# Synopsis

**Tax today**

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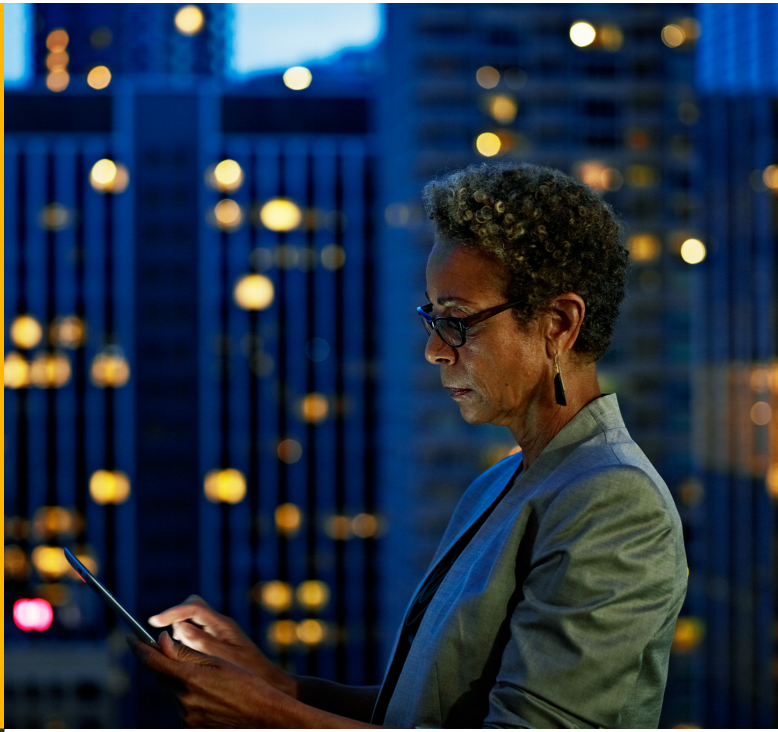

A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

Through analysis of and comment on new laws and judicial decisions of interest, Synopsis helps executives to identify developments and trends in tax law and revenue practice that may affect their business.

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# The OECD's MLI (Multilateral Instrument): What it means for multinational groups

## Introduction

The OECD's MLI — full name "*Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*" but generally abbreviated to "the BEPS Multilateral Instrument" or "MLI"— has a significant impact on the tax-risk-profile of cross-border income-flows of multinational groups. The MLI's modification of existing double tax treaties ("DTTs") means that it should be a consideration not only in relation to proposed future actions, but also in relation to pre-existing structures and income flows.

## BEPS context

As many tax professionals are aware, the G20/OECD Action Plan to address Base Erosion and Profit Shifting ("BEPS") was initiated in 2013, with most of the final recommendations presented in the Reports published in October 2015. The Action Plan sought to address three "themes", namely substance, coherence and transparency, being the main areas of perceived weaknesses in the corporate international tax system. The century-old global tax system had not kept up with the pace of globalisation and economic integration, and with the increased sophistication of corporate structures and business models. This resulted in greater opportunities for tax avoidance and abuse.

With these three broader themes in mind, 15 specific Actions were developed to address BEPS.

## Four Actions requiring treaty-modification

Included in the 15-point BEPS Action Plan are four Actions that require a review of DTTs. That is, effective implementation of the recommendations would require the modification of DTTs. To be clear, some of the implementation recommendations for these items also included some other measures, such as amendments to domestic legislation and/or matters relating to administrative procedure, but the focus in this article is on the modification of DTTs. The four Actions are:

**Action 2:** "*Neutralising the Effects of Hybrid Mismatch Arrangements*" ("Hybrid Mismatches")

Under the general theme of *coherence*, this Action is concerned with the fact that certain entities and/or certain instruments are treated differently in different countries. That is, for *entities*, it may be possible to manipulate attributes such as tax residence or look-through status — e.g., so that one country sees an entity as being tax-resident or taxable in a second country whilst, at the same time, that second country does not necessarily assert taxing rights over that entity. Or, for certain types of instruments and related income-flows, it may be possible for one country to see it as interest-bearing debt (incurring tax-deductible interest), while the other country sees it as akin to equity (generating tax-free dividend income).

**Action 6:** "*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*" ("Treaty Abuse")

Under the theme of *substance*, Action 6 challenges the scenarios where (according to the OECD Report) taxpayers undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted. A common example demonstrating "treaty-shopping" abuse is that of so-called letterbox companies — arguably technically tax-resident in a country but perhaps not necessarily establishing the same level of in-country substance as the intended beneficiaries of DTTs.

## Action 7: "*Preventing the Artificial Avoidance of Permanent Establishment Status*" ("PE Avoidance")

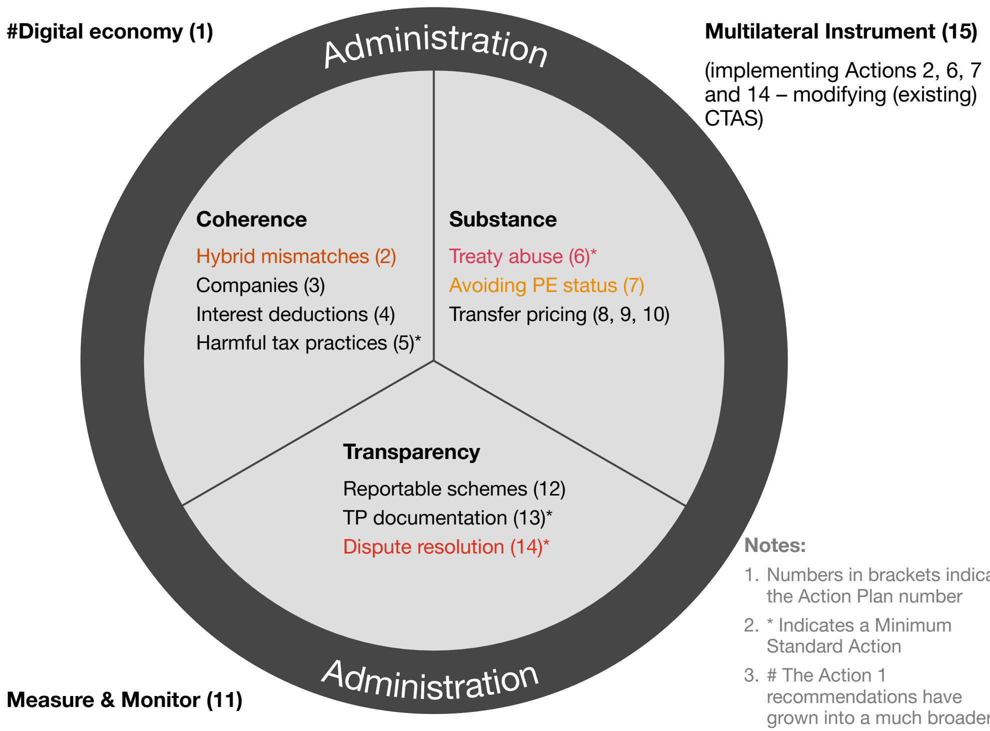
Also under the heading of *substance*, Action 7 is concerned with technical ways of circumventing the PE definition, notwithstanding that, in substance, significant functions (e.g., sales-related activities) are carried out inside the country. There was also a concern that the compartmentalisation of functions (and other mechanisms, such as contract-fragmentation) resulted in the exploitation of the specific PE exemptions.

