LEARNING UNIT 5:

RESIDENTS AND NON-RESIDENTS AND DOUBLE TAX AGREEMENTS (DTA'S)

LEARNING OUTCOMES

After studying learning unit ("LU") 5, you should be able to achieve the following outcomes:

- Evaluate whether a taxpayer is a resident for income tax purposes.
- Identify the factors that should be considered in cross-border transactions.
- Determine whether the source of income that was received by a taxpayer is from a South African source.
- Understand the double tax treaty principles (only Mauritius and UK) and apply it to the case study.
- Briefly discuss, (with supporting calculations) any withholding taxes applicable to a non-resident.
- Discuss and determine specific exemptions, rebates, or deductions applicable and understand the impact thereof on foreign taxes paid.

STUDY PROGRAMME AND TIME FRAME

A total of 6 hours 40 minutesof your study time is allocated to LU 5.

Your time should be divided between two aspects:

- Obtaining the required knowledge
  This entails working through this learning unit **and** the textbooks (SAICA Student Handbook and SILKE), underlining, making summaries and familiarising yourself with the determination of income.
- Application of knowledge
  This entails the completion of the examples and activities included in this learning unit. After completion of your studies of LU's 4 to 6 you will have the opportunity to test your knowledge by completing some questions which will comprise of integrated activities covering the three LU's in Topic 2, but it will also incorporate some of the sections covered during your studies of Topic 1 last week. These integrated activities will be included at the end of LU 6.

The following time allocation is recommended:

Residents and non-residents and double tax agreements		**Minutes**
	Outcomes and assessment criteria	5
5.1	Background	5
5.2	Content of learning unit 5 (5.2.1 Study approach)	5
5.3	Important law amendments	10
5.4, 5.5	Additional notes on residents, non-residents and withholding taxes (including 30 minutes provided for section 9H and 30 minutes for the two illustrative examples), Double Tax Agreements (DTAs)/Tax treaties (including Activity 5.1 (45 minutes) and Activity 5.2 (40 minutes)	245
5.6	Discussion Forum activity: Comprehensive example (Activity 5.3)	30
5.8	Integrated activities 5.4 and 5.5	100
	Total	**400**

Note that there is a lot of work to master in the allocated time, however all the sections covered in this LU, *except for section 9H* (Change of residence – see SILKE par 3.2.3), have been covered in your undergraduate studies. The time in this learning unit will be allocated to those sections that were not included in your prior studies and to additional notes and examples to ensure deeper learning and the development of your decision-making skills. If the time allocated is not enough, you will have to refresh your memory regarding sections you already covered in your prior studies **in your own time**.

5.1 BACKGROUND

South Africa opted for a hybrid system for the years of assessment commencing on or after 1 January 2001. Its traditional source-based system of taxation remains for non-residents, but its residents are taxed on a residence (worldwide) basis of taxation.

Residence as a basis of taxation is founded on the premise that because the taxpayer enjoys the comfort and protection of the country in which they reside, all their income should be taxed in that country. Source, on the other hand, is based on the premise that because the resources of the country give rise to the income, the income should be taxed in that country.

It is therefore important to be able to determine whether a person is a resident or a non-resident for tax purposes, as this will have an impact on the South African tax liability.

5.1.1 UNGC Principle 10

The UNGC principles were introduced in LU 2. Compliance with the laws and regulations is the basis on which the taxation legislation is founded.

UNGC principle 10 states that businesses should work against corruption in all its forms, including extortion and bribery. The definition of corruption includes dishonest or fraudulent conduct. Tax evasion would fall within the ambit of corruption. UNGC principle 10 encourages entities to find a balance between the social obligation to pay taxes and tax planning, in order to minimise the ‘cost’ of these taxes for an entity within the ambit of the law. You should always be aware that a taxpayer should not deliberately incorrectly classify themselves as either a resident or a non-resident, or fraudulently apply DTAs, to not pay tax in their country of origin and/or that of their adopted country. It is important to take note of the UNGC principle 10 when studying this unit.

5.2 CONTENT OF LEARNING UNIT 5

5.2.1 Study approach

For ease, we provide you with either a short summary of your study activity, or a Table of Reference under every sub-heading. Refer to LU 4, note 4.3 for an outline of the study approach followed for Topic 2.

We will enhance your understanding of some concepts with activities in the LU. The time provided for each activity (question or example) is calculated as 6 minutes per page of reading time for each activity, 1.5 minute for every mark and then 6 minutes per page of the solution for you to review your answer against the solution provided.

5.3 IMPORTANT LAW AMENDMENTS

The taxation laws are amended annually and the following Acts, relevant to your studies, were promulgated on 22 December 2023:

- Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2023
- Taxation Laws Amendment Act 17 of 2023
- Tax Administration Laws Amendment Act 18 of 2023

Use the following link to access the newly published Acts:
https://www.sars.gov.za/legal-counsel/primary-legislation/amendment-acts/

The important proposed amendments, which are applicable to this LU, are summarised below.

Law amendments enacted by the Taxation Laws Amendment Act 17 of 2023:	
Section 9(2)(*k*)	**Source of income:** Section 9(2)(*k*) had two minor grammatical amendments – "connected **with** a permanent establishment" replaced with "connected **to** a permanent establishment" in two subsections. This amendment clarifies the connection ("nexus") of an asset to a permanent establishment.
Section 9H(4)*(c)*	**Exemption of foreign dividends and dividends paid or declared by headquarter companies:** This amendment changes the word "**attributable**" to "**effectively connected**" in section 9H(4)(*c*), this clarifies the connection ("nexus") of an asset to a permanent establishment.
Section 35A	**Withholding of amounts from payments to non-resident sellers of immovable property:** The term "**estate agent**" as contemplated in the Estate Agency Affairs Act, 1976 (Act No. 112 of 1976) was replaced throughout section 35A with the term "**property practitioner**" as contemplated in the Property Practitioners Act, 2019 (Act No. 22 of 2019). This amendment replaced an obsolete reference with the correct reference.
Section 50D(1)(*f*)	**Exemption from withholding tax on interest:** Effective from 1 March 2024, South African sourced interest received by or accrued to a resident trust and paid to a beneficiary of that trust that is a resident, will not be subject to the withholding tax on interest (s 50D(1)(*f*)).

5.4 ADDITIONAL NOTES ON RESIDENTS, NON-RESIDENTS AND WITHHOLDING TAXES

5.4.1 The meaning of residence

Residence

- Read par (*a*) of the definition of resident in section 1 of the Income Tax Act.
- Revise par 3.2 – 3.2.1 in SILKE together with the notes provided below.
- To enhance your understanding of the definition of Resident for a natural person you can review Interpretation Note 3 (Issue 2) (Resident: Definition in relation to a natural person – ordinarily resident) (see below link to access).
- Refer to Chapter 2 of the **Case Law Guide** for relevant court cases to analyse and apply the applicable case law principles relating to residents (*CIR v Kuttel* and *Cohen v CIR*)).

Non-resident

- Read par (*b*) of the definition of resident in section 1 of the Income Tax Act.
- Revise par 3.2.2 in SILKE together with the notes provided below.

Interpretation Notes are not included in the SAICA Student Handbook, but to the extent that an Interpretation Note creates a practice generally prevailing (refer to section 5 of the Tax Administration Act), the relevant extract will be provided in the test or examination. Below is a list of Interpretation Notes that relates to Residents.

