



# Comprehensive Guide to Dividends Tax

Dividends Tax



South African Revenue Service

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# Preface

The purpose of this guide is to assist users in gaining a more in-depth understanding of dividends tax. While this guide reflects SARS's interpretation of the law, taxpayers who take a different view are free to avail themselves of the normal avenues for resolving such differences.

The foundation for this guide can be found in the various *Explanatory Memoranda* which supported the dividends tax legislation. The explanations contained in these *Explanatory Memoranda* have been expanded with additional explanations and examples.

This guide is not an 'official publication' as defined in s 1 of the TA Act and does not create a practice generally prevailing under s 5 of that Act. It is also not a binding general ruling under s 89 of Chapter 7 of the TA Act. Should an advance tax ruling be required, visit the SARS website for details of the application procedure.

The information in this guide is based on the income tax and tax administration legislation (as amended) as at the time of publishing and includes the following:

- The Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2021 which was promulgated on 19 January 2022 (as per GG 45788).
- The Taxation Laws Amendment Act 20 of 2021 which was promulgated on 19 January 2022 (as per GG 45787).
- The Tax Administration Laws Amendment Act 21 of 2021 which was promulgated on 19 January 2022 (as per GG 45786).

All guides, interpretation notes, rulings, forms, returns and tables referred to in this guide are available on the **SARS website**. Unless indicated otherwise, the latest issue of these documents should be consulted.

For more information you may –

- visit the SARS website at [www.sars.gov.za](http://www.sars.gov.za);
- visit your local SARS branch;
- contact your own tax advisor or tax practitioner;
- contact the SARS National Contact Centre –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093 (only between 8h00 and 16h30 South African time).

Comments regarding this guide may be emailed to [policycomments@sars.gov.za](mailto:policycomments@sars.gov.za).

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## ABBREVIATIONS

In this guide unless the context indicates otherwise –

- ‘**Close Corporations Act**’ means the Close Corporations Act 69 of 1984;
- ‘**Companies Act, 1973**’ means the Companies Act 61 of 1973;
- ‘**Companies Act**’ means the Companies Act 71 of 2008;
- ‘**dividend *in specie***’, ‘**dividend comprising the distribution of an asset *in specie***’ and ‘**a dividend consisting of a distribution of an asset *in specie***’ are used interchangeably and bear the same meaning;
- ‘**domestic dividend**’ means a ‘dividend’ as defined in s 1(1);
- ‘**Financial Markets Act**’ means the Financial Markets Act 19 of 2012;
- ‘**holder of shares**’ and ‘**shareholder**’ are used interchangeably and bear the same meaning;
- ‘**income tax**’ means the normal tax on taxable income before taking into account any taxable capital gain;
- ‘**Mineral and Petroleum Resources Development Act**’ means the Mineral and Petroleum Resources Development Act 28 of 2002;
- ‘**Schedule**’ means a Schedule to the Act;
- ‘**section**’ means a section of the Act;
- ‘**Share Blocks Control Act**’ means the Share Blocks Control Act 59 of 1980;
- ‘**TA Act**’ means the Tax Administration Act 28 of 2011;
- ‘**tax treaty**’ means an agreement for the avoidance of double taxation entered into between South Africa and another country;
- ‘**the Act**’ means the Income Tax Act 58 of 1962;
- ‘**year 1**’, ‘**year 2**’, ‘**year 3**’ etc. in any of the examples refer to the respective calendar years; and
- any other word or expression bears the meaning ascribed to it in the Act.

### *References to statutory provisions*

para	paragraph
paras	paragraphs
s	section
ss	sections
subpara	subparagraph
subparas	subparagraphs

### *Acronyms*

CGT	capital gains tax, being the portion of normal tax attributable to the inclusion in taxable income of a taxable capital gain
CTC	‘contributed tax capital’ as defined in s 1(1)
GG	<i>Government Gazette</i>
GN	Government Notice
JSE	The securities exchange operated by JSE Ltd

OECD	Organisation for Economic Co-operation and Development
STC	secondary tax on companies previously levied under s 64B

*Legal references*

(A)	Appellate Division of the Supreme Court of South Africa
ACLR	Australian Company Law Reports
AD	Reports of the Appellate Division of the Supreme Court of South Africa
(C)	Cape Provincial Division of the Supreme Court of South Africa
(C)	Cape Special Court
CA	Court of Appeal
CC	Constitutional Court
(CAT)	Court of Appeal of Tanzania at Dar Es Salaam
CIR	Commissioner for Inland Revenue
CPD	Reports of the Cape Provincial Division of the Supreme Court of South Africa
C: SARS	Commissioner for the South African Revenue Service
(EC)	Eastern Cape Tax Court
FCA	Federal Court of Canada: Appeal Division
F.C.R.	Canada Federal Court Reports
(G)	Gauteng Tax Court
ITAT	Income Tax Appellate Tribunal (India)
(N)	Natal Tax Court or Natal Special Court
(NSW)	New South Wales Court of Appeal
(NMH)	Namibia High Court
SA	South African Law Reports
SATC	South African Tax Cases Reports
SBI	Sekretaris van Binnelandse Inkomste
(SCA)	Supreme Court of Appeal
SIR	Secretary for Inland Revenue
(T)	Transvaal Provincial Division of the Supreme Court of South Africa
(TC)	Tax Chamber
TCC	Tax Court of Canada
(W)	Witwatersrand Local Division

# Chapter 1

## Introduction to dividends tax

### 1.1 Methods of taxing dividends

It is generally accepted that there should be neutrality in the taxation of dividends. In other words, economic double taxation (as opposed to international juridical double taxation, which can be described as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods),<sup>1</sup> should be avoided by taxing corporate profits only once. When economic double taxation of corporate profits occurs, it becomes unattractive to carry on a trade through a company and natural persons will rather trade in their own names or in partnership.

Internationally there are many ways in which dividends are taxed. The three main methods of taxing dividends are outlined below. In South Africa, all three of these methods have been applied at different times.

#### 1.1.1 The imputation system

Under this system a company pays normal tax on its profits and in some instances withholds a further amount of tax when a dividend is distributed to holders of its shares. The dividend is subjected to normal tax in the holder's hands by grossing up the net dividend and a rebate is given for the underlying corporate tax or withholding tax, if any.

Before 1941, South African companies paid income tax on profits and holders of shares paid tax on dividends. To avoid super tax for their holders of shares, companies would not declare dividends. In 1941 a system was introduced in terms of which company profits were apportioned to holders of shares. The system gave rise to cash flow difficulties for minority holders of shares who did not necessarily have enough dividend income to discharge the tax liability. To solve this problem a levy on the company that acted as an advance payment was introduced. The apportionment system was abolished in 1952.

#### 1.1.2 The classical system

Under this system a company pays tax on its profits and the holders of shares pay tax in full on any dividends received. The main disadvantage of this system is economic double taxation.

In South Africa, before 1 March 1990, dividends were taxable in the hands of holders of shares, less a 'dividend allowance' based on a sliding scale with a minimum allowance of one-third of the dividend. Private companies were subjected to an undistributed profits tax (UPT) in order to encourage domestic companies to distribute dividends. The UPT system was beset with problems such as dividend stripping, which necessitated the introduction of a number of complex anti-avoidance measures, namely, s 8B (advances, loans or payments made to certain holders of shares deemed to be dividends in certain circumstances), s 8C (proceeds of certain shares deemed to be dividends) and s 8D (inclusion in income of dividends distributed on certain shares constituting trading stock). Domestic dividends received or accrued on or after 1 March 1990 were exempt from normal tax and consequently these anti-avoidance measures were repealed.

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<sup>1</sup> OECD *Model Tax Convention on Income and on Capital*: Condensed Version (2017) OECD Publishing at page 9 in para 1.

### 1.1.3 The corporate level system

Under this system, also known as the dividend exclusion system, tax is imposed at a corporate level only whilst dividends are generally exempt from normal tax when received by or accrued to holders of shares.

STC fell in this category and came into operation on 17 March 1993.<sup>2</sup> STC was a second-stage tax on corporate profits. The first stage 'normal tax' was imposed on the taxable income of a company. STC was imposed when a resident company distributed after-tax profits to its holders of shares. Companies that were not residents were not liable to pay STC on the dividends they declared.

STC was imposed on the amount by which a dividend declared by a company exceeded the sum of dividends that accrued to that company during its dividend cycle. The deduction of dividends accrued from dividends declared prevented economic double taxation of corporate profits flowing between resident companies.

The following types of dividend were potentially subject to STC:

- A 'dividend' as defined in s 1.
- An amount deemed to be a dividend declared under s 64C.

STC was introduced at a rate of 15% and at the same time the company rate of tax was reduced from 48% to 40%.

The STC rate was increased from 15% to 25% with effect from 22 June 1994, while the company rate of tax was reduced from 40% to 35%. The large increase in the rate of STC served as a strong disincentive for companies to distribute dividends and this had a negative impact on STC collections. The STC rate was reduced to 12,5% on dividends declared on or after 14 March 1996 and to 10% on dividends declared on or after 1 October 2007.

The company rate of tax was reduced to 30% in 2000, 29% in 2006 and 28% in 2009.

## 1.2 Replacement of STC with dividends tax

In February 2007 the Minister announced a two-phase approach to the manner in which dividends are to be taxed. The first phase entailed the reduction of the STC rate to 10% as from 1 October 2007, as well as a revision of the tax base (namely, the definition of 'dividend') on which STC relied. The definition of 'dividend' in s 1(1) was substituted with effect from 1 January 2011. The second phase entailed the replacement of STC with dividends tax and the substitution of the definition of 'dividend' in s 1(1) with effect from 1 April 2012.

Dividends tax<sup>3</sup> is a classical method of taxing dividends. The company pays normal tax on its profits and withholds a further amount of dividends tax on behalf of its holders of shares, assuming no exemptions apply, when a cash dividend is distributed to them. By contrast, assuming no exemptions apply, the company is subject to dividends tax on any dividend

<sup>2</sup> STC legislation was contained in ss 64B and 64C in Part VII of Chapter II of the Act. Part VII of Chapter II of the Act was repealed by s 68(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 April 2017.

<sup>3</sup> Dividends tax was introduced by s 56(1) of the Revenue Laws Amendment Act 60 of 2008 with the insertion of Part VIII of Chapter II of the Act. Chapter II was amended by the substitution of Part VIII by s 53(1) of the Taxation Laws Amendment Act 17 of 2009.

*in specie* paid by it. Dividends tax is a stand-alone tax and is not a payment towards a person's normal tax liability.

Dividends tax is, in line with international norms, levied on the beneficial owner unless the dividend consists of a distribution of an asset *in specie*, in which case the distributing company is liable for dividends tax. In the latter event, dividends tax is similar to STC.

The person entitled to the benefit of the dividend attaching to the share will be the person ultimately liable for dividends tax, although the tax will generally be withheld by the company that pays the dividend or by the regulated intermediary. Dividends tax is a final withholding tax, although amounts of dividends tax may be refunded in specified circumstances.

Dividends tax is levied on dividends paid by resident companies (other than headquarter companies). Dividends tax is also payable on a foreign dividend to the extent that the foreign dividend does not constitute the distribution of an asset *in specie* and it is paid to residents by foreign companies in respect of listed shares. Dividends tax is levied at the rate of 20% of the amount of the dividend paid. The rate of dividends tax increased from 15% to 20% in respect of dividends paid on or after 22 February 2017.

Certain dividends are subject to dividends tax at the rate of 0%, for example, certain dividends paid by oil and gas companies<sup>4</sup> and international shipping companies.<sup>5</sup> Dividends paid to non-residents may be subject to a reduced rate of tax under a tax treaty. Depending on the facts, a dividend may qualify for an exemption from dividends tax.

### 1.3 Reasons for the change from STC to dividends tax

#### 1.3.1 Change from a company-level tax to a tax on holders of shares

Internationally dividends are generally taxed at the level of holders of shares as opposed to the company-level. This difference in tax treatment under STC gave rise to the following problems:

- Resident companies were placed at a disadvantage compared to their international counterparts which did not bear any adverse accounting profit reduction when paying dividends.
- Some commentators claimed that STC resulted in an uncompetitive corporate tax rate.
- Non-resident holders of shares (particularly small portfolio investors) were often unable to obtain tax relief from double taxation under South Africa's tax treaties because STC was not a tax on the holder of shares.<sup>6</sup>
- Foreign investors were generally unfamiliar with STC because it is not a tax commonly encountered in other jurisdictions.
- Tax-exempt entities indirectly bore the effect of STC imposed on dividends received.

<sup>4</sup> Paragraph 3(1) of the Tenth Schedule (see 3.1.3).

<sup>5</sup> Section 12Q(3) (see 3.1.5).

<sup>6</sup> In *Volkswagen of South Africa (Pty) Ltd v C: SARS* [2008] JOL 21746 (T), (2008) 70 SATC 195 (T) the court found that STC was a tax on a company declaring a dividend and not a tax on the shareholder receiving the dividend. It was not a tax on dividends as contemplated in the tax treaty and accordingly fell outside the ambit of Article 7 of the tax treaty. See also para 3.2 of Binding General Ruling (Income Tax): 9 (Issue 2) '*Taxes on income and substantially similar taxes for purposes of South Africa's Tax Treaties*'.

### 1.3.2 A change in the tax base

Problems existed with the tax base upon which STC relied. More specifically, the definition of 'dividend' in s 1 drew its meaning from the word 'profits'. A dividend expressly or implicitly required a reduction in profits. The word 'profits' is not defined in the Act and drew its meaning from accounting principles and company law. This mixture of often complex concepts of accounting, company law and tax law complicated the STC system and created opportunities for the avoidance of tax.

### 1.4 Differences between STC and dividends tax

The main differences between STC and dividends tax in respect of a dividend declared and paid, other than a dividend *in specie*, are as follows:

- STC was a tax levied at company level while dividends tax is, with the exception of a dividend *in specie*, a tax levied on the beneficial owner of the dividend attaching to a share. A company that declares a dividend was liable for STC while the beneficial owner of a dividend is liable for dividends tax. The beneficial owner is liable for dividends tax even though the company that declares and pays the dividend, or the regulated intermediary, may be liable to withhold dividends tax.
- STC was a tax payable by a company on the net amount of a dividend declared by that company. The net amount was the amount that remained after reducing a dividend declared by the sum of dividends received or accrued during the dividend cycle. Dividends tax, on the other hand, is a tax that is imposed on the amount of a dividend paid to the beneficial owner of the dividend attaching to a share.

Under the STC system dividends paid between resident companies were exempt from STC if the parties formed part of a domestic group of companies and the declaring company was a controlled group company which elected that the exemption applied. By contrast, under the dividends tax system all dividend payments between resident companies are exempt from dividends tax unless the anti-avoidance provisions in s 64EB apply (see **3.8**).

#### Example 1 – Differences between STC and dividends tax – Cash dividend

##### *Facts:*

Company X declares and pays a dividend in cash of R100 to a natural person, A, its only holder of shares. Company X has reserves available for distribution of R500.

##### *Result:*

The difference in treatment of the cash dividend for STC and dividends tax purposes is outlined below.

	<b>STC</b>	<b>Dividends tax</b>
Dividend	R100	R100
Rate of tax	10%	20%
STC payable by Company X (R100 × 10%)	R10	R0
Dividends tax payable by A (R100 × 20%)	R0	R20
Amount paid to A	R100	R80

**Example 2 – Differences between STC and dividends tax – Dividend *in specie****Facts:*

Company X declares a dividend *in specie* of R100 to a natural person, A, its only holder of shares. Company X has reserves available for distribution of R500.

*Result:*

The difference in treatment of the dividend *in specie* for STC and dividends tax purposes is outlined below.

	<b>STC</b>	<b>Dividends tax</b>
Dividend <i>in specie</i>	R100	R100
Rate of tax	10%	20%
Amount of dividend paid to A	R100	R100
STC payable by Company X (R100 × 10%)	R10	R0
Dividends tax payable by Company X (R100 × 20%)	R0	R20

**1.5 Implementation of dividends tax**

Dividends tax came into operation on 1 April 2012<sup>7</sup> and applies to any dividend declared and paid by a company on or after that date.<sup>8</sup>

A dividend that was declared before 1 April 2012 but paid to holders of shares on or after that date was subject to STC and not dividends tax.

STC on a dividend that was declared before 1 April 2012 but which accrued to holders of shares only after that date was payable on or before 30 April 2012. The reason being that the dividend cycle of the company was deemed to have ended on 31 March 2012 (see **2.3.3**) and STC was payable not later than the last day of the month following the month in which the dividend cycle ended.

The final dividend cycle for STC ended on 31 March 2012 after which no more STC credits (see **2.3.6**) could be created under the STC system. STC credits in existence at the end of the final dividend cycle could, however, still be used after that date until 31 March 2015 under dividends tax legislation. This was possible when a resident company with an STC credit declared and paid a dividend on or after 1 April 2012 to another resident company, because the STC credits 'rolled-over' from the company paying the dividend to the company receiving the dividend.

<sup>7</sup> As determined by the Minister by GN 1073 in GG 34873 of 20 December 2011.

<sup>8</sup> Section 53(2) of the Taxation Laws Amendment Act 17 of 2009 as amended by s 148 of the Taxation Laws Amendment Act 7 of 2010. See **3.9** and Binding Private Ruling 121 'Secondary Tax on Companies or Dividends Tax'.

## 1.6 Dividends tax vs normal tax

Although dividends tax is part of the Act, it is a separate tax from normal tax. Generally speaking, a dividend will be subject to dividends tax or normal tax, not both.

### *Normal tax*

Normal tax is levied on taxable income and tax will therefore be paid on a dividend or foreign dividend received or accrued which has been included in gross income and is not exempt from normal tax.

Paragraph (k) of the definition of 'gross income' in s 1(1) includes in gross income of a person any amount received by or accrued to such person by way of a dividend or a foreign dividend. Both dividends and foreign dividends are therefore included in gross income. The Act defines 'dividend' and 'foreign dividend' in s 1(1) (see **2.2.3** and **2.2.5**).

Generally, domestic dividends received by or accrued to holders of shares are exempt from normal tax under s 10(1)(k)(i). However, there are some exceptions to this rule such as certain dividends received from REITs<sup>9</sup> and controlled companies,<sup>10</sup> certain dividends paid to employees on restricted equity instruments under s 8C or in respect of services rendered, cessions of dividends to companies and certain dividends received as part of a securities lending arrangement or other similar derivative arrangements.<sup>11</sup>

Foreign dividends may be exempt under s 10B.<sup>12</sup> A foreign dividend received by or accrued to a person will, subject to s 10B(4), (5), (6) and (6A), be exempt from normal tax under s 10B(2) –

- if that person<sup>13</sup> (whether alone or together with any other company forming part of the same group of companies as that person) holds at least 10% of the total equity shares and voting rights in the company declaring the foreign dividend (the 'participation exemption'), that foreign dividend is in respect of an equity share and the foreign company is not entitled to a deduction for the dividend in the country in which it has its place of effective management [s 10B(2)(a) and the provisos to s 10B(2)];
- if that person is a foreign company and the foreign dividend is paid or declared by another foreign company that is resident in the same country as that foreign company and the foreign company paying or declaring the foreign dividend is not entitled to a deduction for the dividend in the country in which it has its place of effective management [s 10B(2)(b) and the proviso to s 10B(2)];
- if that person is a resident, to the extent that the foreign dividend does not exceed all the amounts included in that resident's income under s 9D which relate to the net income of the controlled foreign company declaring the dividend or other foreign companies which are included in s 9D because of an indirect holding through that controlled foreign company less the amounts specified in s 10B(2)(c) and calculating net income without reference to s 10B(3) [s 10B(2)(c)];

<sup>9</sup> Definition of 'REIT' in s 1(1).

<sup>10</sup> Definition of 'controlled company' in s 25BB(1).

<sup>11</sup> See s 10(1)(k)(i).

<sup>12</sup> Section 10B applies to specified dividends and foreign dividends received by or accrued to a natural person, deceased estate, insolvent estate or trust on or after 1 March 2012 and received by or accrued to any other person on or after 1 April 2012. See Interpretation Note 93 'The Taxation of Foreign Dividends' for commentary on s 10B.

<sup>13</sup> Excluding a REIT or controlled company with effect from years of assessment commencing on or after 1 January 2021 [s 25BB(2A)(d)].



- to the extent that the foreign dividend is received by or accrues to that person in respect of a listed share and does not consist of a distribution of an asset *in specie*. The exemption is equitable because foreign dividends (excluding dividends *in specie*) paid by non-resident listed companies are generally subject to dividends tax [s 10B(2)(d)]; or
- to the extent that the foreign dividend is received by or accrues to a resident company in respect of a listed share and consists of the distribution of an asset *in specie* [s 10B(2)(e)].

Foreign dividends not exempt under s 10B(2) may, subject to s 10B(5), (6) and (6A), be partially exempt under s 10B(3). The exempt portion of the dividend is determined by multiplying the foreign dividend that is not otherwise exempt under s 10B(2) by the following ratios:

- 25 / 45<sup>14</sup> Natural persons, deceased estates, insolvent estates and trusts.
- 8 / 28<sup>15</sup> Companies and long-term insurers in respect of their company policyholder funds, corporate funds and risk policy funds.<sup>16</sup>
- 10 / 30<sup>17</sup> Long-term insurers in respect of their individual policyholder funds.

The effect of the partial exemption under s 10B(3) is that foreign dividends received by or accrued to a person, that are not exempt under s 10B(2), will generally be subject to a maximum rate of tax of 20% thus giving a result similar to that produced by dividends tax.

A rebate for foreign tax payable on a foreign dividend (for example, a foreign dividend withholding tax) may be available to a holder of shares under s 6quat(1) when a foreign dividend has been subject to normal tax in South Africa. One of the requirements of s 6quat(1A) is that the foreign tax must be 'proved to be payable'. In determining whether a foreign tax is proved to be payable, regard must be had to the terms of the dividends article of any applicable tax treaty. For example, if the foreign company withholds foreign tax of 25% notwithstanding that the tax treaty limits the amount that may be withheld to 15%, South Africa will not give credit for the excess 10% and the taxpayer will have to seek a refund from the foreign jurisdiction. See Interpretation Note 18 'Rebates and Deduction for Foreign Taxes on Income' for more information on s 6quat.

## 1.7 Provisions of the Act that combat tax avoidance relating to dividends

The various sections of the Act and paragraphs of the Eighth Schedule aimed at combatting tax avoidance arising in relation to dividends should be kept in mind when entering into share or dividend transactions. These include the following:<sup>18</sup>

- Section 8E – Dividends derived from certain shares and equity instruments deemed to be income in relation to recipients thereof.

<sup>14</sup> The ratio changed from 26 / 41 to 25 / 45 with effect from years of assessment commencing on or after 1 March 2017.

<sup>15</sup> The ratio changed from 13 / 28 to 8 / 28 with effect from years of assessment commencing on or after 1 March 2017.

<sup>16</sup> The risk policy holder fund was inserted by s 15(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2016.

<sup>17</sup> The ratio changed from 15 / 30 to 10 / 30 with effect from years of assessment commencing on or after 1 March 2017.

<sup>18</sup> It is beyond the scope of this guide to provide detailed commentary on these provisions.

- Section 8EA – Dividends on third-party backed shares deemed to be income in relation to recipients thereof.
- Section 8F – Interest on hybrid debt instruments deemed to be dividends *in specie* (see 3.7.2 e.).
- Section 8FA – Hybrid interest deemed to be dividends *in specie* (see 3.7.2 f.).
- Section 10(1)(k)(i), paras (dd), (jj) and (kk) of the proviso – Dividends received by or accrued to a person in respect of a ‘restricted equity instrument’ as defined in s 8C (see 4.1.12 a.).
- Section 10(1)(k)(i), para (ee) of the proviso – Dividends received by or accrued to a company in consequence of a cession of the right to that dividend or the exercise of a discretionary power by a trustee of a trust (see 4.1.12 a.).
- Section 10(1)(k)(i), paras (ff) and (gg) of the proviso – Dividends received by or accrued to a company on borrowed shares (see 4.1.12 a.).
- Section 10(1)(k)(i), para (hh) of the proviso – A company incurs an obligation to pay dividends when the obligation is determined directly or indirectly with reference to dividends received or accrued on identical shares (see 4.1.12 a.).<sup>19</sup>
- Section 10(1)(k)(i), para (ii) of the proviso – Dividends received by or accrued to a person in respect of services rendered or to be rendered or in respect of or by virtue of employment or the holding of any office (see 4.1.12 a.).
- Section 22B – Dividends treated as income on disposal of certain shares (see the draft Interpretation Note ‘Extraordinary Dividends Treated as Income or Proceeds on the Disposal of Certain Shares’).
- Section 24BA(3)(b) – Transactions under which assets are acquired as consideration for shares issued.
- Paragraph 19 – Losses on the disposal of certain shares.
- Paragraph 43A – Dividends treated as proceeds on the disposal of certain shares (see the draft Interpretation Note ‘Extraordinary Dividends Treated as Income or Proceeds on the Disposal of Certain Shares’).

See 3.8 for commentary on s 64EB which aims to combat dividends tax avoidance.

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<sup>19</sup> Definition of ‘identical share’ in s 1(1).

## Chapter 2

### Scope and definitions (ss 1(1) and 64D)

#### 2.1 Introduction

The introduction of dividends tax led to the substitution of the definition of 'dividend' in s 1(1), as well as the introduction or amendment of certain related definitions in ss 1(1) and 64D. The definitions introduced in s 64D became effective on 1 April 2012. A definition of 'dividend' was also introduced in s 64D for purposes of dividends tax.

The following definitions are considered below:

Definition	Section	Paragraph in this guide
company	1(1)	2.2.1
contributed tax capital (CTC)	1(1) and 8G	2.2.2
dividend	1(1)	2.2.3
equity share	1(1)	2.2.4
foreign dividend	1(1)	2.2.5
JSE Limited Listings Requirements	1(1)	2.2.6
listed company	1(1)	2.2.7
listed share	1(1)	2.2.8
return of capital	1(1)	2.2.9
share	1(1)	2.2.10
beneficial owner	64D	2.3.1
dividend	64D	2.3.2
dividend cycle <sup>20</sup>	64D	2.3.3
effective date	64D	2.3.4
regulated intermediary <sup>21</sup>	64D	2.3.5
STC credit <sup>22</sup>	64D	2.3.6

#### *Company Law reform*

Under the Companies Act, 1973, dividends could be declared only from profits available for distribution. Under s 46(1)(b) of the Companies Act a company is now prohibited from making a distribution<sup>23</sup> only if it reasonably appears that the company will not satisfy the solvency and liquidity tests provided for in that Act immediately after completing the proposed distribution. It follows that the Companies Act allows a company to declare a dividend even if no profits are available for distribution.

#### *Dividends vs CTC*

The definition of 'dividend' in s 1, as it read before 1 January 2011, relied on capital maintenance concepts. A distribution out of share capital and share premium did not constitute a dividend while a distribution out of divisible profits constituted a dividend.

The definition of 'dividend' in s 1(1) that came into operation on 1 January 2011, and which has been amended with effect from 1 April 2012, treats any amount transferred or applied by

<sup>20</sup> Definition of 'dividend cycle' deleted with effect from 17 January 2019.

<sup>21</sup> Definition of 'regulated intermediary' was amended by s 73(1) of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016 to include a portfolio of a hedge fund collective investment scheme in para (g) of that definition.

<sup>22</sup> Definition of 'STC credit' deleted with effect from 17 January 2019.

<sup>23</sup> Definition of 'distribution' in s 1 of the Companies Act.

a resident company in respect of a share as a dividend unless, amongst others, it results in a reduction of CTC. This rule includes amounts transferred or applied during the lifetime of a company as well as amounts transferred or applied during liquidation,<sup>24</sup> winding-up or deregistration of a company.

CTC is a tax concept and broadly represents the amounts contributed to the company in exchange for the issue of its shares.

A transfer or application by a company of an amount comprising a dividend may be subject to dividends tax while a transfer or application of an amount of CTC may have CGT consequences for the holders of shares if the shares are held on capital account or income tax consequences if the shares are held on revenue account.

## 2.2 Definitions [s 1(1)]

### 2.2.1 Definition – ‘company’

‘**[C]ompany**’ includes—

- (a) any association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in the Republic or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law; or
- (b) any association, corporation or company incorporated under the law of any country other than the Republic or any body corporate formed or established under such law; or
- (c) any co-operative; or
- (d) any association (not being an association referred to in paragraph (a) or (f)) formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public; or
- (e) any—
  - (i) . . . . .
  - (ii) portfolio comprised in any investment scheme carried on outside the Republic that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement in terms of which members of the public (as defined in section 1 of the Collective Investment Schemes Control Act) are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest; or
  - (iii) portfolio of a collective investment scheme in property that qualifies as a REIT as defined in the listing requirements of an exchange, as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act, where those listing requirements have been approved in consultation with the Director-General of the National Treasury and published by the appropriate authority, as contemplated in section 1 of the Financial Markets Act, in terms of section 11 of that Act or by the Financial Sector Conduct Authority; or

<sup>24</sup> See Binding Private Ruling 336 ‘Liquidation Distribution’.

