



PROTECT YOUR FOREIGN INCOME FROM SOUTH AFRICAN TAX

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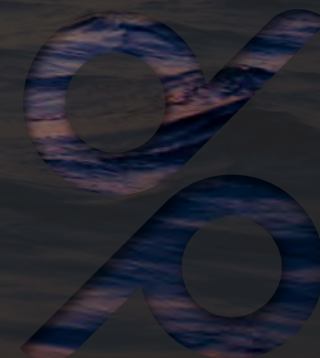
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DOUBLE TAXATION AGREEMENT

Applying a Double Taxation Agreement (DTA) best fits South African tax residents that are abroad for a limited duration to work and will be returning to South Africa in the near future.

The amended South African tax law is now in full effect as of 1 March 2020. Where you have international economic interests, your income may potentially subject to tax both in South Africa as well as in the foreign country, resulting in double taxation. As the co-authors of LexisNexis' Expatriate Tax textbook, the first of its kind in South Africa, we have presented on the impact of the expat tax law change around the world.

Common misconceptions about DTA's

A common misconception we see among South African expats are that they believe they are "automatically tax-exempt" just because there is double taxation treaty in place between the two countries. This is completely wrong and there are various factors that need to be considered, and objectively proven, and you are still required by law to file a tax return and "claim" exemption under treaty relief.

How to correctly apply a DTA

To correctly apply for a treaty relief on your foreign earned income, you will need to consider which country will actually have the right to tax your income. This is achieved through a measured approach, known as the tie-breaker test, and take into consideration the various factors such as if you have a tax residency certificate, where you have a permanent home, where your centre of vital interests are, i.e. where your family and economic ties are, as well as where your habitual abode is, to name a few.

Our dedicated Specialists and Tax Attorneys are well equipped to assist you through the process to ensure South Africa has no taxing right over your foreign income.



Undergoing this process is somewhat more complicated than Financial Emigration ("FE") and is generally used for those expats who are on short-term work contracts and / or specifically intend to return to South Africa in future.

Firstly, South Africa does not have a DTA with every country, so this will only apply to an expat who is living / working in a country that has concluded such an agreement with South Africa. Fortunately, many countries, especially the main South African expat destinations, do have DTA's with South Africa.

Why applying a DTA can be beneficial based on your circumstance

The main advantage of applying a DTA is that you do not need to undergo any formal process in South Africa, so this leaves an expat with the opportunity to make decisions on a whim as long as that expat ensures that they still fulfil the requirements of the DTA to be a non-tax resident in South Africa.

A guarantee of non-residency but freedom to return to South Africa

Applying DTA relief is also a less permanent solution, meaning that a person working abroad can apply the DTA and be fully excluded from paying taxes in South Africa on their foreign income and will not have to reverse any formal process if they do return to South Africa. Ultimately, a DTA may be your saving grace in holding off SARS from taxing your foreign income. Ensuring that you comply with the DTA, if you choose this route, will be of utmost importance if you want it to protect you.



**DTA
ADVANTAGES**

It is a yearly process

Applying a DTA to your situation is a yearly process, which means that every year you will need to be able to prove to SARS that you are a non-tax resident of South Africa in terms of the relevant DTA.

Obtaining a tax residency certificate yearly

To prove you fit the bill in terms of a DTA, SARS will generally require a tax residency certificate to be submitted to them from the country that you are paying taxes in. This may seem simple enough; however, this is often not the case. For instance, in the UAE, obtaining such a certificate can mean taking two full days of your time to go through the process, or finding a service provider that will do this for you, and there can also be very stringent requirements in a country to obtain such a certificate. Even more worrying is that certain countries don't have a formal process in place to obtain or even supply such a certificate. In certain countries, service providers are charging a hefty fee and you will need to obtain this certificate every year.

Beating the Article 4 tie-breaker test

Each DTA is specific on the requirements one needs to meet to be considered a tax resident of a country other than South Africa. You need to ensure that you take careful notice of those requirements and ensure that you meet them year to year. Often South Africans abroad fall in a grey area being, arguably tax resident in both South Africa and the country they have emigrated to, which the DTA attempts to make the final decision on. However, falling into this grey area means that it could make it more complicated to prove to SARS that you are a non-tax resident of South Africa.

