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Preamble

In this Note –

- “**CFC**” means a controlled foreign company as defined in section 9D(1) of the Act;
- “**DTA**” or “**treaty**” means an agreement (including a convention) for the avoidance of double taxation;
- “**foreign-sourced amount**” means an amount derived from a source located outside South Africa that is not deemed to be derived from a South African source under section 9 of the Act;
- “**normal tax**” means South African income tax;
- “**qualifying foreign taxes**” means foreign taxes qualifying for a foreign tax rebate or deduction;
- “**South African-sourced amount**” means an amount derived from a source located in South Africa as well as an amount derived from a source located outside South Africa that is deemed to be derived from a South African source under section 9;
- legislative references to sections, subsections and paragraphs are to sections, subsections and paragraphs of the Act unless otherwise stated; and
- the terms “**South Africa**” and “**the Republic**” are treated as having the same meaning.

1. Purpose

This Interpretation Note explains the scope, interpretation and application of section 6 $quat$, as amended and in effect as of the publication date of this Note.

2. Background

Under the present income tax legislation, residents of South Africa are subjected to income tax on their worldwide taxable income, regardless of the origin (source) of the income.

Consequently foreign-sourced amounts derived by a resident of South Africa may be taxed by both the country of source and South Africa, resulting in international juridical double taxation. International juridical double taxation is the imposition of similar income taxes by two or more sovereign countries on the same item of income (including capital gains) of the same person for the same taxable period.

Relief from double taxation resulting from the imposition of tax by a residence country and a source country on the same amount is normally granted by the residence country. Thus, the source country's right to tax has priority over the residence country's right to tax. In many instances, countries provide for the relief from international juridical double taxation by way of a DTA.

One of the main purposes of a DTA is to protect taxpayers against double taxation by allocating the right to tax the amount of income (or capital) to one or both of the Contracting States. If both States have the right to tax such income or capital, relief from double taxation must be provided for by the State of residence of the taxpayer. A DTA provides, amongst other things, a framework for the resolving of cross-border tax disputes and assists in curtailing tax evasion. Participating countries endeavour 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. Both forms of relief are embodied in section 6quat.

Foreign taxes that qualify for the rebate do not qualify for a deduction while only those foreign taxes that do not qualify for the rebate may be eligible for a deduction under section 6quat(1C). A resident does not have a choice between a rebate and a deduction as relief.

Foreign taxes would not be eligible for a foreign tax rebate when a foreign tax jurisdiction, with which South Africa does not have a DTA, levies a tax on an amount earned by a South African resident which has its actual source in the Republic or when the actual source of an amount is located abroad but is deemed to be sourced in the Republic in terms of the deeming source rules of section 9.

The practice of allowing foreign taxes as a deduction that do not qualify for a tax credit is not unique. A similar approach is followed by many countries that have a residence basis of taxation in order to provide an optional form of relief or as a way of providing some form of relief in instances in which the foreign taxes do not qualify for the credit method of relief.

If a resident earns multiple foreign-sourced amounts during a particular year of assessment, each with its own foreign tax liability, it is possible that some of the

foreign tax liabilities may qualify for the rebate while the remainder will only qualify for a deduction.

Example 1 – Alternative methods of relief in respect of amounts received from abroad

Facts:

A resident derives the following income in year 1:

Foreign income	Foreign taxes payable in respect of foreign income R
(A) Trading income derived from Country A (the income constitutes a foreign-sourced amount)	15 000
(B) Remuneration derived in respect of technical services rendered in South Africa to a person resident in Country B (the income constitutes a South African-sourced amount)	20 000

Result:

In year 1 the foreign taxes contemplated in (A) qualify for the rebate while the foreign taxes contemplated in (B) only qualify for a deduction.

Foreign taxes taken into account as a tax credit reduce a resident's liability for normal tax. However, if taken into account as a deduction, foreign taxes merely reduce a resident's taxable income. In most cases, it will benefit a resident if the foreign taxes payable qualify for a tax credit rather than a deduction because a credit reduces the normal tax payable on a rand-for-rand basis.

Example 2 – Comparison of tax payable under deduction and credit methods

Facts:

A resident company derives foreign income of R100 on which foreign taxes of 25% (R25) are proved to be payable. The South African corporate rate of tax is 28%. Determine the double taxation relief under the deduction and credit methods.

Result:

	Deduction Method R	Credit Method R
Taxable income from a foreign source	100,00	100,00
Less: Foreign taxes qualifying for deduction	<u>(25,00)</u>	<u>(Nil)</u>
Taxable income after deduction of foreign taxes	<u>75,00</u>	<u>100,00</u>
Domestic taxes (28%)	21,00	28,00
Less: Foreign tax credit	<u>(Nil)</u>	<u>(25,00)</u>
Final domestic tax	<u>21,00</u>	<u>3,00</u>
Total tax (domestic and foreign)	<u>46,00</u>	<u>28,00</u>

3. The law and its application

3.1 Introduction to the foreign tax credit method of relief

The term “rebate” simply means “a deduction from an amount to be paid” and is South Africa’s primary mechanism for reducing double taxation. Some countries use the term “offset” rather than “rebate”.

South Africa grants this relief unilaterally through domestic legislation and bilaterally through most of its DTAs. The provisions of a treaty will merely set up the general principle of the credit method with each treaty country’s domestic tax legislation detailing the rules for the implementation of this general principle.

These detailed rules will generally cover the following:

- Use of either the overall limitation method or alternatively the country-by-country limitation method in calculating foreign tax credits.
- Carry-back or carry-forward of excess tax credits.
- Revision of previous assessments in order to allow for the rebate or deduction of the correct amount of foreign taxes payable.
- Persons entitled to a foreign tax credit.

Entitlement to a foreign tax credit under section 6^{quat} arises for a resident in the year of assessment in which a foreign-sourced amount on which foreign taxes are payable is included in the resident’s taxable income. It is unnecessary for the foreign tax liability to be incurred in the same tax year that the amount is included in the taxpayer’s taxable income.

Thus foreign taxes payable must be taken into account in the year of assessment in which the foreign-sourced amount is included in taxable income and not the year of assessment in which the foreign taxes are actually incurred.

Under section 6^{quat} any foreign taxes payable on foreign-sourced amounts included in a resident’s taxable income are set off (credited) against normal tax payable **before the rebates provided for in sections 6 and 6^{quat} respectively are taken into account.**

The application of the foreign tax rebate results in a foreign-sourced amount only being subject to normal tax when the foreign tax rate is less than the normal tax rate. The net normal tax equals the difference between the two tax rates multiplied by the foreign-sourced amount. The foreign taxes are “topped up” by normal tax so that the combined normal and foreign tax rate on the foreign-source amount is equal to the normal tax rate.

Example 3 – Credit method when normal tax rate exceeds foreign tax rate

Facts:

A resident company earns foreign-sourced income of R100. No other income is earned by the resident company. In the country of source the income is subjected to foreign taxation at a rate of 10%, that is, R10.

For South African tax purposes the full amount of R100 is included in the resident's taxable income. Normal tax is payable at a corporate rate of 28%, that is, R28.

Result:

The foreign tax rebate reduces the normal tax payable in respect of the foreign-sourced income to R18 [(28% – 10%) X R100].

The impact of a residence basis of taxation is thus that the resident country taxes any amount sourced in that country, unless it is specifically exempt, irrespective of the resident status of the recipient while also taxing residents of that country on foreign-sourced amounts to the extent that the rate of domestic tax exceeds the foreign tax rate of the country where the foreign amount is sourced.

A foreign tax liability can only be set off against a liability for normal tax and cannot be credited against other domestic taxes, for example, Secondary Tax on Companies.

3.2 Qualifying amounts

Under section 6quat(1) the following foreign-sourced amounts included in a resident's taxable income will, subject to section 6quat(2), qualify for a foreign tax credit:

- a. Any income received by or accrued to a resident, excluding foreign dividends (dealt with in paragraph c below), from an actual (real) source outside the Republic, which is not deemed to be from a source within the Republic (section 6quat(1)(a)(i) *.
- b. Any portion of the net income of a controlled foreign company (CFC) as contemplated in section 9D which is attributed to a resident that holds participation rights in that CFC under section 9D(2) (section 6quat(1)(b)).
- c. Any foreign dividends (section 6quat(1)(d)).
- d. Any taxable capital gain as contemplated in section 26A from a foreign source which is not deemed to be from a source in the Republic (section 6quat(1)(e)).
- e. Any amount dealt with in paragraphs a, b, c or d above which is received by or accrued to a particular person, for example, a trust, but which is deemed to be derived by another person (the resident) (section 6quat(1)(f)(i) and (ii)).
- f. Any amount dealt with in paragraphs a, b, c and d above which forms part of the capital of a trust established in a foreign country, which is regarded as being derived by a resident for either income tax or capital gains tax purposes (section 6quat(1)(f)(iii)).

* The term "income", as used in section 6quat(1), means "income" as defined in section 1.

3.3 Application of section 6quat to capital gains

A resident can choose the order in which capital gains are reduced by any capital losses and may apply any capital loss or assessed capital loss carried forward from the previous year of assessment firstly against those capital gains on which no foreign tax liability was incurred.

Any excess must then be applied against those capital gains derived from a foreign source which have been subject to foreign tax. The application of capital losses in this way will yield the greatest benefit for the resident.

Section 9(2) provides deemed-source rules for capital gains and losses. The source of any capital gain or loss resulting from the disposal of immovable property (including any interest or right of whatever nature to or in immovable property) is deemed to be in South Africa if the property is located in South Africa (section 9(2)(a)).

Under section 9(2)(b)(i) any capital gain or capital loss resulting from the disposal of a movable asset by a resident is deemed to be derived from a South African source when –

- the asset is not attributable to a permanent establishment of the resident which is located outside South Africa; and
- the proceeds from the disposal are not subject to any taxes on income which are payable to a foreign jurisdiction.

Conversely, a capital gain or capital loss will not be derived from a South African source if –

- it is attributable to a foreign permanent establishment, or
- it is not attributable to a foreign permanent establishment but the proceeds on disposal are subject to a foreign tax on income.

Such a taxable capital gain from a source outside South Africa which is not deemed to be from a source within South Africa will qualify for rebate purposes (section 6quat(1)(e)). The tax credit will be equal to the amount of any foreign taxes on income in respect of the taxable capital gain (section 6quat(1A)(a)(iii)), reduced when applicable by a three-step limitation process discussed after the example below.

Example 4 – Deemed source of capital gain

Facts:

A resident acquires shares in a company which is resident in Country S. The resident disposes of the shares which results in a liability for capital gains tax in Country S. Under the domestic tax laws of Country S the proceeds derived by a person who is not a resident of Country S from the sale of shares in a company resident in that country, are subject to a capital gains tax. For South African tax purposes the capital gain is also included in the resident's taxable income.

Result:

The capital gain derived from the disposal of the foreign shares will be regarded as being derived from a foreign source because –

- the capital gain is subject to foreign taxes; and
- the capital gain is not attributable to a foreign permanent establishment.

The resident is entitled to a foreign tax credit for the capital gains tax paid to the tax authority of Country S, subject to paragraph (iB) of the proviso to section 6quat(1B)(a).

The three-step limitation process

The portion of foreign taxes qualifying as a tax credit in respect of a foreign taxable capital gain is determined under a three-step limitation process. The three steps are as follows:

- Step 1 – The comparative inclusion limitation (section 6quat(1)).
- Step 2 – The comparative rate of tax on a foreign taxable capital gain limitation (paragraph (iB) of the proviso to section 6quat(1B)(a)).
- Step 3 – The overall normal tax on taxable income limitation (section 6quat(1B)(a)).

Step 1 – The comparative inclusion limitation

In South Africa capital gains are taxed more favourably than ordinary income.

An annual minimum amount of the sum of capital gains and capital losses of an individual and a certain category of special trust is excluded (the “annual exclusion” referred to in paragraph 5 of the Eighth Schedule to the Act). Various other exclusions exist, such as those relating to –

- the primary residence of an individual and a certain category of special trust (paragraph 45 of the Eighth Schedule to the Act);
- small business assets of an individual (paragraph 57(2) of the Eighth Schedule to the Act); and
- the personal-use assets of an individual and a certain category of special trust (paragraph 53 of the Eighth Schedule to the Act).

The “net capital gain” of a person is the positive amount remaining after deducting the annual exclusion (when applicable) and any assessed capital loss brought forward from the previous year of assessment from the sum of capital gains and capital losses derived during a year of assessment.

Individuals and special trusts include 25% of their “net capital gain” in their taxable income while companies and trusts (other than special trusts) include 50% of their net capital gain in their taxable income.

In determining the amount of foreign taxes that will be allowable, the first step is to compare the amount subjected to foreign tax with the amount subjected to South African normal tax. Thus, if a foreign country taxes a gain as ordinary income (that is, at full inclusion) while South Africa only taxes 25% of the same gain, only 25% of the foreign taxes on the gain will qualify at the outset for a tax credit, before any further limitation in steps 2 and 3. No credit can be given for amounts or portions thereof that are not subjected to tax in South Africa.

Example 5 – Determination of the portion of a foreign tax liability that relates to a foreign taxable capital gain

Facts:

A natural person resident in South Africa disposes of a fixed property (which is not his primary residence) located in Country A for R1 016 000. The property was acquired for no consideration. Country A regards the proceeds as income of a revenue nature and the full amount is subject to tax at a rate of 30%.

Result:

The foreign tax liability amounts to R304 800 (R1 016 000 X 30%). In South Africa the taxable capital gain is determined as follows:

	R
Capital gain	1 016 000
<i>Less:</i>	
Annual exclusion (individuals and certain special trusts only)	<u>(16 000)</u>
Net capital gain	<u>1 000 000</u>
Inclusion rate for an individual	25%
Taxable capital gain	<u>250 000</u>

Only 24.61% ((R250 000/R1 016 000) X 100%) of the foreign tax liability will qualify for a foreign tax credit. The remaining 75.39% will not be taken into account because it does not relate to an amount subject to tax in South Africa.

