Ratification Double Taxation Conventions / Agreements

Sudan DTA Agreement and Australia Protocol

SCOF: 24 June 2008

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Purpose of Agreements

- ⇨ To remove barriers to cross-border trade and investment.

How treaties remove tax barriers

- ⇨ Elimination of double taxation
- ⇨ Certainty of tax treatment
- ⇨ Reduce withholding tax rates
- ⇨ Prevention of fiscal evasion
- ⇨ Assistance in collection
- ⇨ Resolution of tax disputes/interpretation

South Africa – Sudan Double Taxation Agreement

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Introduction

- ⇨ Closely follows the OECD Model Convention, which forms the foundation for the vast majority of Double Taxation Agreements (DTA's) worldwide

- ⇨ A number of articles are different from the normal SA approach. These articles and other articles of interest in the South Africa – Sudan Double Tax Agreements are as follows:

Article 4: Resident

- Paragraph 3 provides that where a person other than a individual is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavour to determine the mode of application of the Agreement to the person. In the absence of such agreement by the competent authorities of the Contracting State, the person shall not be entitled to any relief or exemption from tax provided by the Agreement.

Article 5: Permanent Establishment

- The term "permanent establishment" includes a warehouse or premises used as a sales outlet.
- Construction
  - 12 months in OECD Model
  - 6 months in UN Model
  - South Africa – Sudan DTA
    - Building site, a construction, assembly or installation project or any supervisory activity in connection therewith – more than 12 months.
    - Furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose – periods or periods exceeding in aggregate183 days in any 12 month period.

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Article 5: Permanent Establishment

- ⇨ The concept of “delivery” is not regarded as being of an auxiliary or preparatory nature and will create a permanent establishment.

- ⇨ Paragraph 6 provides that activities of an agent which are wholly or almost wholly on behalf of an enterprise and conditions are made and imposed between the enterprise and agent which differ from those which would be made between independent enterprises, the agent would not be considered an agent of independent status.

Article 9: Associated Enterprises

- Paragraph 3 provides that a Contracting State shall not change the profits of an enterprise after the expiry of the time limit in its domestic law or after 5 years from the end of the year in which the profits subject to the such change would have accrued to that enterprise. This paragraph will not apply in the case of fraud or wilful default is proved.

Article 10: Dividends

- ⇨ Withholding tax of 5% or 15% proposed by OECD Model
- ⇨ In practice, withholding taxes vary widely internationally
- ⇨ Dividend rate in South Africa – Sudan DTA:
  - ➢ 5% for shareholding of at least 25%
  - ➢ 10% on all others

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Articles 11: Interest

- ⇨ Withholding tax of 10% proposed by OECD Model
- ⇨ In practice, withholding taxes vary widely internationally
- ⇨ South Africa – Sudan DTA: 10%
- ⇨ Paragraph 3 provides that interest arising in a Contracting State shall be exempt from tax in that State if it is derived and beneficially owned by the Government of the other Contracting State or a political subdivision or local authority thereof, the Central Bank of Sudan, the South African Reserve Bank or any wholly owned institution of that Government or subdivision or authority.

Article 12: Royalties

- ⇨ No withholding tax proposed by OECD Model
- ⇨ In practice, withholding taxes vary widely internationally
- ⇨ South Africa – Sudan DTA: 10%

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Article 14: Independent Personal Services

- Independent personal services are dealt with separately in this Article. The threshold for taxation in the source State is the existence of a fixed base or 183 days physical presence.

Article 16: Directors Fees

- Paragraph 2: Salaries wages and any other similar remuneration, derived from the company in respect of the discharge of functions as an employee, shall be taxable in accordance with the provisions of Article 15.

Article 20: Teachers and Researchers

- This Article provides an exemption from tax in the host State for two years in respect of visiting teachers or researchers. However, the remuneration must be derived from outside the host State.

Article 21: Students and Trainees

- Paragraph 2 provides that in respect of grants, scholarships and remunerations from employment not covered under paragraph 1, a student or business trainee shall be entitled to the same exemption, relief or reductions in respect of taxes available to residents of the Contracting State being visited.

Article 25: Mutual Agreement Procedure

- Paragraph 4 provides that the competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article.

