
SOUTH AFRICAN REVENUE SERVICE

**GUIDE ON THE
RESIDENCE BASIS OF
TAXATION FOR
INDIVIDUALS
2008/09**

Another helpful guide brought to you by the
South African Revenue Service



GUIDE ON THE RESIDENCE BASIS OF TAXATION FOR INDIVIDUALS

Foreword

This guide provides general guidelines dealing with –

- foreign income received by or accrued to an individual (natural person) who **is** a South African resident (resident);
- income received by or accrued to an individual, who **is not** a South African resident (non-resident), from a source within South Africa; and
- the treatment of capital gains in the hands of a resident or a non-resident.

It does not attempt to reflect on every scenario that could possibly exist, but does attempt to provide clarity on the majority of issues that are likely to arise in practice. Where this guide does not address a specific issue, it must be taken up with the local South African Revenue Service (SARS) branch office.

This guide is not meant to delve into the precise technical and legal detail that is often associated with taxation and should, therefore, not be used as a legal reference. It is not a binding general ruling issued in accordance with section 76P of the Income Tax Act, No. 58 of 1962. Should an advance tax ruling, that is, a binding general ruling, binding private ruling or binding class ruling be required, you may visit the SARS website for the application procedure.

Should you require additional information concerning any aspect of taxation you may –

- contact your local SARS branch;
- visit SARS website at **www.sars.gov.za**;
- contact your own tax advisors;
- if calling locally, contact the SARS National Call Centre on 0860 12 12 18; or
- if calling from abroad, contact the SARS National Call Centre on +27 11 602 2093.

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1. INTRODUCTION

In this guide, legislative references to sections, subsections and paragraphs are to sections, subsections and paragraphs of the Income Tax Act, No. 58 of 1962, (the Act).

Previously, the income tax system in the Republic of South Africa (South Africa) was generally source-based, and apart from a few exceptions, residency was not a criterion in determining taxable income. However, from the 1998 year of assessment (tax year), the worldwide income from investments of a natural person who is a resident became subject to normal tax. With effect from tax years commencing on or after 1 March 2001, South Africa moved from a source-based system of taxation to a residence basis of taxation in respect of which all income, subject to certain exclusions, is subject to normal tax. The effect is that all worldwide income of a natural person who is a resident is subject to normal tax.

2. RESIDENT

In principle, the first step in determining the normal tax liability of any natural person in South Africa is to establish whether or not that natural person is a “**resident**” as defined in section 1.

Two separate tests are applicable to determine whether or not a natural person is a resident, namely –

- the ordinarily resident test; and
- the physical presence test.

2.1 Ordinarily resident test

This concept means that a natural person is a resident if his or her **permanent home**, to which he or she will normally return, is in South Africa. A continuous physical presence is not a prerequisite to be ordinarily resident in South Africa.

The courts have held, in ascribing a meaning to the concept “ordinarily resident”, that it refers to, for example –

- living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person’s ordinary regular course of life to live in a particular place with a degree of permanence, he or she must be regarded as ordinarily resident;
- the place where his or her permanent place of abode is, where his or her belongings are stored, which he or she leaves for temporary absences and to which he or she regularly returns after these absences;
- a residence that is settled and certain and not temporary and casual; or
- where a person normally resides, apart from temporary or occasional absences.

A natural person, who becomes ordinarily resident in South Africa, will become a resident as from a specific date. It, therefore, follows that any income that is received by or accrued to that person from a source outside South Africa, before he or she becomes ordinarily resident in South Africa, will not be subject to tax in South Africa unless such person is regarded as a resident by virtue of the physical presence test (see 2.2).

Example 1 – Ordinarily resident test

X became ordinarily resident in South Africa on 1 October 2008. All worldwide income received by or accrued to X, on or after 1 October 2008 (excluding certain income that may be exempt) will be included in the taxable income of X for the tax years ending on 28 February 2009 and thereafter.

A natural person, who emigrates from South Africa to another country, will cease to be a resident as from the date that he or she emigrates.

Example 2 – Ordinarily resident test

B married a Zambian resident and emigrated from South Africa to Zambia on 29 October 2008. B has no business or financial connection in South Africa and does not intend to return to South Africa. In these circumstances B ceased being a resident on 29 October 2008.

