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6 September 2019

To: ***The Honourable J. Maswanganyi and the Honourable Y. Carrim***
The Standing and Select Committees on Finance

For attention: Mr. Arico Kotze and Mr. Allen Wicomb
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From:
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Our entity is a new manufacturing concern as defined in section 12R of the Income Tax Act. We are located in the Dube Tradeport SEZ and we are over 90% manufacturing as required by section 12R.

Objection to the 2019 draft taxation laws amendment bill

Reason for Comment

As stated in the Full Budget report tabled by the minister of Finance on the 20th February 2019, page 133. Certain section 12R qualifying companies were unfairly harmed by the 20% anti-avoidance measure which saw legitimate business transactions excluded from claiming the 15% reduced corporate tax rate.
Our entity is one such entity which is being unfairly harmed as we comply with all other qualifying criteria.

Draft Explanatory Memorandum on the TLAB
Section 4.2

On the 5th September 2019. Our entity attended the feedback session with National Treasury regarding the anti-avoidance measures for the Special Economic Zones.
Our full submission to Treasury is attached to this e-mail.

Treasury advised that they input this 20% related party anti-avoidance measure as a result of pressure after the OECD contacted them.
We appreciate that Treasury has tried to relax the 20% rule so that it is not simply disqualify entities on the basis of all or nothing.
But we feel this amendment by Treasury still does not achieve the desired result for legitimate qualifying entities and it presents real complications for SARS.

We advised Treasury that a domestic transfer pricing anti-avoidance measure would better suite this anti-avoidance provision.
Treasury agreed with us that domestic transfer pricing would achieve the anti-avoidance measure and that transfer pricing is acceptable by the OECD.
But Treasury's concern is that SARS may not have the capacity to review additional domestic transfer pricing.

We believe that this is an invalid argument by Treasury.

Treasury's submission to allow us to claim a portion of non-related party profit at 15% would actually provide more of a burden on SARS that domestic transfer pricing as:

1. There is no methodology in the income tax act to split taxable income between related and non-related party income and expenses, hence new legislation would have to be drafted to achieve this. This methodology could be complicated.
2. There is no mechanism in the income tax return to apply this apportionment, hence additional resources at SARS would need to be applied to change the e-filing system.
3. Both of these amendments would take significant time and the 10 year sunset clause on section 12R will be halfway through next year.

Recommendation

As a result of this we recommend Treasury replace the 20% anti-avoidance measure which would seem to disqualify a portion of a qualifying entity's taxable income with domestic transfer pricing.

The additional volume of SARS reviewing domestic transfer pricing will be way less that applying Treasury's apportionment solution.

International Transfer Pricing is an accepted practice internationally aswell as by the OECD and this same methodology can be applied easily to domestic transfer pricing without much amendment to the Income Tax Act.

The transfer pricing document can easily be requested on SARS e-filing without much hassle.

The additional benefit is that domestic transfer pricing will allow legitimate qualifying entities to claim the full section 12R benefit.

As mentioned before, National Treasury agreed that domestic transfer pricing will achieve the desired goal and is recognized by the OECD and we have support from tax experts at PWC that this will be the best method.

Appearance

Should the Standing and Select Committees like more explanation, I would like the opportunity to appear and reinforce our arguments to this Act if it will strengthen our case.

Conclusion

We recommend that the 20% anti-avoidance provision be removed from section 12R and replaced with a domestic transfer pricing anti-avoidance provision.

Regards,

Jeremy das Neves CA(SA)
Head of Finance
Samsung Electronics South Africa Production (Pty) Ltd