Step 2 – The comparative rate of tax on a foreign taxable capital gain limitation (paragraph (iB) of the proviso to section 6quat(1B)(a))

For the purposes of step 2 any capital gain arising from the disposal of an asset which is attributable to a foreign permanent establishment must not be taken into account. Gains on the disposal of such assets are subject to the overall limitation under step 3.

The limitation under this proviso applies to a resident deriving a foreign taxable capital gain on disposal of an asset that is not attributable to a foreign permanent establishment of that resident. The amount of any foreign taxes levied on such a qualifying taxable capital gain is limited to the amount of normal tax attributable to that taxable capital gain (paragraph (iB) of the proviso to section 6quat(1B)(a)).

When more than one foreign capital gain falls within step 2, a single taxable capital gain must be determined for the purposes of the limitation calculation.

Any excess foreign tax excluded by the limitation under step 2 is forfeited and does not qualify for a deduction under section 6quat(1C). In addition, any excess may not be carried forward to the following year of assessment to qualify for a tax credit in that year under paragraph (ii) of the proviso to section 6quat(1B)(a).

Step 3 – The overall normal tax on taxable income limitation (section 6quat(1B)(a))

Once the limitation in step 2 has been applied, the taxes thus limited are added to the other qualifying taxes in section 6quat(1)(a) to (f). The final step in the limitation process is then performed, namely, the overall limitation under section 6quat(1B)(a).

Apportionment of certain deductions (paragraph (i) of the proviso to section 6quat(1B)(a))

In determining the taxable income derived from foreign and South African sources respectively, any deductions sought under the following sections must be apportioned on a *pro rata* basis between taxable income derived from local and foreign sources before taking into account the relevant deductions:

- 11(n) (retirement annuity fund contributions),
- 18 (medical and dental expenses), and
- 18A (donations to certain organisations)

(Paragraph (i) of the proviso to section 6quat(1B)(a)).

As a result of taxable income including a taxable capital gain, any deduction under sections 18(2)(c)(ii) and 18A respectively must be calculated by taking into account any taxable capital gain forming part of taxable income.

The following sequence must be followed in order to calculate the correct amounts in respect of the deductions under sections 11(n), 18 and 18A respectively:

	R
Gross income as defined in section 1 from all sources	XXX
Less: Exempt income under section 10	(XXX)
Income as defined in section 1	XXX
Taxable capital gain from all sources	XXX
Less: Retirement annuity fund contributions* (section 11(n))	(XXX)
Donations to certain organisations (section 18A) **	(XXX)
Qualifying medical and dental expenses (section 18) **	(XXX)
Taxable income from all sources	<u>XXX</u>

* When calculating retirement annuity fund contributions, the taxable capital gain must be excluded from the amount on which the 15% allowable deduction is calculated. The reason for this is that a taxable capital gain is part of taxable income and not income as required by section 11(n)(aa)(A).

** The taxable capital gain forms part of taxable income as determined before the sections 18 and 18A deductions are calculated. Thus, it must be taken into account in determining these deductions.

3.4 Meaning of the term “source” in section 6quat

There is no universal definition or understanding of the meaning of source. Yet, even in residence-based systems, source remains a crucial concept when –

- taxes are levied on non-residents, and
- rules exist for the granting of foreign tax credit relief in respect of foreign-sourced amounts included in the taxable income of residents.

Thus the question whether an amount arises either from a South African or a foreign source remains important despite the introduction of the worldwide basis of taxation. Although South African residents may be subject to tax on a worldwide basis, only foreign-sourced amounts are eligible for a section 6quat rebate.

The comments in paragraph 19 of the *Introduction to the Commentaries on the OECD Model Tax Convention on Income and on Capital July 2008 (Condensed Version)* are relevant in this regard and are quoted here for ease of reference:

“For the purposes of eliminating double taxation, the Convention establishes two categories of rules. First, Articles 6 to 21 determine, with regard to different classes of income, the respective rights to tax of the State of source or situs and of the State of residence [...] In the case of a number of items of income and capital, an exclusive right to tax is conferred on one of the Contracting States. The other Contracting State is thereby prevented from taxing those items and double taxation is avoided. As a rule, the exclusive right to tax is conferred on the State of residence. In the case of other items of income and capital, the right to tax is not an exclusive one.

[...] Second, *insofar as these provisions confer on the State of source or situs a full or limited right to tax*, the State of residence must allow relief so as to avoid double taxation; this is the purpose of Articles 23A and 23B. The Convention leaves it to the Contracting States to choose between two methods of relief, i.e., the exemption and the credit method.”

(Emphasis added.)

The Act contains no specific rules as to whether gross income is from sources within or outside South Africa; nor is there a definition of the term “source” in the Act. The rules developed in South Africa for determining whether gross income has a South African or foreign source are essentially those formulated by the courts, not by statute, regulation or administrative practice.

The source of income has been defined, first, to be the originating cause of the income and, secondly, the locations of the originating cause (*Overseas Trust Corporation v CIR*¹). This jurisprudence remains valid for the interpretation of the meaning of the word “source” in section 6quat and the determination must be made upon a case-by-case basis in light of the facts and circumstances.

In many instances the actual source of an amount is located in South Africa despite the fact that the money flows from a foreign country to South Africa for the ultimate benefit of a South African resident. In these instances the foreign country will not have any taxing right in respect of the amount. The source of income is not to be confused with the source from which income is paid. This does not, however, apply when a DTA between South Africa and a foreign country has a “deemed source” provision allowing the foreign country to tax an amount derived from a true source outside that country. The “deeming source” rule overrides the South African tax rules for determining the source of certain income items and capital gains.

Example 6 – DTA providing for deemed-source rule which overrides the actual source

Facts:

A resident company provides technical services to a company resident in Swaziland. The services are rendered from South Africa and the agreement to render these services was negotiated and concluded in South Africa. Under the domestic tax law of Swaziland a withholding tax of 15% is imposable on technical fees remitted to South Africa. Under the DTA the rate of the tax is reduced to 10%.

¹ 1926 AD 444, 2 SATC 71.

Result:

The true source of the fees is where the services are rendered, that is, South Africa (*COT v Shein*²). However, Article 13 of the DTA between South Africa and Swaziland, which deals with technical fees, overrides the true-source rule. Article 13(5) of the DTA deems the fees to be from a source in Swaziland, and provides as follows:

“Technical fees shall be deemed to arise in a Contracting State when the payer is a resident of that State.”

The DTA therefore creates a “source” for technical services fees and a consequent taxing right for the country in which the income is so “sourced”. In addition, Article 22 of the DTA imposes an obligation on South Africa, the country of residence, to relieve the tax suffered at this “source” through a tax credit.

A South African resident will not qualify for a tax credit when –

- tax has been levied by the tax authorities of a foreign country on a payment to that resident;
- the source of the payment is South Africa; and
- although there is a DTA with the foreign country, it does not contain a deemed-source rule.

In these circumstances the resident must seek a refund of the withholding tax from the foreign country under the DTA.

When no DTA exists between South Africa and the foreign country where the foreign tax liability was incurred, the resident may qualify under section 6quat(1C) for a deduction for the foreign taxes not qualifying for the foreign tax credit (see 3.11).

Example 7 – Foreign withholding tax on South African-source income when no DTA exists

Facts:

A resident mining company establishes a subsidiary company in Country A in order to conduct exploration activities in that country. The resident company provides management services from South Africa to its foreign subsidiary, with all such services being performed in South Africa. The tax authorities of Country A levy a withholding tax in respect of the management fees paid. No DTA exists between South Africa and Country A.

² 1958 (3) SA 14 (FC) at 16 and 18, 22 SATC 12.

Result:

The actual source of the income is located in South Africa and the resident company must include the management fees in its income for South African tax purposes. The withholding tax does not qualify for a foreign tax credit because the management fees do not constitute a foreign-sourced amount. However, the resident taxpayer may deduct the amount under section 6quat(1C) in determining the taxable income derived in respect of the management services provided to its subsidiary based in Country A.

Some commentators have suggested that the word “source” should be interpreted differently for the purposes of section 6quat from the way in which it is interpreted in relation to the definition of the term “gross income”. They argue that the word “source” should be given the less-restrictive meaning of “the quarter from which it comes” rather than the traditionally accepted meaning of the “originating cause”. Such an interpretation cannot, however, be accepted. Apart from the fact that it runs counter to a long line of case law in South Africa, it would result in unacceptable tax avoidance.

South Africa’s primary right to tax amounts actually sourced in South Africa should not be eroded by a system of unilateral relief that is not met with a reciprocal obligation by other countries (unlike a bilateral system).

3.5 Grossing-up of foreign-sourced amounts

The requirement to gross up a double-taxed amount by the amount of the foreign tax liability incurred in respect of that amount is fundamental to any foreign tax rebate system. The amount subject to tax is the gross amount before the payment of foreign income tax.

If only the net amount were to be included in gross income, the foreign taxes would be taken into account twice, first, as a deduction and, secondly, as a foreign tax credit.

3.6 Requirements that must be met in order for foreign taxes to be regarded as qualifying foreign taxes

3.6.1 The taxes must be payable on income

A tax is a levy of general application for public purposes enforceable by a government authority. In determining whether or not a particular foreign tax qualifies as a tax on income, the basic scheme of application of the foreign tax must be compared with that of the Act. Only if the basis of taxation is substantially similar, will the foreign tax be accepted as a tax on income. In *Mary D Biddle v Commissioner*³ it was held that in order for taxes paid to a foreign country to qualify as an income tax, it must be shown that the tax imposed by the foreign country is a tax on income within the United States' concept thereof. Similarly, in a South African context the foreign tax liability must be a tax on income within the South African concept thereof.

The mere fact that it is regarded as a tax on income by the country levying the tax is not sufficient. The precise nature of the foreign tax or duty must be determined. A similar term may have a different connotation in another tax jurisdiction.

³ (1938) 302 U.S. 573.

It is immaterial that the foreign tax law differs from domestic tax law to a certain extent. For example, the foreign tax law may include certain items of income or may allow certain exclusions or deductions not included or allowed under domestic tax law.

Taxes payable on capital gains are regarded as taxes on income. Thus any reference to taxes payable on income includes taxes payable on capital gains. Any withholding tax on income such as salaries, dividends, interest and royalties, is also regarded as a tax on income if it is imposed as a final withholding tax. Any withholding tax that only constitutes an advance payment in respect of the ultimate foreign tax liability of the resident does not qualify for a foreign tax credit.

Notwithstanding the foregoing, any tax that is specifically identified as being subject to the provisions of a DTA between South Africa and a particular country will automatically qualify as a tax on income.

A liability for interest, fines, penalties or any other similar obligation imposed under the laws of a foreign country is not regarded as a tax on income and does not qualify for a rebate. Furthermore, the above expenses are not deductible under the general deduction formula because they were not incurred in the production of income.

Taxes that are not taxes on income include –

- turnover, commodity or consumption taxes;
- value-added tax;
- general sales tax;
- customs duties;
- import and export duties;
- estate and inheritance taxes;
- annual wealth taxes;
- net worth taxes;
- environmental-affecting taxes such as a greenhouse gas tax or carbon tax;
- resource royalties;
- company duties;
- business licence and other trade taxes;
- stamp duties;
- transfer duties;
- registration duties;
- property or real estate taxes;
- gift or donation taxes;
- capital transfer taxes; and
- capital taxes*.

- * Capital taxes consist of taxes levied at irregular and very infrequent intervals on the values of the assets or net worth owned by institutional units or on the values of assets transferred between institutional units as a result of legacies, gifts *inter vivos* or other transfers.

A resident carrying on trading operations abroad may incur certain of the above taxes in the ordinary course of such operations, for example, excise taxes or duties that are payable regardless of whether or not a profit is made. Such taxes can properly be described as a charge on earnings rather than on profits. These taxes are not an appropriation of the profits of a taxpayer and may be deducted under section 11(a) (also known as the general deduction formula) provided all the requirements of that section are met.

By contrast, taxes on income are not deductible under the general deduction formula because they are an appropriation of profits after they have been earned, and are not incurred in the production of profits.

Example 8 – Whether a foreign tax on securities qualifies as a tax on income for purposes of section 6quat

Facts:

A resident invests in interest-bearing securities issued in Country A. Country A levies a tax on securities issued in that country which is payable by the issuers of the securities who recover the tax from the bondholders. The tax is imposed at a rate based on the taxable value of the securities.

Result:

The tax levied on securities bears no relation to the income or the profits of the issuer or to the interest payable on the securities. It is not regarded as a tax on income for domestic tax purposes.

The term “taxes on income” is defined in section 6quat(3) to specifically exclude any compulsory payment made to the government of any other country constituting a consideration for the right to extract any mineral or natural oil.

An example of such a consideration is found in so-called production sharing agreements, which involve ownership by a foreign government of oil and gas reserves, with a private oil company acting as a contractor furnishing capital, services and technical knowledge.

The contractor is compensated in the form of a share of production. Foreign taxes paid by or on behalf of the contractor to the foreign government are also in the form of a share of production. Since the foreign government already owns the oil and gas reserves, no payment is actually made by the contractor to the government and even if such a payment could be identified, it is more akin to a royalty than to an income tax.

Example 9 – Foreign taxes qualifying for rebate*Facts:*

A municipality in Finland levies two forms of taxes, namely –

- a tax on profits; and
- normal municipal rates and taxes.

