Ref #:775551

Submission File

28 March 2024

[redacted]
Financial Surveillance Department
South African Reserve Bank
Private Bag X923
Pretoria
0001

BY E-MAIL: [redacted]

Dear Mr Nevhutanda

SAICA COMMENTS ON REFORMS ANNOUNCED IN ANNEXURE E OF THE 2024 BUDGET REVIEW REFLECTED IN THE DRAFT EXCHANGE CONTROL CIRCULARS

The Exchange Control Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the South African Reserve Bank ("SARB") on the reforms announced in Annexure E of the 2024 Budget Review.

We once again thank the SARB 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

Ernest Mazansky
Chair: Exchange Control Committee

Lesedi Seforo
Project Director: Tax Advocacy

Simone Esch
Member: Exchange Control Committee

The South African Institute of Chartered Accountants

COMMENTS

Title of the Exchange Control Circular/Annex no.	Paragraph of the Exchange Control Circular selected for comments	Proposed amendments	Motivation for the proposed amendments
Annexure B.4	Section E.(B)(iii)(b)	It is not clear how the amendments to this section and the broader CFC account rules included in Section E.B of the Currency and Exchanges Manual for Authorized Dealers ("AD Manual") will assist to reduce the "red tape" hampering regional trade. The amendments proposed in terms of the new subsection Section E.(B)(iii)(b) still requires the AD to ensure the transactions are "permissible" which will itself force the Authorized Dealers' ("AD") to implement their own requirements (which will differ from AD to AD) making this process more (rather than less) complex. Thus, it is requested that additional information is inserted into this paragraph which would provide clarity on what such "permissible" transactions would be and the kind of measures the AD should take since the amendments will permit all legitimate foreign currency payments to be paid from a CFC account. Alternatively, it is suggested that this paragraph is removed entirely. Furthermore, there is also no clarification with regard to the credits of a CFC account and whether all legitimate receipts (of the authorized CFC account holders) will also be permissible, i.e. all approved CFC account holders should be treated in the same manner. In addition, it is not clear whether or how the exemptions provided in Section E.(B)(iv) will be affected and thus would	A CFC account is an important tool to have for all businesses that conduct and facilitate cross-border trade. In terms of the existing exchange control regulations, a CFC account can only be opened/used by "local entities" or "legal persons" in terms of section E.B of the AD Manual which are presumably South African ("SA") incorporated companies. The question is whether this term includes branches or external companies of companies incorporated in a foreign country or foreign incorporated companies that are controlled and managed in SA (i.e. SA tax residents of SA). If this is not the case, then it is our view that it should include them, in order to have a real impact on the reduction of red tape on cross border trade and alignment of the SA exchange controls with the SA tax legislation. For example, an SA based Freight Forwarding ("FF") company has established a wholly owned subsidiary ("FF NTL") in the Netherlands to arrange and facilitate the transport of freight from SA to Europe. The subsidiary is effectively managed in SA and is thus a registered tax resident of SA. It is also registered for VAT in SA.

		these still be relevant after the amendments to CFC accounts are introduced? It is proposed that the use and regulation of CFC accounts is revised in totality which recognizes and authorizes the use thereof for the list of authorized holders (included in section E.B(i)) whose business relies greatly on an effective and efficient cross border foreign currency payment system and that these holders are subject to the same rules or restrictions with regard to credits and debits of a CFC account. In addition, that the definition of "local entities" is provided and expanded to include entities that are tax resident in SA or a member of a South African group of companies, i.e. a foreign subsidiary or foreign branch of a South African (local) company which carries on the SA local entities business in a foreign country.	However, even though a SA tax resident and a wholly owned member of a local (SA) legal entity, FF NTL (as a non-exchange control resident) is not permitted to open a bank account in SA that can accept funds (made in ZAR) from its SA customers (who cannot for whatever reason make direct foreign payments) convert such funds into USD and make direct payments (on behalf of the customer) to the shipping lines for freight costs directly linked to that customer's shipping order offshore. Because of the onerous exchange control restrictions, the SA group of FF NTL is forced to arrange a complex method to approve, transfer and make payment of such funds to offshore suppliers. Another alternative is for FF NTL to establish an external company or branch in SA which will qualify as an exchange control resident and thus may qualify to open and use a CFC Account. However, this registration will most likely result in a tax administrative nightmare for FF and FF NTL as the CIPC will automatically register this external company with a new and separate tax registration numbers, i.e. it won't recognize that the branch has been established for the principal purpose of facilitating legitimate FX payments from SA to the Netherlands.
Annexure B.2	Section B.3(C)	The proposal to remove the requirement for Finsurv approval for royalty payments made to both related or non-related parties is welcomed. However, there is no similar amendment proposed for royalties paid in respect of license agreements involving the local manufacture of goods in terms of Section B.3 (D) of the AD Manual. For	Royalties are generally charged in terms of a technology license agreement and/ or a trademark agreement. The technology agreement would include royalty payments for the use of foreign technology

		these royalty payments a lengthy application and approval process is still required with the DTI. It is unclear why royalties involving the local manufacture of goods should be treated differently and subject to a separate process as these would also be covered by the SA tax legislation and the transfer pricing rules included therein. It is proposed that section B.3 (D) is subject to the same authorization process as that proposed for Section B.3(C) with perhaps just a reporting requirement to the DTI for statistical record purposes. Furthermore, clarity is required in this section with regard to royalty payments that need to be made in foreign currency. In many cases royalties from related or unrelated foreign entities are determined and charged in a major foreign currency (USD or EUR) by their parent companies headquartered in Europe and expect to receive payments in that currency from its SA subsidiary and license holder. The licensee should be permitted to make regular royalty payments in the currency reflected in the invoice issued by the foreign licensor which will have a major positive impact on cross-border trade and reduce the red tape on royalty payments.	including the use of the technology for local production purposes, ie one royalty is paid for the use of the technology and there is no separate royalty fee or a distinction made between the two in the royalty agreement. Therefore in terms of a technology license agreement, the same extensive authorization process will be required, i.e. detailed application process to the DTI and thus the proposed amendments would not have any effect and achieve their purpose to reduce the "red tape" for the payment of foreign royalties. It bears repeating that exactly the same transfer pricing rules and methodologies to determine arm's length manufacturing and trademark royalties apply as with other types of royalties. So if reliance is being placed on the tax system to ensure that these other royalties are paid at arm's length prices, there cannot be any tax or exchange control reason to exclude manufacturing and trademark licenses from the new dispensation.
Annexure B.3	Section B.2(G)(iii)(i)	"to be acquired" should be replaced by "was acquired"	Private Equity Funds may enter into a loop structure provided it is reported to AD once the transaction is "finalised." whereas (i) reads that the information to be provided includes the assets "to be acquired." The perception in (i) is created that prior approval is required, whereas the (h) part clearly states it is a matter of placing on record including the information on the foreign currency inflow into ZA

			Rand. The requirement to add the transaction flow details confirms that the local assets should not be listed prior to acquisition. In short the two parts contradict each other

END.