## Action 14: "*Making Dispute Resolution Mechanisms More Effective*" ("Dispute Resolution")

Improving Dispute Resolution mechanisms — as part of the broader *transparency* theme — is a critical aspect of improving certainty for compliant taxpayers. This is acknowledged by the BEPS project not only as a pre-existing area for improvement, but even more so in light of countries' broad adoption of many of the other BEPS Actions. For example, the Mutual Agreement Procedure ("MAP") between revenue authorities is considered to be of fundamental importance to the proper application and interpretation of DTTs.

This graphic summarises the Actions under each of the three themes.

**BEPS Action Plan – 3 Themes / 15 Actions**




**Notes:**

1. Numbers in brackets indicate the Action Plan number
2. * Indicates a Minimum Standard Action
3. # The Action 1 recommendations have grown into a much broader project addressing "Tax Challenges Arising from Digitalisation" (commonly also referred to as "BEPS 2.0", i.e., Pillars One and Two)

## The Model Tax Convention ("MTC") and the MLI

As is usually the case with significant DTT changes proposed by the OECD, a major implementation focus is on revising the OECD's Model Tax Convention ("MTC") and the accompanying explanatory "Commentary". For the BEPS project, this culminated in the publication in November 2017, of a revised MTC and Commentary, taking into account the recommendations and proposals in respect of the four Actions discussed above.

However, the MTC and Commentary would typically only be relevant in forward-looking scenarios, i.e., as and when new DTTs are negotiated or renegotiated bilaterally between specific treaty-partners.  Against that, the BEPS project also sought to implement the proposals into existing DTTs, hence the need for the MLI. Given that there are over 3,000 in-force DTTs already in existence, the MLI is (as Action 15 of the BEPS project) a mechanism through which multiple *existing in-force* DTTs are modified. It implements the four treaty-related BEPS Actions into existing DTTs, and essentially also seeks to reduce the incidence of major gaps, in application and interpretation, between actual in-force DTTs and the revised MTC/Commentary. The MLI thus also means that pre-existing arrangements within Multinational Enterprises ('MNEs') may now be open to challenge as a result of modified DTTs. By 3 July 2023, 100 countries (representing 1,850 bilateral DTTs) had already signed the MLI, of which 81 had already finalised their ratification — meaning that around 1,200 DTTs are already modified.

This table reflects the respective provisions of the MLI and 2017 MTC to implement the various Actions.

| Action | MLI provision | 2017 MTC provision |
|---|---|---|
| Hybrid mismatches (2) | Articles 3 – 5 | Article 4 |
| Treaty abuse (6) | Articles 6 – 11 | Preamble text, Article 29 |
| Avoiding PE status (7) | Articles 12 – 15 | Article 5 |
| Dispute resolution (14) | Articles 16 – 26 | Article 25 |

Even though the rest of this article will focus on the MLI (i.e., the modification of existing in-force DTTs), it is important to recognise that much of the interpretative guidance related to the modifications will be found in the corresponding aspects of the MTC and Commentary.

## How many of SA's treaties are already affected?

SA deposited its instrument of ratification with the OECD on 30 September 2022. This was after we originally signed the MLI in June 2017 and then proceeded to complete all domestic procedures (including ratification by SA's Parliament). This means that the MLI came into force for SA's DTTs on 1 January 2023.

But, to understand which specific DTTs, and which specific Articles within each of those DTTs, have been modified by the MLI, we also need to be aware of the election (or opt-in/out) mechanisms of the MLI. There are two levels of elections required by the MLI signatories, namely:

- on a treaty-by-treaty basis, each country has to select which of the DTTs in their existing treaty network they wish to be covered by the MLI modification, i.e. which DTTs will be "Covered Tax Agreements" (or "CTAs"); and
- on an Article-by-Article basis, which of the MLI modifications they wish to opt in or out for — noting that some of the MLI Articles are so-called "minimum standards" (essentially, compulsory, with no opt-out).

Furthermore, these elections can only have effect if they are symmetrical, in the sense that the same elections are made by the counterparties to the same DTT. For example, a DTT would not be "covered" if only one of the two treaty partners "listed" (i.e., selected) that DTT. Similarly, even if a specific DTT is a CTA (because both treaty partners chose to select that DTT), the only effective MLI modifications to that DTT are those for which both parties have opted in.

Out of SA's 81 total concluded DTTs, 51 are already (as at 3 July 2023) ratified CTAs. Specifically:

| | |
|---|---|
| **SA's total concluded DTTs as at 30 June 2023**<br>(Two not yet ratified, so only 79 actually in-force already) | 81 |
| **DTTs not listed by SA for MLI modification**<br>For at least four of these (Germany, Malawi, Sierra Leone and Zambia), it is likely that SA excluded them from MLI modification because they are in any event in the process of being directly (bilaterally) renegotiated. It is probable that the application of the revised OECD MTC would, in those negotiations, address the same positions as the MLI modifications. | - 5 |
| **DTTs listed by SA to be covered by the MLI** | 76 |
| **Unmatched by other countries**<br>Treaty partners who have either not yet signed the MLI, or who have signed but have not listed (from their side) their DTTs with SA. | - 19 |
| **Matched CTAs** (Covered Tax Agreements) | 57 |
| **Still unratified**<br>Treaty partners who have signed the MLI, and who have also listed their SA DTTs for MLI modification, but who have not yet deposited their instrument of ratification with the OECD. | - 6 |
| **SA's DTTs (CTAs) for which the MLI modifications are fully in-force*** | 51 |
| * For 50 of these DTTs, the MLI modifications came into force on 1 January 2023, given that SA ratified on 30 September 2023 and these 50 treaty partners had already ratified before that date. For the other one (Mexico), the modifications came into effect on 1 July 2023, given that Mexico only ratified in May 2023. | |

As should be apparent from the table above, the number of SA's CTAs may still increase over the next months and years.

## Specific modifications to SA's treaties

As indicated earlier, the MLI is a flexible instrument, so it does not modify all CTAs in the same manner. The OECD explains that impact on a CTA will depend on a country's policy preferences (as indicated in the jurisdiction's list of Reservations and Notifications deposited with the OECD) and whether both parties to a CTA were aligned in their policy preferences.

Once it is established that a DTT is a CTA, the extent of the impact of the MLI on the treaty depends on the two countries' treaty positions. The MLI contains articles where jurisdictions may make reservations and opt in or out of certain provisions, and these selections must be symmetrical in order for the treaty to be modified accordingly. This means that it is important for the impact of the MLI to be analysed on a treaty-by-treaty basis taking into consideration the selections made by each party.

However, while the MLI does offer this flexibility, States may generally not opt out of provisions that reflect a BEPS "minimum standard" — unless the CTA already contains similar provisions and achieves the same purpose. The two main minimum standards requiring DTT modification (and thus also addressed in the MLI) are the Principal Purpose Test ("PPT"), being part of the "Treaty Abuse" BEPS Action, and the Mutual Agreement Procedure ("MAP"), being part of "Improving Dispute Resolution" Action.

South Africa's MLI positions are set out below, and it is perhaps useful to separate between the positions where SA has chosen to:

- opt **in** (or not reserved out, which would also be the case for the "minimum standards" given that opting out is largely not possible), keeping in mind that these positions ultimately only have effect in the DTTs where the other Contracting State has chosen an identical opt-in; and
- opt **out**, recognising that these provisions therefore do not have any impact on SA's DTTs (even if other States have opted in), but keeping in mind also that SA can change these elections, i.e., opt in at a later date, if it chooses to.