Result:

Only the tax on profits is a tax on income while the normal municipal rates and taxes will only qualify for a general deduction if the requirements of the general deduction formula are met.

3.6.2 The taxes should be proved to be payable in respect of an existing foreign tax liability

The rebate is not only granted for foreign taxes actually paid, but also in respect of taxes which are proved to be payable, that is, in respect of which a legal obligation to pay exists. An absolute and unconditional legal liability to pay the foreign taxes must exist irrespective of the fact that payment may only be made in the future. The foreign jurisdiction must have a legitimate right to tax the foreign-sourced amount under its domestic tax law.

A tax on income becomes payable when all the events have taken place that fix the amount of the tax and the person's liability to pay it.

Many countries impose some form of advance payment or provisional tax system. The specific terms of these systems vary, but are generally based upon the taxpayer's liability for the preceding year of assessment or an estimate of its liability for the current year of assessment. An advance payment of an income tax liability imposed by a foreign tax jurisdiction that is similar to South Africa's provisional tax payment is made in respect of an estimated tax liability rather than an ascertained or fixed tax liability.

If and to the extent the resident taxpayer can prove that these advance or provisional payments correspond to (and do not exceed) the final foreign tax liability such payments will be regarded for purposes of section 6quat as being "proved to be payable".

Any amount remitted by a person who is not a resident in respect of a foreign withholding tax levied on an amount paid by that person (payer) to a resident (payee) in circumstances in which –

- the amount is subject to a withholding tax in the payer's country of residence; and
- the payer is obliged to withhold such tax at source

is regarded as being paid directly by the South African resident for purposes of determining the section 6quat rebate. Payment is considered to have been made at the time the amount was withheld.

3.6.3 The taxes must be payable without any right of recovery by any person

A resident is only entitled to claim a tax credit for a foreign tax on income to the extent that the amount of the foreign tax is *proved to be payable* to a sphere of government of a foreign country without a right of recovery. A right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment before such year of assessment is disregarded for this purpose.

To the extent that a resident receives a refund of foreign taxes or is the recipient of a benefit resulting in the removal (or reduction) of double taxation the obligation to provide double tax relief diminishes. The right of recovery *by any person* covers those jurisdictions where a shareholder of a company receives a refund for the tax paid by the company.

The resident or any other person must not be able to recover the taxes proved to be payable. Should the resident exercise any right of recovery, for example, by contesting a foreign tax liability, the amount of the foreign tax liability will not be allowed as a credit while the tax is in dispute and not yet finally determined. The amount of the foreign tax liability under dispute and not paid will only be taken into account for purposes of determining the foreign tax rebate as and when the dispute is finally resolved. The dispute will be regarded as being resolved when all legal remedies with respect to the tax liability have been exhausted or a decision in the matter is no longer open to such remedies. However, should a resident have settled the whole or a part of any disputed tax liability while continuing to exercise a right of recovery, SARS will allow the amount so paid to be taken into account in calculating the credit relief.

States may, in terms of their domestic law, impose a withholding tax on certain payments such as interest, dividends and royalties made to other jurisdictions. DTAs often provide for a rate of tax lower than the domestic rate on such payments. Should a foreign jurisdiction impose a higher domestic rate of tax on such amounts being remitted contrary to the provisions of the relevant DTA, the State of residence will grant a credit for the foreign withholding taxes actually paid, but only to the extent specified in the relevant DTA (see **Example 12** in this regard). The resident must seek a refund of the excess withholding tax from the foreign tax authorities.

Once the foreign tax liability has been finalised, the correct foreign taxes payable must be taken into account in determining the foreign tax rebate for the year of assessment in which the relevant foreign-sourced amount was included in the resident's taxable income.

The term "right of recovery by any person" is interpreted very broadly and includes any form of relief against a foreign tax liability. For example, a refund, credit, rebate, remission, or deduction, is considered to be a right of recovery. Any other form of economic benefit to which a person becomes entitled is also considered to be a "right of recovery by any person."

Examples of economic benefits:

- Goods
- Services
- Fees or other payments

- Rights to use, acquire, or extract any resources or other property
- Discharge of contractual obligations.

If any person becomes entitled to a right of recovery in respect of the foreign tax liability incurred by the resident, which is determined directly or indirectly by reference to all or part of the amount of the foreign tax liability incurred, this information must immediately be disclosed to SARS.

Example 10 – Recovery of foreign tax liability by means of a government grant

Facts:

Two resident retail companies formed a joint venture in Country A to distribute and sell products owned by the government of Country A. In Country A the joint venture is regarded as a taxable entity. The joint venture sold the products at inflated prices which resulted in an increase in its liability for tax. The government of Country A in turn gave the joint venture a monetary grant as a form of economic incentive to compensate for the extra taxes paid due to the inflated sale prices.

In South Africa each company claimed a foreign tax credit based on its proportionate share of the total amount of foreign taxes paid by the joint venture without taking into account the amount of the government grant.

Result:

In determining the companies' tax credit, the foreign tax liability must be reduced by the amount of the government grant received. The amount of the government grant must be apportioned between the companies based on each company's interest in the joint venture.

Example 11 – Recovery of foreign tax liability by means of a refund

Facts:

A resident company derives foreign-sourced income from Country S. Under the rules of that country, advance corporation tax is levied on the basis of a formula. For the tax year, the resident pays advance corporation tax of R100 000 and claims foreign tax relief under section 6quat.

A few years later the resident company realises that it is entitled to a special concession under the rules of Country S. As a result the full amount of R100 000 is refunded to the resident.

Result:

Since the resident received a full refund of the advance corporation tax of R100 000, the amount no longer qualifies for foreign tax relief and the relevant assessment will have to be revised.

Example 12 – Foreign country imposing withholding tax at domestic rate instead of lower rate specified in DTA

Facts:

South Africa has concluded a DTA with Country X in terms of which the latter may levy a withholding tax of 10% of the gross amount of interest being remitted from Country X. However, Country X insists on levying its domestic tax rate of 25% on interest income remitted to a South African resident.

Result:

Under section 6quat the resident may only claim a rebate to the extent of the rate of 10% as specified in the DTA.

3.6.4 The taxes must be payable on amounts included in a resident's taxable income (section 6quat(1A))

The term "taxable income" is defined in section 1 to mean the aggregate of –

- “(a) the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and
- (b) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act.”

Should the end result of a resident's tax calculation for a particular year of assessment represent an assessed loss (whether by virtue of expenditure in the current year or an assessed loss brought forward from the previous year), no foreign tax credit will be allowed in that year of assessment because there is no normal tax payable.

However, it will still be possible for the taxpayer to carry forward the qualifying foreign taxes to the succeeding year of assessment under section 6quat(1B)(a)(ii).

Example 13 – Effect of foreign trade loss on determination of rebate

Facts:

A resident company conducts its primary trading operations in South Africa. It also has a branch in Country N.

Year 1

The company derives trade income from a South African source amounting to R100 000. Corporate income tax is levied in South Africa at a rate of 28%. Its branch in Country N incurred an assessed loss of R300 000.

Year 2

The company derives trade income from a South African source amounting to R100 000. South Africa's corporate income tax rate remains unchanged at 28%. Its branch in Country N derived taxable income of R400 000. Foreign tax is levied in Country N at the rate of 5%.

Result:

Year 1

Tax position in Country N

In Country N the branch has an assessed loss of R300 000, which is carried forward to year 2 under that country's domestic tax legislation.

Tax position in South Africa

For South African tax purposes the foreign assessed loss of R300 000 is ring-fenced under paragraph (b) of the proviso to section 20(1) and is carried forward to year 2. The local trade income of R100 000 will be subject to normal tax in South Africa at the rate of 28%.

The assessed loss is regarded as a foreign loss for purposes of the section 6quat rebate.

Year 2

Tax position in Country N

	R
Taxable income for year 2	400 000
Less: Assessed loss brought forward from year 1	<u>(300 000)</u>
Taxable income	<u>100 000</u>
Tax levied at 5%	<u>5 000</u>

Tax position in South Africa

(1) Taxable income from a foreign source	100 000
Taxable income for year 2	400 000
Less: Assessed loss brought forward from year 1	<u>(300 000)</u>
(2) Trade income from a South African source	<u>100 000</u>
Taxable income (all sources)	<u>200 000</u>
Normal tax payable at 28%	56 000

Section 6quat rebate:

$$\begin{aligned}
 & \frac{\text{Taxable income derived from all foreign sources}}{\text{Taxable income derived from all sources}} \times \text{Normal tax payable} \\
 & = \text{R100 000/R200 000} \times \text{R56 000} \\
 & = \text{R28 000}
 \end{aligned}$$

Thus the full amount of R5 000 will qualify for the foreign tax rebate.

3.7 Person liable for the qualifying foreign liability

3.7.1 General remarks

Under section 6quat(1A) a resident is deemed, in certain circumstances, to have incurred a foreign tax liability notwithstanding that it has been paid by someone else, for example –

- A person's spouse when section 7(2) or paragraph 68 of the Eighth Schedule applies (section 6quat(1A)(f)(i));

- a parent of any minor child or stepchild when section 7(3) or (4) or paragraph 69 of the Eighth Schedule applies (section 6quat(1A)(f)(i));
- donor to a trust when section 7 or paragraphs 68 to 72 of the Eighth Schedule apply (section 6quat(1A)(f));
- a trustee of a discretionary trust when section 25B(2A) or paragraph 80(3) of the Eighth Schedule applies (section 6quat(1A)(f));
- a partnership established in a foreign country that treats a partnership as a person for tax purposes (section 6quat(1A));
- a CFC (section 6quat(1A)(b));
- a portfolio of a collective investment scheme in respect of foreign dividends (section 6quat(1A)(e));
- the person paying the foreign-sourced amount; that is, the foreign taxes are withheld on behalf of the resident recipient by the payer from the gross amount at its source.

3.7.2 Application of section 6quat(1A)

The qualifying foreign tax liability must be payable by any of the following persons –

- a. A resident in respect of –
 - income referred to in **3.2.a**;
 - a dividend referred to in **3.2.c**; or
 - a taxable capital gain referred to in **3.2.d**.
- b. A CFC in respect of a proportional amount referred to in **3.2.b**.
 Any taxes attributable to any proportional amount which –
 - is taken into account in the determination of the taxable income of the resident as a result of an election made by that resident under section 9D(12) or 9D(13); or
 - relates to any amount contemplated in section 9D(9)(b)(ii) or (iii) which is not excluded from the application of section 9D(2) under section 9D(9)(b)(ii) or (iii),
 must in aggregate be limited to the amount of the normal tax which is attributable to the proportional amounts (paragraph (iA) of the proviso to section 6quat(1B)(a)).
- c. A portfolio of a collective investment scheme in respect of any amount of any foreign dividend that is deemed to have been declared to a resident under the proviso to paragraph (k) of the definition of the term “gross income” in section 1 which is included in the taxable income of that resident.
- d. Any other person or trust referred to in **3.2.e** and **3.2.f** respectively in respect of the amount included in the taxable income of the resident concerned.

When the resident is either a member of a partnership or a beneficiary of a trust and the partnership or trust is liable for tax as a separate entity in a foreign country, a proportional amount of tax payable by that entity shall be deemed to be payable by that resident member or beneficiary for purposes of section 6quat. The proportional

amount must be determined with reference to the interest of the resident in the entity in relation to the total interest held in that entity.

3.8 Limitation on the amount of the rebate

The amount of foreign taxes which qualify for the section 6quat rebate is capped at an amount calculated in accordance with the following formula:

$$\frac{\text{Taxable income derived from all foreign sources (A)}}{\text{Taxable income derived from all sources (B)}} \times \text{Normal tax payable on (B)}$$

(Section 6quat(1B)(a))

Normal tax is the South African tax calculated on taxable income before the deduction of any rebates contemplated in sections 6 and 6quat respectively. Taxable income derived from all foreign sources includes all foreign-sourced amounts included in taxable income regardless of the rate of foreign tax (if any) to which those amounts are subject.

The purpose of the limitation in section 6quat(1B)(a) is to ensure that the rebate granted for foreign taxes paid relates only to the foreign income included in South African taxable income. Hence if there is no foreign taxable income included in taxable income, no foreign tax credit will be available. The purpose of foreign tax credit relief is not to relieve all foreign taxation thereby subsidising the tax base of foreign jurisdictions, but rather to ensure that in providing relief to South African residents from double taxation, South Africa's tax base is protected.

The application of the limitation formula will result in foreign taxes payable only reducing normal tax payable on foreign-sourced amounts; it cannot reduce normal tax payable on South African-sourced amounts. The limitation is an "overall" limitation in the sense that all the foreign-sourced amounts derived from different foreign sources are added together without being subdivided further between the different foreign countries from which the amounts were derived. This is in contrast to the "per country" limitation or the "per income item" limitation adopted in some other countries. Effectively the "overall" limitation divides a resident's taxable income into two separate components, namely, taxable income derived from –

- a source within South Africa or deemed to be within South Africa; and
- a foreign source.

Under an overall limitation system, all qualifying foreign taxes are aggregated; in other words, the credit is limited (capped) at the lesser of the aggregate of foreign taxes payable and the normal tax payable on the total amount of the resident's foreign-sourced amounts.

Before applying the limitation rule, one must in the first instance determine –

- what income is sourced within and deemed to be within South Africa; and
- what income is sourced outside South Africa.

Secondly, a tax computation must be performed in order to determine the taxable income resulting from –

- the income derived from sources within South Africa and deemed to be within South Africa; and

- the income derived from foreign sources.

