Dear Sir / Madam

SUBMISSION: DRAFT GUIDE ON THE TAXATION OF FOREIGNERS WORKING IN SOUTH AFRICA 2014/15 (DRAFT GUIDE)

1. We would like to thank SARS for inviting participation in the development of the law in South Africa in respect of the above mentioned Draft Guide.

2. Please find below the SAICA PAYE and Expatriate Tax Sub-Committee’s (the Committees) (sub-committees of the SAICA National Tax Committee) submission regarding the abovementioned matter, as well as related issues.

General

3. We welcome the clarity that has been provided in a number of areas covered by the Draft Guide, however, it must be noted that a number of areas are based on the interpretation of SARS which may differ from the interpretation by advisors and employers.

4. This is not a preferred state and differing interpretations result in different treatments and thereafter disputes. The clearer the guidance the less burdensome it is for both taxpayers and SARS as the numbers of interpretative differences are reduced and thereby fewer disputes will arise.

5. We understand that this Draft Guide has been in progress for an extended period and as a result various provisions mentioned therein have since been amended and updated. We would suggest that before final issue the Draft Guide is updated for the latest amendments.

The term “foreigner”

6. Despite the definition within the Draft Guide there is no definition of a “foreigner” in the existing tax legislation. In particular, the use of both terms “non-resident” and
“foreigner” in clause 1.1 under the first bullet seems to indicate that there is a particular tax status assigned to a foreigner. We would recommend that the more accurate terminology of resident and non-resident be used throughout with a clear distinction being made upfront. Further, South African citizens can be non-resident for tax purposes, but that would not necessarily mean that they are “foreigners” under the normal meaning of the word.

Clause 1.2.2 - Example 2 (page 2)

7. We would suggest further examples to be provided under the resident versus non-resident section as there are a multitude of scenarios that can arise.

8. Example 2 provides a clear cut scenario of emigration which is the extreme case of ceasing to be a resident. There are many scenarios between being a resident and emigration that should be highlighted.

Clause 1.4 – The fundamentals of tax for a foreigner (page 5)

9. The first bullet point does not address the situation where no employees’ tax withholding obligation arises and the ultimate responsibility for the payment of the taxes due fall on the taxpayer to register and submit a tax return.

Clause 1.5 – Record-keeping for income tax purposes

10. The inclusion of a provision in a contract of employment regarding work to be performed outside SA is not compulsory under any SA labour laws (to our knowledge) nor is it required by tax legislation. SARS cannot therefore create or impose a “legal” requirement that is not written in law – only Parliament has the power to create law.

11. Today’s business world is increasingly global in nature and we submit that this fact should be recognised by SARS.

12. If a non-resident employee does not have a specific or express foreign travel requirement contained in their contract it does not mean that any services rendered outside SA is not necessarily sourced outside SA. It’s the nature of the services rendered abroad that needs to be assessed, not whether the employment contract categorically requires it or not.

13. In addition, since SA advertises itself as a “Gateway to Africa”, it follows that SA already recognises that non-residents who come to SA may very well be using SA as a base for their business responsibilities throughout Africa and beyond.

14. We therefore suggest that SARS remove or provide more clarity on this specific “requirement” and provide more practical guidance as to how to satisfy SARS on the foreign duty requirement.
Clause 3.3 - Gross income (page 9)

15. The section on gross income focusses substantially on employees. We would like to suggest that a specific discussion on the treatment within gross income of foreign directors be considered for insertion.

16. Payments to directors are often governed by a separate article within a Double Taxation agreement (DTA) and as a result require specific application that differs from employment related income when dealing with a non-resident employee.

Clause 3.3.1 – Apportionment of income (page 10)

17. There are a few points regarding the apportionment of income that require clarification and further guidance from SARS.

What constitutes Employment Income for purposes of apportionment?

18. The Draft Guide is not clear on what income may or may not be included for apportionment purposes.

19. We would appreciate if SARS could provide clarity on whether all cash, allowances and non-cash benefits (whether received in SA or abroad) may be included in the definition of Employment Income for apportionment purposes.