Legal Opinion to back your case

DTA's being a less permanent solution are also therefore a riskier solution. Nothing is final when dealing with DTA's due to the yearly nature of the proof you need to provide. However, a way to solidify this is by obtaining a legal tax opinion confirming your non-residency in terms of the DTA. Having such a document protects you from SARS and can be used to support your non-residency year to year. This would be issued by a registered tax practitioner and tax attorney, and would be used in support of the claim for tax relief under the DTA in your returns.

FREQUENTLY ASKED QUESTIONS

Q: What if I am living in a zero-tax jurisdiction?

A: In terms of South African tax legislation, a person is excluded from being tax resident in South Africa if they are deemed to be exclusively a tax resident of another other country under a DTA. If this is the case, then that person will not be subject to tax in South Africa on any income earned from a source outside of South Africa.

Q: Why do I need a tax residency certificate?

A: Claiming this relief under a DTA depends on the fact that you are considered to be a tax resident of the other country. Tax residency is generally not the same as “residency” in the immigration sense – instead, tax residency is a test applied by each country to determine whether it has the jurisdiction to tax a person on their income from world-wide sources, regardless of whether it actually imposes tax.

Q: Do I qualify for DTA relief if I have a tax residency certificate?

A: Not necessarily.

A taxpayer is required to prove their tax position taken, and a tax residency certificate provides the documentary evidence needed to substantiate that they are in fact considered to be tax resident in the other country concerned.

However, this only proves that the tie-breaker test in the DTA must still be applied to the taxpayer’s facts in each case to properly determine which country tax residency must fall in favour of.

Q: What if my foreign income is more than R1,25 million per annum?

A: The application of a DTA to cease tax residency is separate to the foreign employment income exemption provided under section 10(1)(o)(ii) of the Income Tax Act, and does not depend on whether you spend more than 183 days (and 60 continuous days) in a 12-month period outside of South Africa. However, this may be relevant to whether you are considered to be a resident of the other country for tax purposes. There is no limitation on the extent of the relief provided in terms of a DTA.

Q: What would I need to do each year to apply the DTA?

A: The DTA must be claimed in your tax return each year. In support of claiming this relief in each return, you will need to ensure that you are consistently covered by a valid tax residency certificate. This proves to SARS that, in that year of assessment, you are considered to be a resident of the other country for tax purposes and therefore have access to the tie-breaker test in the DTA.

If you are in possession of an expert opinion on the matter, you may also furnish this to SARS or otherwise use this in support of your claim under the DTA. You would not need to seek an updated opinion unless there is a change in your factual circumstances that may impact the assessment under the DTA tie-breaker test. However, you would need to continue filing tax returns in South Africa and properly claim relief under the DTA.

FREQUENTLY ASKED QUESTIONS

Q: What are the effects of ceasing tax residency in South Africa?

A: Unlike financial emigration, the application of a DTA to cease tax residency in South Africa will not itself result in the limitation of available banking accounts or facilities. However, the cessation of tax residency does result in a once-off deemed disposal and reacquisition of one's assets for market value, which may result in capital gains tax consequences (also known as the "exit tax"). This excludes immovable property in South Africa, retirement fund interests and cash held worldwide.

Q: Does my spouse need to apply the DTA as well?

A: Not necessarily. The application of a DTA applies in respect of a particular taxpayer's circumstances and this does not depend on whether your spouse is also applying the DTA. However, your spouse would need to apply a DTA to cease tax residency where they are earning foreign income in excess of R1,25 million per annum, or may do so to mitigate South African tax liability where they are earning an income in South Africa while not physically present in South Africa.

Q: Do you need to consider my historic tax returns?

A: Yes. In many cases, the cessation of tax residency in South Africa results in a so-called "manual intervention", which means that human intervention is needed to finalise your tax return assessment as the e-Filing system cannot finalise this automatically.

This gives rise to the risk of non-compliance being flagged and

may lead to a further audit by SARS. When considered in view of SARS' particular focus on expatriate compliance, it is critical to ensure that your historic tax returns have been filed correctly.

Q: Do I get ongoing support?

A: We are happy to assist and will gladly continue to provide ongoing support on matters concerning your position under the relevant DTA. We are a team of more than 100 professional staff including tax attorneys, accountants, tax practitioners, exchange control experts, immigration experts and more, offering a full range of in-house services to meet the needs of our clients while preserving their wealth.

We look forward to partnering with you.



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