

21 February 2015

Group Executive: Interpretation & Rulings
SARS Legal & Policy Division
Khanyisa Building
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PRETORIA
0001

BY EMAIL: POLICYCOMMENTS@SARS.GOV.ZA

Dear Sir/Madam

RE: DRAFT BINDING GENERAL RULING – TERMINATION OF STC CREDITS

Thank you for the opportunity to contribute commentary on the draft binding general ruling (“BGR”) on the termination of STC credits.

It appears that the only purpose of this ruling is to confirm the ordinary wording of the law. Namely, if a company makes payment of a dividend after 1 April 2015 in respect of a declaration before this date, the payment will not be accepted by SARS for the purposes of utilizing the STC credit in terms of section 64J of the Income Tax Act (No. 58 of 1962) (“ITA”). We respectfully question the need for this ruling which is directly based on the wording of the legislation.

We instead request that the ruling addresses the real open issues that are less obvious. These key issues is listed below.

1 Meaning of “paid”: Due and payable

The draft BGR notes that the concept of “paid” is defined in section 64E(2) for private companies to be “due and payable”. This interpretation additionally applies in respect of dividends *in specie*.

SARS, however, provides no guidance as to what SARS believes are the principles of “due and payable” for cash dividends and whether the exact same principles apply to *in specie* dividends. While the term “due” is less problematic because a dividend can only be due on declaration, the term “payable” versus actually “paid” becomes problematic.

The draft BGR also fails to address other distributions, such as a set-off where a due and payable dividend is set-off against another pre-existing debt owed to a shareholder.

In sum, the concept of “due and payable” (as opposed to “paid”) should be clarified. SARS should at least express an opinion in principle as to what will be prohibited. Any interpretation should be applied to both cash and *in specie* dividends.

2 Deemed dividends

The draft BGR does not express an opinion as to how the set-off of deemed dividends must be applied against STC credits as well as to the confirmation of the date of payment. For example, amounts arising under section 8F(2)(a)(i) in respect of hybrid debt are deemed to be a dividend on the last day of the year of assessment. In terms of transfer pricing under the newly amended section 31(3), the deemed conversion of pre-2015 transfer pricing loans are viewed as deemed dividends that are deemed to be declared and paid on 1 January 2015.

Interpretation of the law in respect of deemed dividends for set-off against the STC credit should also be included.

3 Notice requirement

The draft BGR notes that section 64J(1)(b) has to be complied with before 1 March 2015. Yet, the draft BGR fails to express an interpretation as to what SARS believes should be the minimum form of notice.

Furthermore, acceptable delivery methods (assuming delivery is a requirement for being “notified”) are left open as well as the time when a person has been notified to comply with the cut-off date of 31 March 2015.

4 Documentary retention

Even though we accept that documentary retention is probably more within the ambit of an interpretation note, documentary retention of pre-2015 dividends will remain a practical issue for many years to come. SARS should accordingly reiterate what documents should be retained as evidence for determining the STC credit opening balance and subsequent adjustments.

This “prescription” of minimum records will inevitably make the task for SARS audit in respect of future STC credits much easier than leaving the current uncertainties unaddressed.

Thank you for the opportunity to voice our views. Should you have any enquires regarding our submission please do not hesitate to contact us.

Yours sincerely,

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