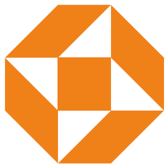

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Editorial

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The speed at which business has shifted from the traditional bricks-and-mortar model to a digital presence has left tax authorities around the world struggling to keep apace, as the existing rules for taxing MNE profits were no longer adequate.

The OECD has made considerable efforts to address this with BEPS Action Plan 1 ('Addressing the Tax Challenges of the Digital Economy'), but consensus has yet to be reached, and many countries have unilaterally amended their domestic laws to levy tax on digital payments.

Amid all this, the UN Tax Committee has released a helpful paper on taxation of digital payments. The approach suggested is simple, easy to follow and transparent. Article 12B on 'Taxation of Automated Digital Services', which is proposed to be inserted in the UN Model Commentary, provides for the option to choose between a **gross** versus **net** basis of taxation. This would essentially be a withholding mechanism, enabling the tax rate for gross basis taxation to be negotiated between contracting states. Further, proposed Article 12B(3) dealing with net basis taxation provides that the profit from 'automated digital services' – assumed to be 30% of the group/relevant segment's overall profit from those services – may be subject to the source country tax rate.

'Qualified profits' is defined as 30% of the amount arrived at by applying overall profitability of the beneficial owner or the profitability of its automated digital services segment, if the same is available to the gross annual revenue derived from the source country. If the beneficial owner belongs to a multinational group, the profitability ratio to be applied shall be that of such group, or of its automated digital services segment, if the same is available. The proposed article also provides a list of services that are considered as automated digital services:

- Online advertising services
- Online intermediation platform services
- Social media services
- Digital content services
- Cloud computing services
- Sale or other alienation of user data
- Standardised online teaching services.

Who will come first in this race for the best model to tax digital payments is like the race for the COVID-19 vaccine. From a taxpayer's and tax professional's perspective, the method finally to be adopted should be unambiguous and fair, and not skewed in favour of developed nations.

The extent of damage caused by COVID-19 on so many levels cannot even be fathomed, and as we approach the end of 2020 – a year that we would all like to erase from the history books! – I pray for a better 2021 and take this opportunity to wish you all a Merry Christmas and a joyous and COVID-free New Year.

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Transfer pricing in Israel

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The new transfer pricing documentation requirements will significantly increase transparency both for the local entity and for the multinational group to which it belongs

The Israeli Ministry of Finance has during October 2020 published a memorandum of law and draft regulations, in which it is proposed to amend the provisions of section 85A of the Income Tax Ordinance and the relevant regulations in the field of transfer pricing.

The essence of the proposal relates to the adoption of new reporting and documentation provisions in accordance with Action Plan 13 of the OECD's BEPS programme, which aims to upgrade the ability of tax authorities to effectively tax multinational groups.

The new transfer pricing documentation requirements will significantly increase transparency both for the local entity and for the multinational group to which it belongs, in a way that will allow the tax authority an unprecedented level of access to and familiarity with data and information.

It is therefore likely that any Israeli entity with international activity, as well as every international entity operating in Israel, will be affected by these new documentation requirements.

The structure of transfer pricing documentation required by the new law and regulation will consist of three layers:

- **Master file –** Comprehensive information about the multinational group as a whole. The origin of this data will usually be in the final parent company of the group, where the subsidiaries will be able to submit the information in their country of residence, if requested to do so.
- **Local file –** Data and information about the local entity in the multinational group and its transactions with related parties.
- **Country by Country (CBC) report –** An international report that includes comprehensive and detailed information on all entities of the multinational group, that will be submitted by the final parent entity in its country of residence. According to Action Plan 13 and the international agreement that follows, the report will only be submitted to multinational companies with a consolidated turnover of at least NIS 3 billion (€750 million).

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COVID-19 in France: Reporting obligations for tax packages postponed to 2021

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The directive of 25 May 2018 on administrative cooperation, known as **DAC 6**, aims to enhance transparency and the fight against tax fraud and tax evasion by providing for an obligation for intermediaries (lawyers, accountants, credit institutions, etc.) or taxpayers to declare potentially aggressive cross-border tax arrangements to the tax authorities.

These declarations are then the subject of an automatic exchange of information between the member states of the European Union.

This directive was transposed into French law by Order No. 2019-1068 of 21 October 2019, under Articles 1649 AD–AH of the general tax code.

