

# Tax implication of income received by or accrued to non-residents from a source within South South

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.

**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.

**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.

**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 above.

**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.

**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.

**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.

**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.

**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.

**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.)

**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.

**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 withhold 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 sportsman is not a resident), the foreign entertainer or sportsman 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 sportsman.

The 15% withholding tax on foreign entertainers and sportsmen is a final tax in respect of such payments received by or accrued to the foreign entertainer or sportsman. It therefore follows that if any other amounts of income are received by or accrued to the foreign entertainer or sportsman 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 sportsmen, 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 sportsman is not applicable on a foreign entertainer or sportsman 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 sportsman 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 sportsman (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.