What constitutes “incidental” services?

20. We appreciate that the definition of incidental will vary from role to role, organisation to organisation and even sector to sector. The test is potentially an extremely subjective test, depending almost entirely on the non-resident employee’s specific personal circumstances and employment responsibilities.

21. However, there must be a few general guidelines or objective parameters that SARS will consult to determine whether services are incidental or not.

22. We therefore request that SARS elaborate in high level what these general guidelines are in order to assist taxpayers to report their SA sourced income as accurately as possible.

23. The SAICA Committee would like to engage further with SARS and National Treasury on creating such guidelines and a discussion around the reluctance to provide a fixed number of days to be regarded as incidental.

24. In our view the loss to the fiscus for allowing a fixed number of days would be well mitigated by the reduction in hours on both SARS’ and the taxpayers’ side from the administration of objections and audits and trying to prove the incidental nature of the time spent in South Africa.
What constitutes a day of “work”?

25. The documentation of a SARS’ view in respect of work days versus calendar days is welcomed as it provides a level of certainty; however, it is of critical importance to understand what SARS views as a day of work for the purpose of work day apportionment.

26. A subjective test would require the “qualitative” aspect of the employee’s work to be considered, i.e. the relevant importance of the work performed is assessed. Such a subjective test would mean that each employee’s specific circumstances could be viewed in a different light with the potential for inconsistent treatment from SARS.

27. We believe that it would be in the best interest of SARS and taxpayers to provide for an objective (quantitative) test in this regard, something along the lines of a fixed number of hours or services to constitute a work day.

28. For instance, the UK when applying its statutory residence test uses a “4 hour” test to determine if the day was spent working or not. Therefore, if an employee works for 4 hours on a particular day (whether reading emails, making calls, attending meetings etc.), it is considered a work day in that location for the apportionment test.

29. This simple and easily measurable test helps provide a uniform treatment for all taxpayers and a greater measure of certainty when they prepare their tax returns. Additionally, with such a test they will know what records they need to keep in order to evidence their work.

30. We suggest that SARS consider applying a similar objective test to help taxpayers analyse their work days and ease the administration of assessments by SARS.

How are days of arrival to and departure from South Africa classified?

31. This is an aspect that will impact almost every single trip abroad. For those departures from SA that occur late in the evening (i.e. a flight to London), it is safe to assume that the day of the flight is a SA work day (if services were rendered during the day). For those arrivals from abroad that occur in the early morning, it is also safe to assume that the arrival day is a SA work day (if services were rendered during the day after arrival).

32. However, where flights occur during ordinary working hours, this presents some challenges.

33. As stated above, the use of subjective or qualitative tests would probably only lead to uncertainty amongst taxpayers, thus an objective test is again suggested to ensure clarity for taxpayers.
34. A simple application test such as this could be considered for arrivals and departures during ordinary work days (i.e. excluding weekends, public holidays and ordinary holidays):

<table>
<thead>
<tr>
<th>Departures from SA</th>
<th>Before 12pm (midday)</th>
<th>Work day abroad (i.e. not a SA work day)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>After 12pm (midday)</td>
<td>SA work day (i.e. not a work day abroad)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Arrivals into SA</th>
<th>Before 12pm (midday)</th>
<th>SA work day (i.e. not a work day abroad)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>After 12pm (midday)</td>
<td>Work day abroad (i.e. not a SA work day)</td>
</tr>
</tbody>
</table>

35. The above test also covers the situation where an employee leaves SA before 12pm midday for a business purpose abroad i.e. to a neighbouring country and returns to SA late in the evening on that same day.

36. The proposed 12pm midday test can equally be applied to employees leaving South Africa via another method (such as driving to a neighbouring country).

37. A number of the above concepts and discussion applies equally to section 10(1)(o)(ii) for outbound employees and we would like to ascertain if a similar and consistent view can be taken in this regard.

