

Ref #:775550

Submission File

28 March 2024

National Treasury Policy Department and Ms Adele Collins
National Treasury / South African Revenue Service

BY E-MAIL:

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Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT GLOBAL MINIMUM TAX BILL AND DRAFT GLOBAL MINIMUM TAX ADMINISTRATION BILL

The Transfer Pricing Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the National Treasury ('NT') and the South African Revenue Service ('SARS') on the Draft Global Minimum Tax Bill ('DGMTB') as well as the Draft Global Minimum Tax Administration Bill ('DGMTAB').

We once again thank SARS for the ongoing opportunity to provide constructive comments in this regard.

SAICA continues to believe that a collaborative approach is best suited in seeking solutions to complex challenges and should you wish to clarify any of the above matters please do not hesitate to contact us.

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Yours sincerely

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The South African Institute of Chartered Accountants



A. DRAFT GLOBAL MINIMUM TAX ADMINISTRATION BILL

GENERAL COMMENTS

Section 23(2) – retrospectivity of effective date

Introduction

1. The Global Anti-Base Erosion (“GloBE”) Model Rules are model rules agreed by the members of the Base Erosion and Profit Shifting (“BEPS”) Inclusive Framework. South Africa is one of the members.
2. The GloBE Rules are designed to be introduced into a jurisdiction’s domestic law and work together with those of other jurisdictions to create a coordinated and comprehensive system of minimum taxation – ensuring that qualifying large multinational enterprise groups (“MNE Groups”) pay a minimum level of tax on their income in respect of every jurisdiction where they operate.
3. GloBE Model Rules will impose a top-up tax to ensure a jurisdictional minimum income tax at a rate of 15% for MNE Groups with consolidated revenue over €750m in at least two of the four years preceding the year under review.
4. The multinational top-up tax may be imposed under the following methods:
 - The Income Inclusion Rule (“IIR”) which taxes the domestic entity of an MNE Group on its share of top-up tax arising from low-taxed income of foreign group entities.
 - The Domestic Minimum Top-Up Tax (“DMTT”) which imposes a joint and several tax liability on the domestic group entities of an MNE Group for any top-up tax arising from low-taxed income of those domestic group entities (calculated on an aggregate basis).
 - The Undertaxed Profit Rule (“UTPR”) serves as a backstop to the IIR by imposing any remaining top-up tax that is allocable to the UPE and that is not collected under a qualified IIR.
 - A fourth method is provided in terms of the Subject to Tax Rule (“STTR”), which is triggered if income is subject to a tax rate below 9% and applies in respect of, for example, interest, royalties, insurance premiums, rent and similar. This rule requires that a bi- or multilateral instrument is introduced to effectively override tax treaty provisions.
5. NT proposes to implement the GloBE Model Rules in South Africa by introducing the Global Minimum Tax Bill (“GMT”), however it is proposed that the methods to be applied are limited to the IIR and the DMTT. It appears that a UTPR is currently not considered and it is not clear if the STTR will be implemented in the future, which may be the case on requests from developing countries.



