Limited tax relief for SA's cross-border workers

It has recently been announced that the foreign earnings exemption for South Africans working overseas will be relaxed to take into account the South African lockdown rules.

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However, cross-border workers who stayed in South Africa during the lockdown may still find themselves paying a heavy tax price. In the worst-case scenario, some might have to fight a double tax battle if the lockdown period prevented them from working offshore.

Those at the greatest risk of a tax shock are people who continued earning an income while working for a foreign employer throughout the lockdown, but did so remotely from South Africa.

Counting the days – new rules

"Even with the proposed relaxation, there is still a substantial risk; that many of these individuals would have been unable to comply with the requirements for the foreign earnings exemption from income tax," says Aneria Bouwer, partner in the South African Tax Practice of leading African law firm, Bowmans.

To qualify for an exemption, a South African tax resident must ordinarily work offshore for more than 183 days during any period of 12 months and for a continuous period of more than 60 days during that 12-month period.

An announcement was made, on 13 October, that limited special relief will be provided for cross-border workers affected by the lockdown.

"Revenue authorities in various other countries announced special relief relating to cross-border workers earlier in the context of their respective lockdown rules,' Bouwer says.

"Many countries have also entered into mutual agreements in respect of income earned by cross-border workers. For example, Belgium and France have agreed that days spent working from home due to lockdown measures, will be deemed to be spent in the state where the workers would ordinarily have carried out such activities."

However, the first indication in South Africa that some relief will be provided was in the Draft Response Document of the Parliamentary Standing Committee on Finance, released on 13 October. Based on this document, it appears that a concession will be made to reduce the 183-day requirement by the 66 days from 27 March 2020 to 31 May 2020, that South Africa operated under Covid-19 alert levels 5 and 4.

The proposal is that:

- 66 days will be subtracted from the 183-day requirement for 12-month periods ending from 29 February 2020 to 28 February 2021;
- an individual must have been outside South Africa for 117 days during the 12-month period; but
- the requirement that the individual should have spent a continuous period of 60 days outside South Africa, remains.

Late announcement makes planning difficult

"While this concession is not as generous as that provided by certain other countries, it may assist those individuals who were able to leave South Africa after 31 May 2020, in order to work offshore. It is unfortunate that this has been announced so late, as it makes it very difficult for individuals to plan according to the revised rules," Bouwer says.

The fact that it has been very difficult for a period of six months to travel internationally, means that some cross-border workers may have spent too little time working offshore to qualify for the exemption.

Bouwer says that while some international travel became possible after 31 May, many workers were unable to benefit from this and had to remain in South Africa until recently.

"Whether or not a person qualifies for the revised exemption will depend on the time spent outside South Africa before and after the lockdown, and on when each person's specific 12-month cycle starts."

Lockdown income earned while in SA is local income

Cross-border workers who continued earning remuneration working for foreign employers while stranded in South Africa must carefully consider their 12-month cycles to see whether they could qualify for the revised exemption.

Even if they do qualify for the exemption, only the first ZAR 1,25 million of foreign earnings is exempt, meaning they could still have a liability to pay South African income tax on a portion of their foreign earnings.

To the extent that their foreign earnings are taxable in South Africa, and if their foreign employer also withheld tax from the remuneration paid to them, they will face a double-tax conundrum.

"Usually, where a South African individual has paid tax in a foreign country for services rendered offshore, he or she is able to claim a foreign tax credit in terms of the Income Tax Act, 1962. But not for work-from-homers,’ says Bouwer.

"The income earned while working in South Africa will most likely be regarded as local income, and thus not qualify for a foreign tax credit,’ she says.

This would probably be the case even if a double tax agreement is in place.

"A double tax agreement is likely to give the taxing right to South Africa in respect of services rendered while the individual was in South Africa. In other words, depending on the specific double tax agreement, the foreign country may not be entitled to tax the individual. The foreign tax authority, and not the South African Revenue Service, would thus be obliged to provide tax relief.

"If the employee fails to obtain a refund from the foreign tax authority, the employee may in its South African income tax return be able to claim a deduction against income for foreign taxes paid, but this would only provide partial relief."

Back to work

There could be some light at the end of the tunnel now that international travel has become a more realistic possibility and cross-border workers can return to work overseas.

Those cross-border employees who were unable to work during the lockdown must carefully consider when their new 12-month cycle will start in order to derive maximum advantage from the exemption. In the ordinary course, the 12-month cycles would run consecutively. However, this is not a requirement of the relevant section of the Income Tax Act.

For example, if the previous 12-month cycle ended at the end of February 2020, and if the employee did not earn any income during the lockdown period, it may be best for the new cycle to start at the time when the employee leaves South Africa to start working overseas again.

Says Bouwer: "With international travel opening up to some extent, and with only limited relief announced in respect of the foreign earnings exemption, it is important both for individuals and for South African employers whose employees may rely on the foreign earnings exemption, to carefully assess their current positions and how the possibility of travel in the near future could provide some relief."