

BINDING PRIVATE RULING: BPR 085

The guidance in respect of the third ruling has changed and should not be relied on.

DATE: 27 May 2010

ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)
SECTION : PARAGRAPH 2 OF THE FOURTH SCHEDULE TO THE ACT
ARTICLES : ARTICLE 15 OF THE AGREEMENTS FOR THE AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME (DTA's) BETWEEN THE GOVERNMENT OF SOUTH AFRICA AND EACH OF INDIA, UNITED STATES OF AMERICA (USA), ROMANIA AND THE CZECH REPUBLIC
ARTICLE 14 OF THE DTA BETWEEN THE GOVERNMENT OF SOUTH AFRICA AND THE UNITED KINGDOM (UK)
ARTICLE 16 OF THE DTA BETWEEN THE GOVERNMENT OF SOUTH AFRICA AND THE NETHERLANDS
SUBJECT : TAXATION ASPECTS OF INCOME DERIVED BY NON SOUTH AFRICAN RESIDENTS FROM EMPLOYMENT IN SOUTH AFRICA

1. Summary

This ruling deals with the interpretation and application of the Articles of the relevant DTA's governing dependent personal services in order to establish whether South Africa has a right to tax the remuneration derived by residents of India, USA, Romania, the Czech Republic, UK or the Netherlands for employment in South Africa. To the extent that South Africa is entitled to tax that remuneration, this ruling also deals with the obligation of the South African employer to withhold employees' tax (PAYE) in respect of that remuneration in terms of paragraph 2 of the Fourth Schedule to the Act.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 76Q of the Act.

In this ruling legislative references to Articles, sections and paragraphs are to Articles of the relevant DTA's, sections of the Act and paragraphs of the Second Schedule to the Act applicable as at 06 March 2008 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant DTA and the Act.

This ruling has been requested under the provisions of –

- Article 15 of the DTA's between the Government of South Africa and each of India, USA, Romania and the Czech Republic
- Article 14 of the DTA between the Government of South Africa and the UK; and
- Article 16 of the DTA between the Government of South Africa and the Netherlands.

3. Parties to the proposed transaction

Associated foreign companies: Foreign companies that are either resident in India, the USA, Romania, the Czech Republic, the UK or the Netherlands that have formal employees who are not a “resident” as defined in section 1

Assigned employees: Formal employees of these Associated foreign companies assigned to the South African company for short terms

The South African company: A South African company that is a “resident” as defined in section 1

The XYZ group of companies: An international group of companies which consist of these Associated foreign companies and the South African company

4. Description of the proposed transaction

The XYZ group of companies operates internationally in various countries. In South Africa the XYZ group of companies operates through, amongst others, the South African company.

The XYZ group of companies has established a global resource pool and global centres of excellence for the optimal use of its worldwide resources and to pool individuals with specific skills. This global resource pool is a register of all available professionals and other technical specialists who may be available for utilization by the South African company (or by any associated foreign company within the XYZ group of companies) to supplement its personnel resources for projects.

The South African company intends to tender for projects in South Africa. Due to either a general lack of appropriate resources in South Africa or the need to use individuals having specialised knowledge that is

essential for the execution of some of these projects, the South African company intends to use, from time to time, these Assigned employees to supplement or complement its project teams. It is expected that these Assigned employees will be sourced from the global resource pool and global centres of excellence.

The South African company intends to utilise these Assigned employees on the following terms:

- (a) Their time spent in South Africa and the work completed by them will depend purely on the expertise required for the particular project at that time, but normally the periods will be between 1 to 3 months.
- (b) Their involvement with the South African projects will not necessarily cease when they leave South Africa, but they will mostly remain involved remotely from their respective country of residence.
- (c) They will remain full time employees of their respective formal employers in their country of residence.
- (d) They will continue to receive their salaries and other benefits in terms of their contracts of employment with their respective formal employers, which salaries and benefits will be paid by their formal employers in their respective countries concerned.
- (e) The South African company will pay an amount to these formal employers of these Assigned employees for the services rendered by these Assigned employees during their assignments to a South African project, calculated as the "burden rate". The burden rate is an hourly amount calculated by these formal employers of these Assigned employees, taking into account the salary of these Assigned employees, the overheads of these formal employers plus a percentage fee.
- (f) In addition to the payments to these formal employers of these Assigned employees, the South African company will provide accommodation, local and international transportation and meals or daily allowances to these Assigned employees whilst on their assignments to South Africa.
- (g) During their assignments to a South African project, these Assigned employees will report to a South African project manager of the South African company and participate fully in the processes of the South African team until their departure. They will, therefore, be subject to the supervision and control of the South African company.

- (h) The South African company will have no right to dismiss these Assigned employees. However, if an individual performs poorly, a replacement will be requested and the performance problems will be reported to the formal employer concerned.
- (i) The South African company will have a right to the work produced by these Assigned employees and will bear the relative responsibility and risk in respect of that work.

The aforementioned proposed transaction to be entered into by the South African company can be summarised as follows:

- A Foreign company, for example, a company resident in India, will, as a labour broker, provide Assigned employees to the South African company if and when requested by the South African company.
- These Assigned employees will be remunerated and continue to be formally employed by the labour broker (with part-benefits paid by the South African company) but will be subject to the supervision and control of the South African company.
- These Assigned employees will be in South Africa for less than 183 days. The South African company will pay a burden rate (as calculated in (e) above) to the labour broker for the provision of these Assigned employees.
- The labour broker will not render the services to the South African company, but will merely, as a labour broker, provide these Assigned employees.

5. Conditions and assumptions

This ruling is made subject to the conditions and assumptions that –

- no one of these Assigned employees is “resident” as defined in section 1 and, therefore, they are all residents of the relevant DTA countries under consideration; and
- the remuneration that will be paid to these Assigned employees by the Associated foreign companies which relates to services rendered during their assignment to a South Africa project, will be sourced in South Africa and , therefore, will be subjected to tax in South Africa in terms of the Act.

6. Ruling

The ruling made in connection with the proposed transaction is as follows:

- The South African company will be regarded as an “employer” of these Assigned employees for the purposes of:
 - (i) Article 15 of the DTA's between the Government of South Africa and each of India, the USA, Romania and the Czech Republic;
 - (ii) Article 14 of the DTA between the Government of South Africa and the UK; and
 - (iii) Article 16 of the DTA between the Government of South Africa and the Netherlands.
- South Africa shall be entitled to tax the remuneration, paid to these Assigned employees by these Associated foreign companies during these Assigned employees' assignments to South African projects, in terms of the DTAs that the Government of South Africa have entered into with the Governments of the foreign countries of residence of these Assigned employees.
- the South African company shall be obliged to comply with the obligations of an employer as prescribed in paragraph 2 of the Fourth Schedule in respect of remuneration paid to these Assigned employees by these Associated foreign companies in their respective country of residence in respect of services rendered by these Assigned employees during their assignments to South African projects.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of ten (10) years as from the date of this ruling.

Issued by:

**Legal and Policy Division: Advance Tax Rulings
SOUTH AFRICAN REVENUE SERVICE**