



SOUTH AFRICAN REVENUE SERVICE

INCOME TAX INTERPRETATION NOTE NO. 16

DATE: 27 March 2003

INCOME TAX

ACT : INCOME TAX ACT, 1962 (the Act)

SECTION : SECTION 10(1)(o)(ii)

SUBJECT : EXEMPTION FROM INCOME TAX: FOREIGN EMPLOYMENT INCOME

1. BACKGROUND

1.1. South Africa's change from a source basis of taxation to a residence basis of taxation resulted in the worldwide income of South African residents being subject to income tax in South Africa. The residence basis of taxation adopted in South Africa is based on the so-called "residence minus" system, which means that taxpayers will be taxed on their worldwide income but certain categories of income arising from activities undertaken outside the Republic will be exempt from South African tax.

1.2. The residence basis of taxation is applicable to years of assessment commencing on or after 1 January 2001. Since the year of assessment of a natural person commences on 1 March, natural persons will only be affected by the residence basis of taxation with effect from 1 March 2001.

1.3. In line with international best practice, remuneration derived from services rendered outside South Africa under certain circumstances is exempt from South African tax under section 10(1)(o)(ii) of the Act.

2. THE LAW.

Section 10(1)(o)(ii) of the Act exempts from income tax:

“any remuneration as defined in paragraph 1 of the Fourth Schedule

(i) ...

(ii) received by or accrued to any person during any year of assessment in respect of services rendered outside the Republic by that person for or on behalf of any employer, if that person was outside the Republic-

(aa) for a period or periods exceeding 183 full days in aggregate during any 12 months period commencing or ending during that year of assessment; and

(bb) for a continuous period exceeding 60 full days during that period of 12 months,

**and those services were rendered during that period or periods:
Provided that-**

(A) for purposes of this subparagraph, a person who is in transit through the Republic between two places outside the Republic and who does not formally enter the Republic through a port of entry as defined in the Immigration Act, 2002 (Act No. 13 of 2002), shall be deemed to be outside the Republic; and

(B) the provisions of this subparagraph shall not apply in respect of any remuneration derived in respect of the holding of any office or from services rendered for or on behalf of any employer, as contemplated in section 9(1)(e)”

3. APPLICATION OF THE LAW

3.1. The wording of section 10(1)(o)(ii) of the Act is analysed and interpreted below:

Wording	Interpretation
any remuneration as defined in paragraph 1 of the Fourth Schedule	“ remuneration ” is specifically defined in paragraph 1 of the Fourth Schedule to the Act.
received by or accrued to any person during any year of assessment in respect of services rendered	<p>The term “received by or accrued to” retains its meaning for income tax purposes.</p> <p>The remuneration that is covered by the exemption relates to remuneration received or accrued in the year of assessment in which the 12 month period (referred to below) commences or ends. If, for example, remuneration accrues in the 2005 year of assessment, but the remuneration is in respect of services rendered outside the Republic during a 12 month period commencing or ending in the 2002 year of assessment, the exemption will not apply.</p> <p>Payments in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right to be appointed) to any office or employment are not covered by this exemption.</p>
outside the Republic	This literally means services rendered outside the borders of the Republic. It must be noted that the borders of the Republic include territorial waters, which is a belt of sea within 12 nautical miles (roughly 22,2 km) beyond the coastline of the country. Remuneration from services rendered beyond the coastline of the Republic will therefore only be exempt if the services are rendered outside the territorial waters.
for or on behalf of any employer	“any employer” means an employer which could either be an employer operating in South Africa, or a non-resident employer.
for a period or periods exceeding 183 full days in aggregate	“full day” means 24 hours (from 0h00 to 0h00). The 183 days do not have to be consecutive or continuous, but a total of 183 days must be exceeded.

<p>during any 12 months period commencing or ending during that year of assessment</p>	<p>Each month in the 12 month period, is a “month” as defined in the Interpretation Act, 1957 i.e. a calendar month. The period must therefore commence on the first day of a particular month, and end on the last day of the twelfth calendar month thereafter.</p> <p>The 183 day period mentioned above must fall within a period of 12 consecutive calendar months. The 12 month period is not necessarily a year of assessment, a financial year, or a calendar year; it is <u>any</u> 12 month period that commences or ends in the year of assessment in which the remuneration in question may be taxed or exempted.</p> <p>To identify the 12 month period it is necessary to identify the period during which the services were rendered to the employer and to fit the 12 month period so as to include the period (or as much of it as can fit) during which the services were rendered.</p> <p><u>Practical application:</u></p> <p>In identifying the possible 12 month periods that may be used, it is advisable to first identify the period during which the services were rendered to the employer (employment period). A first twelve month period can then be determined by working forward 12 months from the first day of the calendar month in which the first day of the employment period falls. If this twelve month period fails to meet the requirements for the exemption, another 12 month period may be used by working back 12 months from the last day of the calendar month in which the last day of the employment period falls. As can be seen, there is an option of making use of any one of two 12 month periods.</p> <p>Also see Annexure A and Annexure C</p>
<p>for a continuous period exceeding 60 full days during that period of 12 months</p>	<p>There must be an absence of more than 60 continuous days in the same 12 month period mentioned above.</p>

