SARS FOCUS ITR12 2022

CONTENTS

TAX RATES

NATURAL PERSONS

Taxable income (R)	2021/22 Rates of tax	Taxable income (R)	2022/23 Rates of tax
R0 – R216 200	18% of each R1	R0 – R226 000	18% of each R1
R0 – R216 200	R38 916 + 26% of the amount above R216 200	R226 001 – R353 100	R40 680 + 26% of the amount above R226 000
R0 – R216 200	R70 532 + 31% of the amount above R337 800	R353 101 – R488 700	R73 726 + 31% of the amount above R353 100
R0 – R216 200	R110 739 + 36% of the amount above R467 500	R488 701 – R641 400	R115 762 + 36% of the amount above R488 700
R0 – R216 200	R163 335 + 39% of the amount above R613 300	R641 401 – R817 600	R170 732 + 39% of the amount above R641 400
R0 – R216 200	R229 089 + 41% of the amount above R782 200	R817 601 – R1 731 600	R239 452 + 41% of the amount above R817 600
R0 – R216 200	R587 593 + 45% of the amount above R1 656 600	R1 731 601 and above	R614 192 + 45% of the amount above R1 731 600

Annual local interest exemption for:		
	Rand	
	2023	**2022**
Persons under 65	23 800	23 800
Persons 65 and above	34 500	34 500

CGT		
	2023	**2022**
Inclusion rate	40%	40%
Annual exclusion	R40 000	R40 000
Exclusion in year of death	R300 000	R300 000
Primary residence exclusion	R2 000 000	R2 000 000

Section 12T Tax free Investment		
	Rand	
	2023	**2022**
Annual contribution	36 000	36 000
Lifetime contribution	500 000	500 000

Medical rebates		
Monthly contributions to medical schemes by the individual who paid the contributions		
	2023	**2022**
First two persons covered by those medical schemes	R347 each	R319 each
Each additional dependant	R234	R215

Rates of normal tax	
Retirement fund lump sum withdrawal benefits – 2021/22/23	
Taxable income	**Rates of tax**
R0 – R25 000	0% of taxable income
R25 001 – R660 000	18% of taxable income exceeding R25 000
R660 001 – R990 000	R114 300 + 27% of taxable income exceeding R660 000
R990 001 and above	R203 400 + 36% of taxable income exceeding R990 000

Rates of normal tax	
Retirement fund lump sum benefits and severance benefits – 2021/22/23	
Taxable income	**Rates of tax**
R0 – R500 000	0% of taxable income
R500 001– R700 000	18% of taxable income exceeding R500 000
R700 001 – R1 050 000	R36 000 + 27% of taxable income exceeding R700 000
R1 050 001 and above	R130 500 + 36% of taxable income exceeding R1 050 000

TAX FORMULA

GROSS INCOME (Section 1-"resident"-worldwide, non-resident SA source, special inclusions)

LESS EXEMPT AMOUNTS (sections 10, 10B, 10C and 12T)

INCOME

LESS DEDUCTIONS (Sections 11 etc *but not* 11F or 18A)

LESS ASSESSED LOSS (Sections 20, 20A)

ADD AMOUNTS TO BE INCLUDED IN TAXABLE INCOME

- ALLOWANCES (taxable portion eg Travel allowance)
- TAXABLE CAPITAL GAINS (Net capital gain x 40% inclusion rate - indiv)

LESS

Section 11F (Retirement fund contributions)

Section 18A (Donations to qualifying PBO's)

TAXABLE INCOME (**excluding qualifying lump sums*)

(multiply by tax rate in tax table)

TAX PAYABLE

Less rebates (section 6 and 6quat)

ADD Tax payable on qualifying lump sums (see lump sums tax tables)

Less medical rebates (sections 6A and 6B)

FINAL TAX PAYABLE

NB: *Taxable income will not include qualifying lump sums (lump sums from retirement funds and severance lump sums).

SEVERANCE BENEFIT

The concept "severance benefit" was introduced with effect from 1 March 2011 and includes any amount (other than a lump sum benefit from a fund) received by or accrued to a person by way of a lump sum from the person's employer in respect of the relinquishment, termination, loss, repudiation of the person's appointment, if:

- Such person has attained the age of 55 years; *or*
- The loss of employment is due to sickness, accident, injury or incapacity through infirmity of mind or body; *or*
- Such termination or loss is due to the employer having ceased to carry on the trade or the person having become redundant (general personnel reduction).

Severance benefits are included in gross income (in terms of par (*d*)) if it is received/ accrued by way of a **lump sum AND one** of the above requirements are met, but do NOT form part of taxable income

Gross income

The definition of the term 'gross income' in s 1 of the Income Tax Act is central to the whole of the Income Tax Act. Once the residence of a taxpayer has been established, the taxpayer's gross income must be determined in relation to the year of assessment or period of assessment of the taxpayer. If the taxpayer is a resident, gross income will be determined on a worldwide basis. If the taxpayer is a non-resent then only amounts from a SA source may be included into the taxpayer's gross income.
As far as is here relevant, gross income will include:

- the total amount, in cash or otherwise,
- received by or accrued to a person
- during such a year or period of assessment,
- excluding receipts or accruals of a capital nature, but including, without limitation of the scope of the definition, certain amounts, whether of a capital nature or not, commonly referred to as the 'special inclusions'.

ELEMENTS OF DEFINITION

'the total amount, in cash or otherwise'

'Gross income' is the total amount received by or accrued to the taxpayer whether in cash or otherwise. Even without the words 'whether in cash or otherwise', the definition of 'gross income' would include, by virtue of the term 'amount', 'not only money, but the value of every form of property earned by the taxpayer.
For example, a person who renders services in return for shares instead of cash will have included in his gross income the value of the shares.
The value to be placed upon the asset other than cash received or accruing as income is the amount that could be obtained for it on the open market if it were to be sold under some reasonable method of sale.

'Received by or accrued to'

The reference in the definition of the term 'gross income' in s 1 to the total amount 'received by or accrued to or in favour of' a person during a particular year or period of assessment makes it clear that the definition applies both to 'receipts' and to 'accruals'. However an amount which has been taxed as an accrual cannot again be taxed when it is received, and an amount which has been taxed as a receipt cannot again be taxed when it accrues.
It is also clear that, despite the frequent use of the word 'profits', it is not profits but (gross) receipts and accruals that are included in gross income. There must be either a receipt or an accrual, and, in the absence of special provisions, when a person neither receives anything nor has anything accrued to him, there can be no amount to be included in his gross income. For example, an unrealized appreciation in the value of his assets or the rental value of the residence he owns and occupies cannot lead to an inclusion in his gross income, since the benefit arising does not constitute a receipt or an accrual.
Generally, the time of accrual of income derived from a foreign source is no different from the time of accrual of income from a source within the Republic.

Meaning of 'received by'

In *Geldenhuys v CIR* [1] it was held that the words 'received by or accrued to or in favour of any person' in the definition of 'gross income' in s 1 relate to the taxpayer, and that the words 'received by' must mean 'received by the taxpayer on his own behalf for his own benefit'. Therefore rent received by an attorney on behalf of a client forms part of the gross income of the client, since the attorney has not received it on his own behalf and for his own benefit.

[1] (14 SATC 419) (1947 (3)SA 256(C))

Meaning of 'Accrued to'

In *Lategan v CIR* [2] it was held that the meaning of the words 'has accrued to' in the definition of the term 'gross income' meant 'to which [any person] has become entitled'. That is, as soon as an amount becomes unconditionally and uncontingently due to a taxpayer, it must be recognized as income. In other words, at the time that a taxpayer obtains a vested right to a future payment, the amount accrues to the taxpayer.

Not in taxpayer's hands or SA

It is often difficult for taxpayers to understand that an amount can be included into "gross income" despite the taxpayer having had no physical receipt of the amount and in certain instances, the amount may not even have been repatriated to SA.

NB Legal and illegal trade: The Act is not concerned with the legality or illegality of a transaction. Receipts and accruals from an unlawful business are taxable if there is a scheme of profit-making involved.

'excluding receipts or accruals of a capital nature'

There is no definition in the Act of receipts and accruals 'of a capital nature'.

- Amounts received by a taxpayer for allowing the use of an asset to some other person, for example, interest, rental, royalties, all partake of the nature of income (revenue) and fall within the definition of gross income. As long as the amount is received for the right of use of an asset without any change in ownership of the asset, it is usually in the nature of income.
- Amounts received for services rendered clearly partake of the nature of income.
- Fortuitous accessions to capital, such as lump-sum legacies and gifts, and isolated lottery, betting or sweepstake wins, are of a capital nature and fall outside the definition of gross income.
- The proceeds derived from the sale of ordinary income-producing investments or from the sale of assets by a person who does not trade in such assets, for example, a private dwelling, rental property and shares are of a capital nature. On the other hand, if the taxpayer makes it their business to buy and sell the same assets, the proceeds derived from the sale would be of an income nature.

Capital vs Revenue

What is a receipt of a capital nature in the hands of one taxpayer may therefore be of an income nature in the hands of another. How do the courts ascertain whether a particular receipt or accrual is 'of a capital nature'?

Capital amount

Generally speaking, amounts of a capital nature are excluded from "gross income" (subject to the special inclusions). This does not mean that the amount is free from tax, but rather that the consequences of capital gains tax (CGT) must be considered. The effective rates of are

- Natural person: 7.2%-18%
- Company: 22.4%
- Trust: 36%

[2] (2 SATC 16) (1926 CPD 2013)

Revenue amount

An amount that is revenue in nature, will be included in "gross income". Qualifying expenses may be deducted and the resulting taxable amount taxed at the rates relevant for the particular taxpayer:

- Natural person: 18-45%
- Company: 28%
- Trust: 45%

The differing tax treatment of capital vs revenue amounts makes it clear why this issue has resulted in decades of dispute between taxpayers and SARS and a multitude of court decisions.

Onus of proof

The first point to note is that in terms of s 102 of the Tax Administration Act the burden of proof that an amount is of a capital or revenue nature rests upon the taxpayer.

No "one size fits all"

Secondly, the inquiry whether an amount is of an income or a capital nature is a question of law, which has to be decided upon the facts of each case.

Intention — the golden rule

The most important 'test' employed by the courts in deciding whether the proceeds arising upon the disposal of an asset are in the nature of income or capital is the test of 'intention': with what intention did the taxpayer:

- acquire,
- hold and
- dispose of the asset?

It is well settled law that the test of intention is subjective and its application involves a consideration of all the circumstances surrounding the acquisition of and method of dealing with an asset.

Scheme of profit making-revenue

The proceeds will be in the nature of income if the asset was acquired and held for the purpose of resale at a profit in a scheme for profit-making (the asset is then regarded as trading stock).

Investment intention-capital

The proceeds will be in the nature of capital and not included in gross income, if the asset was acquired and held not for the purpose of resale at a profit but, for example, in order to produce an income in the form of rent, interest or dividends.

The taxpayer's intention may change between the acquisition and disposal of the asset, with the consequence that the character of the asset, as income or capital, also changes.

It follows that the taxpayer's intention must be investigated not only at the time he acquired the asset, but during the whole period over which he held the asset and at the time he disposes of the asset.

The taxpayer's own evidence about his intention and his credibility will be considered by a court but, because of subjectivity, self-interest, the uncertainties of recollection and the possibility of mere reconstruction, it will test that evidence against the surrounding facts and circumstances in order to establish his true intention.

One must consider:

- the *ipse dixit* (say so) of the taxpayer as to his intent and purpose
- objective review of all the relevant facts and circumstances
- the course of conduct of the taxpayer in relation to the transactions in issue,
- the nature of the taxpayer's business or occupation and
- the frequency or otherwise of the taxpayer's past involvement or participation in similar transactions.

Change of intention

An original intention to use an asset as an investment may be changed to one to use it in the carrying out of a scheme of profit-making. Conversely, an original intention to acquire an asset for the purpose of resale at a profit may be changed into one to hold it as an investment.

If the original intention of buying land is not to buy it in order to sell again but to work it, and subsequently the owner changes his intention, decides to become a land-dealer and, in pursuance of that intention, cuts up the land into plots and merges them into the general profit-making scheme of buying and selling land, any proceeds derived from the sale of the land would be of an income nature, since the owner has changed his intention from one of investment to a profit-making scheme. Conversely, if the land was originally acquired for resale at a profit, that is, to carry out a scheme of profit-making, and subsequently the owner changes his intention and decides to use the land for the erection of buildings in which he will run a factory, any proceeds derived from a subsequent sale of the land would be of a capital nature since the owner has changed his intention from one of a profit-making scheme to one of investment, so that the proceeds have resulted from the realization of an investment.

In deciding whether a taxpayer has changed his original intention in regard to a particular asset and has gone over to the business of selling that asset for profit, the courts will consider the history and activities of the taxpayer.

A change of intention requires something more than the mere decision to dispose of a capital asset, notwithstanding the fact that there may be protracted negotiations or hard bargaining in order to obtain the maximum price on a realization.

CRYPTO ASSETS

SARS'S STANCE ON THE TAX TREATMENT OF CRYPTOCURRENCIES

PRETORIA, 06 April 2018 - The South African Revenue Service (SARS) will continue to apply normal income tax rules to cryptocurrencies and will expect affected taxpayers to declare cryptocurrency gains or losses as part of their taxable income.

The onus is on taxpayers to declare all cryptocurrency-related taxable income in the tax year in which it is received or accrued. Failure to do so could result in interest and penalties.

Taxpayers who are uncertain about specific transactions involving cryptocurrencies may seek guidance from SARS through channels such as Binding Private Rulings (depending on the nature of the transaction).

Increased attentiveness and speculation regarding the future of cryptocurrencies has prompted calls for SARS to provide direction as to how cryptocurrencies should be treated for tax purposes. However, as indicated in this media statement, there is an existing tax framework that can guide SARS and affected taxpayers on the tax implications of cryptocurrencies, making a separate Interpretation Note unnecessary for now.

Cryptocurrency (typified by Bitcoin) is an internet-based digital currency that exists almost wholly in the virtual realm. A growing number of proponents support its use as an alternative currency that can pay for goods and services much like conventional currencies.

In South Africa, the word "currency" is not defined in the Income Tax Act (the Act). Cryptocurrencies are neither official South African tender nor widely used and accepted in South Africa as a medium of payment or exchange. As such, cryptocurrencies are not regarded by SARS as a currency for income tax purposes or Capital Gains Tax (CGT). Instead, cryptocurrencies are regarded by SARS as assets of an intangible nature.

Capital asset or trading stock

Whilst not constituting cash, cryptocurrencies can be valued to ascertain an amount received or accrued as envisaged in the definition of "gross income" in the Act. Following normal income tax rules, income received or accrued from cryptocurrency transactions can be taxed on revenue account under "gross income". Alternatively such gains may be regarded as capital in nature, as spelt out in the Eighth Schedule to the Act for taxation under the CGT paradigm.

Determination of whether an accrual or receipt is revenue or capital in nature is tested under existing jurisprudence (of which there is no shortage).

Taxpayers are also entitled to claim expenses associated with cryptocurrency accruals or receipts, provided such expenditure is incurred in the production of the taxpayer's income and for purposes of trade. Base cost adjustments can also be made if falling within the CGT paradigm.

Gains or losses in relation to cryptocurrencies can broadly be categorised with reference to three types of scenarios, each of which potentially gives rise to distinct tax consequences:

(i) A cryptocurrency can be acquired through so called "mining". Mining is conducted by the verification of transactions in a computer-generated public ledger, achieved through the solving of complex computer algorithms. By verifying these transactions the "miner" is rewarded with ownership of new coins which become part of the networked ledger.

