THE INCOME TAX IMPLICATIONS OF BECOMING A REPUBLIC RESIDENT

by

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Declaration

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Signed ……………………………………………………….

Date ………………………………………………………

Acknowledgements

I would like to thank God and everyone who has encouraged me to enroll and complete this study.

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Summary

The aim of this treatise is to identify the income tax implications of the persons becoming South African tax residents. It will provide a clear understanding of the income tax implications for natural and non-natural persons wishing to take up residence in South Africa. The definition of "resident" in section 1 of the Income Tax Act, 1962, has a direct impact on the tax implications bearing down on any foreigner planning to reside within the Republic of South Africa, especially in relation to the prevention of the double taxation. The following issues or areas have been identified, these issues are summarised below.

The persons receiving foreign pensions may be exempt from normal tax under section 10 (1)(*gC*) and in terms of the tax treaty, they may also escape taxation in their former country of residence. The treatise will look at various treaties that exist between the South Africa and other countries and to discuss the taxing rights. There is a case of double non-taxation and good reason for immigrants to come and avoid tax in South Africa. It is suggested that the legislation and the double tax agreements should be amended.

A person who becomes a resident will receive a step-up in base cost for assets other than South African immovable property and assets of a permanent establishment in South Africa under paragraph 12(2)(*a*) of the Eighth Schedule. The main purpose of the legislation is to ensure that these assets are correctly valued, determining the base cost, when the person becomes a tax resident. The valuation of these assets carries with it the problem of securing sufficient evidence long after the valuation.

Most of the tax planning for such for immigrants revolves around estate duty and donations tax. The person would donate his assets to an offshore discretionary trust before taking up residence in South Africa. The advantage is that donations tax will be avoided because there are exemptions in terms of section 56, for assets acquired before becoming a resident. The income and capital gains vested in non-beneficiary can be taxed in the hands of the donor in terms of section 7 and

paragraph 72 of the Eighth Schedule. The donor should be aware of the anti-avoidance measures; section 7(2) to 7(8) and paragraph 72 of the Eighth Schedule will deem a different person other than the person who is entitled to the income to be taxable on that person. The income and gains received by the beneficiary of a trust can be taxable in the hands of the donor.

The assets owned by the trust will be sheltered from South African estate duty. The foreign discretionary trust, as a non-resident, will not be liable for tax in South Africa. The beneficiaries of such a trust will be liable for income tax from the trust distributions, once they have acquired a vested right to the income. The liability of income tax is deferred to the year when the trustees decide to make distributions. The distribution by the trustees in a subsequent year creates a delay or postponement for taxes which should be paid by the beneficiaries. The trustees are most likely to make distributions in a tax year when the tax rates are low. There are tax opportunities for the immigrants who intend to take up residence.

The tax resident might be subject to withholding taxes on foreign income from the previous country of residence, but might be subject to Double Tax Agreement between South Africa and other countries.

Key words:

Resident

Source

Double Tax Agreement

Deemed disposal

Offshore trust

Immigration

Chapter 1 Introduction

1.1 Background

The road to residence in South Africa is marked by income tax, estate and gift tax potholes and pitfalls. For the persons who are not residents in South Africa and who intend to take up residence in this country, delicate and careful planning is needed.[1]

The concept of "residence" is fundamental to the residence-based system of taxation.[2] The determination of a person's residence is a prerequisite for the calculation of the taxable income, all the deemed source received or accruals. South African tax system was previously based on the source principle. In a source-based system, tax is levied on income earned from a source or deemed source within a country irrespective of whether it was received or accrued by a resident or a non-resident. South Africa moved to a residence based tax system for years of assessment commencing on or after 1 January 2001. In a residence-based tax system, tax is levied on the residents of a country irrespective of where in the world the income is earned.

The source based system of taxation is, however, still applicable to non-residents in South Africa. The persons, who are not residents in South Africa, will only be subject to tax in South Africa on income sourced from this country. The source based system was considered to be out of line with international practice and inappropriate for the circumstances of the South African economy. South African residents are therefore liable for tax on their worldwide income and accruals.

Research questions

The aim of the treatise is to provide a clear understanding of the income tax implications of becoming a South African tax resident. The treatise will answer the following questions that will be discussed in the chapters to follow:

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[1] 'Planning for South Africa tax prior taking up residence' available at http://www.offshoreinvestment.com/media/uploads/planning.pdf accessed 16 July 2014.
[2] Silke: South African Income Tax 2014, page 60.

- When does the person become a resident?
- What is the difference between resident and citizen?
- Do the immigrants escape tax from foreign pension and annuities after taking residence in South Africa?
- What are the Capital Gains Tax implications?
- Does the formation of foreign discretionary trust by foreign settlors affect the South African tax base negatively?
- What are the estate duty implications?

Research method

The text books, tax journals, tax articles and Lexus Nexus sites will be used to answer the research questions.

Overview of the Chapters

To meet the research objectives, the approach of this treatise is as follows:

Chapter 2: Background of the South African tax system.

Chapter 3: The income tax implications of foreign pension and annuities.

Chapter 4: The capital gains tax implications.

Chapter 5: The income tax implications of offshore discretionary trust.

Chapter 6: Estate duty implications

Chapter 7: The effect of withholding taxes

Chapter 8: Conclusion

Chapter 2 South African tax system

2.1 Background of the South African tax system

Income tax is levied either on “source basis” or “residence basis.” The South African tax system was previously based on the source based, since from the inception of the Income Tax Act in 1914. It was decided to move to a residence basis for years of assessment commencing on or after 1 January 2001. The two systems of taxation have impact on the taxation of residents.

2.2 Source based system

In a source-based system, residents and non-residents are subject to normal tax on their income from a source within the Republic. It was stated that the source based system of taxation was increasingly out of line with international practice and inappropriate for the circumstances of the South African economy.[3]

Under this system it was generally irrelevant whether a taxpayer was a resident or not in the country, and this principle applied equally to companies and persons other than a company.[4] The source based system of taxation is, however, still applicable to residents and non-residents in South Africa. The place of residence of the person, receiving the income is not taken into account, if the activities that generated the income took place in South Africa. The receipts and accruals from a source in South Africa will be subject to normal tax for both residents and non-residents. The non-residents are only liable for tax only on income from the South African sources.

2.3 Residence base system

Under the residence based system, tax is levied on the residents of a country irrespective of where in the world the income is earned. Residents are taxed on their world income. It was stated in the Budget speech of the year 2000, that this

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[3] ‘Budget 2000’ available at http://www.treasury.gov.za/documents/national %20budget/2000/speach.pdf, accessed 16 July 2014.

[4] Income Tax in South Africa, cases and materials, Second Edition, page 9.

system will broaden the South African tax base and also bring our tax system in line with international best practice. The definition of 'gross income' was as result amended, with effect from years of assessment, commencing on or after 1 January 2001, providing that the South African residents are subject to tax on their worldwide income. The residence basis of taxation is based on a sufficient connection between the taxpayer and the country, while the source basis of taxation is based on sufficient connection between the source and the country.[5]

2.4 Definition of gross income

The definition of gross income is the starting point in calculating the person`s taxable income. Gross income is defined in section 1 of the income Tax Act[6] as follows:

> 'in relation to any year or period of assessment means –
>
> (i) in the case of any resident, the total amount, in cash or otherwise , received by or accrued to or in favour of such resident; or
>
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic ,
>
> during such year or period of assessment, excluding receipts or accruals of capital nature…'

The word 'resident' is included in the definition of gross income.

2.5 Definition of resident

The definition of "gross income" in section 1 of the Act was amended to include a reference to the word "resident" when the residence basis of taxation became effective. The definition of resident determines whether the person is a resident or not subject to possible effect of Double Tax Agreement (DTA). The relevant DTA may override the definition of 'resident' and domestic tax law.

[5] International Tax, South African Perspective, 2011, Fifth Edition, page 10.
[6] 58 of 1962.

Section 1 of the Income Tax Act defines the term 'resident' as follows:

'means any –

(a) natural person who is –

(i) ordinarily resident in the Republic; or

(ii) not any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic –

(aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessments preceding such year of assessment;

and

(bb) for a period or periods exceeding 915 days in aggregate during the five preceding years of assessments, in which case that person will be a resident which effect from the first day of that relevant year of assessment: Provided that…; or

(b) person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic,

but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation..'

2.6 Natural and Non-natural person

The definition of residents covers the natural persons and persons other than natural person. The requirements of becoming a tax resident are also stated. The definition does not define some of the words. The courts have been asked to give the meaning of the words.

Residence of natural persons

The term “resident” is defined in section 1 in relation to a natural person as either a person ordinarily resident in the Republic or a person who meets the requirements of the physical presence test. The two parts of the definition will be discussed as follows:

Test 1

Ordinarily resident

The term ‘ordinarily resident’ is not defined in the Act, and it does not have the special meaning. Interpretation given by the courts should be followed to determine whether the person is ordinarily resident in South Africa. There are no hard and fast rules which can be applied, to determine the resident status of a person; each case must be decided upon its own facts.

