-sa-have-the-required-framework-for-mutual-legal-assistance-and-extradition/>.

¹¹² Section 3 of the *Extradition Act* 67 of 1962.

Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.

As it is a criminal offence to fail to file one's tax returns, a South African expatriate accused of this offence could be extradited to South Africa. The country in which the South African expatriate resides must, however, have an extradition agreement with South Africa, and the specific offence must be listed in the agreement.

Other than being able to convict a person for not paying taxes, the SARS has a number of debt collection options at their disposal. Some of these are the following: to collect the debt from someone who holds money on the defaulting taxpayer's behalf; to issue a judgement and have the defaulting taxpayer's name blacklisted; and to attach and sell the defaulting taxpayer's assets.¹¹³ The first debt collection method mentioned is called third party appointments. The *TAA* does not specify whether or not the SARS can request a foreign business or person to collect debt on the South African expatriate's behalf if s/he owes money to the SARS. This might become possible if legislation is put in place to do this and the country where the South African expatriate finds himself or herself agrees to pay the tax to the SARS on his or her behalf. This might take a lot of time and effort, however, and may not be worthwhile. The second debt collection method involves the SARS issuing a judgment against a person to get him or her blacklisted. When a person is blacklisted it means that he or she has a bad credit profile because he or she is unable or unwilling to pay his or her debts.¹¹⁴ If the SARS issues a judgement to get a South African expatriate blacklisted for not paying tax on his or her foreign earnings, s/he might only be blacklisted in South Africa and not in the country s/he is now residing in. The judgement would therefore be pointless as the South African expatriate would still be able to get credit in the country s/he resides in and would

¹¹³ SARS 2019 <https://www.sars.gov.za/ClientSegments/Individuals/How-Pay/Pages/Owing-SARS-Money.aspx>.

¹¹⁴ Hornby *et al Oxford Advances Learner's Dictionary*

be affected only if s/he returns to South Africa. The last recourse of the SARS is to attach and sell the defaulting taxpayer's assets. Attachment is the legal process whereby a court instructs the sheriff to seize the property of the debtor.¹¹⁵ If the debt remains unpaid after the attachment, the attached property can be sold at auction so that the proceeds can be used to pay the debt to the creditor.¹¹⁶ This debt collection method would work only if the South African expatriate has assets in South Africa which the SARS can attach and sell. If the South African expatriate has no assets in South Africa, the SARS would not be able to use this method of debt collection.

2.5 Conclusion

As may be seen from the discussion in this chapter, in order for a person to pay tax to South Africa a person needs either to be ordinarily resident in the country or to meet all the requirements for the physically present test.¹¹⁷ This is important to grasp, as only South African expatriates will qualify for the section 10(1)(o)(ii) of the *ITA* exemption, which means that at one stage they were ordinarily resident in the country. At the present time section 10(1)(o)(ii) of the *ITA* affords South African expatriates an exemption on paying tax on their foreign-earned income on condition that they meet certain requirements.¹¹⁸ Firstly, there needs to be an employment relationship.¹¹⁹ Secondly, the remuneration received needs to fall within the ambit of the *ITA*, as not all remuneration qualifies for this exemption.¹²⁰ Thirdly, services should have been rendered, so any remuneration received other than for services rendered does not fall within the ambit of the exemption.¹²¹ Fourthly, services should have been rendered outside the republic. A person is considered to be outside the Republic where the person is in transit between two places outside the Republic.¹²²

¹¹⁵ Hornby *et al Oxford Advances Learner's Dictionary*, The law dictionary 2019 What is attachment <https://thelawdictionary.org/attachment/>.

¹¹⁶ Peté *et al Civil Procedure: A Practical Guide* 380

¹¹⁷ Section 1 of the *ITA* 58 of 1962; Stiglingh *et al Silke: South African Income Tax* 29.

¹¹⁸ Section 10(1)(o)(ii) of the *ITA* 58 of 1962.

¹¹⁹ South African Revenue Service *Interpretation Note* 16 3.

¹²⁰ Section 10(1)(o)(ii) of the *ITA* 58 of 1962; Stiglingh *et al Silke: South African Income Tax* 96.

¹²¹ South African Revenue Service *Interpretation Note* 16 3.

¹²² South African Institute of Tax Professionals *SAIT Compendium of Tax Legislation* 590.

Lastly, the person should have been outside the country for a period exceeding 183 full days in aggregate, and services should have been rendered for a continuous period exceeding 60 full days during any period of 12 months.¹²³ In the event that remuneration is obtained from the holding of a public office or derived from services rendered or work or labour performed for or on behalf of an employer, these employees are excluded from the exemption.¹²⁴ Even if all the requirements are met, these two types of employees are an exclusion from the exemption.

These requirements will still be applicable when section 10(1)(o)(ii) of the *ITA* is amended in March 2020, but the exemption will be limited to R1 250 000.¹²⁵ Therefore, any South African expatriate who earns foreign income that exceeds R1 250 000 will be liable to pay up to 45% tax to South Africa.¹²⁶ In order to enforce this amendment, the SARS has a few practical aspects to consider. Firstly, the SARS will need to determine who earns enough to be liable to pay tax to South Africa. In this case South Africa would receive information from the CRS about how much foreign income South African expatriates earn.¹²⁷ However, the SARS may struggle to get this information from countries who are not part of the CRS. Secondly, it would be possible to convict a South African expatriate of a tax crime only if South Africa has an extradition agreement with the country in which the South African expatriate now resides and the offence is listed in the agreement.¹²⁸ Lastly, the SARS would have to find some new debt collecting methods, as it can be seen above that the methods used to collect debt in South Africa would not work in other countries due to issues such as jurisdiction and a lack of South African assets.

The purpose of this chapter has been to determine what the exemption on foreign employment income in the *ITA* entails, because the amendment to this section will have various implications for expatriates. The next chapter will explain what

¹²³ Section 10(1)(o)(ii)(aa) to (bb) of the *ITA* 58 of 1962.

¹²⁴ Proviso (B) to section 10(1)(o)(ii) of the *ITA* 58 of 1962.

¹²⁵ Section 16(1)(g) of the *Taxation Laws Amendment Act* 17 of 2017.

¹²⁶ Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

¹²⁷ Tax Consulting South Africa *Comprehensive Tax Compliance Solutions for South Africans Abroad* 3.

¹²⁸ Section 3 of the *Extradition Act* 67 of 1962.

implications South African expatriates will face after the amendment to section 10(1)(o)(ii) of the *ITA*.

Chapter 3

3 The implications for expatriates following the amendment of the *ITA*

It has been established in the previous chapter that the amendment of section 10(1)(o)(ii) of the *ITA* will result in South African tax residents working abroad to pay up to 45% of their foreign employment income to South Africa if it exceeds R1 250 000.¹²⁹ There is no uncertainty as to what the amendment of the *ITA* will bring. In other words, tax will be levied on foreign employment income. There is uncertainty, however, as to what implications this amendment will have on South African expatriates. This chapter will firstly determine why South Africans leave South Africa to look for greener pastures elsewhere. Secondly, the different tax systems around the world will be discussed and how each tax system will impact on South African expatriates differently. Thirdly, other implications that are not necessarily linked with the finances of the South African expatriate will be discussed. Lastly, the implications that employers will face after the amendment to the *ITA* will be discussed. As only expatriates receive foreign employment income it is important to determine why South Africans become expatriates.