South Africa – Australia Protocol amending the Double Taxation Agreement

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Introduction

- ⇨ Closely follows the OECD Model Convention, which forms the foundation for the vast majority of Double Taxation Agreements (DTA's) worldwide.

- ⇨ Amendments to the Convention and the Protocol thereto, became necessary in view of the proposed phasing out of the secondary tax on companies and its replacement with a dividends tax.

- ⇨ Articles of interest in the South Africa – Australia Protocol amending the Double Tax Agreement are as follows:

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Article 2: Taxes Covered

- ⇨ Article 2 was deleted and replaced by a new Article on “Taxes Covered”.
- ⇨ Paragraph 2 was amended for completeness. The competent authorities of the Contracting State shall notify each other of any significant changes that have been made in their respective taxation laws.

Article 4: Resident

- ⇨ Article 4 was deleted and replaced by a new Article defining “Resident”. The new Article is in line with our resident-based system of taxation.
- ⇨ Paragraph 5 of the new Article eliminates the possibility of double non-taxation which might result from domestic law exemptions in Australia in conjunction with relief under the Agreement.

Article 5: Permanent Establishment

- Paragraph 2 includes agricultural, pastoral or forestry property in the term "permanent establishment".
- Construction
  - 12 months in OECD Model
  - 6 months in UN Model
  - South Africa – Australia Protocol
    - Building site, a construction, or installation project in connection with such site or project – more than 6 months before a permanent establishment will exist..

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Article 5: Permanent Establishment

- Paragraph 4 activities deemed to be performed through a PE:
  - Carrying on supervisory or consultancy activities in connection with a building site or construction or installation project – periods or periods exceeding in aggregate 183 days in any 12 month period or
  - Carrying on activities including the operation of substantial equipment for the exploration or exploitation of natural resources - periods or periods exceeding in aggregate 90 days in any 12 month period or
  - Operates substantial equipment - periods or periods exceeding in aggregate 183 days in any 12 month period.

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Article 5: Permanent Establishment

- ⇨ Paragraph 5 provides a rule for calculating time tests when the contracts are split between associated enterprises and the activities are connected. The period during which two or more associated enterprises are carrying on concurrent activities will be counted only once in determining the duration of the activities.
- ⇨ Paragraph 7 deems a PE to exist where a person acting on behalf of an enterprise:
- habitually exercises an authority to substantially negotiate or conclude contracts on behalf of the enterprise; or
- manufactures or processes for the enterprise goods and merchandise belonging to the enterprise.

Article 10: Dividends

- ⇨ Withholding tax of 5% or 15% proposed by OECD Model.
- ⇨ In practice, withholding taxes vary widely internationally.
- ⇨ Dividend rate in South Africa – Australia Protocol:
  - ➢ 5% for shareholding of at least 10%
  - ➢ 15% on all others.

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Articles 11: Interest

⇨Withholding tax of 10% proposed by OECD Model

⇨In practice, withholding taxes vary widely internationally.

⇨South Africa – Australia Protocol: 10% on the gross amount of interest.

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Articles 11: Interest

⇨Paragraph 3 provides that interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may not be taxed in the first-mentioned State if:

- the interest is derived by a Contracting State or by a political or administrative subdivision or a local authority thereof, or by any other body exercising governmental functions, or by a bank performing central banking functions; or
- the interest is derived by a financial institution which is unrelated to and dealing wholly independently with the payer.

Article 12: Royalties

- ⇨ Article 12 was deleted and replaced by a new Article on “Royalties”.
- ⇨ Royalties may also be taxed in the Contracting State in which they arise but the tax charged is limited to 5 % of the gross amount of the royalties.

Article 23A: Non-discrimination

- A new Article on Non-discrimination was inserted immediately after Article 23 of the Agreement. This inclusion was due to Australia now accepting such an Article and it broadly follows the OECD and UN Model provisions

Article 25: Exchange of Information

- ⇨ Article 25 of the Agreement was deleted and replaced by a new Article on Exchange of Information.

- ⇨ This new Article is in line with the OECD Model and provides for an extensive exchange of information.

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Article 25A: Assistance in the Collection of Taxes

- ⇨ A new Article on Assistance in the Collection of Taxes was inserted immediately after Article 25 of the Agreement.

- ⇨ Under this new Article the two States are empowered to collect taxes on behalf of each other in cases where the assessments are final.