



EXITING SOUTH AFRICA

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A GUIDE FOR
SOUTH AFRICAN
TAXPAYERS

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THE **NOMAD**
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INTRODUCTION

In a global economy with freedom of choice, you have the luxury to structure your affairs to ensure that you pay low or zero taxes. If so, then why are you still stuck in your old ways? Why are you still paying exorbitant amounts of tax and getting very little in return?

It is time that you realize life is what you make of it and that you do not have to be subject to the results of your surroundings. Your wealth needs to work for you and not for a government that treats you poorly. It is time to plan, execute and exit the surroundings that are holding you back. It is time to go where you and your money are appreciated.

IT STARTS WITH A PLAN

If you are willing to do what it takes to pay less taxes and keep what is yours, then this guide is for you. This sounds easy. However, the reality is that exiting the South African tax net requires thorough planning, diligence, and commitment.



THE TAX IMPLICATIONS FOR SOUTH AFRICAN RESIDENTS

Let's look at the current tax legislation applicable to South African residents. An individual is a tax resident in South Africa by way of:

- Being ordinarily resident;
- Adhering to the requirements of the physical presence test; or
- Being a tax resident due to the application of a Double Taxation Agreement (DTA).

Since an individual's South African tax residency status is key in assessing their South African income tax liability, a discussion of this area has been included below.

In respect of individuals, the Income Tax Act defines a "resident" as a natural person who is:

- Ordinarily resident in South Africa; or
- Not, at any stage during the relevant tax year, ordinarily resident in South Africa, but who:
 - Is physically present in South Africa for more than 91 days in total during that tax year; and
 - Was physically present in South Africa for a period exceeding 91 days in total during each of the prior five tax years; and
 - Was physically present in South Africa for a period exceeding 915 days in total during those prior five tax years.

Ordinarily resident is not defined in the South African Income Tax Act but is a term that should objectively be considered based on case law and commentary, and which should be considered as a factual evaluation based on objective evidence. Guidance in this regard is provided by SARS and is discussed below.

On the other hand, the physical presence test can only be triggered once a person has spent at least five years in South Africa and is entering his sixth year. This is an annual test, and all three criteria must be met every year.

Triggering tax residence under a DTA usually occurs if a person spends more than 183 days in that foreign country and subsequently based on Section 4 of the DTA has taxing rights allocated to that foreign country. It can therefore be the case that an outbound individual may remain ordinarily resident in South Africa but could at the same time become tax resident in another country subject to the requirement of that foreign country. Should this be the case, the individual should establish if South Africa has a DTA in place with that foreign country. If so, the so-called tiebreaker provisions of that DTA would need to be considered. In applying the tiebreaker clause, the individual could establish that he/she is exclusively a tax resident of the foreign country in terms of the DTA, which means that he/she will not be regarded as a South African tax resident.

You can therefore conclude that for a South African not to be taxed in South Africa, excluding income that has been generated from a South African source such as interest, you must prove either of the following:

- You should not be an ordinary tax resident of South Africa;
- You should not adhere to the requirements of the physical presence test; or
- You should not be deemed to be a tax resident due to the application of the DTA.
- Refer to Annexure A which includes an extract from The South African Institute of Chartered Accountants (SAICA) which diagrammatically details the process flow for determining South African residency.

What if you are earning foreign-sourced income but remain a South African tax resident, and you are not able to apply the provisions of the Double Taxation Agreement (DTA)?

Where an individual is a South African tax resident whilst outside South Africa, he/she will remain taxable on his/her worldwide income and capital gains tax. In other words, South Africa levies tax on a residence base and if you remain a South African tax resident you will be taxed on your worldwide income no matter where you currently live or where your income was sourced from. Section 10(1)(o)(ii) in the Income Tax Act provides for a specific exemption allowing for a portion of your foreign-earned income to be tax-free.

The application of this section requires that the respective person:

- Was outside South Africa for at least 183 full days a year;
- Was outside South Africa for a continuous period exceeding 60 full days; and
- Rendered employment services whilst being outside of South Africa.

If an individual adheres to these requirements, the first R1 250 000 of their foreign-earned income will be exempted from South African income tax. If an individual does not adhere to these requirements, he/she will be taxed on the full amount earned from their worldwide income. The only good news is that you will be allowed a tax deduction for the taxes already paid in the foreign country, if any.

It is important to note that even if the individual spends the required 183 days outside South Africa, only the portion of income that relates to employment services rendered outside South Africa will be subject to the exemption. It is further important to note that this exemption only relates to employment services, and therefore any person which is self-employed will not be able to claim this deduction.



AVOIDING TAX RESIDENCY IN SOUTH AFRICA

There are many low or zero-tax jurisdictions around the world. Let's assume that you wish to implement a zero-tax strategy to effect paying zero taxes. Let's also assume the following:

- You have chosen Dubai as zero-tax jurisdiction;
- You are currently ordinarily resident in South Africa for tax purposes;
- You wish to still visit South Africa on an ongoing basis once you have renounced your South African tax residency.

To start with, one must understand that implementing a low tax strategy cannot simply be a paper exercise. You would have to relocate and move to the country of your choice as this will be one of the core requirements in the discussion below. The below requirements are factual as well as considering the application of substance over legal form in determining tax residency.