South African Revenue Service has issued Interpretation Note 3 (the Interpretation Note), which states that in determining whether a person is ordinarily resident in a country, it is impossible to lay down hard-and-fast rules. In terms of the Interpretation Note, a physical presence at all times is not a requisite to be ordinarily resident in South Africa.

The following two requirements need to be present:

- the intention to become ordinarily resident in a country; and
- steps indicative of this intention having been or being carried out.

In terms of the Interpretation Note, the purpose, nature and intention of the taxpayers` absence must be established to determine whether the taxpayer is still ordinarily resident.

The following factors will be relevant in considering the above two requirements:

- Most fixed and settled place of residence
- Habitual abode, i.e. present habits and mode of life

- Place of business and personal interest
- Status of business and personal interest
- Nationality
- Family and social relations, i.e. schools and church
- Political, cultural or other activities
- Application for permanence residence
- Period abroad, purpose and nature of visits
- Frequency of and reasons of visits

It is the stated that the Interpretation note contains many factors not found in the case law, e.g. immigration status and purpose of visit. SARS is not in the position to insist that these factors must be taken into account, in the absence of the legislative authority.[7]

It is responsibility of the taxpayer to prove that he/she is resident of South Africa or not. There is no notification from South African tax authorities advising an individual that he is resident in the Republic. The responsibility rests rest with taxpayers to decide for themselves otherwise he will leave himself open to the tax authorities.[8] The person should not wait for the Commissioner to inform him of his residence status.

There has been number of leading court cases, in which South African courts have decided whether a person is ordinarily resident or not. In Cohen v Commissioner[9] for Revenue Schreiner JA, stated the following, to the meaning of 'ordinarily resident':

> *"Ordinarily resident would be the country to which he would naturally and a matter of course return from his wanderings; as contrasted with other lands it*

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[7] International Tax, South African Perspective, 2011 Edition, page 20.
[8] 'Planning for South Africa tax prior taking up residence' available at http://www.offshoreinvestment.com/media/uploads/planni ng.pdf accessed 16 July 2014.
[9] 1946 AD 175.

might be called his usual or principal residence and it would be described more aptly than other countries as his real home."

This approach was also followed and confirmed in the case of CIR v Kuttel case[10]. It was held that a person is ordinarily resident where he/she normally resides, as apart from temporary or occasionally absences. The meaning of the term 'ordinarily resident' was also addressed in Shephered v Revenue and Customs Commissioners[11]. This case would be of persuasive authority in South Africa, on the meaning of 'ordinarily resident'.

The taxpayer was ordinarily resident in the United Kingdom and decided to move his residence to Cyprus. His main purpose was to pay tax at lower rates on his United Kingdom pension, in Cyprus, than those applicable in the United Kingdom. It was decided that he was still an ordinarily resident in the United Kingdom, as there was no evidence that a move abroad was distinct break and that Cyprus was his real home. This case will be relevant for individuals planning to retire in South Africa and receiving foreign pension.

<u>Test 2</u>

Physical presence test

A natural person who is not any time during the relevant year of assessment 'ordinarily resident' will, however, be 'resident' if he is physically present in the Republic for certain periods, that is, if he meets the requirements of the so called 'physical presence' test[12]. This test applies only to natural persons.

A person must be physically present in South Africa for a period or periods exceeding–

- 91 days in aggregate during the tax year under consideration

[10] 54 SATC 298.
[11] STC 1821.
[12] SILKE: South African Income Tax 2014 Edition, page 61.

- 91 days in aggregate during each of the five years preceding the tax year under consideration
- 915 days in aggregate during those five preceding tax years

The physical presence test will have an impact on individuals who have been given permanent citizenship. These persons will become residents and become liable for tax on their worldwide income. The Immigration Act allows a person to apply for a citizenship after the period of five years. In terms of this Act, the person will become South African resident and be liable for tax on his worldwide income.

Persons other than natural persons

Companies

The term 'resident' is defined in section 1 in relation to a person (other than a natural person), as

> '(*b*)' a person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic.'

A person (other than a natural person) will be regarded as a 'resident' in terms of the Act if either it is incorporated, established or formed in the Republic and if its place of effective management is in the Republic. The Act does not define the terms 'incorporated', 'established', or 'formed'.

The companies formed under the Companies Act[13], are residents in South Africa, because of their formation and incorporation in the Republic. These companies are liable to normal tax in the Republic on its worldwide receipts and accruals. The company incorporated outside the Republic, is required to register its memorandum with the Registrar of Companies in terms of the Companies Act.

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[13] Act 71 of 2008.

It is submitted that the registration of the memorandum of an 'external company' does not result in the incorporation of the company in the Republic and will therefore not be a resident, unless it is effectively managed in the Republic.[14]

Meaning of "place of effective management"

The Interpretation note admits that there are no hard and fast rules. SARS regards the "place of effective management" as the place where key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made. The view of SARS focused on the place of implementation of the decisions of the senior group of persons, rather than where these decisions are taken.

It is important to note that SARS is not bound by its own interpretation of the term 'place of effective management' in Interpretation Note 6. It is stated that the place of effective management, depends on actual circumstances, which is to say where the crucial decisions are made. It is stated that the place of effective management is generally used as a 'tie-breaker' test for residency in a treaty and the international interpretation of the term differs from that of SARS.

Meaning of "place of effective management" according to OECD

The Organization for Economic Co-operation and Development (OECD) sets the International taxation guidelines in areas where international co-operation is desirable for tax treaties.

Paragraph 3 states:

> "As a result of these considerations, the "place of effective management" has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and

[14] Silk on International Tax, 17.3.1(Accessed on Lexus Nexus) 2014 Edition.

commercial decisions that is necessary for the conduct of the entity `s business as a whole are in substance made".

The South African courts will mostly favour the approach of OECD than the approach of SARS, as seen in Tradehold `s case. In the court case of SIR v Downing, it was stated that when interpreting a double taxation agreement, South Africa is bound to follow the OECD Model Tax Convention.

Trusts

Any person, including a trust, is liable for normal tax upon the receipt or accrual of his gross income. The trust will be a tax resident, if it is established or formed in South African or which has its place of effective management in South Africa. In the case of Oceanic Trust Co Ltd,[15] it was held that the place of effective management was located in tax jurisdiction in which key management decisions and commercial decisions necessary for the conduct of the trust `s business were made.

2.7 Double Tax Agreements

It is assumed in this treatise that the person becoming a tax resident, will continue to receive income from the previous country of residence and other countries. The domestic tax legislation and the DTA should be taken into account when the person becomes a tax resident. South Africa has signed agreements with other countries with the purpose of avoiding double taxation.

A Double Taxation Agreement (DTA) is an international agreement entered into between the Government of South Africa and the Government of a foreign country, aimed at eliminating or providing relief from international double taxation. The DTA is concluded with a view to the prevention, mitigation or discontinuance of the levying of tax in respect of the same income, profits or gains, or imposed in respect of the donation under the laws of both countries.

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[15] Oceanic Trust Co Ltd v C: SARS (2012).

2.7.1 Model conventions to avoid double taxation

The following Model Treaties are currently used by countries[16]:

1. The OECD Model Tax Treaty
2. The US Model Tax Treaty
3. The Andean Group
4. Intra-ASEAN Model
5. The Nordic Convention on Income and Capital
6. The UN Model

South Africa has adopted the OECD Model wording in the conclusion of its treaties. The DTA does not impose tax; its purpose is to allocate the taxing rights. Tax is imposed in terms of a country `s domestic law.

The DTA provides, amongst other things a framework for the resolving of cross border tax disputes. Participating countries endeavor to resolve double taxation by applying one of the following methods of relief:

1) The credit method
2) The exemption method
3) The deduction method

South Africa `s tax laws provide for relief from double taxation by way of either a rebate for qualifying foreign taxes on income or a deduction for non-qualifying foreign taxes on income. The DTA will be used to determine the taxing rights between South African and other countries.

2.8 Conclusion

The concept of the term 'resident' is fundamental in the South African tax system. The person who becomes a resident will liable for tax on his worldwide income. The DTA should also be taken into account, when the person will be receiving foreign

[16] Silke on International Tax, Model conventions, chapter 12. Accessed on Lexus Nexus, 2014 Edition.

income from the previous country of residence. The DTA will override the definition of ‘resident’ and the provisions of South African Income Tax Act. The next chapter discusses the tax implication of foreign pensions.

Chapter 3 Taxation of foreign pensions

3.1 Introduction

South Africa is becoming a retirement destination because of its favorable climate and considerable foreign direct investment. Arrival of retiree immigrants is valued in South Africa. This chapter will explain the income tax implications of a foreign pension, for individuals who become residents in the Republic. The income tax legislation and effect DTAs between South Africa and other countries will be examined, to determine the income tax implications when the person becomes a resident in South Africa.

3.2 Foreign pension and annuities.

It is assumed that the retiree from the previous country of residence will receive foreign pension. The foreign pension is included in the gross income and is subject to normal tax, but might be subject to tax, partly exempt or be fully exempt from income tax.

3.2.1 South African tax legislation on foreign pension

The foreign pension, whether it is a government or a non-government pension, will be included in the gross income of a resident.