and those services were rendered during that period or periods	The services that generated the income to be considered for exemption must have been rendered during the 183 day and 60 day periods mentioned above.
in transit ... between two places outside the Republic	This means that the point of departure and the point of destination of the specific journey that is being undertaken must be outside the borders of the Republic, as described above.
the provisions of this subparagraph shall not apply in respect of any remuneration derived in respect of the holding of any office or from services rendered for or on behalf of any employer, as contemplated in section 9(1)(e)	The exemption does not apply to employment income earned by persons mentioned in section 9(1)(e) of the Act.

4. GENERAL OBSERVATIONS

- 4.1. Although the entire 183 day (or more) period of absence from the Republic need not be continuous, the 60 day period must be continuous.
- 4.2. Weekends, public holidays, vacation and sick leave spent outside the Republic are considered to be part of the days during which services were rendered during the 183 day and 60 day periods of absence.
- 4.3. The person's absence must have been to render services for or on behalf of his or her employer in terms of an employment contract, which means that the exemption will not apply to self-employed persons or independent contractors.
- 4.4. The taxability of remuneration earned before the commencement of years of assessment commencing on or after 1 January 2001 (in practice, remuneration earned by natural persons before

1 March 2001) should be determined in terms of the legislation applicable prior to the introduction of the residence basis of taxation.

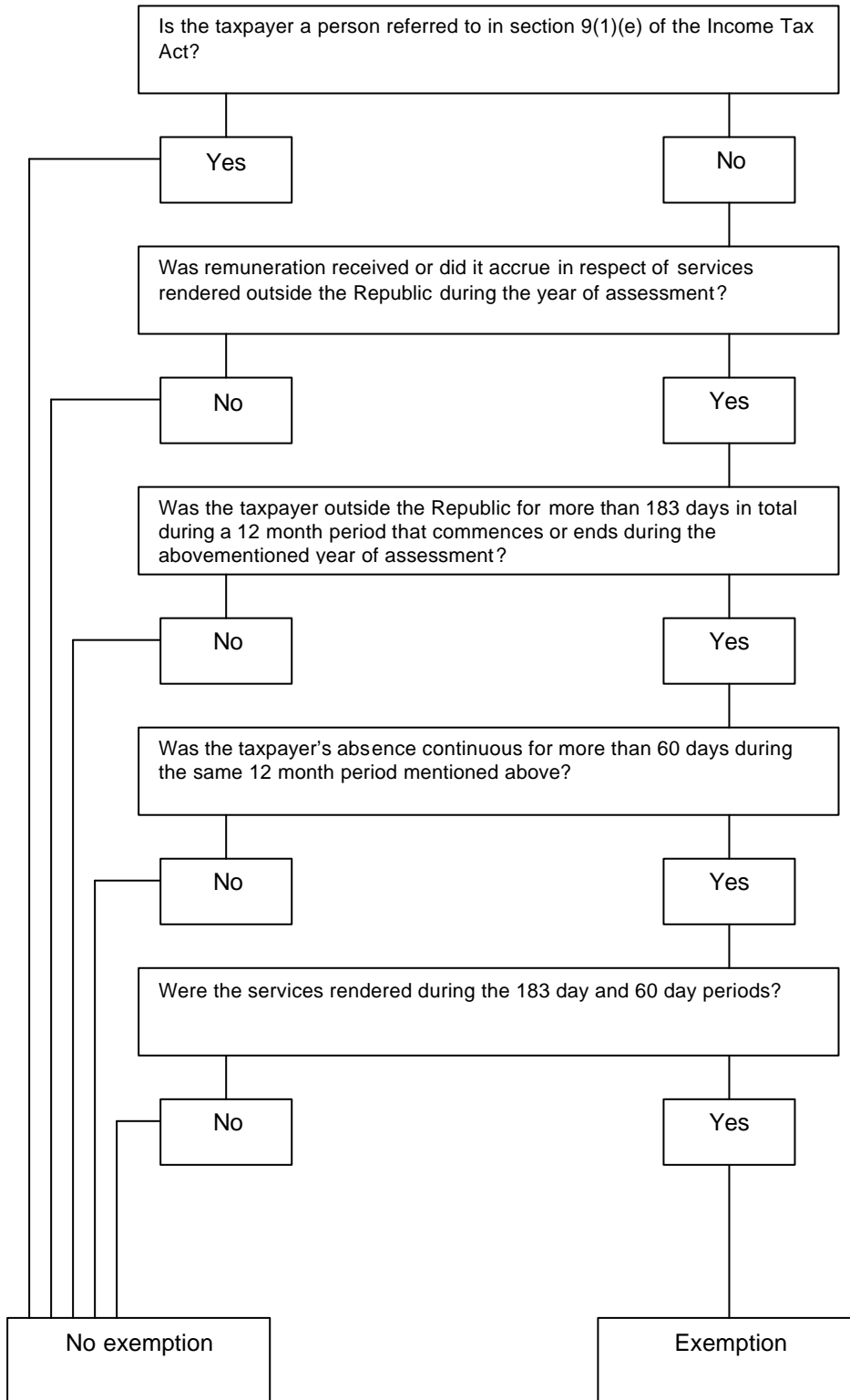
- 4.5. If called upon, taxpayers will have to submit some form of documentation to confirm their absence from the Republic. This documentation may include secondment letters, employment contracts from foreign countries, and copies of passports. This documentary proof will assist in the verification of the period or periods worked outside the Republic.
- 4.6. Where a person who has **already** complied with the exemption requirements of section 10(1)(o)(ii) in a year of assessment, spends vacation leave or sick leave in South Africa during the same year of assessment, the remuneration received by the person during the period of leave will continue to be exempt from tax in terms of section 10(1)(o)(ii) to the extent that the remuneration is attributable to the number of vacation or sick leave days credited to the employee in respect of and during the period of service outside South Africa under a vacation or sick leave scheme operated by the employer that is similar to vacation or sick leave schemes that generally prevails in the South African business community for persons employed in South Africa.
- 4.7. The potential for an exemption under section 10(1)(o)(ii) of the Act does not automatically waive the liability of an employer to deduct employees' tax in terms of the Fourth Schedule to the Act. An employer that is satisfied that the provisions of section 10(1)(o)(ii) will apply in a particular case may, however, elect not to deduct employees' tax in a particular case. Where it is found that the exemption was not applicable the employer would be held liable for the employees' tax not deducted as well as the concomitant interest and penalties.
- 4.8. An exemption under the provisions of section 10(1)(o)(ii) does not mean that an employer or an employee is absolved from liabilities under the Unemployment Insurance Contributions Act or the Skills