For more information regarding the concept “ordinarily resident”, see Interpretation Note No. 3 “*Resident: Definition in relation to a natural person – ordinarily resident*” – 4 February 2002, which is available on the SARS website.

2.2 Physical presence test

This concept is time-based and is only applicable to a natural person who was not at any stage during the relevant tax year ordinarily resident in South Africa. This test is based on the **number of days** during which a natural person is physically present in South Africa. It is important to note that a day includes a part of a day. Thus both the day of arrival and departure are included in the count. This test is also known as the day test or time rule. A day is regarded to start at 00:00, therefore, a person who arrives in South Africa at 23:55 would be regarded to be present in South Africa for a full day. However, any day that a person is in transit through South Africa between two places outside South Africa and that person does not formally enter South Africa through a port of entry, or at any other place as may be permitted by the Director-General of the Department of Home Affairs or the Minister of Home Affairs, is excluded in the count.

The physical presence test must be performed annually in order to determine whether the natural person concerned is a resident for the tax year under consideration. The test consists of three requirements, that is, the natural person must be physically present in South Africa for a period or periods exceeding –

- i) 91 days in aggregate during the tax year under consideration;
- ii) 91 days in aggregate during each of the five tax years preceding the tax year under consideration; and

iii) 915 days in aggregate during the above five preceding tax years.

A natural person has to meet **all three requirements** before he or she will be regarded a resident (refer to the attached diagram in **Annexure A**). A tax year starts on the first day of March of one year and ends on the last day of February of the subsequent year.

In terms of the physical presence test, a natural person who is not ordinarily resident in South Africa only becomes a resident for income tax purposes as from the first day (beginning) of the sixth tax year if he or she is physically present in South Africa for the periods as set out above. The purpose of the presence is irrelevant. A day is therefore counted even if the presence is as a result of a holiday, visiting friends, funeral etc.

A natural person, who is a resident by virtue of the physical presence test, ceases to be a resident if he or she is physically outside South Africa for a continuous period of at least 330 full days. The continuous period begins the day after the day on which he or she physically left South Africa. The natural person ceases to be a resident as from the day immediately after the day on which he or she left South Africa for a continuous period of at least 330 full days.

Note: Any natural person who is deemed to be exclusively a resident of another country with which South Africa has entered into an agreement for the avoidance of double taxation is excluded from the definition of “**resident**”.

For more information regarding the physical presence test, see Interpretation Note No. 4 (Issue 3) “*Resident: Definition in relation to a natural person (physical presence test)*” – 8 February 2006, which is available on the SARS website.

3. TAXABLE INCOME

The term “**taxable income**” as defined in section 1 is used to describe the amount on which normal tax payable is calculated. The starting point in calculating taxable income is to determine the amount of gross income, which represents the total amount, in cash or otherwise (excluding receipts or accruals of a capital nature), received by or accrued to a person, from which the aggregate amount of certain exemptions are deducted to arrive at the amount of income. The aggregate amount of allowable deductions are deducted from the amount of income, and the amount of all taxable capital gains are added to the amount of income in order to arrive at the amount of taxable income. The amount of taxable income can differ materially from the total amount of receipts or accruals of income determined according to accounting principles. For example, certain income of a capital nature may be fully included for accounting purposes, while only a portion thereof may be included for income tax purposes.

4. FOREIGN INCOME RECEIVED BY OR ACCRUED TO A RESIDENT

4.1 Foreign interest

Foreign interest received by or accrued to a resident is subject to normal tax in South Africa.

4.2 Foreign dividends

Foreign dividends received by or accrued to a resident are generally subject to normal tax in South Africa. The following are some of the most important exemptions in respect of such foreign dividends received or accrued:

- Dividends which were declared by non-resident listed companies which are also listed on the JSE, provided that more than 10% of the total equity share capital in that listed company is at the time of the declaration of that foreign dividend held collectively by residents.
- Dividends declared by a foreign company where that person is a resident who owns at least 20% of the total equity share capital and voting rights in that company declaring the dividend.

The Act also makes provision for the exemption from normal tax of other foreign dividends received by or accrued to a resident, for example in specific circumstances where a South African connection is present or a controlled foreign company is involved.

4.3 Foreign dividends and foreign interest exemption

Foreign dividends and foreign interest received by or accrued to a resident are only exempt from tax up to an amount of R3 200. This exemption is applied in the following order:

- Foreign dividends
- Foreign interest.