- (f) a close corporation,  
but does not include a foreign partnership;

The definition of 'company' in s 1(1) is relevant for purposes of determining, amongst others, –

- which companies have 'shares' as defined in s 1(1) (see 2.2.10);
- which amounts transferred or applied by a company for the benefit or on behalf of any person in respect of a share in that company constitute a 'dividend' as defined in s 1(1) (see 2.2.3);
- which companies will be liable to account for dividends tax under s 64E(1) (see 3.1 for examples of the companies that may be subject to dividends tax); and
- which dividends are exempt from dividends tax under s 64F(1)(a) or s 64FA(1)(a) (see 4.1.1 and 4.3.1).

## 2.2.2 Definition – 'contributed tax capital'

' "[C]ontributed tax capital", in relation to a class of shares in a company, means—

- (a) in relation to a class of shares issued by a company, in the case of a foreign company that becomes a resident on or after 1 January 2011, an amount equal to the sum of—
- (i) the market value of all the shares in that company of that class immediately before the date on which that company becomes a resident;
  - (ii) the consideration received by or accrued to that company for the issue of shares of that class on or after the date on which that company becomes a resident; and
  - (iii) if the shares of that class include or consist of shares that were converted from another class of shares of that company to that class of shares—
    - (aa) any consideration received by or accrued to that company in respect of that conversion; and
    - (bb) the amount contemplated in subparagraph (cc) that was determined in respect of shares of the other class of shares that were so converted,

reduced by so much of that amount as—

- (aa) the company has transferred on or after the date on which the company becomes a resident for the benefit of any person holding a share in that company of that class in respect of that share;
- (bb) has by the date of the transfer been determined by the directors of the company or by some other person or body of persons with comparable authority to be an amount so transferred; and
- (cc) in the case of a convertible class of shares some of the shares of which have been converted to another class of shares, so much of the amount contemplated in this paragraph in respect of that convertible class of shares immediately prior to that conversion as bears to that amount the same ratio as the number of shares so converted bears to the total number of that convertible class of shares prior to that conversion; or

- (b) in relation to a class of shares issued by a company, in the case of any other company, an amount equal to the sum of—
- (i) the stated capital or share capital and share premium of that company immediately before 1 January 2011 in relation to shares in that company of that class issued by that company before that date, less so much of that stated capital or share capital and share premium as would have constituted a dividend, as defined before that date, had the stated capital or share capital and share premium been distributed by that company immediately before that date;
  - (ii) the consideration received by or accrued to that company for the issue of shares of that class on or after 1 January 2011; and
  - (iii) if the shares of that class include or consist of shares that were converted from another class of shares of that company to that class of shares—
    - (aa) any consideration received by or accrued to that company in respect of that conversion; and
    - (bb) the amount contemplated in subparagraph (cc) that was determined in respect of shares of the other class of shares that were so converted,

reduced by so much of that amount as—

- (aa) the company has transferred on or after 1 January 2011 for the benefit of any person holding a share in that company of that class in respect of that share;
- (bb) has by the date of the transfer been determined by the directors of the company or by some other person or body of persons with comparable authority to be an amount so transferred; and
- (cc) in the case of a convertible class of shares some of the shares of which have been converted to another class of shares, so much of the amount contemplated in this paragraph in respect of that convertible class of shares immediately prior to that conversion as bears to that amount the same ratio as the number of shares so converted bears to the total number of that convertible class of shares prior to that conversion:

Provided that the amount transferred by a company as contemplated in paragraph (a) or (b) for the benefit of a person holding shares of any class of shares of that company must not exceed an amount that bears to the total of the amount of contributed tax capital attributable to that class of shares immediately before the transfer the same ratio as the number of shares of that class held by that person bears to the total number of shares of that class: Provided further—

- (i) that an amount transferred by a company as contemplated in paragraph (a) or (b) must not comprise a transfer of contributed tax capital unless all holders of shares in that class participate in the transfer in the same manner and are actually allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares;<sup>25</sup> and

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<sup>25</sup> Paragraph (i) of the second proviso to the definition of 'contributed tax capital' applies with effect from 1 January 2023.

- (ii) that no regard must be had to paragraph (i) of this further proviso if the amount transferred constitutes an acquisition by the company of its own securities by way of general repurchase of securities, as contemplated in subparagraph (b) of paragraph 5.67(B) of section 5 of the JSE Limited Listings Requirements, where that acquisition complies with any applicable requirements prescribed by paragraphs 5.68 and 5.72 to 5.81 of section 5 of the JSE Limited Listings Requirements or a general repurchase of securities as contemplated in the listings requirements of any other exchange licensed under the Financial Markets Act, which requirements are substantially the same as the requirements prescribed by the JSE Limited Listings Requirements, where that acquisition complies with the applicable requirements of that exchange;<sup>26</sup>

CTC is a tax concept unrelated to any accounting or company law treatment. A resident company could elect to reduce its CTC, yet for accounting purposes pay the amount out of profits. Conversely, a payment out of the company's share premium account for accounting purposes will not represent a reduction of its CTC unless the directors elect that the company's CTC be reduced by an equivalent amount. A company's CTC cannot become a negative figure. Once the CTC is reduced to nil any further payments to holders of shares will represent dividends because the transfer cannot be determined to be an amount of CTC.

CTC, in relation to a class of shares in a company, is determined for –

- a foreign company that becomes a resident on or after 1 January 2011 (see **a.**, **c.**, **d.** and **e.** below); or
- any other resident company, including a foreign company which became a resident before 1 January 2011 (see **b.**, **c.**, **d.** and **e.** below).

Under para (b) of the definition of 'resident' in s 1(1), a 'resident' is a person, other than a natural person, which –

- is incorporated, established or formed in South Africa; or
- has its place of effective management in South Africa;<sup>27</sup> and
- is not deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation.

Section 8G was inserted<sup>28</sup> in the Act and determines CTC in respect of shares issued by a company to a non-resident group company on or after 19 July 2017 under specified circumstances (see **f.** below).

**a. CTC in relation to a class of shares issued by a foreign company that becomes a resident on or after 1 January 2011 (para (a) of the definition of 'contributed tax capital')**

The CTC in relation to a class of shares issued by a foreign company which becomes a resident on or after 1 January 2011 is an amount equal to the sum of –

- the market value of all the shares in that company of that class immediately before the date on which the company becomes a resident;

<sup>26</sup> Paragraph (ii) of the second proviso to the definition of 'contributed tax capital' applies with effect from 1 January 2023.

<sup>27</sup> See Interpretation Note 6 'Resident – Place of Effective Management (Companies)'.

<sup>28</sup> Section 13 of the Taxation Laws Amendment Act 17 of 2017.

- the consideration received by or accrued to that company for the issue of shares of that class on or after the date on which the company becomes a resident (see b. below for commentary on ‘consideration received by or accrued to a company for the issue of shares’); and
- any consideration received by or accrued to that company on the conversion of shares from another class to that class of shares and an amount of CTC relating to the shares so converted immediately before the conversion (see b. below for commentary on ‘the increase of CTC on the conversion of a class of shares’);<sup>29</sup>
- reduced by the amounts transferred on or after the date on which the company becomes a resident for the benefit of any person holding a share in that company of that class in respect of that share, as determined by the date of transfer by the directors of the company or by any other person or persons with comparable authority to be a reduction of CTC (see b. below for commentary on ‘CTC transferred’); and
- reduced by an amount of CTC relating to shares converted to another class of shares (see b. below for commentary on ‘CTC reduced on the conversion of a class of shares’).<sup>30</sup>

#### **Example – CTC of a company that becomes a resident on or after 1 January 2011**

##### *Facts:*

Company A transferred its place of effective management from Mauritius to South Africa on 29 April year 1. The market value of the issued shares of Company A was R1 million on 28 April year 1. Company A issued further shares on 29 April year 1 for R500 000. Company A made a distribution of R200 000 to its holders of shares on 31 May year 1 and the board of directors determined that the distribution reduced the CTC of Company A.

##### *Result:*

The CTC of Company A on 31 May year 1 is calculated as follows:

	R
Market value of shares on 28 April year 1	1 000 000
Consideration received for shares issued on 29 April year 1	500 000
Less: Distribution of CTC on 31 May year 1	<u>(200 000)</u>
CTC of Company A on 31 May year 1	<u>1 300 000</u>

#### **b. CTC in relation to a class of shares issued by a resident company (para (b) of the definition of ‘contributed tax capital’)**

The CTC in relation to a class of shares issued by a resident company<sup>31</sup> is an amount equal to –

- the stated capital or share capital and share premium of that company immediately before 1 January 2011 in relation to shares in that company of that class issued by that company before that date;
- less so much of that stated capital or share capital and share premium as would have constituted a ‘dividend’ as defined before 1 January 2011 had the stated capital or

<sup>29</sup> This element of the definition was inserted by s 1(1)(d) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

<sup>30</sup> This element of the definition was inserted by s 1(1)(e) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

<sup>31</sup> Excluding a foreign company that became a resident on or after 1 January 2011 (see **2.2.2 a.**).



share capital and share premium been distributed by that company immediately before 1 January 2011 ('tainted' stated capital, or 'tainted' share capital and 'tainted' share premium);

- plus the consideration received by or accrued to that company for the issue of shares of that class on or after 1 January 2011;
- plus any consideration received by or accrued to that company on the conversion of shares from another class of shares to that class and a proportionate amount of CTC immediately before conversion relating to the shares so converted;<sup>32</sup>
- less CTC transferred on or after 1 January 2011 for the benefit of any person holding a share in that company of that class in respect of that share, as determined by the date of transfer by the directors of the company or by any person or persons with comparable authority to be a reduction of CTC; and
- less an amount of CTC relating to shares converted to another class of shares.<sup>33</sup>

*Stated capital or share capital and share premium immediately before 1 January 2011*

A company's CTC immediately before 1 January 2011 is determined as the sum of the company's stated capital or share capital and share premium in relation to shares issued before 1 January 2011.

Shares could have been issued under the Companies Act, 1973, with a par value or for no par value. The entire amount received for the issue of shares for no par value would constitute stated capital. Amounts received for the issue of shares with a par value had to be allocated to the share capital and share premium accounts of a company.

*'Tainted' stated capital, or 'tainted' share capital and 'tainted' share premium*

The amount of CTC of a company immediately before 1 January 2011 must be reduced by the amount of stated capital or share capital and share premium as would have constituted a 'dividend' as defined before 1 January 2011, had the stated capital or share capital and share premium been distributed immediately before 1 January 2011.

Under the definition of 'dividend' in s 1 as it read before its amendment on 1 January 2011,<sup>34</sup> any amount transferred from a company's reserves or undistributed profits to the company's stated capital, share capital or share premium account was deemed to be a profit available for distribution for tax purposes and retained its nature as capital or revenue profits, as the case may be. Reserves or undistributed profits so transferred are generally referred to as 'tainted' stated capital, 'tainted' share capital or 'tainted' share premium (capitalised profits). The return of such an amount to the holders of shares in the company was treated as a dividend for those holders of shares and not as a return of capital. The purpose was to ensure that distributable reserves retained their character despite being transferred to the stated capital, share capital or share premium account.<sup>35</sup>

<sup>32</sup> This element of the definition was inserted by s 1(1)(g) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

<sup>33</sup> This element of the definition was inserted by s 1(1)(h) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

<sup>34</sup> Paragraph (i) of the first proviso to the definition of 'dividend'.

<sup>35</sup> See *Liberty Investors Ltd (In members' voluntary liquidation) v C: SARS 2006 (2) SA 1 (SCA)*, 67 SATC 313.

A company's 'tainted' stated capital or 'tainted' share capital and 'tainted' share premium immediately before 1 January 2011 is made up as follows:

- Any amount transferred on or after 1 January 1974 (but before 1 January 2011) from the company's reserves or undistributed profits (excluding share premium) to its stated capital, share capital or share premium account. It includes the following types of transfer:
  - Transfers which did not result in the paying up of capitalisation shares, for example, with par value shares, a transfer to the share premium account or, with no par value shares, a transfer to the stated capital account.<sup>36</sup>
  - Transfers which resulted in the paying up of equity capitalisation shares. An amount applied in paying up capitalisation shares that were non-equity shares was not regarded as 'tainted' share capital because the issue of non-equity capitalisation shares, for example, non-participating preference shares, was a 'dividend' as defined in para (b) of the definition of 'dividend' as it read before 1 January 2011.<sup>37</sup> The definition of 'equity share capital' in s 1, before its substitution on 1 January 2011 with the definition of 'equity share', meant, in relation to a company, its issued share capital and in relation to a close corporation, its members' interest, excluding any part thereof which, neither as respects dividends nor as respects capital carried any right to participate beyond a specified amount in a distribution, and the expression 'equity shares' was to be construed accordingly.
- Any portion of the equity share capital and share premium of a company (the resultant company) that acquired all the assets from another company (the amalgamated company) arising from an 'amalgamation transaction' as defined in s 44(1), that was deemed to be a profit not of a capital nature available for distribution under s 44(9A).<sup>38</sup>
- Less any reduction in the company's stated capital, or share capital or share premium, before 1 January 2011 to the extent that it represented a distribution of its 'tainted' stated capital or 'tainted' share capital or 'tainted' share premium. A reduction in a company's stated capital, or share capital or share premium, could have occurred as a result of the –
  - acquisition, cancellation or redemption of some of its issued shares;
  - reduction in the nominal value of its share capital; or
  - repayment of all or a portion of its share premium account.

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<sup>36</sup> Under s 75(1)(b) of the Companies Act, 1973 a company could increase its share capital constituted by shares of no par value by transferring reserves or profits to the stated capital account, with or without a distribution of shares.

<sup>37</sup> Read with paras (e) and (h) of the definition of 'dividend'.

<sup>38</sup> Section 44(9A) was deleted by s 63(1)(b) of the Taxation Laws Amendment Act 7 of 2010 with effect from 1 January 2011.

### Example – Calculation of ‘tainted’ share capital and ‘tainted’ share premium

#### Facts:

ABC Ltd's balance sheet reflected the following as at 31 December 2010:

	R
Share capital:	
– 10 000 shares of R1 each	10 000
– 10 000 capitalisation shares of R1 each issued out of revenue reserves	10 000
Share premium:	
– Premium on original issue of shares	10 000
– Transferred from revenue reserves upon issue of capitalisation shares	5 000
Revenue reserves	<u>5 000</u>
	<u>40 000</u>

#### Result:

ABC Ltd had capitalised profits (‘tainted’ share capital and ‘tainted’ share premium) available for distribution as follows:

	R
Capitalisation shares issued out of revenue reserves	10 000
Revenue reserves in share premium account upon issue of capitalisation shares	<u>5 000</u>
‘Tainted’ share capital and ‘tainted’ share premium on 31 December 2010 that would have constituted a ‘dividend’ as defined in s 1 if distributed before 1 January 2011. This amount must therefore be excluded from CTC.	<u>15 000</u>

ABC Ltd's opening balance of CTC at 1 January 2011 comprised the following:

Share capital	20 000
Share premium	15 000
Less: Amount that would have constituted a dividend if distributed before 1 January 2011	<u>(15 000)</u>
CTC	<u>20 000</u>

*Consideration received by or accrued to the company for the issue of its shares on or after 1 January 2011*

CTC of a company is increased by the consideration received by or accrued to that company for the issue of its shares on or after 1 January 2011.<sup>39</sup> See f. below for the determination under s 8G of the CTC in respect of shares issued to a non-resident group company under specified circumstances.

In *Ogus v SIR*<sup>40</sup> the word ‘consideration’ was held, in the context of donations tax, to mean the *quid pro quo* given under a reciprocal obligation.

Consideration for the issue of shares could include, amongst other things, –

- cash;

<sup>39</sup> See Binding Private Ruling 360 ‘Internal Restructure Followed by a Disposal of Shares to a BBEE Investor’.

<sup>40</sup> 1978 (3) SA 67 (T), 40 SATC 100.

- the market value of an asset received by or accrued to the company;<sup>41</sup> or
- the value of services provided to the company.

Section 40 of the Companies Act governs the consideration payable for shares. Before a company may issue shares the board must determine the consideration for the shares, which consideration must be 'adequate'.<sup>42</sup> It is only when shares are fully paid that the company may issue the relevant shares. However, as noted above, payment need not be only in the form of cash, but could include payment in the form of assets or the rendering of services. Few difficulties should arise in recognising payments in the form of assets transferred or services rendered as consideration for the issue of shares, which would constitute CTC. However, difficulty can be experienced when the consideration for the shares is in the form of –

- an instrument, such as a promissory note, the value of which can be realised by the company only at a later date; or
- an agreement for the rendering of future services, future benefits or future payment by the subscribing party.

When the consideration is in the form of such an instrument, future services, future benefits or future payment, the consideration for the shares is regarded as having been received by the company only to the extent that the value of the instrument has been realised or the subscribing party to the agreement has fulfilled its obligations under the agreement.<sup>43</sup>

Importantly, as soon as the company receives the instrument or agreement in respect of future services, future benefits or future payment, it is required to issue the shares and transfer them to a third party to be held in trust and later transfer them to the subscribing party in accordance with the trust arrangement.<sup>44</sup> Notwithstanding that the shares are required to be issued before the receipt of any actual consideration by the company, certain restrictions apply in relation to those shares. These restrictions will apply until such time as the value of the instrument is wholly or partially realised or the future services, future benefits or future payments are effected. Thus, for example, voting rights associated with the shares may not be exercised, the shares may not be transferred and distributions may not be made until the subscribing party has met its obligations.<sup>45</sup>

Shares that have been issued but held in trust in these circumstances may be transferred to the subscribing party only when and to the extent that the instrument has become negotiable or the subscribing party has fulfilled its obligations under the agreement.<sup>46</sup>

The view is held that the consideration payable in respect of shares issued in these circumstances will constitute CTC only to the extent that the relevant instrument has become negotiable or the subscribing party has fulfilled its obligations under the agreement.

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<sup>41</sup> See *WH Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA), 61 SATC 43; *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9; *C: SARS v Brummeria Renaissance (Pty) Ltd & others* 2007 (6) SA 601 (SCA), 69 SATC 205 and *C: SARS v Labat Africa Ltd* [2012] 1 All SA 613 (SCA), 74 SATC 1.

<sup>42</sup> Section 40(1)(a) of the Companies Act.

<sup>43</sup> Section 40(5)(a) of the Companies Act.

<sup>44</sup> Section 40(5)(b) of the Companies Act.

<sup>45</sup> Section 40(6) of the Companies Act.

<sup>46</sup> Section 40(6)(d)(ii) of the Companies Act.

The CTC of a company is not increased if capitalisation shares are issued by that company, since no consideration is received for the issue of capitalisation shares.<sup>47</sup>

**Example 1 – Consideration received by or accrued to a company for the issue of its shares**

*Facts:*

Individual X contributed R100 cash for shares in company Y.

*Result:*

The contribution of R100 is added to the CTC of Company Y.

**Example 2 – Consideration received by or accrued to a company for the issue of its shares**

*Facts:*

Individual B acquired 100 ordinary shares in Company C. As consideration for the shares issued, Individual B transferred an asset with a market value of R150 000 to Company C. The asset was acquired by Individual B for R100 000.

*Result:*

The consideration that Company C receives in exchange for the issue of shares constitutes CTC. The consideration is the market value of the asset transferred by Individual B of R150 000. The CTC of Company C therefore increases by R150 000.

**Note:**

Company C's CTC would also have increased by R150 000 if Individual B had rendered services to Company C to the value of R150 000 as consideration for the shares.

**Example 3 – Consideration received by or accrued to a company for the issue of its shares**

*Facts:*

Company X owed R100 000 to Company A on loan account. Company X issued shares to the value of R100 000 to Company A in discharge of the amount owing to Company A.

*Result:*

The CTC of Company X increased by R100 000, being the amount that accrued to it as a result of the discharge of the loan in exchange for the issue of the shares to Company A.

*Consideration received or accrued on the conversion of shares from another class of shares and an amount of CTC relating to the shares so converted*

The CTC in relation to a class of shares issued by a company includes the consideration received by or accrued to the company on the conversion of shares from another class of shares to that class of shares. An amount of CTC relating to the shares so converted must also be added to the CTC of the class of shares. The formula to calculate an amount of CTC that relates to the shares converted is as follows:

<sup>47</sup> See Binding Private Rulings 201 'Issue of Capitalisation Shares' and 361 'Asset-for-Share Transaction Followed by an Unbundling Transaction, the Issue of Capitalisation Redeemable Preference Shares and the Sale of Shares to a Third Party'.

'Amount of CTC relating to shares converted = CTC of class of shares converted immediately before the conversion / total number of shares of the convertible class of shares immediately before the conversion x the number of shares converted.'

#### *CTC transferred to holders of shares on or after 1 January 2011*

The CTC of a company is reduced by any amount of CTC that is transferred on or after 1 January 2011 for the benefit of any person holding a share in that company of that class in respect of that share.

In order for a transfer to constitute a reduction of a company's CTC, the directors or any person or persons with comparable authority must by the date of transfer determine that such a transfer constitutes a transfer of CTC. Without this determination, no reduction of CTC can occur and the amount transferred will be a dividend potentially subject to dividends tax. In order for this determination to be valid it must be made by the date of transfer.

Paragraph 76(4) of the Eighth Schedule provides that –

- a company that makes a distribution to any other person on or after 1 April 2012, and
- a person that pays a distribution to any other person on behalf of a company on or after 1 April 2012,

must by the time of the distribution or payment notify that other person in writing of the extent to which the distribution or payment constitutes a 'return of capital'.

A distribution of CTC qualifies as a 'return of capital' as defined in s 1(1), to the extent that the amount transferred does not constitute –

- shares in the company itself (for example, capitalisation shares); or
- the acquisition by a listed company of its own securities on the JSE under the circumstances contemplated in subpara (b) of para 5.67(B) of s 5 of the JSE Limited Listings Requirements or by way of a general repurchase of securities as contemplated in the listings requirements of any other exchange,<sup>48</sup> licensed under the Financial Markets Act, that are substantially the same as the requirements prescribed by the JSE Limited Listings Requirements, if that acquisition complies with the applicable requirements of that exchange (see **2.2.3** and **2.2.9**).

#### **Example 1 – CTC transferred to holders of shares**

*Facts:*

Company A's balance sheet reflects the following:

	R
Share capital (100 000 shares subscribed for in cash)	100 000
Retained income	<u>200 000</u>
	<u>300 000</u>

Company A bought back 10% of its shares at R3 a share. The board of directors passed a resolution by the date of transfer which provided that R1 a share of the consideration paid for the shares was to be transferred from the company's CTC.

<sup>48</sup> See **2.2.7** for exchanges currently licensed under s 9 of the Financial Markets Act.

**Result:**

The amount of R10 000 ( $100\,000 \times 10\% \times R1$ ) transferred to the holders of shares constitutes a reduction of Company A's CTC. The CTC of Company A after the share buy-back is R90 000 ( $R100\,000 - R10\,000$ ). The balance of the consideration of R20 000 ( $100\,000 \times 10\% \times R2$ ) constitutes a dividend.

**Example 2 – CTC transferred to holders of shares****Facts:**

Company E issued an equal number of equity shares to its two holders of shares upon formation for a subscription price of R100 000 each.

Subsequently Company E bought back 10% of each holder's shares and paid them R30 000 each. By the date of transfer the board of directors determined that R10 000 of the R30 000 paid to each holder constituted a reduction of the CTC of Company E.

**Result:**

The CTC of Company E subsequent to the share buy-back is calculated as follows:

	R
CTC before the share buy-back ( $R100\,000 \times 2$ )	200 000
Less: CTC transferred to holders of shares ( $R10\,000 \times 2$ )	<u>(20 000)</u>
CTC after the share buy-back	<u>180 000</u>

The dividend portion of the amounts paid to the holders of shares is calculated as follows:

	R
Total amount transferred to holders of shares ( $R30\,000 \times 2$ )	60 000
Less: CTC transferred ( $R10\,000 \times 2$ )	<u>(20 000)</u>
Total amount of dividend	<u>40 000</u>

**Note:**

The full amount of R60 000 would have constituted a dividend if the directors did not determine by the date of transfer that R10 000 of the amount transferred to each holder of shares constituted a transfer of CTC.

**CTC reduced on the conversion of one class of shares to another**

The CTC of a class of shares in a company must be reduced by an amount of CTC relating to shares of that class that were converted to another class of shares. The formula to calculate the amount of CTC relating to the shares converted is as follows:

'Amount of CTC relating to shares converted = CTC of class of shares converted immediately before the conversion / total number of shares of the convertible class of shares before the conversion  $\times$  the number of shares converted.'

**Example – Calculation of CTC on the conversion of one class of shares to another****Facts:**

Company A had an issued share capital of 100 Class A shares and 100 Class B shares. C, the holder of the Class A shares was given the option to convert 50 shares to 50 Class B shares. C exercised this option and the conversion took place at a consideration of R2 000. The CTC of the Class A and Class B shares amounted to R1 000 and R5 000 immediately before the conversion.

**Result:**

The CTC of the Class A and Class B shares of Company A after the conversion of the shares is determined as follows:

	R
<i>CTC of Class A shares:</i>	
CTC immediately before the conversion	1 000
Less: Amount of CTC relating to the shares converted ( <b>Note</b> )	<u>(500)</u>
CTC of Class A shares after the conversion	<u>500</u>
<i>CTC of Class B shares:</i>	
CTC immediately before the conversion	5 000
Consideration received for the conversion of the Class A shares	2 000
Amount of CTC relating to the Class A shares converted ( <b>Note</b> )	<u>500</u>
CTC of Class B shares after the conversion of the Class A shares	<u>7 500</u>

**Note:**

The amount of CTC relating to the 50 Class A shares converted to the Class B shares is calculated as follows:

Amount of CTC relating to shares converted = CTC of class of shares converted immediately before the conversion / total number of shares of the convertible class of shares before the conversion x the number of shares converted.

$$[R1\ 000 / 100 \times 50] = R500.$$

**c. Class-by-class and pro-rata CTC rules**

CTC is defined in relation to a class of shares issued by a company.<sup>49</sup> A company that has issued several classes of shares must maintain a separate record of CTC on a per-class basis. CTC created by virtue of an ordinary share issue cannot, for example, be allocated or reallocated to preference shares. Similarly, distributions in respect of preference shares cannot be used to reduce the CTC associated with ordinary shares. When a company makes a distribution out of CTC in respect of a given class of shares, the CTC distributed can be allocated only to the holders of that class of shares.

Under the first proviso to the definition of 'contributed tax capital', the amount transferred for the benefit of or on behalf of a person beneficially owning the shares must not exceed an amount that bears to the total amount of CTC attributable to that class of shares immediately before the transfer, the same ratio as the number of shares held by that person to the total number of shares in that class.

With effect from 1 January 2023, under the second proviso to the definition of 'contributed tax capital', an amount transferred by a company for the benefit of or on behalf of a person beneficially owning the shares must not comprise a transfer of CTC unless all holders of shares in that class participate in the transfer in the same manner and are actually allocated

<sup>49</sup> Under s 37(1) of the Companies Act all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.



an amount of CTC based on their proportional shareholding within that class of shares (see **Example 3** below).<sup>50</sup>

The second proviso does not apply if the transfer constitutes an acquisition by a listed company of its own securities by way of a general repurchase of its shares in specifically identified situations (see **2.2.3 f.**).<sup>51</sup>

### Example 1 – Class-by-class and *pro-rata* CTC rules

#### Facts:

Company Z has CTC of R600 000. X and Y respectively hold 60% and 40% of the shares in Company Z. Company Z transferred R300 000 to X and Y and the board of directors determined by the date of transfer that R200 000 constituted a transfer of the company's CTC. R100 000 (R300 000 – R200 000) constituted a dividend. The CTC distributed is allocated *pro-rata* between holders X and Y in accordance with the percentage of shares held by each holder in Company Z.

#### Result:

The amount transferred to each holder of shares consists of a reduction of CTC and a dividend which is calculated as follows:

	Holder X R	Holder Y R
Total amounts transferred (R300 000 × 60% or 40%)	180 000	120 000
Less: Reduction in CTC (R200 000 × 60% or 40%)	<u>(120 000)</u>	<u>(80 000)</u>
Dividend amount (R100 000 × 60% or 40%)	<u>60 000</u>	<u>40 000</u>

### Example 2 – Class-by-class and *pro-rata* CTC rules

#### Facts:

Company A has two holders of ordinary shares (B and C) and one holder of preference shares (D). B owns 25 ordinary shares and C owns the remaining 75 ordinary shares. Company A has CTC of R380 000 relating to its ordinary shares and R150 000 relating to its preference shares. A distribution of R200 000 was made to the holders of ordinary shares under a resolution passed by the board of directors stating that R60 000 of the distribution constituted a reduction in CTC. The CTC distributed is allocated *pro-rata* between holders B and C in accordance with the percentage of shares held by each holder in Company A.

#### Result:

The amount of CTC transferred to holders B and C is calculated as follows:

	R
CTC transferred to B (R60 000 × 25%)	15 000
CTC transferred to C (R60 000 × 75%)	<u>45 000</u>
Total reduction in CTC	<u>60 000</u>

The CTC associated with the ordinary shares is reduced to R320 000 (R380 000 – R60 000) after the distribution.

<sup>50</sup> Paragraph (i) of the second proviso to the definition of 'contributed tax capital' applies with effect from 1 January 2023.