Section 10(1)(gC) provides exemption in terms of the Income Tax Act[17], and states as follows:

> *"any–*
>
> *(i) amount received by or accrued to any resident under the social security system of any other country; or*
>
> *(ii) pension received by or accrued to any resident from a source outside the Republic as consideration for past employment outside the Republic."*

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[17] Act 58 of 1962.

There are two deeming provisions applicable to amounts received by or accrued to a person by virtue of a pension or annuity granted to him or her. These deemed source provisions apply to any person irrespective of where payment is made or from where the funds from which payment is made are situated. Section 9 of the Income Tax Act, determines or deems the source of various types of income to be from the South Africa source, if the services in respect of which the amount relates were rendered within South Africa. Section 9(2) of the Income Tax Act states as follows:

> *"(2) An amount is received by or accrues to a person from a source within the Republic if that amount-*
>
> *(i) constitutes a pension or annuity and the services in respect of which that amount is so received or accrues were rendered within the Republic: provided that if the amount is received or accrues in respect of services which were rendered partly within and partly outside the Republic, only so much of that amount as bears to the total of that amount the same ratio as the period during which the services were rendered in the Republic bears to the total period during which the services were rendered as have been received by or accrued to the person from a source within the Republic."*

Specifically, section 9 (2)(*i*) treats an amount as being from a source in South Africa, if it is a pension or annuity and the services in respect of which that amount was received or accrues, were rendered in South Africa. The section further provides that the amount received or accruing, must be apportioned, where the services were rendered partly inside and outside South Africa.

If no such services were so rendered, it will not matter how much of the pension can be attributed to prior services in the Republic.[18] The tax resident will not be liable for

[18] Meyerowitz, D, on Income Tax 2007-2008 (The Taxpayer).

tax on foreign pension if the portion of a pension is applicable to services rendered outside South Africa.

The term "source outside the Republic" can be interpreted to mean either the originating cause[19] which gives rise to that person (foreign services rendered), or the location from which the pension is received (namely, where the fund is situated).

3.2.2 Instance where services were not rendered in South Africa.

The person, who wishes to become the resident of South Africa, will not be subject to normal tax on the receipt or accrual of foreign pension, if the services were not rendered in South Africa. The immigrant will escape tax if he never rendered years of services in South Africa. The tax legislation of the foreign country and the DTA should be taken into consideration. He might be liable for normal tax in the previous country of residence.

3.2.3 Instance where employment services were partly rendered in South Africa.

Section 9(2)*(i)* provides that a pension or annuity received from a source within South Africa if the services in respect of which the amount relates were rendered within South Africa. If the amount relates to services rendered partly in South Africa and partly outside South Africa, the portion of the amount is regarded as from a source within South Africa.[20]

3.2.4 Instances where the Double Tax Agreement exists.

South Africa has concluded number of agreements with a number of countries to prevent double taxation of income. The purpose of a DTA is to allocate taxing rights and not to impose tax. The DTA would stipulate whether foreign pension will be taxed only in one of the two countries or may be taxed in both countries with which

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[19] CIR v Lever Bros and Unilever Ltd 1946 AD 441, 14 SATC.

[20] Silke: South African Income Tax, 2014 Edition Page 97.

the country of residence allowing a credit for the tax imposed by the other country (source country). If an agreement exists, it overrides the provisions of the South African Income Tax Act. The DTA will be scrutinized in the paragraphs to follow to see if South Africa has taxing rights or not, to the foreign pension.

Article 18 of the OECD

Article 18 states the following:

> *"Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to the resident of a Contracting State in consideration of past employment shall be taxable only in that State."*

The residence rule applies to the exclusion of the source rule, with the result that the residence State has the sole right to tax consideration for past employment. The article states that the pension is taxable only in the State of residence.

United States of America DTA

Article 18 covers Pensions and annuities and states the following:

Paragraph 1 states the following:

"Subject to the provisions of Article 19 (Government Service), pension distributions and other similar remuneration derived from sources within a Contracting State and beneficially owned by a resident of the other Contracting State, whether paid periodically or as a single sum, may be taxed by the first-mentioned State under the following conditions:

a) *where the United States is the first-mentioned Contracting State, the tax imposed on the pension or similar remuneration may not exceed 15 percent of the gross amount of the pension or similar remuneration, provided that such pension or similar remuneration is not subject to a penalty for early withdrawal; and*

b) Where South Africa is the first-mentioned Contracting State:

i) the beneficial owner of the pension or similar remuneration has been employed in South Africa for a period or periods aggregating two years or more during the ten year period immediately preceding the date from which the pension first became due; and

ii) the beneficial owner of the pension or similar remuneration was employed in South Africa for a period or periods aggregating ten years or more."

Paragraph 3 states the following:

"Annuities beneficially derived by a resident of a Contracting State shall be taxable only in that State unless the annuity was purchased in the Other Contracting State while such person was a resident of that other State, in which case the annuity may also be taxed in that other State. The term "annuities" as used in this paragraph means a stated sum paid periodically at stated times during life or during a specified number of years, under an obligation to make the payments in return for adequate and full consideration (other than services rendered)."

The US DTA is unique and contains number of principles not found in any other DTA. The US can tax pensions and other remunerations at a maximum rate of 15 percent, if paid to a resident of South Africa in a case where past employment services were rendered in the United States of America.

The portion of the resident`s pension that is received from a source outside South Africa, is exempt in terms of section 10(1)(*gC*) in South Africa. According to this agreement, USA will have the taxing right by withholding tax at the rate of 15 percent.

The remaining portion of the pension will not be subject to normal tax in South Africa, if no employment services were rendered in South Africa. This is an advantage and tax savings for US citizens becoming residents in South Africa, if they have never render any services in South Africa.

In conclusion the United States of America will tax the pension in the form of withholding tax, limited to 15%. South Africa may also tax the pension, but will give credit under section 6*Quat*, or will exempt the pension under section 10(1)(*gC*).

Australia

Article 18 of the DTA covers pension and annuities.

Paragraph 1 reads as follows –

> *"Subject to the provisions of paragraph 2 of Article 19, pensions and annuities from sources in one Contracting State and paid to a resident of the other Contracting State shall be exempt from tax in the first mentioned Contracting State to the extent that such pensions and annuities are included in taxable income in the other State."*

It is assumed that the source of the pension is from Australia. The foreign pension will be included in the South African taxable income, but might be exempt under section 10(1)(*gC*). The DTA exempts the pension from tax in Australia and gives South Africa the taxing rights.

The Australian residents wishing to become resident in South Africa, might not be subject to normal tax in South Africa, according to section 10(1)(gC) and the provision of the DTA, but will be taxable in Australia.

Canada

"Article 18 covers pension and annuities.

Paragraph 1 reads as follows:

> *"Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State."*

Paragraph 2 states:

> *"Pension and annuities arising in a Contracting State and paid to a resident of the other Contracting State may also be taxed in the State in which they arise and according to the law of that State."*

The use of the word "may" indicates that the income can be taxed in both states. The pension and annuity will be taxed in South Africa unless the amount is exempt under section 10(1)(*gC*). South Africa will not have the taxing rights, unless the amount will be deemed to be from a source in South Africa under section 9(2)(*i*). According to paragraph 2, Canada may also tax the pension according to domestic legislation.

United Kingdom

Article 17 covers pensions and annuities and states the following:

> *"1. Subject to the provision of paragraph 2 of Article 18 of this Convention:*
>
> *(a) pension and other similar remuneration paid in consideration of past employment, and*
>
> *(b) any annuity paid,*
>
> *to an individual who is a resident of a Contracting State shall be taxable only in that State."*

According to this article, South Africa has the exclusive right to tax the foreign pension. The previous country of residence will not withhold any tax. In this case no tax will be paid on the pension in the United Kingdom and in South Africa, in terms of the DTA and the provision of section 10(1)(gC). The resident will have more after tax income in South Africa, assuming that the person will be receiving high pension.

3.3 Conclusion

South Africa has favourable tax laws for retirement pension schemes that are based abroad. The South African tax base is not protected; there is a tax opportunity for immigrants wishing to take up residence. The South African tax legislation does not tax foreign pension unless the provision of section 9 applies (source rule). The person planning to take up residence may also escape tax in terms of the treaty in their former country of residence.

The tax implications in South Africa will be determined in terms of the provisions of the Income Tax Act, if the no agreement exists. It is stated that the tax legislation should be amended to ensure that the immigrants are subject to normal tax in South Africa. It is stated that exemption acts as an incentive for relatively wealthy foreigners who have predominately worked abroad to retire in South Africa and is regarded as an interim measure pending further legislation.[21] The next chapter will discuss the capital gains tax implications, when the person becomes a resident in South Africa.

[21] International Tax, South African Perspective 2011, Lynette Olivier, Michael Honiball, page 446

Chapter 4 Capital gains tax

4.1 Introduction

The aim of this chapter is to discuss the capital gains tax (CGT) implications of becoming a South African resident. Capital gains tax was introduced and became effective on or after 1 October 2001. It is not a separate tax but forms part of the taxpayers' taxable income. The relevant legislation is contained in the Eighth Schedule to the Act. Section 26A forms the link between the Income Tax Act and the Eighth Schedule. Both residents and non-residents are subject to capital gains tax.

