Submission File

28 June 2018

South African Revenue Service
Private Bag X923
Pretoria
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BY E-MAIL: policycomments@sars.gov.za

Dear Sir/Madam

COMMENTS ON THE DRAFT INTERPRETATION NOTE 93: THE TAXATION OF FOREIGN DIVIDENDS

1. We present herewith, on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee, our comments on the Draft Interpretation Note 93: The Taxation of Foreign Dividends (Draft IN93) as released by the South African Revenue Service (SARS).

2. Our submission includes a discussion of some of the most pertinent matters, which we believe require SARS' most urgent attention.

3. As always, we thank SARS for the ongoing opportunity to provide constructive comments in relation to draft interpretation. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex challenges.

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

Yours sincerely

Christel Van Wyk Madelein Grobler

Project Director: Tax **Project Manager: Tax**

South African Institute of Chartered Accountants

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ANNEXURE A

Paragraph 4.1.1 on page 11: Definition of "foreign dividend"

5. The foreign income tax treatment of an amount in the hands of a holder of shares (which will normally be the taxpayer) is irrelevant in determining whether the amount constitutes a foreign dividend. Instead, reference should be made to the income tax treatment of the amount from the perspective of the foreign company by which the dividend is paid or becomes payable.

6. Submission: It is submitted, to avoid confusion, that the following sentence should be updated (insert the underlined text and deleting the **bold** text in square brackets):

"The term "applicable laws" refers to income tax laws which deal with the treatment of amounts paid or payable in respect of shares and also to the income tax laws applicable to the specific foreign company ***[taxpayer]*** *concerned."*

Example 4 on page 17: An amount paid or payable by a foreign company that constitutes a share in that company

7. It is not clear why section 40C of the Income Tax Act No 68 of 1962 (the Act) is considered to apply in the specific example.

8. Submission: For the sake of clarity, we submit that a reason should be provided as to why section 40C of the Act will apply in the specific example.

9. We further submit that the following sentence should be updated (insert the underlined text) to provide the clarity:

"Under section 40C the expenditure actually incurred by Resident Company B to acquire the capitalisation shares is deemed to be nil as the capitalisation shares were acquired for no consideration."

Paragraph 4.3.1 on page 23: The participation exemption

10. The second paragraph under subparagraph (c) (i.e. Holding of shares heading) does not currently contain a conclusion, which seems to be required for the sake of completeness.

11. Submission: We therefore submit that the following sentence should be inserted at the end of the second paragraph: *"It is therefore usually the en commandite partners, as opposed to the general partners, that hold the shares for purposes of section 10B(2)(a)."*

Example 9 on page 26: Application of the participation exemption

12. The "Note" section does not clearly state that Resident A will only be entitled to the section 10B(2)(a) exemption if he/she has a vested right to at least 10% of the equity shares and voting rights in the Foreign Company.

13.	Submission: We submit that clarity will be provided if the following sentence is updated (insert the underlined text): *"If Resident A had a vested right in at least 10% of the underlying equity shares and voting rights in Foreign Company B, the exemption under section 10B(2)(a) would have applied."*

Paragraph 4.3.3 on page 30: Exemption of amounts previously included in income under section 9D(2)

14. Paragraph 4.3.3 on page 30 contains an incorrect statement.

15.	Submission: We submit that the following sentence should be corrected (insert the underlined text and deleting the **bold** text in square brackets) for grammatical consistency: *"Add: The aggregate of all amounts included in the resident's income under section 9D in this year and any previous year of assessment that relate to the aggregate net income of any other CFC by virtue of the resident's participation rights held indirectly in that other CFC**[s]** through the CFC declaring the foreign dividend..."*

16. The statement at the bottom of page 33 noting that the section 10B(2)(c) exemption is based on a formula is incorrect. The section does not provide for a formula, but merely impose a limitation on the amount qualifying for the exemption.

17.	Submission: We submit that the reference to "formula" should therefore be replaced with "limitation".

Example 17 on page 40: Partial exemption and natural persons

18.	Submission: We submit that the typographical error should be corrected by closing the quotations marks to the term "gross income" in the following sentence appearing in the result to the example: *"Foreign dividend included in gross income under paragraph (k) of the definition of "gross income" in section 1(1)."*

Example 19 on page 42: Partial exemption and resident companies

19. There are two instances in the example where the provisions of section 10B(2) of the Act apply, which means that the provisos must also be taken into account, which may result in overcomplicating the example. It should therefore be clarified that the provisos to section 10B(2) of the Act do not apply in the example.

20.	Submission: We submit that the example should specify that the assumption is that the provisos to section 10B(2) of the Act do not apply.