TAX

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CHANGES TO REPORTABLE ARRANGEMENTS PREVIOUSLY LISTED IN DRAFT NOTICES

On 16 March 2015, the Commissioner for the South African Revenue Service published Public Notice No. 212 in Government Gazette No. 38569 listing certain arrangements as 'reportable arrangements' for purposes of s35(2) and s36(4) of the Tax Administration Act, No 28 of 2011 (TAA) (Notice).

With effect from the date of publication of the Notice, all previous notices issued under s80M(2)(c) and s80N(4) of the Income Tax Act, No 58 of 1962 (ITA) and s35(2) of the TAA were replaced.

If an arrangement is regarded as a reportable arrangement for purposes of s35 of the TAA read with the Notice, then there is a disclosure obligation on a participant of certain information to SARS within 45 business days of any arrangement qualifying as a reportable arrangement or within 45 days from the date of becoming a participant of a reportable arrangement, failing which a participant is liable for certain penalties.

The publication of the Notice follows the publication of draft notices for public comment. Some of the arrangements listed in the draft notices were published in the final Notice, however, some arrangements were ultimately removed.

The draft notice published during March 2014 (March Draft) listed, among others, the following arrangement as an arrangement "which may have certain characteristics that may lead to an undue tax benefit":

"Any arrangement in terms of which fees in excess of R5 million are or may become payable by a person who is a resident to a person who is not a resident with regard to technical, managerial and consultancy services rendered to that resident, if the person who is not a resident:

(i) has an office in South Africa; or

(ii) has a physical address in South Africa; or

(iii) has established or maintains a bank account, in South Africa; or

(iv) is registered as an external company in terms of the Companies Act, 2008 (Act, No 71 of 2008)".

In the draft public notice that was published for public comment during June 2014 (June Draft), the wording in respect of this 'arrangement' had been changed to read:

"Any arrangement in terms of which fees that are payable or may become payable, on or after the date of publication of this notice, by a person that is a resident to a person that is not a resident with regard to services rendered to that resident in the Republic, exceed or are reasonably expected to exceed R5 million".

It is clear that the application of the June Draft was much wider than that of the March Draft. The March Draft limited the application of the notice to technical, managerial and consultancy services rendered by a non-resident, whereas the June Draft applied to any services. In addition, the application of the notice to non-residents was limited to non-residents with an office, physical address or bank account in South Africa or which were listed as an external company in South Africa, thereby requiring some physical presence in South Africa. The June Draft did not contain such limitation and applied to fees payable to a non-resident, whether or not such non-resident had any physical presence in South Africa.

The aforementioned reporting requirement in respect of service fees has been removed in the Notice. Service fees will nevertheless (with effect from 1 January 2016 and applicable in respect of service fees paid or that become due and payable on or after that date) be subject to a withholding tax of 15% on the amount of any service fee paid by a person to or for the benefit of a foreign person to the extent that the amount is regarded as having been received by or accrued to that foreign person from a South African source. The term 'service fees' is defined in s51A of the ITA as "any amount that is received or accrues in respect of technical services, managerial services and consultancy services but

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does not include services incidental to the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information, or the rendering of or the undertaking to render any assistance or service in connection with the application or utilisation of such knowledge or information".

Another arrangement that was previously listed in both the March and June Drafts relates to tax credits or rebates. In the March Draft the following arrangement was listed as an arrangement that has characteristics that may lead to an undue tax benefit:

"Any arrangement that is expected to give rise or has given rise to a foreign tax credit or foreign tax credits if the credits taken or to be taken into account in determining normal tax payable by any person or persons that are party to that arrangement exceed an aggregate amount of R10 million".

In the June Draft, the wording was changed to read as follows:

"Any arrangement that is expected to give rise, on or after the date of publication of this notice, to any rebate in respect of foreign taxes if the amount of the rebates to be taken or that have been taken into account in determining normal tax payable by any person or persons that is or are party to that arrangement, exceeds or is reasonably expected to exceed an aggregate amount of R5 million".

The June Draft lowered the threshold in respect of the reporting obligation relating to foreign tax credits or rebates from R10 million to R5 million, however, the Notice has completely removed the reporting requirement in respect of such arrangements.

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WITHDRAWAL OF REBATE IN RESPECT OF FOREIGN TAXES ON SERVICE FEES SOURCED IN SOUTH AFRICA

With effect from 1 January 2012, the South African Government introduced s6*quin* of the Income Tax Act, No 58 of 1962 (Act) which provides for a rebate in respect of foreign taxes paid by a South African resident for services rendered within South Africa.

In terms of the various treaties for the avoidance of double taxation that South Africa has with other countries, the country that is the source of the income generally has the sole right to tax that income. In respect of services, the country in which the services are rendered is generally understood to be the source of the income in relation to such services.

However, in contravention of this principle, and for various reasons, some countries impose withholding or other taxes on services rendered by South African residents in South Africa (being the source of the income) to residents of that foreign country. The reasons include that:

- there is no treaty with that country;
- the country interprets the treaty in a different way; and
- the country simply disregards the treaty.

Since the income is from a South African source, it is also taxable in South Africa.

The aim of s6*quin* is essentially to prevent double taxation in these circumstances, by granting a rebate to the South African resident. South Africa therefore effectively gives up its taxing rights.

However, s6*quin*(3A) states that no rebate may be deducted if the South African resident does not, within 60 days from the date on which the amount of tax is withheld, submit to the Commissioner for the South African Revenue Service (SARS) a return proving the amount of tax levied and withheld by the other country as contemplated in s6*quin*(1)(a).

In his 2015 Budget Review, the Minister of Finance, Nhlanhla Nene, proposed that s6*quin* be removed from the Act. The reasons stated for this possible removal are that:

- the taxes imposed in circumstances to which s6*quin* apply were not in accordance with the treaties entered into between South Africa and the relevant countries;
- s6*quin* has resulted in a significant compliance burden to both taxpayers and SARS; and
- some taxpayers were exploiting the relief.

The announcement of the possible removal of s6*quin* has been met with criticism as taxpayers may in certain circumstances be burdened with negotiating with foreign governments to alleviate the double taxation to which s6*quin* would have applied, unless the taxpayers are able to obtain a deduction in terms of s6*quat*(1C) and s(1D) in such circumstances.

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