Problem statement

6. In the 2024 Budget Speech presented by the Minister of Finance on 21 February 2024, it was announced that the GMT will be deemed to have come into operation on 1 January 2024 and will apply to Fiscal Years beginning on or after that date. In parallel, NT has published the DGMTB and the DGMTAB on the same date for public comment by 31 March 2024.
7. The impact of the coming into effect of the GMT from 1 January 2024 is that in-scope MNE Groups with financial year-ends ending on 31 December will already be subject to GMT on affected GloBE Income, which is before legislation has been finalised and assented by parliament. If the GMT is assented by parliament in its current form and applies to Fiscal Years beginning on or after 1 January 2024, it will have retrospective effect in the sense that it will have tax consequences for MNE Groups prior to the announcement of the operative date of the GMT and will cause relevant GloBE Income to be subject to tax from 1 January 2024.
8. A fundamental principle of our law in South Africa and many other countries, is that there is a presumption against the retrospective application of legislative enactments.
9. Retrospective legislation may be susceptible to constitutional challenge if its effect is to unsettle existing transactions in a manner that is inconsistent with the rule of law. The rule of law is entrenched in section 1(c) of the Constitution and requires, inter alia, that the law must be certain and accessible, so that people can regulate their affairs accordingly. As a matter of principle, it may also be fair to assume that legislative enactments are intended to give fair warning of their effect and permit individuals to rely on their meaning until expressly amended.
10. We submit that NT has not provided fair warning of the effective date of the GMT and its communication regarding the implementation of GloBE in South Africa has been inconsistent with its current actions. In the 2022 Budget Speech it was announced that, *“... South Africa will propose legislative amendments to implement these rules once the framework has been finalised and translated into a local context.”*
11. In the 2023 Budget it was announced that, *“... During the 2023 legislative cycle, government will publish a draft position on the implementation of Pillar Two for public comment and draft legislation will be prepared for inclusion in the 2024 Taxation Laws Amendment Bill.”*
12. The tax industry has formally requested clarity from NT on numerous occasions following the 2023 Budget announcement, with regard to the implementation of GloBE in South Africa and for NT to provide its draft position as envisaged in the 2023 Budget Speech, which NT has failed to do. NT has therefore not provided clear and fair warning of the effective date of the GMT.
13. A further consequence of the retrospective effect of the GMT is that it will impact in-scope MNE Groups financially, earlier than anticipated,



14. where IRR or DMTT may become payable. Most MNE Groups are listed on a stock exchange and adhere to very strict financial reporting principles. The provisioning of accurate and comprehensive financial disclosures to the public by these MNE Groups may therefore have been affected.
15. NT's approach of not providing clear and fair warning regarding the effective date of the GMT is inconsistent with the approach taken by other jurisdictions. Other jurisdictions have provided clear and fair warning regarding the effective date of the implementation of the GloBE Model Rules, e.g. UK, Isle of Man, Guernsey and Jersey.
16. The enactment of retrospective legislation is inconsistent with national policy. Where new and substantial tax legislation have been implemented in the past, NT followed a consultative process and provided clear and fair warning of the effective date of such enactment. Case in point, being Capital Gains Tax, Dividends Tax and Interest Withholding Tax.
17. The approach adopted by NT by merely adopting the GloBE Model Rules and commentary and not translating it into local context as envisaged, may have unintended consequences.
18. The GloBE Model Rules are contained in the 650+ pages of template model legislation and commentary thereto that in-scope MNE Groups would need to consider and especially with the application of the GloBE Model Rules in the context of South African tax legislation, i.e. as originally intended by NT.
19. Such translation into local context is a key component now lacking in this process.
20. The GloBE Model Rules may inadvertently impact various tax regimes from a South African perspective and would need to be considered carefully. The approach adopted by NT does not provide adequate opportunity to assess the full impact of the GloBE Model Rules in a local context and regulate one's affairs accordingly.
21. There may potentially be many practicalities that NT and/or SARS have not considered and could not be resolved in such a short period of time, for example relating to excluded entities, or the interaction with the CFC Rules, and hence would warrant a more prolonged consultative process.
22. A further example is the fact that it seems that based on the GloBE Rules, a foreign CIS, if the threshold is met, would be brought in the net only at the level of the UPE, but it seems that this is not necessarily the case regarding the subsidiaries.
23. For example, have NT and SARS fully considered the integration of the GMTA and the GMTAA with the TAA? Currently the TAA in its current form is not applicable to the GMTA or GMTAA, yet the GMTAA refers to the TAA.
24. As for the form and content of the GloBE Information Return ("GIR"), there is very little clarity regarding the technical specification of the filing of the GIR and there may be a need for MNE Groups to undertake changes to information systems for the purpose of providing and preparing the GIR.



