

Tax residency determines obligation

IT IS well known that SA is experiencing a significant skills shortage. With the advent of 2010, among other things, the lack of skilled employees is of major concern for many companies. It is therefore essential that the country attracts skilled expatriates (non-resident individuals working in SA) who will provide us with this much needed expertise and also train our own workers.

However, from a South African tax perspective, it is expensive to employ expatriates as there are few tax concessions available to them, or to South African companies employing them. For the most part, fringe benefits granted to expatriates are subject to tax. Also, most of them are tax equalised, which means that the South African employer is responsible for the payment of their tax cost. This liability is also a taxable benefit that must be grossed up and included in their taxable income.

The taxation of an expatriate will depend on whether he or she is considered to be a South African tax resident or not. SA taxes the world-wide income of South African residents, and the South African sourced income of non-residents (which includes all income received in respect of services rendered for employment in the country). In addition, should such an individual become tax resident and then cease to be resident, he or she will be exposed to a further tax liability as there will be a deemed disposal of his or her worldwide assets for capital gains tax purposes.

An expatriate will be considered to be tax resident in SA if he or she is either ordinarily resident here (generally, if they regard SA as their home and, for example, have applied for permanent residence), or if they qualify in terms of the "physical presence test".

Under the Income Tax Act, an individual will be considered to be tax resident here if he or she is physically present in SA for more than 91 days in any tax year, more than 91 days in each of the five preceding tax years, and more than 915 days in aggregate during these five preceding years. Such an individual will no longer be considered to be tax resident here if he or

she spends a continuous period of 330 days outside of the country.

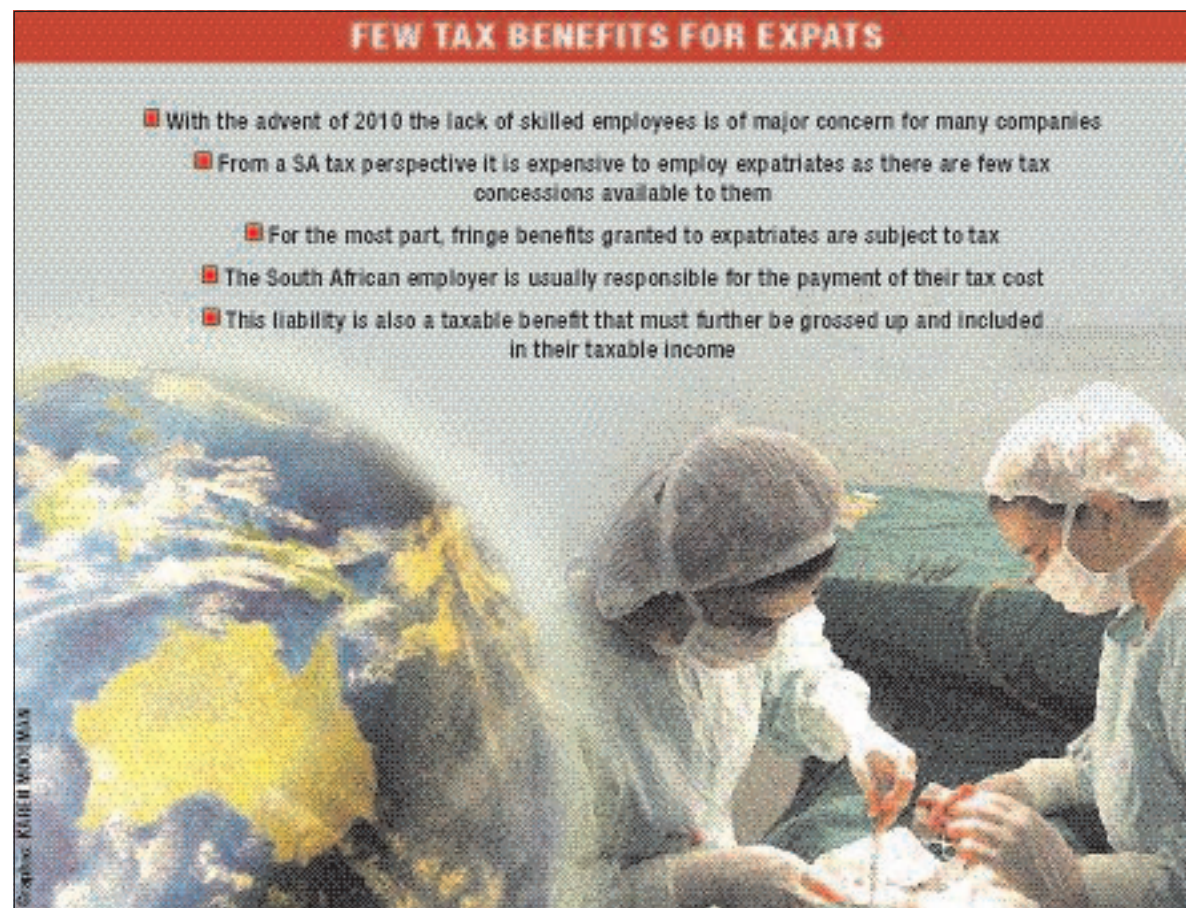
It is important that an individual will not be regarded as a South African tax resident if he or she is deemed to be exclusively a resident of another country with which SA has concluded a double taxation agreement. Expatriates on short-term contracts could be protected from South African tax on their South African salaries, if they are residents of a country with which SA has concluded a double taxation agreement.