This gives rise to an immediate accrual or receipt on successful mining of the cryptocurrency. This means that until the newly acquired cryptocurrency is sold or exchanged for cash, it is held as trading stock which can subsequently be realized through either a normal cash transaction (as described in (ii) or a barter transaction as described in (iii) below.

(ii) Investors can exchange local currency for a cryptocurrency (or vice versa) by using cryptocurrency exchanges, which are essentially markets for cryptocurrencies, or through private transactions.

(iii) Goods or services can be exchanged for cryptocurrencies. This transaction is regarded as a barter transaction. Therefore the normal barter transaction rules apply.

Value-Added Tax (VAT)

With effect from 1 April 2019, the "acquisition, collection…buying..selling" of any cryptocurrency was included in the definition of a 'financial service' in section 2 of the VAT Act and as such will be regarded as an exempt supply for VAT purposes, meaning output VAT will not be levied on the relevant transactions and no input VAT can be claimed.

ITR12 CGT and TRADE

Capital Gain / Loss
(Excluding amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7) ^

Did you dispose of any local assets attracting capital gain or loss (including crypto asset(s))? Y ◯ N ◯

How many disposals (shares to be combined as one disposal) took place? [Number of disposals]

Did you dispose of any foreign assets attracting capital gain or loss (including crypto asset(s))? Y ◯ N ◯

How many disposals (shares to be combined as one disposal) took place? [Number of disposals]

Local Business, Trade and Professional Income (Including crypto asset(s)) (Excluding amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7) ^

Did you derive income from local business, trade or profession other than rental income from the letting of fixed property(ies)? Y ◯ N ◯

How many separate trading activities did you carry on? [Number of partnerships]

ITR 12 Source codes and assets and liabilities

2572	Cryptocurrencies Profit	Profit	2019	Current
2573	Cryptocurrencies Loss	Loss	2019	Current
6520	Gain: Financial Instruments - Cryptocurrencies (Local)		2019	Current
6521	Loss: Financial Instruments - Cryptocurrencies (Local)		2019	Current
6546	Gain: Financial Instruments - Cryptocurrencies (Foreign)		2019	Current
6547	Loss: Financial Instruments - Cryptocurrencies (Foreign)		2019	Current

Statement of Local Assets and Liabilities – Rands only, no cents

Local Assets (at cost)

- R Fixed Properties and all Improvements to Properties
- R Shares in Private Company or Member's Interest in Close Corporation
- R Loan Accounts
- R Financial Instruments Listed (shares, unit trusts, etc.) – excluding Cryptocurrency
- R Financial Instruments – Cryptocurrency
- R Net Capital of Business, Trade, Profession or Farming
- R Equipment, Machinery, Implements
- R Motor Vehicles, Caravans, Boats
- R Debtors
- R Stock
- R Livestock - elected value(s)
- R Cash on Hand, in Bank and Other Similar Institutions
- R Personal Effects (jewellery, paintings, furniture, etc.)
- R Other Assets
- R **Total Local Assets**

Local Liabilities (at cost)

- R Mortgage Bonds
- R Loan Accounts
- R Creditors
- R Bank Overdraft
- R Other Liabilities
- R **Total Local Liabilities**

Statement of **Foreign Assets and Liabilities** – Rands only, no cents

Note: The foreign currency value at cost must be translated to Rand using the exchange rate as at the end of the tax year when the asset was acquired.

- R Total Foreign Assets
- R Total Foreign Liabilities

EXEMPTION FOREIGN REMUNERATION

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Exemption section 10(1)(o)(ii)

In terms of section 10(1)(o)(ii):

In order for the **R1 250 000** exemption to be enjoyed (from the 2021 year of assessment) against remuneration from employment services rendered outside of SA two requirements <u>must both</u> be met. The employee was outside the Republic:

1. for a period exceeding 183 full days in aggregate during any period of 12months; and
2. For a continuous period exceeding 60 full days during that period of 12 months

And the employment services were rendered during the above periods.

TLAA 2020 COVID amendment (wef 29 February 2020):

The first requirement [see (1) above)] has been amended to read:

a) for a period exceeding 183 full days in aggregate during any period of 12months; or
b) For a period exceeding 117 full days in aggregate during any period of 12 months in respect of any year of assessment ending on or after 29 February 2020 but on or before 28 February 2021

There has been no amendment to the second requirement of a continuous period exceeding 60 days (see above)

Period exceeding 117 days

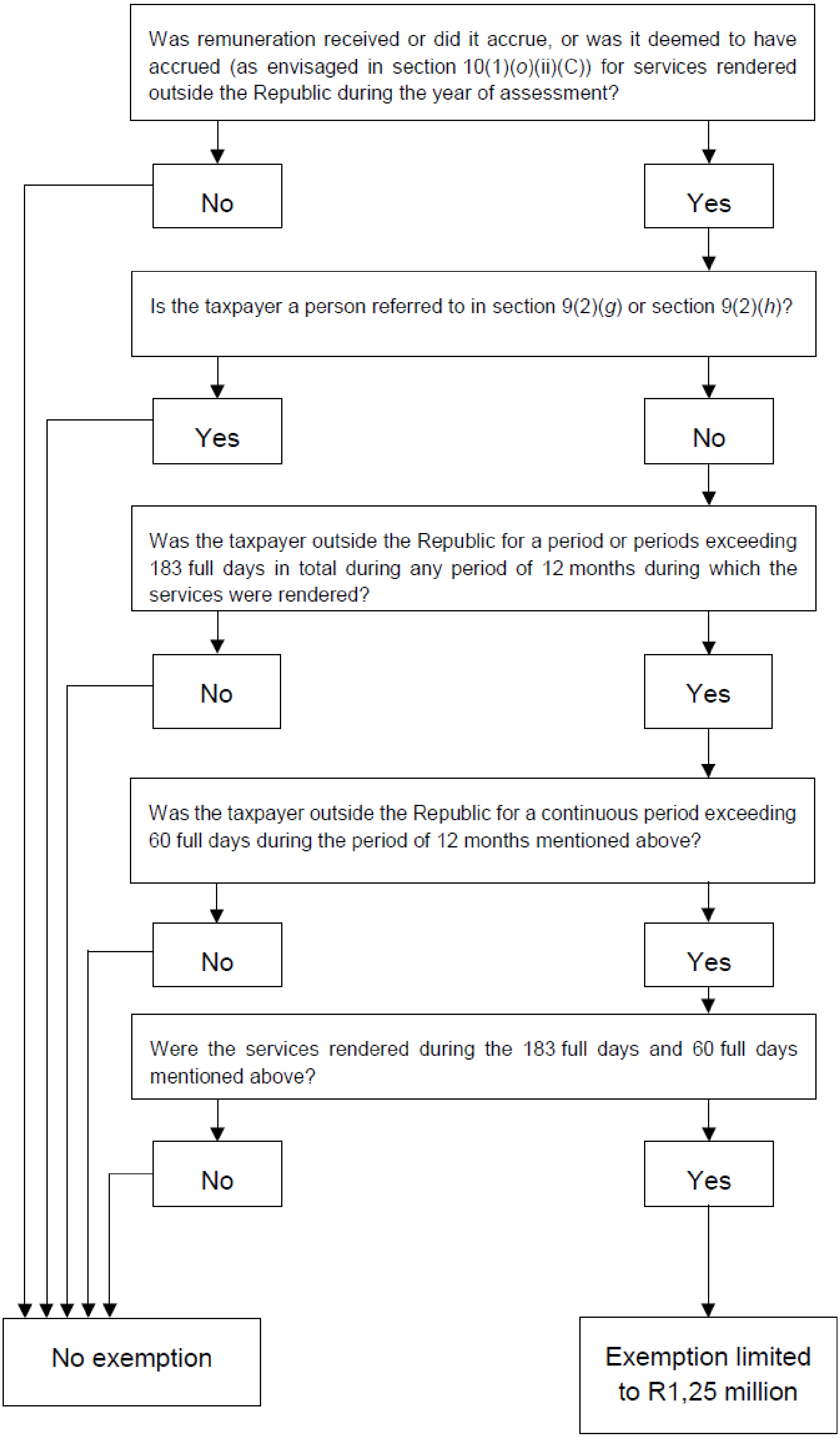
The 12 month period under examination to assess the 117 days must end between 29 February 2020 ("o*n or after*") and 28 February 2021 ("*on or before*"). Should the 12 month period under review not end between these dates, then a period exceeding 183 days in aggregate must again be utilised.

SEE SARS IN 16 (Issue 4)

Annexure B diagram on page 19

Annexure B – Diagram

Basic steps to be followed in determining the exemption



TAX RESIDENCE

The concept of 'resident' is fundamental to the worldwide or residence-based system of taxation. A person who qualifies as a 'resident' as defined in s 1 is subject to tax in the Republic on worldwide receipts and accruals.

A non-resident, that is, a person who does not qualify as a resident, is subject to tax in the Republic only on receipts and accruals from a source within or deemed to be within the Republic.

In determining the tax liability of "residents" and non-residents the effect of a double tax agreement between the Republic and the relevant foreign country must be borne in mind.

The following persons are defined as being 'resident':

- A natural person who is ***ordinarily resident*** in the Republic.
- A natural person who is not at any time during the year of assessment ordinarily resident in the Republic, if such person is physically present in the Republic for certain periods.
- A person other than a natural person that is incorporated, established or formed in the Republic.
- A person other than a natural person that has its place of effective management in the Republic.

Meaning of 'resident': natural persons

The term 'resident' is defined in s 1, in relation to a natural person, as

'(a) a person who is

(i) ordinarily resident in the Republic; ***or***

(ii) meets the requirements of the physical presence test'

A natural person qualifies as a resident, therefore, if he is ordinarily resident in the Republic ***or*** if he meets the requirements of the 'physical presence' test. <u>These two tests are mutually exclusive.</u>

Expressly not *included* (rather than expressly excluded) as a 'resident' is

'any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation.'

This effective exclusion applies only if the person is deemed to be *exclusively* a resident of the other country that is a party to the agreement.

Natural persons — Ordinarily resident

In determining whether a natural person is a resident, therefore, the first test is the common law concept of 'ordinarily resident'. The term 'ordinarily resident' has no special or technical meaning and there is also no definition in the Act of the term 'ordinarily resident'. The reason no doubt being that it is not possible to define satisfactorily the qualities that will determine whether or not a person is ordinarily resident in the Republic. But it could be said that the adverb 'ordinarily' in the expression 'ordinarily resident' should be taken as the converse of 'extraordinarily'; not 'casual and uncertain' but in the ordinary course of the person's life.

As a general rule, 'one is ordinarily resident in the country where, in the settled routine of his life he regularly, normally or customarily lives'. Put somewhat differently, a person's ordinary residence will, essentially, be the country that he regards as his home and to which he would naturally and as a matter of course return from his wanderings.

The question whether a person is 'ordinarily resident' in a country is one of fact. Consequently, it is for the courts to decide on the particular facts of each case whether a person is ordinarily resident in the Republic or not.

Interpretation Note 3 (Issue 2)
When assessing whether a natural person is ordinarily resident in the Republic, the following factors will be taken into consideration:

- An intention to be ordinarily resident in the Republic
- The natural person's most fixed and settled place of residence
- The natural person's habitual abode, that is, the place where that person stays most often, and his or her present habits and mode of life
- The place of business and personal interests of the natural person and his or her family
- Employment and economic factors
- The status of the individual in the Republic and in other countries, for example, whether he or she is an immigrant and what the work permit periods and conditions are
- The location of the natural person's personal belongings
- The natural person's nationality
- Family and social relations (for example, schools, places of worship and sports or social clubs)
- Political, cultural or other activities
- That natural person's application for permanent residence or citizenship
- Periods abroad, purpose and nature of visits
- Frequency of and reasons for visits

The above list ***is not intended to be exhaustive*** and is merely a guideline.
The circumstances of the natural person must be examined as a whole, taking into account the year of assessment concerned and that person's mode of life before and after the period in question. It is not possible to specify over what period the circumstances must be examined. The examination must cover a sufficient period in the context of the specific case for it to be possible to determine whether the natural person is ordinarily resident in the Republic. The conduct of that person over the entire period of examination must receive special attention.

DOUBLE TAXATION AGREEMENTS (DTAS)

Section 108 Income Tax Act vs DTA

Section 108(1) of the Act empowers the National executive to enter into DTA's. Section 108(2) provides that when a DTA becomes effective it must be regarded as though the DTA was enacted in the Income Tax Act. A DTA may override provisions of the Income Tax Act but the DTA cannot levy more tax than the Income Tax Act.

DTA EXTRACTS: SA and UAE

ARTICLE 4 RESIDENT

1. For the purposes of this Agreement, the term "resident of a Contracting State" means:

   (a) in South Africa, any person who, under the laws of South Africa, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature, but this term does not include any person who is liable to tax in South Africa in respect only of income from sources therein;

   (b) in the United Arab Emirates:

      (i) any individual who, under the laws of the United Arab Emirates is considered a resident thereof by reason of that individual's domicile, residence, place of management or any other criterion of a similar nature;

      (ii) any company or other legal entity which is incorporated or created under the laws of the United Arab Emirates by reason of its residence, domicile, place of management or any other criterion of a similar nature;

   (c) that State itself and any political subdivision, local authority, local government or governmental institution thereof.

2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then that individual's status shall be determined as follows:

   (a) the individual shall be deemed to be a resident only of the State in which a permanent home is available to the individual; if a permanent home is available to the individual in both States, the individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);

   (b) if the State in which the individual has a centre of vital interests cannot be determined, or if the individual has not a permanent home available in either State, the individual shall be deemed to be a resident only of the State in which the individual has an habitual abode;

   (c) if the individual has an habitual abode in both States or in neither of them, the individual shall be deemed to be a resident only of the State of which the individual is a national;

   (d) if the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the Contracting State in which its place of effective management is situated.

SECTION 9H: CEASING TO BE RESIDENT

Section 9H provides for a single charge when a person ceases to be a resident.

When a natural person ceases to be a resident, that person is deemed to have disposed of all their assets at market value on the day before that person ceases to be a resident and reacquired all those assets at an expenditure equal to that same market value on the day that person ceases to be a resident. This could trigger either a capital or a revenue gain. Subsection 9H(7) stipulates that the market value of such assets reacquired will be in the same currency in which the assets were originally acquired.

SA immovable property

In terms of section 9H(4), certain assets are excluded from this deemed disposal, the most relevant being immovable property situated in the Republic.

Year of assessment

In terms of section 9H, when a taxpayer ceases to be tax resident, their year of assessment is deemed to have ended on the date immediately before the day on which the taxpayer ceased to be resident. The next succeeding year of assessment will be deemed to start on the day the taxpayer ceases to be resident.

NON-RESIDENTS AND SOURCE

Source basis of taxation

In terms of the Act, tax is levied only on income derived from a source within the Republic.

SOURCE

The definition of 'gross income' in the Act reads as follows:

'"[G]ross income", in relation to any year or period of assessment, means–

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident, or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person *from a source within the Republic*,

during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely. . . .'

(Emphasis added.)

From this definition of 'gross income' it is clear that South Africa subjects foreigners (persons other than a resident) to taxation on a source basis.

SECTION 9 SOURCE RULES

The “new” section 9 uniform source rules largely reflect tax treaty principles (with a few added built-in protections) as set out in the OECD model, so that the South African system is globally aligned. The common law will remain as a *residual* method (the “originating cause” test) for categories of income not specifically addressed in terms of section 9.

