

Foreign employment income exemption

The exemption was introduced to prevent double taxation of an individual's income between South Africa and a host country. The exemption creates opportunities for double non-taxation in instances where the host country imposes little or no tax on employment income.

Any foreign employment income earned over and above R1 million will be subject to normal tax in South Africa, applying the normal tax rates for the particular year of assessment. All requirements to qualify for the exemption remain the same.

In order to qualify for the exemption, a taxpayer must be a tax resident of South Africa who earns certain types of remuneration for employment services rendered outside South Africa. The exemption will only be available provided the specified qualifying periods are met and none of the exclusions apply. These requirements are analysed and interpreted below.

Qualifying periods

In order to qualify for exemption, the services must be rendered outside of South Africa. A person must be in employment, outside South Africa, for at least 183 full days during any 12-month period.

In addition to the requirement that services must have been rendered outside South Africa for a period or periods exceeding 183 full days in aggregate during any period of 12 months. A person also has to rendered services outside South Africa for a continuous period exceeding 60 full days for the same period of 12 months.

In identifying a period of 12 months that may be used, the period during which the services were rendered to the employer should first be identified. A useful point to commence the enquiry would be by looking from the first day of the month in which remuneration from foreign services was received or accrued, and then working forward 12 months to determine whether the 183-day and 60-continuous-day tests were met. If the requirements are met, the foreign remuneration will be exempt. If the days tests are not met, the last day of the month in which foreign remuneration was earned can be worked backwards for 12 months.

A person is deemed to be outside South Africa where such a person is in transit between two places outside South Africa and the person does not formally enter South Africa through a port of entry or the person does not formally enter South Africa at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs under the Immigration Act.

This means that the point of departure and the point of destination of the journey that is being undertaken must be outside the borders of South Africa.

Remuneration

The exemption relates to remuneration received or accrued for services that were rendered outside South Africa during the qualifying periods. Periods outside South Africa where no remuneration was earned fall outside this exemption. Remuneration received subsequent to a qualifying period, but in respect of such qualifying period, will qualify for the exemption, but subject to any applicable apportionment.

Remuneration received by or accrued during a qualifying period for services rendered within South Africa does not qualify for exemption. Remuneration earned during a qualifying period in respect of services that were rendered both inside and outside South Africa must be apportioned so that only the income relating to foreign services is exempt.

Employment relationship

This exemption only applies if an employment relationship exists. The services that are rendered for or on behalf of the employer must be rendered under an employment contract. The term “any employer” means that services rendered to resident or non-resident employers could qualify for exemption. An “employee” under the common law excludes an independent contractor or self-employed person. Directors in their capacity as directors are holders of an office, not employees, and to the extent that they earn director’s fees, such fees do not qualify for exemption.

The remuneration must be received in respect of services rendered. Amounts payable by an employer to an employee, but which do not relate to services rendered, are not included in the exemption. Payments for the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right to be appointed) to an office or employment are received by virtue of such termination, loss, repudiation, cancellation or variation, not in respect of services rendered, and are accordingly not exempt.

The following two categories of employees are expressly excluded from the exemption:

- A public office holder, who must be appointed or deemed to be appointed under an Act of Parliament
- Employees of employers in the national, provincial or local sphere of government, certain constitutional institutions, national and provincial public entities listed in Schedules 2 and 3 of the Public Finance Management Act and municipal entities.