In determining the taxable income derived from a foreign source –

- any expenditure incurred which is directly attributable to such income must be deducted from such income (irrespective of whether such expenditure is incurred in or outside South Africa); and
- a portion of any general expenses incurred which are not directly attributable to income derived either domestically or abroad, for example, head office expenses, must be apportioned between taxable income derived from –
 - a source within South Africa or deemed to be within South Africa; and
 - a foreign source,

based on any method which gives a fair and reasonable apportionment appropriate to the circumstances of the particular case (for example, turnover, gross profit or value of fixed assets).

Failure to allocate expenses to foreign activities could result in an inflated foreign tax credit. This is illustrated in the example below.

Example 14 – Classification of expenses relating to income from a source within South Africa and income from a foreign source

Facts:

A resident company with a local trade and a foreign trade derives the following results in year 1:

Taxable income derived from a South Africa source	R1 000
Taxable income derived from a foreign permanent establishment	R100

In the foreign country where the permanent establishment is located the corporate tax rate is 40% while the tax rate in South Africa is 28%. As a result, excess foreign tax credits of R12 are created. In order to absorb some of the excess foreign tax credits, the branch borrows R100 in South Africa at 10% interest and invests the money borrowed in a bank deposit in the foreign country. The deposit earns interest at 10%. Thus the company as a whole did not realise a profit on the transaction. The company claims the interest expense of R10 as a deduction against South African-sourced income.

Result:

	Taxable income (South African source)	Taxable income (foreign source)	Taxable income (all sources)
	R	R	R
Taxable income before interest	1 000	100	1 100
Interest income	0	10	10
Interest expense	(10)	<u>0</u>	<u>(10)</u>
Taxable income	<u>990</u>	<u>110</u>	<u>1 100</u>
Tax payable		44	308

Application of the credit limitation: $(R110/R1\ 100) \times R308 = R30.8$

If the interest expense of R10 was correctly taken into account in determining foreign-sourced taxable income the application of the credit limitation will provide the following result:

$$(R100/R1\ 100) \times R308 = R28$$

Example 15 – Determination of rebate (no limitation)

Facts:

A resident company conducts its trading operations in South Africa. It also has a branch in Country L.

For its 2009 year of assessment the following results are of importance:

	South Africa	Country L	Total
	R	R	R
Turnover	8 000	2 000	10 000
Less: Direct expenses	(2 000)	(800)	(2 800)
Indirect expenses			<u>(600)</u>
Taxable income (all sources)			<u>6 600</u>
R10 000 – (R2 800 + R600)			
Foreign taxes due			108
South African normal tax due:			
R6 600 X 28%			1 848

Result:

Calculation of taxable income derived from Country L (that is, from a foreign source):

	R
Turnover	2 000
Less: Direct expenses	(800)
Indirect expenses	<u>(120) *</u>
Taxable income	<u>1 080</u>

Notes:

- (1) * Calculation of indirect expenses apportioned to branch in Country L (based on turnover ratio):
 $(R2\ 000/R10\ 000) \times R600 = R120$
- (2) Calculation of limitation of rebate:
 $(R1\ 080/R6\ 600) \times R1\ 848 = R302.40$ (the limitation does not apply). As a result the full amount of R108 will qualify for the rebate.

Example 16 – Determination of rebate (subject to limitation)*Facts:*

During year 1 a resident company conducted share-dealing activities through a dependent agent⁴ located in Country M (that is, the agency is regarded as a branch of the company). It bought foreign shares for R10 000, received a gross foreign dividend of R1 000 from which withholding tax of R150 was payable. During the same tax year it sold the shares for R9 500. The sale of the shares did not result in a tax liability in Country M.

Deductible expenses of R300 were incurred on the transaction. No other transactions or activities were concluded by the resident company during the course of year 1.

Result:

Calculation of the foreign taxable income resulting from the foreign share-dealing operations carried on during year 1:

Foreign gross income	R
Sale of shares	9 500
Foreign dividends	<u>1 000</u>
	10 500
Less: Purchase cost	(10 000)
Other expenses	<u>(300)</u>
Taxable income - foreign source	200
- South African source	<u>Nil</u>
Taxable income (all sources)	<u>200</u>
Normal tax payable (R200 X 28%)	56

The credit relief is limited to R56.

Calculation: $R200/R200 \times R56 = R56$.

The remaining foreign taxes of R94 (R150 – R56) do not qualify for a foreign tax credit or deduction in year 1 but are carried forward to year 2 in which they will be reconsidered for a foreign tax credit.

In determining the taxable income derived from foreign sources and South African sources respectively, any deductions sought in terms of sections 11(n), 18 and 18A must be apportioned on a *pro rata* basis between income derived from both sources as determined before the deduction of any of the amounts contemplated in those sections (paragraph (i) of the proviso to section 6quat(1B)(a)).

The deductions contemplated in section 11(n), 18 and 18A respectively are limited to specified percentages of a taxpayer's taxable income. The determination of the deduction which may be allowed under any one of these provisions is thus dependent upon the amount allowed under the other provisions, and it is accordingly necessary to establish the order in which the various calculations must be made.

In the context of paragraph (i) of the proviso to section 6quat(1B)(a) which deals with the apportionment of the deductions contemplated in sections 11(n), 18 and 18A

⁴ A dependent agent may create a permanent establishment, unlike an independent agent.

respectively, the term “income” must be interpreted to mean taxable income as determined before each of the above-mentioned deductions. The deductions must be apportioned on a pro rata basis between taxable income derived from –

- sources within South Africa and deemed to be within South Africa; and
- foreign sources,

respectively as calculated before taking into account each deduction.

The deduction contemplated in section 11(k) is taken into account before the deductions contemplated in sections 11(n), 18 and 18A are considered. Therefore the taxable income after the deduction contemplated in section 11(k) is relevant for purposes of applying paragraph (i) of the proviso to section 6quat(1B)(a).

As a result of taxable income including a taxable capital gain, any deduction under sections 18 and 18A respectively must be calculated by taking into account any taxable capital gain forming part of taxable income.

Examples relating specifically to natural persons are detailed in **Annexure A**.

3.9 Application of paragraph (iB) of the proviso to subsection 6quat(1B)(a)

Under section 6quat(1B)(a) the amount of foreign taxes qualifying for the section 6quat rebate is limited to a *pro rata* amount calculated in accordance with the following formula:

$$\frac{\text{Taxable income derived from all foreign sources (A)}}{\text{Taxable income derived from all sources (B)}} \times \text{Normal tax payable on (B)}$$

However, before applying the above formula, paragraph (iA) of the proviso to section 6quat(1B)(a) must be given effect.

The proviso places a first-stage limitation on the foreign taxes payable by a CFC which qualifies for the section 6quat rebate. Once this first-stage limitation has been applied, any qualifying foreign taxes will be added to other foreign taxes, and the above formula will then be applied to the total.

The initial limitation applies when the taxes relate to –

- a. any amount apportioned to the income of a person resident in South Africa under section 9D(2) as a result of an election made by that resident under section 9D(12) or (13); or
- b. any part of an amount apportioned to the income of a person resident in South Africa relating to any amount contemplated in section 9D(9)(b)(ii) or (iii) not excluded from the application of section 9D(2) under these subparagraphs.

The foreign taxes incurred by the CFC are limited to the amount of normal tax attributable to the inclusion of the above amounts in the income of the resident under section 9D(2).

To understand the first-stage limitation, it is necessary to have a basic understanding of certain key provisions in section 9D. These are summarised below.

Section 9D(2) – Includes in the income of a resident the ‘proportional amount’ of the ‘net income’ of a CFC. The term ‘proportional amount’ refers to the resident’s effective interest in the ‘net income’ of the CFC. The ‘net income’ is defined in section 9D(2A) and in simple terms is the CFC’s taxable income, assuming it were a resident. The deemed inclusion in income does not apply to a resident that –

- holds less than 10% of the participation rights; and
- may not exercise at least 10% of the voting rights, in a CFC.

Section 9D(9)(b) – This excludes from ‘net income’ any amount attributable to a ‘foreign business establishment’. The proviso to section 9D(9)(b) contains a number of exceptions to this exclusion. Paragraph (ii) of the proviso deals with certain non-arm’s length ‘diversionary’ transactions in terms of which goods are sold or services are rendered by a CFC to a connected person (including through an intermediary). Paragraph (iii) of the proviso removes from the business establishment exclusion certain forms of passive income, capital gains and foreign currency gains to the extent that they in total exceed 10% of the income and capital gains of a CFC.

Section 9D(12) – This applies when a resident, together with connected persons in relation to that resident, holds at least 10% but not 20% or more of the participation and voting rights in a CFC. The resident can elect that section 9D(9) shall not apply to the net income, attributable, for example, to a foreign business establishment. The implication of such an election is that instead of the CFC’s net income only being taxed when declared as a foreign dividend, the resident can elect to apply imputation. The downside of being taxed on the dividend basis is that the resident only has access to the foreign dividend withholding taxes for the purpose of claiming a rebate under section 6quat. By making the election the resident can drill down into the CFC and access the underlying corporate tax. If an election has been made, any dividend subsequently distributed out of the relevant net income will be exempt under section 10(1)(k)(ii)(cc). However, this elective provision should not be used to bring foreign tax credits in excess of the South African tax liability into the tax system, which would shield other sources of low-taxed foreign income. Therefore, excess foreign tax credits will in these instances be forfeited. This election may be made on a year-by-year basis.

Section 9D(13) – This provision enables a resident who, together with any connected person who is also a resident, holds at least 10% but not 20% or more of the participation and voting rights in a foreign company to elect that the company be treated as a CFC in respect of any foreign tax year of that company. This would apply to a foreign company in which residents hold less than 50% of the participation rights. Normally such a company would fall outside section 9D and its resident shareholders only pay tax on the dividends they receive. As explained above in relation to section 9D(12), this election enables a resident to access the underlying corporate tax for rebate purposes instead of just the dividend withholding tax. As with section 9D(12), when an election is made under this provision, any dividends are exempt and the foreign taxes are subject to limitation.

After applying the first-stage limitation the qualifying portion of the foreign taxes incurred by the CFC will be added to any other qualifying foreign taxes. The total is then subject to the second-stage calculation using the formula in section 6quat(1B)(a). Thus the proviso does not prohibit the mixing of the relevant

foreign taxes with other foreign taxes for purposes of the single foreign tax rebate calculation. It merely limits the amount of foreign taxes incurred by a CFC in respect of certain amounts included in the income of a resident under section 9D. The taxes thus limited then qualify for inclusion in the second and final stage foreign tax rebate calculation, which is determined with reference to the sum of all qualifying foreign taxes.

Example 17 – Two-stage limitation of foreign taxes incurred by CFC

Facts:

A resident company derives the following amounts from a foreign source during year 1:

	R
(1) Part of net income of CFC A imputed to income	60 000 (Note 1)
(2) Part of net income of CFC B imputed to income	15 000 (Note 2)
(3) Part of net income of CFC C imputed to income	75 000 (Note 3)
(4) Foreign dividend	70 000 (Note 4)
(5) Profits of a foreign branch	<u>80 000 (Note 5)</u>
Total	<u>300 000</u>

In addition, its South African operations generate taxable income of R200 000.

Note 1: Net income of CFC A

The resident holds 60% of the participation and voting rights in CFC A, which carries on a foreign business establishment. The net income of CFC A for year 1 is R100 000 consisting of rent and interest income, which is not excluded from the income of the resident by section 9D(9)(b)(iii) (*de minimis* exclusion for passive income derived by a foreign business establishment).

In its country of residence the CFC's equivalent taxable income amounted to R120 000 which resulted in a tax liability of R48 000 in that country.

Note 2: Net income of CFC B

The resident holds 15% of the participation and voting rights in CFC B which derives its net income from a foreign business establishment. Under section 9D(12) the resident elects that none of the exclusions of section 9D(9) will apply (that is, it elects that CFC B's net income be imputed to it under section 9D(2)).

The net income of CFC B for year 1 is R100 000. In its country of residence the CFC's taxable income amounted to R125 000 which resulted in a tax liability of R43 750 in that country.

Note 3: Net income of CFC C

The resident holds 75% of the participation and voting rights in CFC C. The net income of CFC C for year 1 is R100 000, made up as follows:

R80 000 – passive investment income unconnected to CFC C's business establishment (it does not qualify for any of the exclusions in section 9D(9)).

R20 000 – “diversionary” trade income attributable to CFC C's foreign business establishment (not excluded from imputation under section 9D(2) by section 9D(9)(b)(ii)).

In its country of residence the CFC's taxable income amounted to R80 000 which resulted in a tax liability of R36 000 in that country.

Note 4: Foreign dividend

The dividend is declared by a foreign company which is not a CFC in relation to the resident. Withholding tax of R3 500 is deducted from the dividend by the tax authorities in the country of residence of the foreign company.

Note 5: Profits of a foreign branch

In the foreign country where the branch is established the branch is obliged to pay foreign taxes of R20 000 as its taxable income in terms of the tax law in that country amounts to R80 000.

Result:

Step 1: Determine taxable income for year 1

	R
(1) South African sourced taxable income	200 000
(2) Foreign-sourced taxable income	<u>300 000</u>
Taxable income (all sources)	<u>500 000</u>

Normal tax payable at 28% = R140 000

Step 2: Determine the portion of foreign taxes incurred by a CFC which will qualify for the foreign tax credit as a result of paragraph (iA) of the proviso to section 6quat(1B)(a)

CFC A:

Despite the foreign taxes incurred amounting to R48 000, only the part relating to the amount included in the resident's income will be considered for purposes of calculating the foreign tax rebate:

Calculation: $(R48\ 000 \times (R100\ 000/R120\ 000)) \times 60\% = R24\ 000$

CFC B:

Despite the fact that the foreign taxes incurred amount to R43 750 only that part which relates to the amount included in the resident's income will be considered for purposes of calculating the foreign tax rebate:

Calculation: $(R43\ 750 \times (R100\ 000/R125\ 000)) \times 15\% = R5\ 250$

CFC C:

Despite the foreign taxes incurred amounting to R36 000, only that part which relates to the amount included in the resident's income will be considered for purposes of calculating the foreign tax rebate.