3.1 Why South Africans leave South Africa

Before dealing with the implications that this amendment will have for South African expatriates it is important to establish why South Africans want to leave South Africa in the first place, as this amendment is applicable to those people only. Different people leave South Africa for different reasons, but the main reasons for people leaving the country include economic uncertainty, affirmative action, the ongoing problems of crime, black economic empowerment, unemployment and political problems.¹³⁰ As most of the reasons people leave South Africa have to do with employment, most South Africans leaving the country are skilled or qualified

¹²⁹ Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

¹³⁰ MyBroadBand 2019 <https://mybroadband.co.za/news/business/306950-south-african-brain-drain-shocking-number-of-skilled-professionals-leaving-the-country.html>.

professionals.¹³¹ This is resulting in the so called "brain drain", as the loss of skills through emigration is extensive. South Africans tend to emigrate to the United Kingdom, Australia, New Zealand, or the United States.¹³² The reason for South Africans seeking greener pastures in those specific countries is that the jobs South African employees are struggling to fill happen to be the very ones that are in high demand in those specific countries.¹³³ Globalisation makes it so much easier for people to leave their lives in their home country and start over again somewhere new. Globalisation can be defined as the growing interdependence of the world's cultures, populations and economies brought about by the cross-border trade in goods and services, technology, people, and information.¹³⁴ It would be more difficult to start a new life in a country which does not share one's own culture or language. Because of globalisation this is not such a big issue anymore, as cultures now move across borders. South Africans most probably find new homes in the United Kingdom, Australia, New Zealand, or the United States as these countries' cultures do not differ from the South African as much the cultures of Asian countries for example. Also, language is not a problem, as English is the commonly used language in these countries. As a result of every country's being able to decide which type of tax system it would like to use, each country might have a different approach towards South African expatriates, as will become evident in paragraph 3.2 below.

3.2 Different tax systems and their impact on expatriates

Every country establishes its own tax system according to its own unique needs.¹³⁵ Currently there are four different types of tax systems around the world, namely,

¹³¹ MyBroadBand 2019 <https://mybroadband.co.za/news/business/306950-south-african-brain-drain-shocking-number-of-skilled-professionals-leaving-the-country.html>.

¹³² MyBroadBand 2019 <https://mybroadband.co.za/news/business/306950-south-african-brain-drain-shocking-number-of-skilled-professionals-leaving-the-country.htm>.

¹³³ Okoye 2019 <https://citizen.co.za/news/south-africa/general/2150853/sas-brain-drain-is-picking-up-speed/>.

¹³⁴ Kolb 2019 <https://www.piiie.com/microsites/globalization/what-is-globalization.html>.

¹³⁵ Kirsch 2007 *New York University Law Review* 448.

citizenship-based taxation, territorial taxation, residential taxation and zero taxation.¹³⁶ Citizen-based taxation is linked to one's citizenship. This type of taxation results in the application of the same tax regime to all a country's citizens regardless of where they live.¹³⁷ Nearly all countries exclude citizenship when creating tax jurisdiction.¹³⁸ The United States of America and Eritrea are currently the only countries in the world which use this method of taxation.¹³⁹ Citizen-based taxation is not restricted to taxing only citizens. Non-citizens can also be taxed if they meet certain requirements such as residency.¹⁴⁰ Territorial taxation is linked to territory; therefore, a person pays tax only on the income earned within the country's borders.¹⁴¹ This means that any income earned from another country would be exempt from tax.¹⁴² Countries that use this tax system include the Philippines, Hong Kong and Paraguay.¹⁴³ Residence-based taxation is linked to one's residence. Therefore, if a person is a resident of a country, the person will pay tax to that country on his or her worldwide income.¹⁴⁴ This method of taxation is justified on the basis that as a resident one enjoys the protection of the state and should therefore contribute to the cost of the government where one resides.¹⁴⁵ More than 130 countries around the world use residence-based taxation,¹⁴⁶ including Australia, Austria and Brazil.¹⁴⁷ These countries have clear requirements as to when a person is a tax resident or not.¹⁴⁸ Paragraph 2.1 above sets out the requirements in order to be a tax resident in South Africa. Countries that have zero taxation tax systems do not require individuals to pay income tax whatsoever, no matter where the income was earned.¹⁴⁹ The burden on South African expatriates will be bigger if they

¹³⁶ Henderson 2019 <https://nomadcapitalist.com/2018/11/20/4-tax-systems/>.

¹³⁷ Taxes for expats 2019 <https://www.taxesforexpats.com/expat-tax-advice/Citizenship-Based-Taxation-International-Comparison.html>.

¹³⁸ Kirsch 2007 *New York University Law Review* 449.

¹³⁹ Cabezas 2016 *Penn State Law Review* 102; Gelardi 2009 *JLTR* 76.

¹⁴⁰ Henderson 2019 <https://nomadcapitalist.com/2018/11/20/4-tax-systems/>; Gelardi 2009 *JLTR* 77.

¹⁴¹ Tax Free Today 2017 <https://tax-free.today/blog/worlds-four-tax-systems/>.

¹⁴² Tax Free Today 2017 <https://tax-free.today/blog/worlds-four-tax-systems/>.

¹⁴³ Tax Free Today 2017 <https://tax-free.today/blog/worlds-four-tax-systems/>.

¹⁴⁴ Henderson 2019 <https://nomadcapitalist.com/2018/11/20/4-tax-systems/>.

¹⁴⁵ Olivier 2001 *Journal of South African Law* 21.

¹⁴⁶ Globalization guide 2018 <https://globalisationguide.org/worlds-taxation-systems-explained/>.

¹⁴⁷ Reeves 2016 <https://premieroffshore.com/which-countries-tax-worldwide-income/>.

¹⁴⁸ Henderson 2019 <https://nomadcapitalist.com/2018/11/20/4-tax-systems/>.

¹⁴⁹ Henderson 2019 <https://nomadcapitalist.com/2018/11/20/4-tax-systems/>.

choose to emigrate to a country that has a residence-based tax system rather than a country that has a zero taxation tax system. This is because living in a country with a zero taxation tax system would mean that the South African expatriate would have to pay tax only to South Africa and not to the country s/he now lives in. Living in a country with a residence-based tax system, on the other hand, might result in a heavy financial burden on South African expatriates, as they would have to pay tax to both South Africa and the country they are living in, unless a DTA applies. For example, if a South African expatriate resides in Australia and earns R1 250 000 or more, s/he will need to pay income tax to Australia as well as to South Africa. On the other hand, if a South African expatriate resides in Monaco, s/he will need to pay income tax to South Africa only if s/he earns R1 250 000 or more. A residence-based country such as the Netherlands has very high tax brackets¹⁵⁰ which could lead to financial problems as the amendment of the *ITA* is aimed at South African expatriates who earn more than R1 250 000 per year.¹⁵¹ South African expatriates who fall into this category might fall into a high tax bracket in the country they reside in. This means that they now need to pay up to 45% of their income to the SARS as well as to pay a high tax rate to the country they live in. This obligation of a South African expatriate to pay tax to both countries may cause financial problems. However, financial problems are not the only implications that South African expatriates will face, as will become more evident in paragraph 3.3 below.

3.3 Other implications for expatriates

The first and most obvious other implication of the amendment of section 10(1)(o)(ii) of the *ITA* is that expatriates will now have to pay tax on remuneration that was previously exempt.¹⁵² The amendment to the *ITA* will result in additional compliance procedures and documentation in order to show whether or not the

¹⁵⁰ The highest tax bracket in the Netherlands is 51.75%.

¹⁵¹ BusinessTech 2019 <https://businesstech.co.za/news/finance/326885/south-africas-new-expat-tax-5-of-the-most-important-questions-answered/>.