General (page 11)

38. The section relating to employment income is too narrow in its consideration of the relevant provisions of the Act. Section 23(m) for example also has application in relation to the employment related income of the non-resident employee by restricting the deductions allowed on employment income.

Clause 3.3.3 - Taxable benefits

Residential accommodation (pages 11 - 13)

39. The introduction of a remuneration proxy for determining the value of the fringe benefit brought much relief to the industry. However, in the case where no previous year is applicable the use of the first month to determine the value of the benefit is problematic. For non-resident employees arriving in SA that do not qualify for the accommodation exemption the first month’s salary often includes large once-off allowances to enable the non-resident employee to settle in South Africa.
40. Examples include relocation allowances, home flight allowances, sign on bonuses etc. This creates an inflated salary on which the value of the benefit is determined.

41. It is submitted that these once off amounts should be excluded from the value determination and SARS and National Treasury would have to consider whether this should be achieved by interpretation or legislation.

Residential accommodation - shared (page 13)

42. The Draft Guide fails to consider the reality of residential accommodation. In many cases non-resident employees will be required to share accommodation. In our view, subjecting 2 or more employees to the benefit based on full and uninterrupted use of the accommodation is excessive. It is also inequitable that 2 employees would suffer the tax on the use of the same accommodation at different rates merely due to a difference in their remuneration levels.

43. It also then creates a value on the fringe benefit that in total exceeds the actual costs of the accommodation. Furthermore, the amount being taxed as a benefit will exceed the amount being deducted as an expense by the employer.

44. We strongly submit that consideration of a practical approach to the sharing of benefits be considered for insertion into the Draft Guide. A solution could be to apply a factor to the value of the benefit if the benefit is a shared one. For example, instead of each employee bearing 100 percent of the benefit the factor of 75% is used for 2 people sharing or 50% if more than 2 are sharing.

45. We do note that this matter has been raised before to Treasury in the last two years yet is not seen as a priority amendment. However, we continue to submit that this would only correct what is essentially an unreasonable quantification of the private benefit enjoyed.

Use of a motor vehicle (pages 14 - 15)

46. The principles highlighted above under the sharing of residential accommodation apply to the sharing of a vehicle as well. While both employees may enjoy the benefit it is not free and uninterrupted use and as such the value of such a benefit should be reduced. See suggestion above for a factor to be applied.

47. We further note the revised provisions on the determination of value for use of a vehicle have not been incorporated into the Draft Guide. This occurs in a number of other places within the Draft Guide and we suggest that the Draft Guide be updated for the latest amendments.
48. The paragraph commencing “However, if the employee is granted…” creates some confusion.

49. We would suggest the paragraph be amended to clearly indicate that this would only apply if the asset has been provided to the employee for private or domestic use and not for business purposes.

50. If provided for business purposes then it must be “mainly” for business purposes. We would suggest that this paragraph and the exclusion paragraph be merged to create a clear picture of the type of benefit that is taxable and that which is not.

Free and cheap services (page 17)

51. The provision of tax and work permit related services will be dealt with separately below.

52. The tax services provided to employees on assignment serve a dual purpose. First, these services ensure that the employees are fully compliant with their personal tax affairs which have been complicated by the employer’s requirement that the employee go on assignment or travel frequently. Second, the employer ensures its own compliance and protects its own reputation by ensuring that the employees’ compliance is taken care of.

53. Many employers (who adopt policies such as tax equalisation or tax protection) pay for some of the tax services provided to the non-resident employees while these employees are in SA. A portion of this tax service is clearly for the benefit of the employer in order to manage their contractual obligation to pay the tax as agreed and a portion of the same tax service would be a fringe benefit for the employee.

54. We suggest that SARS provide clarity on how this apportionment of the tax service benefit between the employer and employee should be calculated, i.e. would SARS agree that adopting a 50/50 split is reasonable?

55. Regarding the visa related expenses; we are firmly of the view that this is a pure business expense and not a taxable fringe benefit, given that it is not a "benefit or advantage" as contemplated in paragraph (i) of the "gross income" definition. The employer is required by law to employ only legal workers, therefore the cost of the permit is for the benefit of the employer.