Calculation: $(R36\ 000 \times 75\%) = R27\ 000$

Part of passive amounts included in income (untainted): R60 000

Calculation: $R80\ 000 \times 75\% = R60\ 000$

Part of amount included in income which relates to "tainted" diversionary income: R15 000

Calculation: $R20\,000 \times 75\% = R15\,000$

The next logical step is to apportion the foreign taxes on a *pro rata* basis between the "tainted" and "untainted" amounts:

Foreign taxes apportioned to untainted income:

$R27\,000 \times R60\,000/R75\,000 = R21\,600$ (this amount is not subject to the limitation in paragraph (iA) of the proviso)

Foreign taxes apportioned to tainted income:

$R27\,000 \times R15\,000/R75\,000 = R5\,400$ (this amount is subject to the limitation in paragraph (iA) of the proviso)

Step 3: Aggregate all foreign taxes subject to limitation in paragraph (iA) of the proviso to section 6quat(1B)(a)

	R
(1) CFC A	24 000
(2) CFC B	5 250
(3) CFC C	<u>5 400</u>
Total	<u>34 650</u>

Step 4: Calculation of normal tax attributable to the above amounts

$(R60\,000 \text{ (CFC A)} + R15\,000 \text{ (CFC B)} + R15\,000 \text{ (CFC C)})/R500\,000 \times R140\,000 = R25\,200$

Step 5: Apply the limitation of paragraph (iA) of the proviso to section 6quat(1B)(a)

Only R25 200 of the foreign taxes of R34 650 will qualify for the rebate. The balance of R9 450 (R34 650 – R25 200) will be forfeited.

Step 6: Sum of foreign taxes that qualify for the foreign tax rebate

	R
(1) Qualifying foreign taxes as calculated above	25 200
(2) In respect of untainted income of CFC C	21 600
(3) Foreign dividend	3 500
(4) Foreign branch	<u>20 000</u>
Total	<u>70 300</u>

Step 7: Calculation of the foreign tax rebate under section 6quat(1B)(a)

(Taxable income from all foreign sources/ Taxable income from all sources) X Normal tax payable

$$= R300\,000/R500\,000 \times R140\,000$$

$$= R84\,000$$

Thus the full amount of R70 300 will qualify for the foreign tax rebate.

3.10 The carry-forward of excess foreign tax credits

When the sum of foreign taxes payable exceeds the amount of the rebate, the excess may be carried forward to the immediately succeeding year of assessment in which it will rank as a foreign tax credit available for set-off against the normal tax payable in respect of taxable income derived from foreign sources in that year of assessment (paragraph (ii) of the proviso to section 6quat(1B)(a)).

A carryover mechanism is pivotal to any foreign tax credit system. Without it, double taxation might occur because tax jurisdictions use different –

- taxing principles;
- definitions for the term “income”; and
- timing rules.

A resident's income may also fluctuate from year to year. Most countries that use a foreign tax credit system have some form of carryover mechanism. The excess foreign taxes do not relate to taxes overpaid to SARS. The foreign taxes relate solely to taxes paid to foreign tax jurisdictions and SARS has no liability to refund any part of them to the relevant taxpayer or to transfer them to another taxpayer such as a company in the same group of companies.

In addition, section 6quat does not provide for the carry-back of excess tax credits to previous years of assessment.

The amount of the foreign tax credit relating to the taxable foreign income derived during a year of assessment must first be used against the normal tax payable in that year. Thereafter, any balance of excess foreign taxes brought forward from the preceding year may be set off against the remaining balance of normal tax payable on taxable income derived from foreign sources (paragraph (ii)(bb) of the proviso to section 6quat(1B)(a)). The balance of excess foreign taxes may not be used against normal tax payable on taxable income derived from South African sources.

Any excess may not be carried forward for more than seven years, calculated from the year of assessment in which the excess was for the first time carried forward (paragraph (iii) of the proviso to section 6quat(1B)(a)).

If a determination of an excess amount of foreign taxes is made for more than one year of assessment, the excess amount determined for each year of assessment must be recorded separately and applied on a first-in-first-out basis against the normal tax payable in future years of assessment.

3.11 The deduction of foreign taxes on income under section 6quat

Section 6quat(1C) was inserted by section 7(c) of the Revenue Laws Amendment Act, No. 35 of 2007 to provide for the deduction of foreign taxes from the income of a resident taxpayer (as opposed to the claiming of a tax credit).

Under section 6quat(1C) –

- the sum of any taxes on income not qualifying for a foreign tax rebate under section 6quat(1A) may qualify as a deduction in determining the taxable income derived by any resident taxpayer from carrying on any trade;

- the taxes must be proved to be payable by that resident to any sphere of government of any country other than the Republic, without any right of recovery by any person other than a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment before that year of assessment.

The following aspects of section 6quat(1C) should be noted:

- A resident may not choose between the credit method of relief and the deduction method of relief. The deduction method only applies if the resident is unable to secure a rebate under section 6quat.
- The foreign taxes are only deductible against taxable income derived from the carrying on of any trade. In other words, no deduction is permissible against passive income.
- Any part of the foreign taxes incurred in respect of amounts received or accrued which do not constitute income as defined in section 1 will not qualify for a deduction (section 6quat(1C) read with section 23(f)).
- Any part of the foreign taxes that were not laid out or expended for the purpose of trade will not qualify for the deduction (section 23(g)).
- The fact that the foreign taxes must be proved to be payable implies that the foreign tax jurisdiction must have a legal right under its tax laws to tax a particular item of income.
- No deduction will be forthcoming when the resident may exercise a right of recovery under a DTA in respect of a foreign tax liability.

Example 18 – Deduction sought for foreign taxes under section 6quat(1C) when a right of recovery exists under a DTA

Facts:

A resident provides managerial and technical support services to a client situated in Nigeria. All the work is performed in South Africa. The resident does not have a permanent establishment in Nigeria. Despite the work being done in South Africa, Nigeria levies a withholding tax on fees paid for managerial and technical support services. Acting under its domestic law Nigeria withheld the tax from the amount remitted to the resident.

Result:

The DTA between South Africa and Nigeria does not specifically deal with income derived from rendering managerial and technical support services. As a result Article 7, which deals with business profits, must be applied. The Article provides that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. In terms of international tax norms the real source of income derived from the rendering of managerial and technical support services is located in the country where the work is done. In this case the work is done in South Africa.

Despite the fact that Nigeria's tax laws may support its right to tax the income, Article 7 confers an exclusive taxing right on South Africa. The resident therefore has

a right of recovery which must be exercised by approaching the Nigerian tax authorities. No deduction under section 6quat(1C) will therefore be allowed.

Despite section 6quat(1C), the amount of foreign taxes that may be deducted is limited to the taxable income (before taking into account any deduction contemplated in section 6quat(1C)) attributable to income which is subject to taxes as contemplated in that subsection. In determining the amount of the taxable income attributable to that income, any allowable deductions contemplated in sections 11(n), 18 and 18A must be deemed to have been incurred proportionately in the ratio that the income bears to total income (section 6quat(1D)).

Any excess amount of foreign taxes is forfeited and will not qualify for a deduction in terms of any other section of the Act (section 23B). In addition, any excess may not be carried forward to the following year of assessment and be taken into account as a deduction in that following year.

3.12 Interaction between DTA credit method and section 6quat

a) DTA methods for providing relief from double taxation

The majority of the DTAs concluded by South Africa provide for the elimination of double taxation by way of the credit method. None of South Africa's DTAs allow for the deduction method of relief.

b) Choice between DTA credit method and section 6quat credit method

Section 6quat(2) provides for a resident to choose between the relief provided in the DTA and the relief provided under section 6quat. A resident is not entitled to claim both the section 6quat rebate and the DTA relief in respect of the same taxable income derived from a country with which South Africa has concluded a DTA. This choice of relief can be exercised annually and the resident is not bound by a choice made in previous years of assessment. If no option is elected by the resident, SARS will apply section 6quat.

c) DTA credit method – effect of wording of relevant articles

The wording of the relevant article in the DTA will determine how the DTA credit method must be applied in a specific case. DTA articles can be divided into –

- those that are “subject to” section 6quat; and
- those that make no reference to section 6quat.

d) DTA credit method – articles that are “subject to” section 6quat

In providing for the credit method of relief, some DTAs stipulate that the credit must be determined –

“subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa”.

(Emphasis added.)

The words “subject to” make it clear that the credit must be determined under section 6quat, since it is the only section in the Act that provides for the deduction of foreign taxes against normal tax payable. In these circumstances the whole of section 6quat will be applicable and not merely certain elements of it such as the carry-forward of excess tax credits.

If such an article applies section 6quat effectively provides the only method for determining the tax credit.

Example of a DTA that is “subject to” section 6quat:

Article 22 of the DTA with Turkey which deals with the elimination of double taxation

The relevant part reads as follows:

“Double taxation shall be eliminated as follows:

- a) in South Africa, *subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa (which shall not affect the general principle hereof)*, Turkish tax paid by residents of South Africa in respect of income which, in accordance with the provisions of this Agreement, may be taxed in Turkey shall be deducted from the taxes due according to South African tax 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;”

(Emphasis added.)

The limitation provided in section 6quat(1B)(a) is an overall limitation that takes into account all of the foreign taxes attributable to the aggregate of the foreign-sourced amounts included in a resident’s taxable income.

As a result, any foreign taxes payable on amounts derived from a country with which South Africa has concluded a DTA that is subject to section 6quat, must be aggregated with all the other foreign taxes payable in other countries that also qualify for the section 6quat rebate notwithstanding that the DTA’s article dealing with the elimination of double taxation specifically provides for a “per country” limitation.

Klaus Vogel states the following on the implications when an article of a DTA dealing with the elimination of double taxation expressly refers to domestic tax law in regard to its implementation:⁵

“Treaties quite frequently do in fact expressly refer to domestic tax law in regard to implementation – particularly of the credit method (see synoptic table re Art. 23 A (2) / 23 B (1), infra m.no. 178)”.

On the question whether DTA relief provisions are complete or require further reliance on domestic law, Vogel says the following:⁶

“The details of both the exemption method and the credit method must be shaped by reference to domestic law, viz. in regard to reference figures – what positive and what negative elements should be included in the ‘foreign items of income’ and what in the ‘domestic’ ones, etc. – and in regard to procedures. In this connection the credit method is, however, by far the more complicated of the two, and that is why it is shaped and supplemented to a much greater extent by domestic law.”

The author expands on the abovementioned statement:⁷

“[Operation of the credit] Article 23 B sets out the main rules of the credit method, but does not give detailed rules on the computation and operation of the credit. This is

⁵ Klaus Vogel on Double Taxation Conventions 3 ed (1997) Kluwer Law International Ltd, London, United Kingdom in paragraph 48 at page 1174.

⁶ In paragraph 38 at page 1131.

⁷ In paragraph 129 at page 1216.

consistent with the general pattern of the Convention. Experience has shown that many problems may arise. Some of them are dealt with in the following paragraphs. In many States detailed rules on credit for foreign tax already exist in their domestic laws. A number of conventions, therefore, contain a reference to the domestic laws of the Contracting States and further provide that such domestic rules shall not affect the principle laid down in Article 23 B".

The abovementioned principle is supported by Arnold:⁸

"The treaty provisions establish the general principle of exemption or credit. Each country is left to establish detailed rules for the implementation of the general principle".

Thus section 6quat does not merely expand on the article of a DTA dealing with the elimination of double taxation. In fact it provides for the detailed rules on the computation and operation of the credit which are not provided for in the DTA. Each country is free to apply its own legislation and technique in calculating foreign tax credits.

Generally those DTAs that prescribe the credit method of relief stipulate that taxes paid by South African residents in respect of income taxable in the other Contracting State, in accordance with the provisions of this Convention, shall be deducted from the South African taxes due according to South African fiscal law. The reference to "South African taxes due according to South African law" relates to the calculation of taxable income under South African tax law. This clarifies that for purposes of the article dealing with the elimination of double taxation the South African tax attributable to the taxable income derived from the other Contracting State must be determined under South African tax law. This nullifies any argument that the credit may be calculated with reference to the taxable income as determined under the tax laws of the other Contracting State. The same principle is applicable in determining taxable income derived from foreign sources for purposes of section 6quat. Such determination is done by applying South African tax law.

e) DTA credit method – articles that are not "subject to" section 6quat

Some DTAs providing for the credit method of relief are not expressly "subject to" section 6quat. In these circumstances a resident may elect to apply the DTA credit method of relief instead of the section 6quat method of relief.

Example of a DTA that is not "subject to" section 6quat:

Article 23 of the DTA with Australia which deals with the elimination of double taxation

The relevant part reads as follows:

- "3. In the case of South Africa, Australian tax paid by a resident of South Africa in respect of income taxable in Australia in accordance with the Agreement, shall be deducted from the taxes due according to South African fiscal law. The 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."

When a resident elects a DTA credit method of relief which is not subject to section 6quat, the question arises how the foreign tax rebate in respect of taxable

⁸ Brian Arnold *International Tax Primer 2* ed (2002) Kluwer Law International, The Hague, The Netherlands at page. 47.

income derived from the relevant country must be determined. Section 6quat is the only section in the Act that gives detailed rules for the computation or operation of the deduction of foreign taxes payable against normal tax payable. If a resident elects the relief provided under the DTA, none of the additional relief measures granted under section 6quat will be available. For example, a person electing to use such a DTA credit method will not be entitled to carry forward any excess foreign taxes under section 6quat(1B)(a)(ii).