Tax arrangements to be reported

Various criteria must be assessed cumulatively for the tax package to fall into the reporting obligation:

- It must be a cross-border arrangement – i.e. 'an agreement, arrangement or plan that is or not enforceable' – and must concern a member state and another member state, or entity outside the European Union (EU).
- It must be described as a potentially aggressive arrangement. To do so, it must meet at least one of the 15 markers set out in the directive. Some markers are subject to the existence of a 'mainly tax advantage' – meaning that the cross-border arrangement would not have been developed in the same way without this advantage. This could include a tax refund, tax relief or reduction, a reduction in tax debt, a tax deferral, or no taxation.

The reporting obligation is incumbent on the intermediary or, where applicable, the taxpayer benefiting from the scheme.

The term 'intermediary' means anyone who designs or promotes a tax planning arrangement, who is responsible for designing, marketing, organising or managing it, or who assists in these tasks. This includes lawyers, accountants, tax advisors and banking institutions when they are involved in the design, marketing, organisation or implementation of a cross-border scheme that must be reported.

If several intermediaries are involved, in principle they must all declare; but those who can establish by any means that the scheme has already been reported by another intermediary will be able to dispense with it. A territorial priority is provided, to prevent the same intermediary from being required to file the same declaration in several member states.

Intermediaries subject to professional secrecy (e.g. lawyers, credit institutions) must first ask the taxpayer concerned for authorisation to declare. Failing that, they must notify any other intermediary to whom the reporting obligation falls or, if necessary, the taxpayer.

Finally, the scheme defines the concept of 'first step' as any legal act or economic, accounting or tax option required to implement the cross-border scheme.

Sanctions

In France, breach of a reporting or notification obligation results in a fine of up to €10,000. If this is the first offence of the current calendar year and the previous 3 years, the amount of the fine may not exceed €5000.

Implementation schedule: 6-month postponement

The order set the effective date for the declaratory obligation to 1 July 2020. This obligation also applies to cross-border

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arrangements whose first stage was implemented between 25 June 2018 and 1 July 2020, for which the reporting period is extended until 31 August 2020.

In the context of the current crisis related to the COVID-19 epidemic, each of the deadlines for reporting and exchanging information under DAC 6 is subject to an optional 6-month deferral (see Table):

- Arrangements whose first stage was implemented between 25 June 2018 and 30 June 2020 (the 'stock') must now be declared by 28 February 2021 (instead of 31 August 2020).
- Arrangements made available for implementation, ready to be implemented or first implemented between 1 July 2020 and 31 December 2020, must be declared within 30 days, with a starting point of 1 January 2021 (i.e., no later than 31 January 2021).
- Similarly, intermediaries who have provided, directly or through others, assistance or advice in connection with a declarable scheme between 1 July 2020 and 31 December 2020 are now required to report within 30 days, the starting point of which is 1 January 2021 (i.e. no later than 31 January 2021).
- The first exchange of information between national authorities will now take place no later than 30 April 2021 (instead of 31 October 2020).

Reporting deadlines

	Initial date	Postponed date
Dealine for filing the transitoinal peroid "1st step" (devices from 25 June 2018 to 30 June 2020)	31 August 2020	28 February 2021
Starting point of the 30-day period for filing first returns	1 July 2020	1 January 2021, i.e. no later than 31 January 2021
Deadline for filing date for deferral period returns (devices from 1 July to 31 December 2020)		1 January 2021, i.e. no later than 31 January 2021
Date of first exchange of information between tax authorities	31 October 2020	30 April 2021

India: Application of tax treaty rate vis-à-vis dividend distribution tax – a benefit?

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Background

Under the Indian income-tax laws, taxation of dividend has had a mixed innings. Though in most years it was taxable, in some years it was exempt. The Finance Act, 1997 introduced the concept of taxation of dividend at the level of the company distributing it, and simultaneously made the payout exempt in the hands of the recipient shareholders. This was referred to as dividend distribution tax (DDT). DDT was an additional income-tax payable by Indian companies on dividends payable to their shareholders (either resident or non-resident). This was a departure from the previous system, which had taxed dividends in the hands of the shareholders. DDT provisions were omitted for a year in 2002, but reintroduced in 2003.

