Seed Weekly

20 March 2019

Taxation of Foreign Income for South Africans

With the recent amendments to the normal tax exemption relating to South Africans working outside the country as provided for in s 10(1)(o)(ii) which comes into effect from 1 March 2020, financial advisers have been inundated with clients and others wanting to 'financially emigrate' and unfortunately some 'emigration' practitioners have also been exacerbating the problem by often muddying the waters with some rather strange claims.

Of particular concern is that from 1 March 2020 the s 10(1)(o)(ii) exemption from normal tax in South Africa is available only to the extent that the 'qualifying' remuneration does not exceed R1 000 000 for a year of assessment.

The first important fact to note is that this exemption from normal tax is applicable only to a South African resident.

Although there is a definition of a 'resident' in the Income Tax Act, it uses the undefined term 'ordinarily resident in the Republic'.

It is then necessary to look at the facts surrounding a taxpayer, especially with regards to binding case law. Two cases from the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) have dealt with the meaning of the term 'ordinarily resident'. These cases are Cohen v CIR and CIR v Kuttel.

In Cohen v CIR, Cohen's physical presence was not a primary factor but rather 'the county to which he would naturally and as a matter of course return from his wanderings'.

It was also pointed out that 'whether a person is an *"ordinary resident"* in [South Africa] . . . does not [depend solely upon his actions during a particular year of assessment]. An investigation of his mode of life before, or even after, that year [of assessment may be necessary] to arrive at a conclusion.'

There is a so-called physical presence test in the definition of a 'resident'.

To add even more complexity to this situation, South Africa has in force double taxation agreements with many different countries. These also impact on whether a person is classified as a resident of a particular country for tax purposes.

Given the above it is difficult to understand the number of queries that are being received from people who have been living outside the country for a number of years, with their families but who have not formally emigrated. Formal emigration per say does not change a person's tax residency status. All the surrounding facts need to be considered when looking at residency. In a follow-up article the implications and the pros and cons of 'financial emigration' will be considered.

So, what are the implications of s 10(1)(o)(ii) if a person is a South African resident and is working abroad?

- First, the s 10(1)(o)(ii) exemption from normal tax relates solely to employment income.
- Secondly, despite it being an exemption from normal tax, it was created to stop people paying less tax in the two countries concerned. This means that people working in countries with high tax rates, for example, Britain and Canada, will suffer less from its impact.
- One of the major concerns, however, is that 'fringe benefits' are subject to normal tax in South Africa. So, for example, a person working in a country where an armed guard is essential will now be subject to normal tax in South Africa for the privilege of staying alive!

One of the most complex areas for a South African working abroad will definitely be the impact and implementation of the relevant double taxation agreement to his particular employment and residential circumstances. These double taxation agreements differ from country to country and their impact can be material.

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So, while the impact of the changes to s 10(1)(o)(ii) are indeed serious and going to be extremely difficult for SARS to implement and for the taxpayer to produce relevant evidence to prove his stays in and out of a country, it is important to remember that it is applicable only when a taxpayer is a South African resident for tax purposes.

Kind regards,

Barry Hugo
Wealth Manager – Hampshire Independent Advisors

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ADDITIONAL INFORMATION (where applicable)

Performance has been calculated using net NAV to NAV numbers with income reinvested. Full performance calculations are available from the manager on request.

DEFINITIONS (where applicable)

Annualised Return	Annualised return shows longer term performance rescaled to a 1-year period. Annualised return is the average return per year over the period. Actual annual figures are available to the investor on request.
Highest and Lowest Annual Return	The highest and lowest returns, since launch, for any rolling 1-year period have been shown.