MUTUAL ASSISTANCE AND CO-OPERATION BETWEEN THE SOUTH AFRICAN REVENUE SERVICE AND FOREIGN TAX AUTHORITIES

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Recent international developments have made it increasingly difficult for taxpayers to hide their assets or to avoid tax and South Africa has joined the list of countries that fully comply with international standards on the transparency and exchange of taxpayers' information.

South Africa is a member of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (the **Global Forum**) (chaired by the chief officer of legal and policy at the South African Revenue Service (**SARS**), Kosie Louw). The Global Forum recently conducted a peer review of 50 jurisdictions, and South Africa is one of only 18 fully compliant countries.

Media statements from SARS emphasise the benefits of automatic information exchange and increased co-operation between revenue authorities for clamping down on tax evasion, and express commitment to increased transparency and co-operation for tax purposes.

South Africa is also currently taking steps to implement the Foreign Account Tax Compliance Act (**FATCA**) enacted by the United States of America (the **USA**) in 2010. On 9 June 2014, South Africa and the USA signed an intergovernmental agreement entitled the "*Agreement to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act*" (the **IGA**). The IGA is a reciprocal agreement, which ensures that financial institutions in South Africa will report information about US account holders to SARS). SARS will transmit that information to the USA's Internal Revenue Service (**IRS**) by means of an automatic exchange of information under the double taxation agreement in force between the United States and South Africa. The IRS will similarly provide information about South African account holders in the United States to SARS.

Bilateral and Multilateral Taxation Treaties

South Africa currently has a wide network of bilateral double taxation agreements in place,[1] most contain provisions allowing the exchange of information between South Africa and the other contracting states. Certain of these agreements, such those with the United Kingdom and Australia, also contain specific articles providing for mutual assistance in the collection of taxes.

South Africa has also entered into a number of tax information exchange agreements, eight of which are currently in force (namely with the Bahamas, Bermuda, Cayman Islands, Gibraltar, Jersey, Liberia and San Marino) and a further 19 of which are in the process of completion.[2] Tax information exchange agreements are typically concluded where one of the contracting states has a different tax base or no tax at all.

In addition, the multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance which entered into force of 1 June 2011 (the **Convention**), came into effect in South Africa on 1 March 2014.[3] Currently, 64 countries have signed either the original or the amended Convention. Following the completion of domestic ratification procedures in these signatory states, the Convention will apply in all 64 member states.

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[1] A summary of the current status of all South Africa's bilateral double taxation agreements and Protocols is available on SARS website at: http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx.

[2] A summary of the current status of South Africa's tax information exchange agreements is available on SARS website at: http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx.

[3] Government Notice 113 in Government Gazette No. 37332 (21 February 2014).

The aim of the Convention is to promote international co-operation so as to tackle tax evasion and tax avoidance, allowing for better operation of national tax laws whilst respecting the fundamental rights of taxpayers.

The Convention covers a much wider range of taxes than many of the double taxation agreements, and extends co-operation to some countries with which South Africa does not have such agreements.

The forms of assistance catered for by the Convention are also broad. The Convention provides for the exchange of information on request (Article 5); the automatic exchange of information (Article 6); the spontaneous exchange of information (Article 7); simultaneous tax examinations (Article 8); performance of tax examinations abroad (Article 9); assistance in the recovery of tax claims (Article 11) and measures of conservancy (Article 12).

South Africa has elected that the Convention will apply to income tax; withholding tax on royalties; tax on foreign entertainers and sportspersons; turnover tax on micro businesses; dividends tax; withholding tax on interest (effective 1 March 2015); capital gains tax; estate duty; donations tax; transfer duty; value-added tax and securities transfer tax.

The Convention contains provisions aimed at protecting taxpayer rights and safeguarding the confidentiality of the information exchanged. Article 21 of the Convention provides that nothing in the Convention affects the rights and safeguards secured for persons by the laws or practices of the state requested to provide assistance. In terms of Article 22, information obtained by a party under the Convention must be treated as secret and protected in the same manner as information obtained under domestic laws and, to the extent required to ensure the necessary level of protection of personal data, in accordance with safeguards which may be specified by the supplying party as required under its domestic law.