Example 3 – Foreign dividend and foreign interest exemption

Facts:

X, is a resident under the age of 65 years and received foreign dividends of R800 and foreign interest of R2 500 during the 2009 tax year. The exemption is calculated as follows:

Result:

The foreign dividend income will be exempt from tax as it is less than the R3 200 exemption.

The foreign interest income will be exempt up to the amount of R2 400, that is, R3 200 less R800 exemption in respect of foreign interest. The balance of foreign dividends of R100, that is, R2 500 less R2 400 exemption, will be included in X's taxable income.

Note: Residents may claim a credit in respect of foreign taxes paid by them against their normal tax liability in South Africa in respect of the foreign dividends and/or interest subject to normal tax in South Africa.

4.4 Foreign rental income

All foreign rental income received by or accrued to a resident is subject to normal tax in South Africa. A description of the asset and physical address of the property must be furnished. Expenses such as bond interest, rates and taxes, insurance and repairs may be claimed as a deduction, subject to certain conditions.

4.5 Foreign royalties

Amounts received by or accrued to a resident, for the imparting of any scientific, technical or commercial knowledge, commonly known as “know-how” payments are subject to normal tax in South Africa. Furthermore, royalties and other “know-how” payments are deemed to be derived from a source within South Africa if it has been received by or accrued to a person by virtue of –

- the use, right of use or grant of permission to use in South Africa of –
 - any patent, design, trademark, copyright, model, pattern, plan, formula or process or any other property of a similar nature; or
 - motion picture film, or any film or video tape or disc or any sound recording or advertising matter; or
- the imparting of or undertaking to impart any scientific, technical, industrial or commercial knowledge or information for use in South Africa.

4.6 Collective investment schemes carried on outside South Africa

“**Collective investment schemes**” are defined as companies for income tax purposes in South Africa, and amounts distributed by these schemes to participatory holders are treated as foreign dividends in the hands of resident holders. These foreign dividends are subject to normal tax in South Africa, and the resident holders are entitled to claim withholding tax imposed in respect of the foreign dividend as a credit against their South African normal tax liability.

4.7 Foreign employment income

As a result of South Africa's residence basis of taxation, foreign employment income (from countries other than South Africa) received by or accrued to a resident is subject to normal tax in South Africa unless –

- an agreement for the avoidance of double taxation with the other country stipulates that only the other country has a right to tax the income; or
- the income is specifically exempt from normal tax in South Africa.

With regard to any form of remuneration (salary, commission, leave pay, bonus, taxable benefits, broad-based employee share plans, share options etc) received by or accrued to an employee during a tax year, for services rendered outside South Africa for or on behalf of any employer, that remuneration will be exempt from normal tax in South Africa, if that employee was outside South Africa –

- 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, and those services were rendered during that period or periods.

Note:

- (1) The remuneration, referred to above, which is received by or accrued to an employee during a tax year for services rendered by that employee in more than one tax year, will be taxed evenly over the period during which those services were rendered.
- (2) For the purposes of counting the days, a person will still be regarded as being outside South Africa where the person is in transit through South Africa between two places outside South Africa and he or she does not formally enter South Africa through a port of entry, or at any other place in the case of a person authorised by the Director-General of the Department of Home Affairs or the Minister of Home Affairs.
- (3) The exemption from normal tax will not apply to residents who are employed in the national or provincial spheres of government, any local authority or any public entity if 80% or more of the expenses of these entities are defrayed from funds voted by Parliament. (See Interpretation Note No. 16 *“Exemption from income tax: Foreign employment income”* – 27 March 2003, which is available on the SARS website.)
- (4) The remuneration of an officer or crew member of a ship is also exempt from normal tax if the requirements of section 10(1)(o) are met. This exemption applies only to remuneration. (See Interpretation Note No. 34 *“Exemption from income tax: Remuneration derived by a person as an officer or crew member of a ship”* – 12 January 2006, which is available on the SARS website.)
- (5) South African residents who are employed by foreign diplomatic or consular missions in South Africa (that is, locally-recruited employees) are not exempt from normal tax on their income received from that mission.

