Dear Sir

CALL FOR COMMENT: DRAFT BINDING RULING ON INCOME AND SIMILAR TAXES FOR PURPOSES OF SOUTH AFRICAN DOUBLE TAX TREATIES

We refer to the call for comment on the above-mentioned document. Set out below please find the SAICA National Tax Committee’s Comments submission regarding the Draft Binding Ruling (DBR) on Income and Similar Taxes for purposes of South African (SA) Double Tax Treaties (DTA’s).

1. The proposed binding ruling serves a valuable function in that it will rescue SA taxpayers of interest and dividends (in the main) from the dilemma as to whether they are obliged to withhold the tax in circumstances where a relevant DTA does not specify the relevant Withholding Tax as one of the SA taxes to which the DTA applies.

What remains a problem, however, and which the draft ruling does not address, is the potential for the foreign recipient of the amount to challenge the fiscus’s right to have the tax withheld, i.e. the argument will be that as the DTA does not specify the tax and as it cannot be a similar tax under the DTA, the payer has no right to withhold the tax, and the SARS has no right to insist that it be withheld.

The fact that the SARS has ruled that these taxes are similar to tax on income, so the argument will go, does not necessarily make it so. The fact is that both the dividends tax and the Withholding tax on interest are taxes separate from normal tax. It might have been different if the dividends and interest were normal tax (and thus the current exemptions in section 10 were removed) but the exemptions or tax rates were set so as to achieve an effective rate of normal tax of 10%, and then the law provided for a withholding on account of the normal tax, but this is not what was done.

2. It our understanding that Secondary Tax on Companies (STC) is not treated by foreign jurisdictions as a tax payable by the shareholder. To the extent therefore that the
shareholder is taxed on dividend income from South Africa, no credit is given for STC paid.

Where the full (or pro rata) income of a South African company is taxed in the hands of a non resident in his home country, the question is whether STC is then given as credit against such income when taxed in the home country. It is our understanding that some countries do not allow STC as a credit on the grounds that it is not a tax on income. Where STC is not mentioned specifically in a DTA, we understand, foreign jurisdictions are, simply ignoring the tax.

We therefore doubt whether there is much we can do about this at this stage as the problem will be solved once STC falls away and is replaced by the new Dividends Tax. We hope and believe that this draft binding ruling will not influence the way foreign jurisdictions give credit for South African STC paid.

3. Furthermore, we also find the DBR document strange and we are not sure what it hopes to achieve. At the end of paragraph 3.2 is the following paragraph:

"STC is a creditable tax under South Africa’s tax treaties, but the circumstances under which a non-resident will be able to secure a tax credit for STC will depend on the terms of the tax legislation of the non-resident’s country of residence and the relevant tax treaty”.

In most treaties STC is not a creditable tax under the treaty and it is the domestic legislation which can give relief. The same is true of income attributed to a SA resident in terms of section 7(8) where domestic relief is given to the SA resident for foreign taxes paid by the non resident person via section 6quat.

Maybe the paragraph should be reworded as it implies there is treaty relief. A recent case in the Czech Republic - Venten Management limited 5 Afs 106/2009-112 discussed at a conference in Vienna (30 countries) in May on “Tax Treaty case law around the globe” reiterated the concept of beneficial ownership of a share which gave rise to dividends.

Treaty relief can only be available if the beneficial owner paid the tax for which relief is sought. It is only if the treaty itself specifically allows this (not common) or domestic legislation provides the specific relief. We therefore request that clarity should be provided on this issue.

4. We however agree with the classifications of the various taxes with regards to DTA’s mentioned in the DBR document. The comment we however have is on the VAT. Non-residents have two options on VAT paid in SA. Either the sale is zero rated or a refund is made. This is in terms of the Export Incentive Scheme for which regulations exist.

If the purchaser is a “qualifying purchaser” which includes a tourist who travels on a non resident travel document and who exports the goods they can apply for a refund from a VRA (Vat Refund Administrator).
There should be some sort of agreement in this regard.

5. In Paragraph 1 under the heading “Purpose”. The comma after the term SARS can be removed.

6. Paragraph 3.2 under the heading “Treatment of STC”. The first sentence of the first paragraph should be amended to read as follows

"South Africa imposes corporate tax on income at two stages.”

The first sentence of the fourth paragraph should be as the term "since" represents the term "from". The term "since" should be replaced by either "as" or "because":

As/Because STC does not constitute a tax on shareholders, it is not affected by any limitation imposed on the source state under the dividends article of SA DTA’s. The last sentence of the fourth paragraph should be amended by the replacement of the term "fell" with the term "falls", i.e. "… accordingly falls outside the ambit of the article".

7. Furthermore, Donations Tax is excluded from the applicable taxes in the DBR. This is levied in terms of the Income Tax Act. However, there will only be DTA implications if the same person is taxed on the same amount of income, which technically would not happen in a donations tax scenario.

8. In conclusion, the DBR document does not add to existing DTA’s interpretation and hence the purpose thereof is unclear.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

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