¹⁵² PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

taxpayer meet the requirements for the exemption.¹⁵³ Therefore, the second implication would be a more extensive process for expatriates to prove that they meet the requirements for the exemption given by the *ITA*. The exemption given by section 10(1)(o)(ii) of the *ITA* does not apply to public sector employees, so the third implication of the amendment to the *ITA* is that public sector employees and private sector employees will be in a better position regarding exempt income.¹⁵⁴ Employees in the public sector will be in the same position as employees in the private sector who do not qualify for the exemption the *ITA* gives, as expatriates in the public sector who earn under R1 250 000 will still be exempt from paying tax. Furthermore, South African tax residents would need to report all local and foreign income in both their provisional and annual tax returns.¹⁵⁵ That said, the fourth implication will be that expatriates need to place a greater emphasis on filing their tax returns, as a failure to do so could result in imprisonment for a period of up to two years.¹⁵⁶ The last implication for expatriates would be that they might want to engage in financial emigration if they would like to break tax ties with South Africa in order to avoid the amendment of the *ITA*. Financial emigration will be discussed in the following chapter. It is important to note however, that financial emigration does not affect your citizenship, and also that it is not necessary for an expatriate to give up his or her citizenship in order to avoid this amendment.¹⁵⁷

One might think that the amendment to the *ITA* will have implications only for employees, but that is not the case.

3.4 Implications for employers

Even though the amendment to section 10(1)(o)(ii) of the *ITA* is directly aimed at South African expatriate employees, that does not mean that employers will not be affected as well. It is noteworthy that in some instances the employer might have

¹⁵³ PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

¹⁵⁴ GoLegal 2019 <https://www.golegal.co.za/exemption-foreign-income-tax/>.

¹⁵⁵ KPMG *Foreign Remuneration Exemption – What Will the Changes Mean?* 2.

¹⁵⁶ Fin 24 2019 <https://www.fin24.com/Money/Tax/sa-expat-tax-law-how-to-avoid-sars-clamp-down-on-expat-income-20190120>.

¹⁵⁷ Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.

to bear the additional tax costs.¹⁵⁸ The reason for this is that the employee might have accepted the employment contract on the premise that s/he would receive a set amount of take-home pay.¹⁵⁹ If the employee is one of the company's best assets, the employer might want to reimburse the employee's additional tax payments to retain the employee.¹⁶⁰ If the employer does not recompense the employee for the additional taxes, the employee might decide that s/he no longer wants the job, as the take-home pay is not enough. Therefore, if employers wish to retain their best employees they might need to start planning for the possible extra costs. These extra tax costs could be effectively managed via expatriate planning. The employer could for example consult with his or her employees to determine their flexibility and educate them about how the amendment will impact on them.¹⁶¹

Whether or not the employer would actually be required to recompense the employee for the additional taxes would depend on the wording of the employment contract.

3.4.1 Employment contract

Even though the law of taxation is the focus of this thesis, it may be helpful briefly to consider certain aspects of the law of contracts. The *locatio conductio operarum*¹⁶² will commence when both parties to the contract have agreed to the essential terms.¹⁶³ Whether or not the agreement gives rise to a binding contract is determined by the principles of the law of contract.¹⁶⁴ These principles include: there should be consensus between the parties; the parties should have the capacity to act; the contractual rights and duties should be possible to perform; the rights created should be permitted by law; and all formalities should be adhered to.¹⁶⁵ After the parties to the contract have agreed on the essential terms of the contract,

¹⁵⁸ Du Toit 2019 *HR Future* 35.

¹⁵⁹ Du Toit 2019 *HR Future* 35.

¹⁶⁰ Du Toit 2019 *HR Future* 35.

¹⁶¹ Du Toit 2019 *HR Future* 35.

¹⁶² Contract of service.

¹⁶³ Grogan *Workplace Law* 29.

¹⁶⁴ Grogan *Workplace Law* 29.

¹⁶⁵ Grogan *Workplace Law* 30; Hutchison *et al The Law of Contract in South Africa* 6.

neither party may unilaterally vary them.¹⁶⁶ If an employment contract stipulates what the employee's take-home pay will be, the employee may not be happy with the extra taxes that the amendment to the *ITA* will cause. The employment contract is therefore important in determining what the agreement between the employer and employee is. The employment contract links with the discussion in paragraph 3.4 above, as the employment contract will determine if the employer will have to recompense the employee for the extra taxes. If the employment contract was concluded before the amendment to the *ITA* commences, the chances are greater that the employer will have to bear the extra tax costs, as the employee's take-home pay would have already been determined before the amendment to the *ITA* commences, resulting in the employer possibly having to pay the extra taxes. On the other hand, if the employment contract was concluded after the amendment to the *ITA*, the employer may provide for the extra taxes or put in a provision in the employment contract that s/he will not recompense the employee for the extra taxes. In *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service*¹⁶⁷ the employment agreement between Bavarian Motor Works South Africa¹⁶⁸ and its employees working overseas stipulated that tax equalisation would be used. This means that an expatriate employee would not have to pay more tax than required in his or her home country.¹⁶⁹ In other words, the employee's take-home pay would remain the same as it would have been if s/he were to be working in South Africa.¹⁷⁰ The *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* case is an example of an employment contract making provisions for any extra tax costs.

¹⁶⁶ Grogan *Workplace Law* 40.

¹⁶⁷ *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JOL 45649 (SCA) para 10.

¹⁶⁸ Bavarian Motor Works South Africa (hereinafter referred to as BMW SA)

¹⁶⁹ *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JOL 45649 (SCA) para 10.

¹⁷⁰ *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JOL 45649 (SCA) para 10.

3.5 Conclusion

It is clear from the above that South Africans have many reasons for leaving the country, but most of them are linked to employment. Ultimately globalisation is what makes it so easy for South African expatriates to leave. However, once they leave there will be different implications for them. The most obvious implication for expatriates is that they will have to pay tax on foreign remuneration earned which was previously exempted.¹⁷¹ This new type of tax payable by South African expatriates might cause a heavy financial burden on them, depending on the foreign country's tax system and whether or not that country itself has high tax brackets. The implications this amendment will have for South African expatriates are not only financial in nature. They also include having to engage in more compliance processes and having to produce more documentation to prove the exemption, as well as having to respond appropriately to the duty to declare all foreign income earned.¹⁷² The amendment of the *ITA* will also have a positive consequence for South African expatriates, as it will ensure equity between the public and private sector.¹⁷³ South African expatriate employees may, however, not be the only people affected by the amendment to the *ITA*. Employers may have to recompense their expatriate employees for the additional taxes, depending on how and when the employment contract was concluded. All things considered, financial emigration will continue to be attractive to those expatriates who would like to avoid paying foreign income tax to South Africa.

The next chapter will explain financial emigration in more detail, and will consider any other ways to legally avoid the outcomes of the amendment of the *ITA*.

¹⁷¹ PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

¹⁷² PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

¹⁷³ GoLegal 2019 <https://www.golegal.co.za/exemption-foreign-income-tax/>.

Chapter 5

4 Legal options at the disposal of expatriates to avoid the consequences brought about by section 10(1)(o)(ii) of the *ITA*

4.1 Introduction

From the above it is clear that the amendment of section 10(1)(o)(ii) of the *ITA* will place a different financial burden on different expatriates, depending on the particular countries they live in, and other factors. Expatriates living in countries with a high cost of living might not be able to afford these costs if they have to pay tax to South Africa. The question that may arise from this is whether there is any way to avoid having to pay tax on their foreign income to South Africa. According to some tax practitioners and financial advisors, the only way to legally avoid the consequences of the amendment of section 10(1)(o)(ii) of the *ITA* is to financially emigrate.¹⁷⁴ However, *DTAs* will also prevent a South African expatriate from having to pay tax on foreign employment income. This chapter will explain what financial emigration is, how it can be done, and the impact it will have on individuals as well as on offshore trusts. Furthermore, the chapter will explain what a *DTA* is, how it arises, what it entails and how it will allow expatriates to avoid paying tax on foreign employment income in South Africa.

