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- the sum of the market values of all the shares in that company on that date,
- less the sum of the contributed tax capital<sup>96</sup> of all the classes of shares in the company as at that date.

Under section 9H(3)(c)(iii)(bb) the dividend is deemed to have been declared and paid to the persons holding shares in that company in accordance with the effective interest of those persons in the shares in the company as at the date immediately before the day on which the company became a headquarter company.

In applying section 9H(3)(c)(iii) it is apparent that the requirements of section 64E(1) and 64EA(b) have been met and that, in the absence of an exemption or a reduced rate of dividends tax applying, the deemed dividend will be subject to dividends tax at a rate of 20%. A resident company will not qualify for an exemption from dividends tax under section 64FA(1) or a reduced rate of dividends tax under section 64FA(2) on a deemed dividend *in specie* which arises under section 9H(3)(c)(iii). For section 64FA(1) or (2) to apply, the beneficial owner must submit the declaration and written undertaking referred to in that section to the company that is deemed to have declared and paid the deemed dividend *in specie*. The term “beneficial owner” is defined in section 64D and means “the person entitled to the benefit of the dividend attaching to a share.” A recipient of a deemed dividend *in specie* under section 9H(3)(c)(iii) is not entitled to the benefit of the dividend because there is no benefit. There is no benefit because the deemed dividend *in specie* is a figure calculated for tax purposes only which has resulting dividends tax implications. A benefit does not arise and is not deemed to arise under section 9H(3)(c)(iii) for the holder of shares for the purposes of section Part VIII of the Act.

In the absence of a “beneficial owner” as defined in section 64D, the requirements for an exemption from dividends tax under section 64FA(1) or a reduced rate of dividends tax under section 64FA(2) cannot be met. Without a beneficial owner it is irrelevant whether the requirements of section 64F as referred to in section 64FA(1) or the specific requirements<sup>97</sup> in a potentially applicable tax treaty for purposes of section 64FA(2) are met.

Under section 9H(4) the following assets of a company that becomes a headquarter company are excluded from section 9H(3):

- Immovable property situated in South Africa.
- A right to acquire a marketable security contemplated in section 8A.

<sup>96</sup> The term “contributed tax capital” is defined in section 1(1) and means, in simplified terms, the consideration received by a company for the issue of its shares. See the *Comprehensive Guide to Dividends Tax* for a detailed interpretation of the definition of “contributed tax capital”.

<sup>97</sup> Specific requirements include, for example, the tax treaty definition of “dividend” and the possible requirement for a specific holding in the capital or voting rights of a company.





































- (ii) in terms of subsection (2A), be deemed to be an amount actually incurred by the headquarter company during that succeeding year that constitutes a royalty payable to a person that is not a resident.

### Section 24I(1) – Paragraphs (a) – (d) of the definition of “local currency”

“local currency” means in relation to—

- (a) any person in respect of an exchange item which is attributable to any permanent establishment outside the Republic, the functional currency of that permanent establishment: Provided that for purposes of this paragraph any exchange item shall be deemed not to be attributable to any such permanent establishment if the functional currency of that permanent establishment is the currency of a country which has an official rate of inflation of 100 per cent or more throughout the relevant year of assessment;
- (b) any resident other than a headquarter company in respect of an exchange item which is not attributable to a permanent establishment outside the Republic, the currency of the Republic;
- (c) any person that is not a resident in respect of any exchange item which is attributable to a permanent establishment in the Republic, the currency of the Republic;
- (d) any headquarter company in respect of an exchange item which is not attributable to a permanent establishment outside the Republic, the functional currency of that headquarter company;

### Section 24I(3)

(3) In determining the taxable income of any person contemplated in subsection (2), there shall be included in or deducted from the income, as the case may be, of that person—

- (a) any exchange difference in respect of an exchange item of or in relation to that person, subject to subsection (10A); and
- (b) (i) any premium or like consideration received by, or paid by, such person in terms of a foreign currency option contract entered into by such person; or
- (ii) any consideration paid by such person in respect of a foreign currency option contract acquired by such person.

### Section 25D(4) and (7)

(4) Where, during any year of assessment—

- (a) any amount—
- (i) is received by or accrued to; or
- (ii) of expenditure is incurred by, a headquarter company in any currency other than the functional currency of the headquarter company; and
- (b) the functional currency of that headquarter company is a currency other than the currency of the Republic,

that amount must be determined in the functional currency of the headquarter company and must be translated to the currency of the Republic by applying the average exchange rate for that year of assessment.

(7) Any amounts received by or accrued to, or expenditure incurred by—

- (a) a headquarter company contemplated in subsection (4);
- (b) a domestic treasury management company contemplated in subsection (5); or
- (c) an international shipping company contemplated in subsection (6),

during any year of assessment in a functional currency that is a currency other than the currency of the Republic must be translated to the currency of the Republic by applying the average exchange rate for the relevant year of assessment.

### Section 31(5) and (6)

(5) Where any transaction, operation, scheme, agreement or understanding has been entered into between a headquarter company and—

- (a) any other person that is not a resident and that transaction, operation, scheme, agreement or understanding is in respect of the granting of financial assistance by that other person to that headquarter company, this section does not apply to so much of that financial assistance that is directly applied as financial assistance to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights;
- (b) any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of financial assistance by that headquarter company to that foreign company, this section does not apply to that financial assistance;
- (c) any other person that is not a resident and that transaction, operation, scheme, agreement or understanding is in respect of the granting of the use, right of use or permission to use any intellectual property as defined in section 23I(1) by that other person to that headquarter company, this section does not apply to the extent that the headquarter company—
  - (i) grants that use, right of use or permission to use that intellectual property to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights; and
  - (ii) does not make use of that intellectual property otherwise than as contemplated in subparagraph (i); or
- (d) any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of the use, right of use or permission to use any intellectual property as defined in section 23I(1) by that headquarter company to that foreign company, this section does not apply to that granting to that foreign company.

