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Submission File

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South African Revenue Service
Private Bag X923
Pretoria
0001

BY E-MAIL: policycomments@sars.gov.za

Dear SARS

COMMENTS ON THE DRAFT INTERPRETATION NOTE – WITHHOLDING TAX ON INTEREST

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants (SAICA) on the draft Interpretation Note (IN) providing guidance on the interpretation and application of sections 50A to 50H of the Income Tax Act, No. 58 of 1962 (the Act) relating to withholding tax on interest.

COMMENTS

Date of expiration for declarations and written undertakings

2. The draft IN in sections 6.3, 6.4 and 6.4.1 refer to 1 July 2020 in respect of the expiration of the declaration and written undertakings that are required in terms of section 50E(2) and 50E(3).

3. Submission: Although the Tax Administration Laws Amendment Act issued on 15 January 2020 required implementing FICA/FATCA/CRS monitoring against the dividend exemption declaration with effect from 1 July 2020, the draft Disaster Management Tax Relief Administration Bill, issued on 1 May 2020, postpones the effective date of these sections from 1 July 2020 to an effective date of 1 October 2020. The 1 July 2020 date referred to in paragraph 6.3 and 6.4 should be replaced with 1 October 2020.

Interaction with section 8F and 8FA

4. The draft IN in paragraph 10.3 deals with the interaction between sections 8F, section 8FA and Part IVB of the Act. In terms of this paragraph, section 8F(2) and section 8FA(2) deem there to be a dividend *in specie* in the hands of the person paying interest in respect of a "hybrid debt instrument". However, this payment of interest remains interest in the hands of the person receiving the interest payment.

5. Therefore, the person paying the interest must withhold both dividends tax at rate of 20% on the deemed dividend *in specie* and withholding tax on interest at 15% on the interest received by the foreign person, unless any exemptions in relation to withholding tax on interest are applicable.
6. The treatment of deemed dividends *in specie* under South African double taxation agreements (DTAs) is unclear. That is, it is not always certain whether a non-resident recipient of a deemed dividend *in specie* may claim any double taxation relief under the dividend article of a DTA. It would appear that in many cases the recipient of the deemed dividend *in specie* can claim to be the “beneficial owner” of the dividend and access the double taxation relief under this clause.
7. We are therefore uncertain whether it was the intention of legislature to deem interest incurred on a “hybrid debt instrument” to be a dividend *in specie* in the hands of the person paying the amount but to regard this same amount as interest received in the hands of the person receiving the amount.
8. Submission: Essentially the draft IN appears to be excluding interest received by a foreign person as mentioned above, from the ambit of the deeming provisions under section 8F and 8FA.
9. We kindly request clarity on whether this was the intention of the legislator as this is, in our view, contrary to the original intention of both sections mentioned above.

Payments made to vesting trusts

10. It would thus appear from the examples in the draft IN on vesting trusts that SARS interprets that section 25B, which is the codification of the conduit principle, gives effect to the receipt of the amount by the trust as actually being received by the beneficiary and not the trust. So at date of receipt of the amount of interest, the trust didn’t receive and didn’t pay anything either.
11. Submission: It is suggested that this principle be made clear, not only in the examples provided in the draft IN, but also in the paragraphs explaining these concepts. This suggestion applies equally to the paragraphs on receipts by discretionary trusts.

Payments made to discretionary trusts

12. Example 10 of the draft IN deals with interest paid to a discretionary trust. This example explains that because the foreign beneficiary was not yet entitled to the interest (ie. it had not yet been vested in the beneficiary by the trustees) at the time the bank paid the interest to the trust, the bank had no withholding tax obligation in respect of the amount made to the trust as the trust was a South African resident at the time of payment.
13. Once the trustees had vested the interest income in the hands of a foreign beneficiary, only then was there a withholding tax obligation, and this obligation was now on the trust. The example explains this as follows: “*Since interest is being paid to a foreign person, ZB Trust is regarded as a withholding agent which has the responsibility for withholding.*”

14. Submitted: It is suggested that this sentence be changed as follows to clearly indicate that it is the vesting that results in the trust becoming the withholding agent because an amount is now due and payable by the trust to a non-resident:
15. *"The amount of interest vested by the trustees in the foreign beneficiary results in the interest being regarded as being due and payable to the foreign beneficiary. The trust will consequently be a withholding agent because the amount is due and payable, even if not paid at that time".*
16. The wording used in example 22 could also be used: *"Since the L Trust is the payer of the interest through its action of vesting...."*

Payment of the withholding tax – documentation requirements

17. Section 7 of the draft IN dealing with the payment of the withholding tax states the following:
18. *"The person that withheld the withholding tax on interest under section 50E is required to submit a return [the Return for Withholding Tax on Interest (form WT002)] and make payment of the amount withheld to SARS by the last day of the month following the month in which the interest payment was made."*
19. The SARS website states the following in respect of what else is needed to be completed by the person paying the interest:

"SARS will need a reconciliation summary of all the WTI payments made for the year. This is where you will declare who you withheld tax from.

An [IT3\(b\) – Certificate of Income from Investments, Property Rights and Royalties](#) must be completed and given to the **foreigner and SARS.**"

20. Submission: It is submitted that the draft IN should include this information regarding the submission of the IT3(b) by the South African resident for completeness sake.
21. Currently there is no legal framework (as exists with employees' tax certificates regarding providing certificates to foreigners and we submit there is no current legal requirement to do so. This has been an ongoing challenge that SARS should engage National Treasury to correct. Payors, like banks, have traditionally voluntarily issued "certificates" on their own letterheads but there is no standard information requirement. This is also by and large a quasi-manual process as these documents have to be generated from the data file information submitted to SARS.

Proof of payment – foreign tax credits

22. Should a foreign person receiving interest under section 50E, want to claim a tax credit in respect of the tax withheld in South Africa on this amount, the only evidence of this payment (made on its behalf by the South African resident), would be a voluntarily issued certificate (see above) or proof of payment by the South African resident. The latter is nearly impossible to provide given that payments to SARS are done on aggregate basis.



23. Many foreign revenue authorities, however, do not accept proof of payment or letters from the withholding party, and would require direct confirmation from the Revenue Authority (SARS) that the amount has been paid or require a SARS system issued document. SARS takes exactly the same position as mentioned above, hence the ongoing difficulty, especially with African revenue authorities, in this regard.

24. Submission: SARS is requested to provide clarity on the process that a foreigner would need to go through in order to receive confirmation directly from SARS that the withholding tax payment has been received by SARS.

25. We request that SARS investigate how to implement an automated system as has been done for employees' tax certificates, which can be generated on behalf of SARS by the payor once submission of the data file has been done on SARS E@syfile Employer. These files can then be electronically sent to taxpayers by the payor.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

Pieter Faber
Senior Executive: Tax

Dr Sharon Smulders
Project Director: Tax Advocacy

The South African Institute of Chartered Accountants