

TAX BITES

Double taxation rules leave no room for manoeuvre



Beric Croome

Participating states are obliged to provide the requested information, especially between trading partners

SA HAS concluded a large number of double taxation agreements (DTAs) with its trading partners to regulate the manner in which income derived by nonresidents who carry out activities in SA should be taxed in this country and vice versa. The primary purpose of a DTA is to eliminate double taxation from arising, such that the same amount of income is not subjected to tax in two states without credit being given for the tax paid in the other state. Furthermore, many DTAs regulate assistance that may be granted by one state to another to assist in the collection of taxes due to the other state. DTAs also seek to ensure that income derived in a foreign country is subjected to tax in at least one of the states party to a DTA and specifically provide that information may be exchanged from SA to another state, or vice versa.

The article regulating the exchange of information in DTAs, typically, provides that the competent authorities of the contracting states — the competent authority in SA is the Commissioner of the South African Revenue Service (SARS) — shall exchange such information that is foreseeably relevant for carrying out the provisions of the DTA, or to the administration or enforcement of the domestic law concerning taxes dealt with the DTA. The Exchange of Information Article seeks to protect taxpayer information by ensuring that information disclosed by, for example, SA to a foreign state, shall be treated as secret in the foreign state and will only be disclosed to persons or authorities, including courts and administrative bodies, concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes dealt with. The article governing the exchange of information contained in the DTA cannot violate the secrecy provisions

contained in SA's fiscal legislation. Furthermore, the article cannot be relied on to supply information that would disclose any trade, business, industrial, commercial or professional secret, trade process or information, the disclosure of which would be contrary to public policy.

When, for example, SA receives a request from a treaty partner under a DTA, SARS is entitled to use the information-gathering provisions contained in the Income Tax Act of 1962, as amended, even though the information is not required by SARS for its own tax purposes. SA may not decline a request for information because the information requested is of no interest to SARS.

The Exchange of Information Article provides that SARS may not decline to supply information because the information is held by a bank or other financial institution, nominee or person acting in an agency or fiduciary capacity, or because it relates to ownership interests in a person. Therefore, based on the Exchange of Information Article, SA can request information from countries with which it has concluded a DTA and, similarly, SA would be obliged to co-operate with requests for information received from countries with which we have concluded DTAs, even though SARS may not have any interest in the information itself.

Historically, the only DTA concluded by SA with trading partners that did not contain an exchange of information provision was the agreement concluded with Switzerland. However, a more recent DTA was concluded by SA and Switzerland that was gazetted on March 6 2009 to take effect in respect of taxable years beginning on or after January 1 2010. That DTA now also contains an exchange of information provision, although the wording is slightly different to the articles found in other DTAs.

It would appear that SA is in the

process of negotiating or finalising various tax information exchange agreements with a host of countries. The SARS website indicated that SA is in the process of negotiating or finalising such agreements with Argentina, Bahamas, Bermuda, British Virgin Island, Cayman Islands, Channel Island, Gibraltar, Guernsey, Isle of Man, Jersey, Liberia, Lichtenstein, Monaco, Netherlands Antilles and San Marino.

On March 18 the Organisation for Economic Co-operation and Development (OECD) announced that the international fight against cross-border tax evasion has entered a new phase with the launch by countries participating in the global forum on transparency and exchange of information of a peer review process (Global Forum) covering a first group of 18 countries. It appears that the reviews are a first step in the three-year process approved during February 2010 by the Global Forum for improved tax transparency and exchange of information. SA is not a member of the OECD but has observer status and it is interesting to note that the OECD has announced that SA will be subjected to phase one and phase two reviews during the second half of 2011.

During the latter part of 2011 the OECD will evaluate how SARS complies with its international obligations to ensure the transmission of information under DTAs and other similar agreements.

In documents recently released by the OECD it has been pointed out that the tax information must be available and that the tax authorities must have access to the information and that there must be a basis for the exchange of any information. The OECD says that if any of the aforementioned elements are missing the exchange of tax information will not be effective.

The OECD requires that countries participating in the exchange of tax information should be able to identify

the owners of companies and any body corporates, as well as identifying partners in any partnerships, and also requires participating states to ensure that information is available to the respective revenue authorities that identifies the settlor, trustee and beneficiaries of trusts created under the laws of the participating state.

The OECD report to be produced pursuant to the phase one review will include a detailed description of the elements of SA's legal and administrative framework for transparency and exchange of information, and is required to deal with the availability of information, access to information and the exchanging of information. The report is required to identify and describe any shortcomings that may exist in SA and provide recommendations how those shortcomings may be addressed.

The second phase of the monitoring and peer review process will focus on whether the exchange of information is effective. Therefore, the OECD will evaluate whether SARS has sufficient resources to seek and exchange the required information, or procedural requirements that frustrate the effective exchange of the information. Phase two of the review process will also determine whether there are deficiencies in the quality of the requests made by other states and the requests for information submitted to SARS.

It is important that taxpayers realise that SARS may exchange information with its trading partners in accordance with the provisions of DTAs, and that SARS will, in turn, receive information from its trading partners under those agreements, which it will rely on in ensuring that taxpayers have complied with their tax obligations in SA.

■ Dr Beric Croome is a tax executive at ENS.