Interpretation Notes are available at: [Interpretation Notes | South African Revenue Service (sars.gov.za)]

Interpretation Notes
Interpretation Note: No. 3 (Issue 2). Date: 20 June 2018 - Resident: Definition in relation to a natural person - ordinarily resident
Interpretation Note No. 4 (Issue 5). Date: 3 August 2018 - Resident: Definition in relation to a natural person - physical presence test
Interpretation Note: No. 6 (Issue 3). Date: 30 June 2023 - Resident – Place of effective management (companies)
Interpretation Note: No. 25 (Issue 3). Date: 12 March 2014 - Resident: Definition in relation to a natural person - application of the physical presence test in the year of death or insolvency

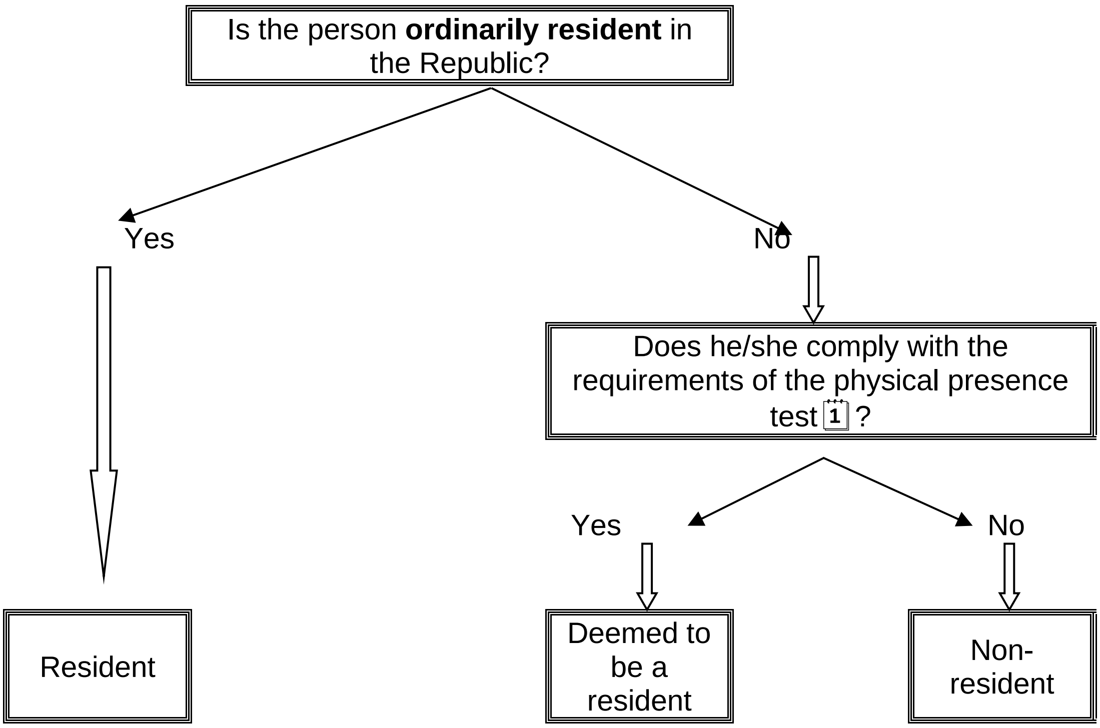
Residence of natural persons

"Resident" as defined is wider than the concept of ordinarily resident, as it includes a physical presence test in its definition.

To establish whether a natural person is a resident, two tests are applied:

- the ordinarily resident test
- the physical presence test (only done if **NOT ordinarily resident** in the Republic!)

The following diagram is useful:



1 Refer to examples 3.1 & 3.2 in SILKE for a practical application of the physical presence test.

You won't be required to calculate the number of days in and out of South Africa (physical presence test), but you are expected to know how to apply the principles of the physical presence test in appropriate circumstances (the number of days will be provided in questions).

Remember that this test only applies in the year of assessment that a person is not ordinarily resident at any time. The year of assessment that a person is ordinarily resident ends on the day before he/she emigrates (ceases to be ordinarily resident). The new year of assessment commences on the day of emigration. (If you need to deepen your understanding of this concept, review SILKE par 3.2.1.)

Remember that section 10(1)(*i*) (the interest exemption), section 12T (the annual investment contribution limit) and par 5 of the Eighth Schedule (annual CGT exclusion) will be apportioned in the year of assessment when you emigrate.

Change of residence – section 9H *(30 minutes)*

Legislation Income Tax Act (Not covered in undergrad)	**Reference to SILKE**	**Application**	**Notes**	**Examinable**
S 9H	3.2.3	Change of residence, ceasing to be controlled foreign company or becoming headquarter company	LU 5	Yes
S 9H	3.2.3	*Reference to headquarter company and CFC, as well as sections 8A and 8B*		No

Since section 9H is a new section not covered in your undergraduate studies, we provide dedicated time for you to study this section and the paragraph in Silke. Section 9H provides for an exit charge when a person ceases to be a resident. When a natural person or a company ceases to be a resident, that person is deemed to have disposed of each of the assets at market value on the day before that person ceases to be a resident and reacquired each of the assets at an expenditure equal to the market value on the day that person ceases to be a resident. This could trigger either a capital or a revenue gain. Subsection 9H(7) stipulates that the market value of such assets reacquired will be in the same currency in which the assets were originally acquired.

In the case of companies, a dividend *in specie* is also deemed to have been declared in terms of s 9H(3). More detail on this is given in Topic 5. Remember that in terms of section 9H(4), certain assets are excluded from this deemed disposal, for instance immovable property situated in the Republic.

5.4.2 The meaning of source

- Revise par (ii) of the definition of gross income in section 1 of the Income Tax Act.
- Read section 9 and 9J of the Income Tax Act. *Sections 9(1), 9(2)(c), (d), (e), (f), (g), (h) and (l), 9(4)(c) & (e) are excluded from the ITC 2025 Tax knowledge list.*
- Refer to Chapter 2 of the **Case Law Guide** to review the applicable case law principles in *CIR v Lever Brothers and Unilever Ltd* if your prior learning is not in place.
- Read the first part of par 21.3 in SILKE.
- Review par 21.3.1 (interest income), 21.3.2 (dividend income), 21.3.4 (rental income), 21.3.5 (disposal of assets), 21.3.6 (services rendered) and 21.3.8 (retirement fund) in SILKE together with our notes and summaries below – focus the time allowed for this LU on those sections that you have not yet mastered in your undergraduate studies.

The starting point to determine the source of income is section 9, which contains the source rules. Common law (case law) remains only as the residual method for categories of income not addressed by section 9, for instance rental income and income from annuities. The case law rule of originating cause will continue to be used for such income.