Residual doctrine of originating cause

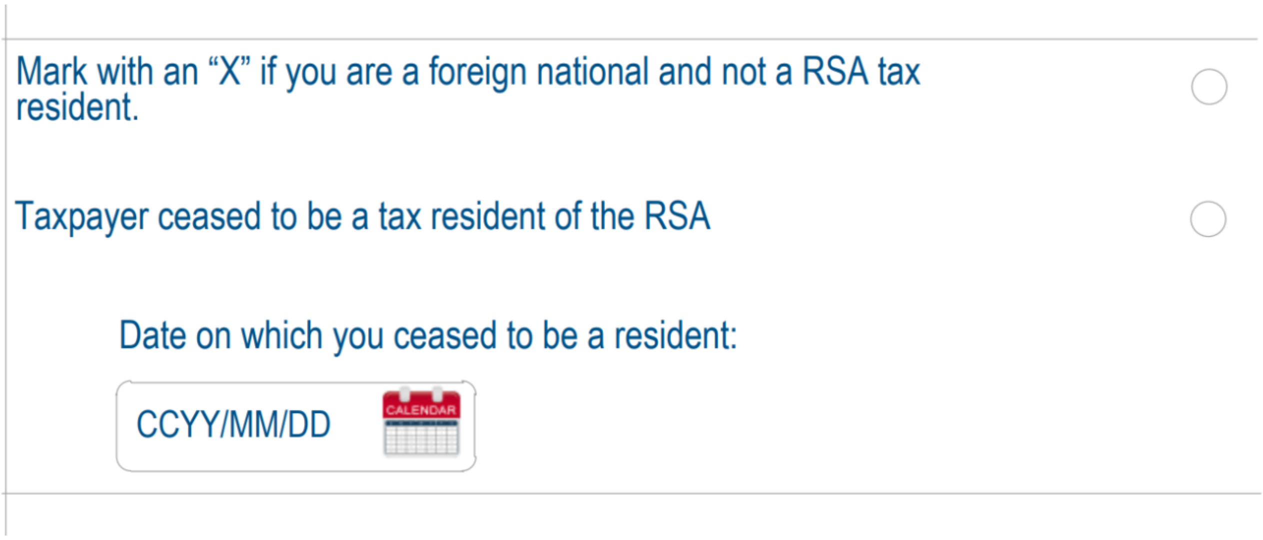
As a result of section 9(4) in the case of foreign: dividends, interest, royalties, and gains from the disposal of assets and exchange gains, the doctrine of originating cause no longer applies. Therefore, items of income of this kind that fall outside the South African sourced categories listed above will be explicitly treated as foreign source income.

Otherwise, the doctrine of originating cause (initiated in *CIR v Lever Brothers & Unilever Ltd* (1946 AD)) will implicitly remain as a residual category. In other words, this doctrine will remain in respect of any residual item of income falling outside the main categories described above (e.g. rental income and insurance premiums).

The doctrine of originating cause involves and inquiry into two matters:

- What is the originating cause of the income?
- Where is the originating cause located?

Regularising Tax Residence with SARS ITR12 (2022 YOA)


Mark with an “X” if you are a foreign national and not a RSA tax resident.

Taxpayer ceased to be a tax resident of the RSA

Date on which you ceased to be a resident:

CCYY/MM/DD

SARS VERIFICATION

The following information is required to verify your non-resident status.

Standard requirements

- The signed declaration indicating the basis on which you qualify (you can download the form from the SARS website, www.sars.gov.za)
- A letter of motivation setting out the facts and circumstances in detail to support the disclosure that you have ceased to be a tax resident.
- A copy of your passport/travel diary.

Specific requirements

In addition to the aforementioned information, also supply the following as applicable:

Qualifying basis 1: Cease to be ordinarily resident

- The type of visa on which you have gone to the foreign country.
- Where you have already taken up permanent residence in the foreign country, submit proof thereof.
- A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates that you are regarded as a tax resident in that country (If available).
- Details of any property that you may still have available in South Africa (Indicate the purpose that such property is being used for)
- Details of any business interest (e.g. investment and employment) that you may still have in South Africa.
- Details of your family. Indicate whether any family members are in South Africa and the reason thereof.
- Details of your social interests (e.g. gym contract, recreational clubs and societies) and location of your personal belongings.
- Details of any return visits to South Africa, the frequency thereof and the reason for undertaking such visits.

Qualifying basis 2: Cease by way of the physical presence test

- Only the standard requirements must be supplied

Qualifying basis 3: Cease due to application of Double Tax Agreement (DTA)

- A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates your status as a tax resident in that country.

TAXATION OF FOREIGN INCOME AND SET-OFF OF FOREIGN LOSSES

Due to the residence basis of taxation SA residents are taxed on foreign sourced income. A Double tax Treaty will in many instances alter this general principle and therefore must always be considered.

Foreign investments

The SA Reserve bank's exchange control provisions currently permit SA resident natural persons to transfer a maximum of R11 million out of SA for investment purposes each year, subject to certain provisions and tax clearances from SARS. Special provisions apply to companies.

The foreign investments may be divided into four broad categories:

- Deposits in foreign financial institutions producing foreign interest
- Fixed property producing foreign rental (see Foreign trade below)
- Shares producing foreign dividends
- Collective investment schemes/funds

Foreign interest

There is no exemption from normal tax in respect of foreign interest.

Section 6quat provides a special rebate for foreign taxes payable, deductible from South African normal tax payable by a resident whose taxable income includes foreign interest. The rebate is limited to the amount of South African tax payable on that income.

Foreign trade (eg rental)

A SA resident carrying on trade as a sole proprietor outside SA will be liable for tax in the same way as if the trade were carried on in SA. The foreign trade income is converted in SA rands in terms of section 25D.

Should the income from the foreign trade not be capable of being remitted to SA (due to the laws of the country in which the foreign trade income was produced), section 9A ensures that the amount of foreign trade income will not be taxed in SA until it is remitted.

If the foreign trade results in an assessed loss, the foreign loss may be set off against other foreign trade income but not against any income form the carrying on of a trade in SA.

Taxation of dividends paid by foreign companies

Foreign dividends may be received from direct holding of shares in a foreign company by a taxpayer or through investing in a local CIS through which foreign dividends are earned

As a general rule, foreign dividends are included in the recipient's *gross income* and any portion of the amount that is not exempt will be taxed at the marginal/tax rates relevant to the specific recipient (that is, 28 percent for companies, up to 45 percent for individuals and 45 percent for Trusts).

Partial exemption section 10B(3)

The partial exemption formula rates are (wef 1 March 2017):

- the 25/45 exemption for natural persons and trusts and
- the 8/28 exemption for companies
- the 10/30 exemption where the person is an insurer in respect of its individual policyholder fund

Total exemption section 10B(2)

Foreign dividends are now subject to four total exemptions, the most relevant participation exemption is listed below:

- *10B(2)(a):* Under this exemption, foreign dividends will be exempt if received by or accrued to a person who holds at least ***10 percent*** of the equity shares and voting rights in the company declaring the foreign dividend.

Expenses to produce foreign dividends disallowed

In terms of section 23(q) the deduction of any expenses incurred to produce foreign dividends is disallowed. As a result, no deductions will be allowed for expenses incurred in relation to the acquisition of the foreign shares.

Section 25D

A natural person and a non-trading trust may elect that all amounts received by, or accrued to and all expenses incurred by that person (or non-trading trust) may be translated into rands by applying:

- The spot rate on the date the amount was received or accrued or the expense was incurred or;
- The average exchange rate for the relevant year of assessment

PARAGRAPH 43:

Assets bought and sold in the same foreign currency

Calculate the foreign gain or loss and translate into SA rands at:

- the average exchange rate for the year of assessment in which asset disposed of or;
- the spot rate at the date of disposal

Assets bought and sold in different currencies

Convert the base cost to rands:

- Spot rate on the date the expense of the base cost was incurred or;
- Average exchange rate for the year of assessment in the year that the expense of the base cost was incurred

Convert the proceeds to rands

- Spot rate on the date of disposal or;
- Average exchange rate for the year of assessment of the disposal

SARS AVERAGE EXCHANGE RATES FOR A YEAR OF ASSESSMENT
Table A

Year of assessment for the 12 months ending:	Australian Dollar	Canadian Dollar	Euro	Hong Kong Dollar	Indian Rupee	Japanese Yen	Swiss Franc	UK Pound	US Dollar
February 2022	11.0100	11.8470	17.3592	1.9084	0.2000	0.1331	16.1603	20.3679	14.8476

ITR12

Amounts Received/Accrued Considered **Non - Taxable –** Rands only, no cents(Excluding amounts received / accrued as a beneficiary of a trust(s), o

R Amounts accrued to you as an exclusive deemed resident of another country in terms of a double taxation agreement between RSA and that other country

R Donations

Description relating to other

R Exempt Local Dividends

R Exempt Foreign Dividends

R Interest earned by a non-resident in terms of s10(1)(*h*)

Foreign Dividends – Rands only, unless cents specified

Gross Foreign Dividends subject to SA normal tax ^

R Gross Foreign Dividends subject to SA normal **4216**

Institution

Institution

Institution

Foreign Tax Credits on Foreign Dividends ^

R Foreign Tax Credits on Foreign Dividends

Account No.

Acc No.

Acc No.

Foreign Income Excl. Investment Income, CGT and amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7 – Rands only, unless cents specified

Mark here with an 'X' if the Foreign Rental (Profit/Loss) declared below should be excluded from the communal estate (if married in community of property)

Note: If you are married in community of property, the full Foreign Rental Profit/Loss applicable to you must be declared as SARS will apply the required apportionment.

R Foreign Rental (from the letting of fixed property(ies)) - Profit	4288
R Foreign Rental (from the letting of fixed property(ies)) - Loss	4289
R Foreign Tax Credits on Foreign Rental Income	4121
R Business / Trading – Profit (excluding rental income derived from the letting of fixed property(ies))	4222
R Business / Trading – Loss (excluding rental income derived from the letting of fixed property(ies))	4223
R Farming – Profit	0192
R Farming – Loss	0193
R Royalties – Profit	4278
R Royalties – Loss	4279
R Other – Profit (Excluding Rental from the letting of fixed property(ies))	4228
R Controlled Foreign Company (CFC) – Share of Profit	4230
R Income received from foreign employment services reflected on a South African IRP5/IT3(a) certificate, subject to tax outside the RSA and the s10(1)(o)(ii) exemption **does not** apply.	4235
R Other – Loss (Excluding Rental from the letting of fixed property(ies))	4229
R Other Foreign Tax Credits (excluding Rental from the letting of fixed property(ies) and Income received from foreign employment services **not** reflected on a South African IRP5/IT3(a) certificate, subject to tax outside RSA and the s10(1)(o)(ii) exemption applies)	4111
R Income received from foreign employment services **not** reflected on a South African IRP5/IT3(a) certificate, subject to tax outside RSA and the s10(1)(o)(ii) exemption applies	4259
R Foreign Tax Credit on income received from foreign employment services **not** reflected on a South African IRP5/IT3(a) certificate, subject to tax outside RSA and the s10(1)(o)(ii) exemption applies	

Loans to trusts-Deemed donation

Insertion of section 7C in Act 58 of 1962

7C. Loan or credit advanced to a trust by a connected person.—(1) This section applies in respect of any loan, advance or credit that—

(a) a natural person; or

(b) at the instance of that person, a company in relation to which that person is a connected person in terms of paragraph (*d*) (iv) of the definition of connected person,

directly or indirectly provides to—

(i) a trust in relation to which—

(*aa*) that person or company; or

(*bb*) any person that is a connected person in relation to the person or company referred to in item (*aa*),

is a connected person; or

(ii) a company if at least 20 per cent of—

(*aa*) the equity shares in that company are held, directly or indirectly; or

(*bb*) the voting rights in that company can be exercised,

by the trust referred to in subparagraph (i) whether alone or together with any person who is a beneficiary of that trust or the spouse of a beneficiary of that trust or any person related to that beneficiary or that spouse within the second degree of consanguinity [*Sub-s. (1) amended by s. 5 (1) (a) of Act No. 17 of 2017 deemed to have come into operation on 19 July, 2017 and applicable in respect of any amount owed by a trust or a company in respect of a loan, advance or credit provided to that trust or that company before, on or after that date*.]

(1A) If a person acquires a claim to an amount owing by a trust or a company in respect of a loan, advance or credit referred to in subsection (1), that person must for purposes of this section be treated as having provided a loan, advance or credit to that trust or company—

(a) on the date on which that person acquired that claim; or

(b) if that person was not a connected person on that date in relation to—

(i) that trust; or

(ii) the person who provided that loan, advance or credit to that trust or company,

on the date on which that person became a connected person in relation to that trust or person, that is equal to the amount of the claim so acquired.

[*Sub-s. (1A) inserted by s. 5 (1) (b) of Act No. 17 of 2017 deemed to have come into operation on 19 July, 2017 and applicable in respect of any amount owed by a trust or a company in respect of a loan, advance or credit provided to that trust or that company before, on or after that date*.]

(1B) Where—
(a) a natural person; or
(b) at the instance of a natural person, a company that is a connected person in relation to that natural person in terms of paragraph (d)(iv) of the definition of 'connected person',
subscribes for a preference share in a company in which 20 per cent or more of the equity shares are held (whether directly or indirectly) or the voting rights can be exercised by a trust that is a connected person in relation to that natural person or to that company, whether alone or together with any person who is a beneficiary of that trust—

(i) consideration received by or accrued to that company for the issue of that preference share shall be deemed to be a loan for the purposes of subsection (3); and
(ii) any dividend or foreign dividend accrued in respect of that preference share shall be deemed to be interest in respect of the loan contemplated in paragraph (i).

(TLAA 2020 WEF 1 January 2021, applicable to any dividend of foreign dividend accruing during any year of assessment commencing on or after that date)

(2) No deduction, loss, allowance or capital loss may be claimed in respect of—
 (a) a disposal, including by way of a reduction or waiver; or
 (b) the failure, wholly or partly, of a claim for the payment,
of any amount owing in respect of a loan, advance or credit referred to in subsection (1).

(3) If a trust or company incurs—
 (a) no interest in respect of a loan, advance or credit referred to in subsection (1) , (1A) or (1B)
 (b) interest at a rate lower than the official rate of interest,
an amount equal to the difference between the amount incurred by that trust or company during a year of assessment as interest in respect of that loan, advance or credit and the amount that would have been incurred by that trust or company at the official rate of interest must, for purposes of Part V of Chapter II, be treated as a donation made to that trust by the person referred to in subsection (1) (*a*), (1A) or (1B) on the last day of that year of assessment of that trust.

(4) If a loan, advance or credit was provided by a company to a trust or another company at the instance of more than one person that is a connected person in relation to that company as referred to in paragraph (*b*) of subsection (1), each of those persons must be treated as having donated, to that trust or company, the part of that amount that bears to that amount the same ratio as the equity shares or voting rights in that company that were held by that person during that year of assessment bears to the equity shares or voting rights in that company held in aggregate by those persons during that year of assessment.

