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International Tax

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South Africa budget contains surprises

South Africa's Minister for Finance presented the budget speech on 22 February 2012. Surprisingly, the minister announced that the new dividends tax – set to replace the 10% secondary tax on companies (STC) on 1 April 2012 – will be levied at a 15% rate, rather than the widely anticipated 10% rate. This new tax means that the South African Revenue Service (SARS) will collect SAR 15 tax out of every SAR 100 dividend. Despite this surprise rate hike, the new tax will collect SAR 1.9 billion less than the STC, largely because dividends received by South African resident corporations and pension funds are exempt. This move could have an impact on South Africa's efforts to attract companies to set up their businesses in the country rather than in other countries offering lower tax rates.

The second major surprise is the hike in capital gains tax (CGT). In an unexpected move, taxpayers will pay more CGT on the sale of capital assets after 1 March 2012. Before this date, individuals pay CGT at a maximum 10% rate, but this figure rises to 13.3%. Likewise, the effective CGT rate for companies increases from 14% to 18.6%, although the implementation date is unclear. Clearly the government is under pressure to collect more revenue and has chosen these two mechanisms to achieve this goal. The increase in the dividend withholding tax rate, together with the proposed increase in capital gains tax inclusion rates for individuals, effectively increases the tax burden of individuals who invest in equity shares to save for retirement. It seems that this approach has been adopted instead of a wealth tax that applies in some jurisdictions.

Carbon taxes will be introduced as from 2013/14 for carbon dioxide emissions above certain thresholds.

On a positive note, the government is considering allowing as a deduction interest incurred on debt obtained to acquire a controlling interest in shares (currently disallowed). Legislation also will introduce special economic zones with possible corporate tax rate reductions and job creation incentives.

This article looks at some of the proposed measures that will affect companies. Draft legislation is likely to be issued in June 2012 and will be promulgated later in the year or in early 2013.

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International tax

Tax rate on external companies – External (i.e. nonresident) companies currently are taxed at a rate of 33% on income earned in South Africa, while domestic companies are taxed at a rate of 28%, plus the 10% STC in respect of dividends declared. As a result of the impending repeal of the STC on domestic companies as from 1 April 2012, it is proposed that the rate applicable to external companies be reduced to 28% as well.

The reduction in the nonresident company tax rate places nonresident companies at a comparative tax advantage to resident companies whose dividends to nonresidents are subject to dividend withholding tax. This could have the unintended consequence of multinational groups seeking to operate in South Africa by way of a branch instead of a subsidiary to take advantage of the lower effective tax rate for shareholders.

Investment into Africa – Initiatives introduced in the past few years aimed at reducing potential double tax costs when investing into Africa will be scrutinized to clarify anomalies, in particular the eligibility of foreign withholding taxes for foreign tax credit relief in South Africa. It also is proposed that the risk of dual residence tax status will be removed where the tax in the foreign country is similar to the relevant South African tax.

Another welcome proposal is that South African loans to African subsidiaries that essentially operate as additional share capital will be treated as shares. This proposal aims to eliminate the transfer pricing concerns that otherwise exist where these loans might be interest free.

Local managers of foreign funds – Foreign investment funds often rely on the advice of South African fund managers in relation to African fund assets. This potentially raised the risk that such funds might be regarded as "effectively managed" in South Africa and, therefore, taxable in South Africa on their worldwide income and assets. It is felt that this risk has deprived local fund managers of foreign investment fund business and has caused such managers to relocate abroad in certain instances. It is proposed that legislation be introduced so that these funds are not inadvertently subject to worldwide taxation.

Ongoing refinements to headquarter company relief – Anomalies in the special rules providing tax and exchange control relief for South African headquarter companies will be addressed. These anomalies mainly relate to transfer pricing and in the context of headquarter companies that rely on foreign currency for their operations.

Dual-listed companies and other offshore reorganizations – Rollover rules were introduced in 2011 in respect of certain offshore reorganizations to provide South African multinational companies with greater flexibility when restructuring offshore subsidiaries. Given the limitations that have been introduced to bring the perceived abuse of the intra-group transaction rules in section 45 of the Income Tax Act under control, a provision similar to section 45 is proposed to be introduced in respect of offshore reorganizations.