4.2 Definitions

South African residents are liable for capital gains tax on their worldwide income. The Eighth Schedule contains definitions which will be continually used in this chapter. Paragraph 1 contains four core definitions namely that of an asset, disposal, proceeds and base cost.

Asset

"asset" includes-

> *"(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and*
> *(b)a right or interest of whatever nature to or in such property."*

The definition of asset is wide enough to include virtually any asset.

Disposals

"disposals" means an event, act, forbearance or operation of law envisaged in paragraph 11 or an event, act, forbearance or operation of law which is in terms of this Schedule treated as the disposal of an asset, and "**disposals**" must be construed accordingly.

The transaction that is subject to CGT can be either qualify as a disposal or a deemed disposals. The disposals of assets are dealt in paragraph 11, while events that are deemed disposals are listed in paragraph 12. Emphasis will be made under paragraph 12 below.

Disposals

Paragraph 11 defines a disposal in very broad terms. Disposals of assets include the following occurrences:

(a) *"Sale, donation, expropriation, conversion, granting, cession, exchange or any other alienation or transfer of ownership of an asset.*

(b) *Forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry or abandonment of an asset.*

(c) *Scrapping, loss or destruction of an asset.*

(d) *Vesting of an interest in a trust asset in a beneficiary*

(e) *Distribution of an asset by a company to a holder of shares.*

(f) *Granting, renewal, extension or exercising of an option.*

(g) *Decrease in value of a person `s interest in a company, trust or partnership as a result of a 'value-shifting arrangement"*

Deemed disposals

The deemed disposals of assets are covered by paragraph 12. This provision should be read with paragraph 24. Paragraph 12 states as follows:

(1) *"Unless subparagraph (4) applies, where an event described in subparagraph (2) occurs, a person must, subject to paragraph 24, be treated for the purposes of this Schedule as having disposed of an asset described in subparagraph (2) for an amount received or accrued equal to the market value of the asset at the time of the event and to have immediately reacquired the asset at an expenditure equal to the market value, which expenditure must be treated as an amount of expenditure actually incurred and paid for the purposes of paragraph 20 (1) (a).*

(2) *Subparagraph (1) applies, in the case of-*

(a) a person-

I. *that commences to be a resident;*
II. *that is a foreign company that commences to be a controlled foreign company; or*
III. *that is controlled foreign company in relation to any resident that ceases to be a controlled foreign company as a result of becoming a resident,*

in respect of all assets of that person other than-

(aa) assets in the Republic listed in paragraph 2(1)(b) (i) and (ii);

(bb) any right to acquire any marketable security contemplated in section 8A."

According to paragraph 12(2)(a)(i) a disposal is deemed to have taken place if a person commences to be a resident. A non-resident who becomes a resident must disregard the portion of any gains or losses on assets attributable to the period of ownership of the relevant assets before becoming a resident. A non-resident is deemed to have disposed of each of the relevant assets at a cost equal to its market value and to have reacquired it at a cost equal to the same market value. The purpose is to establish base cost of the assets, situated outside the Republic, and to prevent pre-residence gains and losses from entering the South African tax system.

The deemed disposal rule does not apply to:

- immovable property in South Africa or any right or interest in in such property [paragraph 2(1)(*b*)(i)];
- any asset attributable to a permanent establishment in South Africa [paragraph 2(1)(*b)(*ii)];
- any right to acquire any marketable security contemplated in section 8A.

The rule will only apply to assets situated outside South Africa. The main purpose is to determine the base cost which will be used, when the asset is disposed in future.

The immigrant or person who wishes to become resident must take into account, the capital gains tax implication from the previous country of residence. The domestic legislation should be taken into account and DTA that exists between the two countries. When the company ceases to be a resident in the United Kingdom certain exit charges and restriction to roll-over relief will apply.

The company is deemed to have disposed of all its assets at their market value immediately before the relevant time and to have reacquired them at that value at the relevant time. The relevant charge is Corporation Tax is known as the 'exit charge, which is similar to South Africa Income Tax Act.[22] The company will not pay capital gains tax immediately when it becomes a resident in South Africa.

4.3 The base cost of the asset of a person who becomes a resident

Paragraph 12(2)(a) must be read with paragraph 24 which applies when the non-residents become residents in South Africa. When the non-residents become residents in South Africa , their assets will in terms of paragraph 12(2) and 13(1)(g) , be treated as having being disposed of on the day before they become residents, and then reacquired at market value on the same day. The person who becomes a resident will be allowed, in terms of paragraph 24(1) to add expenditure on the asset on or after the immigration date to the base cost. There two loss-limitation rules applicable when the immigrant disposes of these assets at a loss, on or after the immigration date in terms of paragraph 24(2) and 24(3).

Paragraph 24(2) states the following:

> *"Where an asset contemplated in paragraph 12 (2) or (4) has been disposed of by a person on or after the date on which that person commenced to be a resident and the proceeds from that disposal and the expenditure allowable in terms of paragraph 20 incurred to that date determined without regard to paragraph 12 (2) or (4) in respect of that asset are each lower than the market value of that asset as contemplated in paragraph 12 (2) or (4), that person must be treated as having acquired that asset at a cost equal to the higher of-*
>
> *(a) the expenditure allowable in terms of paragraph 20 incurred in respect of that asset prior to that date; or*
> *(b) those proceeds less the expenditure allowable in terms of paragraph 20 incurred on or after that date in respect of that asset.*

[22] Section 9H, Income Tax Act 58 of 1962 as amended.

Paragraph 24(3) also deals with the treatment of the base cost of a person who becomes resident in South Africa.

Paragraph 24(3) states the following:

> "*3. Where an asset contemplated in paragraph 12 (2) or(4) has been disposed of by a person on or after the date on which that person commenced to be a resident and the proceeds from the disposal of that asset and the market value of that asset as contemplated in paragraph 12 (2) or (4) are each lower than the expenditure allowable in terms of paragraph 20 incurred prior to that date (determined without regard to paragraph 12 (2) or (4)) in respect of that asset, that person must be treated as having acquired that asset at a cost equal to the higher of-*
>
> *(a) that market value; or*
> *(b) those proceeds less the expenditure allowable in terms of paragraph 20 incurred on or after that date in respect of that asset."*

The main purpose is to establish the base cost of the assets equal to the market value at the time of the commencement of residence. This means that there is no capital gains tax implications to pay after immigration, the assets are now "stepped up" to market value and that there is manner in which this provision can be employed to trigger a gain or loss after immigration.[23]

4.4 Controlled foreign company

4.4.1 Definition

Section 9D of the Income Tax Act contains the definition of 'Controlled Foreign Company (CFC)'. It is an anti-avoidance provision and casts a wide net to prevent the avoidance of taxation by South African residents using foreign companies as intermediaries. A CFC is a foreign company in which South African residents, directly or indirectly,

[23] Comprehensive guide on capital gains tax at page 87

- hold more than 50% of the ‘participation rights (s 9D(1)), or
- can exercise more than 50% of voting rights in the foreign company.

The net income of the CFC is included in the resident`s taxable income.

4.4.2 Controlled foreign company becoming a resident in South Africa

The provision of paragraph 24 also applies where a person ceases to be a controlled foreign company (CFC) as a result of commencing to be a resident. The CFC will be deemed to have acquired each of its assets at expenditure equal to their market value immediately before the disposal. The deemed disposal becomes the base cost for the purpose of paragraph 20(1)(a).

The following assets are excluded:

- any immovable property or interest or right in immovable property situated in South Africa, and
- an asset of a permanent establishment through which the CFC carried on a trade in South Africa during the year of assessment, and
- assets held by the CFC if any amount received or accrued from their disposal would have been taken into account for purposes of determining the net income of that CFC under section 9D.

The above assets already fell within the South African tax net while the foreign company was a controlled foreign company, there is no need to trigger a deemed disposal and reacquisition.[24] The purpose of paragraph 12(4) is to ensure that the any pre-residence unrealized capital gains and losses are excluded from the South African tax system by a ‘deemed acquisition at market value’ rule.[25] Paragraph 24 overrides paragraph 12(4) if the actual pre-residence expenditure and proceeds on disposal are each lower than the market value of the asset on the day immediately before the day on which the person became a resident.

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[24] SARS Comprehensive Guide on Capital Gains, Issue 4 at 87.

[25] SARS Comprehensive Guide on Capital Gains, Issue 4 at 87.

4.5 Valuations of assets when a person becomes a resident

The responsibility rests with a person, who becomes a resident to perform valuation of his assets. The Commissioner may under section 95[26], value the assets if the person fails to value his assets. There is no time limit under paragraph 12(2)(a) and (4) for new residents to value their assets after taking up residence. It is stated that the person can value an asset at the date of disposal, but it carries with it the problem of securing sufficient evidence to support the valuation long after the event.[27]

The taxpayer should request an independent third party to perform valuation of the assets. The taxpayer should ensure the method of valuation for a pre-valuation date asset is reliable and reasonable. The valuation of assets creates more strain for SARS to monitor the valuations of assets. This is a challenge to the Commissioner, as he is likely to accept valuations when the person submits the tax return. .