(5) Subsections (2) and (3) do not apply in respect of any amount owing by a trust or company during a year of assessment in respect of a loan, advance or credit referred to in subsection (1) if—
 (a) that trust or company is a public benefit organisation approved by the Commissioner in terms of section 30 (3) or a small business funding entity approved by the Commissioner in terms of section 30C;
 (b) that loan, advance or credit was provided to that trust by a person by reason of or in return for a vested interest held by that person in the receipts and accruals and assets of that trust and—
  (i) the beneficiaries of that trust hold, in aggregate, a vested interest in all the receipts and accruals and assets of that trust;
  (ii) no beneficiary of that trust can, in terms of the trust deed governing that trust, hold or acquire an interest in that trust other than a vested interest in the receipts and accruals and assets of that trust;

(iii) the vested interest of each beneficiary of that trust is determined solely with reference and in proportion to the assets, services or funding contributed by that beneficiary to that trust; and

(iv) none of the vested interests held by the beneficiaries of that trust is subject to a discretionary power conferred on any person in terms of which that interest can be varied or revoked;

(c) that trust is a special trust as defined in paragraph (*a*) of the definition of a special trust;

(d) that trust or company used that loan, advance or credit wholly or partly for purposes of funding the acquisition of an asset and—

(i) the person referred to in subsection (1) (*a*) or the spouse of that person used that asset as a primary residence as contemplated in paragraph (*b*) of the definition of ―primary residence‖ in paragraph 44 of the Eighth Schedule throughout the period during that year of assessment during which that trust or company held that asset; and

(ii) the amount owed relates to the part of that loan, advance or credit that funded the acquisition of that asset;

(e) that loan, advance or credit constitutes an affected transaction as defined in section 31 (1) that is subject to the provisions of that section;

(f) that loan, advance or credit was provided to that trust or company in terms of an arrangement that would have qualified as a sharia compliant financing arrangement as contemplated in section 24JA, had that trust or company been a bank as defined in that section;

(g) Loan advance or credit subject to section 64E(4)

(h) ……………………………………….

OFFICIAL RATE OF INTEREST

The "official rate" is now defined in section 1 of the Income Tax Act is specifically linked to the repurchase rate (repo rate). The official rate is adjusted at the beginning of the month following the month during which the Reserve Bank changes the repurchase rate.

- ***Debt in Rands:***

  Rate of interest equal to the SA Repo rate plus 100 basis points

  - 1 Aug 2017-31 March 2018: **7.75%**
  - 1 April 2018-30 November 2018: **7.5%**
  - 1 December 2018-31 July 2019: **7.75%**
  - 1 August 2019 – 31 January 2020 **7.5%**
  - 1 February 2020 -31 March 2020 **7.25%**
  - 1 April 2020 – 30 April 2020 **6.25%**
  - 1 May 2020 – 31 May 2020 **5.25%**
  - 1 June 2020 – 31 July 2020 **4.75%**
  - 1 August 2020 – 30 November 2021 **4.5%**
  - 1 December 2021 – 31 January 2022 **4.75%**
  - 1 February 2022 – 31 March 2022 **5%**
  - 1 April 2022 –until there is a change in the repo rate **5.25%**

- ***Debt in foreign currency***

  Rate of interest that is the equivalent of the SA repo rate applicable in that currency plus 100 basis points

***Example* deemed donation 2022 YOA**
Assume a resident natural person made a loan to offshore Trust Z of R10 million at an interest rate of 3%. The natural person is a connected person to Trust Z. Assume the natural person made no other donations during the 2022 YOA.

Deemed donation at 28 February 2022:

10 000 000 x 4.5% x 9/12 =	337 500
10 000 000 x 4.75% x 2/12=	79 166
10 000 000 x 5% x 1/12 =	41666
Total	458 332
Less interest charged	(300 000)
(Less (s56(2)(b))	(100 000)
Total deemed donation	**58 332**

Donations tax payable by 31 March 2022: R58 332 x 20% = R11 666

RESIDENT TRUSTS AND NON-RESIDENT BENEFICIARIES

Non-Resident beneficiary

A non-resident beneficiary of a trust will be treated as a non-resident for tax purposes and be liable for the relevant SA tax on SA sourced amounts.

CGT and attribution of capital gains (para 80)

The capital gains of a trust, subject to the para 80 attribution rules are taxable as follows:

- When there is a vesting of a capital asset, or a vesting of a capital gain, by the trustees of a trust in a ***resident beneficiary***, it constitutes a disposal of that asset or gain, which triggers a tax liability in the hands of the resident beneficiary concerned. In other words, when a resident beneficiary acquires a vested right to the asset in respect of which there is a gain or a vested right only to the gain, the gain is disregarded in the hands of the trust and must be accounted for by the resident beneficiary. This rule applies only to capital gains and there is no attribution of capital losses to a beneficiary. The effective consequence is that a capital loss is 'locked in' the trust only to be taken into account for the purpose of ascertaining the aggregate capital gain or aggregate capital loss of the trust. If all the gains vest in resident beneficiaries, the trust will remain with whatever losses may have been incurred.

In the absence of a vesting in a resident beneficiary, both the capital gains and losses on disposal of any asset must be accounted for in the trust as the taxable entity. When there is a vesting of an asset, or only the gain, in a non-resident beneficiary, the gain remains taxable in the trust.

Anti-avoidance: Attribution provisions (para's 68-72)

Para 80 is subject to the anti-avoidance rules (para's 68-72) that may have the effect of attributing the capital gain to the person who disposed of the assets to the trust.

Effective CGT rates

- Individual taxpayer: 7.2%-18%
- Trust: 36%

Trust Beneficiaries (section 25B)

Section 25B deals with the taxation of the income, expenditure and allowances of trusts and the beneficiaries of the trusts. Section 25B(1) is made subject to the provisions of section 7.

Section 25B(1) provides that any income received by or accrued to or in favour of any person in his capacity as the trustee of a trust fund will, to the extent to which it has been derived for the immediate or future benefit of an *ascertained beneficiary with a vested right to it,* be deemed to be income that has accrued to that beneficiary.

Section 25B(2) provides that when a *beneficiary has acquired a vested right* to any income referred to in section 25B(1) in consequence of the exercise *by the trustee of a discretion vested* in him in terms of the trust deed, agreement or will, the income is for the purposes of section 25B(1) deemed to have been derived for the benefit of that beneficiary.

To the extent that any income received by or accrued to or in favour of the trustee has not been derived for the immediate or future benefit of an ascertained beneficiary with a vested right to the income – in other words, the beneficiaries have only contingent rights to the income – it will be deemed to be income accruing to the trust (section 25B(1)).

Section 25B(3) provides that any deduction or allowance that may be made under the provisions of the Act in the determination of the taxable income derived by way of any income referred to in section 25B(1) will, to the extent to which the income is under the provisions of section 25B(1) deemed to be income that has accrued to a beneficiary or to the trust fund, be deemed to be a deduction or allowance that may be made in the determination of the taxable income derived by the beneficiary or trust fund respectively.

What is not clear in section 25B(1), (2) and (3), is what meaning to give to the word 'income' as used in the provision. Similar provisions to section 25B are section 7 and the 'old' section 25. And in these provisions 'income' does not mean 'gross income less exempt income', but it means 'net profits'. Support for this submission comes from the judgment in *CIR v Simpson*.[3] But this principle cannot apply to section 25B because this provision deals separately with 'receipts and accruals' and 'expenditure and allowances'. It is therefore submitted that 'income' as used in section 25B(1), (2) and (3) must mean 'an amount', and not 'gross income less exempt income'.

Deductions and allowances

Section 25B(4) provides that the deductions and allowances that are deemed to be deductions and allowances of *the beneficiary* in terms of section 25B(3), be limited to the income of *the beneficiary* derived from the trust during the year of assessment.

When the aggregate of the deductions and allowances exceeds the income of the beneficiary, section 25B(5) provides that the excess may be set off against the taxable income of *the trust* during the relevant year of assessment, provided that the excess does not exceed the taxable income of *the trust*, as calculated before allowing the above-mentioned set-off.

Finally, section 25B(6) specifies that when the aggregate of the deductions and allowances contemplated in section 25B(4) exceeds *both* the income contemplated in section 25B(4) of *the beneficiary* and the taxable income of *the trust* contemplated in section 25B(5), this excess may be set off against the income of *the beneficiary* that is derived from the trust in the immediately succeeding year of assessment. The effect of the application of the provisions of section 25B(6) is that the excess carried forward may then be allowed as a deduction as envisaged in section 25B(3), (4) and (5) during the succeeding year.

3 1949 (4) SA 678 (A), 16 SATC 268.

SECTION 25B(2A)

If the receipts and accruals of an offshore trust are not caused by a donation, settlement or other similar disposition then the provisions of section 7 will not apply. Then provided the receipts and accruals are not from a South African source and provided no resident beneficiary has a vested right to them, they may escape Republic taxation.

The word 'may' is used because if the provisions of section 25B(2A) then apply, a resident beneficiary is going to be taxed in the Republic on the receipts and accruals (or some form of them).

The provisions of section 25B(2A) apply when a resident acquires a vested right to any amount representing capital of a non-resident trust if

- this capital arose (directly or indirectly) from any receipts or accruals of the trust that would have constituted income had the trust been a resident, during any previous year of assessment in which the resident had only a contingent right to that amount, and
- that amount was not previously subject to tax in the Republic.

When a resident acquires a vested right to an amount of capital, then in terms of section 25B(2A), the amount is included in the income of the resident in the year of assessment in which the resident acquires this vested right.

Para 80(3) Eighth Schedule

Para 80(3) Eighth Schedule ensures the same tax consequence in respect of any capital gains arising in the non-resident trust, when the contingent beneficiary obtains a vested right to the relevant capital gain. Para 80(3) will cause the relevant capital gain be taken into account where determining the aggregate capital gain or aggregate capital loss of the resident beneficiary in the year of assessment that the resident beneficiary obtains a vested right to the capital gain.

International Retirement Annuity Trust

An international retirement annuity trust is a vehicle that is set up in certain offshore jurisdictions for example Guernsey, Malta or Gibraltar. These retirement trusts are generally unapproved retirement annuity trust schemes and may be regarded more as a retirement savings plan than a retirement fund as recognized in terms of the South African retirement fund legislation. Most retirement trusts are based on a master trust deed and each plan has its own member issued Letter of Wishes. The Letter of Wishes provides direction to the Trustee as to how the member would have wished to distribute any remaining assets held in the retirement trust. The distribution of the remaining assets in the retirement trust is at the discretion of the Trustee.

Any contributions to a retirement annuity trust will not be deductible in terms of section 11F of the Income Tax Act and the provisions of the Second Schedule which apply to lump sum payments from retirement funds, do not apply.

An international retirement annuity trust will be regarded as a non-resident trust as long as the place of effective management remains outside South Africa.

ITR12T Disclosure

Foreign Dividend Income

Note: The exemption i.t.o. s10B(3) will be applied programmatically by SARS

Gross foreign dividends subject to SA normal tax

R 15

Less: Allowable administration expenses attributable to foreign dividend income (excluding donations)

R 15

Taxable amount available for distribution / Assessed loss retained in trust

R 15

Foreign Dividend Income (Continued)

Less: Amount distributed to / vested in beneficiaries or taxable i.t.o. s7

R 15

Taxable in Trust

R 15

ITR12 DISCLOSURE

Was any income distributed to you / vested in you as a beneficiary of a trust, or deemed to have accrued in terms of s7 ? Y ◯ N ◯

Indicate the number of trust(s) applicable? Number of trusts

Trust Income – Income distributed to you / vested in you as a beneficiary of a trust or deemed to have accrued in terms of s7

Trust Details

Trust Name

Trust Registration Number | Trust Tax Reference Number

Details of **Local Income**

R Local Remuneration	Source Code	R Distributions from Real Estate Investment Trust/s (REIT)	4238	R Local Business and Trading Income (excluding Rental Income from letting of fixed property(ies) and income from Farming Operations)	Source Code

Details of **Local Income**

R Local Annuities	Source Code	R Local Capital Gain / Loss	Source Code	R Income from Local Farming Operations (IT48)	Source Code
R Local Interest	4201	R Local Rental Income from the letting of fixed property(ies)	4210	R Deemed Annuity	3611
R SARS Interest	4237	R Dividends deemed to be income in terms of s8E and s8EA	4292	R Other Local Income	Source Code

Details of **Foreign Income**

R Foreign Interest	4218	R Foreign Capital Gain / Loss	Source Code	R Imputed Net Income from Controlled Foreign Companies (CFC)	4276
R Foreign Tax Credits on Foreign Interest	4113	R Foreign Tax Credits i.r.o. Capital Gain / Loss	4114	R Foreign Tax Credit on Imputed Net Income from Controlled Foreign Companies (CFC)	4122
R Foreign Dividends	4216	R Foreign Farming	0192	R Other Foreign Income	4220
R Foreign Tax Credits on Foreign Dividends	4112	R Foreign Tax Credits on Foreign Farming Income	4119	R Foreign Tax Credits on other Foreign Income	4110

RING-FENCING OF ASSESSED LOSSES OF CERTAIN TRADES (SECTION 20A)

This section applies to individuals in the top tax bracket only. Section 20 (set-off of assessed losses) is subject to the provisions of section 20A.

- In terms of section 20A(2), the '**taxed at the maximum marginal tax rate-requirement'** should be tested for by comparing the following amounts:
  - **the sum of the taxpayer's taxable income** (as defined in section 20A(2)) **(determined without having regard to any other provisions of this section) and any assessed loss and balance of assessed loss which were set off in terms of section 20 in determining that taxable income** and
  - the amount at which the maximum marginal tax rate for individuals for the year under review becomes applicable

  Thus, we look at taxable income after deducting the current years and previous years' assessed losses. Assessed losses so deducted, are then added back again. Thus, the net effect is that losses from other trades are in essence ignored for the purposes of the "taxed at the marginal rate-requirement". It is however taken into account for the purposes of calculating as the qualifying donation deduction (section 18A).

- Once an assessed loss is ring-fenced, it stays ring-fenced even if the person is not taxed at the maximum marginal tax rate in a subsequent year of assessment (section 20A(5)).

- Any balance of an assessed loss carried forward, to which section 20A applied in any prior year of assessment, may not be set off against any income other *than income derived from that specific trade*. Income derived from any trade includes: recoupment's in terms of section 8(4) and any amount derived from the disposal, after the cessation of that trade, of any asset used in carrying on that trade (section 20A(6)).

- All farming activities carried on by a taxpayer shall be deemed to constitute a single trade (section 20A(7)).

- If the provisions of section 20A(2) (being "taxed at the maximum marginal rate-requirement") apply, the taxpayer must indicate the nature of the business in his tax return (section 20A(8)).

- It is a commonly held view that separate business activities (other than farming) will constitute separate trades.

Natural person carrying on a **trade** that incurred an **assessed loss**

Yes

"Taxed at the maximum marginal rate-requirement" - Taxable income for current year exceeds the amount at which maximum marginal tax rate for individuals becomes applicable. (s 20A(2))

Yes

"3 out of 5 year-rule"
During the previous 5 years of assessment (current and previous 4 years) incurred an assessed loss in at least 3 of the years of assessment in carrying on that trade (do calculation separately for each year without taking into account an assessed loss from the previous year) (s 20A(2)(*a*))

OR

Suspect trade
The trade in respect of which the assessed loss was incurred, constitutes one of the following so-called suspect trades (s 20A(2)(*b*))

1. Any sport practiced by taxpayer or relative
2. Dealing in collectables by taxpayer or relative
3. Rental of residential accommodation, unless at least 80% is not used by relatives for at least 6 months of the year of assessment
4. Rental of vehicles, aircraft or boats as defined in the Eighth Schedule, unless at least 80% are not used by relatives for at least 6 months of the year of assessment
5. Animal showing by taxpayer or relative
6. Farming or animal breeding, unless it is carried on, on a full-time basis
7. Any form of performing or creative arts practised by taxpayer or relative.
8. Any form of gambling or betting practised by taxpayer or relative
9. ***The acquisition or disposal of any crypto asset***

Yes

Assessed loss incurred is in respect of a ***business*** that has a ***reasonable*** **prospect of deriving taxable income** (excluding a taxable capital gain) **within a *reasonable* period** (s 20A(3)).
(*Reasonable* will be evaluated based on the stipulations in section 20A(3)(*a*) – (3)(*f*))

No

Ring-fencing (section 20A(1)) **applies→** The assessed loss incurred from the trade cannot be set-off against income from any other trade.