Source rules – section 9

The following table will assist you in understanding the source rules contained in section 9 ***(note that s 9(1), 9(2)(c), (d), (e), (f), (g), (h) and (l) as well as 9(4)(c) and (e) are excluded from the ITC 2025 Tax knowledge list for the reason that the source rules laid down in some of these subsections are similar to the rule with regards to interest in s 9(2)(b). You do not have to study these subsections, but we include them for the sake of completeness)***:

Type of income	Section	Source within the Republic in terms of section 9
Dividends	9(2)(*a*)	Any dividend received or accrued Remember – dividend as defined excludes foreign dividends.
Interest received	9(2)(*b*)	Interest received if the debtor is a resident OR if the funds are utilised in the Republic
	9(2)(*b*)(i)	Interest is attributable to a permanent establishment situated outside RSA if it arises from a loan, etc given by that permanent establishment and not by the resident in his/her own capacity. Remember the source rules are there to ensure that only RSA sourced income is taxed in RSA, not foreign income. So, interest arising from a loan from a permanent establishment outside RSA is not from an RSA source and should not be taxable in the hands of a non-resident in RSA.
Royalties	9(2)(*c*) and 9(4)(*c*)	*If the person paying the royalty is a resident*
	9(2)(*d*)	*If the intellectual property is used or the right to use is granted in the Republic*
Scientific, technical, industrial or commercial (STIC) knowledge or information	9(2)(*e*)	*If the person paying for the STIC knowledge or information is a resident*
	9(2)(*f*)	*If the STIC knowledge or information is used or the right to use is granted in the Republic*
Public office	9(2)(*g*)	*Amounts received in respect of the holding of a public office to which that person has been appointed in terms of an Act of Parliament*
Public office	9(2)(*h*)	*Amounts received in respect of services rendered or work or labour performed on behalf of an employer who is a government entity, etc., without any regard to where it is rendered*
Pensions and annuities	9(2)(*i*)	The pro rata portion of pensions and annuities received connected to the number of years of service rendered within the Republic
Capital gain – immovable property	9(2)(*j*)	If the immovable property is situated in the Republic (as defined in par 2 of the Eighth Schedule) (note 1)

Type of income	Section	Source within the Republic in terms of section 9
Capital gain – movable property	9(2)(*k*)	If the person is a resident and the asset is not effectively connected to a permanent establishment situated outside the Republic and the proceeds from the disposal of that asset are not subject to any taxes on income payable to any sphere of government of any country other than the Republic OR the person is a non-resident and the asset is connected to a permanent establishment situated in the Republic
Exchange differences	*9(2)(l) and 9(4)(e)*	*If the person is a resident and the exchange item is not effectively connected to a permanent establishment situated outside the Republic and that amount is not subject to any taxes on income payable to any sphere of government of any country other than the Republic OR the person is a non-resident and the exchange item is effectively connected to a permanent establishment situated in the Republic*

Note 1: Section 9J deems any direct or indirect interest of a non-resident in immovable property situated in South Africa as a South African source asset, even if the interest is held for revenue purposes as trading stock and trigger normal tax.

Source rules – other income (case law)

The following table will assist you in understanding the source rules of the case law:

Type of income	Section/SILKE	Case law – originating cause
Contractual annuity	-	Contract in terms of which annuity is paid
Purchased annuity	-	In practice, the place where the contract was entered into
Rental income - fixed property	21.3.4	Where the fixed property is situated
Rental income – movable property	21.3.4	Emphasis on the • use of assets; or • location of business operations
Business income	21.3.6	Carrying on of business or employment of business capital (whichever is dominant)
Remuneration for servi-ces rendered	21.3.6	Where the services were rendered
Foreign entertainers and sportspersons	*S 47A-47K*	Where the skills were applied

If you want to gain a better under understanding of business income, you might find the following publication interesting:
https://www.treasury.gov.za/publications/other/katz/5.pdf

Keep section 9(4) in mind when applying the case law rules to determine the source of income. Section 9(4) specifically determines that certain amounts received by a person are from a source outside the Republic and they cannot consequently be from a source within the Republic in terms of case law. Section 9 takes precedence over (overrides) case law.

5.4.3 Non-residents

South African taxation of income of non-residents

- Revise par (ii) of the definition of gross income in section 1 of the Income Tax Act.
- Read the introduction of par 21.5.1 in SILKE.
- Study par 21.5.2 together with par 5.2.2 in SILKE.
- Work through the examples provided below.

In par 5.4.2 of LU 5, we examined the source rules in section 9 of the Income Tax Act as well as the case law rules applicable to source. You must remember that a resident must include their worldwide receipts and accruals in gross income. A non-resident (also referred to as a foreigner), however, only needs to include receipts and accruals from a source within the Republic in gross income, in terms of section 9 as well as case law.

Whether dealing with a resident or a non-resident, the tax framework remains the same:

GROSS INCOME (defined in section 1)
    LESS: Exempt income (sections 10, 10A, 10B and 10C and 12T)
= INCOME (defined in section 1)
    LESS: Deductions
    ADD: Amounts to be included in taxable income, including **TAXABLE CAPITAL GAIN**
    LESS: Qualifying donations (section 18A)
= TAXABLE INCOME (defined in section 1)

TAXABLE INCOME is used to calculate **NORMAL TAX.**

The source rules are important as they determine which amounts must be included in the gross income of a non-resident. However, just as important are the relevant exemptions in section 10 of the Income Tax Act, as well as the applicable withholding taxes. Once you have reviewed and studied the above paragraphs in SILKE and the legislation, work through the two illustrative examples below.

Illustrative examples *(30 minutes)*

Example 1 – Source rules

Mr A, 55 years old, emigrated from the Republic five years ago and has since been ordinarily resident outside the Republic. He is also not a resident in terms of the physical presence test for South African income tax purposes for the 2024 year of assessment. He is therefore a non-resident and is taxed on income from a source within the Republic. (Ignore any DTA, unless mentioned otherwise.)

REQUIRED: Critically evaluate, which of the amounts (if any) should be included in Mr A's taxable income in the Republic for the 2024 year of assessment.

Contractual annuity

Before he emigrated, Mr A purchased a 10-year annuity from a South African insurance company. He paid R180 000 for it and has been receiving R2 500 per month as from 1 March 2019. Mr A received R30 000 (R2 500 x 12 months) during the 2024 year of assessment.

Suggested solution

As there is no specific source rule in terms of section 9 of the Income Tax Act that can be applied, case law applies. The originating cause of the annuity is the contract in terms of which it is payable. As the contract was entered into in the RSA, the R30 000 is from a South African source and should be included in Mr A's gross income. However, in terms of section 10A, Mr A will be entitled to an exemption of the capital portion of the annuity amount, calculated as follows:

R180 000/(R2 500 x 12 months x 10 years) x R30 000 = R18 000. The amount to be included in Mr A's income: R30 000 - R18 000 = R12 000.

Dividends

Mr A received gross dividends to the amount of R5 000 during the 2024 year of assessment in respect of shares which he still holds in South African listed companies, incorporated in terms of the South African Companies Act.

Suggested solution

In terms of section 9(2)(*a*), any dividend received by a person, excluding a foreign dividend (as defined), is from a source within the Republic. The R5 000 is therefore from a source within the Republic and must be included in Mr A's gross income. The dividends are, however, fully exempt in terms of section 10(1)(*k*)(i) and therefore no amount will be taxable as part of Mr A's income.

Services rendered

During the 2024 year of assessment Mr A also entered into an agreement with a South African company in terms of which he does contract work for them in the Republic from time to time. Assume that according to the relevant DTA, Mr A is not taxed on this remuneration in the country in which he is now resident.