In light of the perception that unbundling provisions might be used to shift foreign operations of a local multinational outside the South African tax jurisdiction, it is proposed that the participation exemption will be curtailed if the transaction indirectly strips value from a South African multinational.

Rationalization of withholding tax on foreign payments – In the absence of tax treaty protection, international investors currently are subject to a royalty withholding tax of 12% and, with effect from 1 January 2013, will be subject to an interest withholding tax of 10%. Along with the proposal announced in the Budget speech for the dividends tax to be increased to 15%, it is proposed that the withholding tax rates on royalty and interest income be increased to 15% as well, and that the procedures in respect of these withholding taxes be coordinated in a more streamlined manner.

Cross-border cooperation – Notice has been given that SARS will increase its focus on cross-border cooperation.

Corporate tax

Transition from STC to dividend withholding tax – As mentioned above, the transition from the STC to a dividend withholding tax will take place on 1 April 2012, and with the move to the new regime, it has been proposed to increase the dividend withholding tax rate from 10% to 15%. Pension funds currently exempt from income tax will continue to be exempt from dividend withholding tax. The increase in the withholding tax appears to be aimed at wealthy individuals and

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trusts who receive income in the form of dividends and capital gains that are effectively taxed at lower rates than ordinary income.

Double tax relief still will apply for nonresident shareholders where the dividend withholding tax rate may be reduced under a tax treaty.

Other proposed amendments relating to the transition from STC to dividend withholding tax include the following (in addition to the reduction of the tax rate applicable to nonresident companies):

- Reduction in the period available for the utilization of STC credits brought across to the dividend withholding tax regime from five years to three years;
- Removal of the higher income tax rate formula for gold mining companies; and
- Removal of the proposed passive holding company regime, originally designed as an anti-avoidance mechanism, and which is no longer considered necessary with the increase in the dividend withholding tax rate.

Increase in CGT inclusion rates – It is proposed to increase the CGT inclusion rates for companies from 50% to 66.6%, thus increasing the effective tax rate from 14% to 18.66%. The increase in CGT inclusion rates appears to be aimed at achieving closer parity between the income tax and CGT consequences for transactions. However, the increase in CGT inclusion rates may have the adverse effect of discouraging large investment by South African resident individuals and companies. From comments made by the Minister in his budget speech, it appears that, over the longer term, the intention would be to treat revenue and capital gains on the same basis.

Use of excessive debt in business – Proposed changes to the corporate rules, and in particular section 45 of the Income Tax Act, resulted in public debate in 2011 and continue to be a focus area of the authorities who are particularly concerned about a reduction of the tax base as a result of excessive debt in merger and acquisition-type transactions. It is proposed that a revised set of rules be enacted concerning the reclassification of debt-to-equity to limit interest deductions in respect of instruments that are closer in substance to equity than debt. Going forward, the government will consider an "across the board" percentage ceiling for interest deductions to limit excessive debt financing.

The use of debt financing and similar debt instruments is particularly relevant for companies that are looking to grow their businesses but do not have the internal funds to do so. It is hoped that the new rules are not overly complex and detract from the commercial attractiveness of debt financing necessary to finance business growth, and that the rules are sufficiently flexible so as not to stifle new businesses and expansions.

Debt used to fund share acquisitions – Interest on debt used to fund share acquisitions currently is disallowed as a deduction in South Africa, while many countries allow the deduction. As a result, intra-company transactions in terms of section 45 are used as an indirect acquisition technique to do a debt push-down and facilitate an interest deduction by allowing debt to be matched to the underlying assets acquired. It is proposed that interest associated with the use of debt to acquire a controlling interest of at least 70% in a company be allowed as a deduction, subject to the same limitations applicable to a section 45 transaction.

The proposed change is welcome and will help to reduce the complexity and transaction costs incurred by companies when acquiring other business or doing group reorganizations.

Debt cancellations and restructurings – There are currently complex, punitive rules that apply from an income tax and CGT perspective where taxpayers are released, either in full or in part, from their debt obligations. The government intends to simplify these rules and eliminate the adverse tax consequences when debt relief merely restores the taxpayer to solvency. Specific rules will apply to address situations where creditors agree to convert their debt interests into an equity stake as partial compensation for the debt.