Yes

Is it a **suspect trade (excluding farming)** which meets the "**6 out of 10 year-**requirement"? It is if during the 10 years ending at the end of the current year of assessment, an assessed loss was incurred in carrying on that trade in at least 6 of the 10 years (s 20A(4)).
(*Remember:* Exclude any balance of assessed losses carried forward when doing a specific year's calculation. Only 2005 and later years of assessment are taken into account.)

Yes

No

Loss from trade **not ring- fenced**

General deduction formula

The main sections of the Act dealing with deductions are s 11 to s 19 and s 23.

Sections 11 to 19, which are the positive sections relating to deductions, enumerate a list of items that may be deducted from income.

Section 23, which is the negative section, sets out a list of items that may not be deducted from income.

Expenditure under s 11 deductible only if 'trade' is carried on

In its opening words, s 11 provides as follows:

'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived . . . .'

The term 'trade' is given a very wide meaning in s 1, and includes

'every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act [57 of 1978], or any design as defined in the Designs Act [195 of 1993], or any trade mark as defined in the Trade Marks Act [194 of 1993], or any copyright as defined in the Copyright Act [98 of 1978], or any other property which is of a similar nature.

In the terms of s 11 that the Act contemplates the carrying on of more than one trade and deductions should be made from each trade as a unit by itself. Should the allowable deductions in any particular trade exceed the income, then, as regards that particular trade, there is an assessed loss which, in terms of s 20(1)(*b*), may be set off against other income derived by the taxpayer.

The losses created from each trade may be ring-fenced by s20A, which is of application to natural person taxpayers in the highest tax bracket.

Pensions, annuities, interest or dividends

In spite of its wide meaning, the term 'trade' *does not* embrace income in the form of interest, dividends, annuities or pensions.

A person who accumulates his savings and invests them in interest-bearing securities or shares held as assets of a capital nature does not derive the income from carrying on any trade. Nevertheless, the scale and nature of the investment in securities or shares held as assets of a capital nature may, it is submitted, be such as to amount to the carrying on of a trade. A business of speculation in securities or shares held as assets of a revenue nature constitutes the carrying on of a trade.

A taxpayer who was not carrying on the business of investing in equities and interest-bearing securities but was merely watching over his investments was held not to be carrying on a trade. The expenses he so incurred were accordingly disallowed.

On the other hand, the earning of rentals from the letting of any property and the receipt of royalties or similar payments from the use of copyrights or patent rights amount, by definition, to the carrying on of a trade.

Venture

For the word 'venture', it has been held that it refers to a transaction in which a person risks something with the object of making a profit, that is, a financial or commercial speculation.

In a sense very many investments by way of loan are attended with risk but it would be going much too far to suggest that whenever risk is run in a loan the lender has engaged in a venture.

SARS Practice Note 31

In practice SARS accepts that 'if capital is borrowed specifically to reinvest, such a transaction results in trade income and the expenditure is, therefore, allowable'. On this basis it will allow as a deduction under s 11(*a*) interest incurred in order to earn interest income. The Commissioner's practice is set out in Practice Note 31,the relevant portion of which reads:

'While it is evident that a person (not being a moneylender) earning interest on capital or surplus funds invested does not carry on a trade and that any expenditure incurred in the production of such interest cannot be allowed as a deduction, it is nevertheless the practice of Inland Revenue [now SARS] to allow expenditure incurred in the production of interest to the extent that it does not exceed such income. This practice will also be applied in cases where funds are borrowed at a certain rate of interest and invested at a lower rate. Although, strictly in terms of the law, there is no justification for the deduction, this practice has developed over the years and will be followed by Inland Revenue.'

General deduction formula

Most deductions are allowed by virtue of a so-called general deduction formula comprising s 11(*a*), which sets out what may be deducted, namely, the positive test, and s 23(*g*), which stipulates what may not be deducted, namely, the negative test.

The courts have laid down that s 11(*a*) and s 23(*g*) must be read together when one considers whether an amount is capable of deduction.

The current general deduction formula comprised by ss 11(*a*) and 23(*g*) may therefore be broken down into the following elements:

- The expenditure and losses
- must be actually incurred
- during the year of assessment
- in the production of the income:
- they must not constitute expenditure and losses of a capital nature, and
- if they are claimed as a deduction against income derived from trade, they must, either in part or in full, constitute moneys that are laid out or expended for the purposes of trade.

SECTION 23

Section 23 acts to disallow certain expenses. Section 23 will disallow and expense, despite the expense fulfilling the conditions of the general deduction formula or any of the specific deductions of the Act. Of relevance are:

- **Section 23(a)**

  No deduction shall be permitted in respect of costs incurred in the maintenance of any taxpayer, his family or establishment

- **Section 23(b)**

  Domestic expenses, including the rent of, cost of repairs, or expenditure in connection with any dwelling not occupied for "trade" will not be allowed as a deduction, "except in respect of such part as may be occupied for the purposes of trade". Importantly, a part of any dwelling will be deemed not to be occupied for trade (and as such the expenses in relation to this part will not be deductible) unless that part is:

  - Specifically equipped for the purposes of the taxpayer's trade, *and*
  - Regularly and exclusively used for those purposes

- **Section 23(f)**

  No deduction is permitted of any expenses incurred in respect of any amounts received or accrued which do not constitute "income" (gross income less exemptions) as defined in section 1 of the Act. An example would be expenses incurred to produce local dividend that are exempt in terms of section 10(1)(k).

- **Section 23(q)**

  No deduction is permitted of expenses incurred in the production of income of the form of foreign dividends

- **Section 23(o)**

  No deduction of expenses permitted:

  - The payment of the expenditure or the agreement or offer to make that payment constitutes activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004
  - Which constitute a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic
  - Incurred as "fruitless and wasteful expenditure" as defined in section 1 of the Public Finance and Management Act

ITR12

Local Interest (excluding SARS Interest)

Mark with an "X" if you were physically absent from RSA for at least 182 days (or 183 days in a leap year) during the 12 month period preceding the date in which the interest was received?

R Interest Exempt in terms of s10(1)(h) (amount must be included in the local interest amount)

R Allowable interest expenses incurred in the production of interest received

R Local Interest (excluding SARS Interest) 4201

EXAMPLE

Tax Administration Act (TAA)

Previously section 234 enabled SARS to take action when an administrative non-compliance error was committed "wilfully and without just cause" by the taxpayer. In other words, the law required an element of intent. Where the taxpayer could show negligence or ignorance caused the administrative non-compliance, the remedy available to SARS was must less severe than imprisonment and or a fine.

The amendment whereby the section now encompasses actions that are "wilfully *or negligently*" committed by the taxpayer means the intention of the taxpayer in respect of the non-compliance does not matter. A taxpayer can now "negligently" fail to comply or make certain mistakes on their tax returns and commit an imprisonable criminal offence and or be subject to a fine.

Mistakes for taxpayers to avoid include:

- Failure to register their details with Sars or to notify it of any changes to their details;
- Failure to appoint a representative taxpayer or to notify Sars of such appointment or a change in representative taxpayer;
- Taxpayer received compensation for assisting someone with their taxes and failed to register with Sars as a tax practitioner;
- Failure to submit a return when required to do so;
- Failure to retain all relevant substantiating records;
- Failure to provide any information as and when requested by Sars to do so;
- Failure to appear and comply when requested by Sars to attend a meeting or a hearing to give evidence;
- Taxpayer is issued with a directive or instruction by Sars and fails to comply with it;
- ***Taxpayer fails to disclose any material information to Sars or fails to provide Sars with any notification as required under any tax act;***
- Taxpayer is notified by Sars to pay an amount on another taxpayer's behalf in settlement of a tax debt and fails to do so; or
- Taxpayer has a withholding obligation and fails to withhold or deduct the tax correctly and pay it over to Sars.

VOLUNTARY DISCLOSURE PROGRAMME (VDP)

Permanent VDP (normal)

The SARS permanent Voluntary Disclosure Programme (VDP) is administered under the Tax Administration Act, 2011 with effect from 1 October 2012.

Voluntary disclosure relief

Voluntary disclosure relief is limited to defaults disclosed for which relief is granted as per the VDP agreement. The following relief is available:

- Sars will not pursue criminal prosecution for a tax offence arising from the 'default'
- Relief in respect of understatement penalties to the extent referred to in column 5 or 6 of the understatement penalty percentage table in terms of section 223 of the Act;

- 100% relief in respect of an administrative non-compliance penalty that was or may be imposed under Chapter 15 of the Act, or a penalty imposed under a tax Act, but excluding penalty for the late submission of a return.

Applications can be submitted via eFiling or Branch offices using the Voluntary **Disclosure Application Form (VDP01)**

Special VDP

For the period 1 October 2016 until 31 August 2017 a Special Voluntary Disclosure Programme (SVDP) gave non-compliant taxpayers an opportunity to regularise their unauthorised foreign assets and income by voluntary disclosing this information. Individuals and companies could apply during the window period from 1 October 2016 until 31 August 2017. The SVDP was meant for individuals and companies who did not in the past disclosed tax and exchange control defaults in relation to offshore assets. Taxpayers who missed this deadline can still make use of the normal VDP process to disclose offshore income.

Home office expenses

The concept of "home office" expenses is often misunderstood by taxpayers. An important distinction must be made between:

- a taxpayer who runs their ***own*** business from home (for example as an independent contractor),
- a taxpayer who is in employment (or a holder of office) and permitted or required to work from home by the taxpayer's employer, and
- a taxpayer who is in employment and their income from that employment is earned mainly from commission or other variable amounts based on their performance and their duties are performed outside of an office provided by their employer.

Two useful SARS references are

- Interpretation Note 28 (Issue 3)
- Interpretation Note 13

Rules to follow

- All taxpayers listed above must take section 23(b)(a) into account.
- Taxpayers in employment must then also section 23(b)(b) and section 23(m).

Section 23(b)(a): Taxpayers in general

Domestic (or private) expenses, including the rent of, cost of repairs, or expenditure in connection with any premises not occupied for the purposes of "trade" will not be allowed as a deduction.

Similarly, domestic (or private) expenses, including the rent of, cost of repairs, or expenditure in connection with any dwelling-house or domestic premises will not be allowed as a deduction "except in respect of such part as may be occupied for the purposes of trade".

In terms of section 23(b)(a), importantly, a part of any dwelling-house or domestic premises will be deemed *not* to be occupied for trade (and as such the expenses in relation to this part will not be deductible) unless that part is:

- Specifically equipped for the purposes of the taxpayer's trade, *and*
- Regularly and exclusively used for those purposes

Section 23(b)(b) and taxpayers in employment:

Furthermore, where a taxpayer's trade constitutes any employment or office, despite section 23(b)(a) (above) no deduction will be granted unless:

- the taxpayers income from such employment or office is derived mainly from commission or other variable payments based on the taxpayer's work performance, and the taxpayer's duties are mainly performed otherwise than in an office provided to the taxpayer by the taxpayer's employer or
- the taxpayer's duties are mainly performed in such part

As a result, taxpayers in employment have to consider the requirements of both section 23(b)(a) and 23(b)(b).

Types of expenses

Typically, home office expenditure includes the types of expenses referred to in section 23(*b*):

- rent of the premises;
- cost of repairs to the premises; and
- expenses in connection with the premises.

In addition to these types of expenses, other typical expenditure that could be incurred in maintaining a home office may include –

- phones;
- internet;
- stationery;
- rates and taxes;
- cleaning;
- office equipment, furniture and fittings, and repairs thereto; and
- general wear-and-tear.

The expenses listed above are not necessarily deductible for tax purposes.

DEDUCTIBLE EXPENSES

General deduction formula (section 11(a))

Most deductions are allowed by virtue of a so-called general deduction formula comprising s 11(*a*), which sets out what may be deducted, namely, the positive test, and s 23(*g*), which stipulates what may not be deducted, namely, the negative test.

The courts have laid down that s 11(*a*) and s 23(*g*) must be read together when one considers whether an amount is capable of deduction.

The current general deduction formula comprised of sections 11(*a*) and 23(*g*) may therefore be broken down into the following elements:

- The expenditure and losses
- must be actually incurred
- during the year of assessment
- in the production of the income:
- they must not constitute expenditure and losses of a capital nature, and
- if they are claimed as a deduction against income derived from trade, they must, either in part or in full, constitute moneys that are laid out or expended for the purposes of trade.

SECTION 23

Section 23 acts to disallow certain expenses. Section 23 will disallow and expense, despite the expense fulfilling the conditions of the general deduction formula or any of the specific deductions of the Act

Section 11 and the deduction of "home office" and other related expenses

It is not difficult to show that a home office expense meets the requirements of section 11, provided the expense is not of a capital nature. Expenditure such as maintenance, rates and taxes and wear-and-tear on office equipment would usually satisfy the requirements of section 11. Section 11, in so far as it relates to home office expenses, draws no distinction between taxpayers in employment, taxpayers that are holding an office or other taxpayers.

Section 23(g) must always be borne in mind, and as such, to the extent that any expense is not incurred for the purposes of trade the expense will not be deductible in terms of the general deduction formula. Section 11(e) (wear and tear) also requires that an asset must be used for the purposes of trade in order for the wear and tear allowance (or any portion of it) to be claimed.

An expense must still meet the requirements of section 23(*b*) even though it meets the requirements of section 11.

As stated, all taxpayers must meet each the requirements of section 23(*b*)(a):

- The part of the home in respect of which a claim is submitted must be occupied for purposes of a "trade", as defined in section 1, *and*
- The part that is so occupied must be specifically equipped for purposes of the trade, *and*
- That part must be regularly and exclusively used for such purpose

Must be occupied for purpose of trade

The part of the home in respect of which a deduction is claimed must be occupied for the purposes of trade. A trade includes employment.

Specifically equipped for purpose of trade

The word "specifically" is the adverb of "specific". The Collins English Dictionary defines the word "specific" to mean "relating to a specified or particular thing". The same dictionary defines the word "equip", of which "equipped" is the adjective, to mean "to furnish with". The Concise Oxford English Dictionary defines "specific" as "relating uniquely to a particular subject" and "equip" to mean "supply with the items needed for a particular purpose".

It is clear from these definitions that, in order for a part of the premises to be considered "specifically equipped" for the purposes of trade, that part must be fitted with the instruments, tools and equipment required to conduct that trade.

For example, taxpayers who use specialised equipment, such as a mechanic's tools, an architect's drawing board or a doctor's examination room equipment, must ensure that the home office is equipped with these items. For an employee performing office-type work, the likely equipment that the employee would need to have in the home office in order to escape the prohibition from claiming a deduction would include a workstation and chair, as well as computer and communications equipment.

Regular and exclusive trade use

Regular

The Concise Oxford English Dictionary defines "regularly" to mean "done or happening frequently", and "exclusively" to mean "excluding or not admitting other things; excluding all but what is specified".

As each case will have to be decided on its own merits, it is not possible to define what would be acceptable as regular usage for the purposes of trade. However, a home office that is maintained and is only used occasionally, for example, once on a weekend due to the taxpayer maintaining separate business premises, is not used frequently enough to constitute "regular" use.

Exclusive

Regarding the requirement of exclusivity, this provision contemplates that the part used for trade may not be used for any purpose other than the taxpayer's trade. A deduction is not permitted where the taxpayer conducts any activities of a private nature in the part used for trade. For this reason, it is submitted that taxpayers will have great difficulty satisfying the burden of proof that the part was used exclusively for purposes of trade, if the part does not constitute a separate room in the premises.

