ASAP

Legal and Technical Update

Access to retirement funds upon emigration or the cessation of a visa

Retirement annuities (RA)

The Pension Fund Act and the Income Tax Act allows for the withdrawal from a retirement annuity fund if:

- the member is in the process of emigrating, or
- the member has already emigrated from South Africa, or
- the member's Visa has expired.

Preservation funds

From 1 March 2019, preservation funds have been brought in line with RAs in respect of access due to emigration or the cessation of a visa.

Prior to the amendment, only members of preservation funds that did not use their one pre-retirement withdrawal could access their preservation fund benefits as a withdrawal. This was in terms of the normal rules applicable to preservation funds and not specifically due to emigration or the cessation of a visa. As a result, the member that has already used the one withdrawal at the time of emigration or cessation of a visa would not have been able to access the remaining funds in the preservation fund and they would have to wait until retirement to access some or all of the funds (depending on whether it is a pension or provident preservation fund).

The amendment introduced the ability of members to withdrawal preservation fund benefits at the time of emigration or the cessation of a visa, irrespective of whether the one withdrawal was used or not.

Note – In light of the recent amendments allowing for the preservation of retirement benefits by transferring it to an RA or a preservation fund, it is important to remember that retirement benefits are not accessible due to emigration or the cessation of a visa and therefore these post retirement preservation benefits will not be accessible.

Emigration clarified

It is important to understand what is defined as emigration by the SA Reserve Bank (SARB) and SARS. The Exchange Control Handbook determines that all SA residents are able to emigrate insofar they leave the country to reside in any other country outside the CMA (includes Namibia, Lesotho, Swaziland).

The definition of resident refers to someone (a natural person) that is permanently resident in SA or domiciled here. Permanent residency for this purpose is not directly linked to a permanent residence permit or citizenship. Therefore, a foreign national that is permanently resident in SA can also be seen to emigrate when leaving the country on a permanent basis. This is a subjective test and circumstances and duration spent in the country will be considered.

If a foreign national enters the country on a temporary basis (for example on a temporary working visa) and that person makes a declaration to the authorized dealer that he/she is in SA for a limited period of time and intends to return to the country of origin when the contract is terminated, that individual will not be able to emigrate – in this instance the cessation of the Visa can result in access to the retirement annuity.

(Note all major banks are authorized dealers that act as agents of the SARB for the purposes of exchange control and clients should consult with their banks to gain clarity on their specific circumstances.)

When advising a foreign national on an investment in a retirement annuity it is important to determine the future access to the funds prior to making the recommendation. If it is found that the person cannot emigrate from SA as shown above or there is no Visa that will expire, it is important to explain that access to the retirement annuity will be restricted until retirement, disability or death (or if the retirement annuity is made paid up and the value in that fund is less than R7 000).

Important note:

Access to a retirement annuity due to emigration or the cessation of a Visa is restricted to any time **prior** to the retirement date being reached. No withdrawal due to emigration or the expiry of a Visa will be allowed after the retirement date. If a person has reached the retirement date as defined in the rules of the fund, they will only be entitled to a maximum 1/3 cash lump sum.

Each retirement annuity fund rules are unique. The Momentum fund rules define the retirement date as the date on which the member has formally requested retirement from the fund and all the administrative requirements necessary to give effect to the instruction has been met - provided that the member is eligible to retire on that date in terms of the Income Tax Act.

Therefore, if a client is older than 55 and the member has not yet informed the fund of the wish to retire, the retirement date has not been reached and withdrawal due to emigration or the cessation of a Visa will be possible.

Administrative requirements to access funds due to EMIGRATION:

The administration requirements no longer support a process to be following during the emigration process. Access to the RA will therefore only be possible once the emigration process is concluded and all the required documents are available.

The fund will complete a manual Form C for retirement annuities and a Form B for preservation funds, and the following administrative documents will be required:

- A letter from the Authorised dealer to confirm that the emigration was recognised by the South African Reserve Bank for purposes of exchange control;
- A copy of the:
  - Tax Clearance Certificate in respect of emigrations issued by SARS; or
  - 'Tax Compliance Status - Pin issued'; or
  - An affidavit indicating the reason a TCC cannot be provided; and
- The member's certificate of residence obtained from the relevant Tax Authority of the country in which the member resides.

NOTE:

- Only a certificate of residence issued by the Tax Authority of the country in which the member resides in accordance with the Double Taxation Agreement (DTA) between SA and the country of residence will be accepted.
- If there is no DTA in place the member must still obtain a certificate of residence from the relevant Tax Authority or an immigration and citizenship certificate.
  - An immigration and citizenship certificate can only be accepted if there is no DTA in place between the Republic of South Africa and the new country of residence, or if the country has no taxation system.
  - If there is a DTA in place, the immigration and/or citizenship document cannot be accepted. In that case the Tax Authority must confirm residence for tax purposes.

Administrative requirements to access funds due to EXPIRY OF VISA:

The fund will complete a manual Form C in respect of the RA and a Form D for a preservation fund.

The following supporting documents will be required:

- A copy of the Certificate of residency obtained from the relevant Tax Authority of the country where the member permanently resides;
- A copy of the passport validating the exit from SA;
- A copy of the Visa indicating the expiry date and the applicable paragraph in the definition of 'Visa" in S1 of The Immigration Act in terms of which the Visa was issued.

Note:

Where a person belongs to more than one retirement annuity fund or preservation fund, nothing prescribes that a withdrawal must be made from all of the funds at the same time. The member can action the withdrawals as and when they deem it appropriate, as long as the abovementioned requirements are met.

This can be useful where an emigrant has already used the emigration allowance in the given year and where all excess funds are paid into a blocked rand account. The retirement annuity may provide a better net return than the blocked rand account due to the fact that there is no income tax payable on the returns generated in the fund. However, each case must be evaluated based on its own merits.

Other retirement funds

Where a member of a pension or provident fund leaves SA due to emigration or the expiry of a Visa, or for any other reason, the member will resign from their employment and the fund and will be entitled to withdraw the resignation benefit. The administrative process will be exactly the same as if the member resigned from the fund to join another employer and made the election to make a withdrawal.

Living annuities

No access to the living annuity capital is possible due to the emigration or visa expiry of an annuitant.

Income tax implications

The SA tax system is based on residency meaning that all SA tax residents are taxed on their worldwide income in SA.

Where a person is no longer a SA tax resident, the tax system becomes source based, meaning that income tax is payable in SA on all income from a SA source. The result is that the withdrawal amount will be subject to income tax in SA either way – irrespective of whether the person is a SA tax resident or not at the time of making the withdrawal. (Most double taxation agreements will support this rule.)

The lump sum withdrawal amount will be subject to income tax in accordance with the Second Schedule to the Income Tax Act and the tax table applicable to withdrawals will apply. The normal aggregation rules apply.

If the person resides in a country where the amount is also taxable, the double taxation agreement that exist between SA and that country will dictate which jurisdiction has the authority to tax – in general it will be where the source is. If, however, tax is still payable on the same amount in that other country, a tax credit is generally allowed for the income tax paid in the country of source.

The net amount will be remitted offshore where the withdrawal was due to Visa expiry.

Where it was due to emigration, the net amount will form part of the overall emigration allowance limits.

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