4.6 Effect on withholding taxes

The person who becomes a resident will no longer be taxed under section 35A[28], when disposing certain assets situated in South Africa. Non-resident (natural person at 5%, companies at 7.5%, trust at 10%) are taxed at lower rates, when they dispose the property situated in South Africa. On assessment the full capital gain is included and the withholding tax will be set off as a credit against tax payable. Capital gains tax will now be levied from the disposal of assets situated anywhere in the world.

Paragraph 10 sets out the capital gains rates that should be included into normal tax. The inclusion rate for a natural person and a special trust is 13.65% and for the close corporations, companies and ordinary trusts is 18.65% and 27.31%. The natural person and special trust are entitled to an annual exclusion of R30000 against aggregated capital gains.

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[26] Tax Administration Act 28 of 2011.

[27] SARS Comprehensive Guide on Capital Gains, Issue 4 at 166.

[28] Income Tax 58 0f 1962

4.7 Subsequent disposal of foreign assets

Disposal of assets situated in South Africa will trigger CGT implications. A non-resident becoming a resident in South is allowed to disregard any capital gains or losses arising in respect of assets before they are brought into the South African net. When the person subsequently disposes of these assets, the proceeds will be subject to capital gains tax in South Africa. The sale of assets situated outside South African may be taxed in South Africa or in a country where the assets is situated.

The DTAs gives the taxing rights between the South African and other countries, on the disposals of foreign assets by South African residents. South Africa has signed agreements with other countries; most of these agreements are based on the OECD Model.

4.8 Transactions in foreign currency

South African residents are liable for tax on their worldwide income. The foreign income received by South African residents must be converted into rands and included in the gross income. The treaties do not deal with the conversion of foreign currency; conversion should be dealt with under domestic law. Section 25D of the Income Tax Act contains the general currency conversion provisions which will apply in all cases unless a specific section contains its own currency conversion rules.

Paragraph 43 of the Eighth Schedule contains rules dealing with gains and losses on assets disposed of or acquired in foreign currency. It specifies when the conversion must take place and the appropriate exchange rate to be used. It is necessary to determine the capital gain or loss in rand, when dealing with assets acquired or disposed in foreign currency.

The following summary provides the provisions of paragraphs 43(1), (1A) and (2):

> *"1) Paragraph 43(1) is applicable to natural person and non-trading trust where both base cost and proceeds are denominated in the same foreign currency. Determine capital gain or loss on disposal in foreign currency, and translate that capital gain or loss into Rand by applying the average exchange*

rate for the year of assessment in which that asset disposed of or by applying the spot rate on the date of disposal of that asset.

(2) Paragraph 43(1A) applies in all other instances, where paragraph 43(1) does not apply. The base cost should be translated into local currency at spot rate on the date expenditure was incurred or average rate in the year expenditure was incurred. The proceeds should be translated into local currency at spot rate on date of disposal or average rate in the year of disposal."

When the person disposes an asset situated outside South Africa in terms of paragraph 43(1), he will first determine the gain or the loss in foreign currency. The gain or the loss should be translated into Rand by applying the average exchange rate for the year of assessment in which that asset was disposed of or by applying the spot rate on the date of disposal of that asset.

4.9 Disposal of immovable property according to OECD.

Article 13 of the OECD Model covers the disposal of assets subject to CGT. The OECD Commentary makes it clear that it is left to the domestic law of each State to determine whether capital gains tax is indeed payable (paragraph 2 of Commentary on article 6). The article does not give indication of which income will be considered as a capital gain nor how a capital gain should be taxed.[29] This article became relevant when capital gains tax was introduced in South Africa on 1 October 2001. It is stated that in the absence of this article it would result in neither State being entitled to tax the capital gains.

Paragraph 1 state as follows:

"Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State".

[29] International Tax South African Perspective 2011 Fifth Edition at 400.

Paragraph 2 states as follows:

"Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent (alone or with the whole enterprise), may be taxed in that other State".

Paragraph 4 states as follows:

"Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State".

There is no definition of capital gains. The definition and domestic treatment of capital gains varies significantly from country to country. The assets of the person who becomes a resident, situated in the previous country of resident will be subject to tax when disposed. According to paragraph 1 the Source State has the prior right to tax capital gains from the alienation of immovable property.

Paragraph 2 of Article 6 defines term immovable property as follows:

"The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property."

Once a person becomes a resident of South Africa that person would be deemed to acquire their assets at market value on that date except for the South Africa source assets listed in paragraph 2(1)(b). The assets situated in the previous country of

residence and elsewhere will be subject to capital gains tax. If the country which the persons emigrated from does not charge capital gains tax at the time of exit, it will be irrelevant for capital gains purposes. The source state with such immovable property may retain a primary taxing right and South Africa would usually grant a tax credit under section 6*Quat*.

A treaty may, however, confer an exclusive taxing right on the state where the property is situated and such event South Africa would unable to subject the disposal of the property to capital gains tax. Paragraph 1 state that both States gains may be taxed in both states, but the Source States has prior right to tax capital gains from the alienation of immovable property.

The state that has taxing rights shall give the meaning of immovable property, according to the above paragraph article 6. The relevant articles will be studied to see whether the right to tax the gain is optional or whether denied, on the sale of foreign assets by residents.

South Africa/United Kingdom DTA

Capital gains are covered under Article 13 of the agreement between South Africa and United Kingdom.

Paragraph 1 reads as follows:

> *"Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 of this Convention and situated in the other Contracting State may be taxed in that other State."*

Paragraph 2 of Article 6 states:

> *"The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of*

immovable property and rights to variable of fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships and aircraft shall not be regarded as immovable property."

Paragraph 2 states:

"(a) 'Shares, other than shares quoted on an approved Stock Exchange, deriving their value or the greater part of their value directly or indirectly from immovable property situated in the other Contracting State, or
(b) an interest in a partnership or trust the assets of which consist principally of immovable property situated in the other Contracting State, or of shares referred to in sub-paragraph (a) of this paragraph, may be taxed in that other State."

Paragraph 3 states:

"Gains from the alienation of immovable property forming part of the business property of a permanent establishment with an enterprise of a Contracting State has in the other Contracting State, including such gains from alienation of such a permanent (alone or with the whole enterprise), may be taxed in that other State."

Paragraph 4 states:

"Gains derived by a resident of a Contracting State from the alienation of ships or aircraft operated in international traffic by an enterprise of that Contracting State or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that Contracting State."

Paragraph 5 states:

"Gains from the alienation of any property other than that referred to in paragraph 1,2,3 and 4 of this Article shall be taxable only in the Contracting State of which the alienator is the resident."

Paragraph 6 states:

"The provisions of paragraph 5 of this Article shall not affect the right of a Contracting State to levy according to its law a tax on capital gains from the

alienation of any property derived by an individual who is a resident of the other Contracting State and has been a resident of the first-mentioned Contracting State at any time during the six years immediately preceding the alienation of the property if the property was held by that individual, or by the spouse of that individual, before that individual became a resident of that other State."

The resident will be liable for capital gains tax in the United Kingdom and in South Africa, according to paragraph 1, 2, 3 and 4. The United Kingdom has the prior right to tax capital gains from the alienation of immovable property. South Africa will have the taxing rights on any gains from the alienation on any other properties not covered by paragraph 1, 2, 3 and 4. This entitles the source state (United Kingdom) to tax the gain; the state of residence (South Africa) would grant the credit."

Australia

Paragraph 3 states as follows:

"Gains from the alienation of ships or aircraft operated in international traffic by a resident of a Contracting State or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that State."

Paragraph 3 gives South Africa the taxing rights on the gains from the alienation of ships or aircraft operated in international traffic. This is good for the South Africa tax base because the agreement gives South Africa taxing rights to tax the gains.

Cyprus

Paragraph 1 reads as follows:

"Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State."

Cyprus will have the prior right to tax capital gains from the alienation of immovable property. The definition of term "immovable property" in Article 6 of the DTA does not include shares or interest in a company. South Africa is the Contracting State of

which the alienator is a resident. When the South African resident disposes of shares in Cyprus, the agreement gives full rights to South Africa to tax the gains from the disposal of shares, according to paragraph 4.

4.10 Conclusion

The person who becomes a South African resident will receive a step-up in the base cost for assets other than South African immovable property and assets of a permanent establishment under paragraph 12(2)(a) of the Eighth Schedule. The disposal of South African assets and worldwide assets will be subject to capital gains tax. The valuation of the assets is mandatory to a person taking up residence in South Africa. Determination of the base cost of the assets situated outside South Africa can be difficult and challenging to the Commissioner. It is the responsibility of the persons to value all their assets.