Article 4 of the Convention provides that a party may, by a declaration addressed to one of the depositaries (being the Secretary General of the Council of Europe or the Secretary General of the OECD), indicate that, according to its internal legislation, its authorities may inform its resident or national before transmitting any information concerning that resident or national. South Africa has not submitted such a declaration, as South African legislation does not appear to impose an obligation on SARS to inform a taxpayer prior to disclosing that taxpayer's information.

Article 5 of the Convention provides that if the information is available in the tax files of the country requested to provide information, then to enable it to comply with the request, the state must take all relevant measures to provide the applicant state with the information requested. As such, if SARS does not have particular information requested in possession, then SARS is required to take active steps to obtain such information. Such measures will presumably need to comply with South African domestic laws for the gathering of information, as set out in chapter 5 of the South Africa Tax Administration Act, 28 of 2011.

Automatic Exchange of Information

As mentioned above, Article 6 of the Convention deals with the automatic exchange of information between member states. This is regarded as an important tool for identifying non-compliance by taxpayers using foreign accounts. On 13 February 2014, the OECD unveiled a common reporting standard for the automatic exchange of information between revenue authorities.[4] The common reporting standard requires jurisdictions to obtain information from their financial institutions and exchange such information automatically with other jurisdictions on an annual basis. More than 40 jurisdictions have committed to the standard, including South Africa.

[4] Available on the OECD's website at: http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf.

To provide for the automatic reporting of specified information by financial institutions as required under the IGA, SARS has drafted a business requirements specification (**BRS**). The scope of the BRS is such that affected financial institutions will be required to provide information regarding all non-residents, thereby also facilitating the automatic exchange of information with South Africa's other treaty partners, based on the OECD common reporting standard. The information obtained from financial institutions will also be used by SARS under domestic law to tax source-based income from non-residents.

Recent Case Law

In addition to the abovementioned agreements and the Convention, recent cases demonstrate mutual assistance and co-operation between SARS and foreign tax authorities in the enforcement of tax debts, and highlight increasing global efforts to combat cross-border tax evasion and attempts to conceal or dissipate assets.

In *Commissioner: South African Revenue Service v Krok and Another* 2014 (3) SA 453 (GP), a request by the Australian Tax Office (**ATO**) to SARS to assist in the collection of taxes allegedly owed by Mr Krok to the ATO, was confirmed by the North Gauteng High Court who granted a preservation order over the assets of Mr Krok..

The request for assistance by the ATO was made in terms of Article 25A of the double taxation agreement entered into between South Africa and Australia on 1 July 1999, and amended by a Protocol signed on 31 March 2008. Article 25A, which relates to mutual assistance in the collection of taxes, came into force on 1 July 2010.

Article 25A of the double taxation agreement requires SARS and the ATO to assist each other in the collection of taxes. Where a tax debt is enforceable in Australia, and is owed by a person who cannot under the laws of Australia prevent its collection, then at the request of the ATO, SARS is required to collect the tax debt and take measures of conservancy, as if it were an amount due to SARS (and *vice versa* in respect of a tax debt due in in South Africa). Article 25A also provides that the competent authorities of South Africa and Australia may, by mutual agreement, settle the mode of application of Article 25A.

Krok argued that the ATO could not rely on the provisions of Article 25A in respect of taxes which arose during years of assessment commencing prior to the entry into force of Article 25A. The High Court rejected this argument and held that Article 25A has no temporal limitation. In reaching this conclusion, the Court relied on Article 2.3 of the double taxation agreement, which provides that, for purposes of Article 25A, the double taxation agreement applies to taxes of "every kind and description". Accordingly, all taxes arising since the inception of the double taxation agreement in 1999 can be collected in terms of the provisions of Article 25A.

Similar arguments were raised and rejected by the English Court of Appeal in the case of *Ben Nevis (Holdings) Ltd & Anor v Commissioner for HM Revenue and Customs* [2013] EWCA Civ 578, in which the English Court held that Article 25A of the double taxation agreement between South Africa and the United Kingdom was applicable to the tax debts in issue.

It is interesting to note that the *Krok* judgment refers to a memorandum of understanding concluded between SARS and the ATO concerning assistance in the collection of taxes under Article 25A. This memorandum of understanding has not been published by SARS for access by the general public. Notably, in the *Ben Nevis* case, the English Court found it surprising that such memoranda of understanding are not typically published by revenue authorities, given their frequent use in this context and the important bearing they may have on the position of taxpayer. The English Court held that, in the interests of fairness to taxpayers, such memoranda should readily be made available to the public.