4.2 Financial emigration

4.2.1 What is financial emigration?

Financial emigration can be defined as a formal emigration process done through the South Africa Reserve Bank¹⁷⁵ and the SARS to change one's status from a resident of the country to a non-resident, for tax purposes.¹⁷⁶ This process ensures that a person meets all of the requirements under the *ITA* to ensure that the person

¹⁷⁴ BizNews 2019 <https://www.biznews.com/global-citizen/2019/03/12/avoiding-expat-tax-financial-emigration>.

¹⁷⁵ Hereinafter referred to as SARB.

¹⁷⁶ Hugo 2019 <https://www.businesslive.co.za/bt/money/2019-04-07-unpacking-the-complex-and-costly-financial-emigration-process/>.

is a non-resident in accordance with South Africa's tax residency tests.¹⁷⁷ These tests entail being ordinarily resident in South Africa or being a resident in terms of the physical present test. They are discussed in paragraph 2.1 above. When a person emigrates financially this does not affect his or her South African citizenship or the use of his or her South African passport.¹⁷⁸ Financial emigration must be distinguished from informal emigration. Informal emigration is the process of moving to another country without exporting your financial property from your home country.¹⁷⁹ Therefore financial emigration should be used if a person is planning on leaving the country permanently, and informal emigration should be used if a person is planning on returning to the country again.¹⁸⁰ In order to financially emigrate, a certain process must be followed. This process is discussed below.

4.2.2 How to financially emigrate

The starting point in financial emigration would be to contact an Authorised Financial Dealer, which is usually a bank, and which will deal with the SARB on the taxpayer's behalf.¹⁸¹ The bank as the appointed Authorised Dealer will provide the taxpayer with various services. The next step is for the taxpayer to complete an MP336 form, which the Authorised Dealer will attest. This form will register the taxpayer's formal emigration with the SARB.¹⁸² S/he will then need to apply for an emigration tax clearance certificate through the SARS.¹⁸³ His or her Authorised Financial Dealer will finalise the application and forward all necessary documents to the SARB.¹⁸⁴ Once the SARB has approved the application, the Authorised Financial Dealer will forward a confirmation letter to the taxpayer.¹⁸⁵ After receiving a confirmation letter the

¹⁷⁷ BusinessTech 2019 <https://businesstech.co.za/news/finance/321847/massive-jump-in-the-number-of-south-africans-applying-for-financial-emigration/>.

¹⁷⁸ Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.

¹⁷⁹ Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.

¹⁸⁰ Breytenbach and Van Zyl 2017 *Personal Finance Newsletter* 13.

¹⁸¹ Jones 2018 *Personal Finance Newsletter* 6.

¹⁸² Jones 2018 *Personal Finance Newsletter* 6.

¹⁸³ BizNews 2019 <https://www.biznews.com/global-citizen/2019/03/12/avoiding-expat-tax-financial-emigration>.

¹⁸⁴ Jones 2018 *Personal Finance Newsletter* 6.

¹⁸⁵ Jones 2018 *Personal Finance Newsletter* 6.

proceeds of the sale of any remaining assets in South Africa will then be deposited in an unblocked rand account from which it can be transferred overseas.¹⁸⁶ It must be noted that the above process has not been described in detail. Only a brief overview has been given. Going through this process will have certain implications for the individual, as will be seen in paragraph 4.2.3 below.

4.2.3 Implications for individuals of financially emigrating

It is clear from the above that financial emigration changes a person's from being resident to being non-resident for tax purposes, which allows him/her to legally avoid paying tax on foreign employment income. It is equally important to note some of the other implications of financially emigrating, however. When a South African ceases to be a tax resident of the country, this may result in a significant capital gains tax consequence.¹⁸⁷ Section 9H of the *ITA*¹⁸⁸ deals with the capital gains consequence of becoming a non-resident for tax purposes and states the following:

(2) Subject to subsection (4), where a person (other than a company) that is a resident ceases during any year of assessment of that person to be a resident—

(a) that person must be treated as having—

(i) disposed of each of that person's assets to a person that is a resident on the date immediately before the day on which that person so ceases to be a resident for an amount received or accrued equal to the market value of the asset on that date; and

(ii) reacquired each of those assets on the day on which that person so ceases to be a resident at an expenditure equal to the market value contemplated in subparagraph (i);

(b) that year of assessment must be deemed to have ended on the date immediately before the day on which that person so ceases to be a resident; and

(c) the next succeeding year of assessment of that person must be deemed to have commenced on the day on which that person so ceases to be a resident.

In other words, the capital gains tax consequence results in the deemed disposal of a person's worldwide assets at market value. As an illustration, assume that X is a

¹⁸⁶ BizNews 2019 <https://www.biznews.com/global-citizen/2019/03/12/avoiding-expat-tax-financial-emigration>.

¹⁸⁷ Ferrand 2016 *Without Prejudice* 30.

¹⁸⁸ Section 9H(2) of the *ITA* 58 of 1962.

resident of South Africa who received a job offer in the United States of America. X decides to accept the job offer but s/he is aware of the amendment to section 10(1)(o)(ii) of the *ITA* and wants to avoid paying taxes on foreign employment income. X therefore decides to financially emigrate to avoid this amendment to the *ITA*. X has various assets in South Africa, which include a residential home situated in Cape Town; a holiday home situated in Durban; and various movable assets. Because of section 9H(2) of the *ITA* once X becomes a non-resident of South Africa, s/he will be treated as if s/he disposed of all his/her assets to a resident of South Africa for an amount received or accrued equal to the market value of the asset on that date. X therefore will have to pay capital gains tax on all disposed assets. In spite of section 9H(2) of the *ITA*, immovable property situated in South Africa and equity instruments acquired through employment which have not vested for tax purposes are assets excluded from the deemed disposal.¹⁸⁹ The reason for this exclusion is because non-residents will still have to pay tax on income arising from a source within South Africa, for example rental income from immovable property in the country.¹⁹⁰ In addition, s/he will qualify for a foreign capital portion of R10 million per calendar year and a travel allowance of R1 million once s/he has financially emigrated.¹⁹¹ Furthermore, the following can be accessed and transferred out of South Africa: proceeds from your South African retirement annuities before the age of 55; future inheritance funds; passive income from rentals, dividends, directors' fees or a salary; and proceeds from a third-party life policy.¹⁹² It is important to note that if an expatriate returns to South Africa within five years after financially emigrating, SARS will deem it a failed emigration, making all taxes for that period outstanding.¹⁹³

¹⁸⁹ Ferrand 2016 *Without Prejudice* 30.

¹⁹⁰ Muller 2015 *Personal Finance Newsletter* 7.

¹⁹¹ LCR 2019 <https://www.lcrcapital.com/blog/formal-emigration-vs-relocation/>.

¹⁹² Sable International 2019 <https://www.thesouthafrican.com/south-africans-abroad/financial-emigration-and-the-expat-tax/>.

¹⁹³ BusinessTech 2019 <https://businesstech.co.za/news/business/306220/south-africas-expat-tax-is-not-as-simple-a-solution-as-it-seems/>.

Financial emigration will have implications not only for individuals but for offshore trusts as well.