The legislation treats different situations and incomes when calculating the amount of the section 6*Quat* rebate. The determination of the amount of the section 6*Quat* rebate can be difficult from the sale of foreign assets. The rebate in a particular is limited to the amount of normal tax and should be carried forward to a future year. Any foreign tax credit not utilized in the current year will be able to be carried forward for 7 years. A detailed understanding of the provisions and the requirements of section 6*Quat* is needed when dealing with foreign income in a particular year. The rebate in a particular year is limited to the amount of normal tax, but can be carried forward to future years. It has limited life and should be monitored. The next chapter will discuss the income tax implications of a foreign trust and beneficiaries.

Chapter 5 Tax implications of foreign discretionary trusts

5.1 Introduction

The aim of this chapter is to discuss the income tax implications of the foreign discretionary trust and its beneficiaries formed by an immigrant (settlor) before becoming a South African resident. The person would normally donate his assets to an offshore discretionary trust before taking up a residence in South Africa with the aim of avoiding donations tax and estate duty. The foreign tax consequences should be taken into account before the creation of these trusts. The donor will be liable for donations tax, if charged, in the previous country of residence when making a donation to the trust.

5.2 Foreign discretionary trusts

A trust is defined in section 1 of the Income Tax Act 58 of 1962, as

> *"any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person."*

The South African trust law does not recognize the foreign trusts, but according to section 1 of the Act a foreign trust are also included. A discretionary trust refers to a trust where distribution of income and capital to the beneficiaries is within the discretion of the trustees. The fact that a beneficiary has a discretionary right does not mean he or she does not have a right but only *a spes.*[30] The term 'offshore trust' refers to all trusts that are not South African resident.

5.3 The purpose and formation of offshore trust

A pre-arrival strategy often persuaded by individuals who intend to take up residence in South Africa is the formation of an offshore discretionary trust, and transfer to that trust

[30] Taxation of Trusts in South African perspective Fifth edition at 6.

the individual`s foreign assets and rights to the future income.[31] Offshore trust tend to be formed in tax heaven countries that impose no or low rates of tax on trusts and embrace the English common law of trusts. The donor will transfer all his assets to the trust.

5.3.1 Donations of assets to an offshore trust

Donations tax is not levied under a separate tax, but is levied under the Income Tax Act in South Africa. The legislator is well aware of taxpayers' desires to structure their affairs in such a way to pay the minimum taxes on death.[32] Section 56(1)(g) contains an exemption if the property donated consists of any right in property situated outside South Africa and was acquired by the donor before becoming a resident of South Africa for the first time. A non-resident would donate assets to a foreign discretionary trust before taking up residence in South Africa. Donations tax will be avoided for assets acquired before becoming a resident.[33] Donations tax is only chargeable on residents.

Section 56(1) of the Act reads as follows:

> *"Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation-*
>
> *(g) if such property consists of any right in property situated outside the Republic and was acquired by the donor before the donor-*
>
> *(i) became a resident of the Republic for the first time; or*
>
> *(ii) by inheritance from a person who at the date of his death was not ordinarily resident in the Republic or by a donation if at the date of the donation the donor was a person (other than a company) not ordinarily resident in the Republic."*

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[31] Planning for South Africa tax prior taking up residence by Errol Danzinger, Accessed 16 July 2014.

[32] Taxation of Trusts in South Africa at 175

[33] Section 56 of the Income Tax Act No.58 of 1962

There might be income tax implications in the hands of the trustee and the beneficiaries of such a trust. The non-resident, who intends to become a resident, could donate major assets to an offshore trust with the purpose of avoiding donations tax and later estate duty.

5.3.2 Income tax consequences

Taxation is both an advantage and disadvantage in relation to offshore trusts. The main tax advantage of offshore trusts arise from the concept of the separation of legal equitable ownership, where legal ownership keeps the trust assets and trust income outside the tax net for the settlor and or the beneficiaries.[34] The anti-avoidance provision which may prevent a South African resident from avoiding or postponing tax on the foreign-source income through the use of offshore trusts is section 7(8) of the Act.[35]

Section 7(8) reads as follows:

> *"Where by reason of or in consequence of any donation, settlement or other disposition (other than a donation, settlement or other disposition to any entity which is not a resident and which is similar to a public benefit organization contemplated in section 30) made by any resident, any amount is received or accrued to any person who is not a resident (other than a controlled foreign company in relation to such resident), which would have constituted income had that person been a resident, there shall be included in the income of that resident so much of that amount as is attributable to that donation, settlement or other disposition."*

If a person makes a donation before becoming a resident of South Africa, any amount earned from the donated asset will not be caught by the deeming provision after he becomes a resident. The same principle will apply to paragraph 72 of the Eighth

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[34] Taxation of Trusts in South Africa page 53.

[35] Shifting foreign Income, Richard Jooste, Tax Planning, Volume 15 No 3

Schedule. Paragraph 72 deals with the attribution rules which will shift the liability for CGT to the person who has made a 'donation, settlement, or other disposition'. The gain vested in non-resident beneficiary will be taxed in the hands of the donor or the person who donated assets to the foreign discretionary trust.

Section 25B(2A) deals specifically with income of a non-resident discretionary ownership trust and is premised on the view that income received by or accrued to a trust changes its character if not distributed during the year of assessment in which it is received or accrued.[36] This provision deals with the income of both the domestic and offshore trusts and their beneficiaries.

Section 25B(2A) reads as follows:

> *"Where a during any year of assessment any resident acquires any vested right to any amount representing capital of any trust which is not a resident, that amount must be included in the income of that resident in that year, if –*
>
> *(a) that capital arose from any receipts and accruals of such trust which would have constituted income if such trust had been a resident, in any previous year of assessment during which that resident had a contingent right to that amount; and*
> *(b) that amount has not been subject to tax in the Republic in terms of the Act."*

Where a person ordinarily resident in South Africa acquires a vested right to any amount which represents capitalized income of a non-resident trust, which accrued to the trust at the time during which the resident had a contingent right to that income, then that capitalized income must be included in the income of the resident in the period in which the right (to capitalized income) vests.

[36] Tax Alert by Tax, Cliffe Dekker Hofmeyr Treatment of foreign Testamentary and Discretionary trust dated 13 April 2012 by Andrew Seaber.

The following points are apparent:

- Income must not have previously been subject to tax in South Africa.
- The word 'income' used in the preceding overview is used in its colloquial sense. The section refers to 'income received by or accrued to such trust' or 'any receipts or accruals' which would have constituted income if such a trust had been a resident. In its earlier versions, the section referred only to 'income', thereby leaving it unclear whether it could touch amounts accrued to a non-resident trust if those amounts were not from a South African source. The current wording, which is effective for years of assessment from 1 March 2001, clarifies this point. It is therefore clear that 'income' as referred to in this section refers to income as defined and that in determining the attribution from a foreign trust`s distributions, it is necessary to determine whether, if the trust had been a resident, the amount would have been 'income' – that is, all amounts received or accrued other than those of a capital nature.
- What is meant by a 'contingent right' is unclear. It seems likely that the intention of the legislature was to include discretionary beneficiaries in this phrase and while it may be argued that the spes of a discretionary beneficiary is not a 'right', the available literature, suggests that a spes is a category of contingent right. Contingent right is an expectation that might never be realized.
- It is considered that if the trustees have available both capital and capitalized income and resolve to distribute capital to a particular beneficiary then, provided that the trust`s accounting and banking procedures are such that the distinction can be sustained, the provision should not be triggered.

Section 25B(2A) only applies when a resident beneficiary acquires a vested right to the trust income. The tax liability is delayed until the acquisition of a vested right. It provides that where a resident acquires a vested right to an amount representing capital of a non-resident trust and –

(a) such capital arouse from income of the trust (or receipts and accruals which would have constituted income if the trust had been a resident) during any past years during which the resident had a contingent right;

(b) such income (or receipts and accruals) has not been subject to tax in the Republic, then the accumulated income accruing to the resident must be included in his income in the year of accrual to him of the capital.[37]

The author submits the view that this is correct and has potential enormous impact upon new immigrants to South Africa, who are the discretionary beneficiaries of offshore trust, is ameliorated.[38] According to Meyerowitz, it is immaterial whether the beneficiary was a resident or not during the period prior to the distribution to him; the only requirement is that he or she must have had a contingent right in one or more tax years. A beneficiary will have no liability under section 25B(2A) if the income has accrued to the non-resident trust in prior tax year and he or she had no contingent interest, even if he or she was a South African resident at that time.

It is submitted that that the implications for new immigrants to South Africa who are discretionary beneficiaries of offshore trusts are therefore onerous. The administrative cost of keeping records of the accumulated amount by the trustees are high, the burden of proof rests with the beneficiary, should SARS make the requests.[39]

The provisions of section 7 could also apply to the taxation of the offshore trust. Section 7(8) provides that, subject to certain exemptions, where by reason of or in consequence of a donation, settlement or other similar disposition made by a South African resident, income accrues to a non-resident, then any portion of this income which has caused this 'donation' will be subject to tax in the resident donor`s hands. Section 7(8) becomes effective to a donation or settlement made, after the person became tax resident in South Africa.

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[37] Meyerowitz on Income Tax 2007-2008 The Taxpayer, page 16.142A.

[38] The Taxation of Trusts in South Africa, at page 78.

[39] Meyerowitz on Income Tax 2007-2008 The Taxpayer, page 16.142A.