Some have lobbied for abolishing DDT, considering it unfair: shareholders are effectively taxed at the same rate of DDT regardless of income level, violating one of the fundamental principles of taxation.

The Finance Act, 2020 has omitted DDT. As a result, all dividend distributed, declared or paid on or after 1 April 2020 has once again been made taxable in the hands of the shareholders. The taxation of dividend in the case of resident shareholders has been simple and clear. However, where the dividend is paid to a non-resident, taxability would be subject to the beneficial provisions of the tax treaty. Most Indian tax treaties provide for a concessional rate of 5–15%, but this is only available to beneficial owners of dividend who are residents of the other contracting state.

Interestingly, Article 10 (which covers taxation of dividend) does not specify in whose hands such dividend is taxable. It only provides for the maximum rate at which dividend is taxable when declared by a company that is resident in the contracting state. Some issues have arisen in the case of non-resident shareholders, such as:

- **Is credit for DDT available to the non-resident shareholders against their final income-tax liability in their home country?**
  This depends on whether DDT is a tax on the shareholder or on the company distributing dividend. A clear-cut answer to this question is provided in the India–Hungary tax treaty, which specifically provides that the DDT shall be deemed to be taxed in the hands of the shareholders and the tax rate shall not exceed 10% of gross dividends. Note that this provision creates a deeming fiction that DDT is a tax in the hands of the shareholders, implying that this is not usually the case. Unfortunately, similar treatment is not provided for in other tax treaties signed by India.
- **Can the beneficial rate provided in the tax treaty be adopted for DDT purposes?**
  Again, this hinges on the question who pays tax on the dividend – the company, or the shareholder who is the beneficial owner of the dividend. This was recently analysed by the Delhi Income-tax Appellate Tribunal (ITAT) in the case of *Giesecke & Devrient (India) Pvt. Ltd*, as discussed below.

Decision of Delhi ITAT

The Delhi ITAT dealt with this issue from the perspective of the India–Germany tax treaty. The taxpayer, an Indian company, was a 100% subsidiary of the German company. The taxpayer raised an additional ground for the first time on the applicability of tax treaty rate for the purposes of DDT levy. The ITAT admitted the additional ground and held that DDT should be restricted to the rate provided

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under the India–Germany tax treaty. The reasons provided by the ITAT are as follows:

- If India has entered into a tax treaty to grant tax relief or avoid double taxation, the provisions of the Indian income-tax laws shall only apply to the extent that such provisions are more beneficial than the provisions of a tax treaty.[1]
- The India–Germany tax treaty restricts rate of tax on dividend income to 10% of the gross dividend amount, subject to satisfaction of the 'beneficial ownership' condition.
- The amendment in the Indian income-tax laws cannot be allowed to have the same retroactive effect on the tax treaties. Tax treaties represent a reciprocal bargain between the two countries and must be interpreted in good faith. While the Indian Parliament can legislate the domestic laws, it cannot unilaterally amend the tax treaty, which operates on the principle of reciprocity.
- While the obligation is on the Indian company under the Indian income-tax laws, its generis is in charging section, which covers additional income-tax on the total income of every person. The definition of 'income' also includes dividend under the income-tax laws. DDT is an additional income tax required to be paid by a domestic company on amounts distributed as dividends. Accordingly, DDT is a tax on 'income'; and 'income' includes dividends.
- DDT is a tax on dividend income and is only collected from the Indian company for administrative convenience. The legislative amendment in 1997 intended that levy of the DDT on the Indian company at a standard rate was only for administrative convenience and to reduce compliance burdens, rather than to illustrate a shift in the charge of tax from the shareholder to the dividend-paying company.
- Additionally, the ITAT took note of the abolishment of the DDT in the year 2020 on the premise that DDT was levied at the same rate on all categories of shareholder, irrespective of the marginal rate at which the recipient shareholders are otherwise liable to be taxed.
- When considering the rates for taxation of dividend income under the tax treaty, it is not relevant that the DDT is paid by the Indian company.

Reclaim of refund possible?

This ruling will benefit non-resident investors. An additional ground of appeal to this effect would need to be filed before the appellate authority when claiming a refund of the excess DDT. Thus, while giving effect to the order of an appellate authorities, the tax department would be obliged to quantify the excess amount of DDT and grant its refund. This could involve administrative burden and legal obstacles; nevertheless, under Article 265 of the Constitution of India, no tax can be levied or collected except by authority of law. If the ITAT rules the DDT to be excessive, then it can be said to have been collected without the authority of law.

