April 2019

Collective investment schemes and dividend withholding tax

On 17 January 2019, the amendments included in the Taxation Laws Amendment Act, 2018 (2018 TLAB) were promulgated.

One of these amendments impacted the dividend exemption for a portfolio of a collective investments scheme in securities (CISS), specifically section 64F(1)(k) of the Income Tax Act No. 58 of 1962 (the Act). The explanatory memorandum issued in conjunction with the 2018 TLAB described this change as seeking “…to correct superfluous wording…”.

Section 64F(1)(k) of the Act previously provided for a portfolio of a CISS to be exempt from dividends tax. With the promulgation of the 2018 TLAB, the aforementioned exemption has been removed and this raises a query whether the portfolio of a CISS now becomes liable for dividends tax, specifically in the instance where a dividend is not on-distributed within 12 months of its accrual (by the portfolio of a CISS.)

Background

Dividends declared by South African resident companies or non-resident companies, the shares of which are listed on a South African exchange, are subject to dividends tax of 20%. For a cash dividend, the beneficial owner of the dividend is liable for the dividends tax. The beneficial owner is the person entitled to the benefit of the dividend attaching to a share.

In the instance of a cash dividend, the company declaring the dividend has to withhold the dividends tax and pay it over to the South African Revenue Service (SARS), unless, for example, the dividend is paid to a regulated intermediary. A portfolio of a CISS is specifically defined as a regulated intermediary in section 64D of the Act.

How does the deletion impact a portfolio of a CISS?

If a portfolio of a CISS invests a portion of its fund in equity shares of a resident company, and that resident company declares a dividend, then the resident declaring company need not withhold dividends tax as the dividend is being paid to a regulated intermediary (i.e. the portfolio of a CISS). To the extent that the portfolio of a CISS distributes the aforementioned dividend to a unit holder within 12
months, the dividend will be deemed to have accrued to that unit holder. Consequently, the unit holder will be
deemed to be the beneficial owner, and the portfolio of the CISS will then be required is required to withhold
and pay the dividends tax to SARS.

In terms of section 25BA of the Act, where the portfolio of a CISS does not on-distribute dividends within 12
months of its accrual, that dividend is deemed to accrue to the portfolio of the CISS.

Given that the exemption applicable to a portfolio of a CISS is no longer available from 17 January 2019, one
could argue that in the instance where a dividend is not on-distributed within 12 months of its accrual (as
above), the portfolio of a CISS becomes the beneficial owner of that dividend and is subject to dividends tax at
20%. On this basis, the portfolio of a CISS will be required to account for, and pay the dividends tax to SARS
on the dividend not on-distributed.

In our view, even with the deletion of the exemption contained in section 64F(1)(k) of the Act, a portfolio of a
CISS should still be ‘exempt’ from dividends tax having regard to the provisions of section 64F(1)(l) and
section 25BA(1)(b)(ii) of the Act (section 64F(1)(l) of the Act provides for an exemption from dividends tax
where the dividend constitutes ‘income’ of that person.) In essence, a dividend that is not on-distributed within
12 months of accrual is deemed to become income of that portfolio of a CISS.

Consequently, the exemption in section 64F(1)(l) of the Act applies, and the portfolio of a CISS should not be
subject to dividends tax for amounts not on-distributed within 12 months, after 17 January 2019.

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