5.4 Capital gains tax implications

Paragraph 80(3) of the Eighth Schedule deals with residents who have an interest in a trust that is not a resident. If a resident acquires a vested right to any amount representing the capital of any trust which is not a resident and:

- the capital arose from
- a capital gain of the trust; or
- any amount which would have been a capital gain if the trust was a resident; determined in any previous year of assessment during which the resident had a contingent right to that capital; or
- the capital gain has not been subject to tax in the Republic, the amount must be taken into account for the purposes of determining the aggregate capital gain or aggregate capital loss of the resident.[40]

There will be capital gains tax implications in the hands of the South African beneficiaries, according to paragraph 80(3) of the Eighth Schedule. A non-resident beneficiary of a non-resident trust will be liable for capital gains tax if he has a vested right to some of its capital gains. The foreign discretionary trust being a non-resident in South Africa is not liable to any income tax or capital gains tax. The settlor, who made the donation before becoming a resident, is also not subject to any tax-backs rules because he was not a resident. If an immigrant has donated assets to an offshore trust before becoming tax resident in South Africa, section 7(8) cannot apply. Paragraph 72 of the Eighth Schedule does not apply, to any capital gains arising from the trust. The donations made after becoming a tax resident will trigger these provisions.

5.5 Conclusion

Donations tax is not applicable to non-residents. The person who becomes a resident in South Africa will be exempt from donations tax, when he donates his assets to an

[40] Comprehensive Guide to Capital Gains, Issue 4 at 457.

offshore discretionary trust, before taking up residence. The trust, being non-resident in South Africa, will not be liable for income or capital gains tax. This provides tax opportunities to the settlor, for instance, section 7(8) will not be applicable, because he was not a resident at the time he settled the trust. The distribution made up from income accruing to the trust before he became a resident in South Africa, would escape tax, while that part of the distribution made up from income accruing to the trust after he became a resident, would be taxable.

Section 7(5) of the Act will apply to instances where income accrues to the trust and not distributed to the beneficiary. The donor will be liable for income tax in terms of section 7(5). The income retained in the trust cannot be taxed in the hands of the beneficiaries; but the donor will be liable for tax. The beneficiary will be liable for the tax if he has a vested right to the income. The next chapter will discuss the estate duty implications of a person taking residence in South Africa.

Chapter 6 Estate duty

6.1 Introduction

The aim of this chapter is to discuss the estate duty implications for a person taking up residence in South Africa. The Estate Duty Act applies to 'any person'. The definition of person includes a deceased person.[41] The Estate Duty Act [42] came into operation on 1 April 1955; its purpose is to tax the transfer of wealth from one person to another person in the event of death. South African residents are subject to estate duty on death levied at a rate of 20% on the value of their worldwide property, subject to certain exemptions and exclusions. Estate duty is payable on the estate of every person who dies and whose net estate is in excess of R3.5 million. The surviving spouse of a deceased may be entitled to a further R3.5 abatement when that surviving spouse later dies. This chapter will discuss how the property situated outside South Africa will be included in the deceased estate.

6.2 Application of the Estate Duty Act

Section 3(1) of the Estate Duty Act declares that the estate of any person shall consist of all property of that person as the date of his death and of all property which in accordance with the Act is deemed to be property of that person at that date.[43] Property is defined as including all the property of the deceased at the date of death, irrespective of whether it is situated inside or outside South Africa.

6.3 Definition of property

Section 3(2) of the Estate Duty Act defines property as follows:

> *"Property means any right in or to property, movable or immovable, corporeal or incorporeal, and includes –*

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[41] Section 1 of Income Tax Act 58 of 1962

[42] 45 of 1955

[43] Meyerowitz on Administration of Estates and their Taxation, 2010 Edition, page 27.5

(a) any fiduciary, usufructuary other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior his death;

(b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased."

The foreign property of a person who dies while ordinarily resident in the Republic constitutes property in his estate for estate duty purposes. All the property situated in South Africa will be included in the deceased`s estate at the date of his death. The foreign property might be excluded from the deceased estate in terms of section. The Estate Duty Act requires the assets of the deceased person to be valuated upon death. The foreign property will be subject to estate duty in the previous country of residence if that foreign country has an estate duty regime.

6.4 Deductions from the estate

Section 4 provides for deductions from the estate in order to determine the net value of the estate. A deduction is allowed in terms of section 4(e) of the Estate Duty Act for amounts included total value of the property of the deceased that represent the value of rights in or to property situated outside the Republic, acquired by the deceased before he became ordinarily resident in South Africa for the first time.

Section 4(e) reads as follows:

"the amount included in the total value of all property of the deceased as representing the value of any right in or to property situated outside the Republic acquired by the deceased-

(i) before he became ordinarily resident in the Republic for the first time; or

(ii) after he became ordinarily resident in the Republic for the first time, by-

(aa) a donation if at the time of the donation the donor was a person (other than a company) not ordinarily resident in the Republic; or

(bb) inheritance from a person who at the date of his death was not ordinarily resident in the Republic; or

(iii) out of the profits and proceeds of any such property proved to the satisfaction of the Commissioner to have been acquired out of such profits or proceeds."

There are tax advantages for immigrants intending to take up resident in South Africa, as provided for in section 4(e) of the Estate Duty Act. The property situated outside South Africa, acquired by the deceased before becoming ordinarily resident will not be subject to estate duty. The foreign property under section 4(e) will not be subject to estate duty, but the previous country might tax the property if estate duty exists. The deduction for property acquired before becoming ordinarily resident in the Republic for the first time is not allowed to a person born in the Republic who, having left the country, returns to it and at the date of his death possess foreign assets before becoming ordinarily resident in the Republic for the first time.[44]

6.5 Capital gains upon death

A resident must also not lose sight of the capital gains tax implication upon death. Paragraph 40[45] of the Eighth Schedule deals with the three categories of persons, when there is a death of a natural person, namely:

- the deceased person in the year of death,
- that person`s deceased estate, and
- the heirs and legatees.

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[44] Tax Planning Corporate and Personal / Volume 18 No 4 August 2004 / foreign assets and donations tax and estate duty by Michael Stein

[45] The amendments to paragraph 40 and Section 9H will not be included in the scope of this treatise.

6.5.1 The deceased person

A deceased person is taxed as having disposed of his or her assets for an amount received or accrued equal to their market value on the date of death (paragraph 40(1)). The rule does not apply to the following circumstances where:

- assets as contemplated in paragraph 67(2)(a) are transferred to the surviving spouse
- qualifying long-term insurance policies that would normally be disregarded in terms of paragraph 55 was received or accrued, and
- benefits from funds (pension, pension preservation, provident, provident preservation or retirement annuity funds) that would normally be disregarded in terms of paragraph 54 were received or accrued.

The proceeds of the disposal by the deceased person to the estate will be an amount equal to the market value. Capital gains tax will be levied on the difference between the base cost of the assets and the market value as calculated according in paragraph 31, the amount being the proceeds of the deemed disposal by the deceased to the estate. There might be delays when determining the market value of assets situated outside the country, which were acquired after becoming a resident in South Africa.

The problem facing an executor is the determination of the base cost of the asset as at the death of the deceased for the purpose of determining the gain resulting from taking the market value of the asset as being the proceeds of the disposal by the deceased[46]. The primary residence exclusion of R2 million can be deducted from the gain of the primary residence, on the death of the deceased. The deceased person will be further entitled to an annual exclusion of R300 000 from the estate in South Africa.

[46] Meyerowitz on Income Tax 2007-2008 The Taxpayer, page 39.17.3.

6.5.2 The deceased estate

The deceased estate is deemed to have acquired the asset at a cost equal to the market value of the asset on the death of the deceased person.[47] The deemed cost is treated as the base cost for the purpose of paragraph 20(1)(a). Paragraph 40(2) deals with the capital gains tax treatment of assets disposed of by the executor to an heir or legatee other than the surviving spouse.

The estate will be treated as having disposed of the assets for proceeds equal to its base cost. The deceased estate will not be liable for capital gains tax on the disposal of the assets by the estate to an heir or legatee.

6.5.3 The heirs and legates

When the assets are finally distributed to the heirs or legatees the deceased is treated as having disposed of the assets for proceeds equal to the base cost of the deceased estate in respect of the assets. The amount is treated as expenditure in terms of paragraph 20(1). The heirs and legatees will be deemed to have acquired the assets at a cost equal to the base cost to the estate. There will be capital gain tax, when the heirs and legatees subsequently dispose of the assets in future.

6.6 Tax Treaties

The Estate Duty Act provides that the National Executive may enter into an agreement with the government of any other country, whereby arrangement are made with a view toward the prevention, mitigation, or discountenance of the levying of estate duty in respect of the same property, or to the rendering of reciprocal assistance in the administration and collection of estate duty.[48] The foreign property might be subject to estate duty in the previous country of residence. The same asset might be subject to double death duties.

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[47] Paragraph 40(1A)(a) of the Eight Schedule.
[48] Section26.