Suggested solution

As there is no specific source rule in section 9 of the Income Tax Act, case law applies. The work is physically done in the Republic, so the true source of the remuneration is where the services were rendered, i.e. the Republic. It will therefore be included in his gross income and consequently in his income.

Rental income

Mr A still owns a furnished flat in Hout Bay, which he lets to tenants. He receives R15 000 rental per month, R10 000 of which is for the flat and R5 000 for the furniture.

Suggested solution

As there is no specific source rule in section 9 of the Income Tax Act, case law applies. The flat is located in the RSA, so the R10 000 rental income is from a source within the Republic and should be included in his gross income. The R5 000 rental income for the furniture (i.e. movable assets) will also be from a source within the Republic as the letting operations are located in the RSA. Therefore, the full R15 000 per month will have to be included in gross income.

Interest received

During the 2024 year of assessment, Mr A made an *ad hoc* loan to one of his old friends. The credit was granted overseas and the friend (who is ordinarily resident in the Republic) utilised the funds in the RSA. Mr A received R30 000 interest in respect of the loan during the 2024 year of assessment.

Suggested solution

In terms of section 9(2)(*b*), interest is received from a source within the Republic if the debtor is a resident OR if the funds are utilised in the Republic. Therefore, the interest is received from a source within the Republic and needs to be included in Mr A's gross income.

The interest accrued to Mr A. Mr A will be liable for 15% withholding tax on interest in terms of section 50B(1) if he does not qualify for a section 50D(1) exemption. As his friend does not qualify as a banking institution nor a listed financial institution, withholding tax will apply – refer to note 5.4.4 on withholding tax below (and also SILKE chapter 21.5.2.1 and 21.5.2.5).

To qualify for the section 10(1)(*h*) exemption he should not have been physically present in the Republic for a period exceeding 183 days in aggregate in the 12-month period preceding the date on which the interest is received by him, and the debt from which the interest arises is not connected to a permanent establishment of him in the Republic.

Even though Mr A's letting activities are regarded as a trade, as defined, the extent of letting out one flat will not be regarded as "the carrying on of a business through a permanent establishment". He is also not a moneylender. In other words, he is not carrying on a business in a permanent establishment in the Republic. The interest income of R30 000 will therefore be exempt in full in terms of section 10(1)(*h*) so that no amount will be included in income as defined.

Pension received

When Mr A was 50 years old, he retired from the services of his South African employer where he had been working for many years. He emigrated immediately afterwards. He has been receiving a monthly pension of R18 000 from this previous employer from 1 March 2023.

Suggested solution

In terms of section 9(2)(*i*), a pension is from a source within the Republic if the services were rendered in the Republic. This being the case, Mr A will have to include the pension received in his gross income. The R216 000 (R18 000 x 12 months) will therefore be included in his gross income.

> Note that the section 10(1)(*g*C)(ii) exemption does not apply to amounts received from retirement funds as defined in section 1 (domestic retirement funds). However if the taxpayer transfers his foreign retirement funds on retirement to a South African retirement fund, section 10(1)(*g*C)(ii) will apportion these amounts so that the taxpayer is not taxed on the foreign portion. Refer to Interpretation Note No. 104 par 4.2.

Example 2 – Pensions

Mr E worked abroad for a foreign company for 15 years. Thereafter he worked in the RSA for the foreign company for 18 years, after which he retired on 28 February 2023 and transferred his total foreign fund to South Africa. He has been receiving a monthly pension of R18 000 (from 1 March 2023) from this pension fund. Assume that no DTA is applicable.

REQUIRED:

Calculate which amount (if any) must be included in Mr E's gross income for the 2024 year of assessment and which exemptions (if any) he is entitled to if

(a) he is a resident
(b) he is a non-resident and receives a pension amount from a South African fund (ignore any DTA)

Suggested solution

(a) Resident	**R**
Gross income (R18 000 x 12 months) (Note)	216 000
Less: Exemption - section 10(1)(*g*C)(ii) (15/(15 + 18) x R216 000)	(98 182)
Income	117 818

Note: In terms of the definition of gross income, Mr E must include his worldwide receipts and accruals in gross income, but 15/33 x R216 000 is regarded not to be from a source within the Republic and is therefore subject to the section 10(1)(*g*C) exemption.

(b) Non-resident	**R**
Gross income in terms of s 9(2)(*i*) (18/(15 + 18) x R216 000) - Note ❶	117 818
Less: Exemptions	nil
Income	117 818

Note ❶: In terms of section 9(2)(*i*) and section 9(3)(*a*), the pro rata portion of a pension received connected to the number of years of services rendered within the Republic is from a source within the Republic. Therefore 18/(15 + 18) x R216 000 = R117 818 of the pension received is from a source within the Republic and needs to be included in the gross income of Mr E.

5.4.4 Withholding taxes applicable to income received by non-residents

- Read the relevant sections in the Income Tax Act as indicated in the table of reference below.
- Review the paragraphs in SILKE (as indicated below) together with the summary provided in par 5.4.5 below – focus on any sections you have not yet mastered during your undergraduate studies.

Section	SILKE	Application	Examinable
35A	21.5.2.2	Withholding tax on payments in respect of the disposal of immovable property in South Africa Section 35A (8) – (13)	Yes No
47A – 47K	21.5.2.3	Final withholding tax on foreign entertainers and sportspersons	No
49A – 49H	21.5.2.4	Final withholding tax on royalties	No
50A – 50H	21.5.2.5 and 5.2.2	Final withholding tax on interest earned by a foreign person that is not a controlled foreign company; and payment and recovery of tax. Section 50D(1)(*a*)(i)(*cc*), (*b*), (*c*) & (*d*), 50D(2)	Yes No
50G	21.5.2.5	Final withholding tax on interest earned by a foreign person that is not a controlled foreign company	No
64D – 64N		Dividends tax – (Refer Topic 5) You however need to know that 20% dividends tax is withheld before a local dividend is paid to an individual.	Topic 5

The following Interpretation Note relates to withholding tax on interest:

Interpretation Notes are available at: [Interpretation Notes | South African Revenue Service (sars.gov.za)]

Interpretation Note:
Interpretation Note: No. 115 (Issue 2). Date: 30 June 2023 - Withholding tax on interest (s 50A – 50H)

5.4.5 Summary of income received by non-residents and applicable withholding taxes *(grey-highlighted sections are excluded)*

Receipt or accrual by non-resident	Gross income inclusion	Exemption	Withholding tax	Summary	SILKE
Interest received (from the Republic)	s 9(2)(*b*)	s 10(1)(*h*) or (*i*)	s 50A – 50H (s 50D(1)(*b*), (*c*) & (*d*), 50D(2) & 50G excluded)	• Applies to interest received on or after 1 March 2015 • Will be subject to a 15% final withholding tax in terms of s 50B(1), **except** if - it specifically qualifies for exemption from withholding tax in terms of s 50D(1)(*a*) – (*f*) (i.e. for example interest received from the government, a bank); or - it specifically qualifies for exemption from withholding tax in terms of s 50D(3), that is, if the person was physically present in the Republic more than 183 days in total during the 12 months preceding the date of receipt; or if the debt claim in respect of which the interest is paid is effectively connected to a permanent establishment of a foreign person in the Republic – meaning s 10(1)(*h*) will not apply. • If the interest amount fulfils the requirements of section 10(1)(*h*), the gross amount will be exempt from gross income, that is, if the person is **not** physically present in the Republic more than 183 days in total during the 12 months preceding the date of receipt, or if the debt claim in respect of which the interest is paid is **not** effectively connected to a permanent establishment of a foreign person in the Republic. • If it is **not** exempt in terms of s 10(1)(*h*), then it can qualify for the s 10(1)(*i*) exemption. • The s 10(1)(*i*) exemption is only available to natural persons, whereas the s 10(1)(*h*) exemption is available to all qualifying persons, including companies.	21.3.2 21.5.2.5 5.2.1 5.2.2 5.10.3
Foreign interest received	Not gross income	-	-	No source rules or principles of common law	-