<sup>51</sup> Paragraph (ii) of the second proviso to the definition of 'contributed tax capital' in s 1(1).

The dividend portions of the distributions are calculated as follows:

	R
Dividend transferred to B [(R200 000 – R60 000) × 25%]	35 000
Dividend transferred to C [(R200 000 – R60 000) × 75%]	<u>105 000</u>
Total dividend distribution (R200 000 – R60 000)	<u>140 000</u>

The CTC associated with the preference shares is unaffected.

### Example 3 – Class-by-class and *pro-rata* CTC rules

#### Facts:

Y holds 50 ordinary shares in Company X. Company X has a total issued capital of 250 ordinary shares. The CTC in respect of the ordinary shares is R400 000. Under a share buy-back, Y surrenders all 50 shares for R100 000. The board of directors determines that the R100 000 is distributed from CTC. The other holders of shares did not participate in the distribution.

#### Result:

The reduction in CTC may not exceed the holder's *pro-rata* share in the CTC of the company. The amount of CTC distributed is therefore R80 000 (R400 000 × 50 shares / 250 total shares in that class). The balance of R20 000 (R100 000 – R80 000) is a dividend.

#### Note:

If this transaction takes place after the second proviso to the definition of 'contributed tax capital' comes into effect on 1 January 2023, the distribution of R100 000 to Y will constitute a dividend and not a return of CTC. The other holders of shares will not participate in the distribution and therefore it cannot constitute a reduction in CTC, since it is a requirement in the definition of 'contributed tax capital' that all holders of shares must participate in a distribution in accordance with their percentage holding of shares.<sup>52</sup>

### Example 4 – Class-by-class and *pro-rata* CTC rules

#### Facts:

Upon formation Company A issued five ordinary shares to B at R100 000 a share. The issue of the five shares to B resulted in CTC of R500 000 (5 × R100 000) for Company A. A few months later Company A issued five ordinary shares to C at R80 000 a share. The issue of the five shares to C resulted in an increase in CTC of R400 000 (5 × R80 000) for Company A. B and C are the only holders of shares in Company A. Two years later Company A distributed R200 000 to holders of its shares and by the date of transfer the directors determined that R90 000 was a distribution of CTC. The CTC distributed is allocated *pro-rata* between holders B and C in accordance with the percentage of shares held by each holder in Company A.

<sup>52</sup> The second proviso to the definition of 'contributed tax capital' applies with effect from 1 January 2023.

*Result:*

The CTC is allocated to the holders of shares in accordance with the number of shares held by each holder of shares and not in accordance with the consideration paid for the shares. CTC is therefore distributed to B and C as follows:

	R
CTC allocated to B (R90 000 × 50%) ( <b>Note</b> )	45 000
CTC allocated to C (R90 000 × 50%) ( <b>Note</b> )	45 000

Each holder of shares received a dividend of R55 000 (distribution of R100 000 per holder of shares – CTC of R45 000 per holder of shares).

**Note:**

5 shares / 10 shares (total number of shares in that class of shares) × 100 = 50%.

**Example 5 – Class-by-class and *pro-rata* CTC rules***Facts:*

Company Z has one holder of ordinary shares (A) and one holder of preference shares (B). Company Z has CTC of R150 relating to its ordinary shares and CTC of R380 relating to its preference shares. As part of the company's resolution when making a distribution of R200 to its holder of ordinary shares, Company Z allocated the CTC of R150 relating to the ordinary shares and R50 of the CTC relating to the preference shares, to holder A.

*Result:*

Only R150 is a reduction of CTC in relation to holder A. The balance of R50 (R200 – R150) is a dividend, since it does not relate to CTC of the ordinary shares. After the distribution the CTC relating to the ordinary shares is reduced to nil, while the CTC relating to the preference shares remains at R380.

**d. Reductions in CTC**

In order for a transfer from a company to a holder of shares to constitute a reduction of CTC and accordingly not comprise a dividend, the definition of CTC requires that the directors or persons with comparable authority determine that the transfer constitutes a transfer of CTC. Without this determination, which could, for example, take the form of a company resolution, no reduction of CTC can occur and the amount so transferred will constitute a dividend potentially subject to dividends tax. In essence, therefore, this requirement amounts to a unilateral company election. In order for this determination to be valid, it must be made by the date of the transfer by the company to the holders of shares. The determination of what constitutes CTC or a dividend may well be divorced from reality and is done independently of any accounting or company law considerations. A company may, for example, be able to return share premium to its holders of shares as a dividend by not determining that such return of share premium constitutes a transfer of CTC. Similarly, profits can be distributed from an accounting perspective but be determined to be a transfer from CTC for tax purposes assuming the taxpayer has sufficient CTC available.

**e. Company reorganisation rules**

Special rules apply for the calculation of CTC in an –

- asset-for-share transaction under s 42 (see 10.2);
- amalgamation transaction under s 44 (see 10.3.1); and

- unbundling transaction under s 46 (see 10.4.1).

**f. Determination of CTC in respect of shares issued to a non-resident group company on or after 19 July 2017 (s 8G)**

Section 8G is an anti-avoidance provision aimed at companies artificially creating CTC through the insertion of additional resident companies into the group structure and the issuing of shares in those inserted companies to non-resident group companies in return for shares in other resident companies. The payment of dividends tax is avoided by the inserted resident companies making capital distributions to their foreign shareholders instead of the resident companies in which they now hold the shares making a dividend distribution. This may lead to a permanent erosion of the South African tax base, since the capital distributions will not be subject to CGT if the underlying investment is not in immovable property in South Africa.<sup>53</sup> Section 8G came into operation on 19 July 2017 and applies to shares issued on or after that date.

The Act defines ‘group of companies’ in s 8G(1) for purposes of s 8G as follows:

‘(1) For the purposes of this section “**group of companies**” means two or more companies in which one company (hereinafter referred to as the ‘controlling group company’) directly or indirectly holds shares or voting rights in at least one other company (hereinafter referred to as the ‘controlled group company’), to the extent that—

- (a) at least 50 per cent of the equity shares or voting rights in each controlled group company are directly held by the controlling group company, one or more other controlled group companies or any combination thereof; and
- (b) the controlling group company directly holds at least 50 per cent of the equity shares or voting rights in at least one controlled group company.’

Under s 8G(2), the CTC of a resident company in relation to shares issued to a non-resident company is determined under s 8G if the following requirements are met:

- The resident company (the issuing company) issues shares on or after 19 July 2017 to a non-resident company (the subscribing company) that forms, after that transaction, part of the same group of companies as the issuing company.
- The consideration for those shares consists of or is used, directly or indirectly to acquire any shares in another resident company (the target company) that forms part of a group of companies in relation to the subscribing company. Whether consideration for the shares consists of or is used, directly or indirectly to acquire shares in the target company will depend on the facts of a specific case.

To the extent of the consideration referred to above, the CTC in relation to those shares will be equal to so much of the total CTC attributable to shares of that class in that target company so acquired, determined under s 8G(3), as bears the same ratio that the number of shares so acquired bears to the total number of shares of that class.

Under s 8G(3) the CTC in relation to the shares in the target company must be determined under para (b) of the definition of ‘contributed tax capital’ in s 1(1) with reference to the date from which the target company formed part of a group of companies in relation to the subscribing company.

<sup>53</sup> See the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017* in para 2.5 for commentary and examples on the insertion of s 8G.

Section 8G(4) stipulates that para (a) of the definition of ‘contributed tax capital’ in s 1(1) does not apply in respect of any shares of a class issued, as contemplated in s 8G(2), by an issuing company before that company became a resident. Paragraph (b) of the definition of ‘contributed tax capital’ will also not apply to those shares. Should the issuing company therefore become a resident, it will have no CTC in respect of any shares issued to the subscribing company under the circumstances contemplated in s 8G(2) before it became a resident.

### **Example – Determination of CTC in respect of shares issued to a non-resident group company on or after 19 July 2017**

#### *Facts:*

Foreign Company A holds 100% of the equity shares in Resident Company B, as from the latter company’s incorporation on 31 January year 1. Resident Company B’s CTC on 31 January year 1 was R100 and remained unchanged.

On 1 March year 5 Resident Company C was incorporated. It received as consideration for the issue of all its equity shares to Foreign Company A, all the equity shares held by Foreign Company A in Resident Company B. The market value of Resident Company B’s shares was R3 million on 1 March year 5.

#### *Result:*

Section 8G applies, since –

- Resident Company C issued shares to Foreign Company A and these companies formed part of the same group of companies after the transaction;
- consideration for the shares issued to Foreign Company A consisted of shares in Resident Company B; and
- Resident Company B and Foreign Company A formed part of the same group of companies.

Resident Company C’s CTC in relation to the shares issued to Foreign Company A is therefore not the consideration received for the issue of these shares of R3 million, being the market value of Resident Company B’s shares on 1 March year 5. The CTC is determined under s 8G(2) and is equal to the CTC attributable to the shares acquired by Resident Company C in Resident Company B, namely R100.

### **2.2.3 Definition – ‘dividend’**

‘**[D]ividend**’ means any amount, other than a dividend consisting of a distribution of an asset *in specie* declared and paid as contemplated in section 31(3), transferred or applied by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company, whether that amount is transferred or applied—

- (a) by way of a distribution made by; or
- (b) as consideration for the acquisition of any share in,

that company, but does not include any amount so transferred or applied to the extent that the amount so transferred or applied—

- (i) results in a reduction of contributed tax capital of the company;
- (ii) constitutes shares in the company; or

(iii) constitutes an acquisition by the company of its own securities by way of a general repurchase of securities as contemplated in subparagraph (b) of paragraph 5.67(B) of section 5 of the JSE Limited Listings Requirements, where that acquisition complies with any applicable requirements prescribed by paragraphs 5.68 and 5.72 to 5.81 of section 5 of the JSE Limited Listings Requirements or a general repurchase of securities as contemplated in the listings requirements of any other exchange, licensed under the Financial Markets Act, that are substantially the same as the requirements prescribed by the JSE Limited Listings Requirements, where that acquisition complies with the applicable requirements of that exchange;

(iv) .....

(v) .....

The definition of 'dividend' in its current form, incorporating the concept of CTC, was introduced with effect from 1 January 2011. It is not concerned with the presence or absence of profits, accounting treatment or company law considerations. It is an artificial tax concept.

#### *Elements of a 'dividend' as defined in s 1(1)*

A dividend is any –

- amount, other than a dividend consisting of a distribution of an asset *in specie* declared and paid as contemplated in s 31(3) (see **a.** below),
- transferred or applied by a resident company (see **b.** below),
- for the benefit or on behalf of any person (see **c.** below),
- in respect of any share in that company (see **d.** below).

The definition of 'dividend' has specific inclusions and exclusions (see **e.** and **f.** below).

#### **a. Amount**

The meaning of the word 'amount' was judicially considered in *WH Lategan v CIR*<sup>54</sup> in relation to its use in the definition of 'gross income' and the following dictum of Watermeyer J has been cited with authority in a number of other cases:<sup>55</sup>

'In his Lordship's opinion the word "amount" had to be given a wider meaning and must include not only money but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which had a money value.'

In *Cactus Investments (Pty) Ltd v CIR*<sup>56</sup> the court held that in order to comprise an 'amount', rights of a non-capital nature must be 'capable of being valued in money'. Similarly in *CIR v People's Stores (Walvis Bay) (Pty) Ltd*<sup>57</sup> the court held that in order to be included in gross income an amount must be of such a nature that a value can be attached to it in money.

<sup>54</sup> 1926 CPD 203, 2 SATC 16 at 19.

<sup>55</sup> See *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301, 13 SATC 21 at 34 and *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 at 21.

<sup>56</sup> 1999 (1) SA 315 (SCA), 61 SATC 43.

<sup>57</sup> 1990 (2) SA 353 (A), 52 SATC 9.

In *C: SARS v Brummeria Renaissance (Pty) Ltd & others*<sup>58</sup> it was held that it did not follow that if a receipt or accrual cannot be turned into money, it had no money value.<sup>59</sup> The 'turn into money' test was merely one of the tests for determining whether an accrual had a money value. The court confirmed that the test was objective, not subjective.

The same meaning should be ascribed to the word 'amount' within its context in the definition of 'dividend' in s 1(1).

A dividend can therefore constitute the transfer of cash to a holder of shares or the transfer of assets (dividend *in specie*). A dividend *in specie* paid by a company can include, amongst other things, the transfer of the following:

- Shares held by a company in another company. See, however, **10.3.2** for special rules dealing with the transfer of shares as part of an 'amalgamation transaction' under s 44 and **10.4.2** for special rules dealing with transfer of shares as part of an 'unbundling transaction' under s 46.
- Debentures.
- Other movable or immovable assets.
- A loan account owing to the company.<sup>60</sup>

With effect from years of assessment commencing on or after 1 January 2019 a dividend consisting of a distribution of an asset *in specie* declared and paid as contemplated in s 31(3) is specifically excluded from an amount referred to in the definition of 'dividend' in s 1(1). The amount contemplated in s 31(3)(i) is included in the s 64D definition of 'dividend' (see **2.3.2** and **4.3.4 c.**).

The value to be placed on the transfer of assets as a dividend *in specie* is their market value<sup>61</sup> (see **3.3** for commentary on s 64E(3) dealing with the amount of a dividend *in specie* for dividends tax purposes).

#### **b. Transferred or applied by a resident company**

The word 'transferred' encompasses a transfer of ownership of an asset, while the word 'applied' would, for example, include the payment of a debt owed by a holder of shares or a payment to a person providing a service to a holder of shares.

The definition of 'dividend' in s 1(1) is limited to amounts transferred or applied by a resident company. However, the definition of 'dividend' in s 64D includes a 'foreign dividend' as defined in s 1(1), paid by a foreign company in respect of a listed share to the extent that the foreign dividend does not consist of a distribution of an asset *in specie* (see **2.3.2**).

<sup>58</sup> 2007 (6) SA 601 (SCA), 69 SATC 205.

<sup>59</sup> See Interpretation Note 58 'The *Brummeria* Case and the Right to Use Loan Capital Interest Free'.

<sup>60</sup> See Binding Private Ruling 198 'Distribution of a Debit Loan Account in Anticipation of Deregistration of a Company'.

<sup>61</sup> *Lace Proprietary Mines Ltd v CIR* 1938 AD 267, 9 SATC 349.

**c. For the benefit or on behalf of any person**

The amount must be for the ‘benefit or on behalf of any person’.

A person would benefit from the receipt or accrual of a dividend but a person who pays, for example, a market-related consideration for an asset transferred by a company does not derive a ‘benefit’, since there is an equal *quid pro quo*.

An amount could be transferred by a company ‘on behalf of’ a person if, for example, a company pays a debt owed by the beneficial owner to another person.

**d. In respect of any share in that company**

The Act defines ‘share’ in s 1(1) (see **2.2.10**). An amount transferred or applied by a company that does not have shares does not constitute a ‘dividend’ as defined in s 1(1).

The amount transferred or applied by a company must be transferred or applied ‘in respect of’ a share in that company. The question whether an amount is transferred or applied in respect of a share in a company is a factual one. It has been held that whether ‘in respect of’ is restricted to a direct or causal relationship, or something wider depends on the context in which it is used.<sup>62</sup>

Viviers J in ITC 1340 summarised the position as follows:<sup>63</sup>

‘As was pointed out by Solomon JA in *CIR v Crown Mines Ltd* 1923 AD 121 at 128, the expression “in respect of” may be used in various senses, and in each case it is necessary to examine the context in order to ascertain the sense in which it is used. Of the numerous decided cases in which the interpretation of the words “in respect of” was discussed, I need refer only to two of the more recent decisions in which the earlier decisions are referred to: *SBI v Raubenheimer* 1969 (4) SA 314 (A) at 320 (31 SATC 209) and *SIR v Wispeco Housing (Pty) Ltd* 1973 (1) SA 783 (A) where Ogilvie Thompson CJ said the following at 792:

“No doubt the expression ‘in respect of’ must, in certain contexts, be restricted to a direct or causal relationship (cf eg *De Villiers v CIR* 1929 AD 227 at 229); but, as was pointed out in *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301 at 320, the expression ‘in respect of’ does not necessarily or invariably indicate such relationship. In that case, it was held to be used in the sense of ‘in relation to’ or ‘in reference to’. (Cf also *SBI v Raubenheimer* . . . .) The expression ‘in connection with’ *prima facie* extends the ambit of matters comprehended *in casu*, the consideration upon which duty is payable. As Kitto J put it in *Berry’s case* . . . at 658,

‘a consideration may be ‘in connection with’ more things than that ‘for’ which it is received’.

As appears from all the foregoing, the context wherein the expressions “in respect of” and “in connection with” occur is of vital importance. The true position was, in my opinion, happily summarized by Schreiner JA, in *Rabinowitz and another v De Beer’s Consolidated Mines Ltd and another* 1958 (3) SA 619 (A) at 631, as follows:

‘Expressions like “in respect of” and “in connection with”, though they may sometimes be used to cover a wide range of association, must in other cases be limited to the close or more direct forms of association indicated by the context.’

<sup>62</sup> *SBI v Raubenheimer* 1969 (4) SA 314 (A), 31 SATC 209 at 216; *Barnard NO v Regspersoon van Aminie & another* [1999] 4 All SA 451 (T) at 455 and ITC 1340 (1980) 43 SATC 210 (C) at 212.

<sup>63</sup> (1980) 43 SATC 210 (C) at 212.



It was held by Howie P in *Stevens v C: SARS*<sup>64</sup> that there is no material difference between the expressions 'in respect of' and 'by virtue of' in para (c) of the definition of 'gross income' in s 1(1) and that they both connote a causal relationship.<sup>65</sup> The context in which 'in respect of' is used in the definition of 'dividend' in s 1(1) and in para (c) of the definition of 'gross income' in s 1(1) is similar and it is therefore arguable that there must be a causal relationship between the amount transferred or applied and the share.

An amount which is unrelated to a taxpayer's shareholding will not be derived 'in respect of' a share. For example, the purchase by a company of an asset at an arm's length price from a holder of shares on the same terms offered to the public would not constitute a dividend because the amount transferred by the company to that holder would not have been transferred 'in respect of' the holder's shares in the company but by virtue of the arm's length acquisition by the company of the asset.

Another example arises when a holder of shares is an employee of the company and receives remuneration for services rendered. The salary so transferred to the employee would not be in respect of the employee's shareholding but in respect of the employee's services and would therefore not constitute a dividend. Should a dividend, however, be received by or accrued to a person in respect of services rendered, such dividend may not qualify for the exemption from normal tax under para (ii) of the proviso to s 10(1)(k)(i). A dividend not exempt from normal tax under s 10(1)(k)(i) will be exempt from dividends tax under s 64F(1)(l) [see 4.1.12 for commentary on s 64F(1)(l)].

As indicated above, an amount transferred or applied by a company 'for the benefit or on behalf of any person in respect of any share in that company' constitutes a 'dividend' as defined in s 1(1). The ambit of the definition is wide and includes, for example, the waiver of a loan owed by a beneficial owner of a share to the company if the reason for the waiver is causally related to and hence in respect of a share in that company. The waiver represents the transfer of an amount by way of a distribution by the company.

It follows that the transfer or application of an amount to or on behalf of a person who is not a holder of shares will comprise a dividend to the extent that it is causally related to a shareholding in the company and is therefore 'in respect of' a share. For example, a donation made by a company to a person at the instance of a holder of shares would constitute a 'dividend', and may also have a donations tax implication. When an amount is transferred or applied by a company at the instance of a holder of shares as a donation to a third party, two transactions will effectively occur:

- The amount transferred or applied by the company represents a dividend in relation to the holder of shares which is potentially subject to dividends tax.
- The donation by the company is deemed to be a donation by the person at whose instance the donation was made (in this case the holder of shares) under s 57 for purposes of donations tax.

#### **Example 1 – Amount transferred or applied in respect of a share**

##### *Facts:*

E held all the shares in Company B and owed Company B R500 000. Company B reduced the debt owing by E by R300 000 for no consideration.

<sup>64</sup> 2007 (2) SA 554 (SCA), 69 SATC 1 at 7.

<sup>65</sup> See also *De Villiers v CIR* 1929 AD 227, 4 SATC 86.

**Result:**

The reduction of the debt by R300 000 by Company B is in respect of the shares held by E in Company B and therefore constitutes a 'dividend' as defined in s 1(1). This amount does not constitute a 'donation' as defined in s 55(1) for purposes of donations tax, since the debt was reduced because of E being the sole holder of shares in Company B. The reduction of the debt was not motivated by pure liberality.

**Example 2 – Amount transferred or applied in respect of a share****Facts:**

E holds 60% of the shares in Company B. At the instance of E, Company B makes a donation of R100 000 to C who is E's son.

**Result:**

The amount of R100 000 is 'transferred' to C as a consequence of E's shareholding in Company B and therefore constitutes a 'dividend' as defined in s 1(1). The amount of R100 000 transferred to C is deemed to be disposed of under a donation by E for donations tax purposes under s 57.

**e. Inclusions in the definition of 'dividend'***Distributions made by a company (para (a) of the definition of 'dividend')*

Paragraph (a) of the definition of 'dividend' includes any amount transferred or applied by a company by way of a distribution. Typical examples of a distribution include –<sup>66</sup>

- a common law dividend;
- a return of share capital, share premium or stated capital that is not determined to be a distribution of the company's CTC or that does not qualify as a distribution of CTC under the definition of 'contributed tax capital';
- the difference between the market value of an asset and its selling price when the asset is sold at less than market value to the holder of a share or to another person on behalf of such holder;
- a donation of cash or assets to a holder of a share or to some other person on such holder's behalf;
- the waiver of debt owed by a holder of a share; and
- a fractional share payment in respect of a scrip dividend if the cash payment is made by the company and capitalisation shares are not issued by the company to be sold on behalf of the beneficial owners (see **2.2.3 f.**).

The granting of a *bona fide* loan to the holder of a share will not comprise a 'dividend' as defined in s 1(1). The failure to charge interest at the official rate can, however, result in a deemed dividend under s 64E(4). Similarly, the buy-back by a company of its own shares will generally not be a distribution in respect of a share, since the company acquires the shares

<sup>66</sup> See Binding Private Ruling 299 'Dividend Distribution'.

as *quid pro quo*. However, such a buy-back of shares is specifically included in para (b) of the definition of 'dividend' in s 1(1).

#### **Example 1 – Amount transferred or applied by way of a distribution**

*Facts:*

Company A distributed cash of R100 000 and other assets with a market value of R1 million to holders of its shares.

*Result:*

The distribution of the cash of R100 000 and other assets of R1 million constitute a dividend under para (a) of the definition of 'dividend' in s 1(1).

#### **Example 2 – Amount transferred or applied by way of a distribution**

*Facts:*

During the process of liquidation Company X distributed cash of R500 000 and other assets with a market value of R1 million to holders of its shares.

*Result:*

The distribution of the cash of R500 000 and other assets of R1 million constitutes a dividend under para (a) of the definition of 'dividend' in s 1(1).

#### *Consideration for the acquisition of any share in a company – Share buy-backs (para (b) of the definition of 'dividend')*

Paragraph (b) of the definition of 'dividend' specifically includes any consideration given by a company to holders of its shares for the buy-back of its own shares.<sup>67</sup> The purchase of shares by a subsidiary company in its holding company is not a share buy-back for purposes of the definition of 'dividend', since the subsidiary company is not buying back its own shares.<sup>68</sup>

This inclusion in the definition of 'dividend' effectively applies only to non-listed shares and those listed shares not covered by the exclusion of certain share buy-backs as considered in f. below.

#### **Example 1 – Amount transferred or applied as consideration for the acquisition of shares in a company**

*Facts:*

Company C has issued share capital of 100 000 shares of R1 each all of which are held by D. The board of directors of Company C passed a resolution awarding land and buildings with a book value of R60 000 and a market value of R90 000 to D in return for the acquisition of some of Company C's own shares. The directors did not determine the distribution to be a reduction of the company's CTC.

<sup>67</sup> Certain share buy-backs have been identified as reportable arrangements (see GN 39650 of 3 February 2016).

<sup>68</sup> Paragraphs 5.67 to 5.81 of s 5 of the JSE Limited Listings Requirements must, however, be complied with by the holding company if a subsidiary company purchases shares in that holding company because under para 5.67(B) such purchase of shares is regarded as a repurchase of securities under the JSE Limited Listings Requirements (see below).

*Result:*

The amount of R90 000, namely, the market value of the land and buildings transferred by Company C to D as consideration for the buy-back of its own shares, constitutes a 'dividend' as defined in s 1(1).

**Example 2 – Amount transferred or applied as consideration for the acquisition of shares in a company**

*Facts:*

Company D has an issued share capital of 100 000 shares of R1 each. Company D bought back 10% of its shares at R2 a share. The directors did not determine the distribution to be a reduction of the company's CTC.

*Result:*

Company D paid R20 000 (100 000 shares × 10% × R2 per share) to holders of its shares as consideration for the buy-back of its own shares. The amount of R20 000 constitutes a 'dividend' as defined in s 1(1).

**f. Exclusions from the definition of 'dividend'**

The definition of 'dividend' does not include any amount transferred or applied by the company to the extent that the amount so transferred or applied –

- results in a reduction of CTC of the company (para (i) of the exclusions from the definition of 'dividend');
- constitutes shares in that company (para (ii) of the exclusions from the definition of 'dividend'); or
- constitutes an acquisition by a listed company of its own securities by way of a general repurchase of its shares in specifically identified situations (para (iii) of the exclusions from the definition of 'dividend').

*Reduction of CTC (para (i) of the exclusions from the definition of 'dividend')*

The definition of 'dividend' does not include any amount transferred or applied by a company to the extent that the amount so transferred or applied results in a reduction of CTC. An amount transferred or applied by a company for the benefit of or on behalf of any person in respect of a share will result in a reduction of CTC in relation to that class of shares only if the directors of the company or some other person or body of persons with comparable authority has by the date of transfer determined that the amount so transferred, reduced the CTC of the company.<sup>69</sup>

An amount can be determined to be a reduction of CTC only to the extent that a company has CTC before the transfer. In other words, if the company does not have CTC, a transfer cannot be deemed to be a reduction of CTC. In contrast, if the company has CTC and an amount transferred from CTC is not determined by the date of the transfer of such amount to be a transfer from CTC, it will not be treated as a reduction of CTC and will instead constitute a dividend. Similarly, profits can be distributed from an accounting perspective but be determined to be a transfer from CTC for tax purposes assuming the taxpayer has sufficient CTC available.

<sup>69</sup> See Binding Private Rulings 234 'Asset-for-Share and Unbundling Transactions not Regulated by Sections 42 and 46' and 340 'Share Buy-Back at Nominal Value'.

The distribution of an amount of CTC by a company will constitute a return of capital for a holder of shares for CGT purposes. Under a share buy-back the return of capital will comprise the proceeds on disposal of the shares under para 35 of the Eighth Schedule assuming that the amount is of a capital nature. While an amount received by or accrued to a holder of shares under a general repurchase by a listed company is not a return of capital as defined, it is treated in the same way as a return of capital for CGT purposes, that is, as proceeds. In a situation other than a share buy-back the return of capital is treated as a reduction in the base cost of the shares under para 76B of the Eighth Schedule. A return of capital received or accrued after the shares have been disposed of following the deregistration or liquidation of a company is treated as a capital gain under para 77 of the Eighth Schedule.<sup>70</sup>

Depending on the facts of the case it is possible for a return of capital to be of a revenue nature and be included in a person's gross income.

### **Example 1 – Dividend despite the absence of profits**

*Facts:*

Company A has share capital of R300 and profits of nil. The directors pay R200 to the holders of the company's shares but do not determine that the amount transferred out of capital for accounting and company law purposes comprises a reduction of CTC for tax purposes.

*Result:*

The payment of R200 is a dividend and not a reduction of CTC.

### **Example 2 – Notional nature of CTC**

*Facts:*

Company X pays an amount to holders of its shares and determines it to be from CTC for tax purposes. However, from an accounting perspective the payment is paid out of the company's profits.

*Result:*

The payment will comprise a reduction of CTC. The fact that the payment was made out of profits for accounting purposes is irrelevant.

### **Example 3 – Reduction of CTC**

*Facts:*

The following appears in the balance sheet of Company A:

	R
Share capital (30 000 shares of R1 each)	30 000
Retained income	<u>300 000</u>
	<u>330 000</u>

Company A's CTC is R30 000. Company A bought back 10% of its shares at R50 a share from its only shareholder. The board of directors determined by the date of transfer that R10 000 of the R150 000 consideration (3 000 shares × R50) paid by the company for the purchase of its shares constituted a reduction of CTC.

<sup>70</sup> See Chapter 18 of the *Comprehensive Guide to Capital Gains Tax* dealing with company distributions.

**Result:**

Company A paid R150 000 to its shareholder, made up as follows:

	R
Distribution of CTC	10 000
Dividend (R150 000 – R10 000)	<u>140 000</u>
Total distribution	<u>150 000</u>

**Note:**

The reduction in CTC of R10 000 is excluded from the definition of 'dividend' under para (i) of the exclusions from the definition of that term. The return of capital of R10 000 comprises proceeds on disposal of the shares under para 35 of the Eighth Schedule.