4.8 Foreign business income

A resident who derives income from any business or trading activities carried on outside South Africa will be subject to normal tax in South Africa. However, this may have the effect that income derived by a resident may be subject to tax in South Africa as well as in the country where the trading activities are carried out (the source country). This situation will normally be resolved through the application of an agreement for the avoidance of double taxation concluded between the two countries. Normally, profits will only be taxed in the country of residence unless the business is carried on in the other country through a permanent establishment in which case the other country may also tax the profits. The term **“permanent establishment”** is defined in the agreements and generally means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

4.9 Net income of controlled foreign companies

A controlled foreign company (CFC) is any foreign company where more than 50% of the total participation rights in that foreign company are held, or more than 50% of the voting rights in that foreign company are directly or indirectly exercisable, by one or more residents.

The term “**participation rights**” in relation to a company is defined in section 9D(1) as –

- “(a) the right to participate directly or indirectly in the share capital, share premium, current or accumulated profits or reserves of that company, whether or not of a capital nature; or
- (b) in the case where no person has any right in that company as contemplated in paragraph (a) or no such rights can be determined for any person, the right to exercise any voting rights in that company.”

The application of section 9D results in an amount equal to the net income of the CFC being imputed and taxed in the hands of South African residents except where a resident (together with any connected person) in aggregate holds less than 10% of the participation rights and may not exercise at least 10% of the voting rights in that company.

The ratio of the net income to be determined for any one resident is the proportion that the resident’s participation rights bears to all the participation rights in the company.

The term “**net income**” of a CFC in respect of a foreign tax year is defined in section 9D(2A) as an amount equal to the taxable income of the CFC determined in accordance with the provisions of the Act as if the CFC had been a taxpayer, and as if it had been a resident for purposes of the definition of “gross income”, and certain other sections and paragraphs of the Eighth Schedule to the Act.

Section 9D only targets certain types of income, namely –

- passive, investment type income which comprises –
 - dividends,
 - interest,
 - royalties,
 - rental income,
 - annuities,
 - insurance premiums, and
 - capital gains on assets from which the above income is or could be earned;
- income resulting from transactions with connected persons who are residents, which require adjustments for non arm’s length pricing;
- diversionary income of a CFC which is derived from –
 - the sale by a CFC of certain goods to a connected person who is a resident,
 - the sale by a CFC of certain goods where the CFC purchased those goods or intermediary inputs from connected persons who are residents,
 - the performance of certain services by a CFC to a connected person who is a resident,
 - the granting by that CFC of the use, right of use or permission to use an intangible asset to a connected person who is a resident; and
- any other income which is not attributable to a foreign business establishment.

In respect of these types of income, globally referred to as “tainted income” a calculation of taxable income must be performed.

The net income calculation is performed in the CFC's currency of financial reporting and the end-result must be translated to South African Rand by applying the average exchange rate for the tax year during which the net income is included in the resident's income.

In certain instances, the CFC rules do not apply and amounts need not be attributed to the resident holding the qualifying participation rights in the CFC concerned. To determine whether specific exclusions apply, a proper study of the section 9D containing these rules is required.

Subsection 9D(10) allows for a ruling system in terms of which the Commissioner of SARS (the Commissioner) can grant waivers for various requirements regarding foreign business establishments on a case-by-case basis.

Any ruling issued by the Commissioner under these circumstances will generally be subject to the same procedures, terms and conditions as a SARS binding private ruling (with appropriate modifications).

The waivers can be divided into the following categories:

- Business establishment waiver for related CFC group employees, equipment and facilities.
- Diversionary transaction waiver for centrally located operations.
- Financial services comparably-taxed waiver.

4.10 Income from a foreign trust

The income that is received by or accrued to the trust or the income so distributed by the trust, will be taxable in the hands of the beneficiary where a resident is a beneficiary in an offshore trust and –

- has a vested right in the income, or
- where the trustees have exercised their discretion to distribute income (including capital that arose from amounts that would have constituted income) to a beneficiary who has not a vested right.

4.11 Foreign pensions or foreign annuities

Pensions received by or accrued to a resident under the social security system of another country are exempt from normal tax in South Africa.

Any pension received by or accrued to any resident from a source outside South Africa, which is not deemed to be from a source in South Africa, in consideration of past employment outside South Africa, is exempt from normal tax in South Africa.

Annuities (other than pensions or annuities referred to above) such as from a trust, insurance company etc received by residents from abroad ,that is, from a source outside South Africa, are subject to normal tax in South Africa. (The taxability of the annuity may be affected by an agreement for the avoidance of double taxation.)