South Africa's DTAs do not have any specific rules for the computation and operation of a DTA credit method of relief. The provisions of section 6quat may not be used to calculate the DTA credit method of relief. In the absence of any separate agreement between South Africa and the foreign country providing detailed rules on the computation and operation of the credit, the DTA method of relief is applied on a "taxable income per country" basis rather than on a "per income item" basis.

f) Application of DTA method and section 6quat method in the same year of assessment

When a resident derives foreign-sourced amounts from both –

- a foreign country with which South Africa has concluded a DTA which provides for a credit method of relief that is subject to section 6quat, and
- a foreign country with which South Africa has concluded a DTA which provides for a credit method of relief that is not subject to section 6quat

within the same year of assessment, two separate credit limitation calculations must be performed for that year if the resident elects to follow the DTA credit method of relief in respect of the DTA that is not subject to section 6quat.

Example 19 – Determination of section 6quat rebate and a DTA credit within the same year of assessment

Facts:

A resident company conducts its trading operations in South Africa. It also has branches in Country L and Country M. South Africa has a DTA with each of these two countries. The DTA with Country L provides for the credit method of relief and is expressly subject to section 6quat while the DTA with Country M provides for the credit method of relief without any express reference to section 6quat. The company elects the DTA credit method of relief in respect of income derived from Country M.

For its 2009 year of assessment the following results are relevant:

Description	South Africa	Country L	Country M	Total
	R	R	R	R
Taxable income	100 000	20 000	30 000	150 000
Foreign taxes proved to be payable		9 000	12 000	21 000
Normal tax payable at 28%				42 000

<i>Result:</i>				
Description	South Africa	Country L	Country M	Total
	R	R	R	R
(a) Calculation of the section 6quat credit [R20 000/R150 000 X R42 000] Under the carry-forward rules of section 6quat the balance of R3 400 (R9 000 – R5 600) may be carried forward to qualify as a tax credit in the following year of assessment		5 600		5 600
(b) Calculation of the DTA credit [R30 000/R150 000 X R42 000] The balance of R3 600 (R12 000 – R8 400) is forfeited and may not be carried forward as the DTA does not provide for the carry-forward of excess tax credits			8 400	8 400
(c) Calculation of final normal tax payable Normal tax payable before rebates	42 000			42 000
Less: DTA credit rebate				(8 400)
Section 6quat rebate				<u>(5 600)</u>
Final normal tax payable				<u>28 000</u>

g) Meaning of “income” in DTAs

The word “income”, as used in the article dealing with the elimination of double taxation, must be interpreted to mean “net income” or “taxable income”. It does not mean “income” as defined in section 1 of the Act, because South Africa does not levy tax on the end result of gross income less exempt income.

Take for example Article 22 of the DTA with Turkey which deals with the elimination of double taxation. The relevant part reads as follows:

“Double taxation shall be eliminated as follows:

a) in South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa (which shall not affect the general principle hereof), Turkish tax paid by residents of South Africa in respect of *income* which, in accordance with the provisions of this Agreement, may be taxed in Turkey shall be deducted from the taxes due according to South African tax 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*,”

(Emphasis added.)

In this regard Vogel states the following:⁹

“63. The maximum deduction is normally computed as the tax on net income, i.e. on the income from State E (or S) less allowable deductions (specified or proportional) connected with such income.”

h) Payment of foreign tax under the DTA credit method

Under the DTA credit method, any foreign taxes must be paid before the relief can be granted. By contrast, section 6quat merely provides that the foreign taxes must be proved to be *payable*. However, SARS will apply section 6quat without limiting its application to cases in which the foreign taxes are actually paid. This is in accordance with the overriding principle that a DTA may not impose liabilities upon a taxpayer which go beyond the general scope of domestic fiscal law.

3.13 The translation of foreign taxes to rand

A resident's liability for normal tax is determined in rand. For purposes of this determination any foreign-sourced amount and underlying foreign tax (which qualifies either for the credit or the deduction) in respect thereof must be translated to rand. A liability for normal tax is expressed in rand while a liability for foreign tax is expressed in a foreign currency. As a result, the amount of the foreign tax rebate or the amount of the foreign tax deduction will be affected when the foreign currency appreciates or depreciates in value against the rand.

Any foreign taxes proved to be payable in respect of any foreign-sourced amount included in the taxable income of a resident during a particular year of assessment must be translated to rand on the last day of that year of assessment by applying the average exchange rate for that year of assessment (section 6quat(4)).

The average exchange rate is defined in section 1 in relation to a year of assessment to mean the average determined by using the closing spot rates at the end of daily or monthly intervals during that year of assessment. The chosen interval (daily or monthly) must be consistently applied within a year of assessment.

Example 20 – Translation of foreign taxes to rand

Facts:

During year 1 a resident derives interest income from Country A on a monthly basis which is denominated in franc. The interest income is subject to a withholding tax in Country A.

Result:

The foreign taxes expressed in franc must be translated to rand by applying the average exchange rate between the rand and the franc for year 1.

Multiple foreign tax liabilities denominated in different currencies must each be translated separately into rand using the applicable average exchange rate.

⁹ Klaus Vogel on Double Taxation Conventions in paragraph 132 at page 1217.

Fluctuations in the exchange rate may cause a difference between –

- the rand equivalent of the amount of the foreign tax liability determined on the date that the liability is incurred; and
- the rand equivalent of the amount (or amounts) paid, determined on the date (or dates) of payment, in settlement of the liability.

This difference will not impact on the amount of the foreign tax liability which qualifies for the foreign tax credit because the liability may only be translated to rand at the applicable average exchange rate (that is, the actual translation rate of exchange is fixed and any fluctuations in the rate of exchange will not affect the actual translation rate).

Example 21 – Translation of foreign taxes to rand at the average exchange rate

Facts:

A resident becomes liable for income tax in Country B at the end of its fiscal period, but the tax only became payable 14 months later. The average exchange rate for the fiscal period amounted to R14 while the actual exchange rate when the foreign taxes were paid equalled R12.

Result:

The foreign taxes are translated to rand by applying the average exchange rate of R14, while the exchange difference of R2 (R14 – R12) is not taken into account in determining the amount of the foreign tax liability for purposes of the section 6quat rebate.

Average exchange rates for a range of foreign currencies are available on the SARS website www.sars.gov.za at Online Tools. These may be used to translate foreign taxes to rand.

3.14 Recalculation of the section 6quat rebate or deduction

A question arises as to what happens when a foreign-sourced amount is included in a resident's taxable income in one year but the related foreign tax liability is incurred in a different year of assessment.

When a resident claimed a rebate or deduction or could have claimed a rebate or deduction in a previous year of assessment and it is subsequently proved that the actual foreign taxes payable exceed or are less than the amount initially claimed, **SARS should be notified immediately** and a revised assessment may be issued to correct the matter.

The additional or reduced assessment must be issued within six years from the date of the assessment in terms of which the rebate was first allowed (section 6quat(5)).

LAWSA¹⁰ states the following regarding a period stipulated to commence "after" a specific date:

¹⁰ E Cameron "Period Stipulated to Commence 'After' a Specified Date" Volume 27 (First Reissue Volume) *The Law of South Africa (My LexisNexis: 31 October 2001)* LexisNexis Butterworths, Durban in paragraph 445.

“The distinction between a stipulation requiring the commencement of a period after an event and one indicating its commencement after the date upon which an event occurs is well established in the law. The day or date upon which a specified event occurs ‘is a measure or period of time ascertainable with certainty’: it is a period of time beginning at midnight before the event and ending at midnight after the event. Until that period of 24 hours has expired there can be no moment of time ‘after’ or ‘subsequent to’ the date of the event. It follows that the date in question must be excluded from the reckoning so that computation begins only at the beginning of the next day.” (Footnotes not cited.)

It follows that the due date of an assessment does not form part of the six-year period.

The six-year limit does not apply if SARS is satisfied that the amount of tax proved to be payable was incorrectly reflected due to fraud or misrepresentation or non-disclosure of material facts (section 6quat(5)).

When the amount of a foreign tax liability claimed by a resident as a rebate or deduction for purposes of section 6quat is subsequently amended by the relevant foreign tax authority, the onus rests with the taxpayer to notify SARS immediately in writing of these developments and to provide SARS with sufficient information to correct the relevant assessment.

In these circumstances the three-year prescription periods in sections 79 and 81(5) do not apply.

Example 22 – Foreign taxes paid in a year subsequent to the years in which the related income accrued

Facts:

A resident derives remuneration for management services from a foreign source in terms of a three-year management contract. For South African tax purposes accrual takes place as and when services are rendered over the period of the contract, while actual payment is only made at the end of the contract (that is, at the end of year 3). A final withholding tax is levied by the source country as and when payment is made (that is, in year 3).

Thus the contract income is included in the resident’s taxable income in each of the three years on an accrual basis, while the related foreign tax liability only arises in year 3.

Result:

The foreign tax paid in year 3 must be allocated across the three years in which the management fees were earned. Revised assessments must accordingly be issued for years 1 and 2.

Example 23 – Refund of foreign taxes in a subsequent year of assessment

Facts:

In year 1 a resident company realises a capital gain on disposal of rental property in Country R. The capital gain is taxed in Country R in year 1 and payment is made to the tax authorities of Country R in the same year. For South African tax purposes the

amount is taxed as part of the assessment for year 1. The due date for this assessment is 1 February of year 2.

The tax paid to the tax authorities of Country R is reduced because of the favourable outcome of an objection made in respect of deductible expenses which results in a refund on 31 December of year 7.

Result:

The reduction in foreign taxes means that the section 6quat rebate originally allowed in respect of tax year 1 must be reduced. This will result in a corresponding increase in the South African normal tax payable and the Commissioner will have to issue an additional assessment to rectify the matter. The Commissioner must raise the additional assessment within six years from the date of the assessment in which the rebate was originally allowed.

The six-year period ends six years and one day after 31 January of year 2, that is, on 1 February of year 8. The resident taxpayer is obliged to inform SARS immediately that its foreign tax liability has been reduced. SARS must revise the relevant assessment on or before 1 February of year 8. If the resident taxpayer does not disclose that its foreign tax liability has been reduced, it will be regarded as a non-disclosure of material fact and SARS is not bound by the six-year period limitation. In such event, SARS may revise the relevant assessment at any time.

Example 24 – Taxes payable in foreign jurisdiction determined in a year subsequent to the year in which the related foreign-sourced amount is taxed in South Africa

Facts:

A resident company holds 100% of the participation and voting rights in a CFC. A portion of the income of the CFC did not qualify for any of the exemptions in section 9D(9) and, an amount equal to the "net income" of the CFC was accordingly included in the resident company's income. The CFC was also subject to tax on the income included in the resident company's taxable income in the foreign jurisdiction where it carries on its operations. Consequently, the resident company is entitled to claim a credit under section 6quat.

However, because of the timing of submission of tax returns and payment of the taxes in the country of residence of the CFC, it is not possible to determine the amount of the foreign taxes due when the resident company submits its tax return in South Africa.

Result:

The resident company's assessment which included the CFC's net income may be reopened under section 6quat(5) to allow a tax credit when the foreign taxes become payable.

3.15 Application of section 66(13A) to section 6quat

Section 66(13A) deals with the situation in which a person (other than a company) cannot conveniently return income for a year of assessment. In such event, the Commissioner can grant permission for the person to draw accounts to a different

agreed date. The agreed date may fall before or after the end of the year of assessment. When the Commissioner grants permission for business income derived by a person from a foreign source to be returned over a period other than a year of assessment, there is no need to apportion the corresponding foreign tax liability between more than one South African year of assessment. Refer to Interpretation Note No. 19 (issue 2) "Year of Assessment: Accounts Accepted to a Date other than the Last Day of February" , (18 January 2006) for guidance regarding the practical application of section 66(13A).

Example 25 – Determination of section 6quat rebate when foreign tax year does not match the year of assessment

Facts:

A resident individual derives business income from the USA during the year ending 31 December 2010. The foreign tax year of an individual in the USA ends on 31 December. Under section 66(13A) SARS grants permission for the individual to return the business income for the year ending 31 December 2010 in the 2011 return of income (that is, in the year of assessment ending 28 February 2011).

Result:

The USA tax liability for the year ending 31 December 2010 must be taken into account in the individual's 2011 year of assessment in determining the section 6quat rebate.

3.16 Calculation of provisional tax payments with reference to foreign tax liabilities

When determining any provisional tax payable for South African income tax purposes, a provisional taxpayer may take into account any tax proved to be payable to the government of any other country that will qualify as a rebate under section 6quat (paragraphs 21(1)(a)(ii) and 23 of the Fourth Schedule).

In practice SARS will allow provisional taxpayers to take foreign provisional tax payments (or similar advance payments) legally due and payable/paid into account when determining their local provisional tax payments.

3.17 Documentary proof required by SARS in respect of foreign taxes for rebate purposes

A resident that wants to claim a foreign tax credit must prepare a statement which provides the following information:

- the foreign tax year during which the income was received by or accrued to the resident;
- the precise name of the tax and the foreign country in which it was levied;
- the name of the law under which the tax was imposed; and
- whether the tax was levied by the national government, a state or local authority and the name of such authority.

When the foreign tax has been withheld at source the resident must provide certified copies of either –

- a certificate of tax withheld, issued by the person paying the resident the amount;

- a copy of a receipt issued by the relevant revenue authority as evidence of payment of the amount of the tax; or
- a notice issued by the relevant revenue authority requesting payment (if any).

When the foreign tax has not been withheld at source and the foreign tax jurisdiction operates a system of self assessment of income tax, the resident must on request provide certified copies of –

- the relevant parts of the foreign income tax return containing the calculation of taxable income and taxes due, schedule of provisional payments and signature of resident; and
- calculations regarding foreign provisional tax payable.