*Transfer by a company of its own shares (para (ii) of the exclusions from the definition of 'dividend')*

The definition of 'dividend' excludes any amount transferred or applied by a company to the extent that the amount so transferred or applied constitutes shares in that company. For example, the transfer by a company of its own shares as capitalisation shares or bonus shares is excluded from the definition of 'dividend'.<sup>71</sup>

This form of transfer does not result in an outflow of overall value from the company, since all of the underlying assets remain within the company. In *CIR v Collins*<sup>72</sup> Innes CJ stated the following in relation to the issue of bonus shares by a company:

'The company has parted with no assets – no money or money's-worth – and the shareholders have received none. The profits dealt with remain in the business as they were before...The total assets of the company have not been changed, and his original share represented the same proportion of the then issue as his increased shares do of the increased issue.'

**Example – Transfer by a company of its own shares**

**Facts:**

Company A has share capital of R200 000 (200 000 shares of R1 each) and retained income of R300 000. The company issues 200 000 capitalisation shares of R1 each using the retained income of the company to fund the capitalisation issue.

**Result:**

The amount applied of R200 000 in respect of the issue of capitalisation shares does not constitute a 'dividend' as defined in s 1(1), since the issue of capitalisation shares is excluded under para (ii) of the exclusions from the definition of 'dividend'. The CTC of Company A is not increased as no consideration is received for the issue of the capitalisation shares.

**Note:**

Under s 40C the capitalisation shares will have an expenditure of nil for the holders of the shares for purposes of determining –

- the cost price of trading stock when the shares are held on revenue account; and

<sup>71</sup> See Binding Private Rulings 332 'Unbundling and Subsequent Issue of Listed Shares by Non-Resident Subsidiary of Resident Holding Company' and 361 'Asset-for-Share Transaction Followed by an Unbundling Transaction, the Issue of Capitalisation Redeemable Preference Shares and the Sale of Shares to a Third Party'.

<sup>72</sup> 1923 AD 347, 32 SATC 211 at 218.

- their base cost for CGT purposes.

*Fractional share payments in respect of scrip dividends (para (a) of the definition of 'dividend' or para (ii) of the exclusions from the definition of 'dividend')*

In this part of the guide 'scrip dividend' is used to refer to a cash dividend incorporating an election on the part of a shareholder to receive either capitalisation shares or cash, with the default election being either shares or cash.

If a shareholder elects a cash payment, it will constitute a 'dividend' as defined in s 1(1) in terms of the provisions and principles considered above. If a shareholder elects capitalisation shares, it often happens that the number of shares the shareholder becomes entitled to is not a whole number. For example, if the capitalisation share alternative entitles shareholders to two shares for every 75 shares held it would mean a shareholder holding 100 shares would be entitled to receive 2,67 shares ( $100 / 75 \times 2$ ). For various reasons shareholders do not generally hold fractions of shares and receive whole shares equal to the rounded down number of shares (2,67 shares rounded down to two shares) and ultimately a fractional share payment in respect of their fractional share entitlements. Whilst the receipt or accrual of capitalisation shares falls within para (ii) of the exclusions (see '*Transfer by a company of its own shares (para (ii) of the exclusions from the definition of 'dividend')*' above), depending on the facts a fractional share payment may constitute a dividend or it may fall within para (ii) of the exclusions.

In summary, the facts applicable to a particular scrip dividend, the fractional share entitlement and the fractional share payment must be considered in determining whether any of the transactions it involves, for example, the issue of capitalisation shares or the payment of an amount to a shareholder by the company or a regulated intermediary, constitutes a 'dividend' as defined in s 1(1).

In the context of a company listed on the JSE, affected market participants have agreed that fractional share entitlements will be rounded down to the nearest whole number and the cash equivalent of the fractional share entitlements would be paid in cash to the shareholders. The amount of the fractional share payment is an amount equal to the fractional share entitlement multiplied by the fraction rate which is determined with reference to a price assigned to the share, discounted by 10%. Under the JSE Ltd Listings Requirements, a company has an obligation to communicate the fraction rate that must be used to calculate the amount of the fractional share payment. An example of the calculation of a fractional share payment is as follows:

'Shareholders are entitled to receive a cash dividend of R0,35 per share or a scrip alternative of 1,32772 shares for every 100 ordinary shares held. The fraction rate is R23,1436452. A shareholder holding 100 ordinary shares, who elects to receive the scrip alternative, is entitled to 1,32772 ( $100 \times 1,32772\%$ ) new ordinary shares. The rounding provision is applied and the shareholder receives one scrip share and a fractional share payment of R7,5846354 ( $0,32772 \times R23,1436452$ ).'

As noted above, fractional share payments can be structured in different ways and the facts of each case must be considered. Two methods of dealing with the share component of a scrip dividend by resident companies listed on the JSE are considered below.

*First method of dealing with the share component of a scrip dividend*

The first method is understood to be the most commonly applied. Under this method, the company issues capitalisation shares for the benefit of existing shareholders equal to the entitlement to whole shares and the aggregate of entitlements to fractions of a share. For example, in the case of dematerialised shares, capitalisation shares would be issued by the company, for the benefit of the relevant shareholders, to the Central Securities Depository (Strate). From Strate the shares are allocated to Central Securities Depository Participants (CSDPs) and from the CSDPs to their underlying nominees which include regulated intermediaries. The 'excess capitalisation shares', that is, shares in excess of shareholders' entitlements to whole shares, are sold by, for example, the regulated intermediaries in the market on behalf of the shareholders entitled to fractions of shares and an amount, equal to the fractional share payments, is paid to those shareholders.

Accordingly, shareholders are entitled only to proceeds for their fractional share entitlements, which are sold on their behalf, equal to the amount of the fractional share payments. The amount of the fractional share payment is equal to the fractional share entitlement multiplied by the fraction rate (see illustrative example above). Any excess accrues to the regulated intermediary and any shortfall must be made good by the regulated intermediary. Otherwise stated, in return for the disposal of a shareholder's fractional ownership of a share, a regulated intermediary must pay a shareholder an amount calculated using the fraction rate as stipulated in the SENS announcement. Any difference between the fraction rate multiplied by the fractional share entitlement and the actual proceeds on disposal of the fractional share entitlement to a third party on the market, is a loss or gain for the regulated intermediary. The fractional share payment in this case is not paid or funded by the company. The excess capitalisation shares are issued by the company for the benefit of the relevant shareholders and are subsequently sold on behalf of the shareholders.

As noted above, regulated intermediaries must pay shareholders an amount in respect of the disposal of their fractional share entitlements equal to the amount of the fractional share payment on the date of payment of the scrip dividend. This date may be before the actual disposal of the excess capitalisation shares, which may result in regulated intermediaries being out of pocket with cash until the excess capitalisation shares are sold.

The capitalisation shares are issued by the company for the benefit of the company's shareholders and as such are the shareholder's assets which cannot be returned to the company. The company is also not entitled to any proceeds on disposal of the excess shares, since these shares are the shareholders' assets which have been disposed of on their behalf.

The issuing of capitalisation shares by the company does not constitute a 'dividend' as defined in s 1(1), since it is excluded from the definition under para (ii) of the exclusions.

The advance payment of an amount equal to the fractional share payment by, for example, regulated intermediaries to shareholders does not constitute a 'dividend' as defined in s 1(1). Neither does the subsequent disposal in the market to third parties of the excess capitalisation shares by the regulated intermediary on the shareholders' behalf constitute such a dividend. The reason is that the amount the shareholder receives is in respect of the disposal of the shareholder's asset and is not an amount transferred or applied by a resident company for the benefit or on behalf of any person in respect of any share in that company.



The disposal of the fractional share entitlements by the regulated intermediary on behalf of the shareholders may have income tax implications for these shareholders. Whether the proceeds derived on disposal of a fractional share entitlement are of a revenue or capital nature will depend on the nature of the pre-existing shares held by the shareholder in the company. Proceeds derived on disposal of a fractional share entitlement will be of a revenue nature if the pre-existing shares were held by the shareholder on revenue account. By contrast, proceeds derived on disposal of a fractional share entitlement will be of a capital nature if the pre-existing shares were held by the shareholder on capital account. The onus is on the individual shareholders to satisfy SARS whether the proceeds derived from the disposal by a regulated intermediary of fractional share entitlements on their behalf are revenue or capital in nature. The expenditure actually incurred by a shareholder to acquire the fractional share entitlement for purposes of s 11(a) or para 20 of the Eighth Schedule is deemed to be nil under s 40C.

**Example – Fractional share payments in respect of scrip dividends – First method of dealing with the share component of a scrip dividend**

*Facts:*

Company A, a company listed on the JSE, declared a scrip dividend in terms of which its holders of shares were entitled to receive a cash dividend of R0,25 per share or a scrip alternative of 1,25880 shares for every 100 ordinary shares held. The board of directors did not determine that the distribution would reduce Company A's CTC.

Individual Y held 100 ordinary shares in Company A and elected to receive the cash dividend of R25 (100 shares × R0,25 per share).

Individual X held 100 ordinary shares in Company A and elected to receive the scrip alternative. Individual X was entitled to 1,25880 (100 × 1,25880%) new ordinary shares, subject to rounding.

Company A issued shares to a regulated intermediary on behalf of its existing shareholders, equal to the entitlement to whole shares and the aggregate of entitlements to fractions of a share. The 'excess capitalisation shares', that is, shares in excess of shareholders' entitlements to whole shares, were sold by the regulated intermediary on behalf of the shareholders entitled to fractions of shares. The shareholders were entitled to whole shares and to proceeds for their fractional share entitlements, which were sold on their behalf, equal to the amount of the fractional share payments.

The fraction rate for Company A's scrip dividend is R20,1369821. Accordingly, after automatically applying rounding, Individual X received one scrip share and a fractional share payment of R5,21 (0,25880 × R20,1369821).

*Result:*

The distribution of a cash dividend, in the case of Individual Y electing the cash dividend of R0,25 per share *in lieu* of the scrip alternative, constitutes a 'dividend' under para (a) of the definition of 'dividend' in s 1(1).

The issue and distribution of one capitalisation share to Individual X is excluded from the definition of 'dividend' under para (ii) of the exclusions from the definition, since it constitutes a share in Company A. Similarly, the issue of excess capitalisation shares by Company A does not constitute a dividend. Individual X's fractional share payment of R5,21 does not constitute a dividend, since Individual X receives the amount in respect of the disposal of Individual X's asset. The fractional share payment is therefore not an amount transferred or applied by Company A for the benefit or on behalf of any person in respect of any share in that company. Individual X has disposed of an asset and would need to consider the income tax consequences of that disposal.

*Second method of dealing with the share component of a scrip dividend*

Under the second method of structuring a fractional share payment, the company issues capitalisation shares for the benefit of existing shareholders equal to the entitlement to whole shares and pays a cash amount, equal to the aggregate of all the fractional share payment amounts, to the regulated intermediary or, if applicable, another relevant party, for distribution to the respective shareholders. In contrast to the first method, the company does not issue 'excess capitalisation shares', that is, shares in excess of shareholders' entitlements to whole shares, to the relevant shareholders to be sold on their behalf.

The issuing of capitalisation shares equal to the whole share entitlement by the company does not constitute a 'dividend' as defined in s 1(1), since it is excluded from the definition under para (ii) of the exclusions.

The cash payment by the company will constitute a 'dividend' as defined in s 1(1) unless the payment results in a reduction of the company's CTC, since it is an amount transferred by a resident company for the benefit of a person in respect of a share in that company. An amount resulting in a reduction of a company's CTC is excluded from the definition of 'dividend' in s 1(1) under para (i) of the exclusions.

**Example – Fractional share payments in respect of scrip dividends – Second method of dealing with the share component of a scrip dividend**

*Facts:*

Company A, a company listed on the JSE, declared a scrip dividend in terms of which its holders of shares are entitled to receive a cash dividend of R0,25 per share or a scrip alternative of 1,25880 shares for every 100 ordinary shares held. The board of directors did not determine that the distribution would reduce Company A's CTC. Company A issued capitalisation shares equal to the entitlement to whole shares and paid the fractional share payments in cash.

Individual Y held 100 ordinary shares in Company A and elected to receive the cash dividend of R25 (100 shares × R0,25 per share).

Individual X held 100 ordinary shares in Company A and elected to receive the scrip alternative. Individual X was entitled to 1,25880 (100 × 1,25880%) new ordinary shares subject to rounding. The fractional share payment is equal to the fractional entitlement multiplied by the fraction rate. The fraction rate for the scrip dividend is R20,1369821. Accordingly, after automatically applying rounding, Individual X received one scrip share and a fractional share payment from Company A of R5,21 (0,25880 × R20,1369821).

*Result:*

The distribution of the cash dividend, in the case of Individual Y electing the cash dividend of R0,25 per share *in lieu* of the scrip alternative, constitutes a dividend under para (a) of the definition of 'dividend' in s 1(1).

The fractional share payment of R5,21 distributed to Individual X, who elected the scrip alternative, is a cash payment and constitutes a 'dividend' under para (a) of the definition of 'dividend' in s 1(1). The issue and distribution of the one scrip share is excluded from the definition of 'dividend' under para (ii) of the exclusions from the definition, since it constitutes a share in Company A.

*Acquisition by a listed company of its own securities on an exchange by way of a general repurchase of its shares (para (iii) of the exclusions from the definition of 'dividend')*

The definition of 'dividend' excludes any amount transferred or applied by a company to holders of its shares to the extent that the amount so transferred or applied constitutes a general repurchase by that company of its own securities as contemplated in –

- subparagraph (b) of para 5.67(B) of s 5 of the JSE Limited Listings Requirements, if that acquisition complies with the requirements prescribed by paras 5.68 and 5.72 to 5.81 of s 5 of the JSE Limited Listings Requirements;<sup>73</sup> or
- the listings requirements of any other exchange, licensed under the Financial Markets Act, that are substantially the same as the requirements prescribed by the JSE Limited Listings Requirements, if that acquisition complies with the applicable requirements of that exchange.<sup>74</sup>

The requirements prescribed by paras 5.68 and 5.72 to 5.81 of s 5 of the JSE Limited Listings Requirements include the following:

- The general repurchase by a company of its own securities must not, in the aggregate in any one financial year, exceed 20% of that company's issued share capital of that class in any one financial year (para 5.68).
- A company may make a general repurchase of securities subject to the requirements set out in subparas (a) to (h) of para 5.72 of the requirements (para 5.72).
- Certain documents must be submitted to the JSE and certain documents must be published for general repurchases (paras 5.73 and 5.74).
- The general provisions that apply to general repurchases must be complied with (paras 5.75 to 5.77).
- Requirements for the purchase of securities other than equity securities (paras 5.78 to 5.81).

A JSE-listed company can buy back its own shares in several ways, not all of which are contemplated in subpara (b) of para 5.67(B) or which need to comply with paras 5.68 and 5.72 to 5.81, of s 5 of the JSE Limited Listings Requirements. For example, the following buy-backs

<sup>73</sup> Paragraphs 5.82 to 5.84 of s 5 of the JSE Limited Listings Requirements were repealed with effect from 30 September 2014. Paragraph (iii) of the exclusions from the definition of 'dividend' was amended with effect from 18 December 2017 to refer to paras 5.72 to 5.81 instead of paras 5.72 to 5.84.

<sup>74</sup> This part of para (iii) of the exclusions from the definition of 'dividend' was inserted by s 2(1)(a) of the Taxation Laws Amendment Act 34 of 2019 with effect from 15 January 2020.

by a JSE-listed company of its listed shares are not excluded from the definition of 'dividend' in s 1(1):

- A dissenting buy-back under s 164 of the Companies Act as contemplated in para 5.67(A). This is not regarded as a repurchase of securities for purposes of the JSE Limited Listings Requirements.
- A pro-rata repurchase by a company from all its holders of shares. This type of buy-back does not need to comply with paras 5.68 and 5.72 to 5.81.
- A specific repurchase as contemplated in subpara (a) of para 5.67(B), which includes a buy-back from option holders and an offer to named sellers. This type of buy-back must comply with paras 5.68 and 5.72 to 5.81.
- An odd-lot repurchase, which must also comply with paras 5.68 and 5.72 to 5.81 but which is not contemplated in subpara (b) of para 5.67(B) of s 5 of the JSE Limited Listings Requirements. The JSE defines 'odd-lot offer' in para 5.123 of the JSE Limited Listings Requirements as an offer under which the listed company intends reducing administrative costs resulting from a large number of 'odd-lot' holders. The JSE interprets an 'odd-lot' as a total holding of –
  - less than 100 securities; or
  - 100 or more securities, provided that it can be illustrated to the JSE that the cost associated with a holder disposing of such number of shares is equal to or exceeds the total value of such number of securities.

A general repurchase by a listed company of its own shares on the open market as contemplated in subpara (b) of para 5.67(B), is excluded from the definition of 'dividend', since the holder who disposes of the shares would not necessarily be aware that the company in which the holder holds the shares is buying back the shares. Such a general repurchase of shares is also excluded from the definition of 'return of capital' in s 1(1) (see **2.2.9**). In such a case the full consideration received by or accrued to the holder for the disposal of those shares will constitute proceeds for CGT purposes or gross income if the shares were held as trading stock.

#### **Example – Acquisition by a JSE-listed company of its own securities**

##### *Facts:*

Individual A held 100 listed shares in Company B Ltd which were acquired on 1 August year 1 at R10 a share. Individual A decided to sell the shares through a broker and the shares were purchased on 15 June year 5 on the open market by Company B Ltd at R25 a share.

##### *Result:*

The general repurchase by Company B Ltd of its own shares on the open market does not constitute a 'dividend' as defined in s 1(1), since it is excluded under para (iii) of the exclusions from that term. The general repurchase by Company B Ltd of its own shares is also not a 'return of capital' as defined in s 1(1).

The full purchase price of R2 500 (100 × R25) constitutes proceeds for Individual A for CGT purposes. The shares were held for a period exceeding three years and therefore automatically qualify for capital treatment on disposal under s 9C. The capital gain on disposal of the shares is R1 500 [R2 500 – R1 000 (100 × R10)].

### 2.2.4 Definition – ‘equity share’

‘ “[E]quity share” means any share in a company, excluding any share that, neither as respects dividends nor as respects returns of capital, carries any right to participate beyond a specified amount in a distribution;’

A distribution could take the form of a distribution of profits (dividends) or capital (return of CTC). The share will be an equity share as long as the right to participate in either of these types of distribution is unrestricted. The share will not be an equity share if both of these rights are restricted.

### 2.2.5 Definition – ‘foreign dividend’

‘ “[F]oreign dividend” means any amount that is paid or payable by a foreign company in respect of a share in that foreign company where that amount is treated as a dividend or similar payment by that foreign company for the purposes of the laws relating to—

- (a) tax on income on companies of the country in which that foreign company has its place of effective management; or
- (b) companies of the country in which that foreign company is incorporated, formed or established, where the country in which that foreign company has its place of effective management does not have any applicable laws relating to tax on income,

but does not include any amount so paid or payable that—

- (i) constitutes a redemption of a participatory interest in an arrangement or scheme contemplated in paragraph (e)(ii) of the definition of ‘company’; or
- (ii) .....;
- (iii) constitutes a share in that foreign company;’

A foreign dividend is an amount paid or payable by a foreign company in respect of a share in that foreign company. The Act defines ‘share’ in s 1(1) (see **2.2.10**).

The Act defines ‘foreign company’ in s 1(1) as any company which is not a resident.

In order for the amount to qualify as a foreign dividend, it must be treated as a dividend or similar payment by that foreign company for purposes of the laws relating to –

- tax on income on companies of the country in which that foreign company has its place of effective management; or
- companies (company law) of the country in which that foreign company is incorporated, formed or established, if the country in which that foreign company has its place of effective management does not have any applicable laws relating to tax on income.

Specifically excluded from the definition of ‘foreign dividend’ is, amongst other things, the issue by a foreign company of its own shares as capitalisation shares (para (iii) of the exclusions from the definition of ‘foreign dividend’).<sup>75</sup>

<sup>75</sup> See Interpretation Note 93 ‘The Taxation of Foreign Dividends’.

### 2.2.6 Definition – ‘JSE Limited Listings Requirements’

‘**“JSE Limited Listings Requirements”** means the JSE Limited Listings Requirements, 2003, made by the JSE Limited in terms of section 11 of the Financial Markets Act;’

Section 11 of the Financial Markets Act prescribes a number of requirements for the listing of securities that must be satisfied.

The term ‘JSE Limited Listings Requirements’ is used in the definitions of ‘dividend’ and ‘return of capital’ in s 1(1) to exclude certain buy-backs by a listed company of its listed shares from these definitions (see 2.2.3 and 2.2.9).

### 2.2.7 Definition – ‘listed company’

‘**“[L]isted company”** means a company where its shares or depository receipts in respect of its shares are listed on—

- (a) an exchange as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act; or
- (b) a stock exchange in a country other than the Republic which has been recognised by the Minister as contemplated in paragraph (c) of the definition of ‘recognised exchange’ in paragraph 1 of the Eighth Schedule;’

The JSE has, for example, implemented dedicated Listings Requirements (para 19.86 of those requirements) for purposes of listing depository receipts. In para 19.1 of the JSE Limited Listings Requirements a ‘depository receipt’ is defined as follows:

‘**“[D]epository receipt” or “DR”** means an instrument representing an issuer’s securities, where the instrument confers rights in respect of such securities;’

The following is stated, amongst other things, in para 19.94 of the JSE Limited Listings Requirements:

‘The deposit agreement ... must provide without limitation for the following:

...

(b) the status of DRs as instruments, representing ownership interests in securities of an issuer or underlying entity, that have been deposited via the depository;

...

(j) the right of DR holders to corporate action entitlements. The deposit agreement ... should address the rights (if any) and procedures applying to cash distributions, distributions of shares, rights issues or any other distribution accruing to the securities which the DRs represent, as per Schedule 24 or such other manner acceptable to the JSE;

...

(k) the manner in which any corporate action, or other reclassification of the issuer or underlying entity’s securities, will be represented by and accrue to the DRs, in accordance with the principle that holders of DRs are to be treated as having generally equivalent rights to holders of the securities which the DRs represent;’

A foreign company may have a primary listing of its shares on a stock exchange in a country other than South Africa and may have a secondary listing of the depository receipts of its listed shares on an exchange.

The Financial Markets Act defines ‘exchange’ in s 1 of that Act as follows:

‘**“[E]xchange”** means a person who constitutes, maintains and provides an infrastructure—

- (a) for bringing together buyers and sellers of securities;
- (b) for matching bids and offers for securities of multiple buyers and sellers; and
- (c) whereby a matched bid and offer for securities constitutes a transaction;’

The JSE, A2X,<sup>76</sup> CTSE,<sup>77</sup> and EESE<sup>78</sup> are currently licensed under s 9 of the Financial Markets Act.

The Act defines ‘recognised exchange’ in para 1 of the Eighth Schedule as follows:

‘**“[R]ecognised exchange”** means—

- (a) an exchange licensed under the Financial Markets Act; or
- (b) . . . . .
- (c) an exchange in a country other than the Republic which is similar to an exchange contemplated in paragraph (a) and which has been recognised by the Minister for purposes of this Schedule by notice in the *Gazette*;’

See Regulation 997 in GG 22723 of 2 October 2001 and GN 1088 in GG 30484 of 16 November 2007 for exchanges which have been recognised by the Minister.

### 2.2.8 Definition – ‘listed share’

‘**“[L]isted share”** means a share that is listed on an exchange as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act;’<sup>79</sup>

The JSE, A2X, CTSE and EESE are currently licensed under s 9 of the Financial Markets Act.<sup>80</sup>

### 2.2.9 Definition – ‘return of capital’

‘**“[R]eturn of capital”** means any amount transferred by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company to the extent that that transfer results in a reduction of contributed tax capital of the company, whether that amount is transferred—

- (a) by way of a distribution made by; or
- (b) as consideration for the acquisition of any share in,

that company, but does not include any amount so transferred to the extent that the amount so transferred constitutes—

- (i) shares in the company; or
- (ii) an acquisition by the company of its own securities by way of a general repurchase of securities as contemplated in subparagraph (b) of paragraph 5.67(B) of section 5 of the JSE Limited Listings Requirements, where that acquisition complies with any applicable requirements prescribed by paragraphs 5.68 and 5.72 to 5.81 of section 5 of the JSE Limited Listings Requirements or by way of a general repurchase of

<sup>76</sup> A2X Markets (Pty) Ltd.

<sup>77</sup> Cape Town Stock Exchange (previously 4 Africa Exchange (Pty) Ltd).

<sup>78</sup> Equity Express Securities Exchange (Pty) Ltd.

<sup>79</sup> See above.

<sup>80</sup> See above.

securities as contemplated in the listings requirements of any other exchange, licensed under the Financial Markets Act, that are substantially the same as the requirements prescribed by the JSE Limited Listings Requirements, where that acquisition complies with the applicable requirements of that exchange;<sup>81</sup>

A 'return of capital' means any amount transferred by a resident company in respect of a share in that company and which results in a reduction of CTC, but excluding any amount which constitutes shares in the company itself or specified circumstances which involve the acquisition of its own shares. Since the definition of 'dividend' in s 1(1) excludes a reduction of CTC, a return of capital and a dividend are mutually exclusive.

The definition of 'dividend' and the definition of 'return of capital' have the following in common:

- Both terms apply to amounts transferred by a resident company in respect of the company's issued shares, regardless of whether the transfer arises from a distribution made by the company or from the repurchase by the company of its own shares.
- Both terms exclude the transfer by a company of its own shares (for example, capitalisation shares),<sup>82</sup> as well as a buy-back by a company of its own listed shares by way of a general repurchase (see **2.2.3 f.** for commentary on 'the acquisition by a listed company of its own securities on an exchange by way of a general repurchase of its shares').

The CGT consequences of a distribution by a company of a 'return of capital' or 'foreign return of capital' as defined in s 1(1) must be considered under paras 74, 75, 76, 76A, 76B and 77 of the Eighth Schedule.<sup>83</sup>

Since CGT was introduced on 1 October 2001, returns of capital or foreign returns of capital received by a holder of shares before the disposal of the relevant share have been dealt with in three different ways. It is beyond the scope of this guide to explore these different methods; suffice to say that the changes have necessitated a number of transitional measures which are contained in paras 76 and 76A of the Eighth Schedule.

With effect from 1 April 2012 (the commencement date of most of the substantive dividends tax provisions) returns of capital and foreign returns of capital that are received by a holder of shares before disposal of the relevant share are dealt with under para 76B of the Eighth Schedule as a reduction in base cost of the shares. Should the return of capital or foreign return of capital exceed the base cost of the share the excess is treated as a capital gain. A transitional rule contained in para 76B(1) of the Eighth Schedule re-establishes the base cost of pre-valuation date shares in order that the base cost reduction method can be applied. The return of capital is considered on a per share basis under para 76B. This is necessary because each share is an asset for CGT purposes. If, for example, a holder of shares holds more than one share in a class of shares of a company, the expenditure incurred in respect of each share may be different and could result in a capital gain on one share (if the return of capital exceeds the base cost of the share) but no capital gain on the other share (if the return of capital equals or is less than the base cost of the share). A capital gain must be included in the holder of shares' aggregate capital gain or aggregate capital loss, as appropriate.

<sup>81</sup> Paragraph (ii) of the exclusions from the definition of 'return of capital' was amended by s 2(1)(g) of the Taxation Laws Amendment Act 34 of 2019 with effect from 1 March 2019 to exclude also a general repurchase of securities by other listed companies from the definition.

<sup>82</sup> See Binding Private Ruling 201 'Issue of Capitalisation Shares'.

<sup>83</sup> See Binding Private Ruling 366 'Distribution *In Specie* of Shares'.



### Example – Allocation of return of capital on a per share basis

#### *Facts:*

Company A is a wholly owned subsidiary of Company B. Company A was incorporated in 2002 at which time it issued 1 000 shares of R1 each at a premium of R10 000. In 2007 Company A issued another 1 000 shares of R1 each at a premium of R30 000. On 31 January 2021 Company A distributed R15 per share and before the transfer determined it to be from CTC.

#### *Result:*

Company B received a return of capital of R15 per share. The CGT consequences under para 76B are considered per share. However, practically the calculation can be done per batch of shares, since the expenditure incurred per share in a batch is the same for all the shares in that batch.

The acquisition cost per share for the first batch was R11  $[(1\ 000 \times R1) + R10\ 000 / 1\ 000]$  and for the second batch R31  $[(1\ 000 \times R1) + R30\ 000 / 1\ 000]$ .

The first batch of shares produced a total capital gain of R4 000  $[(R15 \text{ proceeds (return of capital per share)} - R11 \text{ base cost (expenditure in respect of the share)}) \times 1\ 000 \text{ shares}]$  under para 76B(3) which must be included in Company B's aggregate capital gain or aggregate capital loss, as appropriate. Going forward the base cost of each share in this batch of shares is nil.

The second batch of shares has a reduced base cost of R16 000  $[(\text{expenditure per share of } R31 - R15 \text{ return of capital per share}) \times 1\ 000 \text{ shares}]$ , that is R16 per share under para 76B(2).

Paragraph 77 of the Eighth Schedule treats a return of capital as a capital gain when it is received or accrued after a share has been disposed of in consequence of the liquidation or deregistration of the company.