A portion of any pension (not a foreign pension) or annuity payable to any person for services rendered inside and outside of South Africa and at least two years out of the last 10 years of services (before the accrual of the pension) were rendered in South Africa, will be taxable in South Africa in the ratio which the number of years' service rendered in South Africa bears to the total period during which services were rendered. (The taxability of the pension may be affected by an agreement for the avoidance of double taxation.)

5. INCOME RECEIVED BY OR ACCRUED TO NON-RESIDENTS FROM A SOURCE WITHIN SOUTH AFRICA

A non-resident is only taxed on amounts received by or accrued to him or her from a source within South Africa. However, the non-resident's tax position may be affected by an agreement for the avoidance of double taxation entered into between the Government of South Africa and the Government of the foreign country in which he or she resides. In terms of that agreement the non-resident's remuneration earned in South Africa may not be subject to normal tax in South Africa where specific requirements are met.

5.1 Income from investments and businesses

Passive income (investment income) and/or business income from South Africa can be received by or accrued to a non-resident. First, it needs to be established whether the income is from a source within South Africa. The nature of the income will determine how the income will be treated for normal tax purposes.

5.2 Interest

Interest received by or accrued to a non-resident from a source within South Africa is exempt from normal tax in South Africa. However, this exemption is not applicable if the non-resident –

- was physically present in South Africa for a period exceeding 183 days in aggregate during the tax year; or
- at any time during the tax year carried on a business through a permanent establishment in South Africa.

5.3 Dividends

Dividends received by or accrued to a non-resident from a source within South Africa (resident companies) are exempt from normal tax in South Africa. Dividends from collective investment schemes are also exempt from normal tax in the circumstances described under **5.1**.

5.4 Rental income

The source of rental income is generally regarded to be where the property is used on a day-to-day basis. Rental income which arises in South Africa, received by or accrued to a non-resident will be subject to normal tax in South Africa. Expenses such as rates and taxes, bond interest, insurance and repairs may be claimed as deductions against such rental income, subject to certain conditions.

5.5 Royalties

In the case of a non-resident, “know-how” payments received by or accrued to him or her for the use, or right of use of intellectual property or the grant of the permission to use such property in South Africa, are subject to a final withholding tax of 12% (or a rate determined in the relevant agreement for the avoidance of double taxation) on the payments received or accrued. Such payments, which have been subject to the final withholding tax of 12%, are exempt from normal tax in South Africa.

5.6 Salary of non-residents temporarily working in South Africa

Salary income earned in South Africa by a non-resident will be subject to normal tax in South Africa, unless the agreement for the avoidance of double taxation entered into between the Government of South Africa and the Government of the foreign country in which he or she resides, stipulates otherwise.

Example 4 – Salary of non-residents temporarily working in South Africa

Facts:

Y, who is a Mexican resident (non-resident), was seconded to South Africa for a period of seven months by her Mexican employer.

Result:

The salary received by Y in South Africa during the seven-month period will be subject to normal tax in South Africa, as this is from a source in South Africa. There is no agreement for the avoidance of double taxation between Mexico and South Africa.

Y is not regarded as a resident of South Africa and her worldwide income (except her salary earned in South Africa) will, therefore, not be subject to normal tax in South Africa.

A non-resident working in South Africa for short periods is liable for normal tax in South Africa in respect of his or her income earned in South Africa. His or her tax position may be affected by an agreement for the avoidance of double taxation entered into between the Government of South Africa and the Government of the foreign country in which he or she resides.

The non-resident’s employment income will generally be subject to tax in South Africa, where such an agreement has been concluded with a foreign country. However, if **all three** of the following requirements are met the income will not be subject to normal tax in South Africa:

- He or she is present in South Africa for a period or periods in aggregate not exceeding 183 days in any 12-month period (not necessarily a tax year).
- His or her remuneration is paid by, or on behalf of an employer who is not a resident of South Africa.
- His or her remuneration is not borne by a “permanent establishment” that the employer has in South Africa. A “permanent establishment” means in essence a fixed place of business through which the business of the employer is wholly or partly conducted.

5.7 Remuneration of employees of foreign governments working in South Africa

The remuneration earned by an employee of a foreign diplomatic or consular mission in South Africa is exempt from normal tax in South Africa if –

- the employee is stationed in South Africa for the sole purpose of holding office in South Africa as an official of a foreign government; and
- the employee is not ordinarily resident in South Africa.