## Articles where SA has opted in

| Article | Description | Description and PwC Commentary |
|---|---|---|
| *Hybrid Mismatches* | | |
| MLI Art. 3<br>MTC Arts. 1 and 23 | Transparent entities | Income derived by an entity that is transparent (for tax purposes will be considered — for treaty purposes — to be income of a "resident" of a State only to the extent that the income is treated as income of a resident under the *domestic* tax law of that State.<br>Put differently, if an entity escapes taxation in the Residence State (as a result of being tax-transparent there), then the income is likely to be excluded from DTT relief in the Source State. For example, if a DTT provision uses language such as "a resident of a Contracting State", a tax-transparent entity might no longer qualify as such a resident, and would thus lose the treaty benefit. |
| MLI Art. 4<br>MTC Art. 4 | Dual-resident entities | For companies that are tax-resident in both States, the tie-breaker for treaty-purposes is "mutual agreement" between the two competent authorities ("CAs"), i.e. revenue authorities. Aspects such as "incorporation" and "place of effective management" ("PoEM") are confirmed to be relevant factors. If the CAs can't agree, then the company is not entitled to any relief under that DTT (except to the extent agreed by the CAs).<br>This is a significant modification for two reasons. First, the previous position in the vast majority of SA's DTTs was simply the PoEM as the tie-breaker. Secondly, as is usually the case with the mutual agreement procedure ("MAP"), there is no compulsion upon the CAs to actually resolve the matter but, rather, they simply have to "endeavour". For modified DTTs, therefore, the position is now far more uncertain. |
| *Treaty Abuse* | | |
| MLI Art. 6<br>MTC Preamble | Purpose of a CTA | The *preamble* to the relevant DTT is expanded and elaborated to confirm that — even though the primary purpose of the DTT remains the elimination of double taxation— it is subject to the expectation that its application should not be "*creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion*". The objection to treaty-shopping is also expressly highlighted in the preamble.<br>This provision does not represent a technical or substantive change to any specific DTT article but, rather, is intended to have a significant impact on the interpretation perspective in applying the DTT. |
| MLI Art. 7<br>MTC Arts. 10, 11, 12 and 29 | Prevention of treaty abuse | As part of the limited optionality in relation to this "minimum standard", SA opted for the introduction of the principal purpose test ("PPT"). Specifically, treaty benefits are denied if "*it is reasonable to conclude*" that obtaining the treaty benefit was:<br>• one of the principle purposes<br>• of any arrangement or transaction<br>• that resulted directly or indirectly in that benefit.<br>This is perhaps the most significant modification introduced by the MLI, inserting into the majority of SA's DTTs a general anti-avoidance rule ("GAAR"). Furthermore, the vague and broad nature of the GAAR language naturally increases substantially the level of uncertainty that has now been created.<br>(An in-depth discussion of the PPT will be the subject of a separate article in a later *Synopsis*.)<br>That said, it is noteworthy that, even before the MLI modification, 13 of SA's DTTs already contained anti-treaty-abuse language akin to the PPT. Specifically, 11 DTTs have the PPT language in the articles on dividends, interest and royalties (Arts. 10, 11 and 12, respectively); the Netherlands-SA DTT has PPT language in Art. 10 (i.e., Dividends); and the Japan-SA DTT has an anti-treaty-shopping GAAR in Art. 22 (clarified in Protocol 2). |

| Article | Description | Description and PwC Commentary |
|---|---|---|
| MLI Art. 8<br><br>MTC Art. 10 | Dividend transfer transactions | The treaty relief for dividend withholding tax may now be subject to a one-year holding requirement. That is, for the relief (whether full exemption or simply a rate-reduction) that is subject to a minimum capital shareholding, the relief will only be available if that minimum capital was held for the full 365 days preceding (up to and including) the dividend payment date.<br><br>It is common for a DTT's "Dividends" article (typically Art. 10) to offer more than one separate relief, with the "better" relief available to non-resident shareholders (typically companies) who own at least a specified minimum capital. This MLI modification applies only to this aspect of the Dividends article, i.e. the more general relief available to all shareholders remains undisturbed.<br><br>Corporate reorganisation transactions would generally not break the holding period, so the relief would not be lost simply because the shares (of the dividend-paying company) were transferred within the same group. |
| MLI Art. 9<br><br>MTC Art. 13 | Capital gains from alienation of shares deriving their value from immovable property | Upon the disposal of so-called property-rich shares, more DTTs will now permit the Source State to apply its domestic CGT.<br><br>If a non-resident sells actual immovable property situated in the Source State, most DTTs (typically Art. 13(1)) will permit the Source State to apply the CGT chargeable under its domestic rules. However, this is not necessarily the case upon the disposal of property-rich shares — i.e., if the asset disposed of is not actual immovable property but, rather, shares in a company that derives its value primarily from immovable property situated in the Source State. If the Source State's domestic rules impose CGT on that share-disposal, there has, historically, always been a mix of SA DTTs that either permit or prevent the charging of that CGT.<br><br>The MLI modification has now increased the number of SA's DTTs that do permit the charging of domestic CGT on the disposal of property-rich shares. Specifically, the modified language says that the Source State may tax gains derived from the alienation of:<br><br>• shares or comparable interests, such as an interest in a partnership or a trust<br>• if, at any time during the 365 days preceding the alienation<br>• those shares (or comparable interests) derived more than 50% of their value, directly or indirectly, from immovable property situated in the Source State. |
| MLI Art. 11<br><br>MTC Art. 1 | Application of treaties to restrict a party's right to tax its own residents | This modification provides that, as a general matter, a DTT cannot affect the taxation by a State of its own residents. Put differently, the DTT can only be used to restrict the Residence State from taxing its own residents in terms of expressly specified provisions.<br><br>The specifically listed exceptions are where the DTT:<br><br>a. requires the Residence State to make a corresponding adjustment, in relation to a transfer pricing adjustment or PE profit-attribution in the Source State;<br><br>b. might affect how the Residence State taxes resident individuals on income from services rendered to the government (etc.) of the Source State;<br><br>c. might affect how the Residence State taxes a resident individual who is a student or teacher (etc.) working in the Source State;<br><br>d. requires the Residence State to eliminate double taxation (through a credit or exemption) on income that the DTT permits the Source State to tax;<br><br>e. protects residents against discriminatory practices by that State;<br><br>f. permits residents to seek competent authority consideration;<br><br>g. might affect how the Residence State taxes a resident individual who is a member of a diplomatic or government mission, or has a consular post, for the Source State;<br><br>h. exempts (in the Residence State) pensions, etc. made under the social security legislation of the Source State — i.e., where the DTT provides that those payments may be taxed *only* in the Source State;<br><br>i. exempts (in the Residence State) pensions, annuities, etc. arising in the Source State — i.e., where the DTT provides that those payments may be taxed *only* in the Source State; or<br><br>j. otherwise expressly limits the Residence State's right to tax its own residents, or where a DTT provision expressly provides that the Source State has the exclusive right to tax an income-item arising in that Source State. |