For more detail on the CGT consequences of returns of capital or foreign returns of capital see Chapter 18 of the *Comprehensive Guide to CGT* and the *Tax Guide for Share Owners*.

As noted above, the buy-back of listed 'excluded shares' is neither a 'dividend' nor a 'return of capital' as defined in s 1(1). It does not, however, follow that any consideration received by a holder of shares in respect of the disposal of such shares to the company in consequence of a qualifying general repurchase necessarily escapes taxation. Any consideration paid by a listed company for the acquisition of such 'excluded shares' would still constitute 'proceeds' derived by the holder in respect of the disposal of the shares for CGT purposes under para 35 of the Eighth Schedule. The holder of the shares would therefore be taxed on the difference between the proceeds and the base cost of the shares. Should the relevant shares be held as trading stock, the consideration derived by the holder in consequence of the general repurchase of the shares by the listed company would constitute gross income.

### 2.2.10 Definition – ‘share’

‘ “[S]hare” means, in relation to any company, any unit into which the proprietary interest in that company is divided;’

*Lexico.com* defines ‘proprietary’ as –<sup>84</sup> ‘

‘[r]elating to an owner or ownership’.

*Lexico.com* defines ‘interest’ as –<sup>85</sup>

‘[a] stake or involvement in an undertaking, especially a financial one’.

In *Standard Bank of South Africa Ltd & Another v Ocean Commodities Inc & others* Corbett JA stated the following regarding the meaning of a share:<sup>86</sup>

‘A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends.’

The following types of company would in most instances have shares as defined in s 1(1):

- An association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law (para (a) of the definition of ‘company’).
- An association, corporation or company incorporated under the law of any country other than South Africa or any body corporate formed or established under such law. This includes a co-operative incorporated under foreign law (para (b) of the definition of ‘company’).
- A ‘co-operative’ as defined in s 1(1) which means any association of persons registered under s 27 of the Co-operatives Act 91 of 1981 or s 7 of the Co-operatives Act 14 of 2005 (para (c) of the definition of ‘company’).
- An association (other than an association, corporation or company incorporated under South African law, a body corporate formed or established under South African law or a close corporation) formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public (para (d) of the definition of ‘company’).
- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement in terms of which members of the public (as defined in s 1 of the Collective Investment Schemes Control Act), are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest (para (e)(ii) of the definition of ‘company’).
- A portfolio of a collective investment scheme in property that qualifies as a ‘REIT’ as defined in the listing requirements of an ‘exchange’, as defined in s 1 of the Financial Markets Act and licenced under s 9 of that Act, where the listing requirements have been approved in consultation with the Director-General of the National Treasury and published by the appropriate authority, as contemplated in s 1 of the Financial Markets

<sup>84</sup> [www.lexico.com/definition/proprietary](http://www.lexico.com/definition/proprietary) [Accessed 28 January 2022].

<sup>85</sup> [www.lexico.com/definition/interest](http://www.lexico.com/definition/interest) [Accessed 28 January 2022].

<sup>86</sup> 1983 (1) SA 276 (A) at 288.

Act, under s 11 of that Act or by the Financial Sector Conduct Authority (para (e)(iii) of the definition of 'company').

- A close corporation (para (f) of the definition of 'company').

Not every association, corporation or company incorporated under a law will have shares, for example, a body corporate established under s 36 of the Sectional Titles Act 95 of 1986 does not have shares.

## 2.3 Definitions (s 64D)

### 2.3.1 Definition – 'beneficial owner'

' "[B]eneficial owner" means the person entitled to the benefit of the dividend attaching to a share;'

The registered owner of a share may not necessarily be the beneficial owner of that share. An approved nominee may, for example, be the registered owner of a share that is held for the benefit of another person.

The meaning of 'beneficial owner' was considered in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd in which Holmes JA stated the following*.<sup>87</sup>

'A nominee is an agent with limited authority: he holds shares in name only. He does this on behalf of his nominator or principal, from whom he takes his instructions; see *Sammel and Others v. President Brand Gold Mining Co. Ltd.*, at p. 666. The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'. This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognises only its registered shareholders.'

The term 'beneficial owner' should, however, not be interpreted too widely or out of context. Not every person that benefits from the holding of shares by another will necessarily be the beneficial owner of a dividend. In *Her Majesty the Queen v Prévost Car Inc.*<sup>88</sup> the taxpayer paid dividends to its Dutch shareholder, which then paid a similar amount of dividends to its corporate shareholders, residents of Sweden and of the United Kingdom. The court held that the Dutch shareholder, and not the corporate shareholders of the Dutch shareholder, was the beneficial owner of the dividend paid to the Dutch shareholder. The judge referred to the judgment in *Prévost Car Inc. v Her Majesty the Queen*<sup>89</sup> in which it was held that the beneficial owner of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received.

It was held in *Velcro Canada Inc. v Her Majesty the Queen*<sup>90</sup> that –

- in looking at the beneficial ownership issue one must apply the test as set out in *Prévost*, and in doing so, one must look to the ordinary meaning of individual words, that is, 'possession', 'use', 'risk' and 'control';
- the person who is the beneficial owner is the person who enjoys and assumes all the attributes of ownership; and

<sup>87</sup> 1976 (1) SA 441 (A) at 453A-B.

<sup>88</sup> 2009 FCA 57, [2010] 2 F.C.R. 65.

<sup>89</sup> (2008) TCC 231.

<sup>90</sup> (2012) TCC 57.

- only if the interest in the item in question gives that party the right to control the item without question, will it meet the threshold set in *Prévost*.

The above-mentioned principles are supported in *The Clicks Group Ltd & Others v The Independent Community Pharmacy Association & Others*.<sup>91</sup>

#### *Cessionary of a dividend*

Ownership in shares can be transferred by a contract of cession provided that there is the necessary intention to pass ownership.<sup>92</sup> Similarly, the rights attaching to shares can also be ceded.<sup>93</sup> The cession of a right to dividends can be done under a pledge, cession or other security obligation. There must be a legal obligation to pass a dividend on to a third party for such third party to be considered the beneficial owner of the dividend. The third party will not become the beneficial owner of the dividend that has been ceded should the holder of the shares have a discretion, but not an obligation, to pass the dividend on to the third party (but see below as regards a discretionary trust arrangement).

The cessionary of a dividend will be the beneficial owner of a dividend for dividends tax purposes if the cession takes place before the dividend is deemed to be paid for dividends tax purposes, that is, before the liability to account for dividends tax is determined. See **3.2** for details on when a dividend is deemed to be paid for dividends tax purposes. For example, the cessionary will be the beneficial owner for dividends tax purposes if the holder of the shares has ceded the dividend rights on listed shares to the cessionary after the company has declared a cash dividend but before the dividend is paid.

See **3.8** for commentary on 'deemed dividends which arise in the context of a cession of a dividend'.

#### *Beneficiary of a trust*

A beneficiary of a trust will have a vested right in a dividend –

- under a bebind trust, since ownership of the trust property vests in the beneficiary;
- under a vesting trust which confers a vested right to the dividend on the beneficiary; or
- under a discretionary trust, when the trustees have exercised their discretion to vest the dividend in the beneficiary –
  - by the date that the dividend is deemed to be paid for dividends tax purposes (see **3.2**); or
  - after the dividend is deemed to be paid for dividends tax purposes (see **3.2**) but before the end of the year of assessment of the trust.

In the latter case, while the liability to account for dividends tax arises on the date that the dividend is 'paid' to the trust as contemplated in s 64E(2), if the trustees have exercised their discretion and vested the dividends within the trust's year of assessment in which the dividend is paid to the trust, the beneficiary is deemed to have derived the dividend and not the trust [s 25B(1) and (2)]. It follows that for dividends tax purposes it is the beneficiary who is the beneficial owner of the dividends.

Dividends tax would have been withheld or paid on the date the dividend was originally deemed to have been 'paid' for dividends tax purposes because the trust had not at that time

<sup>91</sup> [2022] 1 All SA 297 (SCA).

<sup>92</sup> *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A).

<sup>93</sup> ITC 1378 (1983) 45 SATC 230 (T).

vested the dividends in the beneficiary. Therefore, if the dividend is subsequently vested in a beneficiary that is exempt under s 64F(1) or s 64FA(1)(a) within the same year of assessment in which the dividend was received by or accrued to the trust, the trust may claim a refund under s 64L or s 64M from the company paying the dividend or from the regulated intermediary (see **8.2** and **8.3**).<sup>94</sup> Sections 64L and 64M state that ‘so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable *to the person to whom the dividend was paid*’. It is therefore the trust and not the beneficiary who may claim the refund (see **Example 2** in **5.2.2 c.** and **Example 3** in **8.2.4**). The trust can subsequently pay the dividends tax recovered to the beneficiaries. For a dividend that constitutes the distribution of an asset *in specie*, the company that paid the dividend can claim a refund from SARS under s 64LA (see **8.4**).

A trust that receives a dividend or to whom a dividend accrues will be the beneficial owner of the dividend if –

- at the date the dividend is deemed to be paid for dividends tax purposes, the beneficiary does not have a vested right to the dividend; or
- the trustees of a discretionary trust do not exercise their discretion to vest the dividend in the beneficiary during the same year of assessment of the trust in which the dividend is received by or accrues to the trust.<sup>95</sup>

*A portfolio of a collective investment scheme, other than a portfolio of a collective investment scheme in property (CIS)*

A unit holder in a CIS is regarded as the beneficial owner of a dividend under s 25BA(1)(a) if the dividend that accrued to the CIS is on-distributed to the unit holder not later than 12 months after its accrual to the CIS. The dividend is deemed under s 25BA(1)(a) to have accrued directly to the unit holder on the date of the distribution by the CIS if the CIS on-distributes the dividend within the 12-month period to the unit holder.

A CIS is regarded as the beneficial owner of a dividend under s 25BA(1)(b) if the dividend that accrued to it is not on-distributed to the unit holders within 12 months after its accrual to the CIS (see **4.1.11** and **5.4**).

*Usufructuary of a share*

The usufructuary (the person entitled to a usufruct) of a share will be the beneficial owner of a dividend. A ‘usufruct’ has been defined as –<sup>96</sup>

‘the right to use the thing of another in such a way as to preserve its substantial character’.

The bare *dominium* holder who owns the underlying asset (the share) will not be the beneficial owner of any dividends declared on the shares, since the bare *dominium* holder is not entitled to the benefit of the dividends attaching to the share.

*Partners of an en commandite partnership*

In an *en commandite* partnership, the shares held by the partnership in a company will generally be registered in the names of the general partners and not in the names of the *en commandite* partners. Even though the shares are registered in the names of the general

<sup>94</sup> See Binding Private Rulings 118 ‘Withholding of Dividends Tax’, 125 ‘Vesting by Discretionary Trust of Dividend Rights to the Beneficiary of the Trust’ and 129 ‘Beneficial Owner of Dividends’.

<sup>95</sup> See para (ee) of the proviso to s 10(1)(k)(i) which is an anti-avoidance provision dealing with the exercise of a discretionary power by a trustee of a trust in specified circumstances.

<sup>96</sup> *Brunsdon’s Estate v Brunsdon’s Estate & others* 1920 CPD at 174.

partners, the *en commandite* partners will be the beneficial owners of a percentage of the shares in accordance with the partnership agreement.

### 2.3.2 Definition – ‘dividend’

‘**“[D]ividend”** means any dividend or foreign dividend as defined in section 1, including any amount contemplated in section 31(3)(i), that is—

- (a) paid by a company that is a resident; or
- (b) paid by a foreign company—
  - (i) if the share in respect of which that foreign dividend is paid is a listed share; and
  - (ii) to the extent that that foreign dividend does not consist of a distribution of an asset *in specie*;

The definition of ‘dividend’ in s 64D includes both a ‘dividend’ and certain ‘foreign dividends’ as defined in s 1(1) [see **2.2.3** and **2.2.5** for commentary on the meaning of ‘dividend’ and ‘foreign dividend’ as defined in s 1(1)].

#### a. Dividend paid by a resident company [para (a)]

A dividend paid by a resident company (see **2.2.1**) may be subject to dividends tax.

With effect from years of assessment commencing on or after 1 January 2019, any amount contemplated in s 31(3)(i) is specifically included in the definition of ‘dividend’ in s 64D (see **4.3.4 c.**).

#### b. Dividend paid by a foreign company [para (b)]

A foreign dividend paid by a foreign company is potentially subject to dividends tax –

- if the share in respect of which the dividend is paid is a listed share, and
- only to the extent that the foreign dividend does not consist of a distribution of an asset *in specie*.

Whilst a foreign dividend meeting these requirements is potentially subject to dividends tax, it may be exempt from normal tax under s 10B(2)(d).

A foreign dividend paid by a foreign company in respect of a listed share is not subject to dividends tax to the extent that the dividend consists of a distribution of an asset *in specie*. A foreign company, the shares of which are listed shares, must not withhold dividends tax from the distribution of an asset *in specie*. Such a foreign dividend is included in a person’s gross income under para (k) of the definition of ‘gross income’ in s 1(1), but may be exempt in full from normal tax under s 10B(2)(e) if the dividend is received by or accrues to a resident company<sup>97</sup> or may otherwise be partially exempt from normal tax under s 10B(3). A rebate under s 6quat(1) can potentially be deducted from normal tax payable by a resident whose taxable income includes a foreign dividend that is not fully exempt under s 10B (see **9.3**).<sup>98</sup>

### 2.3.3 Definition – ‘dividend cycle’

The definition of ‘dividend cycle’ was deleted with effect from 17 January 2019. See previous issues of this guide for commentary on the meaning of ‘dividend cycle’.

<sup>97</sup> On or after 1 March 2014.

<sup>98</sup> See Interpretation Note 93 ‘The Taxation of Foreign Dividends’.

### 2.3.4 Definition – ‘effective date’

‘ “[E]ffective date” means the date on which this Part comes into operation;’

The effective date on which dividends tax came into operation is 1 April 2012.<sup>99</sup> Dividends tax is levied on dividends declared and paid by a company on or after 1 April 2012. Dividends declared before 1 April 2012 were subject to STC.

### 2.3.5 Definition – ‘regulated intermediary’

‘ “[R]egulated intermediary” means any—

- (a) central securities depository participant contemplated in section 32 of the Financial Markets Act;
- (b) authorised user as defined in section 1 of the Financial Markets Act;
- (c) approved nominee contemplated in section 76(3) of the Financial Markets Act;
- (d) nominee that holds investments on behalf of clients as contemplated in section 9.1 of Chapter 1 and section 8 of Chapter 11 of the Codes of Conduct for Administrative and Discretionary Financial Service Providers, 2003 (Board Notice 79 of 2003) published in *Government Gazette* No. 25299 of 8 August 2003;
- (e) portfolio of a collective investment scheme in securities;
- (f) transfer secretary that is a person other than a natural person and that has been approved by the Commissioner subject to such conditions and requirements as may be determined by the Commissioner; or
- (g) a portfolio of a hedge fund collective investment scheme.’<sup>100</sup>

A regulated intermediary is in essence an entity that temporarily holds a dividend paid by a company before it is eventually paid over to the ultimate beneficial owner. An obligation may exist for a regulated intermediary to withhold dividends tax under s 64H (see 5.3).

The investment intermediary structure in respect of listed companies in South Africa is explained as follows:<sup>101</sup>

‘Uncertificated or dematerialized listed investments in South Africa are regulated by the central security depository, known under its abbreviated name of STRATE. Linked to STRATE are.....Central Securities Depository participants (CSD Participants), mainly the large banks and Computershare, the only non-banking entity. The next level of role players, who are in most cases the entities with direct contact with investors, are brokers. STRATE compiles shareholders information from the CSD Participants, which are then made available to companies via their appointed transfer secretaries.

Therefore, the typical chain of information flow is from shareholder to broker to a CSD Participant to STRATE. The flow of dividends from a listed company to its dematerialized shareholders would be a payment to STRATE, who would in turn pay onwards to the CSD Participants, who would pay on to the broker, who would pay on further down the chain. The aforementioned system is in respect of uncertificated shares. Companies must run separate systems for certificated shares because these are not administered by STRATE, but by the companies’ appointed share transfer secretary.

<sup>99</sup> GN 1073 in GG 34873 of 20 December 2011.

<sup>100</sup> Paragraph (g) of the definition was inserted by s 73(1) of the Taxation Laws Amendment Act 25 of 2015 with effect from 1 April 2015.

<sup>101</sup> SAICA ‘Dividends Tax 1998. Preparing for 1 April 2012’ (October 2011) Issue 146 *SAICA Integrity Newsletter* at page 6.

Both CSD Participants and brokers keep so-called nominee accounts. Shares may therefore be registered in the name of say “ABC Bank Nominees”, which would then be the shareholder reflected on the companies’ sub registers in STRATE, and CSD Participants records.’

**a. Central securities depository participant [para (a)]**

A ‘central securities depository’ (CSD) is defined in s 1 of the Financial Markets Act. A CSD means a person who constitutes, maintains and provides an infrastructure for holding uncertificated securities which enables the making of entries in respect of uncertificated securities, and which infrastructure includes a securities settlement system. A license will be granted to a CSD under s 29(1) of the Financial Markets Act if it complies with the relevant requirements of that Act and if the objects of that Act referred to in s 2 will be furthered by the granting of such a license. The Financial Markets Act aims to –

- ensure that the South African financial markets are fair, efficient and transparent;
- increase confidence in the South African financial markets by –
  - requiring that securities services be provided in a fair, efficient and transparent manner; and
  - contributing to the maintenance of a stable financial market environment;
- promote the protection of regulated persons, clients and investors;
- reduce systemic risk; and
- promote the international competitiveness of the South African financial markets and of securities services in South Africa.

Section 31 of the Financial Markets Act provides that a licensed CSD may authorise a person as a participant in that central securities depository under the depository rules.

A central securities depository participant (CSDP) is a person who holds securities or an interest in securities as a custodian or participant on behalf of other persons. The duties of a CSDP are stipulated in s 32 of the Financial Markets Act.

The JSE implemented an electronic system called ‘share transactions totally electronic’ (STRATE) which enables share transactions to be settled electronically. STRATE is the approved CSD and only CSDPs can liaise directly with STRATE.

CSDPs must meet certain criteria prescribed by STRATE and must obtain approval from the Financial Sector Conduct Authority. Approved equities CSDPs are listed on the STRATE website.<sup>102</sup>

**b. Authorised user [para (b)]**

An ‘authorised user’ is defined in s 1 of the Financial Markets Act and means a person authorised by a licensed exchange to perform one or more securities services in terms of the exchange rules, and includes an external authorised user, where appropriate. An ‘external authorised user’ as defined in s 1 of the Financial Markets Act means a foreign person who is authorised by a supervisory authority<sup>103</sup> to perform a service or services similar to one or more securities services as defined in that Act and who is subject to the laws of a country other than South Africa, which laws –

- establish a regulatory framework equivalent to that established by that Act; and

<sup>102</sup> [www.strate.co.za](http://www.strate.co.za).

<sup>103</sup> As defined in s 1 of that Act.



- are supervised by a supervisory authority.

The term 'authorised user' includes authorised share brokers.

**c. Approved nominee [para (c)]**

A 'nominee' as defined in s 1 of the Financial Markets Act means a person approved under s 76 of that Act to act as the holder of securities or of an interest in securities on behalf of other persons.

An approved nominee contemplated in s 76(3) of the Financial Markets Act means a nominee that is approved by the Financial Sector Conduct Authority. The approved nominee must comply with the requirements which the Financial Sector Conduct Authority may prescribe before it can function as a nominee.

A nominee approved under s 76(3) of the Financial Markets Act excludes a nominee of an authorised user and a nominee of a participant.

**d. Nominee appointed by administrative and discretionary financial service providers [para (d)]**

A nominee appointed by administrative and discretionary financial service providers is also known as a linked investment service provider (LISP). A LISP is a financial institution that packages, distributes and administers a broad array of unit trust arrangements (including voluntary and retirement products).

A LISP is essentially a single portal of investment choices supported by a financial advisor and can operate purely as an administrative vehicle or as a discretionary vehicle with an independent ability to exercise investment decisions.

Companies, regulated intermediaries and collective investment schemes making payments to LISP vehicles effectively deal with the LISP as a separate entity with the LISP acting as an interface.

**e. Portfolio of a collective investment scheme in securities (CISS) [para (e)]**

The Act defines 'portfolio of a collective investment scheme in securities' in s 1(1) as any portfolio comprised in any collective investment scheme in securities contemplated in Part IV of the Collective Investment Schemes Control Act 45 of 2002, managed or carried on by any company registered as a manager under s 42 of that Act for the purposes of that Part.

A 'collective investment scheme' is defined in s 1 of the Collective Investment Schemes Control Act as follows:

“**[C]ollective investment scheme**” means a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which—

- (a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and
- (b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed,

but not a collective investment scheme authorised by any other Act;

A CISS does not operate as a pure nominee that on-distributes dividends immediately when received. A CISS holds dividends and revenue receipts or accruals for a period of between three to twelve months (depending on the terms of the CISS trust deed) and subsequently on-distributes the dividends and other revenue amounts (less expenses such as management fees) to the CISS participatory interest (unit) holders (see **4.1.11** and **5.4**).

**f. Transfer secretary [para (f)]**

Listed and larger unlisted companies often outsource the transfer secretary function to an agent in order to ease the burden of maintaining a share register for paper (certificated) shares. The main function of the external 'agent' transfer secretary involves the recording of share ownership and the processing of dividend payments.

A transfer secretary may be regarded as a regulated intermediary if approved by the Commissioner. The Commissioner will take into account, amongst other aspects, the diversity of clients as well as the financial sustainability of the transfer secretary, since the transfer secretary is not subject to any regulatory requirements. The approval may be subject to conditions and requirements specified by the Commissioner.

Any person other than a natural person may be appointed as a transfer secretary.

**g. Portfolio of a hedge fund collective investment scheme [para (g)]**

The Act defines 'portfolio of a hedge fund collective investment scheme' in s 1(1)<sup>104</sup> as any portfolio held by any hedge fund business that qualifies as a declared collective investment scheme in terms of s 63 of the Collective Investment Schemes Control Act.

**2.3.6 Definition – 'STC credit'**

The definition of 'STC credit' was deleted with effect from 17 January 2019.

All STC credits terminated on 1 April 2015. STC credits could be utilised to reduce dividends tax in respect of dividends paid on or before 31 March 2015. The STC legislation contained in ss 64B and 64C was repealed with effect from 1 April 2017.

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<sup>104</sup> The definition was inserted by s 4(1)(zL) of the Taxation Laws Amendment Act 31 of 2013 with effect from 1 April 2015.

## Chapter 3

### Levy of dividends tax, liability for dividends tax, deeming provisions and special rules applying to specified companies (ss 8F(2), 8FA(2), 9H(3), 12Q(3), 24BA(3)(b), 25BB(6), 26B(2), 31(3), 64E, 64EA and 64EB)

#### 3.1 Application and rate of dividends tax and special rules applying to headquarter companies, oil and gas companies, REITs and controlled companies and international shipping companies [ss 12Q(3), 25BB(6), 26B(2) and 64E(1)]

Section 64E(1) provides that the tax to be levied is to be –

- known as the dividends tax, and
- calculated at the rate of 20% of the amount of any dividend paid by any company other than a headquarter company.

Section 64E(1) was amended with effect from 18 December 2017 to provide that dividends tax must be levied at 20% or at such rate as the Minister of Finance may announce in the national annual budget contemplated in s 27(1) of the Public Finance Management Act 1 of 1999, with effect from a date indicated in that Announcement. If the Minister makes such an announcement 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.

Since the Minister has not yet announced another rate, dividends tax is levied at 20%. This rate increased from 15% to 20% with effect from dividends paid on or after 22 February 2017.

However, dividends paid by an ‘oil and gas company’ as defined in para 1 of the Tenth Schedule out of amounts attributable to its oil and gas income are subject to dividends tax at a rate of 0% under para 3(1) of the Tenth Schedule, read with s 26B(2) (see **3.1.3**).

Dividends paid by an international shipping company from international shipping income is subject to dividends tax at the rate of 0% under s 12Q(3) (see **3.1.5**).

#### **Example 1 – Calculation of dividends tax – Dividends paid on or after 22 February 2017**

##### *Facts:*

On 15 March year 1 Company A declared a cash dividend of R100 000 to holders of its shares who are natural persons, payable on 31 March year 1.

##### *Result:*

Dividends tax is calculated as follows:

	R
Dividend payable by Company A	100 000
Less: Dividends tax (R100 000 × 20%)	<u>(20 000)</u>
Amount of dividend payable to holders of shares	<u>80 000</u>

### Example 2 – Calculation of dividends tax – Dividends paid on or after 22 February 2017

*Facts:*

B, a natural person, holds all the shares in Company A and owes R500 000 on loan account to Company A. Company A waived R300 000 of this debt on 15 March year 1.

*Result:*

The discharge of the debt of R300 000 was related to B's holding of shares in Company A and is a 'dividend' as defined in ss 1(1) and 64D. Dividends tax payable under s 64E(1) on the dividend *in specie* is R60 000 (R300 000 × 20%).

### Example 3 – Calculation of dividends tax – Dividends paid on or after 22 February 2017

*Facts:*

X, a natural person, holds all the shares in Company Y. X owes R100 000 to Company Z. Company Y settles the amount owed by X to Company Z on behalf of X without holding X liable for the amount settled.

*Result:*

The payment of the debt of R100 000 by Company Y is a 'dividend' as defined in ss 1(1) and 64D because it is related to X's holding of shares in Company Y. Dividends tax payable under s 64E(1) on the dividend *in specie* is R20 000 (R100 000 × 20%).

#### 3.1.1 Companies liable to pay dividends tax

Dividends tax is levied on a 'dividend' as defined in s 64D, paid by a company. Dividends tax is therefore levied –

- on a dividend paid by a resident company, other than a headquarter company; or
- on a foreign dividend paid by a foreign company, if the share in respect of which that foreign dividend is paid is a listed share and to the extent that that foreign dividend does not consist of a distribution of an asset *in specie*.

The definition of 'dividend' in s 64D refers to both a 'dividend' and a 'foreign dividend' as defined in s 1(1). The definitions of 'dividend' and 'foreign dividend' in s 1(1) require that an amount must be 'transferred or applied' ('dividend') or be 'paid or payable' ('foreign dividend') in respect of a share in a company in order to constitute a 'dividend' or a 'foreign dividend'. The Act defines 'share' in s 1(1) (see **2.2.10**). A company that does not have shares cannot pay a 'dividend' as defined in s 64D. The Act defines 'company' in s 1(1) (see **2.2.1**).

Dividends paid by the following types of company, amongst others, may be subject to dividends tax:

- A state-owned company, a private company, a personal liability company and a public company (para (a) of the definition of 'company'). A non-profit company is prohibited from distributing its income and property to its members.<sup>105</sup>
- A domesticated company which is a company whose registration has been transferred to South Africa (para (a) of the definition of 'company'). Under s 13(5) of the

<sup>105</sup> Definition of 'non-profit company' in s 1 of the Companies Act.

Companies Act it is treated as if it had been originally incorporated and registered under the Companies Act.

- A share block company which is a 'company' as defined in the Companies Act even though it must comply with the Share Blocks Control Act (para (a) of the definition of 'company'). A dividend may arise when a share block company converts to a normal company and the share block company distributes its property to its members, or when a share block company transfers a unit to a member of the share block company in which case the disposal of such unit may be exempt from dividends tax under s 64FA(1)(d) (see **4.3.1**).
- A mutual bank incorporated under the Mutual Banks Act 124 of 1993 (para (a) of the definition of 'company').
- An association, corporation, company or body corporate incorporated or formed under foreign law, for example, a co-operative incorporated under foreign law (para (b) of the definition of 'company'). As noted above, a foreign dividend paid by a foreign company will potentially be subject to dividends tax only if it is paid in respect of a listed share and to the extent that it does not consist of a distribution of an asset *in specie*.
- A co-operative (para (c) of the definition of 'company') to the extent that the amount of the dividend was not included in the 'income' of the beneficial owner [see **4.1.12** for commentary on s 64F(1)(l)].
- A portfolio of a collective investment scheme in property that qualifies as a 'REIT' as defined in the listing requirements of an 'exchange', as defined in s 1 of the Financial Markets Act and licensed under s 9 of that Act, where those listing requirements have been approved in consultation with the Director-General of the National Treasury and published by the appropriate authority, as contemplated in s 1 of the Financial Markets Act, under s 11 of that Act or by the Financial Sector Conduct Authority (see **3.1.4** for commentary on 'dividends paid by a REIT') (para (e)(iii) of the definition of 'company').
- A close corporation established under the Close Corporations Act (para (f) of the definition of 'company').

Dividends paid by the following companies are not subject to dividends tax:

- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities. Such a portfolio is a 'company'<sup>106</sup> as defined in s 1(1) but it is not allowed to list its shares on an exchange which means that a dividend paid by such a portfolio will not constitute a 'dividend' as defined in s 64D.
- A 'headquarter company' as defined in s 1(1) is not subject to dividends tax, since it is specifically excluded under s 64E(1) (see **3.1.2**).

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<sup>106</sup> Paragraph (e)(ii) of the definition of 'company'.