Other proposed changes – The following is a list of other proposed changes and items under consideration:

- Special economic zones will be introduced to build on the industrial development zone policy, and various tax incentives will be explored relating to the conduct of business in these zones, including a reduction in the corporate tax rate for companies in the zones.
- The taxation of financial instruments on a mark-to-market basis to align the tax treatment with the accounting treatment will be considered.

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- A review of the system for taxation of short-term and long-term insurers and the tax treatment of captive insurers will take place.
- Captive finance schemes involving the use of artificial financing schemes to eliminate income will be reviewed for potential elimination.
- A comprehensive review of government grants qualifying for exemption will be undertaken.
- The connected person rule deeming assets to be acquired at the lower of a purchaser's or connected person's tax cost as they relate to the sales of trading stock will be removed.
- Accelerated depreciation (50:30:20) applicable to energy projects, such as wind, solar power and hydroelectric facilities, will be extended to include the foundations and supporting structures associated with these arrangements.

Value added tax

Finance services – The provision of credit is a financial service and is exempt from VAT unless such supply otherwise would have qualified for zero rating, as is the case where credit is provided to a nonresident. It is proposed to eliminate this zero rating to level the playing fields between local and foreign borrowers. Although neither local nor foreign borrowers will have VAT levied on interest charges, the local lender would have been entitled to deduct input VAT incurred on expenditure relating to foreign and not local loans. In other words, loans to nonresidents would have been entirely free of VAT, whereas loans to residents would not. This is, however, consistent with a destination-based VAT system where goods and services are taxed in the country of consumption and VAT is removed from exported goods or services. The removal of the zero rating will mean that input VAT on expenditure relating to loans to nonresidents will no longer be deductible.

Exports – Qualifying indirect exports (where the purchaser is responsible for removing the goods from South Africa) are zero rated. One of the requirements for zero rating to apply in this context is that the goods are initially delivered to a designated harbor or airport, thereby effectively excluding road transport. It is proposed that this exclusion be reviewed.

Temporary imports – Provision currently is made for the exemption of VAT in respect of temporary imports. The requirements are, however, restrictive and it is proposed that the VAT treatment of such imports be reviewed to promote local processing and beneficiaries.

Double VAT charges – The situation can arise where a foreigner, who is a vendor for South African VAT purposes, sells goods that are then imported into South Africa by the purchaser. The result is that VAT is levied on the sale and the purchaser also is obliged to account for VAT on importation. It is proposed that such transactions be reviewed to avoid the duplication of VAT charges.

Other taxes

Securities transfer tax – An exemption from securities transfer tax currently applies to brokers who acquire shares for their own benefit. It is proposed that the blanket exemption for brokers be abolished and that broker transactions, where the beneficial ownership rests with the broker, be taxed at an appropriate lower rate. This reduced rate also will cover the purchase of shares utilized in support of derivative hedging.

Carbon tax – It is proposed that a carbon tax will be implemented in 2013/2014 at a rate of SAR 120 per ton of carbon dioxide equivalent (CO2e) on direct emissions. The proposed tax will have the following features:

- Percentage-based rather than absolute emissions thresholds, below which a carbon tax will not be payable;
- A higher tax-free threshold for process emissions;
- Additional relief for trade-exposed sectors;
- The use of offsets by companies to reduce their carbon tax liability;
- A phased implementation;
- The tax will increase by 10% per annum until 2020;
- The revenue received from the tax will not be earmarked for climate change initiatives; and
- The CO2e emissions will be calculated using agreed methods.

Companies will be encouraged to reduce the carbon intensity of their products. A comparison based on industry emissions will be used to either reduce or increase the tax-free threshold. Companies whose carbon intensity of products is higher

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than the industry standard will be penalized by reducing the 60% threshold. Likewise, companies whose carbon intensity of products is lower than the industry standard will receive a higher tax-free threshold, capped at 90%.

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Austria:
Draft austerity package announced

Austria's Ministry of Finance published draft amendments to various tax laws on 17 February 2012 that are part of an austerity package aimed at reducing sovereign debt over the next five years. While the lion's share of revenue is to be raised by expense cutting, taxpayers are expected to contribute as well.