<table>
<tr><th>Article</th><th>Description</th><th>Description and PwC Commentary</th></tr>
<tr><td colspan="3">Avoidance of Permanent Establishment ("PE") Status</td></tr>
<tr><td>MLI Art. 13<br>MTC Art. 5</td><td>Artificial avoidance of PE status through the specific activity exemptions</td><td>This modification deals with the exemptions from the PE definition for activities such as facilities used solely for the storage or delivery of goods, etc. (typically in Art. 5(4)).<br><br>First, an express "preparatory or auxiliary" requirement is added to all the specific exemptions. And secondly, if the non-resident enterprise, together with "closely related", already has a PE or other activities conducted in the Source State, then activities that are ostensibly exempt (on a stand-alone basis) might be denied the exemption when viewed together with those other activities.<br><br>Previous versions of this exemption paragraph listed some specifically exempt activities (typically four, being sub-paras (a) - (d) of Art. 5(4)), but did not require these individual activities to also be "of a preparatory or auxiliary character". The preparatory/auxiliary prerequisite applied only for the general "any other activity" exemption (typically sub-para (e)), and for activities comprising "any combination" of the specified activities (sub-para (f)). The new position, now, is that each specified individual activity would only be excluded from the PE definition if, in addition to being a specified activity, it is also "of a preparatory or auxiliary character". The preparatory/auxiliary prerequisite also remains in place for the general "any other activity" exemption, as well as for "the overall activity" if it is a combination of the specified activities.<br><br>Furthermore, the exemption would also be denied for any fixed place of business of a non-resident enterprise, if that enterprise or any "closely related" enterprise already has other activities in the Source State —whether in a shared or completely separate location in that Source State — and either:<br>• any of those places-of-business already constitutes a PE in that Source State; or<br>• the combination of all those activities is not, as an overall activity, of a preparatory or auxiliary nature;<br><br>if those business activities "constitute complementary functions that are part of a cohesive business operation".<br><br>According to the definition (in Art. 15 of the MLI), a person is "closely related" to an enterprise if one has control of the other, or if both are under control of the same persons or enterprises. Entities will in any event be closely related if there is a more-than-50% beneficial ownership (or voting rights, etc.) relationship.</td></tr>
<tr><td colspan="3">Improving Dispute Resolution</td></tr>
<tr><td>MLI Art. 16<br>MTC Art. 25</td><td>Mutual agreement procedure ("MAP")</td><td>Of the 21 elements of the MAP-related BEPS Action, six require DTT modification through the MLI (or DTT-specific bilateral negotiation). Being a "minimum standard", SA's options to elect out were very restricted. In fact, it is only in relation to one element that SA entered a slight reservation (adopting the other five without any reservation). That said, many of these MAP elements were already present in many of SA's DTTs.<br><br>The six MAP aspects that would now be seen as part of matched CTAs are:<br>i. Competent Authorities ("CAs") are permitted to, and should, resolve treaty-related interpretation/application debates/difficulties via MAP.<br>ii. Taxpayers are able to request MAP assistance, if any CA action will result in tax "not in accordance with" the DTT. The taxpayer must present their request within three years of the CA action in question.<br>iii. Taxpayers must present their request to the CA in their own Residence State, i.e., where the taxpayer is resident. This is the only MAP aspect where SA has deviated slightly from the MAP standard, which would have been to permit taxpayers to present their cases to either CA. However, the reservation — i.e., for MAP requests to be presented to only the Residence State's CA — is permitted on condition that there is a process through which, if that CA intends to reject the application, they will first consult with the other CA.<br>iv. The CAs should endeavour to resolve the case (through MAP).<br>v. CAs should be able to consult on double tax scenarios not addressed in a DTT.<br>vi. The MAP process, and implementation of the resultant agreement, would disregard (override) domestic-law time-limits, i.e., MAP overrides prescription, etc.</td></tr>
<tr><td>MLI Art. 17<br>MTC Art. 9</td><td>Corresponding adjustments</td><td>If one State makes a profit-inclusion in terms of its transfer pricing ("TP") rules, in relation to profits that have also been taxed in the other State, then the other State should make an "appropriate" adjustment to its tax charge. Simply put, if one country makes a TP adjustment (increasing taxable profits), then the other country should make a downward adjustment. The CAs should consult, "if necessary", to determine the adjustment.<br><br>It is submitted that this modification is not significant, in that most of SA's DTTs already contained this type of provision (typically Art. 9(2)). It is likely that SA's adoption of this MLI article is aimed at updating the minority of DTTs that do not already have these provisions and, also, to standardise the language of this rule on corresponding adjustments.</td></tr>
</table>

## MLI Articles where SA has opted out

| MLI Article | Description | Description and PwC Commentary |
|---|---|---|
| *Hybrid Mismatches* | | |
| MLI Art. 5<br>MTC Art. 23 | Methods for elimination of double taxation | Where a DTT currently requires the Residence State to exempt the income derived from the Source State, that exemption provision should essentially be replaced by a credit (rebate) provision, depending on the actual level of taxation in the Source State.<br>It is submitted that SA's decision to reserve out of this article is not significant, since the majority of SA's DTTs in any event already apply the credit method (not outright exemption) to eliminate double taxation. |
| *Treaty Abuse* | | |
| MLI Art. 10<br>MTC Art. 29 | PEs situated in third jurisdictions | Treaty benefits would be denied if income derived in one Source State (second State) is treated as attributable to a PE in another Source State (third State), if the tax suffered (on that income) in the third State is less than 60% of the tax that would have been charged by the Residence State if that income was attributable to a PE in the second State.<br>This anti-abuse rule applies only if the income attributable to the third State is generally exempt from tax in the Residence State. It is submitted that SA's decision to reserve out of this article is not significant, since — for income attributable to a PE in the Source State — SA's DTTs generally do not grant a full exemption in the Residence State. |
| *Avoidance of Permanent Establishment Status* | | |
| MLI Art. 12<br>MTC Art. 5 | Artificial avoidance of PE status through commissionnaire arrangements and similar strategies | The so-called "dependent agent" aspect of the PE definition (typically Art. 5(5)) is expanded significantly. Whereas it used to catch situations where a representative in the Source State habitually (or regularly) concluded contracts in the name of the non-resident principal, it is now extended to also include scenarios where the representative habitually "plays the principal role leading to the conclusion of contracts that are routinely concluded without modification" by the non-resident enterprise.<br>SA's decision to reserve out of this provision is significant, essentially meaning that its DTTs retain the existing (narrower) dependent agent PE concept. There are some interesting theories and commentaries around SA's choice here, such as protecting its SA-based outbound groups. Interestingly, around half of the MLI signatories also reserved out of this article.<br>It is of course noteworthy that SA's domestic PE definition (in section 1 of SA's Income Tax Act) does in fact adopt this expanded language. The broader wording is naturally part of the PE definition in Art. 5 of the OECD's revised MTC, which is imported verbatim into section 1, as SA's domestic PE definition. That said, the domestic definition is relevant solely for the Income Tax Act (and rules involving "source", currency, and some others), and does not impact any of SA's DTTs. |
| MLI Art. 14<br>MTC Art. 5 | Splitting-up of contracts | For aspects of the PE definition that depend on time-based thresholds, this modification seeks to combat the practice of project-fragmentation (or splitting-up of contracts). For example, a construction or installation project (typically in Art. 5(3)) automatically constitutes a PE if the project exceeds a specified number of months (e.g. 9 or 12 months), depending on the specific DTT.<br>Where a non-resident carries on multiple seemingly separate activities at a construction site (etc.) in the Source State, and each individual activity exceeds 30 days, then all of those separate periods must be aggregated in determining whether the overall time-based PE threshold has been breached. Furthermore, even if the separate activities are not all carried on by the same non-resident enterprise but, rather, are undertaken by "closely related" enterprises, all those activities must still be aggregated.<br>SA has reserved out of this modification. |
| *Arbitration (Dispute Resolution)* | | |
| MLI Arts. 18 - 26 | Binding arbitration | If the MAP process fails to resolve a particular matter, the taxpayer may proceed to request mandatory binding arbitration. This aspect of the MLI sets out the process, and is subject to specific opt-in (i.e., if an MLI signatory simply remains silent on this point, then mandatory arbitration is not applicable).<br>Approximately two-thirds of the MLI signatories (including SA) have forgone this option. |

## The takeaway

For any multinational group operating in SA and relying on SA's treaty-network, the impact and significance of the MLI will depend not only on which other territories the group is active in, but also on the specifics of your corporate structure and transaction flows (etc.). The only way to assess the impact will be to pick through the treaty modifications introduced by the MLI — and the relevant elections and reservations by all parties — on an individual treaty-by-treaty basis. Several technology tools are available to map these impacts.