Note:

- (1) Employees in the domestic service of the above employees are also exempt from normal tax in South Africa provided they are not South African citizens and are not ordinarily resident in South Africa.
- (2) The fact that the employee or the employee in his or her domestic service will as a consequence of the application of the physical presence test (see **2.2**) become a resident will not affect his or her remuneration exemption in this regard.
- (3) In the event that the employee applies for and receives a permit for permanent residence in South Africa, the exemption falls away and liability for normal tax in South Africa arises, from the date of issue of the permit for permanent residence. Furthermore, in the event that a foreign government carries on business activities in South Africa, the remuneration payable to its employees could also be subject to normal tax in South Africa. (The taxability of this income may be affected by an agreement for the avoidance of double taxation between South Africa and the foreign country.)
- (4) An employee who is not exempt from normal tax in South Africa in the above circumstances must register as a provisional taxpayer with his or her local SARS office.
- (5) The salary of a foreign employee of foreign states, foreign government agencies and certain multinational organisations is also exempt from normal tax in South Africa.
- (6) A non-resident who is employed in the national or provincial spheres of government, any municipality in South Africa or any national or provincial public entity if 80% or more of the expenses of these entities are defrayed from funds voted by Parliament to render services outside South Africa, will be exempt from normal tax in South Africa if the remuneration is taxed in his or her country of residence and the foreign tax is not paid on his or her behalf by the employing entities.
- (7) This exemption does not apply to any other income such as interest or rentals that the employee of a foreign government may earn while working in South Africa.

5.8 Business income

Business income received by or accrued to a non-resident from carrying on a trade or business within South Africa is subject to normal tax in South Africa. The taxability of the income may be affected by an agreement for the avoidance of double taxation. See 7 for more details.

5.9 Pension or annuities

A portion of a pension or a annuity payable to any non-resident or resident for services rendered inside and outside of South Africa and at least two years out of the last 10 years of services (before the accrual of the pension) were rendered in South Africa, will be taxable in South Africa in the ratio which the number of years' service rendered in South Africa bears to the total period during which services were rendered. (The taxability of the pension may be affected by an agreement for the avoidance of double taxation.) The fund administrator is obliged to withhold tax on a monthly basis.

Annuities received from sources within South Africa, such as from retirement annuity funds, insurance policies, trusts and estates are subject to normal tax in South Africa. However, the capital element of a purchased annuity is exempt from normal tax. The certificate issued by the insurance company will reflect the capital content. Annuities are subject to the deduction of tax where the source is in South Africa. (The taxability of the annuity may be affected by an agreement for the avoidance of double taxation.)

5.10 Directors' fees

A non-resident, who derives directors' fees or other similar remuneration in his or her capacity as a member of a board of directors of a company which is a resident of South Africa, will generally have the directors' fees subject to normal tax in South Africa. The same fees may also be taxable in the foreign country. Generally, but depending on the foreign legislation and normally within specified limits, a credit will be allowed in the foreign country in respect of the normal tax paid in South Africa.

5.11 Tax on foreign entertainers and sportspersons

With effect from 1 August 2006, any resident who is liable to pay any amount to a foreign entertainer or sportsperson for his or her performance in South Africa, must deduct or withhold from that payment an amount of tax, known as "tax on foreign entertainers and sportspersons", at a rate of 15% on all payments made to such foreign entertainer or sportsperson. The resident who deducted or withheld the tax must pay it over to SARS on behalf of the foreign entertainer or sportsperson before the end of the month following the month in which the tax was deducted or withheld. Failure to deduct or withhold the tax and to pay the tax over to SARS will render the resident personally liable for the tax.

In the event that it proves impossible for the withholding tax to take place (for example, the person who is liable for the payment to the foreign entertainer or sportsperson is not a resident), the foreign entertainer or sportsperson will be held personally liable for the 15% tax that must be paid over to SARS within 30 days after the amount is received by or accrued to the foreign entertainer or sportsperson.

The 15% withholding tax on foreign entertainers and sportspersons is a final tax in respect of such payments received by or accrued to the foreign entertainer or sportsperson. It therefore follows that if any other amounts of income are received by or accrued to the foreign entertainer or sportsperson from a source within South Africa, only such other amounts are subject to normal tax in South Africa. Amounts received by or accrued to foreign entertainers and sportspersons, which are subject to this 15% withholding tax, are exempt from normal tax in South Africa.