4.2.3 Implications for trusts of financially emigrating

This section is best described through an example. Assume young adult siblings are South African tax payers who are solely tax resident in a foreign country as they do not have a permanent home in South Africa. They are, however, beneficiaries of a trust which owns South African assets and was founded by their grandparents. They are not the only beneficiaries as they have younger family members who are also beneficiaries of the trust. These other beneficiaries are still resident in South Africa. When a person decides to financially emigrate they often get advised to dissolve the trust.¹⁹⁴ However, in this example the South African expatriates are not the only beneficiaries to the trust as it is a family trust. This leaves the siblings with no control over dissolving the trust. If the trust is not dissolved the following tax issues need to be considered. In South Africa the trust will be the topic of both tax and exchange control scrutiny.¹⁹⁵ In regard to taxation the vesting of interest income and capital may result in added and higher tax rates.¹⁹⁶ Rental income that vests in the South African expatriates could be taxed by both South Africa and the foreign country. The former is taxed based on source rules and the latter as income tax.¹⁹⁷ The siblings will therefore be taxed twice on the same amount. It can be seen that financial emigration may have a negative impact on trusts.

However, financial emigration is not the only option available to South African expatriates in order to avoid the amendment of section 10(1)(o)(ii) of the *ITA*. DTAs are another option and will be discussed below.

¹⁹⁴ Van Zyl 2019 *Tax Talk* 37.

¹⁹⁵ Van Zyl 2019 *Tax Talk* 37.

¹⁹⁶ Van Zyl 2019 *Tax Talk* 37.

¹⁹⁷ Van Zyl 2019 *Tax Talk* 37.

4.3 DTAs

A *DTA*¹⁹⁸ is an agreement between two countries which reduces the tax liability of a person who is a resident of one country but has citizenship of another country.¹⁹⁹ The aim of a *DTA* is to prevent a taxpayer from paying tax to both countries.²⁰⁰ *DTAs* also include provisions which enable the two countries who entered into the agreement to exchange information and assist each other in collecting taxes.²⁰¹ Double taxation often arises as most countries around the world apply a dualistic approach to taxation, taxing the worldwide income of residents and the domestic income of non-residents.²⁰² This dualistic approach leads to a conflict called international judicial double taxation.²⁰³ This means that the same income of the same taxpayer is taxed in the source country as well as in the country of residence. The *ITA* makes provision for the National Executive to enter into a *DTA* with the government of another country.²⁰⁴ The *ITA*²⁰⁵ states the following on *DTAs*:

The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.

This section makes it clear that only the National Executive may take the step to enter into a *DTA* with another country. It also makes it clear that a *DTA* will result in South Africa and the contracting country having to help each other in the collection and administration of taxes. In the case of the *Commissioner for the South African Revenue Service v Van Kets*²⁰⁶ the SARS was requested by the Australian Tax Office to furnish information on a person suspected of evading his Australian

¹⁹⁸ Double Tax Agreement.

¹⁹⁹ Your Dictionary 2010 <https://www.yourdictionary.com/double-taxation-agreement>.

²⁰⁰ Your Dictionary 2010 <https://www.yourdictionary.com/double-taxation-agreement>.

²⁰¹ Stiglingh *et al Silke: South African Income Tax* 787.

²⁰² Mosupa 2003 *Juta's Business Law* 178.

²⁰³ Mosupa 2003 *Juta's Business Law* 178.

²⁰⁴ Stiglingh *et al Silke: South African Income Tax* 787.

²⁰⁵ Section 108(1) of the *ITA* 58 of 1962.

²⁰⁶ *Commissioner for the South African Revenue Service v Van Kets* 2012 2 All SA 413 (WCC) para 2.

tax obligation. The request was made under the *DTA* between South Africa and Australia. In this case the court held that *DTAs* become part of domestic income tax laws and that the purpose of the exchange of information clause in the *DTA* is to ensure that residents do not escape tax in the country in which they reside.²⁰⁷ The above discussion briefly describes what a *DTA* is and how it works. It is furthermore, important to note that if a South African expatriate becomes a resident in another country which has a *DTA* with South Africa, the other country will assume the taxing rights.²⁰⁸ Section 1 of the *ITA* states that the term resident does not include:

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

Therefore, South African expatriates can avoid the amendment of section 10(1)(o)(ii) of the *ITA* by becoming residents of a country that has a *DTA* with South Africa. However, this might not always be possible as one cannot always choose where one would like to work. One might get a job opportunity in a country with no *DTA* with South Africa.

4.4 Conclusion

It is clear from the above that the only two ways that an expatriate is able to avoid the amendment of the *ITA* are either to financially emigrate or to move to a country with a *DTA* with South Africa. Financial emigration is the formal process of breaking tax ties with South Africa.²⁰⁹ There is, however, a process to follow in order to financially emigrate, which includes appointing an Authorised Financial Dealer to deal with the SARB on your behalf.²¹⁰ After receiving a confirmation letter from the Authorised Financial Dealer, the taxpayer can transfer his/her funds overseas.²¹¹

²⁰⁷ *Commissioner for the South African Revenue Service v Van Kets* 2012 2 All SA 413 (WCC) para 28.

²⁰⁸ Experts for Expats 2019 <https://www.expertsforexpats.com/expat-tax/double-tax-treaties/>.

²⁰⁹ Hugo 2019 <https://www.businesslive.co.za/bt/money/2019-04-07-unpacking-the-complex-and-costly-financial-emigration-process/>.

²¹⁰ Jones 2018 *Personal Finance Newsletter* 6.

²¹¹ BizNews 2019 <https://www.biznews.com/global-citizen/2019/03/12/avoiding-expat-tax-financial-emigration>.

Engaging in this process and going ahead with financially emigrating will result in extra costs to the expatriate, who will have to pay a capital gains exit charge in order to cut tax ties with South Africa.²¹² S/he may, however, transfer assets out of South Africa, which would not have been possible without financially emigrating. These assets include retirement annuities; future inheritance funds; passive income from rentals, dividends, directors' fees or salaries; and proceeds from a third-party life policy.²¹³ Financially emigrating will also have an implication for trusts. This implication is a negative one, however, as it could result in double taxation on a South African expatriate who is a beneficiary of the trust on vested income.²¹⁴ Luckily *DTAs* are also an option for South African expatriates. A *DTA* has been described as an agreement between two countries which reduces the tax liability of a person who is a resident of one country but has citizenship in another country.²¹⁵ *DTAs* might help save on tax costs, but they might not always be an option, as the taxpayer might receive a job opportunity from a country without a *DTA* with South Africa.

South Africa is the only country that requires an expatriate to financially emigrate in order to become a non-resident for tax purposes and to avoid paying tax on foreign employment income. It is therefore important to compare the taxation of foreign employment income in South Africa with that of other countries such as Canada and India. This will be done in the chapter 5 below.

²¹² Ferrand 2016 *Without Prejudice* 30.

²¹³ Sable International 2019 <https://www.thesouthafrican.com/south-africans-abroad/financial-emigration-and-the-expat-tax/>.

²¹⁴ Van Zyl 2019 Tax Talk 37.

²¹⁵ Your Dictionary 2010 <https://www.yourdictionary.com/double-taxation-agreement>.

Chapter 5

5 A comparison of South Africa, Canada and India

5.1 Introduction

Taxing South African expatriates is a brand new concept for South Africa. It is therefore important to look into other jurisdictions and compare how South Africa is proposing to tax South African expatriates with how other countries already tax their expatriates. Two countries will be compared with South Africa, namely Canada and India. Both of these two countries already tax expatriates on foreign employment income. However, they tax expatriates in a manner different from that in which South Africa is proposing to tax expatriates. Each of the three countries will be discussed independently, where after a comparison will be drawn.