Certainly, the hype around SA's ratification of the MLI (within the context of the overarching hype around the BEPS project in general) has already started manifesting in interesting queries and harsher interpretations from revenue authorities.

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# Memberships in foreign partnerships: Further reflections in light of the Coronation case

## Introduction

This article will outline considerations regarding the South African ("SA") tax treatment of income earned by controlled foreign companies ("CFCs") as a result of their membership in foreign partnerships. This will include an explanation of the manner in which the income earned by foreign partnerships is generally taxed in SA (i.e. where the partner in the foreign partnership is a SA resident *or* a CFC) and in which instances such income should not be subject to tax in SA. This will involve a description of the corporate legal nature of CFCs and foreign partnerships, the tax treatment of these entities in light of the underlying policy rationale for such treatment and finally the interplay between these tax concepts. In summary, this article will illustrate that the income earned from a foreign partnership should not be subject to tax in SA where the partner in the foreign partnership is a CFC, and the business of the foreign partnership is carried on from a fixed place of business situated outside of SA which is suitably staffed and equipped to conduct the primary operations of its business which aligns with the primary business of the partner CFC and further that the income of the CFC is not considered to be diversionary income.

## Controlled foreign companies

A CFC is, in summary, a foreign company where:

- more than 50% of the participation rights (i.e. the right to directly or indirectly participate in all or part of the benefits of the rights attaching to a share or any interest of a similar nature), or more than 50% of the voting rights in that company, are held by tax residents in SA; or
- its financial results are reflected in the consolidated financial statements of a SA resident company (other than headquarter companies) as contemplated in IFRS 10.

Of significance is that a CFC is a foreign company. A foreign company is defined in section 1 of the Income Tax Act 58 of 1962 ("the Act") as any company which is not a resident. The definition of a company in section 1 of the Act excludes foreign partnerships. This indicates that foreign partnerships cannot be CFCs.

South African resident taxpayers are required to submit the so-called IT10B tax return to the South African Revenue Service ("SARS"). This form discloses, *inter alia*, the number of employees of the CFC, the imputed net income of the CFC and provides SARS with a snapshot of the tax treatment of the CFCs of that SA resident.

Notwithstanding that foreign partnerships cannot constitute CFCs (per the above definitions), it is common for taxpayers to include these entities in their IT10B disclosures thereby subjecting them to the same tax treatment as CFCs. This ultimately results in taxpayers applying the foreign business establishment ("FBE") exemption to shield the income of the foreign partnerships in instances where the exemption *may* not in fact apply.

## Foreign partnerships

Examples of entities which could potentially qualify as foreign partnerships include Limited Liability Partnerships, Limited Liability Companies and Common Contractual Funds. In some cases, foreign taxpayers may have the option to elect whether these entities would be treated as corporations, while in some jurisdictions, these entities may be considered independent taxpayers and treated as companies automatically.

Given these nuances, it is recommended that where these entities exist within an offshore structure of a SA tax resident, a detailed analysis is undertaken to determine if these entities are indeed CFCs or whether they could constitute foreign partnerships as different tax treatments apply.

From a SA tax perspective, the foreign partnership definition essentially considers how the foreign entity is treated in terms of the existing laws of the country in which it was formed or established. The terms “partnership”, “association”, “body of persons” or “entity” as used in the ‘foreign partnership’ definition is not defined in the Act. The process of statutory interpretation would need to be applied to determine the meaning of these phrases. While a detailed review of each of these terms falls outside the scope of this article, it is noted that these terms can be interpreted widely to include a broad range of foreign entities or arrangements.

Once it has been determined that the entity in question falls within these terms, it would then need to be determined whether the country in which the foreign partnership was formed or established has laws relating to the tax on income or not. If it does, the entity would constitute a foreign partnership provided the foreign tax treatment of the entity essentially results in the income of that entity being taken into account by its partners when it is received by the entity (and that the entity is accordingly not liable for or subject to tax on income). Conversely, where the country in which the entity is formed does not have laws relating to tax on income, regard should be had to the agreement between the members in the entity to determine if they are allocated any receipt or accrual of that foreign partnership concurrently.

There are a number of practical and interpretation nuances which arise in determining whether entities constitute foreign partnerships, and accordingly this determination would need to be done on a case-by-case basis.

## Taxation of CFCs

The taxation of CFCs is an established practice which is followed in various countries throughout the world. The taxation of CFCs in SA essentially results in the ‘net income’ of the CFC being included in the income of the SA resident. One of the far-reaching provisions which should be considered when calculating net income is the so-called “FBE exemption”. When calculating net income, the FBE exemption does not take into account amounts attributable to a fixed place of business located in a foreign country which is used for the carrying on of the business of the CFC for a period not less than a year, provided it meets certain other requirements.

For a more detailed explanation of the FBE exemption and commentary on a recent case thereon refer to our article titled “*Primary operations of a business: Am I who I decide to be, or am I simply what I’m authorised to be? The case of SARS v Coronation*” in the February 2023 edition of the Synopsis. This article discussed the Supreme Court of Appeals interpretation of the FBE exemption in the recent case of *South African Revenue Service v Coronation Investment Management SA (Pty) Ltd (1969/2021) [2023] ZASCA 10*, the principles of which are important for the purposes of this article.

It is emphasised for the purposes of this article that the policy rationale behind the FBE exemption is to exclude from the CFC tax net, any amounts which has been ‘legitimately’ earned abroad (i.e. through utilisation of physical structures and activities as distinguished from passive income which could have been just as easily earned by the SA resident directly). This policy rationale was made in light of the ease at which SA residents can shift income, which could have been earned within SA, to separate legal entities which are not tax residents in SA. The FBE exemption recognises that amounts actually attributable to activities and assets located outside of SA should not be subject to tax in SA. There are however provisions which exclude certain income from the FBE exemption which is considered to be diversionary or passive in nature.

Although not immediately relevant to this article, it is noted that another exemption which CFCs can rely on is the so-called High Tax Exemption (“HTE”). The HTE essentially deems the net income of a CFC to be nil where the aggregate amount of foreign taxes on income payable by the CFC in respect of the foreign tax year of that CFC is at least 67,5 percent of the amount of normal tax that would have been payable in respect of any taxable income of the CFC had the controlled foreign company been a resident for that foreign tax year. It is therefore worth noting that the below discussion regarding the nuances of foreign partnership income earned by CFCs would not need to be considered for CFCs which meet the HTE as no imputation would arise for that CFC in any event.

## Taxation of foreign partnerships

Section 24H of the Act regulates the taxation of persons who carry on trade or business in partnership. The charging provision within section 24H provides that:

> “Where any income has in common been received by or accrued to the members of any partnership or foreign partnership, a portion (determined in accordance with any agreement between such members as to the ratio in which the profits or losses of the partnership are to be shared) of such income shall, notwithstanding anything to the contrary contained in any law or the relevant agreement of partnership, be deemed to have been received by or to have accrued to each such member individually on the date upon which such income was received by or accrued to them in common.”