Development Levy Act. These two Acts do not provide for the same exemption.

Law Administration
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ANNEXURE A

BASIC STEPS TO BE FOLLOWED IN DETERMINING THE EXEMPTION



ANNEXURE B

EXAMPLES

- 1) Ms. A was seconded by a South African holding company to a subsidiary in Australia for the period 1 March 2001 to 30 September 2001 (7 months). An employment contract was entered into in which it was clear that she would be remunerated by the South African holding company and that she would not, under any circumstances, return to South Africa during the period of the secondment.

Questions and Answers:

a) Will she be entitled to the section 10(1)(o) exemption?

If the conditions of the employment contract are met she would have rendered services outside South Africa for a continuous period of 214 days. When the filtering process of the flow diagram in Annexure A is followed, it is clear that she will be entitled to the exemption in terms of section 10(1)(o).

b) Is the employer allowed not to deduct PAYE?

An employer that is satisfied that the provisions of section 10(1)(o)(ii) will apply in a particular case may elect not to deduct employees' tax in a particular case. Where it is later found that the exemption was not applicable the employer would be held liable for the employees' tax not deducted as well as the concomitant interest and penalties.

c) What happens in the tax assessment of the employee?

The income from the secondment will still be shown under the relevant code on the IRP 5 certificate of the employee and must be declared in the relevant section of the employee's income tax return that deals with income considered not to be taxable. Proof like a passport and an employment contract may be requested from the employee to support the exemption.

- 2) Mr X is employed by the South African subsidiary of a multi-national company. Due to his specialised knowledge he was seconded to the New Zealand subsidiary on 1 June 2001 where he worked until 31 December 2001. The subsidiary company in New Zealand remunerated him during the secondment period.

He was often home-sick hence he returned to South Africa during the following periods which include his travelling:

- from 27 July 2001 to 31 July 2001 (5 days),
- from 5 September 2001 to 9 September 2001 (5 days),
- from 11 November 2001 to 15 November 2001 (5 days) and
- from 21 December 2001 to 31 December 2001 (11 days).

Question

Is the income derived from the services rendered in New Zealand exempt from income tax in the 2002 year of assessment?