### 3.1.2 Dividends paid by headquarter companies [s 64E(1)]

A dividend paid by a headquarter company is not subject to dividends tax. The Act defines 'headquarter company' in s 1(1) as follows:<sup>107</sup>

' "[H]eadquarter company" in respect of any year of assessment means a company contemplated in section 9I(1) in respect of which an election has been made in terms of that section;'

A resident company may elect to be a headquarter company for a year of assessment if the requirements of s 9I(2) are met. The main requirements of s 9I(2) are as follows:

- For the duration of that year of assessment of the company, each holder of shares, whether alone or together with any other company forming part of the same group of companies as that holder, must have held 10% or more of the equity shares and voting rights in the company [s 9I(2)(a)].
- At the end of that year of assessment and of all previous years of assessment of the company, 80% or more of the cost of the total assets of the company was attributable to one or more of –
  - any interest in equity shares in a foreign company;
  - any debt owed by a foreign company; or
  - any 'intellectual property' as defined in s 23I(1) that is licensed by the headquarter company to a foreign company [s 9I(2)(b)].
- The assets referred to above must have been held in any foreign company in which the company, whether alone or together with any other company forming part of the same group of companies, held at least 10% of the equity shares and voting rights. The cost of total assets excludes any amount in cash or a bank deposit payable on demand [s 9I(2)(b)].
- In determining whether the 80% of total cost requirement is met for the current and every previous year of assessment, a particular year of assessment may be disregarded if the company did not own assets with a total market value exceeding R50 000 at any time during such year of assessment [s 9I(2)(b)].
- When gross income, excluding any exchange difference determined under s 24I in respect of any exchange item, of the company for that year of assessment exceeds R5 million, 50% or more of the gross income must consist of one or both of –
  - any rental, dividend, interest, royalty or service fee paid or payable by any foreign company in which the company, whether alone or together with any other company forming part of the same group of companies, held at least 10% of the equity shares and voting rights; or
  - any proceeds from the disposal of any interest in equity shares in any foreign company in which the headquarter company, whether alone or together with any other company forming part of the same group of companies, held at least 10% of the equity shares and voting rights, or of any intellectual property licensed to such a foreign company [s 9I(2)(c)].

### 3.1.3 Dividends paid by oil and gas companies [s 26B(2)]

Section 26B(2) provides that dividends tax levied on the amount of a 'dividend' as defined in s 64D, which is paid as contemplated in s 64E(2), by an oil and gas company out of amounts

<sup>107</sup> See Interpretation Note 87 'Headquarter Companies'.

attributable to its oil and gas income, must be determined in accordance with the Act but subject to the Tenth Schedule.

The Act defines ‘oil and gas company’ in para 1 of the Tenth Schedule as follows:

- ‘ “[O]il and gas company” means any company that—
- (i) holds any oil and gas right; or
  - (ii) engages in exploration or post-exploration in terms of any oil and gas right;’

The Act defines ‘oil and gas income’ in para 1 of the Tenth Schedule as follows:

- ‘ “[O]il and gas income” means the receipts and accruals derived by an oil and gas company from—
- (a) exploration in terms of any oil and gas right;
  - (b) post-exploration in respect of any oil and gas right; or
  - (c) the leasing or disposal of any oil and gas right;’

The Act defines ‘oil and gas right’ in para 1 of the Tenth Schedule as follows:

- ‘ “[O]il and gas right” means—
- (a) any reconnaissance permit, technical co-operation permit, exploration right, or production right as defined in section 1 of the Mineral and Petroleum Resources Development Act or any interest therein;
  - (b) any exploration right acquired by virtue of a conversion contemplated in item 4 of Schedule II to the Mineral and Petroleum Resources Development Act or any interest therein; or
  - (c) any production right acquired by virtue of a conversion contemplated in item 5 of Schedule II to the Mineral and Petroleum Resources Development Act or any interest therein;’

Paragraph 3(1) of the Tenth Schedule stipulates that the rate of dividends tax contemplated in s 64E that is paid by an oil and gas company on the amount of any dividend derived from oil and gas income must not exceed 0% of the amount of that dividend.

Dividends paid out of amounts not derived from an oil and gas company’s oil and gas income will be subject to dividends tax at the rate of 20%<sup>108</sup> contemplated in s 64E(1) if a reduced rate or exemption is not applicable.

Section 26B(2) also applies to the amount of a foreign dividend paid by a foreign oil and gas company on listed shares provided that the foreign dividend is derived from that company’s oil and gas income.

In *Western Platinum Ltd v C: SARS*<sup>109</sup> the Supreme Court of Appeal had to decide in what circumstances interest may be characterised as ‘income derived from mining operations’. The court confirmed the finding of the court *a quo* that in order to qualify as mining income, the income had to be directly connected to the mining source. The same test should be applied to determine whether other income derived by an oil and gas company was derived from ‘oil and gas income’.

<sup>108</sup> The rate of dividends tax increased from 15% to 20% with effect from dividends paid on or after 22 February 2017.

<sup>109</sup> [2004] 4 All SA 611 (SCA), 67 SATC 1.

A dividend that is paid by an oil and gas company out of oil and gas income and other income not directly connected to the oil and gas source must be apportioned to calculate the amount of the dividend that is –

- subject to dividends tax at a rate of 0%; and
- subject to dividends tax at a rate of 20% (if a reduced rate or exemption is not applicable).

To calculate the amount of a dividend that is paid out of oil and gas income, the following formula must be used:

'Dividend paid by oil and gas company × oil and gas income net of expenses / total income net of expenses'

To calculate the amount of a dividend that is paid out of other income not directly connected to the oil and gas source, the following formula must be used:

'Dividend paid by oil and gas company × other income net of expenses not directly connected to the oil and gas source / total income net of expenses'

### **Example – Dividend paid by an oil and gas company**

#### *Facts:*

Company C is an oil and gas company that derived oil and gas income net of expenses of R300 million and dividend income net of expenses, not directly connected to the oil and gas source, of R30 million during its year of assessment ending on 31 March year 1. Company C paid a dividend of R10 million on 31 March year 1 to holders of its shares that are all residents and natural persons.

#### *Result:*

Under s 26B(2) read with para 3(1) of the Tenth Schedule the amount of the dividend paid by Company C from oil and gas income is subject to dividends tax at a rate of 0% and is calculated as follows:

'Dividend paid by oil and gas company × oil and gas income net of expenses / total income net of expenses'

$R10 \text{ million} \times R300 \text{ million} / R330 \text{ million} = R9 \text{ 090 909.}$

Dividends tax @ 0% = nil.

The amount of the dividend paid by Company C from dividend income is subject to dividends tax at the rate of 20% under s 64E(1) and is calculated as follows:

'Dividend paid by oil and gas company × dividend income / total income net of expenses'

$R10 \text{ million} \times R30 \text{ million} / R330 \text{ million} = R909 \text{ 091.}$

Dividends tax @ 20% = R181 818,20.

### **3.1.4 Dividends or interest paid by a REIT or a controlled company [s 25BB(6)(a) and (b)]**

Two types of real estate investment entity operate in South Africa, namely, property unit trusts (portfolios of a collective investment scheme in property) and property loan stock companies. A portfolio of a collective investment scheme in property was included in the definition of 'company' in s 1(1) with effect from years of assessment commencing on or after 1 April 2013. Paragraph (e)(iii) of the definition of 'company' in s 1(1) was, however, amended with effect



from years of assessment commencing on or after 1 January 2015 to provide that only a portfolio of a collective investment scheme in property that qualifies as a 'REIT' as defined in para 13.1(x) of the JSE Limited Listings Requirements, is a company. It follows that a collective investment scheme in property that does not qualify as a REIT does not constitute a company with effect from years of assessment commencing on or after 1 January 2015. A distribution from such a scheme would therefore not constitute a 'dividend' as defined in s 1(1) and would not attract dividends tax.

Because of the approval of new exchanges, namely, A2X, CTSE and EESE, para (e)(iii) of the definition of 'company' has since been amended to refer to a 'REIT' as defined in the listing requirements of an exchange (see **3.1.1**).

The Act defines 'REIT' in s 1(1) as –

- (a) a company that is a resident; and
- (b) the equity shares of which are listed—
  - (i) on an exchange (as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act); and
  - (ii) as shares in a REIT as defined in the listing requirements of that exchange approved in consultation with the Director-General of the National Treasury and published, after approval of those listing requirements by the Director-General of the National Treasury, by the appropriate authority, as contemplated in section 1 of the Financial Markets Act, in terms of section 11 of that Act or by the Financial Sector Conduct Authority;

Section 25BB(6)(c) stipulates that any amount of interest paid on a linked unit in a REIT or a resident controlled company during years of assessment commencing on or after 1 April 2013 is deemed to be a dividend paid by that REIT or controlled company for purposes of dividends tax and not to be an amount of interest for purposes of withholding tax on interest.

The Act defines 'linked unit' and 'controlled company' respectively in s 1(1) and s 25BB(1) as follows:

‘**[L]inked unit**’ means a unit comprising a share and a debenture in a company, where that share and that debenture are linked and are traded together as a single unit;’

‘**[C]ontrolled company**’ means a company that is a subsidiary, as defined in IFRS, of a REIT;’

The Act defines 'IFRS' in s 1(1) and means –

‘the International Financial Reporting Standards issued by the International Accounting Standards Board;’

A 'subsidiary', as defined in IFRS 10, means an entity that is controlled by another entity.

The meaning of the word 'control' is dealt with in paras 5 – 18 of IFRS 10. It is stated in para 5 that an investor, regardless of the nature of its involvement with an entity (the investee), must determine whether it is a parent by assessing whether it controls the investee. Paragraph 6 stipulates that an investor controls an investee when it is exposed or has rights to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee.

Section 25BB(6)(a) stipulates that any amount of interest received by or accrued to a person during a year of assessment commencing on or after 1 April 2013 on a debenture forming part of a linked unit in a –

- REIT or a resident controlled company held by that person, is deemed to be a dividend received by or accrued to that person during that year; or
- controlled company that is a foreign company is deemed to be a foreign dividend received by or accrued to that person during that year.

Dividends and foreign dividends received by or accrued to a person are included in that person's gross income under para (k) of the definition of 'gross income' in s 1(1).

Dividends received by or accrued to a resident that were distributed by a REIT or by a resident controlled company are not exempt from normal tax, unless they constitute a share buy-back contemplated in para (b) of the definition of 'dividend' in s 1(1) [para (aa) of the proviso to s 10(1)(k)(i)]. In contrast, dividends received by or accrued to a person that is not a resident that were distributed by a REIT or by a controlled company are exempt from normal tax under s 10(1)(k)(i).

Foreign dividends received by or accrued to a person from a controlled company that is not a resident may be exempt under s 10B(2) or partially exempt under s 10B(3).

Section 64F(2) provides that any dividend paid by a REIT or a controlled company that is received by or accrued to a beneficial owner before 1 January 2014 is exempt from dividends tax to the extent that the dividend does not consist of the distribution of an asset *in specie* (see 4.2).

It follows that dividends received by or accrued to a beneficial owner will not be exempt from dividends tax under s 64F(2) if –

- the dividend consists of the distribution of an asset *in specie*; or
- the dividend is received by or accrues to a beneficial owner on or after 1 January 2014.

In addition, a dividend paid by a REIT or a controlled company which is received by or accrued to a resident during a year of assessment commencing on or after 1 April 2013 is exempt from dividends tax under s 64F(1)(l), since the dividend is required to be included in the income of the resident. Any dividend distributed by a REIT or controlled company must be included in the resident's gross income under para (k) of the definition of 'gross income' in s 1(1). Such a dividend, other than one arising from a share buy-back, is not exempt from normal tax under para (aa) of the proviso to s 10(1)(k)(i) (see 4.1.12), and as such will constitute income in the resident's hands.

See Interpretation Note 97: 'Taxation of REITs and Controlled Companies'.

#### **Example – Dividends and interest paid by a REIT**

##### *Facts:*

REIT A paid a dividend of R200 000 and interest of R19 800 000 on debentures forming part of linked units to its linked-unit holders on 31 March year 1. The linked units in REIT A are held equally by residents and non-residents.

*Result:**Implications for resident linked-unit holders**Normal tax*

Under s 25BB(6)(a) the interest of R9 900 000 (R19 800 000 × 50%) paid on debentures forming part of linked units held in REIT A is deemed to be dividends received by or accrued to resident linked-unit holders.

The deemed dividends of R9 900 000 and actual dividends of R100 000 (R200 000 × 50%) are included in gross income of the linked-unit holders under para (k) of the definition of 'gross income' in s 1(1). The deemed dividends and actual dividends derived by the resident linked-unit holders are not exempt from normal tax because of para (aa) of the proviso to s 10(1)(k)(i).

*Dividends tax*

Under s 25BB(6)(c) the interest paid on the linked units of R9 900 000 is deemed to be dividends paid by REIT A for purposes of dividends tax.

The deemed dividends of R9 900 000 and actual dividends of R100 000 are exempt from dividends tax under s 64F(1)(f) because of their inclusion in the resident linked-unit holders' income for normal tax purposes.

*Implications for non-resident linked-unit holders**Normal tax*

Under s 25BB(6)(a) the interest of R9 900 000 (R19 800 000 × 50%) paid on debentures forming part of linked units held in REIT A is deemed to be dividends received by or accrued to the non-resident linked-unit holders.

The deemed dividends of R9 900 000 and actual dividends of R100 000 (R200 000 × 50%) are included in 'gross income' of the linked-unit holders under para (k) of the definition of 'gross income' in s 1(1). The deemed dividends and actual dividends derived by the non-resident linked-unit holders are exempt from normal tax under s 10(1)(k)(i).

*Dividends tax*

Under s 25BB(6)(c) the interest paid on the linked units of R9 900 000 is deemed to be dividends paid by REIT A for purposes of dividends tax.

The deemed dividends of R9 900 000 and actual dividends of R100 000 derived by the non-resident linked-unit holders are liable to dividends tax at a rate of 20% under s 64E(1) but may be subject to a reduced rate of tax under s 64G(3) or s 64H(3) because of the application of a tax treaty.

**3.1.5 Dividends paid by international shipping companies [s 12Q(3)]**

Section 12Q(3) provides that the rate of dividends tax in s 64E<sup>110</sup> that is paid by an international shipping company on the amount of a dividend derived from international shipping income must not exceed 0% of the amount of that dividend. The amount of a dividend derived from any other income of an international shipping company is liable to dividends tax at the rate of 20% under s 64E(1).

<sup>110</sup> This reference should be s 64E(1).

Section 12Q(1) contains the following definitions which apply for the purposes of the section:

‘ “[~~the~~]**international shipping**” means the conveyance for compensation of passengers or goods by means of the operation of a South African ship mainly engaged in international traffic;

‘ “[~~the~~]**international shipping company**” means a company that is a resident that operates one or more South African ships that are utilised in international shipping;

‘ “[~~the~~]**international shipping income**” means the receipts and accruals of a person derived from international shipping mainly from the operation of one or more ships contemplated in paragraph (a) of the definition of ‘South African ship’;

‘ **“South African ship”** means a ship—

- (a) which is registered in the Republic in accordance with Part 1 of Chapter 4 of the Ship Registration Act, 1998 (Act No. 58 of 1998); or
- (b) another ship or ships used temporarily in lieu of the ship contemplated in paragraph (a) by virtue of that ship being subject to repair or maintenance.’

With effect from 1 April 2019, the definitions of ‘international shipping income’ and ‘South African ship’ were amended<sup>111</sup> to take into account income derived by a qualifying resident company that temporarily makes use of a replacement non-South African ship for purposes of international traffic for a short period of time in the event that a South African ship is not available for use because of maintenance or repairs.

‘International shipping income’ therefore means the receipts and accruals of a person derived from international shipping mainly from the operation of one or more ships registered under the Ship Registration Act 58 of 1998. The determination of whether the receipts and accruals of a person from international shipping are derived mainly from the operation of one or more ships registered under the Ship Registration Act is a question of fact. In *SBI v Lourens Erasmus (Edms) Bpk*<sup>112</sup> Botha JA held that, in the context of an exemption for the previously applicable undistributed profits tax, the word ‘mainly’ prescribed a purely quantitative standard of more than 50%.<sup>113</sup> In the context of the definition of ‘international shipping income’, ‘mainly’ is also interpreted to mean more than 50%.

In *Western Platinum Ltd v C: SARS*<sup>114</sup> the Supreme Court of Appeal had to decide in what circumstances interest may be characterised as ‘income derived from mining operations’. The court confirmed the finding of the court *a quo* that in order to qualify as mining income, the income had to be directly connected to the mining source. The same test should be applied to determine whether income derived by an international shipping company is income derived from international shipping and therefore ‘international shipping income’.

A dividend that is paid by an international shipping company out of international shipping income and other income not directly connected to the international shipping source must be apportioned to calculate the amount of the dividend that is subject to –

- dividends tax at a rate of 0%; and
- dividends tax at a rate of 20% (if a reduced rate or exemption is not applicable).

<sup>111</sup> Amended definitions included above.

<sup>112</sup> 1966 (4) SA 434(A), 28 SATC 233 at 245.

<sup>113</sup> See Interpretation Note 107 ‘Deduction in respect of Commercial Buildings’ for commentary on the meaning of ‘mainly’.

<sup>114</sup> [2004] 4 All SA 611 (SCA), 67 SATC 1.

To calculate the amount of a dividend that is paid out of international shipping income, the following formula must be used:

'Dividend paid by international shipping company × international shipping income net of expenses / total income net of expenses'

To calculate the amount of a dividend that is paid out of other income not directly connected to the international shipping income source, the following formula must be used:

'Dividend paid by international shipping company × other income not directly connected to the international shipping source net of expenses / total income net of expenses'

### **Example – Dividend paid by an international shipping company**

#### *Facts:*

Company A is an international shipping company that derived net income from international shipping of R100 million net of expenses and interest of R10 million net of expenses, not directly connected to its international shipping source, during its year of assessment ending on 31 March year 1. Company A paid a dividend of R5 million on 31 March year 1 to holders of its shares that are all residents and natural persons.

#### *Result:*

Under s 12Q(3) the amount of the dividend paid by Company A from net income from international shipping is subject to dividends tax at a rate of 0% and is calculated as follows:

'Dividend paid by international shipping company × net income from international shipping / total income net of expenses'

$R5 \text{ million} \times R100 \text{ million} / R110 \text{ million} = R4 \text{ 545 455.}$

Dividends tax @ 0% = nil.

The amount of the dividend paid by Company A from interest income is subject to dividends tax at the rate of 20% under s 64E(1) and is calculated as follows:

'Dividend paid by international shipping company × interest income / total income net of expenses'

$R5 \text{ million} \times R10 \text{ million} / R110 \text{ million} = R454 \text{ 545.}$

Dividends tax @ 20% = R90 909,00.

## **3.2 Date on which a dividend is deemed to be paid [s 64E(2)]**

### **3.2.1 A dividend that does not consist of a distribution of an asset *in specie* [s 64E(2)(a)]**

#### **a. Dividend declared by a listed company (resident company and foreign company) [s 64E(2)(a)(i)]**

A dividend declared by a listed company, which does not consist of a distribution of an asset *in specie*, is deemed to be paid on the date on which the dividend is paid. This provision applies to listed resident companies and listed foreign companies.

A listed foreign company will be liable for dividends tax only if the relevant share is listed on the JSE or another exchange licensed under s 9 of the Financial Markets Act (essentially a dual listing). The JSE, A2X, CTSE and EESE are currently licensed under s 9 of the Financial Markets Act.

**Example – Date on which a dividend is deemed to be paid***Facts:*

Company E Ltd declared a cash dividend of R100 000 on 7 February year 1, payable to holders of shares registered on Friday 24 February year 1. The dividend was paid to holders of shares on Monday 27 February year 1, the next business day.

*Result:*

Under s 64E(2)(a)(i) the dividend is deemed to be paid on the date on which the dividend is paid by Company E Ltd, namely, 27 February year 1.

**b. Dividend declared by a company that is not a listed company [s 64E(2)(a)(ii)]**

A dividend declared by a company that is not a listed company is deemed to be paid on the earlier of the date on which the dividend –

- is paid; or
- becomes due and payable.

In *Marra Developments Ltd v BW Rofe (Pty) Ltd* it was held that –<sup>115</sup>

‘under the general law the payment of a dividend normally involves two steps: the declaration of the dividend by the competent authority...and the payment over of money in satisfaction of the dividend’.

A delay may exist between –

- the due date and the date on which the dividend is payable; and
- the date the dividend is payable and the date of actual payment of the dividend.

For example, a company may declare a dividend at the end of a month but specify that it is payable only in the middle of the following month. However, when the middle of the following month arrives the company might not have received anticipated cash flows and may pay the dividend only at a later date. The dividend in these specified circumstances is regarded for dividends tax purposes as having been paid when it became due and payable in the middle of the following month and not when it is ultimately paid.

*Paid*

An amount can be paid in a variety of ways, including in cash, in kind, in the form of set-off or by crediting a loan account.<sup>116</sup> There is generally little difficulty in determining the date of payment when the dividend is paid in cash. However, the date of payment can be more difficult to establish when payment is in a form other than cash. ITC 1688<sup>117</sup> set out some useful principles for determining the date of payment when payment is in the form of set-off, cheque<sup>118</sup> or loan account.

<sup>115</sup> (1977) 3 ACLR 185 CA (NSW).

<sup>116</sup> With effect from 1 January 2021 cheques are no longer used in the national payment system in South Africa, as communicated in a combined Media Statement dated 18 November 2020 by The South African Reserve Bank (SARB), Financial Sector Conduct Authority (FSCA), Payments Association of South Africa (PASA) and the Banking Association South Africa (BASA).

<sup>117</sup> (1999) 62 SATC 478 (N).

<sup>118</sup> See above – with effect from 1 January 2021 cheques are no longer used in the national payment system in South Africa.

In that case the appellant company declared two dividends to the sole holder of its shares on 2 March 1992 and 5 March 1993 respectively. Payment of these dividends was not made in cash or by cheque. Rather, the resolutions declaring the dividends provided that payment of the dividends would be effected by crediting the holder's loan account. Journal entries were duly effected giving credit to the holder of the shares, but the holder's loan account was credited only on 31 July 1993. At issue was whether the dividends were subject to STC which came into operation on 17 March 1993. The relevant legislation provided that dividends declared before 17 March 1993 that were paid on or after that date were deemed to be declared on 17 March 1993 thus making them potentially subject to STC. The crisp issue was whether the dividends were paid before 17 March 1993.

In delivering his judgment Galgut J stated the following about the nature of payments generally:<sup>119</sup>

'The determination of the date upon which a payment is made is of course a question of fact. When payment of a dividend is made in cash there can of course be no difficulty in determining the date of such payment. The same applies to a payment by cheque, even if the cheque is post-dated or dishonoured, because payment will be effected when the proceeds of the cheque are received by or on behalf of the payee.

Payment can of course be made other than in cash or by cheque. There are a number of possibilities. To take but one, it might happen for example that a shareholder owes his company money, and that the company thereafter becomes indebted to the shareholder by the declaration of a dividend. In such a case the company may elect to effect a set-off, provided of course all of the other requisites for a set-off are present. One such requisite is that both debts must be fully due. In such a case the shareholder would have no choice because, as was said in *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 472B-C, set-off operates *ipso jure*,<sup>120</sup> and it is effective from the date upon which the parties became mutually indebted to each other. It would therefore operate without the shareholder's consent, and what is more it would operate immediately upon the declaration of the dividend. If the debt owing by the shareholder is recorded in a loan account with the company, then the set-off will be recorded by crediting the taxpayer's loan account in the amount concerned.

It is important to emphasise, however, that such crediting is no more than a recording of a pre-existing fact, so that the operation of the set-off will not depend upon the crediting of the loan account.

As distinct from the operation of a set-off, or from the tender of cash or (subject to certain qualifications which are not relevant for present purposes) a cheque, all other forms of payment can only discharge a debt if the creditor agrees thereto. One such agreement is where the creditor agrees, as in the present case, to lend the money concerned to the debtor, where he agrees in other words that the debtor may retain the money as a loan. In such an event, as in the case of a set-off, both the payment of the dividend and the advancing of the loan in each instance take place automatically, and as such they are effected *pari passu* with the conclusion of the agreement. As such, and this must be emphasised, payment is in each case effected on the date upon which the agreement is concluded. It would of course be otherwise were the resolution whereby the dividend is declared to contain a term showing that the dividend is to be paid at some date thereafter, or were the agreement of loan to contain a term showing that the loan would similarly be delayed. In the absence of such an indication, in the absence in other words of anything to show that the parties intended otherwise, it would be fair to conclude that both the payment of the dividend and the reciprocal advancing of the loan occurred, and were intended to occur, then and there.'

In summary, the court held that payments in a form other than cash, cheque or set-off can discharge a debt only with the creditors consent. Based on the facts of the case the court

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<sup>119</sup> At 481.

<sup>120</sup> By operation of law.

found that this took place when the respective resolutions were passed and not when the physical crediting of the loan account took place and accordingly found in favour of the appellant.

In concluding the court stated the following:<sup>121</sup>

'I should emphasise finally that nothing I have said should be understood to mean that where declared dividends are left on loan in a company, it will be presumed or will necessarily mean that payment takes place at the time the dividend is declared. At the risk of repeating myself I stress that the date of payment is a question of fact, and that as such the date must be determined on the particular facts of each case.'

The judge's concluding comments highlight that the outcome of ITC 1688 may have been different had the resolution contained a term indicating that payment would be made at a later date. This case emphasised the importance of the facts of the particular case in determining when an amount is considered to be paid and highlighted that the crediting of a loan account will not always necessarily constitute payment.

### *Due and payable*

The declaration of a dividend creates a debt owing to a holder of a share. Such a debt arises out of a formal act performed by a company.<sup>122</sup> A dividend declared by a company that is not listed is generally due on the date on which the dividend is declared.

It has been held that the word 'payable' can have different meanings. In *CIR v Janke*<sup>123</sup> Stratford J quoted<sup>124</sup> the judgment of Searle J in *Stafford v Registrar of Deeds*:<sup>125</sup>

'It is clear that the word 'payable' is sometimes construed as meaning 'payable at a future time' or 'in respect of which there is a liability to pay'. It is also true that it is sometimes used to mean 'payable immediately' or 'actually due and presently demandable'.'

In *Singh v C: SARS* Olivier JA stated that –<sup>126</sup>

'[t]he word 'payable' can have at least two different meanings, viz ' . . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid . . . The sense of (a) is a present liability – due and payable – . . . (b) . . . a future or contingent liability'.

An amount may be due under a contract (*dies cedit*) but not payable (*dies venit*). An amount will be payable only when the time for payment arrives. For an amount to be 'due and payable' the amount must not only be owing, but a person must have the right to claim payment of it.<sup>127</sup>

<sup>121</sup> At 482.

<sup>122</sup> *Boyd v CIR* 1951 (3) SA 525 (A), 17 SATC 366 at 377; *South African Iron and Steel Industrial Corp Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd & others* 1993 (4) SA 705 (NMH) at 711 and 713.

<sup>123</sup> 1930 AD 474, 4 SATC 269.

<sup>124</sup> At SATC 276.

<sup>125</sup> 1913, C.P.D. 329.

<sup>126</sup> 2003 (4) SA 520 (SCA), 65 SATC 203 at 216.

<sup>127</sup> L Mitchell 'Cash Consideration Only' (2005) 19 *Tax Planning* 84.



**Example 1 – Date on which a dividend is deemed to be paid***Facts:*

Company F, an unlisted company, declared a dividend of R50 000 on 31 March year 1, payable to holders of its shares on 15 April year 1. The dividend was actually paid to the holders of shares on 18 April year 1.

*Result:*

Under s 64E(2)(a)(ii) the dividend is deemed to be paid by Company F on the earlier of the date on which the dividend is paid (18 April year 1) or becomes due and payable (15 April year 1). The dividend is therefore deemed to be paid on 15 April year 1.

**Example 2 – Date on which a dividend is deemed to be paid – Cancellation of dividend***Facts:*

Company A, an unlisted company, declared a dividend of R200 000 on 31 March year 1 payable to holders of its shares on 31 May year 1. The dividend declaration was cancelled on 29 May year 1.

*Result:*

The dividend became due and payable on 31 May year 1 but was cancelled before that date by Company A. Dividends tax can therefore not be levied on the amount of the dividend which was cancelled on 29 May year 1.

**Example 3 – Date on which a dividend is deemed to be paid***Facts:*

Company M, an unlisted company, declared a dividend of R500 000 on 10 May year 1, payable to holders of its shares on 31 May year 1. Owing to cash flow problems, the dividend was paid by Company M to the holders of shares only on 30 June year 1.

*Result:*

Under s 64E(2)(a)(ii) the dividend is deemed to have been paid on the earlier of the date on which it is paid (30 June year 1) or the date on which the dividend becomes due and payable (31 May year 1). The dividend is therefore deemed to be paid on 31 May year 1.

**Example 4 – Date on which a dividend is deemed to be paid***Facts:*

Company C, an unlisted company, declared a dividend of R100 000 on 30 June year 1, payable to D, the sole holder of its shares, on 29 July year 1. On 31 August year 1 Company C paid the dividend by crediting D's loan account with R100 000.