The above essentially results in partners being deemed to earn their share of the net taxable profit from the activities of a partnership in their own taxable income. For example, if an SA resident is a member of a foreign partnership and that foreign partnership receives business profits, the SA resident partner would be deemed to have earned their share of this amount directly (i.e. the foreign partnership is treated as a transparent entity) and would accordingly be subject to tax on the taxable profit of such receipt. This liability to SA tax would however need to be assessed in light of any applicable Double Taxation Agreement entered into between SA and the country in which the foreign partnership earns its income.

The policy behind this tax treatment should be considered in light of the corporate legal nature of partnerships in SA. In this regard it is noted that partnerships are not seen as separate juristic entities, but rather a fiction which is created by agreement between the parties. This agreement between the partners would essentially stipulate how the economic gains derived from the activities of the partnership should be split amongst the partners. Accordingly, it is logical to tax the partners on an individual level rather than creating a fictitious legal entity which could be liable for tax on its income.

It is further noted that section 24H(2) also provides that each of the partners to a partnership is deemed to be carrying on the trade or business which is carried on by the partnership. This is an important element for the determination of the applicability of any deductions or exemptions contained within the Act.

## Interplay between CFCs and foreign partnerships

A distinguishing feature when considering CFCs as members of a foreign partnership (as opposed to SA residents being members in the foreign partnerships directly) is that neither the foreign partners nor the foreign partnerships are entities which operate in SA. The only reason that this arrangement would need to be considered from a SA tax perspective is as a result of section 9D of the Act together with section 24H resulting in the income of the foreign partnership being deemed to have been earned by the CFC (which could then be imputed in the hands of the SA tax resident). Therefore, in determining if the income from the foreign partnership would be subject to tax in SA, the applicability of section 9D would need to be considered.

In summary, the FBE exemption provides that an FBE is a fixed place of business located in a country other than SA that is used or will continue to be used for the carrying on of the business of that CFC. As indicated above, where a CFC is a member of a foreign partnership, the CFC would be deemed to be carrying on the business of that foreign partnership. When deciding whether to impute income, it needs to be considered if a foreign partnership operates in a way that qualifies for the FBE exemption. If so, the CFC could potentially rely on this because it is considered to be conducting the same trade and business, but only if their primary operations are aligned.

In this regard, we highlighted that the Coronation case provided a strict interpretation of the FBE exemption by essentially providing that the 'primary operations of the CFC' must be conducted from the fixed place of business in question. The judgment suggested that, in order for the income from the foreign partnership to be shielded by the FBE exemption, the business conducted by the foreign partnership must align with the primary operations of the CFC who is a partner to the foreign partnership. This interpretation would however go against the above-mentioned underlying policy rationale for the FBE exemption (i.e. to exclude from the SA tax net, income which is physically earned abroad).

### The takeaway

The SCA appears to have placed significant focus on determining the primary operations of a business (i.e. in the context of the Coronation case, the key question was whether investment management or fund management was the primary business) and only afforded the protection of the FBE exemption to this primary business being investment management.

Where a CFC is a member to a foreign partnership which conducts a business outside of its primary operations, there is a risk that the FBE exemption would not apply.

In light of this, the SA treatment of income earned from foreign partnerships of SA resident multinational enterprises should be considered afresh given the potential risks noted in this article.

The implications of the Coronation case continue to present themselves in varying circumstances and judicial clarity on this case, through appeal to the Constitutional Court, would be welcomed. As presented in the budget announcements shortly after the judgment of the SCA was delivered, amendments to the FBE definition should be expected. It could perhaps be that the mischief which the National Treasury would like to target is more focused on outsourcing activities rather than where various business operations are undertaken (or deemed to be undertaken in the case of foreign partnerships).

We therefore recommend that SA resident entities who have a large foreign network of subsidiaries and who are involved in foreign partnerships carefully consider the specific facts and circumstances of their arrangements to ensure that they are correctly treating their foreign partnerships from a CFC point of view.

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# SARS Watch

## SARS Watch 1 June 2023 – 30 June 2023

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| **Legislation** | | |
| *30 June 2023* | Returns of information to be submitted by third parties in terms of section 26 of the Tax Administration Act 28 of 2011 ("TAA") | Notice 3631 published in Government Gazette No. 48867. This public notice replaces, for periods commencing on or after 1 March 2023, Notice 241 published in Government Gazette No 41512 of 23 March 2018. The dates for submission of returns are specified in the notice. |
| *23 June 2023* | Withholding Tax on Royalties – Summary of DTA rates – Africa<br>Withholding Tax on Royalties – Summary of DTA rates – Rest of the World | Summary of withholding tax rates per South African Double Taxation Agreements currently in force. |
| *23 June 2023* | Withholding Tax on Interest – Summary of DTA rates – Africa<br>Withholding Tax on Interest – Summary of DTA rates – Rest of the World | Summary of withholding tax rates per South African Double Taxation Agreements currently in force. |
| *23 June 2023* | Dividends Tax Tables – Summary of DTA rates – Africa (Version 9)<br>Dividends Tax Tables – Summary of DTA rates – Rest of the World (Version 9) | Summary of withholding tax rates per South African Double Taxation Agreements currently in force. |
| *14 June 2023* | Notice in terms of section 25 of the TAA, read with section 66(1) of the Income Tax Act 58 of 1962 ("ITA"), for submission of income tax returns for the 2023 tax year | Notice 3540 published in Government Gazette No. 48788.<br>The dates for submission of returns are specified in the notice. |
| *9 June 2023* | 2023 Draft Revenue Administration and Pension Laws Amendment Bill<br>Draft Memorandum on Objects of 2023 Draft Revenue Administration and Pension Laws Amendment Bill<br>2023 Draft Revenue Laws Amendment Bill<br>Draft Explanatory Memorandum on the 2023 Draft Revenue Laws Amendment Bill | These draft bills provide the necessary legislative amendments required to implement the first phase of the "two-pot" retirement system.<br>Comments are due to SARS and National Treasury by Saturday, 15 July 2023. |
| *8 June 2023* | Table A – A list of the average exchange rates of selected currencies for a year of assessment as from December 2003<br>Table B – A list of the monthly average exchange rates to assist a person whose year of assessment is shorter or longer than 12 months | Average exchange rates updated up to May 2023. |
| **Interpretation** | | |
| *30 June 2023* | Interpretation Note 115 (Issue 2) – Withholding tax on interest | This Note deals with the interpretation and application of sections 50A to 50H of the ITA relating to withholding tax on interest. |
| *30 June 2023* | Interpretation Note 6 (Issue 3) – Resident – Place of effective management (Companies) | This Note provides guidance on the interpretation and application of the term "place of effective management" in determining the tax residence of a company as one of the considerations under the tie-breaker rule in a tax treaty. |
| *8 June 2023* | Interpretation Note 130 – Exemption for international aid received or accrued under an official development assistance agreement | This Note provides guidance on the application of section 10(1)(yA) of the ITA and the requirements that have to be met before an exemption can apply. |