Since the Finance Act, 2020 (effective from 1 April 2020) has abolished the DDT and the classical system of taxation of dividend income has been brought back under the income-tax laws, the aforesaid ruling would be applicable in the case of dividend declared, distributed or paid on or before 31 March 2020.

Another aspect that arises for consideration is: **Who will be entitled to claim refund for excess of DDT: the non-resident shareholder, or the Indian company?** It could be argued that dividend

REFERENCES

1. Azadi Bachao Andolan (2003) 263 ITR 706 (Supreme Court)

income belongs to a shareholder, so they should be entitled to claim a refund for excess DDT. But DDT would have to be argued to be tax paid on behalf of the shareholder; and the dividend paying company then has no grounds for claiming a refund, since the income belongs to another person. The non-resident shareholder will have to comply with various requirements (e.g. submission of tax residency certificate, documents showing no presence/permanent establishment in India, establishment of beneficial ownership of dividend, etc) to qualify for the beneficial rate. This could be a time-consuming, and even litigious, process. Refund claims by the Indian company are likely to be equally difficult.

Conclusion

The recent ruling of Delhi ITAT is a groundbreaking decision that broadens interpretation of the Income-tax laws and tax treaty provisions. It emphasises the economic burden of DDT in the hands of the shareholders, along with equity and regressive taxation, to resolve the conflict between the Indian income-tax laws and the beneficial tax treaty provisions. Yet it would be equally valid to argue that dividend is exempt from tax in the hands of even non-resident shareholders and hence, no extra burden is imposed on them in violation of treaty provisions. Given the extensive ramifications of the ITAT's decision, the tax authorities are expected to challenge it before the High Court.

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Business in Australia: Back to the future

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> *This revised definition is to take effect from the first financial year starting after the implementing legislation is passed by Parliament, but taxpayers will be given the option to apply it from 15 March 2017*

Released on 6 October 2020, the Australian Federal Budget contained an announcement that will be warmly welcomed by companies and their advisers: the law about determining whether a company is resident in Australia will revert to the well-understood and familiar position it had until 2016.

Before 2016

Historically, a company that was incorporated outside Australia would be treated as a resident of Australia and potentially liable to Australian income tax on its worldwide income if it carried on business in Australia and either:

- Its central management and control (CMAC) was in Australia; or
- Its voting power was controlled by Australian residents.

A company's CMAC was generally regarded as being located where the high-level, strategic decisions affecting it were made by its directors. As a result, a foreign company's directors could be based in Australia, but that company would not be treated as an Australian tax resident as long as it did not carry on business in Australia.

What changed?

In 2016, the High Court affirmed a 2015 decision of the Full Federal Court effectively declaring that everyone since 1936 (when the relevant taxing Act was passed) had misunderstood what it meant to 'carry on business in Australia'. The Commissioner of Taxation then changed the interpretation of this term in early 2017 to include merely having the company's CMAC in Australia.

As a result, companies that had no operations in Australia or connection with Australia other than the location of their directors were exposed to being treated as Australian tax residents.

The new residency test

Recognising how uncertain and unworkable the recent changes were, the government has now decided to change the corporate residency test. A 'significant economic connection to Australia' is established by a company having its:

- Core commercial activities undertaken in Australia; and
- CMAC in Australia.

This revised definition is to take effect from the first financial year starting after the implementing legislation is passed by Parliament, but taxpayers will be given the option to apply it from 15 March 2017, when the Commissioner publicly changed interpretation of the old test.

Subject to a fine distinction in wording ('carry on business' versus 'core commercial activities'), this new test is substantially the same as the test applied before 2016 and it is clearly intended to reflect that earlier position. That intention is welcome, but we are yet to see the amending legislation or the Commissioner's interpretation of it in practice.

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Australia's temporary loss carry-back provision

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The OECD has encouraged the world's leading economies to implement a loss carry-back provision to boost the vital cash flow needed by businesses that would otherwise be profitable if not for the adverse impacts of the global economic downturn caused by the COVID-19 pandemic. Various forms of similar measures have already been adopted by some of the OECD countries such as the United States, United Kingdom, Japan, Austria, Germany, Singapore and New Zealand.