*Result:*

Under s 64E(2)(a)(ii) the dividend is deemed to be paid on the earlier of the date on which the dividend is paid (31 August year 1) or the date on which the dividend becomes due and payable (29 July year 1). The dividend is thus deemed to be paid on 29 July year 1.

### 3.2.2 A dividend that consists of a distribution of an asset *in specie* declared by a listed company or a company that is not listed [s 64E(2)(b)]

To the extent that a dividend consists of a distribution of an asset *in specie*, it is deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable. See 3.2.1 for commentary on the meaning of the words 'paid' and 'due and payable'. In practice, a dividend *in specie* will be paid or become due and payable on the date when the asset is delivered or transferred to the shareholder or on the date when it is due to be delivered or transferred. A tangible movable asset can be transferred only by delivery and an intangible asset by cession.

Special rules apply to the following dividends *in specie*:

- An amount owing to a company by certain persons by virtue of the holding of shares in that company [s 64E(4)(c)] (see 3.4).
- A company that ceases to be a resident or that becomes a headquarter company [s 9H(3)(c)(iii)] (see 3.7.2 b.).
- Transactions under which assets are acquired as consideration for shares issued [s 24BA(3)(b)(ii)] (see 3.7.2 c.).
- Interest on hybrid debt instruments deemed to be dividends *in specie* [s 8F(2)(a)(i)] (see 3.7.2 d.).
- Hybrid interest deemed to be dividends *in specie* [s 8FA(2)(a)(i)] (see 3.7.2 e.).
- Transfer pricing adjustments deemed to be a dividend consisting of a distribution of an asset *in specie* [s 31(3)] (see 3.7.2 f.).

#### Example – Date on which a dividend is deemed to be paid

##### *Facts:*

On 30 August year 1 the directors of Company A approved the distribution of assets *in specie* to holders of shares in the company and determined that the assets were to be transferred to those holders on 30 September year 1. The assets were transferred on 4 October year 1.

##### *Result:*

The dividend paid by Company A consists of the distribution of an asset *in specie*. Under s 64E(2)(b) the dividend is deemed to be paid by Company A on the earlier of the date on which the dividend is paid (4 October year 1 – the date the assets were transferred) or becomes due and payable (30 September year 1 – the date that the assets were due to be transferred). The dividend became due and payable on 30 September year 1 but was paid only on 4 October year 1. The dividend is therefore deemed to be paid on 30 September year 1.

### 3.3 Amount of distribution of an asset *in specie* [s 64E(3)]

#### 3.3.1 A financial instrument listed on a recognised exchange [s 64E(3)(a)]

The amount of a dividend *in specie* consisting of the distribution of a financial instrument<sup>128</sup> which is listed on a recognised exchange<sup>129</sup> and for which a price is quoted on that exchange, is deemed to be equal to the ruling price of that financial instrument on that recognised

<sup>128</sup> Definition of 'financial instrument' in s 1(1).

<sup>129</sup> Definition of 'recognised exchange' in para (1) of the Eighth Schedule.

exchange at close of business on the last business day before the date that the dividend is deemed to be paid.

**Example – Amount of a distribution of an asset *in specie* – Financial instrument**

*Facts:*

Company A, a resident, holds shares in Company B, a listed company. Company A declared a dividend on 3 June year 1 consisting of the distribution of 100 000 shares held by Company A in Company B on 17 June year 1. Company A transferred the shares on Friday 17 June year 1. The ruling price per share was R3 on 3 June year 1, R2,98 on 15 June year 1 and R2,99 on 17 June year 1. Tuesday 16 June year 1 was a public holiday.

*Result:*

The dividend paid by Company A consists of the distribution of an asset *in specie*. The dividend is deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable [s 64E(2)(b)]. The dividend was due and payable on 17 June year 1 and was also paid on that date.

The amount of the dividend is equal to the ruling price of the shares on the last business day before the date that the dividend is deemed to be paid, that is the ruling price on Wednesday 15 June year 1. The amount of the dividend paid by Company A is R298 000 (100 000 shares × R2,98).

**3.3.2 Other assets [s 64E(3)(b)]**

The amount of a dividend declared and paid by a resident company and which consists of a distribution of an asset *in specie* other than an asset referred to in s 64E(3)(a), namely, certain financial instruments (see 3.3.1), is deemed to be equal to the market value of the asset on the date that the dividend is deemed to be paid.

When a resident company sells an asset at less than its market value to a person in respect of a share in the company, the difference between the market value and the selling price of the asset will generally constitute a dividend.

Special rules apply under s 64E(4)(b) to determine the amount of a dividend that is deemed to have been paid when a debt owed by specified persons to a company has arisen by virtue of a share held in that company (see 3.4.2).

**Example 1 – Amount of a distribution of an asset *in specie* – Other assets**

*Facts:*

On 30 August year 1 the directors of Company A approved the distribution of assets *in specie* to holders of shares in the company and determined that the assets were to be transferred to those holders on 30 September year 1. The assets were transferred on 30 September year 1. The market value of the assets was R100 000 on 30 August year 1 and R90 000 on 30 September year 1.

*Result:*

Under s 64E(2)(b) the dividend is deemed to be paid by Company A on the earlier of the date on which the dividend is paid or becomes due and payable. The dividend became due and payable and was also paid on 30 September year 1. Under s 64E(3)(b) the amount of the dividend is deemed to be equal to the market value of the assets on the date that the dividend is deemed to have been paid, being 30 September year 1. The amount of the dividend is therefore R90 000.

**Example 2 – Amount of a distribution of an asset *in specie* – Other assets***Facts:*

On 31 May year 1 the liquidator of Company Z distributed assets with a market value of R500 000 to holders of shares in the company.

*Result:*

Under s 64E(2)(b) the dividend is deemed to be paid by Company Z on the date of the distribution of the assets *in specie* to the holders of shares, namely, 31 May year 1. Under s 64E(3)(b) the amount of the dividend is deemed to be R500 000 which is equal to the market value of the assets on 31 May year 1, the date the dividend is deemed to have been paid.

**3.4 Company deemed to have paid a dividend – Amount owing on a debt [s 64E(4)]****3.4.1 Company deemed to have paid a dividend – Amount owing on a debt [s 64E(4)(a)]**

A company is deemed to have paid a dividend if an amount is owing to that company during any year of assessment by –

- a person (other than a company) that is a resident and a connected person in relation to that company [s 64E(4)(a)(i)]; or
- a person (other than a company) that is a resident and a connected person in relation to the person indicated above [s 64E(4)(a)(ii)],

if that debt arises by virtue of any share held in that company by the person who is a connected person in relation to that company referred to in s 64E(4)(a)(i).<sup>130</sup>

The word 'debt' is described as follows in *The Shorter Oxford English Dictionary on Historical Principles*:<sup>131</sup>

**[D]ebt 1** Something owed or due; something (as money, goods, or service) which one person is under an obligation to pay or render to another. **2** A liability or obligation to pay or render something; the condition of being so liable or obligated.'

A debt owing to a company will be deemed to be a dividend paid by the company only if the debt arose by virtue of a share held in the company by a person referred to in s 64E(4)(a)(i). It follows that an amount owing to a company will not be subject to dividends tax if the debt arose for a business or a commercial reason and not 'by virtue of a share held' in the company by a person referred to in s 64E(4)(a)(i). Whether or not a debt arose by virtue of a share held in a company by a person referred to in s 64E(4)(a)(i) will depend on the facts of each case.

<sup>130</sup> See Interpretation Note 67 'Connected Persons' for commentary on the definition of 'connected person'.

<sup>131</sup> A Stevenson 6 ed (2007) Oxford University Press in vol 1.

The company to which the debt is owed may be a resident or a non-resident. However, an amount owing by a resident connected person to a foreign company in the circumstances described above is not subject to dividends tax. No liability for dividends tax arises because the amount is deemed to be a distribution of an asset *in specie* under s 64E(4)(b)(i) (see **3.4.2**) and does not constitute a 'dividend' as defined in s 64D. Such a debt may, however, be subject to the transfer pricing rules in s 31 which apply to tax payable on international transactions which are not conducted under the arm's length principle.

#### **Example 1 – Deemed dividend – Amount owing on a debt**

*Facts:*

Company K granted an interest-free loan of R100 000 to Individual L, a resident. Individual L holds 60% of the equity shares in Company K.

*Result:*

Individual L is a connected person in relation to Company K under para (d)(iv) of the definition of 'connected person' in s 1(1). Under s 64E(4)(a) and (b)(i) Company K is deemed to have paid a dividend *in specie* equal to the amount determined under s 64E(4)(b)(ii).

#### **Example 2 – Deemed dividend – Amount owing on a debt**

*Facts:*

Company A advanced an interest-free loan of R50 000 to B. B is C's sister. C holds 20% of the equity shares in Company A. All three persons are residents.

*Result:*

B and C are connected persons in relation to each other under para (a)(i) of the definition of 'connected person' in s 1(1). C is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person'. Under s 64E(4)(a) and (b)(i) Company A is deemed to have paid a dividend *in specie* equal to the amount determined under s 64E(4)(b)(ii).

#### **Example 3 – Deemed dividend – Amount owing on a debt**

*Facts:*

Trust A holds 100% of the member's interest in ABC Close Corporation (ABC CC). Individual D is a discretionary beneficiary of Trust A and Trust B. ABC CC made an interest-free loan to Trust B.

*Result:*

Under s 64E(4)(a) ABC CC will be deemed to have paid a dividend if an amount is owing to it on a debt by a person who is a connected person in relation to a person who is a connected person in relation to ABC CC. Trust A is a connected person in relation to ABC CC under para (d)(vi)(aa) of the definition of 'connected person' in s 1(1). Trust A and Trust B are connected persons in relation to each other under para (b)(ii) of the definition of 'connected person'. ABC CC is deemed to have paid a dividend under s 64E(4)(a), since it granted an interest-free loan to a person (Trust B) that is a connected person in relation to a person (Trust A) that is a connected person in relation to ABC CC. The amount of the dividend, which is deemed to be a dividend *in specie*, is determined under s 64E(4)(b)(ii).

An amount owing by a resident company to another resident company on a debt which arose by virtue of a share, is not deemed to be a dividend paid by the company that provided the

debt, since s 64E(4)(a) applies only if the debtor is not a company. This outcome is in line with the exemption from dividends tax under s 64F(1)(a) and s 64FA(1)(a) which exempts a dividend paid to a resident company (see 4.1.1).

An amount owing by a connected person who is not a resident (including a company) to a resident company on a debt which arose by virtue of a share, is not deemed to be a dividend paid by the company, since s 64E(4)(a) applies only to an amount owing by a resident. The debt may, however, be subject to the application of s 31 which applies to international transactions which are not based on the arm's length principle.

### 3.4.2 Nature and amount of dividend deemed to have been paid [s 64E(4)(b)]

#### a. Nature of dividend deemed to have been paid [s 64E(4)(b)(i)]

The amount of a dividend that is deemed to have been paid under s 64E(4)(a) (see 3.4.1), is deemed to consist of a distribution of an asset *in specie*.

When the deemed distribution is by a resident company, that company is liable for dividends tax under s 64EA(b) (see 3.7.2).

#### b. Amount of dividend deemed to have been paid [s 64E(4)(b)(ii)]

The amount of a dividend that is deemed to have been paid under s 64E(4)(a) (see 3.4.1) is deemed to be equal to the greater of –

- the market-related interest [essentially this means interest determined at the 'official rate of interest' as defined in s 1(1)<sup>132</sup>] in respect of that debt, less the amount of interest that is payable to that company on that debt for that year of assessment; or
- nil (when the interest that is payable exceeds the market-related interest).

A dividend is deemed to have been paid for each year of assessment for which non-market-related interest is payable in respect of the debt (see 3.4.4 for the meaning of 'market-related interest').

#### Example 1 – Amount of dividend deemed to have been paid

##### Facts:

Company G's year of assessment ends on the last day of February. Company G advanced a loan of R1 million on 1 March year 1 to Individual P, a resident and the sole holder of its shares, at a rate of interest of 6%. The loan is repayable after two years. The 'official rate of interest' is 10% for year of assessment 1 and 9% for year of assessment 2.

##### Result:

Individual P is a connected person in relation to Company G under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company G is deemed to have paid dividends under s 64E(4)(a), since an amount is owing by a resident connected person in respect of a debt which arose by virtue of that person's shareholding in Company G. The amount of those dividends is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

<sup>132</sup> Definition of 'official rate of interest' inserted in s 1(1) and deleted from para 1 of the Seventh Schedule with effect from 18 December 2017.

The amount of the dividends deemed to have been paid is R40 000 [R1 million × 4% (10% – 6%)] in year of assessment 1 and R30 000 [R1 million × 3% (9% – 6%)] in year of assessment 2 under s 64E(4)(b)(ii).<sup>133</sup>

Company G is liable for dividends tax under s 64EA(b). Dividends tax payable by Company G on the dividend *in specie* is R8 000 (R40 000 × 20%) in year of assessment 1 and R6 000 (R30 000 × 20%) in year of assessment 2.

**Note:**

The dividends will be exempt from dividends tax under s 64F(1)(f) if Individual P is also an employee and the deemed dividend has been taxed as a fringe benefit in the employee's hands under para (f) of the definition of gross income in s 1(1) and paras 2(f) and 11 of the Seventh Schedule (see 4.1.12 d.).

**Example 2 – Amount of dividend deemed to have been paid**

*Facts:*

Company H's year of assessment ends on the last day of February. Company H advanced a loan of R20 million on 1 March year 1 at a rate of interest of 2% to LJ Trust, which was formed in South Africa. The 'official rate of interest' was 8%. The loan was repaid on 1 March year 2. LJ Trust and Company H are connected persons in relation to each other. The loan was advanced to LJ Trust by virtue of the shares LJ Trust held in Company H.

*Result:*

Company H is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid under s 64E(4)(b)(ii)<sup>134</sup> is R1,2 million [R20 million × 6% (8% – 2%)]. Dividends tax payable by Company H on the dividend *in specie* is R240 000 (R1,2 million × 20%).

**Example 3 – Amount of dividend deemed to have been paid**

*Facts:*

Company A's year of assessment ends on the last day of February. Company A advanced an interest-free loan of R2 million on 1 March 2012 to Individual B, the sole holder of its shares who was a resident. The loan was advanced by virtue of Individual B's holding of shares. The loan was repaid on 28 February 2013. Assume that the 'official rate of interest' was 6,5% for the year of assessment ended on 28 February 2013 and that the loan did not attract STC on 1 March 2012.

*Result:*

Individual B is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company A is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

<sup>133</sup> Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

<sup>134</sup> Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

The amount of the dividend deemed to have been paid is R119 167  $[(R2 \text{ million} \times 6,5\%) \times 11 / 12]$  under s 64E(4)(b)(ii).<sup>135</sup> Dividends tax payable by Company A on the dividend *in specie* is R17 875,05  $(R119 167 \times 15\%)$ .

**Note:**

Dividends tax is calculated for 11 months, since dividends tax came into operation only on 1 April 2012.

**Example 4 – Amount of dividend deemed to have been paid**

*Facts:*

Company B's year of assessment ends on 31 May. Company B advanced a loan of R1 million on 1 June year 1 to Individual C, who is a connected person in relation to Company B and a resident. The loan was repaid on 31 May year 2. The loan carried interest at 6,5% from 1 June year 1 to 28 February year 2 but was interest-free for the period 1 March year 2 to 31 May year 2. The 'official rate of interest' was 6,5% for the full period of the loan. Individual C holds 25% of the equity shares in Company B and the loan arose by virtue of the holding of shares.

*Result:*

Company B is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid is R16 250  $\{[(R1 \text{ million} \times (6,5\% - 6,5\%) \times 9 / 12)]^{136} + \{[R1 \text{ million} \times (6,5\% - 0\%)] \times 3 / 12\}$  under s 64E(4)(b)(ii).<sup>137</sup> Dividends tax payable by Company B on the dividend *in specie* is R3 250,00  $(R16 250 \times 20\%)$ .

**Example 5 – Amount of dividend deemed to have been paid**

*Facts:*

Company M's year of assessment ends on the last day of February. Company M advanced a loan of R2 million on 1 March year 1 at a rate of interest of 8,5% to Trust N, the sole holder of its shares and a resident. The loan, which arose by virtue of Trust N's holding of shares in Company M, was repaid on 29 February year 2. The 'official rate of interest' was 6,5% for the full period of the loan.

*Result:*

Trust N is a connected person in relation to Company M under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company M is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

<sup>135</sup> Section 64E(4)(b)(i) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

<sup>136</sup> That is, a nil deemed dividend for the period during which the loan carried interest at 6,5%.

<sup>137</sup> Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.



The amount of the dividend deemed to have been paid under s 64E(4)(b)(ii) is the greater of –

- (R40 000) (R2 million × 6.5% – 8.5%); or
- nil.

Dividends tax payable by Company M is nil.

### 3.4.3 Deemed date of payment of deemed dividend [s 64E(4)(c)]

A dividend that is deemed to have been paid by a company under s 64E(4)(a) is deemed under s 64E(4)(c) to have been paid on the last day of the year of assessment of the company during which such debt was owing to that company.

#### Example – Deemed date of payment of deemed dividend

##### Facts:

Company K's year of assessment ends on the last day of February. Individual T holds 60% of the equity shares in Company K. Company K made an interest-free loan to Individual T, a resident, of R100 000 on 31 August year 1. The loan was advanced as a result of Individual T's significant holding of shares in Company K. The 'official rate of interest' was 6%. The loan was repaid on 28 February year 2.

##### Result:

Individual T is a connected person in relation to Company K under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company K is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid is R3 000 (R100 000 × 6% × 6 / 12) under s 64E(4)(b)(ii).

The deemed dividend of R3 000 is deemed to have been paid on 28 February year 2 under s 64E(4)(c), which is the last day of Company K's year of assessment during which the deemed dividend was determined.

Dividends tax of R600 (R3 000 × 20%) was payable by Company K on the dividend *in specie* on or before 31 March year 2 under s 64K(1)(b) (see 7.1.2), since the company was liable for dividends tax under s 64EA(b) (see 3.7.2).

### 3.4.4 Meaning of 'market-related interest' [s 64E(4)(d)]

For purposes of s 64E(4), 'market-related interest' in relation to any debt owed to a company means the amount of interest that would have been payable to that company on the amount owing to that company for a period during a year of assessment had interest for that period been payable at the 'official rate of interest' as defined in s 1(1).

Section 7D<sup>138</sup> stipulates that in determining the amount of interest that would have been payable at a specific rate of interest, that amount must be determined –

- without regard to any rule of the common law, for example, the *in duplum* rule, or provision of any Act under which the amount of any interest that is incurred in respect

<sup>138</sup> Section 7D applies with effect from 1 January 2018.

of a debt may not in aggregate exceed the amount of that debt or no interest may accrue or be incurred in respect of a debt once the amount that has accrued or been incurred as interest is equal to the amount of that debt; and

- as simple interest calculated daily.

Under the *in duplum* rule unpaid interest ceases to accrue once it equals the outstanding capital amount of a debt.<sup>139</sup> An amount owing on a debt may therefore be subject to s 64E(4) even if no interest was charged on the debt because of the *in duplum* rule.

The Act defines ‘official rate of interest’ in s 1(1) as follows:<sup>140</sup>

‘ “[O]fficial rate of interest” means—

- in the case of a debt which is denominated in the currency of the Republic, a rate of interest equal to the South African repurchase rate plus 100 basis points; or
- in the case of a debt which is denominated in any other currency, a rate of interest that is the equivalent of the South African repurchase rate applicable in that currency plus 100 basis points:

Provided that where a new repurchase rate or equivalent rate is determined, the new rate of interest applies for the purposes of this definition from the first day of the month following the date on which that new repurchase rate or equivalent rate came into operation;’

**Table – Official rates of interest**

Date from	Date to	Rate (%)
1 March 2011	31 July 2012	6,50
1 August 2012	31 January 2014	6
1 February 2014	31 July 2014	6,50
1 August 2014	31 July 2015	6,75
1 August 2015	30 November 2015	7
1 December 2015	31 January 2016	7,25
1 February 2016	31 March 2016	7,75
1 April 2016	31 July 2017	8
1 August 2017	31 March 2018	7,75
1 April 2018	30 November 2018	7,50
1 December 2018	31 July 2019	7,75
1 August 2019	31 January 2020	7,5
1 February 2020	31 March 2020	7,25
1 April 2020	30 April 2020	6,25
1 May 2020	31 May 2020	5,25
1 June 2020	31 July 2020	4,75
1 August 2020	30 November 2021	4,50

<sup>139</sup> *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (In liquidation)* 1998 (1) SA 811 (SCA); *Sanlam Life Insurance Ltd v South African Breweries Ltd* [2000] 1 All SA 563 (W) and *C: SARS v Woulidge* 2002 (1) SA 68 (SCA), 63 SATC 483. In *Paulsen & another v Slip Knot Investments 777 (Pty) Ltd* 2015 (5) BCLR 509 (CC), 2015 (3) SA 479 at 516, 519 and 521 the Constitutional Court held that the *Oneanate* judgment of the Supreme Court of Appeal of 1998 was incorrect in holding that the *in duplum* rule continues to operate once litigation to recover the debt has been instituted.

<sup>140</sup> The definition of ‘official rate of interest’ was inserted in s 1(1) and deleted from para 1 of the Seventh Schedule with effect from 18 December 2017.

1 December 2021	31 January 2022	4,75
1 February 2022	Until change in repo rate	5,00

### 3.4.5 Debt owing previously subject to STC [s 64E(4)(e)]

An amount owing to a company by a qualifying connected person in respect of a debt (see 3.4.1) will not be deemed to be a dividend for purposes of s 64E(4)(a) to the extent that the amount was deemed to be a dividend that was 'subject to' STC. Thus, while an amount may continue to be owing by a qualifying connected person to a company subsequent to the introduction of dividends tax at an interest rate that is less than the prevailing market-related interest rate, that debt will not trigger a liability for dividends tax if the amount of the debt was 'subject to' STC before its replacement with dividends tax.

A deemed dividend could have arisen for STC purposes under s 64C(2)(g) when a company made a loan or granted an advance to a holder of shares or to a connected person in relation to that holder at a rate of interest less than the 'official rate of interest' as defined in para 1 of the Seventh Schedule. The amount of the deemed dividend for STC purposes would have been the capital amount of the loan. STC would have been levied under s 64B(2) on the amount of the deemed dividend.<sup>141</sup>

To qualify for the exclusion from dividends tax, the amount of the debt must have been 'subject to' STC. The meaning of 'subject to' is not defined in the Act. While these words have also not received judicial consideration in South Africa, it is evident from an analysis of foreign case law<sup>142</sup> that what is required is that STC must have been imposed on the amount of the debt. It is not sufficient that the amount owing was within the scope of STC but because of an exemption that applied in relation to the amount owing, no STC was payable. The deemed dividend could, for example, have been exempt from STC under s 64C(4) or the net amount of the dividend determined under s 64B(3) could have been nil because of dividends received by or that accrued to the company during the relevant dividend cycle.<sup>143</sup>

#### Example 1 – Amount of debt owing previously subject to STC

##### *Facts:*

Company C's year of assessment ends on 31 March. Company C granted an interest-free loan of R2 million to the sole holder of its shares, Individual B, on 1 April 2011. The loan was repayable only in 15 years' time. The loan was deemed to be a dividend under s 64C(2)(g) and STC of R200 000 (R2 million × 10%) was levied on 1 April 2011 which is the date that the loan was made available under s 64C(6)(e). Assume an 'official rate of interest' of 6%.

##### *Result:*

Under s 64E(4)(e) Company C is deemed not to have paid a dividend under s 64E(4)(a), since the amount owing of R2 million was deemed to be a dividend declared by Company C under s 64C(2)(g) that was subject to STC.

<sup>141</sup> STC legislation was repealed with effect from 1 April 2017.

<sup>142</sup> See *Paul Weiser v HM Revenue and Customs* [2012] UKFTT 501 (TC) and L Kruger 'Interest-free and Low-interest Shareholder Loans' (September 2014) 5 *Business Tax and Company Law Quarterly* 21.

<sup>143</sup> STC legislation was repealed with effect from 1 April 2017.

**Example 2 – Amount of debt owing previously not subject to STC***Facts:*

Company D's year of assessment ends on 31 March. Company D granted an interest-free loan of R2 million to the sole holder of its shares, Individual A, on 1 April 2011. The loan was repayable only in 15 years' time. The loan was deemed to be a dividend under s 64C(2)(g) and potentially fell within the ambit of STC on 1 April 2011, which is the date that the loan was made available under s 64C(6)(e). However, no STC was payable because the loan reduced the market value of all the assets of the company to an amount that was less than the liabilities of the company and the exemption in s 64C(4)(c) applied. Assume an 'official rate of interest' of 6%.

*Result:*

Under s 64E(4)(a) Company D is deemed to have paid a dividend. Section 64E(4)(e) does not apply to change this outcome, since the amount owing of R2 million was not 'subject to' STC. The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i). The amount of the dividend deemed to have been paid is R120 000 [R2 million × (6% – 0%)]. The deemed dividend is deemed to have been paid on 31 March 2013. A deemed dividend must be determined for each year of assessment until the loan is repaid or interest equal to or greater than the official rate of interest is charged.

**3.5 Amount of dividend denominated in a currency other than the currency of South Africa [s 64E(5)]**

An amount of a dividend denominated in any currency other than the rand, must be translated to rand by applying the spot rate applicable at the time that the dividend is paid. The Act defines 'spot rate' in s 1(1) as follows:

‘ “[S]pot rate” means the appropriate quoted exchange rate at a specific time by any authorised dealer in foreign exchange for the delivery of currency;’

**Example – Amount of dividend denominated in a currency other than the currency of South Africa***Facts:*

Company K is a foreign company and its shares are listed on the JSE. Company K paid a dividend of \$100 000 on those shares to Individual L, a resident, on 3 September year 1. The spot rate on 3 September year 1 was \$1 = R13,6768.

*Result:*

The dividend is deemed to have been paid by Company K on 3 September year 1 under s 64E(2)(a)(i). Under s 64E(5) the amount of the dividend paid on 3 September year 1 is R1 367 680 (\$100 000 × 13,6768).

### 3.6 Company and regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)]

#### 3.6.1 Company deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)(a)]

A company that pays a dividend to any person and withholds dividends tax from that payment under s 64G(1) is, for purposes of dividends tax, deemed to have paid the amount so withheld to that person. Dividends tax is therefore levied on and withheld from the gross amount of the dividend.

For normal tax purposes the gross amount of the dividend, which includes the amount of dividends tax withheld, is included in the beneficial owner's gross income<sup>144</sup> notwithstanding that the beneficial owner does not receive the full amount of the dividend declared by the company. The full amount is not received because of the withholding of dividends tax by the company from the gross dividend payable.

Consequently, assuming the beneficial owner is subject to dividends tax at the rate of 20%, the beneficial owner will receive only 80% of the amount of the dividend after dividends tax is withheld by the company. The full amount of the dividend must nevertheless be included in the beneficial owner's gross income.

#### **Example – Company deemed to have paid the amount of dividends tax withheld to the beneficial owner**

##### *Facts:*

Company A declared a cash dividend of R100 000 to Individual B. Company A withheld dividends tax of R20 000 ( $R100\ 000 \times 20\%$ ) from the dividend payable to Individual B under s 64G(1) and paid the net amount of the dividend of R80 000 ( $R100\ 000 - R20\ 000$ ) to Individual B.

##### *Result:*

Under s 64E(6)(a) Company A is deemed to have paid the dividends tax withheld of R20 000 to Individual B. Dividends tax at the rate of 20% was withheld from the gross amount of the dividend. The total amount of the dividend paid to Individual B that is included in Individual B's gross income under para (k) of the definition of 'gross income' is R100 000 (R80 000 actual receipt + R20 000 dividends tax withheld).

#### 3.6.2 Regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)(b)]

A regulated intermediary that makes payment of a dividend to any person and withholds dividends tax from that payment under s 64H(1) must, for purposes of dividends tax, be deemed to have paid the amount so withheld to that person. Dividends tax is therefore levied on and withheld from the gross amount of the dividend.

For normal tax purposes the gross amount of the dividend, which includes the amount of dividends tax withheld, is included in the beneficial owner's gross income<sup>145</sup> notwithstanding that the beneficial owner does not receive the full amount of the dividend declared by the

<sup>144</sup> Paragraph (k) of the definition of 'gross income' in s 1(1).

<sup>145</sup> Paragraph (k) of the definition of 'gross income' in s 1(1).

company. The full amount is not received because of the withholding of dividends tax by the regulated intermediary from the gross dividend payable.

Consequently, assuming the beneficial owner is subject to dividends tax at the rate of 20%, the beneficial owner will receive only 80% of the amount of the dividend after dividends tax is withheld by the regulated intermediary. The full amount of the dividend must nevertheless be included in the beneficial owner's gross income.

**Example – Regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner**

*Facts:*

Regulated Intermediary A received a dividend of R100 000 from Company B which it is required to pay, net of dividends tax, to Individual C. Regulated Intermediary A withheld dividends tax of R20 000 ( $R100\,000 \times 20\%$ ) from the dividend under s 64H(1) and paid the net amount of the dividend of R80 000 ( $R100\,000 - R20\,000$ ) to Individual C.