Any person who is primarily responsible for founding, organising or facilitating a specified activity in South Africa and who will be rewarded directly or indirectly for that function of founding, organising or facilitating, must notify SARS of the performance within 14 days of concluding the agreement and provide SARS with the details relating thereto as may be required by SARS.

The 15% withholding tax on a foreign entertainer or sportsperson is not applicable on a foreign entertainer or sportsperson who is employed by a South African employer; and he or she is physically present in South Africa for more than 183 days in aggregate in a 12-month period that begins or ends in a tax year. In these circumstances the foreign entertainer or sportsperson has to pay normal tax on the same basis as a resident, that is, at the rate of normal tax, which may require the submission of an income tax return. In these circumstances no withholding tax needs to be deducted. Such payments, made by the South African employer to the foreign entertainer or sportsperson (employee), are regarded as remuneration which is subject to income tax in South Africa by way of employees' tax deducted by the South African employer.

6. CAPITAL GAINS TAX: RESIDENTS AND NON-RESIDENTS

6.1 Taxation of capital gains and capital losses

Capital gains tax (CGT) was introduced with effect from 1 October 2001. A capital gain arises when the proceeds upon the disposal of an asset exceed its base cost. A capital loss occurs when an asset is disposed of and its base cost exceeds the proceeds upon disposal.

In the case of a natural person, 25% of the taxable capital gain, after deducting the annual exclusion of R16 000 (this is increased to R120 000 where he or she dies during the tax year), is included in his or her taxable income and is subject to normal tax at his or her marginal rate of tax.

Capital losses may only be set off against capital gains. Any capital loss that is not used in the current tax year is carried forward to the next tax year and may be set off against any capital gain in that tax year.

6.2 Disposal

CGT is triggered by the disposal of an asset. Events that trigger a disposal include a sale, donation, exchange, loss, death and cessation of residence in South Africa.

6.3 Exclusions

Some of the capital gains or capital losses (or a portion of them) made by a natural person are excluded for CGT purposes.

The following are some of the specific exclusions:

- R1.5million gain or loss on the disposal of his or her primary residence.
- Most personal belongings which are not used by him or her for the carrying on of a trade. Examples include motor vehicles, caravans, furniture, jewellery etc.
- Any gain or loss on disposal of a motor vehicle for which he or she receives a travel allowance.
- Retirement benefits.
- An amount received in respect of a long-term insurance policy of which he or she was the original owner.
- In the case of a natural person, the first R16 000 of the sum of capital gains and capital losses in a tax year (known as the annual exclusion).
- The annual exclusion increases to R120 000 in the tax year during which he or she dies.

6.4 Non-residents and CGT

A non-resident must account for capital gains and capital losses made from the disposal of the following assets:

- Immovable property situated in South Africa or any interest or right in immovable property situated in South Africa. The term “interest in immovable property situated in South Africa” includes a direct or indirect holding of 20% or more of the shares in a company, where 80% or more of the current market value of the shares of that company are directly or indirectly attributable to immovable property situated in South Africa. Also included as immovable property is a vested interest in a trust where 80% or more of the value of that interest is attributable directly or indirectly to immovable property in South Africa.
- Assets attributable to a permanent establishment in South Africa (for example, a branch or agency of a foreign company in South Africa).

6.5 Residents and CGT

In the case of a resident, the disposal of his or her worldwide assets is subject to CGT. The method for determining the taxable capital gain or assessed capital loss depends on the nature of the asset. Set out below are some examples of foreign assets and their CGT treatment.

6.5.1 Immovable property held outside SA

The capital gain or capital loss on property that has been acquired and disposed of in the same foreign currency is determined in the foreign currency and translated to rand by applying –

- the average exchange rate for the tax year in which the asset was disposed of; or
- the spot rate on the date of disposal of the asset.

Special rules apply to immovable property bought in one foreign currency and disposed of in another (or where assets are attributable to a foreign permanent establishment and financial reporting is in another foreign currency).

6.5.2 Assets other than immovable property attributable to a foreign permanent establishment

The same rules, as explained above, apply as in the case of foreign immovable property.