Receipt or accrual by non-resident	**Gross income inclusion**	**Exemption**	**Withholding tax**	**Summary**	**SILKE**
Dividend received (from the Republic)	s 9(2)(*a*)	s 10(1)(k)(*i*) proviso (*dd*)-(*kk*) excluded	s 64D – 64N	• Full exemption in terms of s 10(1)(*k*)(i), but subject to 20% final dividends tax. • Exempt from dividends tax if the company paying the dividend is a non-resident and it is paid in terms of a listed share (dual listed companies).	21.3.1 5.3 Topic 5
Foreign dividend received	Not gross income	-	-	No source rules or principles of common law	
Pensions or annuities	s 9(2)(*i*)	-	Employees' tax	Only the portion which relates to years of services rendered in the Republic is from a source in the Republic and consequently gross income.	21.3.8
Capital gain – immovable property	s 9(2)(*j*) & s 26A	Not exempt	s 35A	• The purchaser of the immovable property of a foreign owner must withhold tax in respect of the disposal at either 7.5% (seller is natural person), 10% (seller is a company) or 15% (seller is a trust) if the purchase price is more than R2 million. • This is not a final withholding tax, but only a pre-payment of any tax liability which may arise from the disposal of the fixed property. • The same principle applies where non-residents disposes of immovable property or an interest or right therein as trading stock (deemed to be from a South African source under s 9J).	21.5.2.2 17.3.3 21.3.5 17.3.2
Capital gain – movable property	s 9(2)(*k*) & s 26A	Not exempt	-		21.3.5
Recoupments in terms of section 8(4)	Par (*n*) of gross income definition	-	-		
Other income:	Case law	-	-		21.3

5.4.5 Summary of taxes applicable to non-residents

The tax	The application
<u>Value-Added Tax Act</u>	• No distinction between **residents and non-residents**. If an enterprise is carried on in the Republic, then the taxpayer must register for VAT if all the requirements are met.
<u>Estate Duty Act</u>	• Applicable to a person **ordinarily resident** in the Republic on worldwide assets. • Applicable to persons **not ordinarily resident** in the Republic on assets situated in the Republic.
<u>Income Tax Act</u> Normal tax (excluding section 26A - taxable capital gains)	• Applicable to a **resident** on worldwide gross income. • Applicable to **non-residents** only on gross income from a source within the Republic.
<u>Income Tax Act (Eighth Schedule)</u> Determination of taxable capital gain and assessed capital losses	• Applicable to a **resident** on worldwide assets. • Only applicable to **non-residents** on immovable property situated in the Republic and assets which are attributable to a permanent establishment of that person in the Republic through which the non-resident carries on business in the Republic.
<u>Income Tax Act</u> Donations tax (section 54 – 64)	• Only applicable to a **resident**.
<u>Income Tax Act</u> • Withholding tax on non-resident sellers of immovable property • Withholding tax on interest received	• Applicable in respect of the disposal of immovable property by **non-residents.** • Applicable to **non-residents** who receive interest. Exempt in terms of section 10(1)(*h*).
<u>Income Tax Act</u> Dividends tax on companies	• Only applicable to a **resident** company and non-resident companies if it is a listed share (and not a dividend in *specie*). • Refer to Topic 7.

5.5 DOUBLE TAX AGREEMENTS (DTA'S)/TAX TREATIES

- Read SILKE 21.4 (Tax Treaties (DTA's)) as well as notes provided below.
- Review SILKE 21.4.1 – 21.4.2 as well as SILKE 21.4.3 – 21.4.3.3, 21.4.3.5, 21.4.3.9 and 21.4.3.10 and study sections you have not mastered in your undergraduate studies during your own time.
- Only the DTA between South Africa and Mauritius and the DTA between South Africa and the United Kingdom respectively are examinable and it will be printed in the Student Handbook. Do **not** assume that a person carries on business through a "permanent establishment". It will be specifically stated if there is a permanent establishment.

Double tax means that a taxpayer is subject to tax on the same income in two countries. A DTA is a contract between two countries whereby both countries agree on how to deal with taxation conflicts. DTAs overcome overlapping taxing rights. The resident country always has the taxing rights, unless otherwise agreed and the other country obtains the taxing rights in terms of the DTA. In the case of double taxation, where the taxpayer is taxed in the resident country, as well as in the other country (where the income is eligible to be taxed under source rules in the other country), the resident country will grant tax relief. Relief from double tax can take the form of either

- unilateral relief (credit method), for example the section 6*quat* rebate for foreign taxes paid by residents on income which has been subject to taxation in another country, or

- bilateral relief (exemption method), where a DTA between countries provides relief from double taxation, by either exempting that income or granting a deduction.

In terms of section 108(1) of the Income Tax Act, the National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with that government to prevent, mitigate or discontinue levying, under the laws of the Republic and of the other country, of tax for the same income, profits or gains; or tax imposed on the same donation; or to render reciprocal (mutual) assistance in the administration and collection of taxes under the laws of the Republic and that other country.

DTAs are based on one of two models, namely

- the Organisation for Economic Co-operation and Development “OECD” model, or
- the United Nations “UN” model

Although these two models prescribe a template as basis, no two countries’ agreement will be the same as the next agreement. South Africa’s newer DTAs are based on the OECD model.

An approved DTA has the force of law, i.e. as if it is enacted in the Income Tax Act (section 108(2)). We must therefore either state the rules of the DTA **(thus include an extract from the DTA in the question)** or tell you to ignore any possible existence of a DTA in questions. Should a specific tax not be mentioned in the DTA, then that specific tax does not form part of the relief.

Remember the following when answering a question:

- Each DTA between countries may differ! Therefore, read the provisions of the relevant DTA carefully.
- Residence is the key determining factor when reading a DTA as this determines the final taxing rights. Article 4 of the DTAs between South Africa and Mauritius and the United Kingdom respectively deals with how to determine the residence of a taxpayer. When is a taxpayer considered a resident?

  - Natural persons
    - Ordinarily resident (Interpretation Note 3) - Refer to the **Case Law Guide** Chapter 2– *Cohen* and *Kuttel* cases.
    - Physical presence test. Reference is made to the number of days in the country.
    - If the taxpayer is a resident of both countries, then article 4 in the DTAs contains “tie breaker” rules to resolve the problem of dual residence. An example is where the taxpayer has a permanent home, or where the centre of the taxpayer’s vital interests is, such as his family or social ties. If after the considerations of article 4 the taxpayer is deemed to be a resident of both states, then the authorities of the two contracting states shall settle the question by mutual agreement.