In addition, SARS may require further information such as –

- documentary proof that a foreign tax liability has been incurred, for example, a letter from the relevant foreign tax authority or a receipt in respect of taxes paid; and
- a certificate from the resident's auditor stating that the amount is payable.

When the foreign tax has not been withheld at source and the foreign tax jurisdiction operates a system of assessment similar to South Africa, the resident must on request provide certified copies of –

- the relevant notice of assessment;
- the relevant parts of the foreign income tax return showing the calculation of the taxable income and taxes due, schedule of provisional payments and signature of the resident;
- calculations of any provisional taxes payable; and
- a copy of a statement of account issued by the relevant revenue authority requesting payment;

In addition, SARS may require further information such as –

- documentary proof that a foreign tax liability has been incurred, for example, a letter from the relevant foreign tax authority or a receipt in respect of taxes paid;
- a certificate from the resident's auditor stating that the amount is payable.

The above information must be made available upon request. If any of the documentary evidence submitted is worded in a foreign language, the resident must appoint a sworn translator to translate it into English. A certificate prepared by the translator stating officially that the translation is a true rendition of the original must also be available.

3.18 Additional tax payable as a result of an incorrect statement in respect of a foreign tax rebate

Section 76(1)(c) provides that when a taxpayer makes an incorrect statement in any return rendered by that taxpayer which results or would, if accepted, result in the assessment of normal tax at an amount less than the tax properly chargeable, SARS shall require that the taxpayer pay in addition to the tax chargeable in respect of the taxpayer's taxable income an amount equal to twice the difference between the tax

as assessed in accordance with the return made by the taxpayer and the tax which would have been properly chargeable.

Thus a resident that makes an incorrect statement in respect of that resident's foreign tax liability will be subjected to section 76(1)(c).

Example 26 – Imposition of additional tax in the event of overstatement of a foreign tax liability

Facts:

A resident company derives income from a foreign source during year 1. In year 1 the following information is relevant for income tax purposes:

	R
Taxable income derived from a foreign source	5 000
Taxable income derived from a South African source	<u>20 000</u>
Taxable income (all sources)	25 000
Normal South African tax liability before foreign tax rebate	7 000
Foreign tax liability disclosed in return of income	1 400
Actual foreign tax liability determined as a result of an audit	1 000

Result:

Section 6quat rebate based on information disclosed in return	1 400
Section 6quat rebate based on correct information	1 000
Normal tax payable after taking into account the incorrect section 6quat rebate (R7 000 – R1 400)	5 600
Normal tax payable after taking into account the correct section 6quat rebate (R7 000 – R1 000)	6 000
Additional tax raised under section 76(1)(c) [(R6 000 – R5 600) x 2]	800

3.19 Section 89quat(2) interest

In the event that a claim for a foreign tax credit is not allowed, the taxpayer may request SARS to waive any section 89quat(2) interest payable as a result of the underpayment of provisional tax.

The discretionary powers of SARS for the waiver of section 89quat(2) interest are set out as follows in section 89quat(3):

“Where the Commissioner having regard to the circumstances of the case is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been so included or that such deduction, allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103(6), direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion.”

The application of the discretion is limited to either an amount included in taxable income or a deduction or allowance claimed. A section 6quat rebate cannot be regarded as a deduction or an allowance.

A section 6*quat* rebate is not taken into account in determining a resident's taxable income. It merely reduces a liability for normal tax payable by the amount of the rebate in order to establish a resident's final tax liability. Thus SARS will not accede to a resident's request to waive interest levied under section 89*quat*(2) due to a foreign tax rebate being denied.

Legal and Policy Division
SOUTH AFRICAN REVENUE SERVICE
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Annexure A: Additional examples in respect of natural persons

Example 1 – Persons married in community of property receiving foreign dividends

Facts:

A South African couple is married in community of property. Both are residents and 40 years of age. The couple owns 5% of the equity share capital of a company in Country F. The wife is the registered owner of the shares.

On 20 February 2008 the company declared a dividend of \$12 000 000 (amount before withholding tax) of which the South African couple's share amounted to \$600 000. The withholding tax payable in respect of the couple's share of the dividend amounted to \$60 000.

The couple elected to translate the income derived from foreign dividends to rand by using the average exchange rate method of translation. For the 2008 year of assessment ending 29 February the average exchange rate was \$100 : R4,4. The couple incurred interest of R10 000 in respect of the dividend received.

During the 2008 year of assessment the wife also received a salary of R100 000 from which an amount of R10 285,29 was withheld in respect of SITE and PAYE. In addition the couple earned interest income amounting to R30 600 on a joint investment in a South African bank.

Result:

Appropriation of foreign dividends, interest expense and withholding taxes for purposes of sections 7(2A) and 7(2B)

	Total (100%) R	Wife (50%) R	Husband (50%) R
Foreign dividends included in gross income [(\$600 000/\$100) X R4,4]	26 400	13 200	13 200
Deductible interest expense (section 11C(1))	10 000	5 000	5 000
Withholding tax [(\$60 000/\$100) X R4,4]	2 640	1 320	1 320

1. Tax calculation for the wife

1.1 Taxable income derived from foreign dividends (foreign sources)

	R	R
Foreign dividends included in gross income		13 200
Less:		
Section 10(1)(j)(xv)(aa) exemption		<u>(3 000)</u>
Income derived from foreign dividends		10 200
Less:		
Section 11C(1) interest deduction		
Lesser of –		
(1) actual expenditure; or	5 000	
(2) income derived from foreign dividends	<u>10 200</u>	<u>(5 000)</u>
Taxable income derived from foreign dividends		<u>5 200</u>

1.2 Taxable income derived from South African sources

	R	R
Remuneration income		100 000
Local interest income (R30 600/2)	15 300	
Less:		
Section 10(1)(j)(xv)(bb) exemption	<u>15 000</u>	<u>300</u>
Taxable income derived from South African sources		<u>100 300</u>

Calculation of section 10(1)(i)(xv) exemption:

Total amount available for the section 10(1)(i)(xv) exemption	18 000
<i>Less:</i>	
Amount allowed in terms of section 10(1)(i)(xv)(aa)	<u>(3 000)</u>
Balance available for the section 10(1)(i)(xv)(bb) exemption	<u>15 000</u>

1.3 Total taxable income derived from all sources

	R
Taxable income derived from foreign sources	5 200
Taxable income derived from South African sources	<u>100 300</u>
Total	<u>105 500</u>

1.4 Tax calculation for the wife on R105 500**(a) Calculation of normal tax payable before rebates**

Normal tax payable: (Rates of tax – 2008 year of assessment)	R
R105 500 X 18%	18 990

(b) Calculation of foreign taxes which relate to exempt foreign dividends

$$\begin{array}{r} \underline{R3\,000} \\ R13\,200 \end{array} \quad \times \quad R1\,320$$

= R300

This amount is forfeited and cannot be carried forward to the 2009 year of assessment to be used as a foreign tax credit or deduction because it relates to exempt income.

(c) Calculation of foreign taxes which relate to taxable foreign dividends

	R
Foreign taxes payable in respect of gross foreign dividends	1 320
<i>Less:</i>	
Foreign taxes payable in respect of exempt foreign dividends	<u>(300)</u>
Foreign taxes which relate to taxable foreign dividends	<u>1 020</u>

(d) Calculation of the section 6quat rebate

	R
Amount of foreign taxes that qualifies for the rebate	1 020,00
<u>Limited to:</u>	936,00

Calculation of the R936 limitation:

<u>Taxable income derived from all foreign sources</u>	X	Normal tax payable
Total taxable income derived from all sources		
<u>R5 200</u>	X	R18 990
R105 500		
= <u>R936</u>		

Note:

R936 of the qualifying withholding tax of R1 020 is deductible in full. The balance of R84 (R1 020 – R936) may be carried forward to the 2009 year of assessment to be used as a foreign tax credit.

(e) Calculation of the normal tax payable after taking into account rebates

	R
Normal tax payable before rebates	18 990,00
Less: Primary rebate	<u>(7 740,00)</u>
	11 250,00
Less: Section 6quat rebate	(936,00)
Less: SITE and PAYE	<u>(10 285,29)</u>
Amount payable	<u><u>28,71</u></u>

2. Tax calculation for the husband**2.1 Taxable income derived from foreign dividends (foreign sources)**

	R	R
Foreign dividends included in gross income		13 200
Less:		
Section 10(1)(i)(xv)(aa) exemption		<u>(3 000)</u>
Income derived from foreign dividends		10 200
Less:		
Section 11C(1) deduction		
Lesser of –		
(1) actual expenditure; or	5 000	
(2) income derived from foreign dividends	<u>10 200</u>	<u>(5 000)</u>
Taxable income derived from foreign dividends		<u><u>5 200</u></u>

2.2 Taxable income derived from South African sources

	R
Local interest income (R30 600/2)	15 300
Less:	
Section 10(1)(i)(xv)(bb) exemption	<u>(15 000)</u>
Taxable income derived from South African sources	<u><u>300</u></u>

Calculation of the section 10(1)(i)(xv)(bb) exemption:

	R
Total amount available for the section 10(1)(i)(xv) exemption	18 000
Less:	
Amount allowed in terms of section 10(1)(i)(xv)(aa)	<u>(3 000)</u>
Balance available for the section 10(1)(i)(xv)(bb) exemption	<u><u>15 000</u></u>

2.3 Total taxable income derived from all sources

	R
Taxable income derived from foreign sources	5 200
Taxable income derived from South African source	<u>300</u>
Total	<u><u>5 500</u></u>

2.4 Tax calculation for the husband on R5 500**(a) Calculation of normal tax payable before rebates**

Normal tax: (rates of tax – 2008 year of assessment)

	R
R5 500 X 18%	990,00

(b) Calculation of foreign taxes which relate to exempt foreign income

$$\frac{R3\,000}{R13\,200} \times R1\,320 = R300$$

This amount is forfeited and cannot be carried forward to the 2009 year of assessment to be used as a foreign tax credit or deduction because it relates to exempt income.

(c) Calculation of foreign taxes which relate to taxable foreign dividends

	R
Foreign taxes payable in respect of gross foreign dividends	1 320
<i>Less:</i>	
Foreign taxes payable in respect of exempt foreign dividends	<u>(300)</u>
Foreign taxes payable in respect of taxable foreign dividends	<u>1 020</u>

(d) Calculation of the section 6quat rebate

	R
Amount of foreign taxes that qualify for the rebate	1 020,00
<u>Limited to:</u>	936,00

Calculation of the R936 limitation:

<u>Taxable income derived from all foreign sources</u>	X	Normal tax
Total taxable income derived from all sources		
<u>R5 200</u>	X	R990
R5 500		
= R936		

Note:

R936 of the qualifying withholding tax of R1 020 is deductible in full. The balance of R84 (R1 020 – R936) may be carried forward to the 2009 year of assessment to be used as a foreign tax credit.

(e) Calculation of the normal tax payable after taking into account rebates

	R
Normal tax before rebates	990,00
<i>Less:</i> Primary rebate	<u>(7 740,00)</u>
Amount payable	<u><u>NIL</u></u>

Note:

As the amount of the primary rebate exceeds the amount of normal tax payable, no portion of the qualifying foreign tax credit of R936 may be used against the normal tax payable. This foreign tax credit is forfeited. It may not be used as a rebate against normal tax payable and may also not be carried forward to the 2009 year of assessment to be used as a rebate against normal tax payable.

Example 2 – Natural person receiving foreign dividends and foreign interest*Facts:*

Mr. A, age 30 and single, is a resident. For the 2008 year of assessment he earned a pensionable salary from a South African source of R100 000 from which an amount of R8 930,79 was withheld in respect of SITE and PAYE. In addition he received the following investment income:

	Dividends	Interest
	R	R
South African source	50 000	29 000
Foreign sources	56 500	44 000
Withholding taxes paid in respect of the abovementioned foreign sourced income	20 000	8 800

- In terms of his contract of employment he is obliged to contribute 8% of his monthly salary to a pension fund.
- He also contributed R10 000 to a retirement annuity fund.
- An amount of R6 412 qualifies for a medical deduction under section 18.
- He also donated R1 500 to a public benefit organisation which has been approved for section 18A purposes.

*Result:***(a) Calculation of taxable income**

	South African source	Foreign sources	Total
	R	R	R
Gross income	179 000	100 500	279 500
Salary income	100 000	Nil	100 000
Dividend income	50 000	56 500	106 500
Interest income	<u>29 000</u>	<u>44 000</u>	<u>73 000</u>
<i>Less:</i>			
Exempt income	<u>65 000</u>	<u>3 000</u>	<u>68 000</u>
General dividend exemption			
Section 10(1)(k)(i)	50 000	Nil	50 000
Basic investment income exemption			
Section 10(1)(j)(xv)(aa)	Nil	3 000	3 000
Section 10(1)(j)(xv)(bb) (R18 000 – R3 000)	<u>15 000</u>	<u>Nil</u>	<u>15 000</u>
Income	114 000	97 500	211 500
<i>Less:</i>			
Pension fund contributions			
Section 11(k)(i) -			
Actual contributions R8 000 (R100 000 X 8%)			
<u>Limited</u> to the greater of –			
i) R1 750; or			
ii) 7,5% X R100 000 = R7 500	<u>(7 500)</u>	<u>(Nil)</u>	<u>(7 500)</u>
	106 500	97 500	204 000
<i>Less:</i>			
Retirement annuity fund contributions			
Section 11(n)(aa) –			
Actual contributions R10 000			

Limited to the greater of:-

- i) R1 750;
- ii) R3 500 – R7 500 = RNil; or
- iii) [(R50 000 + R29 000 + R56 500 + R44 000) – (R50 000 + R15 000 + R3 000)] X 15% = R16 725

Limited to the actual contributions of R10 000

Apportionment of R10 000:

(R106 500/R204 000 X R10 000) = R5 221

(R97 500/R204 000 X R10 000) = R4 779

	5 221	4 779	10 000
Taxable income before the deduction of donations and medical expenses	101 279	92 721	194 000

Less:

Donation to public benefit organisation

Section 18A –

Actual donation R1 500

Limited to 10% of R194 000 = R19 400

Thus the full R1 500 may be deducted.