EXAMPLES (all examples from SARS IN 28 Issue 3)

Example 1 – Regularity test

Facts:

ABC (Pty) Ltd permits employees to work from home for four days per week. The remaining working day is reserved for meetings and administration from the employer's office premises, which is equipped with hot desking that can be used on a first-come-first-serve basis.

P is an architect employed by ABC (Pty) Ltd. For the period March 2020 to December 2020, P took advantage of the employer's permission to work from home for four days per week. For January and February 2021, P worked from ABC (Pty) Ltd's premises after deciding that specific equipment at the employer's premises was required, and so only worked from home for one day every alternate week.

Result:

For the period March 2020 to December 2020, P satisfies the regularity test and could qualify for a home office deduction in respect of expenditure incurred during that period.

For the period January and February 2020, P will not meet the regularity test. One working day out of every two weeks is not sufficient to qualify as "regular" and no deduction will be permitted in respect of expenditure incurred during this period.

Example 2 – Exclusivity test

Facts:

Z's employer permitted Z, who is a computer services agent, to work remotely from home on a permanent basis. Z's work entails uploading and upgrading computer software and resolving queries remotely. Z works remotely from a laptop on the dining room table in the dining room on the premises.

Result:

Z works from a laptop in the dining room on the premises and not from a dedicated space specifically equipped for purposes of Z's trade (a dining room is also used for purposes other than Z's trade). Z therefore does not meet the provisions of section 23(*b*) in that the home office is not used exclusively for purposes of Z's trade, and will not be entitled to a deduction of home office expenditure.

Example 3 – Exclusivity test

Facts:

X and Y, who are married, are both required by their employers to work from home. With effect from 1 April 2020, X (who is a lecturer) and Y (who is a tailor) perform their duties mainly in a home office, which is specifically equipped for purposes of each of their trades, and regularly and exclusively used for such. The area of the home office is 18 m^2 in relation to the area of the entire dwelling of 110 m^2. X and Y share this home office space to perform their duties, and wish to claim a deduction for home office expenditure.

Result:

It is a requirement that the home office be **specifically equipped** for purposes of the **taxpayer who is claiming the deduction's** trade; and that it be **exclusively** used for such purposes. Since X and Y share the home office space, it would mean that the home office space used by X would **not** have been specifically equipped solely for X's trade, but also for that of Y, and *vice versa*.

In addition, since both X and Y are sharing the home office space, it cannot be said to have been occupied exclusively for X's trade or exclusively for Y's trade. The use of a home office is therefore partially used for purposes of X's trade and partially for that of Y's trade. As such, the provisions of section 23(*b*) must be applied, and neither X nor Y can claim a deduction for home office expenditure.

Burden of proof Section 102 Tax Administration Act

Taxpayer's wishing to claim expenses in respect of the use of part of their dwelling for trade purposes, will bear the burden of proving to SARS what portion of their dwelling is used for trade as required.

EMPLOYMENT

As previously stated, where the taxpayer's trade constitutes employment then section 23(b)(b) restrictions must now be considered:

- the taxpayers income from such employment or office is derived mainly from commission or other variable payments based on the taxpayer's work performance, and the taxpayer's duties are mainly performed otherwise than in an office provided to the taxpayer by the taxpayer's employer or
- the taxpayer's duties are mainly performed in such part.

It is clear that the further restrictions depend on whether or not the income from employment that the employee receives constitutes mainly commission or not.

NON-COMMISSION EARNERS

For employees who do not earn mainly commission, their duties must be performed *mainly* (more than 50%) in that part of the private premises occupied for purposes of trade.

Employees who do not earn commission but who spend the majority of their time on the road visiting clients, perform their duties mainly at their clients' premises and, as a result, they do not qualify for a deduction under section 23(b).

The requirement that the employee's duties "are mainly performed in such part" requires an objective factual enquiry. Whether or not the employer requires the employee to perform the employment duties mainly at home is not the test.

It is for employees to prove on a balance of probabilities that more than 50% of their duties were performed in the home office. Employers often issue letters to employees confirming that they performed their duties mainly in a home office. SARS is unable to accept such letters. An employer is ordinarily only able to confirm:

- that the employee is permitted under the employment agreement to render employment services away from the employer's premises; and
- that the employee was not present at the employer's premises for a particular number of days.

It is not within an employer's personal knowledge to confirm whether or not the employees performed their duties in the home office.

Example 4 – Mainly test

Facts:

ABC (Pty) Ltd permits its tele-sales employees to work from home, maintaining hot desking in a smaller office for purposes of rotational meetings and administration. ABC (Pty) Ltd drafted an addendum to the employees' contracts of employment allowing employees to work mainly from home.

E is a salaried employee of ABC (Pty) Ltd. E is in a relationship with F. E and F own and reside in separate properties. E's property has a separate home office specifically equipped and exclusively used for purposes of E's trade.

During the year of assessment in question, E performed employment duties at ABC (Pty) Ltd's premises for two days per week, for every week of the year of assessment. For another two days every week, employment duties were rendered at E's home office. The last day of the week, E performed employment duties from F's dining room table.

ABC (Pty) Ltd has issued a letter to E, confirming that E performed employment services for 60% of the year of assessment from a home office.

***Result*:**

While the addendum to E's employment contract might *allow* E to work mainly from home, whether the requirements of section 23(*b*) are met is a question of fact, which the employees are required to substantiate on assessment. The Addendum does not conclusively achieve the purpose of proving the factual position.

Further, ABC (Pty) Ltd was not entitled to issue the letter to E, because ABC (Pty) Ltd was not aware of E's location for the remaining three days per week. The letter was factually incorrect. ABC (Pty) Ltd could only issue a letter confirming that E was not in the office for 3 days of each week.

In this example, E only performed employment duties in the home office for two days every week of the year. This amounts to 40% of the year of assessment, and does not meet the requirement of the "mainly" test.

Example 5 – Mainly test

Facts:

L, a law researcher, worked from a home office on Mondays, Wednesdays and Fridays, and from the employer's premises on Tuesdays and Thursdays. This resulted in L working from a home office for 150 working days during the year of assessment, and 100 working days at the employer's premises.

Result:

L performed employment duties in the home office for 60% of the year of assessment (150 / 250 working days). As this exceeds the 50% requirement, L's duties were performed "mainly" in the part of the home occupied for trade.

Example 6 – Mainly test

Facts:

Due to restrictions imposed by national government, H, a software developer, was forced to work from home from 1 April 2020 to 30 October 2020. For the month of March 2020, and for the period 1 November 2020 to 28 February 2021, H worked from the employer's premises. H was on leave from 1 to 31 December 2020.

Result:

For the period 1 April 2020 to 31 October 2020, there were 146 working days that H worked from home. There were 22 working days in March 2020 and 61 working days for the period 1 November 2020 to 28 February 2021, excluding December.

Total working days: 22 + 146 + 61 = 229

146 / 229 = 63,76%

H performed employment duties for 63,76% of the 2021 year of assessment in the part of the premises occupied for purposes of trade. H therefore meets the "mainly" requirement.

Further restriction for individuals in employment (section 23(m)

As well as considering all of the above, individuals in employment have to consider section 23(m).
Section 23(*m*) is essentially applicable if the taxpayer is in receipt of remuneration derived from employment or the holding of an office, unless the remuneration is derived mainly (more than 50%) from commission based on sales or turnover (for more details see Interpretation Note No. 13).

Deductions available to the taxpayer are limited under section 23(*m*) to the deductions listed in this section. These expenses include:

- S11F contributions to a pension fund, provident and RAF
- S11(c) legal expenses
- S11(e) wear and tear
- S11(i) bad debts
- S11(j) doubtful debts
- Any deduction permitted in terms of the general deduction formula (s11(a)) or s11(d) repairs in respect of any rent of, cost of repairs of or expenses in connection with any dwelling, house or domestic premises, to the extent that the deduction is not prohibited under s23(b).

Summary

Section 23(m) prohibits the deduction of all other expenses relating to employment, but these restrictions do not apply to a person who is an agent or a representative who normally derives his income mainly in the form of commissions based on his sales turnover. Effectively a taxpayer in non-commission based employment (or earning less than 50% of their income in the form of commission) will only be able to claim rental, repairs and expenses incurred in relation to a dwelling, house or domestic premises under s11(a) and (d) and wear and tear allowances under s11(e) as determined with reference to section 23(b).

Even though an expense may meet the requirements of section 11 and may be excluded from the prohibition imposed by section 23(m), home office expenditure must still escape the restrictions imposed by section 23(b).

COMMISSION-EARNERS

The income derived from this trade must be mainly from commission (that is, commission must exceed 50% of the total income from employment or the office) or other variable payments which are based on the taxpayer's work performance.

The employee's duties may also not be performed mainly in an office provided by his or her employer. Typical examples of employees who could meet this requirement are travelling sales representatives who spend the majority of their time on the road visiting clients; and commission-earning information technology consultants who spend the majority of their time at their client's premises.

For example, employees' who do not earn commission but who spend the majority of their time on the road visiting clients and perform their duties mainly at their clients' premises may not qualify for a deduction of any typical "home office expenses due to the limitations of section 23(*b*).

CALCULATING THE DEDUCTION

TAXPAYERS IN EMPLOYMENT

Calculating the deduction

In determining the deduction that may be claimed for expenditure incurred in respect of a home office, both the apportionment ratio and the expenditure that is subject to apportionment must be determined.

Apportionment

SARS accepts that the correct method to calculate the proportion of expenditure attributable to a part of a premises occupied for purposes of trade, is apportionment based on floor area of the premises.

When using this methodology, it is imperative that the entire area of all of the buildings on the property are used to calculate the portion of expenditure attributable to the home office, and not only the area of the main dwelling. Under no circumstances will an estimate of the floor area be allowed. The taxpayer must be in a position to prove the exact floor area of the premises and the part attributable to the home office.

For example, an approved building plan or a hand-drawn floor plan, with dimensions, could also suffice, provided that the premises' dimensions were accurately measured and not estimated.

Should you qualify for a deduction in respect of home office expenses, the amount must be calculated on the following basis: A / B x total costs, where:

- A = the area in m² of the part specifically equipped and used regularly and exclusively for trade (namely, the qualifying home office)
- B = the total area in m² of the residence (including any outbuildings and the area used for trade in the residence)
- Total costs = the costs incurred that are linked closely to the premises (such as rent, rates and taxes, repairs, and electricity), excluding expenses of a capital nature.*

*Note that only expenses relating to the premises must be apportioned based on floor area (for example, rent, rates and taxes, cleaning, etc.). Expenses that are not in connection with the premises (such as wear and tear on equipment and furniture used for trade purposes) do not need to be apportioned based on floor area

Example 7 – Apportionment

Facts:

With effect from 1 April 2020, X worked from home and was no longer provided with an office by the employer. Before 1 April 2020, the home office had been used as a storage room in X's home. X's home is situated on an erf totalling 600 m^2 in extent. The floor area of the main dwelling, which includes the storage area, is 210 m^2, of a double garage is 18 m^2, and of workers' quarters is 25 m^2. X's home office is 4m by 4m, that is, 16 m^2. X qualifies for a home office deduction. The total expenditure related to premises incurred by X for the period 1 April 2020 to 28 February 2021 amounts to R135 000.

Result:

The expenditure that X may claim in relation to a home office must be apportioned as follows:

R135 000 × (16 m^2 / 253 m^2*****)

= R8 537.

***** 210 + 18 + 25 m^2

Notes:

1. The erf size of 600 m^2 is not relevant in the apportionment calculation.
2. The total expenditure for the year of assessment cannot be apportioned for the part of the year of assessment that the home office was used for purposes of trade by means of a time apportionment method (for example months or days), such as for the months of April to February in this example. The actual expenditure incurred for the months that the employee qualifies for a deduction must be determined and apportioned based on floor area. Expenditure incurred in respect of March is not deductible.

After the apportionment based on the floor area of the premises and, if applicable, a full inclusion or exclusion of some expenses (see above), the amount so calculated does not need to be apportioned further based on the proportion of time that the employee spends in the home office. For example, an employee that works from a home office for three days out of five every working week may claim the amount so calculated in respect of maintaining the home office, not only three fifths of the expense. If the part of the premises is, amongst others, not exclusively used for purposes of the trade, section 23(*b*) does not permit any deduction

Permitted expenditure
The expenditure that is permitted by section 23(b) is rent of, cost of repairs of, or expenses in connection with, any premises occupied for purposes of trade.
Repairs
Any repairs to the property must have some relation to the home office in order that the deduction is not prohibited. For example, if the garage interior or bathroom is repainted, or a window in the master bedroom repaired, no portion of such repair may be claimed, as that expense will not have been incurred for the part of the premises occupied for trade.
If, on the other hand, the entire roof of the property has to be repaired because it is in a state of disrepair, then the cost of such repair, apportioned based on the floor area, may be claimed as a home office deduction.

Expenses in connection with the premises
Expenses in connection with a premises that would qualify for a deduction include items such as:
- interest on the mortgage bond;
- rates and taxes, and any other municipal service charges such as sewerage and refuse;

- levies;
- electricity; and
- cleaning costs.

Insurance costs are generally not claimable for the following reasons:
Bond insurance is normally a life insurance product and is specifically prohibited from being deducted, and is most likely capital in nature.
Household insurance ordinarily relates to the contents of the premises and not the premises itself.

Phone, fibre and stationery

Expenditure such as phone costs (including the monthly charges), stationery, furniture, and computer and communication equipment are not incurred in connection with premises, and fall outside of the scope of what is permitted by section 23(b). Equipment may, however, qualify for a wear-and-tear allowance under section 11(e) and would thus be excluded from the section 23(m) prohibition.
In modern times, many taxpayers have fibre optic cabling (fibre) installed to their homes, which may be used, in part at least, for purposes of their trade. The fibre cabling terminates in an "Optical Network Terminal" (ONT) on the user's premises. Under most contracts for the provision of fibre, the ONT remains the property of the fibre service provider. Ordinarily an installation fee and connection or activation fee are charged for the initial set up of the fibre, whilst most service providers supply a free wifi router, provided that the user remains a client for a specified period, alternatively that the router be returned in the condition that it was received if the user terminates the contract before a specified period.

Under these circumstances, the initial costs for setting up a fibre installation are not expenses in connection with the premises, and fall outside of what is permitted by section 23(b). Further, the initial costs and monthly subscriptions are prohibited from being deducted by section 23(m). The router, which was received at no cost to the user, and who does not acquire ownership of the router until the effluxion of a period of time, also does not qualify for a wear-and-tear allowance.
These principles would also apply to other telecommunication expenses.

Calculation

The expenditure that is not prohibited by section 23(b) must be determined separately to other expenditure. Only the expenditure relating to rent of, cost of repairs of, and expenses in connection with, the premises, is required to be apportioned based on floor area. Other expenses may be claimed in full, provided such expenses are for purposes of trade and meet the other requirements for deductibility.