A double tax treaty provides relief by its provision that remuneration will not be taxed in the country where the services are rendered (for example SA) where the expatriate spends less than 183 days in that country during any 12 month period, tax or calendar year (depending on the wording of the various double tax treaties). Further, the expatriate must continue to render services to a non-resident employer and his or her foreign employment costs must not be borne by a permanent establishment or fixed base of that employer in the country where the services are rendered.

Double tax agreements can therefore provide useful relief provided all these three conditions are met. It is clear that expatriates and companies paying them should keep accurate records of their time spent in SA.

It is also worth mentioning that the Organisation for Economic Co-Operation and Development (OECD) has recently released the draft contents of the next update to the OECD Model Tax Convention (and Commentaries) where it has proposed that those days during which the expatriate is a resident of the source state should be excluded when determining if the expatriate has spent less than 183 days in the source state.

PREVIOUSLY, a significant tax benefit that was available to expatriates was the tax-free provision of residential accommodation by an employer. This was generally available, provided the expatriate was not ordinarily resident in SA. However, there have recently been a number of amendments to the tax treat-



ment of residential accommodation and the Taxation Laws Amendment Bill of 2008 sets out what is expected to be the final legislation applicable for tax years starting March 1.

Per the proposed amendments, no rental value shall be placed on any accommodation provided by an employer to an employee away from such employee's usual place of residence outside SA:

- For a period not exceeding two years from the date of arrival of the expatriate in SA, for the purposes of performing his or her duties of employment; or

- If that accommodation is provided to the expatriate during the year of assessment and such expatriate is physically present in SA for a period of less than 90 days in the said tax year.

However, the said exemptions will not apply where:

- The expatriate was present in SA for a period exceeding 90 days during the year of assessment im-

mediately preceding the date of arrival for employment purposes; or

- To the extent that the cash equivalent of the value of the taxable benefit derived from the occupation of the residential accommodation exceeds R25 000 multiplied by the number of months in which accommodation is provided.

Considering that most assignments are for longer than two years, the reduced number of years for which the accommodation could be provided free of tax, presents a significant tax cost for companies employing expatriates.

South African companies paying expatriates must take care that all benefits, such as the payment of school fees and holiday flights for family members, are included in the calculation of the expatriates' taxable income. They must also withhold employees' tax from these amounts. Not only is a local company responsible for the withholding of employees' tax from salaries and benefits paid to expa-

triate but, both from a practical and contractual perspective, it is often responsible for the submission of their tax returns and other relevant documents to the South African Revenue Service (SARS).

SARS has recently announced details for this year's filing season. Employers will be required to file employee tax certificates (IRP5s) and IRP501 reconciliations between July 1 and August 29. Individual tax returns will be pre-populated with the IRP5 information received from the employer and individuals will then be required to file returns from September 1.

The above will not apply to non-resident employers. An expatriate who is not remunerated by a South African employer or representative employer in SA must register as a provisional taxpayer and pay provisional tax biannually.

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