  - Others (non-natural persons)
    - Place of incorporation/registration (This is where the physical paperwork was lodged.)
    - Place of effective management

  - An extract from article 4 of the DTA with the United Kingdom defines *Residence* as: “For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person’s **domicile**, **residence**, **place of management**, **place of incorporation** or any **other** criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof.” And an extract from article 4 of the DTA with Mauritius defines *Resident* as: “For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person’s **domicile**, **residence**, **place of management** or any **other** criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.”

- A DTA cannot create a tax liability but merely reduces the tax liability of the taxpayer. Therefore, if a specific tax does not exist in a resident country, then a DTA cannot create it.
- When reading a DTA, always replace the references to “Contracting State” and “other State or “other Contracting State” with South Africa and the other country that is party to the DTA. For example:

Extract 6.2 of the OECD template:
Income derived by a resident company of a *Contracting State* from immovable property (including income from agriculture or forestry) situated in the other *Contracting State* may be taxed in that other *State*.

Will then read as follows:
Income derived by a resident company of *South Africa* from immovable property (including income from agriculture or forestry) situated in *Mauritius* may be taxed in *Mauritius*.

As the interrelationships between domestic legislation and the below terms are examinable in the ITC 2025, special regard must be had to the following terms in the DTAs:
- Resident (article 4)
- Immovable property (rental and CGT) (articles 6 and 13)
- Business profits (only article 7(1)). Do not assume that a person carries on business through a “Permanent Establishment” - it will be specifically stated if applicable
- Dividends (article 10)
- Interest (article 11)
- Employment (article 14)
- Pensions (article 17)
- Elimination of double tax (article 21 (UK DTA) and article 22 (Mauritius DTA))

Activity 5.1 (45 minutes)

Once you have reviewed the above paragraphs in SILKE and the legislation, work through the following illustrative examples in SILKE that practically illustrate the workings of a DTA:

SILKE Example 21.4 – 21.7; 21.9 – 21.10 and 21.12 in SILKE par 21.4.

Activity 5.2 (40 minutes)

To practically apply the knowledge you have obtained in LU 5 and to see how it can be integrated with your previous LU's, you can now attempt the Example below:

Example

Amy is 40 years old and works in Saudi Arabia as a contractor. She commenced as a contractor in Saudi Arabia in 2021 with an initial contract for a two-year period renewable every two years. She has renewed and extended her contract for the period 2023–2024. Housing is provided by the employer. Every time she extends her contract, she must obtain a work permit through the Department of Foreign Affairs in the Republic.

She is single and does not own any fixed property. She visits her parents, who live in South Africa, twice a year during April and December for a total period of three weeks at each visit. Amy travels on her South African passport. She does not possess any other passport. Her monthly income is $2 800 ($1 =R17 = R47 600 per month). She is a member of a South African medical aid fund and pays a monthly contribution of R3 750 to the fund. The tax rate applicable to individuals in Saudi Arabia is 0%.

Assume that there is **no DTA** between the two governments in place.

Amy wants to donate R175 000 to her elderly parents to assist them in buying a house in a retirement village in South Africa. She can either give them the cash or her parents can register a mortgage bond over the property. She would then repay the bond. She also wants to donate R100 000 to her 5-year-old niece who lives in South Africa and R25 000 to her 22-year-old cousin living in the United Kingdom.

Amy is uncertain about whether she will still be regarded as ordinarily resident in the Republic.

REQUIRED:	
(a)	Critically evaluate (with reference to case law) whether Amy will be regarded as ordinarily resident in the Republic in terms of the definition of resident in the Income Tax Act. (You do not have to discuss the physical presence test.)
(b)	Advise Amy on her South African normal tax position for the 2024 year of assessment. (Assume that she will be regarded as a resident and that there are no DTA's.)
(c)	Reflect on the donations tax implications (assume that Amy is a resident). Assume that the value of her donations did not exceed R30 million and that no other donations will arise other than those mentioned in the question.
(d)	Advise Amy on how she can minimise her donations tax liability.

Suggested solution

(a) Amy is a resident because she is ordinarily resident in the Republic. "Ordinarily resident" is not defined but the courts consider various factors in deciding whether a taxpayer is ordinarily resident in the Republic or not.

In *Cohen v CIR* the principle was laid down that a person may be resident in more than one country at a time, but the person can only be ordinarily resident in one country. Ordinary residence is the residence in the country to which a person would naturally and as a matter of course return from their wanderings. Their principal residence would be their real home. Physical absence during the whole year of assessment is not decisive in the question of ordinary residence.

CIR v Kuttel held that a person is ordinarily resident where they have their usual or principal residence, that is, what may be described as their real home.

The following circumstances indicate that Amy is ordinarily resident in the Republic:
She does not own property in either of the countries. It appears that her family resides in the Republic. She travels on a South African passport and does not possess any other passport. Her medical aid fund is in the Republic. She returns to her parents in South Africa during her vacations. If her contract expires, she will have to return to the Republic. The circumstances indicate that she regards her real home as the Republic and, therefore, she is ordinarily resident in the Republic.

(b) Amy is a South African resident and, in terms of the gross income definition, she has to include her worldwide income of R571 200 (R47 600 x 12) in gross income. Section 10(1)(*o*)(ii) exempts remuneration (type of remuneration is specified in this subsection) derived by a person in respect of services rendered outside the Republic for or on behalf of any employer if the person concerned was outside the Republic,

- for more than 183 complete days in aggregate during <u>any</u> 12-month period commencing or ending during any year of assessment (refer to SILKE par 5.4.9); and
- for a continuous period of absence exceeding 60 full days during the relevant period of 12 months; and
- the services were rendered during that period for or on behalf of an employer, who can be situated in or outside South Africa; and
- the remuneration was below R1.25 million (only the first R1.25 million will be exempt in terms of this section).

Her remuneration of R571 200 will be exempt and her South African income tax liability will be Rnil.

(c) Amy is a South African resident and is liable for donations tax. In terms of section 56(2)(*c*), donations tax "shall not be payable in respect of so much of any *bona fide* contribution made by the donor towards the maintenance of any person as the Commissioner considers to be reasonable (not subject to objection or appeal)".

Amy donates R175 000 to her parents to assist them in buying a house in a retirement village. One can argue that this amount is not a contribution to maintenance but rather assistance to her parents to obtain an asset.

Amy will pay donations tax of 20% on the value of property donated in excess of R100 000 during any year of assessment.

She will be liable for donations tax on all the donations made to her parents, niece and cousin. Donations tax is calculated in the order of the donations made, but her total donations tax liability will be:

	R
Parents	175 000
Niece	100 000
Cousin	25 000
Total	300 000
Less: Exemption (s 56(2)(*b*))	(100 000)
Amount subject to donations tax	200 000
	@ 20%
Donations tax liability	40 000

(d) Amy should rather contribute monthly to her parents' maintenance. This amount would be exempt in terms of section 56(2)(*c*). She should split the donation to her niece and cousin over two years with payments in February 2024 and March 2024. The payment to the niece in February 2024 should be for the amount of R100 000. In the next year of assessment, she can donate the R25 000 to her cousin.

In the 2024 year of assessment the donations tax will then be Rnil (R100 000 less R100 000) and in 2025 the donations tax payable would be Rnil (R25 000 less R100 000).