Record keeping for tax purposes

It is essential that any claim for a home office deduction is supported by sufficient evidence proving that all the requirements that are necessary to claim a deduction have been met.[56] These records must be retained for a period of five years from the date upon which the tax return was submitted to SARS[57] and must be produced should the taxpayer be selected for inspection, verification or audit.[58]

There is no closed list of documents or evidence that can prove a claim for a deduction for home office expenses. However the following documentation would typically be required to support such a claim in circumstances where the taxpayer's home office is a separate room:

- Schedule setting out details of each amount claimed, as well as the apportionment calculations.
- Floor plan of the premise clearly showing the home office and including the actual dimensions of each part. If other buildings are required to be included in the apportionment calculations, a plan showing all the buildings on the property, including the actual dimensions of each.
- Photographs of the home office showing the dedicated space, specifically equipped.
- Documentation supporting the incurral of each expense claimed and proof of payment, for example:
    - Municipal accounts for rates and taxes, electricity and other municipal services, or an electricity bill from a managing agent, or a prepaid electricity voucher and proof of payment.
    - Bond statement reflecting the interest portion of the mortgage bond repayment.
    - Copy of the insurance policy and proof of payment of insurance premiums.
    - Schedule of rent paid, copy of lease agreement and proof of payment.
    - Schedule of repairs, including invoices and proof of payments.
    - Proof of acquisition or of the lease of assets used for purpose of trade for which wear-and-tear is claimed and proof of payment.
- Schedule of dates[59] detailing when the employee worked from home during the year of assessment, and a calculation proving that the employee worked mainly from the home office during the year of assessment.
- Letter from the employer, on the employer's letterhead, confirming that the employee was permitted to work from home, including the periods that the employee was permitted to work from home and, if available, those periods that the employee did not report to the office.

The burden of proof is very difficult in cases where the claim is in respect of a part of a room that would ordinarily be used for private purposes. Taxpayers will need to consider what additional evidence they can provide to prove that the part was used exclusively for trade, with no other use during or after work hours, throughout the relevant period. The more that a particular type of room would ordinarily be used for private purposes, the more difficult the taxpayer's burden of proof will be that a part of that room was used exclusively for purposes of trade.

The information listed above is neither comprehensive nor exclusive, and each employee may provide whatever evidence supports his or her particular factual position. For example, affidavits may need to be submitted to support some factual assertions. The information should be prepared and retained so that it can be submitted if requested

Example 8 – Determination of home office deduction by an employee with income derived mainly from commission

Facts:

X is an employee who is in receipt of commission income of R500 000, a salary of R200 000 and a travel allowance of R30 000 a year. X is obliged in terms of an employment contract to work from home since the employer does not provide an office at work. X maintains a home office which has been specifically set up for the purposes of performing employment duties. The home office is used regularly and exclusively for the purposes of X's trade. X's duties are performed mainly in the home office. The total area of the home office is 20 m2 in relation to the total area of the premises which is 200 m2.

X had purchased a computer for R12 000, an office desk for R3 000 and an office chair for R1 800 for the home office. The interest on the household bond amounts to R45 000 for the year of assessment. The rates and taxes for the year amount to R12 500. X contributes R15 000 for the year of assessment to a pension fund and had also incurred commission-related business expenses of R9 000 consisting of cell phone expenses and consumable stationery costs.

Result:

Since more than 50% of X's total income consists of commission, the restrictions imposed by section 23(m) will not apply. Furthermore, X maintains a home office which is regularly and exclusively used for the purposes of trade. The home office has been specifically equipped for the purposes of X's trade and X's employment duties are mainly performed other than in an office provided by the employer. X can therefore claim a deduction for the following:

- Pension fund contributions of R15 000, subject to the limits imposed by section 11F
- Cell phone expenses and consumable stationery expenses of R9 000 against commission income
- Wear-and-tear allowance under section 11(e) for the computer, office desk and office chair
- Travel deduction against the travel allowance
- Interest on bond of R4 500 (10% of R45 000)*
- Rates and taxes of R1 250 (10% of R12 500)*

* X may claim a proportionate portion of the interest on bond and the rates and taxes, being expenses in connection with a dwelling house or domestic premises, in respect of the home office. The proportion that may be claimed is based on the area of the home office expressed as a percentage of the total area of the house, which is 10% (20 / 200 m2).

Example 9 – Determination of a home office deduction by employee with income not derived mainly from commission

Facts:

Y is an employee who is in receipt of a salary of R500 000, commission of R20 000 and a travel allowance of R30 000 for the year of assessment. Y is obliged in terms of an employment contract to work from home since the employer does not provide an office at work. Y maintains a home office which has been specifically set up for the purposes of employment duties. The home office is used regularly and exclusively for the purposes of work. Y's duties are performed mainly in the home office. The total area (square metres [m2]) of the home office is
20 m2 in relation to the total area of the premises which is 200 m2.
Y had purchased a computer for R12 000 and incurred computer repair costs of R2 000, an office desk for R3 000 and an office chair for R1 800 for the home office. The interest on the household bond amounts to R45 000 for the year of assessment. The rates and taxes for the year are R12 500. Renovation costs to the roof of the property amount to R10 000. Y contributes R15 000 for the year of assessment to a pension fund and has also incurred commission-related business expenses of R9 000 consisting of cell phone expenses and consumable stationery costs.

Result:

Since less than 50% of Y's total income consists of commission, the restrictions imposed by section 23(m) will apply. Y meets the requirements of section 23(b), that is, Y maintains a home office which is regularly and exclusively used for the purposes of trade, and the home office has been specifically equipped and is mainly used for the purposes of her trade. Y will be limited to the following deductions:

- Pension fund contributions of R15 000, subject to the limits imposed by section 11F
- Wear-and-tear allowance under section 11(e) for the computer, office desk and office chair
- Travel deduction against the travel allowance
- Interest on bond of R4 500 (10% of R45 000)*
- Rates and taxes of R1 250 (10% of R12 500)*
- Renovation costs of R1 000 (10% of R10 000)*

Y will be entitled to claim a proportionate portion of the interest on bond, rates and taxes and renovation costs in respect of the home office, being expenditure in connection with the premises. The proportionate claim is based on the area of the home office expressed as a percentage of the total area of the house, which is 10% (20 / 200 m2).

The following expenses will be disallowed under section 23(m):

- Cell phone expenses and consumable stationery costs of R9 000
- Repair costs of computer of R2 000

TAXPAYERS IN EMPLOYMENT

Did you receive any other income (excluding amounts received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7) and/or incur any other allowable expenses not addressed above? Y ◯ N ◯

Other **Deductions / Exemptions** – Rands only, no cents

R Expenses against local taxable subsistence allowance	4017	R Expenses against foreign taxable subsistence allowance	4019	R Donations allowable in terms of. s18A to approved public benefit organisations	4
R Depreciation	4027	R Home Office Expenses	4028	R Travel Expenses (no allowance - commission income)	4
R Amounts Refunded in terms of s11(nA) and 11(nB)	4042	R Allowable Accountancy / Administration Expense	4043	R Legal expenses in terms of s11(c)	4
R Bad debt/Provision for doubtful debt	4045	R Use of motor vehicle	4046	R Section 8C losses	4
R Holders of Public Office: Deduction in terms of s 8(1)(d)	4047	R Remuneration taxed on IRP5 but comply with exemption in terms of s10(1)(o)(i)	4033	R Remuneration for foreign employment services that qualifies for s10(1)(o)(ii) exemption (excluding s 8A/8C gains and dividends)	4
R Other	4016	R Deduction of interest repaid to SARS (in terms of s7F) that was previously taxed in terms of s7E	4052	R Deduction i.t.o. s6*quat*(1C) for foreign taxes paid or proved to be payable to a foreign government of any country on any SA sourced trade income	4
		Description relating to other			

INDEPENDENT CONTRACTORS

Taxpayers earning income from a trade that is not regarded as employment, are commonly referred to as independent contractors, and will earn income from the services they render as such. The home office related expenses that are deductible from the income earned from services rendered by an independent contractor are limited only by section 23(b)(a):

- The part of the home in respect of which a claim is submitted must be occupied for purposes of a "trade", as defined in section 1, *and*
- The part that is so occupied must be specifically equipped for purposes of the trade, *and*
- That part must be regularly and exclusively used for such purpose

The further restrictions of section 23(b)(b) and section 23(m) are not applicable. Taxpayers will need to meet the requirements of section 11 and section 23(g) where applicable.

Taxpayer's must distinguish between:

- expenses that directly relate to the work space and may deductible in full, and
- those thought of as indirect expenses that can be partially deducted as they are related to the cost of the property where the office is based.

Direct costs attributed to the office would include repairs to the office, stationary, telephone ONT costs relating to the business, and can be claimed in full. Wear and tear can also be claimed in full on assets only used for trade, for example, desk, chair, printers etc.

Apportionment

However, expenses relating to the property, as a whole, are more complicated and the portion of the expense that could be claimed will depend on the percentage of the home that is used for trade purposes. To calculate these expenses the floor area of the home office would need to be divided by the total floor area of the home in order to determine the accurate expenditure that has incurred within the office space. Examples of these types of indirect expenses include real estate property taxes, rent, mortgage interest, utilities and homeowners or renters insurance.

Mixed use

Mixed use (for both trade and private purposes) of certain trade assets must also be considered, for example claiming expenses in respect of motor vehicles, computers and telephone. The percentage of private use of assets and the relevant expenses are will not be deductible.

Local Business, Trade and Professional Income (other than Rental Income from the Letting of Fixed Property(ies) and distributions received / accrued as a beneficiary of a trust(s), or deemed to have accrued in terms of s7)

Description	Note: If in a partnership, declare full partnership financial details. Should you have incurred expenditure for your own account relating to the partnership and which is not reflected In the financial statements of the partnership, such expenditure should be claimed under "Other Deductions".
Unique Identifier	Note: Where a unique identifier was allocated to this trade in the previous year, please complete that allocated number. Also ensure that the description above is the same as the previous year.

Income – Rands only, no cents

R Turnover / Sales	R Gross Profit	Description relating to other
R Income Reflected on an IRP5/IT3(a) regarded to be trading Income	R Gross Loss	
R Cost of Sales	R Income Other than Turnover	R TOTAL

Expenditure – Rands only, no cents

R Accounting Fees	R Entertainment	R Salaries and Wages
R Administration Cost	R Insurance	R Telephone
R Bad Debts	R Interest / Finance Charges	R Travel Costs – Local
R Bank Charges	R Lease Payment	R Travel Costs – Foreign
R Capital Allowances	R Legal Costs	R Other
R Commission paid	R Provision for Doubtful Debts	R TOTAL
R Consulting Fees Paid	R Rental Paid	R Accounting Profit
R Depreciation	R Repairs / Maintenance	R Accounting Loss
R Electricity / Rates and Taxes	R Royalties and License Fees	Description relating to other

SARS VERIFICATION TYPE QUESTIONS

- Letter from your employer confirming the reason AND the period that you were required to work from your office at home. Employer to also confirm whether you had an office available at their premises and if in the affirmative the days you spend at the office compared to time spent at your home office.
- Is the home office exclusively occupied for the purposes of trade or also used for private/recreational purposes?
- Is the home office specifically equipped for the purposes of trade?
- List of items and equipment situated within the home office
- Is the home office regularly used for the purposes of trade eg how many hours per week/month
- 360 Degree photographs of the home office
- Documentary proof of interest on bond
- Rental agreement

PRIMARY RESIDENCE

An individual is entitled to deduct R2 million from any capital gain computed in relation to 'the primary residence of that person'. The same rule applies to a special trust whose beneficiary occupies the trust's property. A capital loss on a primary residence must also be reduced by R2 million. The exclusion applies each time an individual disposes of a primary residence. It is therefore neither an annual nor a cumulative exclusion and if an individual were to dispose of consecutive primary residences in each of four years, the total possible exclusion would be R8 million (subject to the limitations discussed in this chapter).

This basic rule is qualified by a number of provisos, namely:

- Where a primary residence is jointly owned (typically by a husband and wife), the R2 million is apportioned between the capital gains or losses accruing to each individual.
- The maximum extent of a primary residence qualifying for the R2 million exclusion is two hectares. If the property which is used as a primary residence exceeds that size, the proceeds of an area not exceeding two hectares must be determined as the limit against which the R2 million may be set off.

Where a house is situated on a separate erf from, for example, its gardens, the exclusion only applies to so much of the separate erven as is disposed of at the same time and to the same person as the residence itself. So, for example, if an individual were to subdivide his property so that the residence and a small garden stood on one plot and were to sell off the subdivided vacant plot to a person other than the purchaser of his residence, no exclusion would apply to the gain computed in respect of the plot. Similarly, even if both residence and plot were disposed of to the same person, the sale must be at the same time in order for the plot to enjoy participation in the R2 million exclusion - in this context 'at the same time' effectively means in the same sale agreement.

Where an individual has not been continually resident in his primary residence through the period of ownership from 1 October 2001 or acquisition (whichever is the later) to the date of disposal, then an apportionment of the gain from the disposal may be required:
The R2 million exclusion is applied to that portion of the gain or loss attributable to:

  - the period (if any) during which the residence was used wholly for business/rental purposes; *and*
  - the proportion of the residence that was used mainly for business purposes.

Definition of primary residence
Only one residence can be a 'primary residence' of a natural person or of a special trust at any one point in time. This is expressly provided for, notwithstanding that the word 'primary' on its own would tend to suggest that conclusion.

A 'residence' means:
'Any structure, including a boat, caravan or mobile home which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith.'

Furthermore, where adjacent land (i.e. a separate erf) is used mainly for domestic or private purposes together with the residence, then it, too, is included, provided that it is sold together with and to the same person as the residence itself.
A primary residence can be owned directly or jointly with another person who need not necessarily hold their share also as a primary residence - in other words the enquiry is made in respect of the particular owner or part-owner concerned, without reference to the status of other part-owners. But in relation to the person concerned, it must be used by that person as their main residence in which they ordinarily reside or resided.

Generally, it will be fairly easy to determine whether a particular person occupies a property as his or her primary residence together with their spouse. Note that occupation by children and other dependants is irrelevant, so that if the owner of a residence moves away and allows their children to use it, the primary residence status will lapse in the same way as it would if let or otherwise used for business purposes. In such a case, the basic exemption is applied against that portion of the gain that is attributable to the period during which the residence was occupied in a qualifying manner after 1 October 2001.

On the other hand, if a person uses a property as his primary residence and allows another person to live in the premises at the same time, whether a child, relative or friend, then provided no commercial (trade) use is made of the premises, it continues to qualify as a primary residence and there is no reduction of the gain qualifying for exclusion.

Non-residential use
The provisions of paragraph 49 are subject to the provisions of paragraph 50. Paragraph 49 provides that when a natural person or special trust disposes of an interest in a primary residence or disposes of an interest in a residence that was a primary residence for a part of the period on or after the valuation date during which he or it held that interest, and when he or it used the residence or a part of it for the purposes of carrying on a trade for any portion of the period on or after the valuation date when he or it held that interest, the portion of the capital gain or capital loss to be disregarded in terms of paragraph 45 must be determined with reference to the period on or after the valuation date during which he or it used that residence for domestic purposes, and to the part of that residence used by him or it mainly for purposes other than the carrying on of a trade.

The purpose of paragraph 49 is to reduce the capital gain or capital loss disregarded, in terms of the primary residence exclusion, when a part of the primary residence was used for the purposes of carrying on a trade. It also caters for the situation when the property was at some stage used as a primary residence but not for the entire period of ownership after the valuation date.

An apportionment of the capital gain or capital loss to be disregarded in terms of paragraph 45 must be made with reference to the *period* on or after the valuation date during which the person or beneficiary used the residence for domestic purposes and to the *part* of the residence used by him mainly for purposes other than the carrying on of a trade. Thus the apportionment must be made with regard being had to both the time, and space, used mainly for domestic purposes.

Example 10 – CGT consequences

Facts:

G purchased a primary residence on 1 October 2002 for R800 000. G began performing employment duties from home on 1 October 2012. G carried out renovations to the home amounting to R300 000 (not deductible as home office expenditure). 20% of the premises' floor area was used for business purposes. G also claimed 20% of the permissible costs relating to the primary residence as expenses incurred in carrying on a trade, that is, a home office deduction, for the 2013 to 2020 years of assessment. On 1 October 2019, G sold the property for
R3,7 million.