Schedule 2 – Treasury Laws Amendment ('A Tax Plan for the COVID-19 Economic Recovery') Bill 2020 – Temporary Loss Carry Back Provision was promptly introduced into Parliament following the Australian Federal Budget announcement on 6 October 2020.

Eligible corporate tax entities with aggregated turnover under $5 billion will be able to carry back losses made in the 2019/20, 2020/21 and 2021/22 financial years to the 2018/19, 2019/20 or 2020/21 financial years. This is done by allowing the corporate entity to claim a refundable tax offset in the 2020/21 or 2021/22 financial years. Only revenue losses are eligible for carry-back (see Table).

A corporate tax entity is defined in Section 960–115 as an entity that is:

- A company;
- A corporate limited partnership; or
- A public trading trust.

This Temporary Loss Carry Back Provision will not be available to many businesses that are conducted outside a corporate structure – such as a sole trader, trust or partnership. Corporate entities who have only generated tax losses during this period, such as start-up companies, will not be eligible for the relief as they have no prior year taxed profits.

The amount of refundable tax offset is limited to previously taxed profits made in the 2018/19 and later income years, and is limited to the corporate entity's franking account balance for the year in which the refund is being made.

Essentially, the corporate entity will be able to claim the tax refund by election upon lodgement of its tax returns for the 2020/21 and 2021/22 income years. Any corporate entity that does not elect to carry back losses under this measure will be able to carry forward its losses under the normal rules to be deducted against income derived in later income years.

Generally, the company tax rate is 30%. However, base rate entities (i.e., companies with aggregated turnover of less than $50 million and passive income no more than 80% of their assessable income) have a progressive reduction in tax rates to be factored in when calculating the tax offset, as follows:

- If the loss year is 2019/20: 27.5%
- If the loss year is 2020/21: 26%
- If the loss year is 2021/22: 25%

Financial year	Taxed profits	Carry-back losses	Claim offset on lodgement of tax return
2018/19	X		
2019/20	X	X	
2020/21	X	X	X
2021/22		X	X

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Some integrity rules and administrative measures have been included in the provision, whereby a company that has entered into a scheme for the purpose of obtaining the tax offset will be denied access to the relief.

This Temporary Loss Carry Back Provision interacts well with the Temporary Full Expensing of Depreciating Assets measure (Schedule 8 of the Bill), which is available to all businesses with an aggregated turnover of under $5 billion to fully deduct the cost of eligible assets purchased and held ready for use from Budget night 6 October 2020 to 30 June 2022.

Example[1]

Company ABC with aggregated turnover of $20m (under $50m)

Income year 2018/19

- Taxable income = $2m
- No other exempt income
- Applicable company tax rate is 27.5%
- Tax paid = $550,000

Income year 2019/20

- Taxable loss = $400,000
- Applicable company tax rate is 27.5%
- Loss carry-back tax offset component = $110,000 ($400,000 × 27.5%)

Income year 2020/21

- Company ABC purchases a capital asset for $1m
- As a result of the Temporary Full Expensing of Depreciating Asset measure, Company ABC's net tax loss is $500,000
- Applicable company tax rate is 26%
- Loss carry-back tax offset component = $130,000 ($500,000 × 26%)
- Total loss carry-back tax components for 2019/20 and 2020/21 income years is $240,000 ($110,000 + $130,000)
- Franking account balance = $200,000

Company ABC will be entitled to claim a refundable loss carry-back tax offset of $200,000 (up to maximum franking account balance) by election upon lodgement of its 2020/21 income year tax return.

The above example illustrates the interaction between two of many other initiatives by our government to support eligible businesses.

These measures provide incentives for new capital investments necessary for long-term economic growth and provide eligible corporate businesses that have paid tax in previous years to utilise their current tax losses rather than carrying them forward. This is intended to generate cashflow benefits earlier through refundable tax offsets that are much needed during this current economic downturn.