5.2 South Africa

The way South African expatriates will be taxed from March 2020 will not be discussed in detail as chapter 2 above has already dealt with this in detail. Some points are worth mentioning again, however. From March 2020 South African tax residents working abroad will have to pay up to 45% of their foreign employment income to South Africa if it exceeds R1 250 000.²¹⁶ All of the requirements²¹⁷ that need to be met in order to qualify for the foreign earned income exemption still apply, but the exemption is no longer unlimited. It is now limited to R1 250 000. As tax experts are of the opinion that financial emigration would be the only way to avoid having to pay tax on foreign remuneration,²¹⁸ it seems that permanently emigrating and becoming a resident of another country simply will not be enough. Therefore, non-residents of South Africa will also be taxed on their foreign employment income unless they become non-resident for tax purposes by financially

²¹⁶ Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

²¹⁷ See paragraph 2.3 above.

²¹⁸ BizNews 2019 <https://www.biznews.com/global-citizen/2019/03/12/avoiding-expat-tax-financial-emigration>.

emigrating.²¹⁹ However, when the South African expatriate financially emigrates a capital gains exit charge will become payable.²²⁰ As stated before, Canada already taxes its expatriates. The paragraph below will elaborate on this.

5.3 Canada

Canada follows a residence-based tax system. Therefore, residents of Canada have to pay tax on their worldwide income to Canada.²²¹ A person's residential ties to Canada will determine his or her residential status, which could be one of four different types, namely factual residents, deemed residents, non-residents, or deemed non-residents.²²² The differences between these types of residents are important as it will determine whether a person is taxed on foreign employment income or not.

A person is seen as a factual resident if s/he is living or travelling outside Canada but still keeps significant ties with the country.²²³ When a person is seen as a factual resident of Canada his or her income is taxed as if he or she never left the country.²²⁴ Therefore, a factual resident will be taxed on foreign employment income. However, the person will be able to claim a foreign tax credit on his or her Canadian income tax return if s/he paid tax on income to a foreign country on income from that country.²²⁵ The foreign tax credit could possibly reduce the federal and provincial tax that an expatriate would have to pay on foreign employment income.²²⁶ A person can claim a foreign tax credit on either the foreign income tax he or she paid or on

²¹⁹ Visser 2019 <https://www.fin24.com/PartnerContent/everything-south-africans-need-to-know-about-expat-tax-20190722>.

²²⁰ Section 9H of the *ITA* 58 of 1962.

²²¹ Gollom 2012 <https://www.cbc.ca/news/business/taxes/6-must-know-tax-facts-for-canadians-earning-abroad-1.1167892>; Gelardi 2009 *JLTR* 77.

²²² Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²²³ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²²⁴ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/factual-residents-temporarily-outside-canada.html>.

²²⁵ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/factual-residents-temporarily-outside-canada.html>.

²²⁶ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/factual-residents-temporarily-outside-canada.html>.

the tax due to Canada on his or her net income from that country, whichever is the lowest.²²⁷

A person is seen as a deemed resident if he or she finds himself or herself in one of the following situations: Firstly, the person lived outside Canada during the tax year and is not considered to be a factual resident because of having no significant ties to the country.²²⁸ In addition, the person is a government employee, a member of the Canadian Forces including their overseas school staff, or working under a Global Affairs Canada assistance programme.²²⁹ This could also be applicable to the family members of a person who is in this situation. Secondly, if a person temporarily lived in Canada for 183 days or more in the current tax year, does not have significant ties with the country, and is not considered a resident of another country due to a tax treaty.²³⁰ The 183-day rule includes each day or part of a day that a person attended a Canadian university or college, the days worked in Canada and days spent on vacation in Canada.²³¹ Deemed residents have the obligation to report world income and will therefore be taxed on foreign employment income.

A person will be seen as a non-resident of Canada if s/he normally lives in another country and is not considered to be a resident of Canada.²³² Furthermore, a person will be seen as a non-resident if s/he does not have significant residential ties to Canada and lived outside the country during the tax year or stayed in Canada for fewer than 183 days.²³³ When a person is seen as a non-resident of Canada s/he

²²⁷ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/factual-residents-temporarily-outside-canada.html>.

²²⁸ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/deemed-residents.html>.

²²⁹ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/deemed-residents.html>.

²³⁰ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/deemed-residents.html>.

²³¹ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/deemed-residents.html>.

²³² Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²³³ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

will be required to pay tax only on certain income earned in Canada by way of employment, through a business carried on in Canada, and gains on the disposal of certain property situated in the country.²³⁴ In addition, Canadian law imposes an exit tax on taxpayers who cease to be residents of the country.²³⁵ Whether a Canadian has given up his or her residency in the country is a matter of fact.²³⁶ The following factors are taken into consideration when determining if a Canadian has given up his or her residency: whether or not the taxpayer's spouse and dependents also leave the country; whether or not the taxpayer has disposed of his or her home in Canada and established a permanent home in a different country; and whether or not the taxpayer has sold his or her property, given up social ties in Canada, and obtained them in the foreign country.²³⁷

A person will be seen as a deemed non-resident if he or she is a factual or deemed resident of Canada and he or she is considered to be a resident of another country that has a tax treaty with Canada.²³⁸ Deemed non-residents follow the same rules as non-residents and therefore only need to declare Canadian sourced income.²³⁹ For that reason, non-residents and deemed non-residents will not be taxed on foreign employment income. India is the next country to be discussed.

5.4 India

India also follows a residence-based system of taxation. This can be seen in section 5(1) of the Indian *Income Tax Act*,²⁴⁰ which states that:

Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived.

²³⁴ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>; Gelardi 2009 *JLTR* 78-79.

²³⁵ Gelardi 2009 *JLTR* 78.

²³⁶ Gelardi 2009 *JLTR* 79.

²³⁷ Gelardi 2009 *JLTR* 79.

²³⁸ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²³⁹ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²⁴⁰ Section 5(1) of the *Indian Income Tax Act*, 1961.

Furthermore, section 5(1)(c) of the Indian *Income Tax Act*²⁴¹ states that a person will be taxed on income accrued to him or her outside India, provided that if the person is not ordinarily resident in the country, he or she will not pay tax on such income. A person will be considered a resident of India if s/he is present in the country for 182 days or more in the fiscal year, or 60 days or more in a fiscal year and 365 days or more during the previous four fiscal years.²⁴² The 60-day test is extended to 182 days for resident Indians in special circumstances.²⁴³ A resident can be further classified into two types of residents, namely a resident and not an ordinarily resident²⁴⁴ and a resident and ordinarily a resident.²⁴⁵ A resident will be seen as a RNOR if he or she satisfies either of the following conditions: The person has been a non-resident in India for at least 9 of the previous 10 fiscal years; or the person has been in India for 729 days or fewer during the previous 7 fiscal years.²⁴⁶ Residents who do not satisfy either of these conditions will be seen as ROR's. Residents and ROR's are taxed on their worldwide income in India, whereas non-residents and RNOR's are taxed only on India-sourced income.²⁴⁷ Therefore, an Indian expatriate will be taxed on foreign-earned income only if s/he is ordinarily resident in the country. However, section 90 of the *Indian Income Tax Act* provides relief for expatriates from double taxation.²⁴⁸ Section 90 of the *Indian Tax Act*²⁴⁹ states that:

The Central Government may enter into an agreement with the Government of any country outside India-

(a) for the granting of relief in respect of income on which have been paid both income- tax under this Act and income- tax in that country, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

²⁴¹ Section 5(1)(c) of the *Indian Income Tax Act*, 1961.

²⁴² Section 6(1) of the *Indian Income Tax Act*, 1961; Vispi 2004 *International Tax Review*.

²⁴³ Vispi 2004 *International Tax Review*.