56. The reputational and financial risk for the employer is too great to employ illegal workers. There is very little, if any, personal benefit to a work related visa or the services engaged in order to obtain one, therefore it is not provided for “private or domestic purposes” per paragraph 2(e) of the Seventh Schedule.
57. It sole purpose is to legally secure the productive capacity of the employee for the employer’s business purposes in a specific country.

58. If the employee was in SA for pleasure then a work related visa would not be necessary. They are here to render services to the employer, not for personal reasons, and for that purpose an appropriate visa/permit is required by law.

59. The employer is not in the business of obtaining visas and as such a service provider is required to ensure that the necessary requirements are fulfilled to protect the employer.

60. The employee has not asked to come to South Africa and should not be taxed on the cost of being sent to South Africa in compliance with the immigration laws (compliance which is of great benefit to the employer but not to the employee).

Payment of employee debt (pages 18 and 19)

61. The block relating to the calculation of the benefit on the payment of tax by the employee refers. We note a typographical error in Step (f). We believe the sentence should read as follows:

“(f) Subtract the figure calculated in step (e) from the tax calculated in step (c)”

62. We further note that in the SARS Guide for Treatment of PAYE for VDP Purposes (extract below), where the employee moved into the higher tax bracket it was advised that 1 percent could be added to the tax rate to determine an appropriate tax rate. We would suggest consistency be applied to both the employees’ tax regime and the VDP regime.

- NOTE: Where the gross-up of the taxable remuneration results in an increase in the tax rate from one tax bracket to the next, the marginal tax rate in the above formula must be increased by 1%, for example, marginal rate equals 16%, increase by 1% to 19%.

Employer contribution to foreign pension funds (page 22)

63. We welcome the certainty provided by the Draft Guide in relation to the treatment of foreign pension contributions.

64. The terminology, however, merely requires the fund to be similar to an approved fund in SA.

65. We would be grateful if SARS could clarify this statement by stating whether this relief can be applied without any additional formal steps being taken (such as registration or recognition of the overseas pension fund with the Financial Services Board and SARS, as is the case with certain tax treaties).
66. A process map in this regard would be most helpful for employers and employees alike.

Clause 3.3.4 – Tax-free benefits

Look-see trips (page 23)

67. We welcome the clarity provided regarding look-see trips.

68. We would like to suggest that this be expanded to include the following expenses borne by the employer that may be incurred in the initial assignment phase such as:

- Visa application costs (see discussion above)
- Language/cultural courses
- Agency fees in securing accommodation for the non-resident employee

Share incentive schemes (page 24)

69. The opening paragraph relating to share incentive schemes is not technically correct. Are SARS stating that only equity instruments acquired in connection with employment in South Africa are subject to section 8C? We would suggest the rewording of the paragraph to correctly reflect the distinction between vesting and acquisition.

Clause 3.4 - Exempt income (page 25)

70. Given that the discussion under exempt income deals with interest received by the non-resident employee we would suggest the insertion of a short paragraph relating to withholding tax on interest which may impact non-resident employees. We note that withholding tax on dividends is discussed and suggest a similar approach be taken with withholding tax on interest. The legislation referred to also needs to be updated.

Clause 3.6 - Deduction of expenses

Allowance for accommodation, meals and other incidentals (page 27)

71. There is some confusion in the market regarding the provision of subsistence allowances to non-resident employees. The clarity provided by the Draft Guide in indicating that non-resident employees are able to receive subsistence allowances is welcomed. Section 8(1)(a)(i)(bb) refers to the recipient spending "at least one night away from his or her usual place of residence in the Republic". We seek confirmation that this would apply even to employees temporarily "residing" at a "usual place of residence" in South Africa, but not ordinarily resident in South Africa.
Clause 5 - Provisional tax

72. This clause is factually incorrect. The definition of a “provisional taxpayer” reads as follows:

“provisional taxpayer” means –

(a) Any person (other than a company) who derives by way of income any amount which does not constitute remuneration or an allowance or advance contemplated in section 8(1)…”

73. Non-resident employees do earn remuneration as defined. The mere fact that employees’ tax is not deducted because the employer is foreign and not subject to the Fourth Schedule withholding obligation does not automatically require the non-resident employee to register as a provisional taxpayer and to pay provisional tax.