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| **Binding rulings** | | |
| *21 June 2023* | Binding General Ruling 64 – Temporary application of new dwellings for exempt supplies simultaneously held by developers for taxable purposes | This BGR clarifies the VAT treatment of newly built residential dwellings that have been developed and held for sale under a taxable supply by developers, but that are simultaneously temporarily applied to make exempt supplies of residential accommodation in a dwelling. |
| *15 June 2023* | Binding Private Ruling 394 – Instalment sale agreements and their sale to a non-resident | This ruling determines the income tax treatment of amounts received by the Applicant on instalment sale agreements and on the sale or cession of the receivables to a non-resident at a discount. |
| *15 June 2023* | Binding Private Ruling 393 – Income tax consequences resulting from consecutive asset-for-share transactions | This ruling determines the income tax consequences resulting from two consecutive asset-for-share transactions in terms of which two separate business operations of a resident company will be disposed of as part of a restructuring within a group of companies. |
| *15 June 2023* | Binding Private Ruling 392 – Sale of shares in a controlled foreign company (CFC) | This ruling determines the tax consequences for a resident shareholder disposing of its shares in a CFC. |
| *15 June 2023* | Binding Private Ruling 391 – Tax consequences of the termination of an *en commandite* partnership | This ruling determines the tax consequences for the partners in an *en commandite* partnership (the Partnership) following the termination of the Partnership and associated distribution of partnership assets in accordance with their interests in the Partnership. |
| *15 June 2023* | Binding Private Ruling 390 – Disposal in anticipation of liquidation | This ruling determines the tax consequences of a disposal, by a resident, of its business to its shareholder in anticipation of or in the course of liquidation of that company, as contemplated in section 47(1) of the ITA. |
| *6 June 2023* | Binding Private Ruling 389 – Bursaries awarded by a resident company | This ruling determines the income tax consequences resulting from bursaries awarded by a resident company in terms of two distinct bursary schemes to members of the general public and relatives of employees and former employees. |
| **Customs and excise** | | |
| *30 June 2023* | Draft amendments to Schedule No. 5 – Refunds or drawbacks of duties upon export of imported fuel | Comments are due to SARS by Friday, 21 July 2023. |
| *30 June 2023* | Amendment to rules under section 120 – Item 202.00 of the Schedule to the rules is amended by the substitution of the following forms (DAR248):<br>• DA 185 – Application form – Registration or Licensing of Customs and Excise Clients<br>• DA 185 4A3 – Registration Client Type 4A3 – Rebate or Refund User (Schedule No's 3 4 and 6) | Notice R.3621 published in Government Gazette No. 48862 with an implementation date of 30 June 2023. |
| *30 June 2023* | Amendment to rules under sections 46, 49 and 120 – Trade agreements (DAR249) | Notice R.3620 published in Government Gazette No. 48862 with an implementation date of 30 June 2023. |
| *29 June 2023* | Updated Facilities Code list | The facility codes used in Box 30 on the Customs Clearance Declaration (CCD) have been updated due to:<br>• The name changes of:<br>- De-grouping depot 56 in ORTIA from Hellman to Hellmann Worldwide Logistics (Pty) Ltd.;<br>- Container depot K4 in Johannesburg and L2 in Port Elizabeth from Zackpack Johannesburg (Pty) Ltd. to Zacpak Johannesburg Depot (Pty) Ltd.; and<br>• The cancellation of de-grouping depot 67 Expeditors SA (Pty) Ltd. |
| *23 June 2023* | Amendment to the rules under sections 49 and 120 – Economic Partnership Agreement between the SADC EPA states, of the one part, and the European Union and its member states, of the other part (DAR247)<br>• Appendix A – List of countries with which cumulation may be applied<br>• Appendix B – Exclusion list of materials where cumulation would not apply – SADC<br>• Appendix C – Exclusion list of materials where cumulation would not apply – MFN | Notice R.3565 published in Government Gazette No. 48838 with retrospective effect from 1 June 2023. |
| *20 June 2023* | A further six-month prohibition of exports of waste and scrap metal | The additional six months prohibition is to ensure the Phase 2 Actions of the policy gazetted in Government Gazette No. 48791 in 2022 can be fulfilled accordingly. |

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| *9 June 2023* | Prohibited and Restricted Imports and Exports list updated. | Goods classified under tariff heading 8408.90.65 are not restricted. |
| *7 June 2023* | Prohibited and Restricted Imports and Exports list updated. | Tariff headings 3503 and 3504 to be detained for State Vet and the following tariff headings to be detained for NRCS: 8404.4, 84.71, 8471.3, 8471.41, 8471.49, 8471.50, 8471.60, 8471.70, 8471.80, 8471.90, 8504.31, 8504.40, 8504.50, 85.16, 8507.60, 8516.10, 8516.10.90, 8517.62, 8517.62.10, 8517.62.90, 8517.69, 8518.21, 8518.22, 8518.29, 8518.30, 8518.40, 8518.50, 8519.20, 8519.30, 8519.81.05, 8519.81.10, 8519.81.90, 8519.89.10, 8519.89.90, 8521.90.10, 8521.90.90, 8523.21, 8523.41, 8523.41, 8523.51, 8523.52, 8523.52.10, 8523.52.90, 8523.59, 8543.70, 9028.30, 9503.00.10, 9503.00.90, 95.04 |
| *2 June 2023* | Draft Amendment to Part 1 of Schedule No. 1 – Substitution of Additional Note 6(a) to Chapter 22 | Comments were due to SARS by Sunday, 23 June 2023. |
| **Case law** | | |
| *In accordance with the date of judgment* | | |
| *6 June 2023* | Adidas International Trading AG (Switzerland) and Another v CSARS (2019 28878) [2023] ZAGPPHC 417 | This is an opposed application for referral to trial, in terms of Rule 6 (5) (g) of the Uniform Rules of Court, following dispute of facts around the alleged simulation, sale for export and quantum that led to SARS noting underpayment of duty upon audit. |
| *2 June 2023* | U Taxpayer v CSARS (IT 24502) [2023] ZATC 7 | This is an opposed interlocutory application in terms of rule 51(2) of the tax court rules for 'a legality review in limine as part of' the appellant's pending tax appeal. First, to seek the separate, advance determination of three "legal issues" and if the court grants the principal relief, 'to the extent necessary' (a) grant leave to amend the taxpayer's rule 32 statement "consequentially"; and (b) permit the taxpayer to raise a 'collateral, defensive or reactive' challenge to the lawfulness of the additional assessments raised by SARS. |
| **Guides and forms** | | |
| *29 June 2023* | Updated Confirmation of Disability Diagnosis (ITR-DD) form | An updated ITR-DD form was published. |
| *29 June 2023* | Correspondence with SARS on Estate cases | Guidelines when corresponding with SARS to prevent any unnecessary delays in finalising a query. |
| *29 June 2023* | Tax implications if married in community of property | FAQs for the Married in Community Spousal Assessment. |
| *27 June 2023* | Guide on Income Tax and the Individual (2022/23) | The purpose of this guide is to inform individuals who are South African residents of their income tax commitments under the ITA. |
| *27 June 2023* | Guide on the Determination of Medical Tax Credits (Issue 15) | This guide provides general guidelines regarding the medical scheme fees tax credit and additional medical expenses tax credit for income tax purposes. |
| *26 June 2023* | Guide to submit a dispute via eFiling | This guide is designed to assist taxpayers with the submission of a Request for Remission (RFR), Notice of Objection (NOO), Notice of Appeal (NOA), Request for Reason, Request for Late Submission (Condonation) and the Suspension of Payment form on eFiling. |
| *26 June 2023* | Guide to submit your individual income tax return via eFiling | This guide is to assist taxpayers/tax practitioners in filing an Income tax return for individuals via eFiling. It is structured such that the user should be able to log in to eFiling, file/submit an Income tax return and request a correction via eFiling amongst others. Additional functions embedded on the system pertaining to eFiling and the Income tax return are discussed for the effective use of the system when accessing and filing Income tax returns. |
| *26 June 2023* | Guide to complete the Company Income Tax Return (ITR14) eFiling | The purpose of this guide is to assist the representative taxpayer/tax practitioner/public officer in the completion, submission and management of the Company Income Tax Return (ITR14) via eFiling. This document must be read in conjunction with the External Guide – How to complete the Income Tax Return (ITR14) for Companies. |
| *26 June 2023* | Guide to the Individual (ITR12) Return for Deceased and Insolvent Estates | The purpose of this document is to assist to complete an income tax return for individuals where there is income received or accrued to a deceased or insolvent estate. |
| *26 June 2023* | Comprehensive Guide to the ITR12 Income Tax Return for Individuals | The purpose of this document is to provide guidance for the completion of the ITR12 return and to briefly explain the various sections of the ITA that will be applied during the assessment process. |