Answer

The number of days during which remuneration was derived from services rendered in New Zealand in the 2002 year of assessment is as follows:

	Jun	Jul	Aug	Sep	Oct	Nov	Dec	TOTAL
1 June 01 to 26 July 01	30	26						56
1 Aug 01 to 4 Sept 01			31	4				35
10 Sept 01 to 10 Nov 01				21	31	10		62
16 Nov 01 to 20 Dec 01						15	20	35
								188

The services rendered in New Zealand were to an employer for the period 1 June 2001 to 31 December 2001. It is clear from the above table that this period includes an aggregate period of 183 days and a

continuous period of 60 days which will fall into the 12 month period commencing in the year of assessment i.e. 1 June 2001 to 31 May 2002 and the 12 month period ending in the year of assessment i.e. 1 January 2001 to 31 December 2001.

The steps in the flow diagram can then be used to arrive at a conclusion i.e.

a) **Is the taxpayer a person referred to in section 9(1)(e) of the Income Tax Act?**

No.

b) **Was remuneration received or did it accrue in respect of services rendered outside the Republic during the year of assessment?**

Yes, for the period identified in the table.

c) **Was the taxpayer outside the Republic for more than 183 days in total during a 12 month period that commences or ends during the abovementioned year of assessment?**

Yes.

Two qualifying 12 month periods commencing or ending in the 2002 year of assessment can be identified. They are:

- 1 June 2001 to 31 May 2002; and
- 1 January 2001 to 31 December 2001.

It is clear from the table that both of these periods will encompass a period of absence of more than 183 days outside the Republic. Anyone of them can therefore be used to answer the question.

d) **Was the taxpayer's absence continuous for more than 60 days during the same 12 month period mentioned above?**

Yes. Either one of the two 12 month periods in which the 183 days period is present can be used for this purpose.

(e) **Were the services rendered during the 183 day and 60 day periods?**

Yes.

(f) **Conclusion**

The remuneration from the employer for the services rendered in New Zealand for the 2002 year of assessment is exempt from income tax in South Africa.

- 3) The same Mr X was seconded to England from 1 March 2002 to 30 April 2002. He was able to return to South Africa for the Easter holidays (4 days) which included his travelling. The subsidiary in England was responsible for remunerating him on a monthly basis. He worked in South Africa for the rest of the 2003 year of assessment.

Question

Is the income derived from the services rendered in England exempt from income tax in the 2003 year of assessment?

Answer

The number of days during which remuneration was derived from services rendered outside South Africa in the 2003 year of assessment is as follows:

	March	April	TOTAL
1 March 2002 to 28 March 2002	28		28
2 April 2002 to 30 April 2002		29	29
			57

The services rendered in England were to an employer for the period 1 March 2002 to 30 April 2002.

The steps in the flow diagram can then be used to arrive at a conclusion:

(a) Is the taxpayer a person referred to in section 9(1)(e) of the Income Tax Act?

No.

It becomes clear that whereas the initial 12 month period could not exempt the income from England in the 2003 year of assessment, the alternative 12 month period could exempt the same income. This highlights the necessity to work forwards and backwards when calculating the 12 month period.

It is clear from the table that this 12 month period will encompass a period of absence of more than 183 days outside the Republic.

- (d) **Was the taxpayer's absence continuous for more than 60 days during the same 12 month period mentioned above?**

Yes, from 10 September 2001 to 10 November 2001.

- (e) **Were the services rendered during the 183 day and 60 day periods?**

Yes.

- (f) **Conclusion**

Based on the answer in (e), the remuneration derived from services rendered in England for the 2003 year of assessment is exempt from income tax in South Africa.

ANNEXURE C

SUGGESTED PRACTICAL APPROACH FOR DETERMINING THE MOST SUITABLE 12 MONTH PERIOD

From the above examples the following standard approach may be adopted when dealing with a practical situation:

- (1) Identify the amount of remuneration that was received or accrued from a particular employer for services rendered outside the Republic **in a year of assessment**.
- (2) Identify the period(s) of employment in that year of assessment in which the remuneration was earned.
- (3) Consider exempting the remuneration for the identified period of employment by following the steps below.
- (4) Place the period of employment identified in (2) into a 12 month period by working forward 12 months from the first day of the calendar month in which the first day of the period falls. Establish if there is an aggregate 183 day period and a 60 day continuous period during which services were rendered in this 12 month period.
- (5) If the 183 day and 60 day periods do not exist in this 12 month period then the exemption will not apply which means that another 12 month period will have to be considered, as described in the next step.
- (6) Work backwards 12 months from the last day of the calendar month in which the last day of the period falls. Establish if there is an aggregate 183 day period and a 60 day continuous period during which services were rendered in this 12 month period.
- (7) If the 183 day and 60 day periods exist in this 12 month period then the exemption will apply.
- (8) If the 183 day and 60 day periods do not exist in this 12 month period then the exemption will still not apply.