6.5.3 Foreign equity instruments

These include shares and interests in collective investment schemes and deemed South African source assets, for example, foreign endowment policies and other movable assets.

The capital gain or capital loss is determined by translating –

- the **proceeds** from the sale of the asset into rand at the average exchange rate for the tax year in which the asset was disposed of or at the spot rate on the date of disposal thereof; and
- the **expenditure** incurred in respect of that asset into rand at the average exchange rate for the tax year during which it was incurred or the spot rate on the date on which it was incurred.

6.5.4 Foreign currency assets and liabilities

These include foreign bank notes, traveller's cheques, bank accounts and foreign loans.

Foreign currency notes and coins and traveller's cheques used for the regular payment of personal expenses (for example, during a holiday) are exempt from CGT. A person is also allowed one foreign bank account (a call or current account) free of CGT, provided that it is used for the regular (that is, monthly) payment of personal expenses.

Foreign currency gains and foreign currency losses on these assets became subject to CGT with effect from 1 March 2003. A foreign currency asset pool must be maintained for each foreign currency for the purpose of determining the base cost of a foreign currency asset. Additions to the pool are made at the average exchange rate in the tax year of acquisition. When an asset is disposed of, its base cost will be the weighted average rand cost of the pool. Proceeds are translated at the average exchange rate in the year of disposal.

6.6 Registration

CGT forms part of the income tax system. A person need not register separately for CGT if he or she is already registered as a taxpayer for normal tax purposes.

A person, whose sole source of taxable income comprises a taxable capital gain, needs to register as a taxpayer at a SARS branch office. This may, for example, occur when a non-resident, who has no other South African-source income, disposes of immovable property in South Africa.

7. AVOIDANCE OF DOUBLE TAXATION

7.1 Agreements for the avoidance of double taxation

In certain circumstances, the provisions of an agreement for the avoidance of double taxation may be applicable. Most countries impose income tax both on the worldwide income derived by the residents of the country and on income derived by non-residents in that country. The effect of such a system is that income derived by a resident of one country from a source in another country is subject to tax in both countries. As this position discourages foreign investment, countries that have trade relationships entered into agreements for the avoidance of double taxation.

Such agreements provide that income of a particular nature will be taxed only in one of the two countries or may be taxed in both countries with the country of residence allowing a credit for the tax imposed by the other country. Certain agreements may provide that the residence country may exempt the income. South Africa uses the credit method.

7.2 Rebate for foreign taxes paid

A resident who is taxable in South Africa on income received from a foreign country and who is liable to tax in the foreign country on that income will be allowed a credit for the foreign tax paid against his or her normal tax liability in South Africa. To qualify for this credit, the taxes must have been paid or payable to the government of any country other than South Africa, without any right of recovery of the tax paid or payable. This rebate may be granted in substitution for the relief to which a resident would be entitled under a double taxation agreement and is not granted in addition to such relief.

It will be necessary for a resident to submit proof of foreign taxes paid or payable. An assessment or the equivalent thereof, tax receipts or an official document will generally be accepted as proof of foreign tax paid or payable.

In the case of persons married in community of property, certain income is deemed to have accrued in equal shares to both spouses. In such cases, foreign tax credits relating to that income must be divided equally between the two spouses. It must be noted that foreign tax credits can never exceed the South African normal tax payable on the total amount of foreign taxable income in the hands of a resident during a tax year. An excess amount may, however, be carried forward for possible setting off in succeeding years but may not be carried forward for more than seven years calculated from the tax year when it was for the first time carried forward.

Foreign taxes paid on income that is not subject to tax in South Africa are, however, forfeited and cannot be carried forward. (For more information see Interpretation Note No. 18 (Issue 2) *“Rebate for foreign taxes: Natural Persons”* – 31 March 2009, which is available on the SARS website.)

8. CONCLUSION

Any natural person who for the purposes of the Act is considered to be a resident of South Africa is taxable on his or her worldwide income, that is, income derived from sources within and outside South Africa subject to certain exclusions. Natural persons who are not considered to be residents (non-residents) for tax purposes are taxable on income from a source only within South Africa.

It is hoped that this guide will contribute to greater clarity regarding foreign income received by or accrued to residents and income received by or accrued to non-residents from a source within South Africa as well as the treatment of capital gains tax in the hands of a resident or non-resident.

Annexure A – Physical presence test diagram