The following are the more significant proposed changes:

- The main proposal affecting corporation income taxation is a measure to curb the tax utilization of foreign losses (i.e. losses of foreign permanent establishments (PEs) and foreign tax group members). Under current rules, such losses are determined by applying Austrian tax rules. The draft legislation instead provides that the tax losses used in Austria could not exceed the tax losses as determined under foreign tax rules. If approved, the restriction on loss utilization would apply as from 2012 to anyone with a foreign PE and to tax groups with foreign group members.
- Eligible expenses for subcontracted R&D work would be subject to a higher cap of EUR 1 million instead of EUR 100,000 if the principal (rather than the subcontractor) opts to claim the R&D premium. The subcontractor would need to be a qualifying EU/EEA institution and not a related party. As drafted, the principal would be permitted to apply the amendment to business years starting after 31 December 2011.
- A new rule would be introduced to ensure that only true R&D activity is fostered through the R&D premium. Taxpayers would be able to request an expert opinion from the Austrian FFG mbH, a state-owned special purpose company designed to foster R&D through loans and subsidies, to demonstrate that their activities qualify as R&D according to the Frascati Manual. In such a case, the tax office would have to issue an assessment as to whether the R&D is eligible. If the taxpayer does not request an expert opinion from the FFG mbH, the tax office would be authorized to do so.
- The capital gains taxation of real property would be overhauled. Currently, individuals, certain businesses held by individuals and private foundations can sell real estate tax free after a 10-year holding period. This holding period would be abolished so that capital gains derived from real property would be subject to tax regardless of how long the property has been held. The new rules are proposed to apply to all alienations after 31 March 2012. The rules for corporations would not change so that capital gains earned by corporations remain subject to 25% corporate income tax.

  The capital gain would be subject to a special flat tax of 25% (versus a tax rate of up to 50% under the current rules). However, if the property has been held for more than 10 years at the time of alienation, the gain would be reduced by 2% for each year exceeding the 10-year period, but by no more than 50% in total ("inflation allowance").

  Grandfathering rules would be available for real property where capital gains would not have been taxable as per 31 March 2012 under the existing rules (as a rule this would cover real property acquired before 1 April 2002). Under the grandfathering rules, the taxpayer would be allowed to use a lump-sum amount as the historical cost of acquisition when computing the capital gain. This lump sum amount would be determined as a certain percentage of the sales proceeds and no inflation allowance would be available in this case. However, the taxpayer could opt for taxation under the normal rules where the actual historic cost of acquisition and an inflation allowance are considered.

  Losses crystallizing upon the sale of real property could be offset only against capital gains derived from the sale of real property.

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- The effective tax rate for individuals earning income from employment would be increased temporarily. Currently, 1/6 of the annual income from employment is taxed at a flat rate of 6%. From 2012 through 2016, however, the flat rate would be replaced by higher tax rates for annual gross income from employment exceeding EUR 185,000.

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Costa Rica:
Authorities issue rulings on double tax relief

Costa Rica's tax authorities issued rulings on 13 and 21 February 2012 on the availability of relief for double taxation. According to the tax authorities, taxes paid abroad by Costa Rican taxpayers may be deducted in computing taxable income.

Deductibility of foreign taxes may be beneficial for multinational corporations rendering "back office" services from Costa Rica to other Latin American countries (e.g. to Brazil, where the Brazilian government claims a 25% withholding tax on payments for the services). Previously, a Costa Rica corporation was unable to deduct foreign withholding tax paid in computing its Costa Rica-source income.

Companies with operations in Costa Rica and that have incurred foreign tax should review their profit and loss statements with a view to requesting a refund, if appropriate (keeping in mind that the statute of limitations in Costa Rica is three years).

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India:
AAR rules payments to nonresident for purchase of software subject to withholding

India's Authority for Advance Rulings (AAR) held on 6 February 2012 that payments received by a nonresident from India-based distributors for the sale of software products and a package of support services are in the nature of a royalty as defined in section 9(1)(vi) of the Income-tax Act, 1961 (ITA) and the India-Australia tax treaty.