Section 9H – Exit Tax

The first step to implementing a zero or low tax strategy is to plan for your exit. Not being subject to tax in South Africa would require that you cease tax residency in South Africa. This results in triggering what is referred to as Exit Tax per section 9H of the Income Tax Act. In short, the application of this so-called Exit

Tax will result in you having to pay capital gains taxes on your worldwide assets when you cease residence. Notable exclusions are cash and fixed property which will be taxed at a later stage once sold.

Exit Tax can therefore have a significant effect on your decision to cease tax residency, as it can result in value destruction upon exiting the South African tax net.

An over-simplistic indication of how you can avoid paying Exit Tax is to ensure that you "own" nothing in your personal capacity. This can be achieved by way of making use of trust structures and as an example, you can acquire your assets in a company and have your trust hold the shares in that company. This will mean that you do not own the actual underlying asset but can still have sufficient control over the asset through the company and the trust deed.

Application of Exit Tax would be equally relevant when you cease to be ordinarily resident or when you apply the provisions of the DTA. The provisions of the Exit Tax will also be applicable in the case of ceasing to be a resident due to the physical presence test not being applicable anymore.

Ceasing Tax Residency

Ceasing tax residency is a process of notifying SARS that you plan to do this and that you will no longer be paying taxes in South Africa except for taxes on income derived from a source in South Africa.

This is not merely a tick-box approach. SARS will request bona fide information proving beyond doubt that your humble abode is no longer within South Africa but in fact in the new country in which you will be taking up residency or citizenship.

Being ordinarily resident is not defined in the legislation, however this is laid out in numerous court cases on various occasions in the past. In short, a person is an ordinarily resident of a country if he/she will return to that country after their wanderings abroad. Secondly, your way of life, possessions, and family connection are all indicators of the fact that you will or will not return to the country to which you are deemed to be ordinarily resident.

The determination is a question of fact, and each case must be determined on its own merits. In addition to the courts, SARS has also issued guidance in this regard in Interpretation Note 3 which lists several guiding factors, however not exhaustive, to help determine a person's circumstances.

It includes:

- a. Your intention;
- b. The natural person's most fixed and settled place of residence;
- c. The natural person's habitual abode, that is, the place where the person stays most often, and his/her present habits and mode of life;
- d. The place of business and personal interests of the natural person and his/her family;
- e. Employment and economic factors;
- f. The status of the individual in the Republic and in other countries, for example, whether he/she is an immigrant and what the work permit periods and conditions are;
- g. The location of the natural person's personal belongings;
- h. The natural person's nationality;
- i. Family and social relations (for example, schools, places of worship, and sports or social clubs);
- j. Political, cultural, or other activities;
- k. That natural person's application for permanent residence or citizenship;
- l. Periods abroad, purpose and nature of visits;
- m. Frequency of and reasons for visits.

For a taxpayer to prove that he/she is not a resident for taxation purposes in South Africa, he/she must objectively and based on evidence prove that these factors do not point to South Africa.

Not formally ceasing residency but applying the provisions of the Double Taxation Agreement (DTA)

The DTA is an annual test, and the requirements should be considered as such. In this case, reference is made to the DTA between South Africa and the United Arab Emirates.

The various DTAs usually define a resident under Article 4 of the DTA in a very similar manner as what is referred to under Interpretation Note 3 which has been issued by SARS and is referred to above.

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;

If, however, a person is a resident of both contracting states (i.e. your home and a foreign country) then residency 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 a habitual abode;
- c. if the individual has a 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.

As can be noted above, the requirements of the DTA have broadly the same characteristics and requirements as that of ceasing residency under normal circumstances, however the requirements and application are not as broad.

In support of successfully applying the provisions of the DTA it is also advisable to obtain a tax residency certificate in the United Arab Emirates. This is a certificate that you formally apply for which objectively indicates that you are a tax resident of the UAE. However, bear in mind that this document in isolation is not sufficient proof of being a tax resident in the UAE and one must consider all the facts.

Visiting South Africa and ensuring you do not fall foul of the requirements of the physical presence test

It is conceivable that once you have ceased South African tax residency or applied the provisions of the DTA successfully, that you can visit or stay in South Africa for long periods.

As indicated above, the requirements for adhering to the physical presence test is:

- A natural person who is not, at any stage during the relevant tax year, ordinarily resident in South Africa, but who:
 - Is physically present in South Africa for more than 91 days in total during that tax year; and
 - Was physically present in South Africa for a period exceeding 91 days in total during each of the prior five tax years; and

- Was physically present in South Africa for a period exceeding 915 days in total during those prior five tax years.

You can therefore be in South Africa more than 91 days per year. However, to break this cycle you should at least in the six years ensure that you do not enter South Africa for a period of at least 330 full days. Once this has been achieved, the application and consideration of the physical presence test starts from scratch. You should also ensure that if you visit South Africa for extended periods, you do not trigger the requirements for being ordinarily resident as has been highlighted above.

IN SUMMARY

With much more flexibility and freedom, individuals can choose where they wish to stay and how to plan for their taxes.

Being a South African citizen does not mean that you must be confined to the bounds of this country and the tax system that it imposes on its residents. As indicated above, with proper planning and a will to achieve, one can easily affect a zero-tax lifestyle.

Get in touch with the team at The Nomad Accountant to discuss your next adventure.

ANNEXURE A

An extract from The South African Institute of Chartered Accountants (SAICA) which diagrammatically details the process flow for determining South African residency.