5.6 DISCUSSION ACTIVITY: COMPREHENSIVE EXAMPLE

Activity 5.3 (30 minutes)

> Work through the comprehensive example 21.17 under par 21.5.3 that relates to *South African income tax implications of inbound cross-border transactions by a non-resident.* This activity will test your ability to apply the knowledge you gained whilst studying this LU. Make a rough summary of what your solution would be now that you have studied the income tax principles applicable to non-residents. Share your solution on **Discussion Forum 5.1**, then refer to the solution available in SILKE. Participate in the discussion on the discussion forum on any issues or problems you have identified.

5.7 SUMMARY OF LEARNING UNIT 5

In this learning unit, the concepts of ‘resident’ versus ‘non-resident’ were introduced. It is always important to identify a taxpayer as a resident or a non-resident, as a non-resident will be taxed according to source rules, while a resident is taxed on his/her world-wide income. You need to be able to discuss the tax effect of income received by a taxpayer from a South African source or not, keeping in mind that the taxpayer who received the income could be either a resident or non-resident.

Familiarise yourself with the newest relevant law amendments. Consider every scenario so that you are able to critically analyse if the taxpayer is a resident or non-resident and determine if a DTA will apply or not. If a DTA does not apply to the amounts paid from a South African source to a non-resident, you need to be able to calculate any withholding taxes applicable. Note that the rebate in terms of section 6*quat* will be discussed in Topics 3, 4 and 5. Ensure that you have worked through (flagged and highlighted) the sections referred to in LU 5 in your Income Tax Act as well as in SILKE and that you have worked through the examples in the applicable section. In the next learning unit, we will discuss the calculation of CGT if an asset is disposed of by a taxpayer.

5.8 INTEGRATED ACTIVITIES 5.4 AND 5.5

Below are two activities for you to complete. Use these activities to assess your own knowledge, competencies and take responsibility for your own learning experience. The activities will assist you to identify shortcomings in your knowledge relating to LU 5 and will also serve as a measure of your understanding.

The time provided for each activity (question) is calculated as 6 minutes of reading time for each activity, 1.5 minutes for every mark and then 6 minutes per page of the solution for you to review your answer against the solution provided.

ACTIVITY 5.4: Gross income (including source) and exempt income (33 marks / 74 minutes)

PART 1 **(7 marks)**

Manley Blaine, a South African resident, owns a block of flats situated in Wynberg, Cape Town. He inherited the block of flats in terms of his father's (Mr Blaine Senior) valid will, executed in the United Kingdom. Mr Blaine Senior was, at date of his death and throughout his adult life, ordinarily resident in the United Kingdom.

YOU ARE REQUIRED TO:

1. Identify the source of the rentals received by Mr Blaine Senior and whether the source is determined in terms of s 9 or in terms of common law principles with appropriate explanations and reference to applicable case law principles.
2. Assume the block of flats that Manley inherited were situated in the United Kingdom. Would it change the tax effect of rentals received by Mr Blaine Senior before his death as well as Manley Blaine? Ignore any double tax agreement (DTA) in your answer.

PART 2 **(9 marks)**

A leading lung specialist (a SA resident) in private practice in the Republic of South Africa was flown to a Central African State to perform an operation on one of their top ministers in their government. The president (of the African State) sent his private jet to fetch and return the specialist. All the expenses of the doctor were paid and, although he did not wish to be paid for his services, the government of the African State insisted on paying him the equivalent of R100 000 in the current year of assessment.

YOU ARE REQUIRED TO:

1. Explain where the source of the income would be, and
2. Explain with reasons whether the lung specialist will be taxed on the amount in the Republic of South Africa.

ACTIVITY 5.4 (continued)

PART 3 **(7 marks)**

Chancer, a SA resident, occupied a position that required him to be entrusted with funds to be used for secret operations in South Africa. Over a number of years, he appropriated funds to himself and, in total, took about R450 000 from the trust fund. Chancer was ultimately caught, charged and ordered to repay the whole amount, which he subsequently did.

Chancer was then assessed to be taxed on the amount he had stolen. Chancer objected to this assessment on the grounds that the amount was not 'received' by him and it was therefore not gross income.

YOU ARE REQUIRED TO:

Discuss whether the R450 000 was or was not 'received by' Chancer. Refer to case law principles where appropriate.

PART 4 **(5 marks)**

Andrew Stein, a SA resident, runs a new and second-hand furniture shop. During the current year of assessment, he sold a dining-room suite to a customer for R15 000. It was agreed that Andrew would accept the customer's antique sideboard in settlement of the purchase price. The market value of the sideboard at the time was R20 000. Andrew wanted the sideboard as a birthday gift for his wife and had therefore agreed to the transaction. Before Andrew could transport the sideboard to his home a regular customer offered him R25 000 for the sideboard. Andrew could not resist the offer and sold it to the customer for R25 000 cash.

YOU ARE REQUIRED TO:

Determine Andrew's gross income as a result of the above transactions. Give reasons for each inclusion or exclusion from gross income. (Ignore any VAT implications in your answer.)

PART 5 **(5 marks)**

Jane Murray is a SA resident who retired from a South African employer on 28 February 2023. She had also worked for an American firm AmerCo for 30 years.

Jane headed the South African branch of AmerCo (in Johannesburg) from 1 January 2015 to 31 December 2016. She retired from AmerCo on 31 December 2021 and started to work for the South African employer. On retirement from AmerCo, Jane transferred her total foreign fund to South Africa and has been receiving a pension of R400 000 per annum (from 1 March 2023) from this pension fund. Jane had become ordinarily resident in the Republic from 1 January 2022. In addition to her pension, Jane received interest on a deposit in an American bank. This amounted to R200 000 for the 2024 year of assessment.

YOU ARE REQUIRED TO:

Determine the amount (if any) to be included in Jane Murray's income for the 2024 year of assessment.

ACTIVITY 5.4 – SUGGESTED SOLUTION

Part 1 - Manley Blaine

1. There is no specific source rule in terms of s 9(2) for rent received on fixed property and also not a specific exclusion in terms of s 9(4). (1)
   The common law principles need therefore to be applied. (1)
   The originating cause of rentals being received is the block of flats located in Cape Town i.e. where the taxpayer's capital is employed. (*CIR v Lever Brothers and Unilever Ltd*). (1)
   Thus, the source of the rental income in terms of common law is South Africa. (1)

2. Mr Blaine Senior: The rent received from fixed property situated in the United Kingdom is not from a source in the Republic in terms of s 9. The common law source of the rent is in the United Kingdom where the flats are situated. (2)

   Manley Blaine: Since Manley is a SA resident in terms of the gross income definition, he would include the rental income in gross income in both cases as he is taxed on his world-wide income. (1)

   (7)

Part 2 - Lung Specialist

1. To establish the source of the income it is necessary to apply s 9 of the Income Tax Act. There is no source rule in s 9 for services rendered by an independent contractor.