Background

The taxpayer, Citrix Systems Asia Pacific Pty Limited, is a company incorporated in Australia and is engaged in the business of providing software services that assist in virtualization, networking and application delivery. The taxpayer entered into non-exclusive agreements with independent Indian distributors for the distribution and sale of its software and hardware products in India. The arrangement provided that the hardware products would be shipped to the distributors who, in turn, would supply them to re-sellers and end users. While no physical deliveries of the software were made to the distributors (end users were instead required to download the software from the taxpayer's server), the distributors were invoiced for the software and, in turn, they invoiced the resellers and end users. The distributors also facilitated the sale of the "Citrix Subscription Advantage Program" (the "program"), a package of support services that included product version updates, the subscription advantage news and update and secure portal access.

The taxpayer requested a ruling from the AAR as to whether payments it receives from the Indian distributors for the sale of software products and the program are in the nature of a "royalty as defined in ITA section 9(1)(vi) or under article 12 of the treaty with Australia. Section 9 of the ITA deems the income of a nonresident to be accrued in, or arising in, India in certain circumstances. Section 9(1)(vi) addresses the payment of royalties, including the transfer of all or any rights (e.g. the granting of a license) in a copyright. Section 195 of the ITA requires the Indian payer to withhold tax on a payment of

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income to a nonresident if the income is subject to tax in India. The withholding tax rate on royalties under India's domestic rules is 10%, plus any applicable surcharge and cess (with an effective rate lower than the 15% rate applicable under the treaty with Australia). If the section 9 deeming provision does not apply in this case to source the payment within India, the payment will only be subject to tax in India if the nonresident has a permanent establishment in India (which the taxpayer declared it did not have).

The taxpayer sought to distinguish between payments for the sale of its software products as "copyrighted articles" versus payments for the use of any or all rights in a copyright, claiming that only the latter qualifies as a "royalty" under the ITA or treaty with Australia.

Observations and ruling of the AAR

In reaching its conclusion that the payments were in the nature of a royalty under both the ITA and the treaty (taxed at the more favorable of the domestic or – assuming the recipient qualifies as tax resident for treaty purposes – treaty rate), the AAR paid particular consideration to the definition of "copyright" and "royalty," noting as follows:

- "Copyright" has been defined in India's Copyright Act to mean the exclusive right to carry out (or authorize such) any of the acts referred to in the Act in respect of a work or any substantial part thereof. Additionally, in the case of a computer program, "copyright" includes the right to sell, commercially rent or offer for sale or commercial rental, any copy of the computer program.
- The owner of a copyright can grant an exclusive license to another to exploit the copyright. Alternatively, the owner can grant a license that places certain restrictions, for example, with respect to rights, users and duration. A lawful possessor of a computer program (which can be an assignee, an exclusive licensee or a licensee of the program) also has a right (absolute or limited) to use the copyright.
- The assignment or license of software for use involves an assignment or license of the right to use the embedded copyright in the software (the intellectual property right or "IPR"). The software cannot be divorced from the embedded IPR of the software's creator.
- Software is no more than a program and other operating information used by a computer, such that the sale or licensing of software for use passes to the grantee a copyright as defined in the Copyright Act. Thus, the sale or licensing of the software involves the grant of a right to use the copyright in the software, so that, when software is transferred or licensed for use, the transfer includes the copyright embedded in the software.
- "Royalty" under the Indian ITA is defined as consideration for the transfer of all or any rights (including the grant of a license) in respect of a copyright. The words "including the grant of license" indicate an expansive definition and should be understood plainly as the grant of a license.
- "Royalty" under the India-Australia treaty refers to payments made as consideration "for the use of or right to use of any copyright," patent, etc., which could be construed to be broader than the definition in the ITA because it includes consideration for the use of a copyright, in addition to consideration paid for the right to use a copyright.

The AAR further observed that the distinction sought to be made by the taxpayer between a copyright and a copyrighted article appears to be illusory because, when a copyrighted article is permitted or licensed to be used for a fee, the permission involves not only the physical or electronic manifestation of a program, but also the use of or the right to use the copyright embedded therein. Further, neither India's Copyright Act, the ITA nor the treaty use the expression "copyrighted article," which could have been used if the intent of their respective drafters was as claimed by the taxpayer.