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| *26 June 2023* | Submit Request for Reduced Assessment (RRA01) via eFiling | This guide provides the steps to complete and submit an RRA01 form via eFiling if a taxpayer wants to request SARS to reduce an existing assessment. |
| *26 June 2023* | Guide for Provisional Tax | The purpose of this guide is to assist provisional taxpayers with:<br>• completion and submission of the Provisional Tax Return (IRP6)<br>• calculation of the estimated taxable income for provisional tax payments<br>• calculation of penalties and interest payable on late or incorrect payments of provisional tax. |
| *26 June 2023* | Comprehensive Guide to the Income Tax return (ITR12T) for Trusts | The purpose of this document is to provide guidance for the completion of the Income tax return for Trusts (ITR12T). |
| *26 June 2023* | Step-by-Step Guide to complete your Trust return (ITR12T) via eFiling | The purpose of this document is to assist the representative taxpayers of Trusts in the completion and submission of the Income Tax Return for Trust (ITR12T) via SARS eFiling. |
| *26 June 2023* | Guide to services offered via the SARS MobiApp | The SARS MobiApp offers residents a safe and an easy way to resolve most tax queries digitally. This guide outlines the services offered via the SARS MobiApp. |
| *26 June 2023* | Guide on how to submit your Individual Income Tax Return (ITR12) via the SARS MobiApp | This guide demonstrates how taxpayers can navigate the SARS MobiApp for the purpose of submitting their income tax return to SARS. The guide also includes functionalities that may be utilised when filing income tax returns, such as how to respond to duplicate income tax certificates (IRP5) or how to view tax assessments before an official return is submitted. |
| *22 June 2023* | Corporate Income Tax (CIT) – Form and system changes | Form and system changes will be introduced from 23 June 2023 to the Income Tax Return for Companies (ITR14) and Notice of Assessment for Companies (ITA34C). |
| *15 June 2023* | Draft Guide – Tax Treatment of the Net-billing Tariff System for Excess Power Generated | This guide provides general guidance on the tax treatment of credits due to taxpayers for excess power generated from renewable energy sources and exported via the grid. Guidance is also provided on the tax treatment of the various expenses that are incurred by the taxpayer in generating such electricity.<br>Comments were due to SARS by Friday, 30 June 2023. |
| *5 June 2023* | How to Complete Registration Amendments and Verification (RAV01) Form. | Updated guide on the rules built in the RAV01 form when PAYE and SDL liability dates are completed or updated. |
| *2 June 2023* | PAYE BRS for Employer Reconciliation version 22 1 1 | The following source codes have been amended:<br>3903/3953, 3905/3955 and 4150. |
| **Other Publications** | | |
| *29 June 2023* | OECD: OECD launches new version of the BEPS Multilateral Convention Matching Database to further support international tax co-operation | A new and improved version of the database supporting the application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "BEPS MLI") has been released and will allow tax authorities and other interested parties to make projections on how the MLI modifies a specific tax treaty. |
| *27 June 2023* | OECD: Latin American countries make headway on transparency and exchange of information for tax purposes, with margin for improvements | Publication *Tax Transparency in Latin America 2023* presents the latest progress achieved by 16 Latin American countries in tackling tax evasion and other illicit financial flows through transparency and exchange of information for tax purposes. |
| *27 June 2023* | Tax Alert: 2023 Tax Filing Season | SARS published a notice to notify taxpayers to submit income tax returns for the 2023 year of assessment, together with details of the periods within which the returns must be furnished. This Alert summarises the notice published. |
| *23 June 2023* | SARS Media release: 2023 Filing season for Individuals and Trusts | This media release highlights service improvements made ahead of the 2023 Filing Season. Individuals (provisional and non-provisional taxpayers) as well as trusts may start filing their income tax returns on Friday 7 July 2023 after 8pm. |

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| *22 June 2023* | SARS: Transfer Duty scenarios’ sequence of events | SARS outlines four scenarios where the sequence of events is not always followed namely:<br>1. Divorce and then later inheritance<br>2. Massed estate<br>3. Divorce and re-marriage<br>4. Inheritance where the surviving spouse is also donating her share to the children – not mentioned in the will as a massed estate, but clear from the contents that such occurred. |
| *21 June 2023* | OECD: Continued progress on countering harmful tax practices as jurisdictions bring their preferential regimes in line with international standards | Jurisdictions continue making progress on implementing the international standard under BEPS Action 5 to address harmful tax practices, as the OECD/G20 Inclusive Framework on BEPS releases new results on preferential tax regimes. |
| *20 June 2023* | SARS: Trust changes for Filing Season 2023 | Form and system changes to be introduced from 23 June 2023. |
| *20 June 2023* | SARS: Personal Income Tax changes for Filing Season 2023 | Some of the changes for the upcoming Personal Income Tax Filing Season include:<br>• Aligning the 40 Business Days Rule to the Filing Season End Date<br>• Automated process for requesting Reduced Assessment in terms of section 93 of the Tax Administration Act<br>Read more on the Filing Season 2023 page on SARS’s website. |
| *20 June 2023* | SARS: PAYE Administrative Penalties Update | SARS will implement phase 3 of the PAYE Admin Penalty on 23 June 2023. |
| *20 June 2023* | Tax Policy Alert: European Commission FASTER Directive would harmonise withholding tax procedures in the EU | The European Commission published the draft Faster and Safer Relief of Excess Withholding Taxes (FASTER) Directive on 19 June to encourage investment in the Single Market by making withholding tax procedures in the European Union (EU) more efficient and secure for investors, financial intermediaries, and Member State tax administrations. Once adopted by EU Member States, the proposal is expected to come into force on 1 January 2027. The Tax Policy Alert provides more details. |
| *13 June 2023* | OECD: OECD Forum on Tax Administration launches peer-to-peer support for developing countries on the implementation of the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy | OECD’s Forum on Tax Administration Pillar Knowledge Sharing Network held its first virtual meeting of what will be a series of peer-to-peer knowledge-sharing events where experts from tax administrations in ‘early implementer’ jurisdictions will offer high-level practical advice and share lessons learnt on administrative and implementation aspects of the Two-Pillar Solution. |
| *9 June 2023* | OECD: Uzbekistan joins the Inclusive Framework on BEPS and participates in the agreement to address the tax challenges arising from the digitalisation of the economy | Uzbekistan joins international efforts against tax evasion and avoidance by joining the OECD/G20 Inclusive Framework on BEPS. |
| *8 June 2023* | OECD: International Standards for Automatic Exchange of Information in Tax Matters – Crypto-Asset Reporting Framework and 2023 update to the Common Reporting Standard (CRS) | The CRS was amended to<br>• bring certain electronic money products and central bank digital currencies in scope<br>• ensure that indirect investments in crypto-assets through derivatives and investment vehicles are now covered by the CRS<br>• strengthen the due diligence and reporting requirements and to provide a carve-out for genuine non-profit organisations. |