These measures provide incentives for new capital investments necessary for long-term economic growth and provide eligible corporate businesses that have paid tax in previous years to utilise their current tax losses rather than carrying them forward

REFERENCES

1. Modified from explanatory memorandum of the Bill.

The puzzle of stamp duties in Nigeria

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The British government first introduced stamp duty in Nigeria via the Ordinance 41 of 1939, which was later promulgated as the Stamp Duty Act No. 5 of 1939 and slightly amended in 1956

Introduction

Stamp duty has been in existence in Nigeria for over 80 years, albeit sparsely implemented. Except when perfecting land title documents at Land Ministries, incorporating companies with share capitals at the Corporate Affairs Commission, and admitting documents as evidence in court proceedings, stamp duty tends to be overlooked by taxpayers and tax authorities alike.

Despite legislation that subjects all qualifying documents to stamp duties and prescribes penalties for non-compliance, the misconception that documents only need to be stamped in the event of an actual or perceived litigation has gained popularity. The Finance Act 2019 has reversed this narrative, triggering discussions around the subject and generating increased awareness.

Backing legislation

The British government first introduced stamp duty in Nigeria via the Ordinance 41 of 1939, which was later promulgated as the Stamp Duty Act No. 5 of 1939 and slightly amended in 1956.

The enabling law is currently codified as the Stamp Duties Act Cap S8, LFN 2004 (SDA), and governs the administration, assessment, imposition and collection of stamp duties in the country. The SDA stipulates in its Schedule all 'dutiable instruments' (documents subject to stamp duties) alongside their applicable rates, as well as all instruments exempted from stamp duties.

The Finance Act 2019 introduced amendments to the SDA with effect from 1 February 2020. Electronic receipts are now dutiable instruments, and the Federal Inland Revenue Service (FIRS) is the competent agency to collect stamp duties on behalf of the federal government.

Dutiable instruments and rates

The SDA prescribes a wide range of dutiable instruments, covering over 100 documents – leases, mortgages, bills of exchange, marketable securities, conveyances, power of attorney, insurance policies, wills, contract notes, affidavits, proxy forms, and so on. Duties payable on instruments are denoted by impressed/ adhesive stamps.

Stamp duties may be charged at either fixed rates or *ad valorem* rates. While fixed rates do not vary regardless of the consideration of a qualifying transaction, *ad valorem* rates are charged at a fixed percentage based on the value of the consideration of a qualifying transaction. For example, wills and conveyances on sale are charged at a fixed rate of ₦500 and an *ad valorem* rate of 1.5%, respectively.

Current practice of stamp duties in Nigeria

The tax authorities sought to enforce swift implementation, but this has been met with some resistance from taxpayers owing to a number of factors. These include:

- **Obsolete provisions:** The SDA, being a dated statute, contains largely archaic provisions – from its language to the value of rates, which are no longer in tune with current realities. Consequently, the provisions of the law do not accurately convey its intentions. For instance, the SDA prescribes a penalty of ₦20 (c. US$0.053) for non-compliance with its provisions, which barely serves as a deterrent for defaulters.
- **Varied scope of dutiable instruments:** The Schedule to the SDA provides for a vast range of instruments which, compared to other jurisdictions, is

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somewhat excessive. In Nigeria, it is expected that stamp duty is paid on every document, written and electronic, save for a few exemptions expressly stipulated in the law. This increases the burden on taxpayers, resulting in some resistance. Comparison is often drawn with the practices in other jurisdictions to prove that Nigeria's practice deviates from global best practices.

- **Contrasting rates:** The Joint Tax Board (JTB), a body made up of the heads of the tax authorities in the 36 States of the Federation and headed by the Chair of the FIRS, established to advise the government on taxation matters to ensure an efficient tax administration system, unilaterally increased the stamp duty rates contained in the SDA via an information circular. Consequently, there are two sets of rates currently in operation in the country – the SDA rates usually adopted by the taxpayers, and the JTB rates that the tax authority seeks to enforce.

Although the rates contained in the SDA are obsolete and do not align with current economic realities, the law provides that only the legislature (i.e., the National Assembly and States' Houses of Assembly) is empowered to vary the rates as contained in the Schedule to the Act. Therefore, the applicable rates, until such amendment in line with the law is implemented, are those contained in the SDA being the backing legislation.

Conclusion

The sudden resuscitation and drive for stamp duty is occasioned by dwindling government revenue – itself a fallout from the slump in the price of global crude oil, which has been the country's main source of revenue. The government continues to seek alternative and internal revenue-generating sources to meet its ever-growing expenditure needs, and some officials have proposed that previously overlooked sources such as the SDA should be reconsidered in this light.