²⁴⁴ Resident and not ordinarily resident, hereinafter referred to as RNOR.

²⁴⁵ Resident and ordinarily resident, hereinafter referred to as ROR.

²⁴⁶ Ernst & Young Global Limited 2019 <https://www.ey.com/in/en/services/tax/ey-working-in-india-residency-in-india-and-tax-incidence>; Vispi 2004 *International Tax Review*.

²⁴⁷ KPMG 2019 <https://home.kpmg/xx/en/home/insights/2011/12/india-income-tax.html>.

²⁴⁸ Vispi 2004 *International Tax Review*.

²⁴⁹ Section 90(1) of the *Indian Income Tax Act*, 1961.

(c) for exchange of information for the prevention of evasion or avoidance of income- tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income- tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

Therefore, the provisions of a tax treaty will override the provisions of the *Indian Tax Act*, which will prevent Indian expatriates from being taxed more than once on income received. In paragraph 5.5 below these three countries will be compared with one another.

5.5 Comparison among countries

It is clear from the above that all three countries follow a residence-based system of taxation. Therefore, whether or not expatriates are taxed on foreign employment income depends on what type of resident he or she is. South Africa has only two types of residents, namely residents or non-residents, whereas Canada and India have various different types of residents. In regard to the taxation of foreign employment income, in South Africa you will be taxed on this income regardless of whether you are a resident or a non-resident of the country unless you financially emigrate. In India and Canada, however, non-residents will not be taxed on foreign employment income. Foreign employment income will be taxed only if the expatriate of one of the two countries has significant ties to the particular country. In South Africa the only way that a non-resident will be liable for tax on foreign employment income is if he or she financially emigrates. This will result in a capital gains exit charge, similar to Canada's exit tax when a resident gives up Canadian residency. In Canada and India, not having ties with the country and being physically absent from the country for a certain period will be sufficient to not be liable for tax on foreign employment income. Non-residents of each country do, however, have to pay income tax on any income accrued from a source within the respective country. South Africa will tax foreign-earned income only if it exceeds R1 250 000. In Canada and India, you are taxed on foreign employment income regardless of how much income you earn. In Canada, however, you can claim a foreign tax credit to reduce the amount of tax payable to the country on foreign-earned income. The only relief

India has become operable if there is a *DTA* between India and the country the income was received from. *DTAs* are also applicable to South Africa and Canada, which will relieve the tax burden on foreign employment income.

In my opinion Canada has the best system of taxing expatriates on their foreign employment income because if you still have ties to the country you will pay tax on foreign-earned income and if you do not have ties to the country you do not. If you receive benefits from the country, you will pay tax to help to contribute to the benefit you receive, which is fair. Even though there is no limit to when you start paying tax on foreign-earned income, you can claim back foreign tax credits, which helps relieve the financial burden.

5.6 Conclusion

The paragraphs above clearly set out the position regarding the taxation of foreign employment income in South Africa, Canada and India. All three of these countries use a residence-based form of taxation. Each country has its own rules regarding when a person will be seen as a resident or a non-resident. Residency is the most important factor when it comes to determining if an expatriate will pay tax on foreign employment income. Canada and India, however, take their residency further than South Africa, as their categories of taxpayers are not limited to residents and non-residents only. Canada has four different types of residents, namely factual residents, deemed residents, non-residents, or deemed non-residents.²⁵⁰ Only factual residents and deemed residents will be taxed on their foreign employment income, whereas non-residents and deemed non-residents will be taxed only on income from a source within Canada.²⁵¹ India has residents and non-residents, and residents are further classified into ROR's and RNOR's. RNOR's and non-residents do not pay tax on foreign employment income, whereas residents and ROR's do pay tax on this income.²⁵² The former type of residents will, however, have to pay tax

²⁵⁰ Government of Canada 2018 <https://travel.gc.ca/travelling/living-abroad/taxation>.

²⁵¹ Government of Canada 2019 <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/factual-residents-temporarily-outside-canada.html>.

²⁵² KPMG 2019 <https://home.kpmg/xx/en/home/insights/2011/12/india-income-tax.html>.

on income received from a source in India. In South Africa it will not matter whether or not the person is a resident or a non-resident of the country, s/he will have to pay tax on foreign employment remuneration regardless. However, financial emigration can help avoid paying this type of tax. In India and Canada financial emigration is not necessary, as simply not being present for a certain period of time will be sufficient to qualify the person as a non-resident who does not have to pay tax on foreign employment income.

Chapter 6

6 Conclusion and recommendations

6.1 Conclusion

This research has aimed to identify what the tax implications will be for expatriates following the amendment of section 10(1)(o)(ii) of the *ITA*. The research was necessary since the levying of tax on foreign-earned income is a new concept for South Africa. The biggest limitation experienced in conducting this research was that the sources were limited. As taxation on foreign employment income has not yet come into force, most of the sources used in this research are internet sources. Despite this limitation it was still possible to find sufficient information for each chapter. Each of the above chapters was important to addressing the question posed, which is what the tax implications for expatriates are, following the amendment of section 10(1)(o)(ii) of the *ITA*.

It can be seen in chapter 1 that in South Africa income tax is levied at a progressive rate on any income earned.²⁵³ South Africa changed to a residence-based system after following a sourced-based system prior to 2001.²⁵⁴ Therefore, residency is a very important concept to the South African tax law. However, it seems that South Africa is not following the usual rules regarding residency in regard to the taxation of foreign employment income. The National Treasury intended to repeal section 10(1)(o)(ii) of the *ITA* as a whole.²⁵⁵ This section exempted South African expatriates from paying income tax on foreign employment income.²⁵⁶ However, the National

²⁵³ Coetzee *et al* *A Student Approach to Income Tax Natural Persons* 3; Pollak 1961 BTR 313; SARS 2019 <http://www.sars.gov.za/TaxRates/IncomeTax/Pages/Rates%20of%20Tax%20for%20Individuals.aspx>.

²⁵⁴ South African Revenue Service 2018 <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-04%20-%20Resident%20definition%20natural%20person%20physical%20presence.pdf>.

²⁵⁵ Mzizi and Botha 2018 <https://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>.

²⁵⁶ Section 10(1)(o)(ii) of the *ITA*.

Treasury decided only to change the wording of this section.²⁵⁷ The new wording exempts South African expatriates from paying tax on foreign employment income to the extent that the remuneration does not exceed R1 250 000 in a year of assessment.²⁵⁸ R1 250 000 may seem reasonable but one needs to remember that allowances and fringe benefits are also included in employment income, and together they easily make up the R1 250 000.²⁵⁹

Chapter 2 dealt with the current position regarding the taxation of foreign-earned income and established what the position will be after March 2020. A person will qualify for the section 10(1)(o)(ii) of the *ITA* exemption only if he or she is ordinarily resident in the country, as the section is available to South African expatriates only.²⁶⁰ Five requirements need to be met in order to qualify for this exemption. Firstly, there needs to be an employment relationship.²⁶¹ Secondly the remuneration received needs to fall within the ambit of the *ITA*, as not all remuneration qualifies for this exemption.²⁶² Thirdly, services should have been rendered, so any remuneration received other than for services rendered does not fall within the ambit of the exemption. Fourthly, services should have been rendered outside of the republic.²⁶³ A person is considered to be outside the Republic when s/he is in transit between two places outside the Republic.²⁶⁴ Lastly, the person should have been outside the country for a period exceeding 183 full days in aggregate and services should have been rendered for a continuous period exceeding 60 full days during any period of 12 months.²⁶⁵ In the event that remuneration is obtained from the holding of a public office or derived from services rendered or work or labour

²⁵⁷ Mzizi and Botha 2018 <https://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>.