74. If the non-resident employee earns anything other than remuneration there may be a requirement to register for provisional tax, however, remuneration is excluded from provisional tax per the definition. We would strongly urge that this be amended to correctly reflect the law as it currently stands regardless of the desire of SARS to have such taxpayers register for provisional tax. We further understand that the 2015 ITR12 will permit individuals to report remuneration income that does not appear on an IRP5 and has not been subject to PAYE, so that SARS’ system may record that it is not income subject to Provisional Tax.

Clause 6 – Employer-related issues (page 39)

Example 7

75. Example 7 is incorrect, a branch of a foreign company remains a non-resident company and as a result no withholding obligation arises as the employer remains non-resident. If the employer appoints a South African resident agent or public officer with the authority and liability to pay remuneration, then that representative employer shall be obliged to withhold PAYE, not the non-resident employer.

Clause 7.1 - Short term assignments (page 43)

76. We believe a distinction should be made between Short-Term Assignments (STAs) and Short Term Business Visitors (STBVs).

77. STAs are generally non-resident employees who are assigned, under some form of contractual agreement, to SA in order to perform specific work for a specific period with the added consequence that in most cases remuneration costs of the STA are usually recharged to SA.
78. STBVs are generally non-resident employees who visit SA on short business trips, with no recharge of costs.

79. We believe it would be prudent for SARS to align the naming convention of these visitors to how they are known by other global tax authorities, i.e. STBVs.

**STBVs from non-treaty countries**

80. We infer from the Draft Guide that STBVs from non-treaty countries are, by default, taxable in SA on their earnings, irrespective of duration of stay, costs recharge, nature of duties etc.

81. We would appreciate if SARS could clarify whether this is their understanding of the law as clarity in this regard is greatly needed, given that there are many STBVs visiting SA from non-treaty countries.

82. If SARS is of the view that STBVs from non-treaty countries are subject to tax from the first day of their visit irrespective of the duration of stay and costs recharge, could SARS also provide clarity on whether the distinction of incidental work days (as applied to apportionment under para 3.3.1) would apply equally in this situation to determine the source of earnings of work days in SA as well.

**Treaty application**

83. The “Note” on page 44 requires some support within the legislative framework. The DTA provisions entrench the view that the employment relationship remains with the foreign employer, as a result the SA Company is not providing an employee with a benefit as the non-resident employee is not an employee of the local company.

84. Other than the 183 days test, the Draft Guide appears clear cut that the “follow the money” principle is the only other factor to be considered when determining whether the services being rendered by the non-resident employee are taxable in SA.

85. The OECD has issued guidance on the interpretation of this section in tax treaties (which introduced the concept of “economic employer”) and set out eight factors to consider when determining this test.

86. Although SA is not an OECD member, we would appreciate clarity from SARS as to whether they look to the issue of costs only (i.e. follow the money as is currently the case in the Draft Guide) or whether the other factors (as per OECD guidance) should also be taken into account by the non-resident employee in determining their tax reporting obligations in SA.
Clause 7.2 - Employees of foreign governments working in South Africa

87. The paragraph commencing with “In the event that the foreigner…” is not factually correct. The mere provision of a permanent residence status via Home Affairs does not automatically trigger tax residence.

Clause 8.5 - Refunds in respect of tax equalised employees

88. The position of SARS on the payment of refunds to employers in this scenario is noted although not accepted. The Committees would welcome the opportunity to discuss this further with SARS.

Conclusion

Should SARS require further clarity on any aspect of the above, the Committees are happy to engage with relevant SARS officials.

Yours sincerely

Tarryn Atkinson          Pieter Faber
CHAIRMAN: PAYE and Expat Sub-Committees  PROJECT DIRECTOR: Tax