A holistic overhaul of the SDA is essential for meeting the objectives of reforming the domestic tax laws and increasing revenue for both the federal and state governments. Limiting the coverage of the SDA, reducing the applicable rates, expanding the scope of exempted items and making adequate clarifications where required are fundamental to ensuring compliance with the provisions of the SDA since the amendments by the Finance Act have brought the statute out of its erstwhile obscurity.

Until the recommended amendments are implemented, to avoid penalties taxpayers and potential investors are expected to adhere to the provisions of the SDA and ensure that all chargeable instruments as provided by law are stamped at their specified rates.

India: Obligation for non-resident e-commerce operators to withhold taxes

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Section 194-O specifies that if an ecommerce participant sells goods or provides services via an e-commerce operator's digital/electronic facility/platform, then the e-commerce operator must deduct 1% income tax from the gross amount of such sales/services

Tax deduction at source (TDS) is the quickest and most convenient way for a government to collect taxes. It is therefore not surprising that the scope of withholding taxes is often increased by widening the provisions relating to withholding taxes. Applicable from 1 October 2020, a new section 194-O has been added to the Finance Act 2020, requiring e-commerce operators to deduct TDS on the amount of sales or services effected through their online platform.

Section 194-O specifies that if an ecommerce participant sells goods or provides services via an e-commerce operator's digital/electronic facility/platform, then the e-commerce operator must deduct 1% income tax from the gross amount of such sales/services. This deduction must be made when the e-commerce participant's account is credited for the sale/services, or when they receive payment by any mode, whichever is earlier. As per section 206-AA, in a case where tax is liable to be deducted under section 194-O, and the e-commerce participant does not furnish their Permanent Account Number (PAN) or Aadhar number, the tax rate increases to 5%.

Section 194-O includes the following definitions:

- **e-commerce:** The supply of goods or services or both, including digital products, over a digital/electronic network.
- e-commerce **operator:** Someone who owns, operates or manages a digital/electronic facility or platform for electronic commerce.
- e-commerce **participant:** A person resident in India selling goods or providing services or both, including digital products, through a digital/electronic facility or platform for e-commerce.

Note that the definition of 'e-commerce **participant**' specifies a person resident in India, but 'e-commerce **operator**' includes all persons irrespective of whether resident in India or not. Thus, an e-commerce operator who is non-resident and is making payment to, or crediting the account of, a resident e-commerce participant shall be liable to deduct tax at source.

This poses an obligation on non-resident e-commerce operators to comply with withholding tax obligations in India, but many practical difficulties might hinder compliance. Firstly, a tax deduction account number (TAN) is the prerequisite for withholding any taxes; but obtaining one requires the applicant to specify an address in India. In the e-commerce business model, it is common for a non-resident operator to have no presence in India other than an independent third-party storage facility. If a non-resident e-commerce operator has no presence or representation in India, it may have difficulty obtaining a TAN.

Section 194-O also provides that any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant for the sale of goods or provision of services or both, facilitated by an e-commerce operator, shall be deemed to be the amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included in the gross amount of such sale or services for the purpose of deduction of income tax under this subsection. Thus, the section requires e-commerce operators to deduct TDS where the payment for goods or services is not routed to the supplier through the e-commerce operator. Recovering the TDS from the supplier is likely to be difficult for the e-commerce operator.

According to section 194-O, the e-commerce operator is the person responsible for paying the e-commerce

participant, even though they don't pay them directly. In the event of any default, the e-commerce operator would be considered as assessee in default and liable for action under the Act. The meaning of the 'person responsible for paying' the tax contained in section 204 has also been expanded to now include, in the case of a person not resident in India, that individual or anyone acting on their behalf in India, including anyone treated as an 'agent' under section 163. The recent amendment also imposes a liability to deduct tax where the operator is a non-resident. Thus, if a non-resident uses the address of any third independent party for obtaining a TAN, such a person be deemed responsible for paying the taxes for the purposes of section 194-O, as per the expanded definition given in section 204.

Given the challenges around compliance with the provisions of 194-O and the complexities of the e-commerce business model, it will be difficult for non-resident e-commerce operators to comply with these new obligations. Non-compliance could potentially attract recovery of the taxes required to be withheld by the non-resident, along with interest and penalties, thus leading to more litigation.

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The Next Step

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