²⁵⁸ Section 16(1)(g) of the *Taxation Laws Amendment Act* 17 of 2017.

²⁵⁹ BusinessTech 2019 <https://businesstech.co.za/news/wealth/301694/south-africas-big-expat-tax-here-are-your-options/>.

²⁶⁰ South African Revenue Service *Interpretation note* 3 1.

²⁶¹ South African Revenue Service *Interpretation note* 16 3.

²⁶² Section 10(1)(o)(ii) of the *ITA* 58 of 1962; Stiglingh *et al Silke: South African Income Tax* 96.

²⁶³ South African Revenue Service *Interpretation note* 16 3.

²⁶⁴ South African Revenue Service *Interpretation note* 16 6.

²⁶⁵ Section 10(1)(o)(ii)(aa) to (bb) of the *ITA* 58 of 1962.

performed for or on behalf of an employer, these employees are excluded from the exemption.²⁶⁶

In March 2020 all of these requirements will still be applicable, but the amount of remuneration exempted will be limited to R1 250 000. South African expatriates who earn more than R1 250 000 will be liable to pay up to 45% tax to South Africa on their foreign employment income.²⁶⁷ There are three practical aspects that the South African Government needs to consider when implementing this new amendment. Firstly, it will be difficult for the SARS to determine if a South African expatriate's foreign income exceeds R1 250 000 if the country he or she resides in does not form part of the CRS.²⁶⁸ Secondly, in order to convict a South African expatriate for a tax crime South Africa would need to get that person into the country. This will be possible only if South Africa has an extradition agreement with the country the expatriate resides in and if tax crime forms part of the agreement.²⁶⁹ Lastly, the SARS's current debt collection methods might not be sufficient due to a lack of jurisdiction and the person's not having any South African assets.

Chapter 3 is the most important chapter in this thesis. It answers the research question. Altogether there will be five implications for expatriates and one for employers following the amendment to the *ITA*. Firstly, South African expatriates will have a greater financial burden as they will have to pay tax on foreign-earned income to both the foreign country and to South Africa.²⁷⁰ Secondly, a bigger duty will be placed on South African expatriates to declare their foreign employment income to South Africa. Thirdly, more compliance and other documentation will be needed in order for a South African expatriate to prove that he or she qualifies for the section 10(1)(o)(ii) of the *ITA* exemption.²⁷¹ Fourthly, the amendment to the

²⁶⁶ Provisio B to section 10(1)(o)(ii) of the *ITA* 58 of 1962.

²⁶⁷ Financial Emigration 2019 <http://www.financialemigration.co.za/south-african-expats-abroad-understanding-the-tax-law/>.

²⁶⁸ Tax Consulting South Africa *Comprehensive Tax Compliance Solutions for South Africans Abroad* 3.

²⁶⁹ Section 3 of the *Extradition Act* 67 of 1962.

²⁷⁰ PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

²⁷¹ PWC *South African Nationals Working Abroad: Imminent Changes to the "Foreign Earned Income" Exemption* 1.

ITA will place public sector South African expatriates in a more fair position in relation to private sector South African expatriates.²⁷² Lastly, South African expatriates will need to financially emigrate if they would like to avoid paying tax to South Africa on foreign employment income, which will have more financial implications. Employers might also have an extra tax burden when section 10(1)(o)(ii) of the *ITA* is amended, depending on the wording of the employment contract.

Not all South African expatriates will have to financially emigrate. They will have to financially emigrate if they would like to avoid paying tax on foreign employment income, however. Chapter 4 dealt with the two ways in which an expatriate can avoid the consequences of section 10(1)(o)(ii) of the *ITA*. Financial emigration is the first option available to South African expatriates. This is the process of breaking tax ties with South Africa.²⁷³ Financial emigration involves a certain process and will have capital gains tax consequences.²⁷⁴ There are other positive consequences of financial emigration, however, such as being able to transfer assets out of South Africa, which would not have been possible without financially emigrating. Emigrating to a country that has a DTA with South Africa is the second option available to South African expatriates. DTAs reduce the tax liability for a person who is a resident in one country but has citizenship in another country.²⁷⁵

Chapter 5 compared the way South Africa is proposing to tax foreign employment income with how Canada and India currently taxes foreign employment income. All three countries follow a residence-based tax system. Therefore, non-residents who receive income from a source within each country will need to pay tax on that income. South Africa recognises only two categories of citizens for tax purposes - residents and non-residents, whereas Canada and India recognise more types of residents. In South Africa you will be taxed on foreign employment income regardless of whether or not you are a resident or a non-resident of the country

²⁷² GoLegal 2019 <https://www.golegal.co.za/exemption-foreign-income-tax/> accessed 9 July 2019.

²⁷³ Hugo 2019 <https://www.businesslive.co.za/bt/money/2019-04-07-unpacking-the-complex-and-costly-financial-emigration-process/>.

²⁷⁴ Ferrand 2016 *Without Prejudice* 30.

²⁷⁵ Your Dictionary 2010 <https://www.yourdictionary.com/double-taxation-agreement>.

unless you financially emigrate. In Canada and India, however, non-residents are not taxed on foreign employment income. You will be taxed on foreign employment income in Canada and India only if you have significant ties to the country. In South Africa you will need to financially emigrate and cut tax ties with the country in order to avoid paying tax on foreign employment income. In Canada and India, you will pay tax on foreign employment income on your full income. In South Africa the first R1 250 000 will be exempt from tax. You will, however, be able to claim a foreign tax credit on the tax you pay on foreign employment income in Canada.

Therefore, the answer to the question of what the tax implications for expatriates will be following the amendment of section 10(1)(o)(ii) of the *ITA* is that expatriates will need to pay tax of up to 45% on their foreign employment income to South Africa if their income exceeds R1 250 000 or a capital gains exit charge if they financially emigrate to avoid the first tax implication.

6.2 Recommendations

In the light of the findings of this research, three recommendations need to be made. Firstly, the R1 250 000 exemption is a generous amount, but the recommendation is that it should not be R1 250 000 that is exempted but 1 250 000 in whichever currency you are earning in the foreign country. The way section 10(1)(o)(ii) of the *ITA* will be changed is not fair to people who are earning currencies which have a higher value than the Rand. An example will clarify this statement. If a South African expatriate resides in the United States of America, he or she would need to pay tax to South Africa if he or she earns \$73 094 p.a.. On the other hand, if the South African expatriate resides in Zambia he or she would need to pay tax to South Africa if he or she earns ZK1 459 481. The amendment to the *ITA* therefore does not take the exchange rate into account, a fact which will lead to inequality. Only a rich South African expatriate living in Zambia will have to pay tax on foreign-earned income, whereas an average South African expatriate in the United States of America will have to pay tax on foreign employment income. The exchange rate therefore needs to be taken into account.

Secondly, the study would recommend that in order to avoid the implications of the amendment to the *ITA*, the normal rules of residency should be used. In Canada and India, a person will not have to pay tax on foreign employment income if he or she is seen as a non-resident. This will happen once the expatriate severs all ties with the country and spends a certain amount of time outside the country. In South Africa, however, an expatriate will need to first financially emigrate in order to be seen as a non-resident for tax purposes. This places an extra and unnecessary financial burden on the expatriate. Therefore, South Africa should also allow for South African expatriates to be fully exempt from tax on foreign-earned income if they become non-resident according to the normal rules of residency.

Lastly, as the biggest difficulty encountered in performing this study was in finding relevant sources, the study recommends that further research should be done on this topic. Once South African expatriates start paying tax on foreign employment income, it will be possible to determine the further implications for expatriates.

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