(6) Where any transaction, operation, scheme, agreement or understanding that comprises the granting of—

- (a) financial assistance; or
- (b) the use, right of use or permission to use any intellectual property as defined in section 23I,

by a person that is a resident (other than a headquarter company) to a controlled foreign company in relation to that resident or in relation to a company that forms part of the same group of companies as that resident, this section must not be applied in calculating the taxable income or tax payable by that resident in respect of any amount received by or accrued to that resident in terms of that transaction, operation, scheme, agreement or understanding if—

- (i) .....
- (ii) that controlled foreign company has a foreign business establishment as defined in section 9D(1); and
- (iii) the aggregate amount of tax payable to all spheres of government of any country other than the Republic by that controlled foreign company in respect of any foreign tax year of that controlled foreign company during which that transaction, operation, scheme, agreement or understanding exists is at least 75 per cent of the amount of normal tax that would have been payable in respect of any taxable income of that controlled foreign company had that controlled foreign company been a resident for that foreign tax year: Provided that the aggregate amount of tax so payable must be determined—
  - (aa) after taking into account any applicable agreement for the prevention of double taxation and any credit, rebate or other right of recovery of tax from any sphere of government of any country other than the Republic; and
  - (bb) after disregarding any loss in respect of a year other than that foreign tax year or from a company other than that controlled foreign company.

#### **Section 41(1) – Definition of “company”**

“**company**” does not include a headquarter company and, for the purposes of sections 42 and 44, includes any portfolio of a collective investment scheme in securities or any portfolio of a hedge fund collective investment scheme;

#### **Section 49D(c)**

**49D Exemption from withholding tax on royalties.**—A foreign person is exempt from the withholding tax on royalties if—

- (c) that royalty is paid by a headquarter company in respect of the granting of the use or right of use of or permission to use intellectual property as defined in section 23I to which section 31 does not apply as a result of the exclusions contained in section 31(5)(c) or (d).

#### **Section 50D(1)(a)(i)(cc)**

**50D. Exemption from withholding tax on interest.**—(1) Subject to subsection (2), there must be exempt from the withholding tax on interest any amount of interest—

- (a) if that amount of interest is paid to any foreign person—
  - (i) by—
    - (cc) a headquarter company in respect of the granting of financial assistance as defined in section 31(1) to which section 31 does not apply as a result of the exclusion contained in section 31(5)(a); or



**Section 64E(1)**

**64E. Levy of tax.**—(1)(a) Subject to paragraph 3 of the Tenth Schedule, there must be levied for the benefit of the National Revenue Fund a tax, to be known as the dividends tax, calculated—

- (i) at the rate of 20 per cent; or
- (ii) at such rate as the Minister may announce in the national annual budget contemplated in section 27(1) of the Public Finance Management Act, with effect from a date mentioned in that Announcement,

of the amount of any dividend paid by any company other than a headquarter company.

- (b) If the Minister makes an announcement contemplated in paragraph (a)(ii), that rate comes into effect on the date determined by the Minister in that announcement and continues to apply for a period of 12 months from that date subject to Parliament passing legislation giving effect to that announcement within that period of 12 months.

**Section 64N(1)**

**64N. Rebate in respect of foreign taxes on dividends.**—(1) A rebate determined in accordance with this section must be deducted from the dividends tax payable in respect of a dividend contemplated in paragraph (b) of the definition of “dividend” in section 64D.

**Paragraph 35(3)(a)**

(3) The proceeds from the disposal, during a year of assessment, of an asset by a person, as contemplated in subparagraph (1) must be reduced by—

- (a) any amount of the proceeds that must be or was included in the gross income of that person or that must be or was taken into account when determining the taxable income of that person before the inclusion of any taxable capital gain;

**Paragraph 43(1A) and (6A)**

(1A) Where, during any year of assessment, a person disposes of an asset (other than a disposal contemplated in subparagraph (1)) for proceeds in a foreign currency or after having incurred expenditure in respect of that asset in a foreign currency, that person must, for the purposes of determining the capital gain or capital loss on the disposal of that asset, translate—

- (a) the proceeds into the local currency at the average exchange rate for the year of assessment in which that asset was disposed of or at the spot rate on the date of disposal of that asset; and
- (b) the expenditure incurred in respect of that asset into the local currency at the average exchange rate for the year of assessment during which that expenditure was incurred or at the spot rate on the date on which that expenditure was incurred.

(6A) Subparagraph (1A) must not apply in respect of the disposal by a person of—

- (a) .....
- (b) any amount of a debt owed to that person denominated in a foreign currency; or
- (c) any right of that person arising from any contractual agreement or arrangement to which that person and another party are parties where—
  - (i) that contractual agreement or arrangement gives rise to that right and to a corresponding obligation of the other party; and

(ii) the value of that right and the amount of that obligation are determined directly or indirectly with reference to an amount contemplated in item (b).

**Paragraph 64B(2) and (4)**

(2) Subject to subparagraph (4), a headquarter company must disregard any capital gain or capital loss determined in respect of the disposal of any equity share in any foreign company (other than an interest contemplated in paragraph 2(2)) if that headquarter company (whether alone or together with any other person forming part of the same group of companies as that headquarter company) immediately before that disposal held at least 10 per cent of the equity shares and voting rights in that foreign company.

(4) A person must disregard any capital gain determined in respect of any foreign return of capital received by or accrued to that person from a "foreign company" as defined in section 9D (other than an interest contemplated in paragraph 2(2)) where that person (whether alone or together with any other person forming part of the same group of companies as that person) holds at least 10 per cent of the total equity shares and voting rights in that company.

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