



# Tax & Legal Flash

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## Foreign Remuneration Exemption – Tax directives and the way forward

With all the talk and buzz around the changes to the Foreign Remuneration Exemption (Section 10(1)(o)(ii)), a lot of uncertainty and questions were raised as to how this will be implemented practically.

SARS have now issued an updated Interpretation [Note 16 \(IN\)](#) on the Foreign Remuneration Exemption which includes guidance on how the Foreign Tax Credits (“FTC”) may be claimed via payroll.

### Why is this important?

With the change in legislation, more employees will find themselves in a situation whereby they are subject to tax on the same income in South Africa (“SA”) and the foreign country. This may place employees in a difficult cash flow position, as tax is potentially first payable in both countries and needs to be claimed back in one of them. The IN discusses methods that may be applied to alleviate these hardships.

### What happens if you either do not qualify for the exemption under S 10(1)(o)(ii) or qualify for the exemption but earn remuneration above the R1 million exemption?

A double tax situation arises where the employee does not qualify for the S 10(1)(o)(ii) exemption or qualifies for the exemption, but earns taxable remuneration that exceeds the R1 million exemption. This can cause hardship for the employee on South African payroll, who is required to pay tax in the foreign country, and has employees’ tax withheld in South Africa.

In these circumstances, employees are entitled to claim an FTC for the taxes paid in the foreign country on foreign-sourced income. The FTC claimable is limited to the income actually taxed in South Africa and in the foreign country. In other words, if the employee earns taxable income in excess of the R1 million exemption, only the portion of the foreign taxes paid in respect of any amount in excess of that R1 million, will be available to offset against South African tax due, as an FTC.

Employers may (and arguably should) assist employees who are remunerated through a South African payroll, in both situations, to reduce the immediate hardship caused by the double tax where both countries require a monthly withholding.

This may be done by applying for a tax directive from SARS to vary the basis on which employees' tax is withheld, enabling employees to claim the FTC on a monthly basis rather than only on assessment of their annual tax returns. The final FTC will then be confirmed on assessment of the annual return.

Employees who are not remunerated through a South African payroll will be considered provisional taxpayers and will be required to claim the FTC when filing their provisional and annual tax returns.

#### **What is the purposes of the tax directive?**

The purpose of the directive is to alleviate the financial hardship suffered by employees due to the double tax situation. The directive can be applied for in both situations mentioned above where tax is paid in more than one country on the same remuneration. SARS have recently released the specific tax directive [application form](#) and [guidance](#) to completing the form to assist employers through the directive process.

#### **Who can apply for the directive?**

According to Paragraph 10 of the 4<sup>th</sup> Schedule of the Income Tax Act , employers are required to withhold employees tax from any amount that is payable to an employee, unless SARS has granted authority to do otherwise.

As such, an employer may submit a tax directive application requesting SARS to vary the basis to deduct or withhold employees' tax. This is done by taking into account the potential FTC on a monthly basis when calculating the employee's tax liability.

The directive can include multiple employees, however the current version of the application form only allows for the details of a single employee to be completed. We understand that once the form is rolled out in an electronic version, employers will be able to add multiple employees. The current work around is to complete the employee details on page 1 multiple times and submit as one application.

Once granted, the directive is valid for an indefinite period, however, if the facts and circumstances of any individual employee change, a new application will be required. A new application will need to be made each time new employees incur foreign tax liabilities and require FTCs to be claimed.

It is important to note that the onus lies on the employer to inform SARS if the circumstances have changed as this may influence the validity of the directive. Circumstances will also change whenever the foreign tax legislation or tax rates are amended, and so constant attention to be paid to this aspect.

#### **Information needed to complete the form:**

The list below shows some of the information that is needed to complete the form:

- Particulars of employer: PAYE number, name of employer, business address and postal code, and contact details of the person to be contacted where additional information is required.
- Particulars of employee: Name, surnames, ID number, Tax reference number, Date of birth, employee's tax residency status, and assignment details (foreign country and assignment period).
- You will also need to know if the respective employees meet the days requirements of the S 10(1)(0)(ii) exemptions and if the R1 Million exemption is exceeded or not.

It is important to note that the application must be accompanied by a detailed letter which sets out the basis and reason for the request. It is also important that all the required information is on the form to prevent the application from being rejected.

#### **Conclusion**

All employers with South African resident employees working in foreign countries, should urgently assess each employee's circumstances to determine if a directive application is warranted.

Some of the questions that immediately come to mind are:

1. Are they South African tax residents?;
2. Do they qualify for the S10 (1) (o) (ii) exemption, but earn taxable income in excess of the R1 million threshold?; and/or
3. Do they have a foreign tax liability and if so, can an FTC be claimed to alleviate potential double taxation on a monthly basis, rather than waiting for the annual tax return assessment?

It is important that all employers in these circumstances are prepared and able to implement these measures effective from 1 March 2020. The time has arrived. Advice should be sought to ensure calculations and information required are correctly supplied to SARS, so as not to disadvantage employees on foreign assignments.

<https://home.kpmg/xx/en/home/insights/2019/05/tnf-south-africa-foreign-earnings-exemption-changes-certain-individuals.html>

<https://home.kpmg/xx/en/home/insights/2019/04/tnf-south-africa-changes-foreign-remuneration-exemption-working-abroad.html>

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