25. In addition, there are many other complicated matters that must be addressed with the GIR, for example the interaction and alignment with safe harbours and CbCR reporting requirements. It is noted in this regard that the Euro 750 million threshold and the R10 billion thresholds applicable for CbCR purposes that are headquartered in South Africa do not align based on current exchange rates.

26. Submission: We propose that the implementation date of the proposed legislation be consistent with the approach taken by NT previously where new tax legislation has been introduced. Typically, NT have provided early warning of the effective date of such legislative enactments.

27. We recommend that NT postpone the effective date of the GMT to apply to Fiscal Years beginning on or after 1 January 2025, to allow for the important process of localising the rules as well as the public consultation process to be finalised to ensure better certainty and fairness.

Status of the GMTA and GMTAA

28. South Africa is proposing including the GloBE rules in two new and separate Acts. It is not clear at this stage how these Acts will apply in relation to the existing Income Tax Act and Tax Administration Act, for instance whether the new Acts will apply before consideration of the Controlled Foreign Company rules in section 9 of the Income Tax Act.

29. Submission: The status of the new Acts should be explained and how the implementation of these applies to relevant aspects of the Income Tax Act and Tax Administration Act.

SPECIFIC COMMENTS

Part III – Section 4 – Income Inclusion Rule (IIR)

30. It is common understanding that the limitation contained in a double taxation agreement ("DTA") which intends to avoid double taxation, overrides domestic law. The interaction of these with the proposed IIR rule needs to be understood, especially where the DTA exempts the foreign income from taxation in South Africa.

31. Submission: This issue should be considered and explained.

Part III – Section 5 – Disapplication of the UTPR

32. South Africa proposes disapplying the OECD proposed approach of the IIR, coupled with the UTPR, in favour of the DMTT. It is not clear how potential double tax will be dealt with where the MNE group is subject to differing rules in different jurisdictions.

33. Submission: This issue should be considered and explained through examples where possible.



PART IV – Section 12 – Exclusion of certain foreign taxes on domestic income

34. Section 12(1) of the DGMTB states that:

“The Adjusted Covered Taxes for each Domestic Constituent Entity, Domestic Joint Venture, and Domestic Joint Venture Subsidiary are to be calculated excluding any tax accrued by a Constituent Entity-owner located in another jurisdiction—

(a) with respect to the GloBE Income of a Domestic Constituent Entity, Domestic Joint Venture, and Domestic Joint Venture Subsidiary which would otherwise be allocated to that Domestic Constituent Entity under Article 4.3.2(a), Article 4.3.2(c) or 4.3.2(d) of the GloBE Model Rules”

35. Submission: It is submitted that the Draft Explanatory Memorandum should include examples clarifying the exact interpretation of section 12.

B. DRAFT GLOBAL MINIMUM TAX ADMINISTRATION BILL

GENERAL COMMENTS

Dedicated SARS unit

36. Submission: Given the short timeframe provided by NT for the implementation of this legislation, it is submitted that SARS set up a unit, team or person dedicated to addressing the anticipated practical issues in a timeous manner.

SPECIFIC COMMENTS

Section 3 – Due date for filing GloBE Information Return

37. Section 3 notes the due date for submission of the return as being either 15 months or 18 months from the end of the fiscal year, depending on the specific circumstances mentioned.

38. The due date for the submission of a Company Income Tax Return (“ITR14”), however, is 12 months from the end of a fiscal year.

39. Submission: It is submitted that a reason be provided in the draft Explanatory Memorandum for the difference in due dates between the ITR14 and the GloBE return.

Section 4 – Exception for returns provided under an automatic exchange of information agreement

40. This provision lays out the circumstances in which a Domestic Constituent Entity need not submit the GLoBE Information return, and the notification required to be provided to the Commissioner of that fact.



41. The manner in which the Commissioner will be notified, however, is not clarified (i.e. whether the notification will be in the form of a letter or e-filing, etc). Similarly, there is a lack of clarity in respect of local filing and information requirements.

42. Submission: Clarity ought to be provided in this regard.

END.