Comments

The adverse ruling by the AAR follows (in time) the taxpayer-favorable ruling in December 2011 by the Delhi High Court in DIT v. Ericsson Radio System A.B. & Others, in which the High Court held that a payment for software that forms an integral part of a global system for mobile communications was not taxable as a royalty. In so holding, the Delhi Court distinguished between the sale of a copyrighted product and the transfer of copyright in the software. This position was particularly welcomed by taxpayers in light of the highly publicized adverse ruling by the Delhi Income Tax Appellate Tribunal (ITAT) in the 2010 Microsoft decision, in which the ITAT held that consideration for use of a computer program is taxable as a royalty and a copyrighted article cannot be treated as a product. The ITAT in Microsoft had disregarded the OECD Commentary, which distinguishes between a copyright and a copyrighted article. It also should be noted that the Karnataka High Court in the 2011 Samsung Electronics case held that payment for shrink-wrapped software was for the transfer of a copyright, including the right to make copies of software for internal business, and was hence taxable as a royalty. The Citrix ruling

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leaves taxpayers once again waiting for an authoritative pronouncement by the Supreme Court to settle this contentious issue.

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Indonesia:
New rules issued on bookkeeping in foreign language and currency

The Indonesian Minister of Finance issued a regulation on 2 February 2012 (PMK 24) that provides guidance on the procedures for maintaining books in a foreign language and in a currency other than the Indonesian rupiah for tax purposes. PMK 24 revises previous guidance issued in 2007.

The following taxpayers are included in the 2007 guidance as being eligible to maintain their books and records in a foreign language and currency:

- Companies that have foreign capital participation/investment;
- Permanent establishments of foreign companies;
- Taxpayers that have a foreign parent company;
- Companies that have entered into a general mining work contract or an oil and gas production sharing contract; and
- Entities that enter into collective investment contracts and issue U.S. dollar-denominated mutual funds.

PMK 24 adds another type of taxpayer to this list: an entity that prepares its financial statements in the U.S. dollar as its functional currency in accordance with Indonesia's generally accepted financial accounting standards (i.e. PSAK 10).

According to PSAK 10, which was revised in 2010 and applies as from 1 January 2012, companies must record their foreign currency transactions using their functional currency and prepare their financial reports using their functional currency. Previously, companies could maintain their records and financial reports in rupiah, even though their functional currency was in a currency other than the Indonesian rupiah. The new rules under PSAK 10 define the functional currency as the currency of the primary economic environment in which the entity operates and mandate that the functional currency be determined based on a hierarchy of specified indicators, e.g. the currency that mainly influences the sales price, labor and material costs of the company, the currency in which funds from financing activities are generated, etc. The functional currency may be rupiah or any other currency as determined by the hierarchy of indicators.

The issuance of PMK-24 is an attempt to accommodate the requirements of PSAK 10 to the bookkeeping requirements for tax calculation purposes, although it does not resolve the issue of what happens if a company's functional currency is other than the Indonesian rupiah or the U.S. dollar, the only two currencies that are permitted.

It is important to note that taxpayers falling within the scope of the category mentioned in PMK 24 whose fiscal year starts in January, February, March or April 2012 were required to submit an application to the Indonesian Directorate General of Taxation for approval to maintain their bookkeeping in U.S. dollars and in English within 30 days after the issuance of PMK 24. If the application was rejected or the taxpayer failed to comply with the 30-day deadline (and the application is therefore denied), there may be complications as to which currency the taxpayer should use both from a tax and an accounting perspective.

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Korea:
Tax exemption period for foreign technicians/engineers extended

The Korean government has extended the tax exemption period with respect to the earned income of qualified foreign technicians/engineers for an additional three years (i.e. from 31 December 2011 to 31 December 2014).

Under Korean tax law, 50% of wages received from a domestic entity by a qualified foreign technician/engineer providing services in Korea to a domestic entity may be eligible for a tax exemption for two years from the date the individual first provides services in Korea. To qualify for the exemption, the foreign technician/engineer must have had at least five years' work experience, or three years' experience and a bachelor's degree or higher, and be contracted to work in a field designated by Korean law, such as construction, mining, technology intensive industries, certain engineering services, etc.

Companies should determine whether foreign technicians/engineers working in Korea will qualify for the earned income tax exemption.

