



Tax and Legal News



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Proposed amendment to the Foreign Earnings Exemption – days outside South Africa

National Treasury and SARS proposes to relax the requirements for days spent outside South Africa from 183 to 117, for individuals who could not travel to work outside South Africa, during the period from 1 March 2020 to 28 February 2021.

Background

COVID-19 has brought the world to a standstill. Lockdowns and travel restrictions were unforeseeable and imposed globally. In addition to the myriad of challenges this has brought about, these restrictions also have an impact on individuals from a tax perspective, and for the purposes of this alert, specifically in relation to qualifying for the foreign earnings exemption (in the case of South African tax residents).

Current legislation

In terms of the current legislation, remuneration earned for services rendered by a South African tax resident will be exempt if the individual was working offshore for more than 183 days during any period of 12 months starting or ending in the tax year concerned and for a continuous period of more than 60 days during that 12 month period. As of 1 March 2020, the exemption applies up to a maximum amount of R1.25 million per year.

Proposed amendment

In light of the impact of COVID-19 travel restrictions, the National Treasury Draft Response Document to the 2020 Draft Taxation Laws Amendment Bill (TLAB) proposes that changes be made in the 2020 Draft TLAB so that the 66 days that commenced on 27 March 2020 and ended on 31 May 2020, when South Africa operated under COVID-19 alert level 5 and 4, should be subtracted from the 183-day threshold used to determine the eligibility for exemption of foreign services remuneration.

Therefore, in order to qualify for exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12-month period, for years of assessment ending from 29 February 2020 to 28 February 2021. The current requirement in section 10(1)(o)(ii) that more than 60 of the days abroad should be a continuous period will remain unchanged.

Our thoughts

Excluding days during COVID-19 alert level 5 and 4

This is a welcomed proposal that South African expatriates, employers and tax advisors have been waiting for during the past six months. Some may raise the question as to whether the period used for exclusion from the 183-day requirement is correct and if other alert levels should be added to this. In terms of the COVID-19 alert level regulations, the restriction on the return of a South African national or permanent resident to his or her place of employment, study or residence outside South Africa was lifted when we moved to alert level 3 on 1 June

2020. It therefore appears reasonable that only alert level 5 and 4 is considered in this proposed amendment.

What about remote working in South Africa for a foreign employer?

Consideration should be given to cases where an individual continued working for a foreign employer but did so remotely from South Africa due to lockdown. In these instances, the current foreign earnings exemption legislation would not provide relief as the services in question were not rendered offshore.

An individual who earned income from a foreign employer while working in South Africa, could suffer double taxation if the individual is also subject to income tax in the foreign country. A Double Taxation Agreement will not provide relief and the individual would have to look to the section 6quat relief.

In some countries relief measures were introduced to deem the services rendered in that country to be rendered in another country, if the individual was employed primarily to render services offshore. Presumably this would need to be supported by the underlying employment contract or assignment agreements etc. South Africa's current proposed relief measure is silent on this.

Impact of travel restrictions on tax residency determination

South Africa has a residence basis of taxation and taxes residents on their worldwide income. Therefore, the concept of residency is key to defining our tax base and taxpayers' obligations. Non-residents who have been unable to leave South Africa since 27 March 2020 may be concerned about becoming tax resident (due to physical presence) as a result of the lockdown rules.

It is interesting to note that the background statement to the proposed amendment to the foreign earnings exemption in the Draft Response Document talks to the impact of travel restrictions on the tax residency status of individuals. However, the proposal only addresses the foreign earnings exemption related to residents.

Again, many countries have announced relaxations in respect of residency tests, if a person is forced to be present in their country as a result of extraordinary circumstances. With the proposed relief provided in relation to the foreign earnings exemption, an expectation has been created that further changes should be brought about specifically dealing with the tax residency impact of the COVID-19 lockdown restrictions. It seems reasonable to expect that a similar approach should be followed, and the lockdown days pre-lifting of travel restrictions should be disregarded when assessing a person's residency status by virtue of physical presence, at least for the 2021 tax year.

Next steps

Proposed amendments to the 2020 Draft Taxation Laws Amendment Bills as contained in the Draft Discussion Document are expected to be finalised and approved later this year.

Taxpayers and their employers should consider the impact of the abovementioned proposed amendment and the absence of an amendment regarding remote working in South Africa on an individual's tax residency status. KPMG's skilled team of professionals can assist with these assessments in light of current legislation and the proposed amendments.

Contact us



Carolyn Chambers
Director: GMS & ETA
Email: Carolyn.chambers@kpmg.co.za
M: +27834405564



Zohra de Villiers
Director: Global Mobility Services and Employment Tax Advisory
Email: zohra.devilliers@kpmg.co.za
M: +27827190279



Angela Jacobs
Associate Director: Global Mobility Services and Employment Tax Advisory
Email: angela.jacobs@kpmg.co.za
M: +27827191974

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