The Estate Duty Act makes provision for the deduction of foreign death duties imposed upon property situated outside the Republic and included, for estate duty purposes, in the estate of any ordinarily resident in the Republic at his death.[49] South Africa has entered has entered into estate DTAs with Lesotho, Sweden, United Kingdom, the United States of America and Zimbabwe.

Section 16(c) provides for a deduction of the amount of any foreign death duties paid in respect of the foreign property from estate duty payable in South Africa. The rebate under section 16(c) will not be available, in case the DTA exists between South Africa and other countries.

6.7 Effect of foreign property

The person who is an ordinarily resident in South Africa is liable for estate duty on his worldwide property. Case studies will be used to determine the effect of estate duty on the following countries: United Kingdom and Australia.

Case study

The deceased owned block of flats situated outside South Africa. It is assumed that section 4(e) is not applicable. The block of flats were valued at R600 000.00 at the time of death.

6.7.1 Australia

Estate duty implications

Australia has concluded a DTA with South Africa but does not charge estate duty, death duties or gift taxes upon death**.** The estate will be taxed in South Africa because worldwide property is included in the deceased `s estate. There will also be capital gains tax implications upon the deceased`s date.

[49] Section 16(c) of the Estate Duty Act.

Capital gains tax implications

The Australian tax legislation should be taken into account since capital gains tax exists in Australia. The deceased is liable for capital gains tax in South Africa and Australia. The DTA should be taken into account. The gains from the disposal of immovable property in Australia shall be taxable in South Africa, according to Article 13 of the DTA. The deceased will be liable for capital gains tax in South Africa on the block of flats situated in Australia.

6.7.2 United Kingdom

South Africa has concluded a DTA and estate tax treaty with the United Kingdom.

Estate duty implications

The same assets asset is subject to estate duty in South Africa and United Kingdom. South Africa has also entered into double estate-duty agreement with United Kingdom, where ordinarily resident test is the relevant residence test but domicile is the tie-breaker test. United Kingdom levies estate duty and gift tax on property situated in the United Kingdom. The relief under any DTA will supersede the relief granted under section 16(c).

The block of flats will be included in the deceased estate. Inheritance Tax is paid if a person `s state (their property, money and possessions) is worth more than £325,000 when they die. The rate of Inheritance Tax is 40% on anything above the threshold. The estate may be taxed at the rate of 36% when 10% or more of the estate is donated to charities. There will be no tax levied on the value of the property in the United Kingdom. South Africa will tax the same property at the rate of 20%. The exemptions and deductions, according to the Estate Duty Act should be taken into account.

Capital gains tax implications

According to the DTA between South Africa and United Kingdom, gains shall be taxable only in the Contracting State of which the alienator is a resident. The deceased person is liable for capital gains tax in South Africa on the block of flats.

6.8 Conclusion

South African residents are liable for income tax on their worldwide income. The estate of an "ordinarily resident" person for estate duty purpose consists of all the property of that person as at the date of his or her death, wherever in the world such property is situated. The property acquired before becoming a resident, situated outside South Africa will not be included in the estate at the time of death. There is a tax advantage for immigrants because assets acquired before becoming a resident will not be subject to estate duty. The DTA and death duties should be taken into account.

Chapter 7 will address the effect of withholding taxes.

Chapter 7 Effect on withholding taxes

7.1 Introduction

The aim of this chapter is to discuss the effect on withholding taxes. Under the South African domestic law, withholding tax is imposed on royalties, disposal of immovable property by non-residents, non-residents entertainers and sportspersons and on interest. This treatise will specifically discuss the royalties, disposals of immovable properties and interest. When the person becomes a resident he will taxed according to the domestic tax laws.

7.2 Interest

The tax treatment of investment illustrates the importance of ordinarily residence status. The local interest will not be exempted from tax in terms of section 10(1)(h). The withholding tax on interest will no longer apply to the person who becomes a tax resident in South Africa. Interest earned in South Africa by individuals who are ordinarily resident is fully taxable at standard income tax rates. The provision of the DTA will fall away. The DTA normally gives the source state a right to withhold 10 percent of tax from interest. This results in a tax advantage to the tax base because the interest will be taxed fully at standard income tax rates, but subject to exemptions.

The foreign interest is subject to tax in South Africa. The relevant DTA will give the taxing rights between the source state and the country of residence (South Africa). The foreign interest will be subject to tax according to the law of the source state, but shall not exceed certain limitations as stated in the specific DTA.

7.3 Royalties

Amounts received for the imparting of any scientific, technical, industrial or commercial knowledge or information, commonly known as “know-how” payments, are specifically included in the definition of the term “gross income”, and are taxable.

Non-residents are currently paying 15 percent final withholding tax in South Africa. When the person becomes a resident, the royalties from a source in South Africa will be

fully taxable. Section 49B(1)(*b*) will no longer apply after the person became a resident. The foreign royalty is taxable in South Africa. The relevant DTA will give the taxing rights between the source state and the country of residence. The previous country of residence will determine the tax implication according to its domestic tax law but limited to the percentage according to the DTA.

Article 12 of the OECD covers the royalties.

Paragraph 1 states the following:

> *"Royalties arising in a Contracting State and beneficially owned by a resident of the contracting State shall be taxable only in the Other State."*

Paragraph 3 states the following:

> *"The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall not apply."*

Paragraph 1 states that the royalties arising in one of the Contracting State and beneficially owned by a resident of the other state are only taxable in the latter State. South Africa does not have the right to withhold tax on royalties' sourced in South Africa and paid to the resident of the other State. Non-residents may be exempt according to the treaty, but also the Source State may withhold certain percentages. The person who becomes a resident will be liable in full for tax on royalties without applying the treaties. This is an advantage to the tax base but also a disadvantage to the resident. In the Australia DTA South Africa may deduct tax on royalties, but limited to 5 percent. The royalty will be taxable on higher rate when the person becomes a resident.

7.4 Sale of immovable property in South Africa.

The capital gains tax implication on assets which are situated in South Africa should be taken into account. In terms of paragraph 2(1)(*b)(*i) of the Eighth Schedule of the Income Tax Act, non-residents are subject to capital gains tax on immovable property situated in South Africa, as well as on any interest or right of whatever nature to or in immovable property situated in South Africa. Non-residents are currently taxed on gains on the following rates:

- 5% of the amount payable, if the seller is an individual;
- 7.5% of the amount payable, if the seller is a company; and
- 10% of the amount payable, if the seller is a trust.

When the person becomes a resident, the above rates will cease, the gain from the sale of the property will not be subject to tax using withholding taxes.

7.5 Conclusion

DTAs will no longer be used when the person takes up residence. Disposal of assets which were situated in South Africa will be taxed at higher tax rates. It is submitted that the collection of taxes may be problematic in international taxes. South Africa will have the full taxiing rights on royalties which were fully taxable in country of residence. The immigrants will no longer enjoy lower tax rates after becoming residents. There are significant tax consequences on the receipts and accruals of local interest, which were previously, tax free under section 10(1)(h).

Chapter 8 Conclusion

The concept of 'residence' is fundamental to the residence-based system of taxation. The South African residents are taxed on their worldwide income under the residence-based system of taxation. There South African tax base is positively affected because when the person immigrates to South Africa, he is liable for tax on his worldwide receipts and accruals.

Persons receiving foreign pensions may be exempt from normal tax under s 10(1)(*gC*) and in terms of the tax treaty, they may also escape taxation in their former country of residence. There is a case of double non-taxation and a good reason for foreigners to come and attempt tax avoidance in South Africa. It is stated that this exemption act as an incentive for relatively wealthy foreigners who have predominately worked abroad to retire in South Africa and is regarded as an interim measure pending further legislation. The United States of America (USA) DTA protects the South African tax base because the first 15 percent of pension and annuity is taxed in the USA. The person will be taxed on 75 percent of the pension in South Africa provided the provision of section 9(1)(g) are met. The tax legislation should be amended in order to protect the tax base.

There is an opportunity for immigrants to donate a significant part of their assets to a foreign discretionary trust before taking up residence in South Africa. Most of the tax planning revolves around estate duty and donations tax and the attribution rules in section 7 and paragraph 72 of the Eighth Schedule. The advantage is that donations tax will be avoided for assets acquired before becoming a resident. The assets donated to the trust will generate future income which will be taxable in hands of the South African beneficiaries.

The assets owned by the trust will be sheltered from the South African estate duty, and the foreign source income earned by the trust will not be subject to income tax in South Africa. The distributions of trust income can be retained and capitalized in the trust, these create postponement of taxes. There are disadvantages of running such a trust because the settlors manage the trust outside the Republic, it may be expensive. It is

submitted that the tax authorities are aware of the tax opportunities, legislation can be changed in the country where the trust is effectively managed as well as in South Africa.

A person who becomes a resident will receive a step-up in base cost for assets other than assets situated in South Africa and assets of permanent establishment under paragraph 12)(2)(a) of the Eighth Schedule. The purpose is to prevent pre-residence gains and losses from entering the South African tax system. The valuations of the assets when becoming a resident can be challenging specifically during the determination of the market value of the assets situated outside the South Africa. The provision of the DTA should always be taken into account when the foreign assets are disposed of.

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