Apportionment of R1 500:

(R106 500/R204 000 X R1 500) = R783

(R97 500/R204 000 X R1 500) = R717

	(783)	(717)	(1 500)
Taxable income before medical expenses	100 496	92 004	192 500

Less:

Medical expenses

Section 18(2)(c)(ii) –

Deductible amount = R6 412

Apportionment of R6 412:

(R106 500/R204 000 X R6 412) = R3 347

(R 97 500/R204 000 X R6 412) = R3 065

	(3 347)	(3 065)	(6 412)
Taxable income	97 149	88 939	186 088

(b) Calculation of normal tax before rebates

Normal tax: payable (Rates of tax – 2008 year of assessment)

	R
On R180 000	37 125,00
On R6 088 (30%)	1 826,40
Total	38 951,40

(c) Calculation of foreign taxes which relate to exempt foreign dividends

$\frac{R3\ 000}{R56\ 500} \times R20\ 000$

= R1 061,95

This amount is forfeited and cannot be carried forward to the 2009 year of assessment to be used as a foreign tax credit because it relates to exempt income.

(d) Calculation of foreign taxes which relate to taxable foreign dividends

	R
Foreign taxes payable in respect of gross foreign dividends	20 000,00

Less:

Foreign taxes payable in respect of exempt foreign dividends	<u>1 061,95</u>
Foreign taxes which relate to taxable foreign dividends	<u>18 938,05</u>

(e) Calculation of foreign taxes which relate to total taxable foreign income

	R
Foreign taxes payable in respect of taxable foreign dividends	18 938,05
Foreign taxes payable in respect of taxable foreign interest	<u>8 800,00</u>
Foreign taxes paid which relate to total taxable foreign income	<u>27 738,05</u>

(f) Calculation of the section 6quat rebate

	R
Amount of foreign taxes that qualify for the rebate	27 738,05
Limited to	18 616,45

(g) Calculation of the R18 616.45 limitation

$$\begin{array}{r} \underline{R88\ 939} \\ R186\ 088 \end{array} \quad \times \quad R38\ 951,40$$

$$= R18\ 616,45$$

Note:

The amount of the limitation is less than the sum of the foreign taxes of R27 738,05 as calculated above. Thus the section 6quat rebate for the 2008 year of assessment is limited to R18 616,45 while the balance of R9 121,60 (R27 738,05 – R18 616,45) may be carried forward to the 2009 year of assessment to be used as a foreign tax credit.

(h) Calculation of the normal tax payable after taking into account rebates

	R
Normal tax paid before rebates	38 951,40
Less: Primary rebate	<u>(7 740,00)</u>
	31 211,40
Less: Section 6quat rebate	(18 616,45)
SITE and PAYE	<u>(8 930,79)</u>
Amount payable	<u><u>3 664,16</u></u>

Example 3 – Pensioner receiving foreign dividends and foreign interest*Facts:*

Mr. B, age 72 and single, is a resident. For the 2008 year of assessment he earned a pension of R24 000 from a South African source.

In addition he received the following income:

	Dividends R	Interest R
South African source	50 000	60 000
Foreign sources	56 500	44 000
Withholding taxes paid in respect of foreign sourced dividends and interest	5 650	2 000

- An amount of R38 000 qualifies for a medical deduction under section 18.
- He also donated R5 000 to a public benefit organisation which has been approved for section 18A purposes.
- An unused foreign tax credit of R5 500 was brought forward from the 2007 year of assessment.

*Result:***(a) Calculation of taxable income**

	South African source R	Foreign sources R	Total R
Gross income	134 000	100 500	234 500
Pension income	24 000	Nil	24 000
Dividend income	50 000	56 500	106 500
Interest income	60 000	44 000	104 000
<i>Less:</i>			
Exempt income	73 000	3 000	76 000
General dividend exemption			
Section 10(1)(k)(i)	50 000	Nil	50 000
Basic investment income exemption			
Section 10(1)(j)(xv)(aa)	Nil	3 000	3 000
Section 10(1)(j)(xv)(bb)* (R26 000 – R3 000)	23 000	Nil	23 000
Income	61 000	97 500	158 500
<i>Less :</i>			
Donation to public benefit organisation			
Section 18A –			
Actual contribution: R5 000			
<u>Limited to 10% of R158 500 = R15 850</u>			
Thus the full R5 000 may be deducted.			
Apportionment of R5 000:			
(R61 000/R158 500 X R5 000) = R1 924			
(R97 500/R158 500 X R5 000) = R3 076	(1 924)	(3 076)	(5 000)
Taxable income before medical expenses	59 076	94 424	153 500
<i>Less:</i>			
Medical expenses			

Section 18(2)(c)(ii)

Deductible amount = R38 000

Apportionment of R38 000:

(R61 000/R158 500 X R38 000) = R14 625

(R97 500/R158 500 X R38 000) = R23 375

Taxable income

<u>(14 625)</u>	<u>(23 375)</u>	<u>(38 000)</u>
<u>44 451</u>	<u>71 049</u>	<u>115 500</u>

* As Mr B is above the age of 65 year he qualifies for an exemption of R26 000 less the R3 000 exemption in respect of foreign dividends = R23 000

(b) Calculation of normal tax before rebates

Normal tax payable: (Rates of tax – 2008 year of assessment)

	R
On R112 500	20 250,00
On R3 000 (25%)	<u>750,00</u>
Total	<u>21 000,00</u>

(c) Calculation of foreign taxes with relate to exempt foreign dividends

$\frac{R3\ 000}{R56\ 500} \times R5\ 650$
= R300

This amount is forfeited and cannot be carried forward to the 2009 year of assessment to be used as a foreign tax credit or deduction because it relates to exempt income.

(d) Calculation of foreign taxes which relate to taxable foreign dividends

	R
Foreign taxes payable in respect of gross foreign dividends	5 650,00
Less:	
Foreign taxes payable in respect of exempt foreign dividends	<u>(300,00)</u>
Foreign taxes which relate to taxable foreign dividends	<u>5 350,00</u>

(e) Calculation of foreign taxes which relate to total taxable foreign income

	R
Foreign taxes which relate to taxable foreign dividends	5 350,00
Withholding tax on foreign interest	<u>2 000,00</u>
Foreign taxes which relate to total taxable foreign income	<u>7 350,00</u>

(f) Calculation of the section 6quat rebate

	R
Amount of foreign taxes that qualify for the rebate	7 350,00
<u>Limited to</u>	<u>12 918,00</u>

Calculation of the R12 918 limitation:

$\frac{R71\ 049}{R115\ 500} \times R21\ 000$
= R12 918

Note:

The amount of the qualifying taxes of R7 350,00 is less than the amount of the limitation of R12 918,00 and is therefore allowable in full against normal tax payable.

(g) Calculation of the normal tax payable after taking into account rebates

	R	R
Normal tax before rebates		21 000,00
Less: Primary rebate		(7 740,00)
Secondary rebate		<u>(4 680,00)</u>
		8 580,00
Less: Section 6quat rebate		<u>(7 350,00)</u>
		1 230,00
Less: Excess foreign taxes brought forward from the 2007 year of assessment	5 500,00	
Limited to:	1 230,00	<u>(1 230,00)</u>
Amount payable		<u> Nil</u>

The excess foreign tax credit brought forward from the 2007 year of assessment which was not used in the 2008 year of assessment of R4 270,00 (R5 500,00 – R1 230,00) may be carried forward to the 2009 year of assessment to be used as a foreign tax credit in that year.

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Example 4 – Natural person receiving foreign dividends, foreign interest and a foreign capital gain

Facts:

Mr. D, aged 26, is a resident who derives income from both local and foreign sources during his 2008 year of assessment. None of the income derived from a foreign source is attributable to a permanent establishment of Mr. D located outside South Africa. Employees' tax (SITE and PAYE) of R10 285,29 was deducted by his employer from his domestic salary.

The following information is relevant:

Income items:

	R
• Domestic salary income	100 000
• Foreign dividends	40 000
• Capital gain resulting from the sale of immovable property located in South Africa	410 000
• Capital gain resulting from the sale of shares in a foreign company	360 000

Expense items:

• Donation to approved public benefit organisation	36 000
• Medical deduction under section 18	7 123
• Foreign withholding taxes on foreign dividends	4 000
• Foreign capital gains tax levied in respect of disposal of foreign shares (Calculation: R360 000 X 20%)	72 000

Result:

(a) Calculation of taxable income

	South African source R	Foreign sources R	Total R
Gross income			
Salary income	100 000	Nil	100 000
Dividend income	<u>Nil</u>	<u>40 000</u>	<u>40 000</u>
	100 000	40 000	140 000
<i>Less:</i>			
Exempt income:	<u>Nil</u>	<u>(3 000)</u>	<u>(3 000)</u>
Basic investment income exemption (section 10(1)(i)(xv)(aa))	<u>Nil</u>	<u>(3 000)</u>	<u>(3 000)</u>
Income	100 000	37 000	137 000
Taxable capital gain	<u>100 503</u>	<u>88 247</u>	<u>188 750</u>
Calculation:			
Inclusion rate for natural persons: 25%			
Amount included in taxable income: [((R360 000 + R410 000) – R15 000) X 25%] = R188 750			
South African portion of total taxable capital gain	100 503	0	100 503
Calculation: (R410 000/R770 000) X R188 750 = R100 503			
Foreign portion of total taxable capital gain	0	88 247	88 247
Calculation: (R360 000/R770 000) X R188 750 = R88 247			

Taxable income before donations and medical expenses	200 503	125 247	325 750
<i>Less:</i>			
Donation to approved public benefit organisation Section 18A – Actual contribution: R36 000 <u>Limited</u> to 10% of R325 750 = R32 575 Apportionment of R32 575 (R200 503/R325 750 X R32 575) = R20 050 (R125 247/R325 750 X R32 575) = R12 525			
	<u>(20 050)</u>	<u>(12 525)</u>	<u>(32 575)</u>
Taxable income before the deduction of medical expenses	180 453	112 722	293 175
<i>Less:</i>			
Qualifying medical deduction under section 18(2)(c)(ii) Apportionment of R7 123 (R200 503/R325 750 X R7 123) = R4 384 (R125 247/R325 750 X R7 123) = R2 739			
	<u>(4 384)</u>	<u>(2 739)</u>	<u>(7 123)</u>
Taxable income	<u>176 069</u>	<u>109 983</u>	<u>286 052</u>

(b) Calculation of normal tax payable before rebates

Normal tax payable: (Rates of tax – 2008 year of assessment)

	R
On R250 000	58 125,00
On R36 052 (35%)	<u>12 618,20</u>
Total	<u>70 743,20</u>

(c) Calculation of the portion of foreign taxes levied in respect of the foreign taxable capital gain which qualifies for the rebate calculation

	R
Total amount of foreign taxes on foreign capital gain	72 000,00
Portion of foreign taxes that relates to foreign taxable capital gain included in taxable income	17 649,40

Calculation:

<u>Amount of foreign taxable capital gain included in taxable income</u>	X	Foreign tax payable
Amount of foreign taxable capital gain subject to foreign taxes		
<u>R88 247</u>	X	R72 000
R360 000		
= <u>R17 649,40</u>		

Limited to R21 824,27

Calculation of the R21 824,27 limitation:

<u>Amount of foreign taxable capital gain included in taxable income</u>	X	Normal tax payable
Total taxable income derived from all sources		
<u>R88 247</u>	X	R70 743,20
R286 052		
= <u>R21 824,27</u>		

Note:

The amount of R17 649,40 qualifies for the section 6quat rebate calculation.

(d) Calculation of foreign taxes which relate to exempt foreign dividends

$$\begin{array}{r} \underline{R3\ 000} \\ R40\ 000 \end{array} \quad \times \quad R4\ 000 \\ = \underline{R300}$$

This amount is forfeited and cannot be carried forward to the 2009 year of assessment to be used as a foreign tax credit because it relates to exempt income.

(e) Calculation of foreign taxes which relate to taxable foreign dividends

	R
Foreign taxes payable in respect of gross foreign dividends	4 000
<i>Less:</i>	
Foreign taxes payable in respect of exempt foreign dividends	<u>(300)</u>
Foreign taxes which relate to taxable foreign dividends	<u>3 700</u>

(f) Calculation of the section 6quat rebate

	R
Qualifying foreign taxes in respect of foreign taxable capital gain	17 649,40
Qualifying foreign taxes in respect of foreign dividends	<u>3 700,00</u>
Total	<u>21 349,40</u>
<u>Limited to:</u>	27 199,77

Calculation of the R27 199,77 limitation:

<u>Taxable income derived from all foreign sources</u>	X	Normal tax payable
Total taxable income derived from all sources		
<u>R109 983</u>	X	70 743,20
R286 052		
= <u>R27 199,77</u>		

Note:

The full amount of R21 349,40 qualifies for the section 6quat rebate because it is less than the limitation amount.

(g) Calculation of the normal tax payable after taking into account rebates

	R
Normal tax payable before rebates	70 743,20
<i>Less: Primary rebate</i>	<u>(7 740,00)</u>
	63 003,20
<i>Less: Section 6quat rebate:</i>	(21 349,40)
SITE and PAYE	<u>(10 285,29)</u>
Amount payable (refundable)	<u>31 368,51</u>