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# South Africa’s Non-Resident Entertainment Royalty or Similar Payment Withholdings

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There has been a lot of uncertainty with regard to withholding taxes imposed by the ***South African Revenue Service (SARS)*** on cross-border payments made by South Africans to offshore recipients, and the ambiguous administrative and compliance procedures relating thereto. Based on the information available directly from SARS, any amounts received for the imparting of any technical or commercial knowledge or information, commonly known as “know-how” payments, are specifically included in the definition of the term “gross income” and are in fact taxable. According to SARS material, the foregoing includes the income derived from entertainment industry royalties or similar payments made to a person who is not a South African resident for the right of, or the grant of permission to use in South Africa, copyrights or “any motion picture film, or any film or video tape or disc for use in connection with television, or any sound recording or advertising matter used or intended to be used in connection with such motion picture film, film or video tape or disc.”

The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2012, and the effectuation of the Taxation Laws Amendment Act, 2012 (the “Act”), on July 1, 2013, have, in addition to raising the withholding tax amount on royalty and similar payments, seemingly clarified many of the prior uncertainties. For example, the Act has codified a new refund mechanism for the overpayment of royalty and licenses payments and also specific currency translation rules, both of which were previously absent.

Prior to July 1, 2013, SARS mandated a withholding tax of 12 percent (or a lower rate determined in a relevant agreement for the avoidance of double taxation) on royalty or similar payments made to a person who is a non-resident South African. With the effectuation of the Act, and subject to the royalty payment withholding tax exemption (as discussed below), (a) the withholding tax increased from 12 percent to 15 percent; (b) the liability for payment remains with the person making the payments; (c) the withholding tax is now triggered by the date the royalty or similar payment is paid or becomes due and payable; and (d) currency translation rules now mandate that the amount of the royalty is to be translated to Rand (currency of South Africa; sign: R; code: ZAR) at the spot rate on either the day the royalty or similar payment is paid or that date that the royalty or similar payment becomes payable. Also, a refund mechanism has been effectuated whereby an overpayment amount may be refunded if the person paying the royalty or similar payment lodges a claim for a refund within 3 years after the royalty or similar payment is paid to the non-resident South African person.

The royalty payment withholding tax exemption codified by SARS, according to the agency, applies where no withholding tax is to be deducted for any non-resident who (i) is physically present in South Africa during the tax year for more than 183 days; or (ii) has a permanent establishment in South Africa at any time during the tax year and is subject to normal tax. Additionally, previous exclusions on withholdings for royalties received or accrued by a controlled foreign corporation were removed by the Act.

Based on this information, as a general rule, withholding taxes imposed on royalty or similar payments are often greatly reduced or eliminated by Double Tax Agreements between South Africa and offshore countries. Therefore, it appears that provisions of South Africa’s Income Tax Act, 1962 (Act No. 58 of 1962), any amendments thereto and the Act will apply unless a Double Tax Agreement or Tax Treaty states otherwise. For specific advice on Africa tax law advice, please contact a practitioner admitted as such locally.

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