Result:

The CGT calculation is as follows:

	R
Proceeds on disposal	3 700 000
Less: base cost (R800 000 + R300 000)	(1 100 000)
Capital gain	2 600 000
Less: Gain attributable to the business use for the period (7 years) that the property was partially used as a home office	
[(R2 600 000 x 7/17) x 20%]	(214 117)
Portion of the capital gain attributable to the property's use as a primary residence	2 385 883
Less: Primary residence exclusion – paragraph 45(1)(a)	(2 000 000)
Capital gain from private portion	385 883
Add: capital gain from business portion	214 117
Total capital gain	600 000
Less: Annual exclusion – paragraph 5	(40 000)
Aggregate capital gain	560 000

The taxable capital gain for individuals is 40% of the aggregate capital gain for a year. This means that 40% of the gain (that is, R560 000 × 40% = R224 000) is added to G's taxable income and will be taxed at the applicable marginal rate of tax.

Capital Gains Tax

The provisions to determine a capital gain or capital loss are contained in the Eighth Schedule to the Income Tax Act.

Assets disposed of by a person, on or after 1 October 2001 (referred to as the valuation date), are subject to CGT, irrespective of whether those assets were acquired by that person before or after valuation date. But, only the capital gain or capital loss relating to the period subsequent to valuation date is subject to CGT.

Residents are subject to CGT on their world-wide assets. But non-residents are subject to CGT on only immovable property (including an interest or right in it) situated in the Republic and the assets of a permanent establishment situated in the Republic.

TAXABLE CAPITAL GAINS AND ASSESSED CAPITAL LOSSES

A person's capital gain or loss is determined, for each asset disposed, during the year of assessment as follows:

Proceeds	xx xxx
Less: base cost	x xxx
Capital gain or loss	xx xxx

A capital gain may be excluded, deferred, disregarded or attributed to another person. Special rules apply to capital losses. Capital losses may be offset against capital gains. Yet, capital losses may not be offset against other normal income. They must be carried forward to the subsequent year of assessment to be set off against future capital gains.

To calculate a taxable capital gain:

1. First, the sum of the all capital gains and losses for each asset (determined separately) disposed of during the year of assessment is determined.
2. Then the resulting total is reduced by an annual exclusion (R40 000) for a taxpayer who is a natural person or special trust, resulting in the aggregate capital gain or loss for the year of assessment.
3. An assessed capital loss brought forward from the previous year of assessment is then deducted from the aggregate capital gain or loss, resulting in a net capital gain or capital loss.
4. The net capital gain is then multiplied by an inclusion rate to determine the amount to be included in the taxpayer's taxable income.
5. A net capital loss is carried forward to the next year of assessment. It becomes an assessed capital loss.

The inclusion rate for a natural person or special trust is 40% and for a company or trust it is 80%

Example (natural person 2022 YOA)

Capital gains

Shares

Proceeds on disposal	2 300 000	
Less base cost	1 700 000	600 000
Block of flats		
Proceeds on disposal	4 500 000	
Less base cost	4 600 000	-100 000
Sum of gains and losses		500 000
Less annual exclusion		40 000
Aggregate capital gain		460 000
Less assessed capital loss brought forward (assumed)		84 000
Net capital gain		376 000
		× 40%
Inclusion in taxable income – 40% of net capital gain		150 400

MAIN ELEMENTS OF CGT

Residence

Residents pay CGT on their worldwide assets

Non-residents only pay CGT on - Immovable property in republic

- Interest in immovable property
- (see s35A)

The four building blocks of CGT are:

- An asset
- A disposal
- Proceeds
- Base Cost

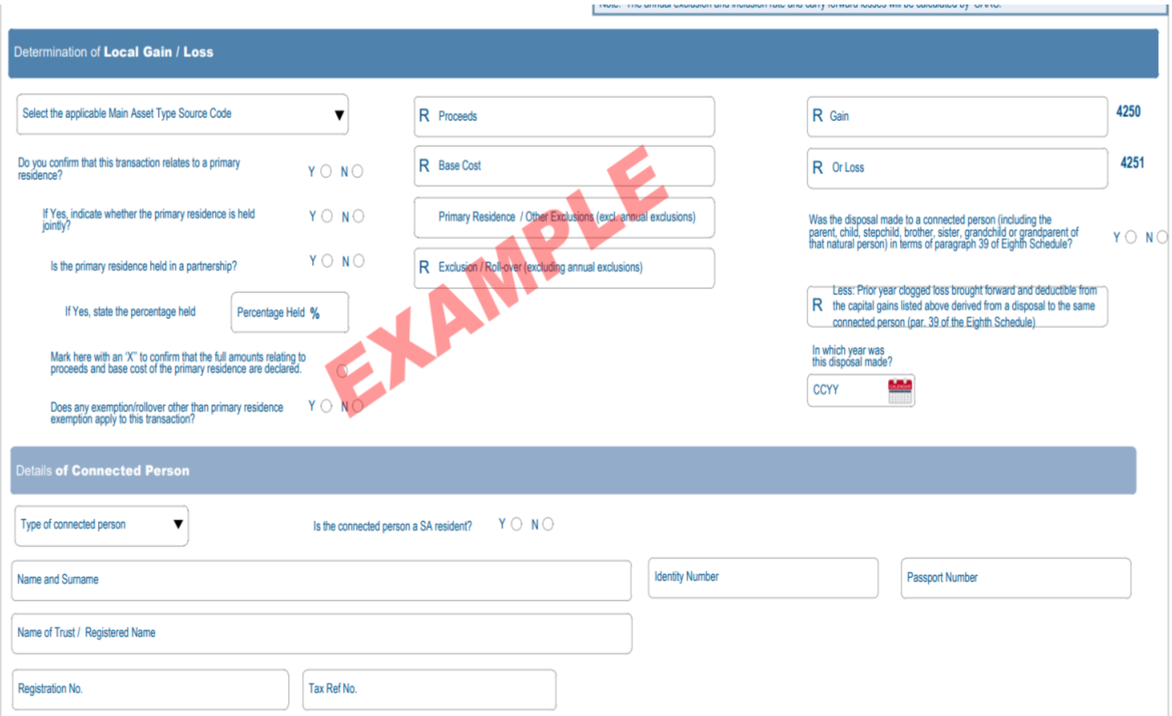
A capital gain or a capital loss is made when proceeds or deemed proceeds arise on the disposal of an asset. A disposal is therefore the event that causes a potential liability for capital gains tax (CGT). It is therefore essential to identify when a disposal has occurred.

A disposal is any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset. Para 11 specifically includes as disposals a donation of an asset and the exchange (swap) of one asset for another.

Certain events are deemed to be disposals regardless of the nature of the event:

- Cessation of tax residence
- Death
- Donation of an asset

ITR12



Determination of **Local Gain / Loss**

Select the applicable Main Asset Type Source Code

Do you confirm that this transaction relates to a primary residence? Y ○ N ○

If Yes, indicate whether the primary residence is held jointly? Y ○ N ○

Is the primary residence held in a partnership? Y ○ N ○

If Yes, state the percentage held: Percentage Held %

Mark here with an "X" to confirm that the full amounts relating to proceeds and base cost of the primary residence are declared. ○

Does any exemption/rollover other than primary residence exemption apply to this transaction? Y ○ N ○

R Proceeds

R Base Cost

Primary Residence / Other Exclusions (excl. annual exclusions)

R Exclusion / Roll-over (excluding annual exclusions)

R Gain 4250

R Or Loss 4251

Was the disposal made to a connected person (including the parent, child, stepchild, brother, sister, grandchild or grandparent of that natural person) in terms of paragraph 39 of Eighth Schedule? Y ○ N ○

R Less: Prior year clogged loss brought forward and deductible from the capital gains listed above derived from a disposal to the same connected person (par. 39 of the Eighth Schedule)

In which year was this disposal made? CCYY

EXAMPLE

Details **of Connected Person**

Type of connected person

Is the connected person a SA resident? Y ○ N ○

Name and Surname

Identity Number

Passport Number

Name of Trust / Registered Name

Registration No.

Tax Ref No.

Section 6quat

Section 6*quat* provides a special rebate for foreign taxes payable on foreign sourced amounts, deductible from South African normal tax payable by a resident whose taxable income includes, among others, foreign dividends and foreign interest. The rebate is limited to the amount of South African tax payable on that income.

The s 6quat rebate

Section 6*quat* provides a special rebate, or unilateral tax credit, for foreign taxes payable by residents (natural persons and legal entities) in respect of income from *non-Republic sources*.

Where a foreign country levies tax on income derived from a source in South Africa, s 6*quat* allows relief not as a rebate but in the form of a deduction for the foreign taxes paid.

The rebate is deductible from normal tax payable by a resident whose taxable income includes any of the following amounts:

(*a*) Income, other than foreign dividends dealt with separately in item (*c*) below, received by or accrued to a resident from a source outside, and not deemed to be within the Republic.

(*b*) The proportional amount of the net income referred to in s 9D. Section 9D is an anti-avoidance measure which has the effect of including as income in the hands of residents, who hold more than 50% of the participation rights or voting rights in a CFC, a proportional amount of its net income.

(*c*) Foreign dividends.

(*d*) Taxable capital gains derived from a source outside and not deemed to be within the Republic. Section 26A includes in the taxable income of a person for a year of assessment his taxable capital gains for that year, as determined in terms of the Eighth Schedule to the Act. It follows that when a resident makes a taxable capital gain from a foreign source, which is not deemed to be within the Republic, but the gain is subject to tax in the foreign country, the rebate provided by s 6*quat* would be available against South African tax payable on the gain.

(*e*) Amounts referred to in items (*a*), (*b*) and (*c*) received by or accrued to any 'other person', but deemed to have been received by or accrued to a resident in terms of s 7. Section 7 contains specific anti-avoidance provisions that aim to nullify, for fiscal purposes, schemes intended to shift the incidence of tax. More specifically, the various provisions apply to particular and expressly defined transactions in terms of which certain categories of income diverted by one person to another, are deemed to have accrued to the person concerned Effectively, therefore, the resident will qualify for the s 6*quat* rebate in respect of the income deemed to have been received by or accrued to him.

(*f*) A capital gain from a source outside and not deemed to be within the Republic, which is attributable to a resident in terms of paras 68 (attribution of capital gains to a spouse), 69 (attribution of capital gains to parent of minor child), 70 (attribution of capital gains subject to conditional vesting), 71 (attribution of capital gains subject to revocable vesting), 72 (attribution of capital gains vesting in non-residents) or 80 (attribution of capital gains vesting in resident beneficiaries of a trust) of the Eighth Schedule.

(*g*) Amounts referred to in items (*a*), (*b*), (*c*) and (*d*) above representing capital of a trust and included in the income of a resident beneficiary by virtue of s 25B(2A) or taken into account in determining his aggregate capital gain or aggregate capital loss in terms of para 80(3) of the Eighth Schedule.

Section 25B(2A) establishes a special rule when a resident beneficiary, during a year of assessment, acquires a vested right to an amount representing the capital of a non-resident trust, if the capital arose from income accrued to the trust in a prior year of assessment. The rule states that the amount must be included in the income of the resident beneficiary in the year in which he acquires the vested right. And, in the context of capital gains, para 80(3) of the Eighth Schedule achieves a similar result in relation to non-resident trusts. Thus, when a resident beneficiary acquires a vested right to an amount representing the capital of a non-resident trust, and the amount arises from a capital gain of the trust determined in a prior year, the amount must be taken into account for the purposes of calculating his aggregate capital gain or aggregate capital loss for the year in which he becomes entitled thereto.

In both situations the resident beneficiary will be entitled to the s 6*quat* rebate, even if, in the second situation immediately above, the foreign tax has been paid by the non-resident trust.

The following is a summary of the legal nature of the income to qualify for the rebate:

- The income received or accrued by the resident must be from a source outside and not deemed to be within the Republic, unless specifically indicated otherwise.
- The amount received or accrued must be included in the taxpayer's taxable income, that is, it must not constitute exempt income.
- The amount must have been subject to foreign tax.

The foreign taxes

The rebate will be an amount equal to the sum of the foreign taxes on income proved to be payable to any sphere of government of any country other than the Republic, without any right of recovery by any person (other than a right of recovery in terms of an entitlement to carry back losses arising during any year of assessment to a prior year of assessment).

The foreign taxes are those payable by the following persons:

- A resident in respect of

  –income from sources outside and not deemed to be within the Republic (see item (*a*) above);

  –'foreign' dividends (see item (*c*) above);

  –taxable capital gains (see item (*d*) above).
- A CFC in respect of a proportional amount referred to in item (*b*) above. In other words, even though the foreign tax is borne by the CFC, the rebate may be claimed against the foreign tax relative to the proportional amount of the CFC's net income imputed to the resident. The entitlement to the s 6*quat* rebate is subject to s 72A(3), however, which denies a taxpayer the deduction if he fails, without reasonable grounds, to submit a return reflecting the participation rights held in a CFC or a copy of its financial statements.

The term 'income' in the context of taxes on income includes 'profits, income and gains and taxes imposed by national and certain lower tiers of government [that is, state, provincial, local and any other level of government] in a foreign country and capital gains taxes . . . qualify for the rebate'.

The rebate may be claimed only if the foreign income is included in the resident's taxable income. Where the resident is a member of a partnership or a beneficiary of a trust and the partnership or trust is liable for tax as a separate entity in the foreign country, a proportional amount of any tax payable by the entity that is attributable to the resident's interest in the partnership or trust is deemed to have been paid by the resident (proviso to s 6*quat*(1A)). In other words, where a foreign partnership or non-resident trust has paid tax in a foreign country, the tax may be apportioned to the resident partners or beneficiaries.

Amount of rebate

The maximum amount available as a rebate or rebates for any foreign tax proved to be payable is limited in aggregate to an amount that bears to the total normal tax payable the same ratio as the total taxable income attributable to the included income, proportional amount, foreign dividend or taxable capital gain or amount bears to the total taxable income (s 6*quat*(1B)(*a*)). In other words, the rebate must be determined on the 'apportionment' or '*pro rata*' basis. This approach is in accordance with the dictates of Interpretation Note 18 issued by SARS.

Expressed as a formula, the rebate will be calculated as follows:

$$\text{Section 6}\textit{quat}\text{ rebate} = \frac{\text{taxable income derived from all foreign sources}}{\text{total taxable income from all sources}} \times \text{Normal tax payable on taxable income from all sources}$$

Since the taxable income attributable to the included income (that is, the total taxable income from all foreign countries) must be aggregated, as must the normal tax payable on this income, for the purposes of calculating the rebate, it is clear that the rebate is not 'ring-fenced' relative to each foreign country. Instead it is calculated on what can be described as a 'pooled basis', which means that there is no need to link each amount of foreign tax to a specific amount of income.

For example, say a South African company has the following income and tax liability for a year of assessment:

Income – South Africa		R500 000
– Country A	R250 000	
– Country B	100 000	350 000
Taxable income		850 000
South African tax (45% × R850 000)		382 500
Less: Section 6quat rebate		
Foreign tax(assumed) – Country A	112 000	
– Country B	22 000	
	134 000	
Limited to $\frac{R350\ 000}{R850\ 000} \times R382\ 500$		157 500

Get **R134 000** as section 6quate rebate

ITR12

Foreign Dividends – Rands only, unless cents specified

Gross Foreign Dividends subject to SA normal tax		Foreign Tax Credits on Foreign Dividends	
R Gross Foreign Dividends subject to SA normal	4216	R Foreign Tax Credits on Foreign Dividends	4112
Institution		Account No.	