

South African withholding taxes

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Over the past few years we have seen the introduction of various withholding taxes to the South African tax system. We set out below a high-level summary of the various withholding taxes that are levied in terms of the Income Tax Act 58 of 1962 (**the “Act”**), their rates and the withholding and reporting obligations. Apart from the dividends tax, these withholding taxes primarily apply to persons that constitute non-residents for South African tax purposes. However, tax residents should also take note since they could have a withholding obligation which may result in them having a secondary tax liability.

Withholding tax on disposal of immovable property by a non-resident

Since 1 September 2007, a withholding tax is levied on the disposal by a non-resident of any immovable property in South Africa in terms of section 35A of the Act. This withholding tax is not a final tax but an advance payment of tax on the seller's actual account of normal tax liability. The amount to be withheld is 5% of the amount payable where the seller is a natural person, 7.5% where the seller is a company and 10% where the seller is a trust. The purchaser must withhold the tax and submit a return to the Commissioner within 14 days after the date on which the tax was withheld if the purchaser is a resident, or within 28 days if the purchaser is a non-resident. Should the amount payable be less than R2 million, no withholding tax is levied.

Withholding tax on foreign entertainers and sportspersons

A final withholding tax is levied on foreign entertainers and sportspersons in terms of section 47B of the Act at the rate of 15% on amounts received by or accrued to a non-resident in respect of any personal activity exercised in South Africa. The foreign entertainer or sportsperson is exempt from this tax if he/she is an employee of a resident employer or if he/she is physically present in South Africa for more than 183 full days in aggregate during any twelve-month period commencing or ending during the year of assessment in which the specified activity is exercised. The resident that pays the foreign entertainer or sportsperson has the withholding obligation and such amount must be paid to the South African Revenue Service (**“SARS”**) before the end of the month following the month during which the withholding tax was deducted or withheld. SARS has a specific unit dealing with non-resident entertainers and sportspersons.

Withholding tax on royalties

A final withholding tax on royalties is levied in terms of section 49B of the Act. It is levied at the rate of 12% of the amount of any royalty (as defined) paid by any person to a non-resident to the extent that it is sourced in South Africa. Section 9(2) of the Act sets out the various instances when royalties will be deemed to be derived from a source within South Africa. The withholding tax rate was increased to 15% with effect from 1 January 2015. The withholding obligation is on the person making payment of the royalty. The tax must be paid by the last day of the month following the month in which the royalty is paid.

Exemptions apply to certain non-residents. In order to qualify for exemption or a reduced rate of withholding tax in accordance with a double taxation agreement, the non-resident must submit a declaration as prescribed to the person making the payment by a specified date or by the date of payment. SARS recently made the Return for Withholding Tax on Royalties (WRT01) form available.

Dividends tax

Section 64E of the Act levies a dividends tax at the rate of 15% of the amount of any dividend paid by any company other than a headquarter company. Dividends tax is only a withholding tax where cash dividends are paid. It is also levied on foreign dividends, which constitute cash dividends, if the shares in respect of which those dividends are paid are listed on the JSE Limited. The dividends tax is a final tax.

The company that declares and pays the dividend or a regulated intermediary that pays a dividend declared by any other person has the withholding obligation. No withholding obligation will arise if, *inter alia*, a dividend is paid to a company that forms part of the same group of companies as defined in section 41 of the Act or if it is paid to a regulated intermediary. Exemptions exist which may apply in certain instances. For example, resident companies that are beneficial owners of the dividends are exempt from the dividends tax.

The dividends tax must be paid by the last day of the month following the month in which the dividend was paid by the person that has the withholding obligation. A return must be submitted in order to make payment. A return must also be submitted by a person that has received an exempt dividend. A beneficial owner claiming an exemption or a reduced rate of tax must provide a declaration to that effect to the company or regulated intermediary paying the dividend as well as a written undertaking to inform the company should any circumstances affecting the exemption or reduction change.

Withholding tax on interest

A final withholding tax on interest is due to enter into force on 1 March 2015. The withholding tax on interest will be levied at the rate of 15% in terms of section 50B of the Act on any interest that is paid by any person to or for the benefit of any foreign person to the extent that the amount is sourced in South Africa. Section 9(2)(b) of the Act determines when interest will be deemed to be sourced in South Africa.

Exemptions exists which may apply to certain debt instruments or holders

The person paying the interest has to withhold and must submit a return and pay the tax by the last day of the month following the month in which the interest is paid. To claim exemption or a reduced rate of tax in terms of a double taxation agreement, a declaration has to be submitted in such form as prescribed by the

Commissioner. If a reduced rate is claimed, a written undertaking must also be submitted to the person making payment that they will be informed of any change in circumstances affecting the application of the double taxation agreement.

Withholding tax on service fees

Section 51B of the Act levies a final withholding tax on services fees calculated at the rate of 15% of the amount of any service fee that is paid by any person to or for the benefit of any foreign person to the extent that an amount is regarded as having been received by or accrued to that person from a source within South Africa. 'Service fees' is a defined term. This withholding tax will only be effective from 1 January 2016. Exemptions may apply to certain non-residents or double taxation relief may reduce the rate of the withholding tax. The person making payment of such service fee to the non-resident must withhold the tax and submit a return and pay the tax to the Commissioner by the last day of the month following the month in which the service fee is paid. Again, a declaration needs to be submitted in order to claim exemption or a reduced rate of withholding tax in terms of a double taxation agreement. To our knowledge, such a declaration has not yet been made available by SARS.

Conclusion

It is important to consider the application of the above taxes to any payments made to non-residents and in the case of the dividends tax to residents.

Failure to withhold or pay these taxes to SARS could result in the person that is required to withhold the tax being personally liable for the tax. In addition, penalties may be levied in certain instances for the failure to withhold or to correctly withhold.