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Sweden:
Court rules withholding tax on dividends paid to foreign fund undertakings violates EU law

The Administrative Court of Appeal in Sweden ruled on 15 February 2012 in several cases that the withholding tax levied on dividends paid on Swedish shares to foreign fund undertakings and to foreign companies that are similar to a Swedish investment company is incompatible with the free movement of capital principle in the Treaty on the Functioning of the European Union. As a consequence, the court held that all tax withheld on such distributions must be repaid to the claimants. The decision may provide an opportunity for qualifying funds to obtain a refund of dividend withholding tax paid in Sweden.

The cases published thus far have involved UCIT funds in the form of Luxembourg SICAVs and U.K. OEICs (open ended investment companies), i.e. fund undertakings that are legal persons. One case, however, involved a listed Finnish limited liability company (Oyj) that was deemed to have characteristics similar to a Swedish investment company.

Significantly, the Administrative Court of Appeal ruled in 2011 that a foreign fund undertaking that is not a legal person (that case involved a Luxembourg FCP) was not liable to withholding tax in Sweden because the Swedish Withholding Tax Act only provides for tax liability for foreign individuals (and estates of foreign deceased individuals) and foreign legal persons. The tax authorities have appealed that decision to the Supreme Administrative Court.

With the additional support from the recent decisions of the Administrative Court of Appeal, foreign UCIT funds, funds within the EU that can be deemed to be similar to a Swedish special fund, as well as pension funds and investment companies, should consider reclaiming withholding tax paid on Swedish share investments if they have not yet done so. Because the levy of withholding tax has been deemed to violate the free movement of capital principle, which also could apply in relation to countries outside the EU, reclaims should be considered by non-EU funds. Reclaims can be made for withholding tax paid during the last five calendar years (i.e. during year 2012, reclaims can be made for withholding tax paid as from and including 2007).

It should be noted that, as from 1 January 2012, a change in the legislation has resulted in the abolition of withholding tax on dividends paid to certain foreign fund undertakings that are resident within the EEA or a country that has concluded a tax treaty with Sweden that includes an exchange of information provision or with which Sweden has an agreement regarding the exchange of information in tax matters.

The Court of Appeal decision can be appealed to the Supreme Administrative Court, although it is currently uncertain whether the Swedish tax authorities will appeal the cases. The deadline for an appeal is 15 April 2012.

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In brief

Colombia – The government has introduced a 1% withholding tax, for income tax purposes, on gross revenue earned from the export of hydrocarbons, oil and other mining products. The withholding tax is calculated on the amount received at the official exchange rate on the date of payment or the date the income was accrued. The tariff does not apply to gold exports by national companies recognized as international trading companies.

Honduras – A decree published on 20 February 2012 grants a tax amnesty from the payment of interest, surcharges and penalties where a taxpayer opts to pay taxes due. The amnesty, which applies until 30 July 2012, has been granted because of a case pending before the Court of Justice.

Korea – For withholding tax obligations arising as from 1 July 2012, a nonresident taxpayer that wants to claim reduced tax rates for Korean-source income under a bilateral tax treaty will be required to submit a "Reduced Tax Rate Application Form" to the relevant withholding agent.

Namibia – The 2011 Income Tax Amendments that were gazetted on 30 December 2011 (and applicable as from that date) include a final withholding tax of 25% on entertainment fees, director's fees, management and consulting services where such services are provided by a nonresident to a resident of Namibia. The terms management and consulting services are defined broadly and include administrative, managerial, technical, consultative or similar services.

United Kingdom – As from 1 April 2012, businesses will be required to file VAT returns online and pay any VAT due electronically. Any business that is not already required to file returns and make payments electronically will be obliged to do so for all accounting periods beginning on and after 1 April.

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Canada
Velcro Canada wins beneficial ownership case
The Tax Court has ruled that the tax treaty with the Netherlands applies to reduce Canadian withholding tax applicable to royalties paid to a Dutch company, despite that company having a contractual obligation to make a payment equal to 90% of the royalties to a Netherlands Antilles company within 30 days of receipt. [Issued: 28 February 2012]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/d80df5611b7c5310VgnVCM2000001b56f00aRCRD.htm
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