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Submission File

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Organisation for Economic Co-operation and Development (OECD)
Tax Treaties, Transfer Pricing and Financial Transactions Division,
Centre for Tax Policy and Administration
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France

BY E-MAIL: taxtreaties@oecd.org

Dear Sir/Madam

COMMENTS ON ARTICLE 9 OF THE MODEL TAX CONVENTION

1. We present our comments and submissions on behalf of the South African Institute of Chartered Accounts' (SAICA) Transfer Pricing Committee on the public consultation document 'Proposed changes to commentaries in the OECD Model Tax Convention on Article 9 and on related articles' released by the OECD.
2. We thank the OECD for the 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.

BACKGROUND

3. Article 9 of the OECD Model Tax Convention deals with the taxation of transactions between associated enterprises.
4. Working Party 1 on Tax Conventions and Related Questions (which is the subgroup of the OECD Committee on Fiscal Affairs in charge of the Model Tax Convention), in consultation with Working Party 6 and the Forum on Tax Administration's Mutual Agreement Procedures (MAP) Forum, has recently undertaken work on the Commentary on Article 9 to clarify its application, especially as it relates to domestic laws on interest deductibility, such as those recommended in the final report on BEPS Action 4, where some commentators have questioned its interaction with those rules. This work is closely linked to the report Transfer Pricing Guidance on Financial Transactions published on 11 February 2020.
5. This public discussion draft includes proposals for changes to the Commentary on Article 9 and other related articles. The changes put forward in this discussion draft are expected to be included in the next update to the OECD Model Tax Convention (MTC).

6. SAICA's Transfer Pricing Committee's comments on these proposals are discussed next.

COMMENTS ON THE PROPOSALS

Article 9 commentary changes

7. The new wording contained in the proposed amendments to paragraph 3 on the commentary talks about the instrument being a loan or a contribution to equity capital and then refers to domestic law.
8. Our concern is whether the MTC now influences the domestic provisions relating to what is a loan and what is capital. For instance, it states "*taking into account factors discussed in its domestic laws OR in the OECD Transfer Pricing Guidelines*".
9. The paragraph also states that once the allocation of profits has been determined then it is up to each country to determine how they should be taxed. This could lead to double taxation in itself or double non-taxation.

10. Submission: In our view, domestic law should prevail as some matters may have been decided through the courts setting a precedent.

11. Furthermore, clarity should be provided on whose views would prevail if a country had a different approach to the other treaty country.

12. Paragraph 6 stipulates that a corresponding adjustment is only made to the amount the state considers is arm's length. This suggests that if the countries cannot agree on the arm's length amount, the country making the corresponding adjustment only makes it to what it thinks is the arm's length amount. This leaves taxpayers open to double taxation where MAP is followed, and the countries cannot agree.

13. Submission: There should be a mechanism introduced to ensure that an agreement is reached and that the double taxation is eliminated.

Article 7 commentary changes

South Africa has indicated that it reserves the right not to adopt the Authorised OECD Approach and to follow the version of Article 7 and the commentary that was included in the Model Tax Convention immediately before the 2010 update¹. As such we have not provided comments on the proposed changes to Article 7 at this stage.

¹ OECD Model Tax Convention on Income and Capital (2017) – Full Version: [Positions on Article 7 \(Business Profits\) and its commentary | READ online \(oecd-ilibrary.org\)](#)



Article 25 commentary changes

14. The new paragraph in the commentary on Article 25 is designed to admit cases into the MAP where there is economic double taxation.

15. Submission: We submit that Article 25 should state that MAP would need to be followed irrespective of the domestic processes required to be followed. Furthermore, where settlement of the tax payable in one jurisdiction is determined unilaterally based on sound transfer pricing principles there should always be recourse for the relief from double taxation under MAP irrespective of any domestic limitations.

16. We do once again want to state that the lack of suitable dispute resolution mechanisms such as APAs and limited MAPs is a common problem in South Africa and other African countries, resulting in protracted disputes and double taxation. Taxpayers operating in South Africa or other similar jurisdictions are thus put at an unfair disadvantage as the costs and time incurred to resolve these types of conflicts are high and long, and the desired result is often not achieved.

17. It is therefore submitted that the relevant jurisdictions be required to ensure that suitable functioning dispute resolution processes and appropriate administrations be put in place. In this regard, taxpayers must be given the assurance that these procedures (APAs, MAPs etc) will be completed within a reasonable period of time (maximum 12 months). And where possible, countries are encouraged to adopt arbitration to ensure this happens.

Yours sincerely

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