Dear Sir

SUBMISSION: SECTION 10(1)(o)(ii) ITR12 DISCLOSURES

1. We refer to the SARS National Stakeholder Meeting held on 7 April 2015. In that meeting, a request was made for recognised controlling bodies to make proposals as to how the ITR12 form should be amended to alleviate the difficulties being experienced by those taxpayers who qualify for the exemption available in terms of section 10(1)(o)(ii) of the Income Tax Act 58 of 1962 (the Act).

2. The amendments requested are to ensure that the ‘number of days’ requirement for the exemption may be properly calculated. The reason for the proposed amendments to the ITR12 is to take into account the fact that the exemption may apply due to the qualifying days in the 12 month period overlapping years of assessment and there has been difficulty in applying the exemption in these circumstances.

3. Please find the SAICA PAYE and Expatriate Tax Sub-Committees (the Committees) submission regarding the abovementioned issues, as well as related issues. The Committees are sub-committees of the SAICA National Tax Committee.

4. We note that SARS have taken the position that days spent outside South Africa, which is not as a result of duties or on instruction from the employer, do not qualify for the exemption. For example, if a person is outside the country for 175 days on contract and then takes leave for two weeks in a foreign country before returning to South Africa, the two weeks leave will not be taken into account when determining the ‘number of days’ requirement in terms of section 10(1)(o)(ii).

5. It is unclear how SARS will deal with holiday closures, weekends and intermittent leave spent outside South Africa as the approach, in our view, may not only be technically questionable but also impractical to apply.
Proposed amendments to the ITR12

Source codes used in IRP5 and return

6. The general view from the Committees is that the current source codes available to employers are insufficient and create a significant amount of administration for both SARS and employers due to the multitude of section 10(1)(o) objections and appeals that need to be filed.

7. The current source code options are foreign taxable (3651) and foreign exempt (3652). SARS is of the view that all section 10(1)(o)(ii) remuneration should be reflected under code 3651, however, this is generally treated as taxable by the assessors who reject the section 10(1)(o)(ii) “deduction” resulting in the income being taxed.

8. This is especially a problem where employers do not want to take any PAYE risks and subject the amounts to tax and leave it to the employees to claim the exemption on assessment.

9. The grounds for the denial of the exemption are often not provided or are unclear despite supporting documents being provided. The taxpayer is then required to object and enter into the dispute resolution process which is time consuming and costly.

10. In our view, if the source codes were altered or a new code introduced to clearly indicate that certain remuneration has been treated as exempt due to the application of section 10(1)(o)(ii) along with directed questions that require the taxpayer to declare that the requirements of section 10(1)(o)(ii) have been met (which is then auditable), the administration and frustration of taxpayers, employers and SARS would largely be alleviated.

Questions on return

11. The following questions are proposed to provide the answers that SARS would require in order to determine if the section 10(1)(o)(ii) ‘number of days’ requirement has been met and the amount claimed as an exemption.

"With respect to employment income claimed to be exempt in terms of section 10(1)(o)(ii):

a. Were you physically present outside South Africa for more than 183 full days in the 12 month period(s) to which the earnings relate? YES / NO

b. Were you physically present outside South Africa for a continuous period exceeding 60 full days during the relevant 12 month period(s)? YES / NO

c. Do you have travel records (such as passport stamps) to evidence that you satisfied the two tests above? YES / NO
d. Amount received or accrued in respect of foreign services in the year of assessment (AMOUNT)

e. Amount relating to these foreign services claimed to be exempt (AMOUNT)

12. We propose further that every taxpayer should have to state whether they are resident or not as this is the basis of assessment and recommend that this question be included in the ‘wizard’ on the first page of the form. The residency questions should then be populated only if the taxpayer claims to be non-resident, or has changed residency status during the year.

Matters for clarification

*Income subject to Section 10(1)(o)(ii)*

13. We note that it is SARS practice to exclude leave taken at the end of an assignment from the calculation of the days to be taken into account in determining whether the ‘number of days’ requirement in section 10(1)(o)(ii) was met.

14. In our view, this should not apply to all taxpayers applying for the exemption, but should instead be applied on a case-by-case basis dependent on the specific circumstances in each case.

15. It must be highlighted that section 10(1)(o)(ii) does not only apply to those taxpayers that are on formal assignments, there is no requirement for a secondment agreement to be in place in order for the exemption to apply.

16. Further, it must be noted that leave accrues based on days worked and as a result is directly related to the services rendered both in and outside of South Africa and we submit that it is irrelevant whether the employee takes those leave days in the middle of the 183 days during the 12 month period or at the end of the 12 month period in order to meet the 183 day requirement.

17. The Committees support the use of workdays as an apportionment methodology, however, this should not be confused or conflated with how the section 10(1)(o)(ii) test is framed.

18. The test could in theory be passed by including non-work days (as these can also be in respect of services rendered abroad) but the foreign income being exempted could be calculated on a strict work-days basis. The two issues should not be linked. If SARS takes the view that non-work days cannot be used to pass the exemption test, then it is unclear as to how weekends or other forms of leave such as sick leave would be treated.

19. The application would be unworkable, as it wouldn’t make sense to exclude weekends from the calculation. However, we submit that weekends could arguably be excluded from the apportionment of foreign income, which is a separate issue.
Apportionment of income

20. The Committees note the concession provided within the Draft Guide for Foreigners working in South Africa which indicates that an apportionment calculation based on work days is supported.

21. A consistent view is required as regards the application of the section 10(1)(o)(ii) exemption for those working outside of South Africa and confirmation that the same principle will be applied to outbound individuals is requested.

Incidental days

22. Clarity is required regarding the concept of incidental days and the impact of this on the apportionment of income. For example, if an expatriate returns to South Africa for business meetings related to the services being rendered outside of South Africa, it is unclear as to whether those days should be counted against the taxpayer and further whether they would trigger a South African tax liability due to physical presence in South Africa.

23. In our view, for those on assignment to foreign countries, attempting to collect South African tax for a small number of days physically in South Africa, which remuneration is already being subjected to tax in the host location, is impractical.

24. We therefore request some guidance from SARS on what is regarded as incidental in such matters.

In transit

25. As South Africa is the central transport hub into Africa, many employees of multinational companies that have operations across Africa are negatively impacted by the transit provisions.

26. For example, a South African resident seconded to Mozambique is required to travel to Lesotho for business. In order to fly to Lesotho, the expatriate is required to fly into OR Tambo Airport in Johannesburg and then pass through passport control and re-enter South Africa in order to board the flight to Lesotho. Any day in transit is regarded as a day in South Africa.

27. In terms of meeting the more than 60 continuous days test within section 10(1)(o)(ii) this expatriate would then fail to meet the requirements. We request that SARS takes this matter into consideration in its response to this submission.
Conclusion

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

Yours sincerely

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