

TO MR JOHN RATH

***IN RE: PARTIAL EXEMPTION FOR
FOREIGN EARNED INCOME***

OPINION

ADV. C. LOUW SC

Club Advocates' Chambers
Hazelwood, Pretoria

19 March 2025

Instructing Attorney:

Mr Lucas Visagie

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[A] INTRODUCTION

1. **Mr. Raath** (M. Raath) (M. Raath). I furnished a draft opinion on 10 March 2025.
2. This opinion incorporates follow-up questions contained in the email of 10 March 2025.

[B] FACTS

3. **Mr. Raath** is a South African tax resident individual who currently resides in the United States of America (“United States”). Mr Raath has been outside South Africa for an uninterrupted period of two years. He has not formally emigrated from South Africa and does not have a non-tax resident certificate from the South African Revenue Service. He earns income in the United States of more than R1.25 million per year.

[C] ADVICE REQUIRED

4. I am requested to advise on the income tax implications of earning income in the United States while being a South African tax resident, in particular, on the application of the partial exemption of R1.25 million on income earned abroad.
5. In consultant’s email of 10 March 2025 he requested to be addressed on the following:
 - a. Whether my opinion of the 10th March 2025 still applies if Mr Raath is out the country for the consecutive 183 days but is still a tax resident; and
 - b. **Mr. Raath’s** tax position in South Africa if he has a non-tax residency certificate issued by SARS.

[D] LEGISLATIVE FRAMEWORK

6. Section 10(1)(o)(ii) of the Income Tax Act 58 of 1962 (“the Act”) provides a partial exemption for any remuneration. The salient provisions state as follows:

“(1) There shall be exempt from normal tax—

...

(o) any form of remuneration

...

(ii) to the extent to which that remuneration does not exceed R1,25 million in respect of a year of assessment and is received by or accrues to any employee during any year of assessment by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, including any amount referred to in paragraph (i) of the definition of gross income in section 1 or an amount referred to in section 8, 8B or 8C, in respect of services rendered outside the Republic by that employee for or on behalf of any employer, if that employee was outside the Republic—

(aa) (a) for a period or periods exceeding 183 full days in aggregate during any period of 12 months; ... and

(bb) for a continuous period exceeding 60 full days during that period of 12 months, and those services were rendered during that period or periods... ”.

[E] KEY ELEMENTS OF THE EXEMPTION

7. The following are key elements of the exemption:
- 7.1 Only specific items of income are exempt.
 - 7.2 Services need to be rendered by way of employment.
 - 7.3 Employment should be outside South Africa.
 - 7.4 Period spent outside South Africa.

[a] Only specific items of income are exempt

8. The exemption applies to remuneration in the form of the following:
 - 8.1 Salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance;
 - 8.2 The cash equivalent of any benefit or advantage granted in respect of employment or holding of any office;
 - 8.3 Gains made by directors of companies or employees in respect of rights to acquire marketable securities;
 - 8.4 Amounts derived from broad-based employee share plans; and
 - 8.5 Amounts received by employees or directors on the vesting of equity instruments in respect of services rendered outside the Republic by that employee for or on behalf of any employer.

[b] The services need to be rendered by way of employment

9. This exemption applies to employees for services rendered by way of employment.
10. Independent contractors and self-employed individuals, sole proprietors and partners in partnerships do not qualify for the exemption because they are not employees in the common sense of the word.

11. The Act specifically excludes from the exemption persons holding public office appointed in terms of an Act of Parliament and employees of government, constitutional institutions public entities or municipal entities.

[c] The employment should be outside South Africa

12. The employment from which the exempt remuneration is earned should be exercised outside South Africa. However, the location of employer is inconsequential.

[d] Period spent outside South Africa

13. The exemption applies if the employee was outside the Republic for a period or periods exceeding 183 full days in aggregate during any period of 12 months. The 183 full days do not have to be consecutive or continuous but, to meet the exemption requirements, a total of 183 full days in any 12-month period must be exceeded. During that 183-day period, the employee should be outside South Africa for a continuous period exceeding 60 full days.

[F] APPLICATION OF THE EXEMPTION

14. Remuneration up to R1.25 million is exempt from tax in South Africa. The excess amount is taxable in South Africa at the personal income tax rates for individuals. This is, however, subject to double taxation relief provided by the Act and the Double Taxation Agreement between South Africa and the United States.

[G] RELIEF BY THE ACT FOR TAXES PAID IN THE UNITED STATES

15. Section 6quat of the Act provides a rebate for taxes paid in the source country, the United States in this case.
16. The salient provisions of section 6quat provide that *“where the taxable income of any resident during a year of assessment includes (a) any income received by or accrued to such resident from any source outside the Republic... in determining the normal tax payable in respect of that taxable income there must be deducted a rebate determined in accordance with this section.”*
17. The rebate is *“an amount equal to the sum of any taxes on income proved to be payable to any sphere of government of any country other than the Republic, without any right of recovery by any person.”*
18. In the calculation of the taxes payable in South Africa by ██████████ on income earned in the United States, the amount of taxes on income payable in the United States would be deducted from the tax payable in South Africa.

[H] RELIEF PROVIDED BY THE DOUBLE TAXATION AGREEMENT

19. The Double Taxation Agreement between the United States and South Africa (“the DTA”) affords the United States the right to tax salaries, wages and remuneration derived by a resident of South Africa in respect of employment exercised in the United States.

20. The DTA further provides that United States' taxes paid by South African residents in respect of income taxable in the United States must be deducted from the South African taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income taxable in South Africa.
21. The rebate reduces the rate of tax in South Africa by the amount of tax paid in the United States. The tax would be payable in South Africa to the extent that the taxes in the United States are lower than in South Africa; or to the extent that the tax payable in South Africa is higher than the tax payable in the United States. Thus, the relief provided by the treaty is the same as the relief provided by section 6quat of the Act.

[I] CONCLUSION

22. Income earned by ~~Mr Raath~~ above R1.25 million per year will be taxable in South Africa. However, section 6quat and the DTA provide relief, by way of a deduction from South African tax of taxes paid in the United States. To the extent that the taxes in the United States are lower than in South Africa, the difference would be tax payable in South Africa.

[J] WHETHER MY OPINION OF 10 MARCH 2025 STILL APPLIES IF MR RAATH IS OUT THE COUNTRY FOR THE CONSECUTIVE 183 DAYS BUT IS STILL A TAX RESIDENT

23. Yes, this opinion applies if ~~Mr Raath~~ is out of the country for 183 days while he is tax resident in South Africa.

[K] [REDACTED] TAX POSITION IN SOUTH AFRICA IF HE HAS A NON-TAX RESIDENCY CERTIFICATE ISSUED BY SARS

24. [REDACTED] would not be subject to tax in South Africa on the basis of residence if he has a non-tax residency certificate issued by SARS.



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Tax Practitioner

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19 March 2025