   To establish the common law source of the income it is necessary to determine the originating cause i.e. why the amount was received. There could be two originating causes i.e.
   - practice of the doctor located in South Africa or
   - the services rendered in the African state (2)

   When confronted with a multiplicity of originating causes it is necessary to identify the dominant cause (*CIR v Lever Brothers and Unilever Ltd*). It is submitted that the most proximate cause is the rendering of the services, and the source is therefore the Central African State. (3)

2. Since the specialist is a SA resident, the gross income definition includes all amounts received in his gross income, irrespective of their source as he is taxed on his world-wide income. (1)
   A second issue concerns the capital or revenue nature of the receipt. It could be argued that because no payment was requested, the amount is fortuitous and therefore of a capital nature. However, paragraph (*c*) of the gross income definition includes any amounts received in respect of services rendered whether they are of a capital nature or not. (3)

   9

Part 3 – Chancer

An amount is 'received by' for the purposes of the gross income definition in section 1 of the Income Tax Act if the taxpayer received the amount on his own behalf and for his own benefit. (Geldenhuys) (2)

However, Chancer illegally appropriated about R450 000 of these funds for himself. This constitutes an illegal receipt. (1)

The *Delagoa Bay Cigarette Co. Ltd* ran an illegal lottery. This case introduced the principle that in determining whether an amount is 'income' or not, no account must be taken of the fact that the activity involved was illegal, immoral or ultra vires; whether the source of the income is legal or illegal, is immaterial. (1)

ACTIVITY 5.4 - SUGGESTED SOLUTION (continued)

MP Finance Group CC ran an illegal pyramid scheme, whereby it took money from 'investors' under false pretences. It was held that an amount will be regarded as having been 'received' by the taxpayer for the purposes of the gross income definition if the taxpayer has intended to receive it for his own benefit, and these amounts were considered taxable.		(2)
It follows that the R450 000 was "received by" Chancer and must be included in his gross income (he would be subject to tax on the amounts that he has stolen).		(1)
		7

Part 4 - Andrew Stein

Sale of a dining-room suite (gross income)	R20 000	(1)
Andrew is trading in the sale of furniture. In terms of the gross income definition, it is an "amount in cash or otherwise" and must be included in gross income. (*Lategan; People's Stores*).		(1)
The sideboard must be valued on date of acquisition at its market value. Andrew must include R20 000 in his gross income.		(1)
Sale of sideboard	nil	
This sale was a fortuitous offer which was not sufficient to change Andrew's true intention on acquisition. Alternatively, SARS could decide that there was a change of intention and that the transaction was in the ordinary course of business (based on the type of business Andrew Stein ran). Note that in terms of section 102 of the TAA, the onus would be on Andrew to show that the amount was capital.		(2)
		5

Part 5 - Jane Murray

		R	
Gross income (her pension is part of world-wide income)		400 000	(1)
Less: Foreign pension (s10(1)(*g*C))	$^{28}/_{30}$ x 400 000 =	(373 333)	(1)
In terms of the 'gross income' definition, Jane must include her worldwide receipts and accruals into 'gross income', but 28/30 x R400 000 is regarded not to be from a source within the Republic and therefore subject to the section 10(1)(*gC*)(ii) exemption.			(1)
Foreign interest		200 000	(1)
No interest exemption available for foreign interest, s10(1)(*i*) is only applicable to interest from a source in SA.			(1)
			(5)
Included in income		226 667	
			33

ACTIVITY 5.5: Double tax agreements (DTA's) (9 marks / 26 minutes)

Will Goodwill, works for a large privately owned South African construction company, Perfect Construct Solutions (Pty) Ltd ("PCS"). PCS has clients in South Africa and in a number of foreign countries. Will is a highly-skilled technician and in November 2022 the decision was taken by PCS to send Will to a construction site in Mauritius to assist with the completion of a project for the construction of an industrial building for a Mauritian client of PCS.

Will left South Africa on 15 December 2022 and commenced working in Mauritius at the client's construction site on 2 January 2023. PCS does not have a permanent establishment in Mauritius. It was agreed between PCS, as his employer and Will that he shall return to South Africa at the end of May 2023. Will's monthly remuneration amounts to R85 800. He is concerned about the taxing implications of his remuneration earned whilst working abroad. He does not know whether he will be subject to South African income tax or Mauritian income tax or perhaps even double taxation on his income earned whilst working in Mauritius.

The applicable extract from the relevant article in the South Africa/Mauritian Double Taxation Agreement reads as follows:

	Article 14 Income from Employment
1.	Subject to the provisions of Articles 15, 17, 18 and 20 *(none of these articles is relevant in this scenario)*, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2	Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if – (a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned; and (b) The remuneration is paid by or on behalf of an employer who is not a resident of the other State; and (c) The remuneration is not borne by a permanent establishment which the employer has in the other State.
3.	… *(not relevant)*

REQUIRED	**Marks**
Explain to Will Goodwill the tax implications in respect of his remuneration earned whilst working for his South African employer in Mauritius. Do not perform any tax calculations but confine your answer to a discussion on whether his remuneration earned between the period January 2023 to May 2023 will be subject to South African income tax and/or Mauritian income tax or neither.	8
Communication skill – clarity of expression	*1*
Total	**9**

ACTIVITY 5.5 - SUGGESTED SOLUTION

The starting point is to determine whether Will Goodwill will be subject to tax on the remuneration in question in terms of the Income Tax Act. The Articles of the Double Tax Agreement (DTA) become relevant if it is determined that Will Goodwill will be subject to South African tax in terms of the Income Tax Act.

As a South African resident, Will Goodwill will be **taxed on** his **worldwide income**. (1)

The remuneration will be **included in Will's gross income** in terms of section 1 of the Income Tax Act. (1)

However, one has to further consider the exemption provisions of section 10(1)(*o*)(ii) of the Income Tax Act to determine if such remuneration is exempt from normal tax.

In the circumstances in question, **section 10(1)(*o*)(ii) will not be applicable, and the remuneration will not be exempt from South African income tax**, because Will Goodwill was not outside the Republic for a period in excess of 183 days during a 12-month period (16 December 2022 – 31 May 2023 = 167 days). (1)

However, in light of the fact that Will's remuneration in question is earned in Mauritius, in order to determine where Will Goodwill will be taxed on the income, regard must be had to the provisions of the DTA between South Africa and Mauritius, as the **DTA is integrated with the South African Income Tax Act** (section 108). (1)

In terms of Article 14(1) of the DTA between South Africa and Mauritius the remuneration derived by Will Goodwill in respect of his employment exercised in Mauritius **may be taxed in Mauritius**. (1) However, the **provisions of Article 14(1) are subject to the provisions of Article 14(2)** (1) of the DTA and in terms of Article 14(2), the remuneration derived by Will in respect of his employment exercised in Mauritius shall be taxable only in South Africa if the following three requirements are all met:

(a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned – **this requirement is met because Will Goodwill will be in Mauritius for only 150 days**. (2 January 2023 – 31 May 2023) (1)

(b) The remuneration is paid by or on behalf of an employer who is not a resident of the other State – **PCS** is Will Goodwill's **employer and is a South African resident (and not a Mauritian resident) and this requirement is thus also met**. (1)

(c) The remuneration is not borne by a permanent establishment which the employer has in the other State – **PCS does not have a permanent establishment in Mauritius. This requirement is also met**. (1)

It follows that the remuneration derived by Will Goodwill in Mauritius will be **taxable only in South Africa**. (1)

Available	10
Communication skill – clarity of expression	*1*
	11
Max	9

5.9 LIST OF REFERENCES OF LEARNING UNIT 5

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END OF LEARNING UNIT 5