*Result:*

Under s 64E(6)(b) Regulated Intermediary A is deemed to have paid the dividends tax withheld of R20 000 to Individual C. Dividends tax at the rate of 20% was withheld from the gross amount of the dividend. The total amount of the dividend paid to Individual C that is included in Individual C's gross income under para (k) of the definition of 'gross income' is therefore R100 000 (R80 000 actual receipt + R20 000 dividends tax withheld).

**3.7 Liability for dividends tax and deeming provisions (ss 8F(2), 8FA(2), 9H(3)(c)(iii), 24BA(3)(b), 31(3), 64E(4)(b)(i) and 64EA)**

The following persons are liable for dividends tax:

- A beneficial owner of a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie* [s 64EA(a)].
- A resident company that declares and pays a dividend, to the extent that the dividend consists of a distribution of an asset *in specie* [s 64EA(b)].

**3.7.1 Dividend in cash – Beneficial owner liable for dividends tax [s 64EA(a)]**

A beneficial owner of a dividend is, to the extent that the dividend does not consist of a distribution of an asset *in specie*, liable for dividends tax on that dividend notwithstanding that the dividends tax is withheld by the company declaring the dividend or the regulated intermediary (see **Chapter 5**). The incidence of dividends tax on a cash dividend thus falls on the beneficial owner and not the company paying the dividend. This principle is important for a non-resident beneficial owner wishing to claim a tax credit for the dividends tax withheld in South Africa in the non-resident beneficial owner's country of residence (assuming this is catered for by the tax legislation of the beneficial owner's country of residence or under a tax treaty) and for purposes of enabling qualifying beneficial owners to claim exemption from dividends tax or a reduced rate under a tax treaty.

### 3.7.2 Dividends *in specie* – Company declaring and paying dividend liable for dividends tax [ss 8F(2), 8FA(2), 9H(3)(d)(iii), 24BA(3)(b), 31(3), 64E(4)(b)(i) and 64EA(b)]

A resident company that declares and pays a dividend is, to the extent that the dividend consists of a distribution of an asset *in specie*, liable for dividends tax on that dividend. See a. – f. below for examples of deemed distributions of assets *in specie*.

A foreign company that declares and pays a dividend that consists of a distribution of an asset *in specie* is not liable for dividends tax on that dividend, since a distribution of this nature is not included in the definition of ‘dividend’ in s 64D for dividends tax purposes (see 2.3.2). Such a foreign dividend constitutes gross income of the beneficial owner and is subject to normal tax but may be –

- exempt in full under s 10B(2)(a), (c) or (e);<sup>146</sup> or
- in any other case, partially exempt under s 10B(3).

#### a. Debt owing to a company [s 64E(4)(b)(i)]

The amount of a dividend that is deemed to have been paid by a company under s 64E(4)(a) on a debt owing to that company (see 3.4.1), is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i) (see 3.4.2). The company that is deemed to have paid a dividend under s 64E(4)(a) is liable for dividends tax on that dividend.

#### b. A company that ceases to be a resident or that becomes a headquarter company [s 9H(3)(c)(iii)]

Section 9H(3)(c)(iii) provides that a company must, on the date immediately before the day on which it ceased to be a resident or became a headquarter company, for the purposes of s 64EA(b), be deemed to have declared and paid a dividend that consists solely of a distribution of an asset *in specie* to the persons holding shares in that company in accordance with their effective interests in the shares in the company. The amount of the distribution of the asset *in specie* is deemed to be equal to –

- the market value of all the shares in that company on that date,
- less the sum of the CTC of all the classes of shares in the company as at that date.

Immovable property in South Africa, assets of a permanent establishment in South Africa and certain securities derived from employment are excluded from the calculation above under s 9H(4).<sup>147</sup>

<sup>146</sup> Section 10B(2)(e) applies to foreign dividends received or accrued on or after 1 April 2014.

<sup>147</sup> Before 12 December 2013 any interest or right of whatever nature to or in immovable property situated in South Africa, including an interest in immovable property contemplated in para 2(2) of the Eighth Schedule, was also excluded under s 9H(4)(b).

### Example – Company ceases to be a resident – Company liable for dividends tax

#### Facts:

Company A ceased to be a resident on 1 June year 1 as a result of transferring its place of effective management to Mauritius on that date. The balance sheet of Company A reflected the following assets and liabilities as at 31 May year 1:

	R
Cash	200 000
Equity shares in companies at market value	3 000 000
Debt owing to Company A	<u>7 000 000</u>
Total assets	<u>10 200 000</u>
Liabilities	6 000 000

Company A's CTC amounted to R1 million.

#### Result:

Under s 9H(3)(c)(iii)(aa) the amount of the dividend *in specie* deemed to have been declared and paid by Company A on 31 May year 1 is calculated as follows:

	R
Market value of shares in Company A (10 200 000 – 6 000 000)	4 200 000
Less: CTC	<u>(1 000 000)</u>
Dividend <i>in specie</i> deemed to have been declared and paid by Company A	<u>3 200 000</u>

Under s 64EA(b) Company A is liable for dividends tax of R640 000 (R3,2 million × 20%) assuming no exemption or reduced rate applies under s 64FA and had to pay the amount to SARS by 30 June year 1 under s 64K(1)(b).

Section 9H(3A) stipulates that when an exemption or a reduced rate of dividends tax under s 64FA applies to a dividend *in specie* referred to in s 9H(3)(c)(iii) in respect of a company ceasing to be a resident, a beneficial owner contemplated in s 64FA, that holds at least 10% of the equity shares and voting rights in the company ceasing to be a resident, must be treated as having disposed of each of those shares to a person that is a resident on the date immediately before the day on which the company ceased to be a resident and reacquired each of those shares on the day on which the company ceased to be a resident, for an amount equal to the market value of each of those shares.<sup>148</sup> Holders of shares will need to consider the tax consequences of the deemed disposal.

#### c. Transactions under which assets are acquired as consideration for shares issued [s 24BA(3)(b)]

Section 24BA applies when –

- a company issues shares in that company to a person as consideration for an asset acquired from that person; and
- the consideration for that asset, determined as indicated below, is different from the consideration that would have applied had that asset been acquired in exchange for

<sup>148</sup> Section 9H(3A) applies to a holder of shares in a company that ceases to be a resident on or after 1 January 2021.



the issue of those shares under a transaction between independent persons dealing at arm's length.

The consideration for the asset must be determined before taking into account any other transaction, operation, scheme, agreement or understanding that directly or indirectly affects that consideration.

When s 24BA applies, s 24BA(3)(b) provides that, notwithstanding para 11(2)(b)<sup>149</sup> of the Eighth Schedule, to the extent that the market value of the shares immediately after that issue exceeds the market value of that asset immediately before the disposal, the amount of the excess is, for purposes of dividends tax, deemed to be a 'dividend' as defined in s 64D which –

- consists of a distribution of an asset *in specie*; and
- is paid by the company issuing the shares on the date of that issue.

Section 24BA(3)(b) therefore deems the excess referred to above to –

- be a 'dividend' as defined in s 64D;
- consist of a distribution of an asset *in specie*; and
- be paid by the issuing company on the date of that issue.

Section 24BA(3)(b) does not deem any person to be a recipient of the deemed dividend and, taking the purpose of the provision into account, SARS's view is that the parameters of the deemed dividend are not extended to include a deemed recipient.<sup>150</sup> See **4.3.4 a.** for the impact this has on possible exemptions from dividends tax under s 64FA(1) and a possible reduction in the rate of dividends tax under s 64FA(2).

Section 24BA does not apply when a company acquires an asset from a person if –

- that company and that person form part of the same group of companies immediately after that company acquires that asset (see **4.3.1** for commentary on the meaning of 'group of companies') or that person holds all the shares in that company immediately after that company acquires that asset; or
- para 38 of the Eighth Schedule applies which deals, amongst other things, with transactions between connected persons not at an arm's length price.<sup>151</sup>

#### **Example – Assets acquired as consideration for shares issued – Deemed dividend *in specie***

##### *Facts:*

Company A and Company B are residents who are not connected persons in relation to each other. Company A and Company B entered into an agreement under which Company B acquired an asset from Company A on 28 February year 1 in exchange for the issue of shares by Company B on the same date. The market value of Company A's asset immediately before the transaction was R1 million and the market value of the shares issued by Company B was R3 million immediately after the transaction.

<sup>149</sup> Under para 11(2)(b) of the Eighth Schedule there is no disposal of an asset by a company in respect of the issue of a share in the company.

<sup>150</sup> *Chotabhai v Union Government & another* 1911 AD 13; *Daud & another v Tanzania Postal Bank* [2008] 2 EA 77 (CAT); *Kuber Tobacco Products (P) Ltd v DCIT* AIT-2009-11-ITAT.

<sup>151</sup> Section 24BA(4).

**Result:**

Under s 24BA(3)(b) the difference between the market value of the asset exchanged and the market value of the shares issued of R2 million (R3 million – R1 million) is, for purposes of dividends tax only, deemed to be a 'dividend' as defined in s 64D. The dividend is deemed to consist of a distribution of an asset *in specie* and is deemed to be paid by Company B on the date of the issue of the shares, namely, 28 February year 1. Company B is liable for dividends tax under s 64EA(b).

The exemption under s 64FA(1)(a) does not apply, since s 24BA does not deem a person to be the recipient or beneficial owner of the deemed dividend.<sup>152</sup>

**Note:**

Section 24BA would not have applied had Company A and Company B formed part of the same group of companies or if Company A held all the shares in Company B immediately after the transaction [s 24BA(4)].

**d. Interest on hybrid debt instruments deemed to be dividends *in specie* [s 8F(2)]**

Under s 8F(2) any amount that is incurred by a company or accrues to a person<sup>153</sup> in respect of interest on or after the date that an instrument becomes a hybrid debt instrument is –<sup>154</sup>

- deemed to be a dividend *in specie* in respect of a share declared and paid by that company to the person to whom that amount accrued on the last day of the year of assessment of that company during which it was incurred;<sup>155</sup>
- not deductible;<sup>156</sup> and
- deemed to be a dividend *in specie* in respect of a share that accrues to that person on the date contemplated in the first bullet.<sup>157</sup>

Applicable amounts of interest incurred or accrued on or after 19 January 2022<sup>158</sup> are deemed to be a dividend *in specie* for the company incurring the interest and for the person to whom it accrues. Before that date the position under s 8F(2) varied depending on the amendments applicable to the facts of the particular case. Depending on the date and facts, amounts of interest were deemed to be a dividend *in specie* for the company incurring the interest but remained interest for the person to whom it accrued, or amounts were deemed to be a dividend *in specie* for the company incurring the interest and for the person to whom it accrued. The various amendments must be considered in light of the facts of a particular case taking into account the effective date of the amendments.

The amount of the interest that is deemed under s 8F(2)(a) to be a dividend *in specie* declared and paid by the company incurring the interest expense will be liable to dividends tax under s 64E(1). This dividend may qualify for an exemption from dividends tax under s 64FA(1)(a) or (b) or be subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaties are met (see 4.3.1, 4.3.2 and 4.3.4). The company

<sup>152</sup> See 4.3.4 a.

<sup>153</sup> The words 'or accrues to a person' apply in respect of amounts incurred or accrued on or after the date of promulgation of the Taxation Laws Amendment Act 20 of 2021, namely 19 January 2022.

<sup>154</sup> The Act defines 'hybrid debt instrument' in s 8F(1).

<sup>155</sup> Section 8F(2)(a).

<sup>156</sup> Section 8F(2)(b).

<sup>157</sup> Section 8F(2)(c) applies in respect of amounts incurred or accrued on or after the date of promulgation of the Taxation Laws Amendment Act 20 of 2021, namely 19 January 2022.

<sup>158</sup> Date of promulgation of the Taxation Laws Amendment Act 20 of 2021.

incurring the interest expense would be liable for dividends tax under s 64EA(b) because the interest expense is deemed to be a dividend *in specie*.

Under s 64K(1)(b) dividends tax must be paid to the Commissioner by the last day of the month following the month during which the dividend is paid by the company. As noted above, the dividend is deemed to have been declared and paid on the last day of the year of assessment of the company during which the interest expense was incurred. The dividends tax, if applicable, must therefore be paid on or before the last day of the first month of the year of assessment following the year of assessment in which the dividend was deemed to be paid.

The amount of interest that is deemed to be a dividend *in specie* in respect of a share that accrues to a person on the last day of the payer's year of assessment, is included in that person's gross income under para (k) of the definition of 'gross income' in s 1(1). The deemed dividend *in specie* may qualify for exemption under s 10(1)(k)(i).

Section 8F(3) provides that s 8F does not apply to an instrument under specified circumstances.

Various amendments were made to s 8F.<sup>159</sup> These amendments must be considered in light of the facts of a particular case and taking into account the effective date of the amendments.

**Example – Interest on hybrid debt instrument deemed to be a dividend *in specie* – Amounts incurred or accrued on or after 19 January 2022**

*Facts:*

Company A incurred interest of R20 million on an instrument evenly during its year of assessment ending on 31 March year 2. On 1 October year 1 the instrument became a 'hybrid debt instrument'.

*Result:*

Under s 8F(2)(a) interest of R10 million (R20 million × 6 / 12) incurred by Company A and which accrued to the holder of the hybrid debt instrument is deemed to be a dividend *in specie* in respect of a share that is declared and paid by Company A to the person to whom the interest accrued on 31 March year 2. Under s 8F(2)(b) Company A is not entitled to a deduction for the amount when calculating taxable income. The amount of R10 million is deemed to be a dividend *in specie* which accrued to the holder of the instrument on 31 March year 2 under s 8F(2)(c). This amount is included in gross income but may be exempt from normal tax under s 10(1)(k)(i).

Depending on the facts of the particular case, the interest of R10 million that is deemed to be a dividend *in specie* may be exempt from dividends tax under s 64FA(1)(a) or (b) or subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaties are met. Assuming that the dividend does not qualify for an exemption or a reduction in the rate of dividends tax in this example, the deemed dividend is subject to dividends tax at a rate of 20% under s 64E(1). Company A is liable for dividends tax of R2 million (R10 million × 20%) under s 64EA(b) which must be paid to the Commissioner under s 64K(1)(b) on or before 30 April year 2.

<sup>159</sup> The Taxation Laws Amendment Acts 43 of 2014, 25 of 2015, 15 of 2016, 17 of 2017, 23 of 2018, 34 of 2019, 23 of 2020 and 20 of 2021.

### e. Hybrid interest deemed to be dividends *in specie* [s 8FA(2)]

Under s 8FA(2) any amount that is incurred by a company or accrues to a person<sup>160</sup> in respect of interest, on or after the date that the interest becomes hybrid interest is –<sup>161</sup>

- deemed to be a dividend *in specie* in respect of a share that is declared and paid by that company to the person to whom that amount accrued on the last day of that year of assessment of the company during which it was incurred;<sup>162</sup>
- not deductible;<sup>163</sup> and
- deemed to be a dividend *in specie* in respect of a share that accrues to that person on the date contemplated in the first bullet.<sup>164</sup>

Applicable amounts of interest incurred or accrued on or after 19 January 2022<sup>165</sup> are deemed to be a dividend *in specie* for the company incurring the interest and for the person to whom it accrues. Before that date position under s 8FA(2) varied depending on the amendments applicable to the facts of the particular case. Depending on the date and facts, amounts of interest were deemed to be a dividend *in specie* for the company incurring the interest but remained interest for the person to whom it accrued or the amounts were deemed to be a dividend *in specie* for the company incurring the interest and for the person to whom it accrued. The various amendments must be considered in light of the facts of a particular case taking into account the effective date of the amendments.

The amount of interest deemed under s 8FA(2)(a) to be a dividend *in specie* declared and paid by the company incurring the interest expense will be liable to dividends tax under s 64E(1). This dividend may qualify for an exemption from dividends tax under s 64FA(1)(a) or (b) or be subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaty are met (see 4.3.1, 4.3.2 and 4.3.4). The company incurring the interest expense is liable for dividends tax under s 64EA(b) because the interest expense is deemed to be a dividend *in specie*.

Under s 64K(1)(b) dividends tax must be paid to the Commissioner by the last day of the month following the month during which the dividend is paid by the company. As noted above, the dividend is deemed to have been declared and paid on the last day of the year of assessment of the company during which the interest expense was incurred. The dividends tax, if applicable, must therefore be paid on or before the last day of the first month of the year of assessment following the year of assessment in which the dividend was deemed to be paid.

The amount of interest that is deemed to be a dividend *in specie* in respect of a share that accrues to a person on the last day of the payer's year of assessment, is included in gross income under para (k) of the definition of 'gross income' in s 1(1). The deemed dividend *in specie* may qualify for exemption under s 10(1)(k)(i).

Section 8FA(3) provides that s 8FA does not apply to interest owed on an instrument in specified circumstances.

<sup>160</sup> The words 'or accrues to a person' have been inserted in respect of amounts incurred or accrued on or after the date of promulgation of the Taxation Laws Amendment Act 20 of 2021, namely 19 January 2022.

<sup>161</sup> The Act defines 'hybrid interest' in s 8FA(1).

<sup>162</sup> Section 8FA(2)(a).

<sup>163</sup> Section 8FA(2)(b).

<sup>164</sup> Section 8FA(2)(c) applies in respect of amounts incurred or accrued on or after the date of promulgation of the Taxation Laws Amendment Act 20 of 2021, namely 19 January 2022.

<sup>165</sup> Date of promulgation of the Taxation Laws Amendment Act 20 of 2021.

Various amendments were made to s 8FA.<sup>166</sup> These amendments must be considered in light of the facts of a particular case and taking into account the effective date of the amendments.

**Example – Hybrid interest deemed to be a dividend *in specie* – Amounts incurred or accrued on or after 19 January 2022**

*Facts:*

Company X incurred interest of R10 million on an instrument during its year of assessment ending on 31 March year 2. The interest became 'hybrid interest' on 1 October year 1.

*Result:*

Under s 8FA(2)(a) the hybrid interest of R5 million ( $R10 \text{ million} \times 6 / 12$ ) incurred by Company X and which accrued to the holder of the instrument is deemed to be a dividend *in specie* in respect of a share that is declared and paid by Company X to the person to whom the interest accrued on 31 March year 2. Under s 8FA(2)(b) Company X is not entitled to a deduction for the amount when calculating taxable income. The amount of R5 million is deemed to be a dividend *in specie* which accrued to the holder of the instrument on 31 March year 2 under s 8FA(2)(c). This amount is included in gross income but may be exempt from normal tax under s 10(1)(k)(i).

Depending on the facts of the particular case the hybrid interest of R5 million that is deemed to be a dividend *in specie* may be exempt from dividends tax under s 64FA(1)(a) or (b) or subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and applicable tax treaties are met. Assuming that the dividend does not qualify for an exemption or a reduction in the rate of dividends tax in this example, the deemed dividend is subject to dividends tax at a rate of 20% under s 64E(1). Company X is liable for dividends tax of R1 million ( $R5 \text{ million} \times 20\%$ ) under s 64EA(b) which must be paid to the Commissioner under s 64K(1)(b) on or before 30 April year 2.

**f. Transfer pricing adjustments deemed to be a dividend consisting of a distribution of an asset *in specie* [s 31(3)]**

Section 31 applies to any international transaction between specified connected persons or associated enterprises<sup>167</sup> not dealing at arm's length if any person that is a party to that transaction, operation, scheme, agreement or understanding or any resident in relation to a controlled foreign company contemplated in subpara (iv) of the definition of 'affected transaction', derives a tax benefit from it. Section 31(2) requires taxpayers to –

- determine whether the actual terms and conditions of any transaction, operation, scheme, agreement or understanding meeting the requirements of para (a) of the definition of 'affected transaction'<sup>168</sup> differ from the terms and conditions that would have existed if the parties had been independent persons dealing at arm's length; and
- calculate their taxable income based on the arm's length terms and conditions of the affected transaction if there is a difference which results or will result in a tax benefit for one of the parties to the affected transaction or any resident in relation to a

<sup>166</sup> The Taxation Laws Amendment Acts 43 of 2014, 25 of 2015, 15 of 2016, 17 of 2017, 23 of 2018, 34 of 2019, 23 of 2020 and 20 of 2021.

<sup>167</sup> Section 31 applies to associated enterprises with effect from years of assessment commencing on or after 1 January 2023. Definition of 'associated enterprise' in s 31(1).

<sup>168</sup> Definition of 'affected transaction' in s 31(1).

controlled foreign company contemplated in subpara (iv) of the definition of 'affected transaction'.

Section 31(3) provides for a secondary adjustment to be made to the extent that there is a difference in the amount applied in calculating taxable income (that is, an arm's length amount) under s 31(2) and the amount which would have been applied had s 31(2) not applied. It states that the amount of the difference must, if the person is a resident and the other person to the affected transaction is not a resident or is a resident that has a permanent establishment outside South Africa to which the affected transaction relates be deemed –

- to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person if the resident is a company [s 31(3)(i)]; or
- for the purposes of donations tax, to be a donation made by that resident to that other person if the resident is a person other than a company [s 31(3)(ii)],

on the last day of the period of six months following the end of the year of assessment for which the adjustment is made.<sup>169</sup>

A dividend consisting of a distribution of an asset *in specie* declared and paid as contemplated in s 31(3) is specifically excluded from the definition of 'dividend' in s 1(1) but any amount contemplated in s 31(3)(i) is specifically included in the definition of 'dividend' in s 64D with effect from years of assessment commencing on or after 1 January 2019.

In applying the deeming provisions above it is apparent that the requirements of ss 64E(1) and 64EA(b) (see **3.1.1** and **3.7.2**) have been met and that, in the absence of an exemption or a reduced rate of dividends tax applying (see **4.3.1**, **4.3.2** and **4.3.4**), the deemed dividend will be subject to dividends tax at a rate of 20%.

For completeness, it is also noted that in the case of a deemed donation under s 31(3)(ii), Part V of the Act, which includes the exemptions from donations tax, must be considered in determining if donations tax is payable. Practically the exemptions are unlikely to apply but it will depend on the facts of each case.

If the difference referred to under s 31(3) was deemed before 1 January 2015 to be a loan that constituted an affected transaction then to the extent it had not been repaid before 1 January 2015, it was deemed –<sup>170</sup>

- to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person on 1 January 2015 if the resident was a company [para (a) of the proviso to s 31(3)]; or
- for the purposes of donations tax, to be a donation made by that resident to that other person on 1 January 2015 if the resident was a person other than a company [para (b) of the proviso to s 31(3)].

The same principles regarding the availability of an exemption from dividends tax or donations tax, as appropriate, or a reduction in the rate of dividends tax as indicated above apply. See **4.3.1**, **4.3.2** and **4.3.4 c**.

<sup>169</sup> Section 31(3) was amended by s 50(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2015. The amended s 31(3) therefore applies to years of assessment ending on or after 1 January 2015 as the determination of taxable income would be on or after that date.

<sup>170</sup> The proviso to s 31(3).

**Example – Transfer pricing adjustment deemed to be a dividend consisting of a distribution of an asset *in specie***

*Facts:*

Company A, a resident, entered into an agreement with Company B, a foreign company on 31 January year 1 which resulted in a transfer pricing adjustment of R20 million made under s 31(2) to the taxable income of Company A for its year of assessment ending on 30 April year 1.

*Result:*

Under s 31(3)(i) the amount of R20 million is deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by Company A to Company B on 31 October year 1, which is the last day of a period of six months following the end of its year of assessment ending on 30 April year 1.

The deemed dividend under s 31(3)(i) is included in the definition of ‘dividend’ in s 64D. Under ss 64E(1) and 64EA(b) Company A is liable to pay dividends tax of R4 million (R20 million × 20%). The dividends tax has to be paid to SARS on or before 30 November year 1 under s 64K(1)(b).

**Note:**

If the transfer pricing adjustment of R20 million was deemed before 1 January 2015 to be a loan that constituted an affected transaction, so much of the deemed loan that was not repaid before 1 January 2015 had to be deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by Company A to Company B on 1 January 2015, under para (a) of the proviso to s 31(3).

### 3.8 Deemed dividends (s 64EB)

Section 64EB is an anti-avoidance provision that is deemed to have come into operation on 1 September 2012. It applies to transactions entered into on or after that date and amounts paid on or after 1 October 2012 on transactions entered into before 1 September 2012.

See also **3.7.2 b., c., d., e. and f.** for circumstances in which various sections deem certain amounts to be a dividend consisting of a distribution of an asset *in specie*.

#### 3.8.1 Cession of a dividend [s 64EB(1)]

See Issue 3 of this guide for amounts paid before 4 July 2013.

*Amounts paid on or after 4 July 2013<sup>171</sup> but before years of assessment commencing on or after 1 January 2019*

Section 64EB(1) provided that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquired the right to a dividend by way of a cession; and
- the dividend was either announced or declared before that acquisition,

the person ceding the right was deemed to be the beneficial owner of that dividend.

<sup>171</sup> The treatment of amounts paid from 1 October 2012 to 3 July 2013 is not included in this Guide – refer to the wording of the section applicable during that time.

Section 64EB(1) did not apply to any cession in respect of a share if the person to whom those rights were ceded held all the rights attaching to the share after the cession.

### **Example – Deemed dividend – Cession of a dividend**

#### *Facts:*

Company A Ltd declared a dividend of R1 million on 4 October year 1 to non-resident holders of its shares. The dividend was payable to holders registered on 21 October year 1 and was paid on 24 October year 1. The non-resident holders of shares ceded the right to the dividend on 5 October year 1 to Company B, a resident, for consideration of R925 000. Company A Ltd paid the dividend of R1 million on 24 October year 1 to Company B. On 24 October year 1 Company B paid R925 000 to the non-resident holders of shares for the cession of the dividend.

#### *Result:*

##### *Dividends tax*

Under s 64EB(1) the non-resident holders of the shares were deemed to be the beneficial owners of the dividend of R1 million paid by Company A Ltd to Company B on 24 October year 1.

Under s 64G(1) (see **5.2.1**) Company A Ltd had to withhold dividends tax of R200 000 (R1 million × 20%) from the dividend actually paid to Company B. The dividend could have been subject to dividends tax at a reduced rate as a result of the application of a tax treaty under s 64G(3) (see **5.2.3**). If Company A Ltd made use of a regulated intermediary, the regulated intermediary had to withhold dividends tax under s 64H(1).

##### *Normal tax*

While the non-resident holders of the shares were deemed under s 64EB(1) to be the beneficial owners of the shares for dividends tax purposes, Company B was for all other tax purposes the recipient of the dividends. Under para (ee) of the proviso to s 10(1)(k)(i) the dividend received by Company B was not exempt from normal tax. Company B could possibly have claimed a deduction under s 11(a) of R925 000 paid to the non-resident holders of shares for the cession of the dividend.

### *Amounts paid in respect of years of assessment commencing on or after 1 January 2019*

Section 64EB(1) provides that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquires the right to a dividend in respect of a share, including a dividend that has not yet been declared or has not yet accrued, by way of cession; and
- an amount in respect of that dividend is received by or accrues to the person who acquired that right,

any<sup>172</sup> person ceding that right is deemed to be the beneficial owner of that dividend.

Section 64EB(1) does not apply to any cession in respect of a share if the person to whom those rights are ceded holds all the rights attaching to the share after the cession.

<sup>172</sup> Section 64EB(1) was amended to refer to ‘any’ person ceding that right with effect from 1 January 2021 and therefore also applies to amounts paid on or after 1 January 2021 in respect of shares borrowed or acquired under a collateral arrangement.



### 3.8.2 Amount paid for a borrowed share in a listed company [s 64EB(2)]

See Issue 3 of this guide for amounts paid before 4 July 2013. *Amounts paid on or after 4 July 2013 but before years of assessment commencing on or after 1 January 2019*

Section 64EB(2) applied when a person that is listed in s 64EB(2)(a) (the borrower – see list of specified borrowers below) borrowed a share in a listed company from another person (the lender) and a dividend was either announced or declared by the listed company before that share was borrowed. Under s 64EB(2), for the purposes of dividends tax, any amount paid by the borrower to the lender not exceeding the amount of the dividend in respect of the borrowed share was deemed to be a dividend paid by the borrower for the benefit of the lender.

The persons specified in s 64EB(2)(a) are the following:

- A resident company (see **4.1.1**) [s 64EB(2)(a)(i)].
- The government of South Africa in the national, provincial or local sphere (see **4.1.2**) [s 64EB(2)(a)(ii)].
- A public benefit organisation approved by the Commissioner under s 30(3) (see **4.1.3**) [s 64EB(2)(a)(iii)].
- A trust contemplated in s 37A, namely, an environmental rehabilitation trust (see **4.1.4**) [s 64EB(2)(a)(iv)].
- An institution, board or body contemplated in s 10(1)(cA) approved by the Commissioner which is exempt from normal tax (see **4.1.5**) [s 64EB(2)(a)(v)].
- A fund contemplated in s 10(1)(d)(i) or (ii) that is exempt from normal tax (see **4.1.6**) [s 64EB(2)(a)(vi)].
- A person contemplated in s 10(1)(t) that is exempt from normal tax (see **4.1.7**) [s 64EB(2)(a)(vii)].
- A holder of shares in a ‘registered micro business’, as defined in the Sixth Schedule, paying that dividend, to the extent that the aggregate amount of dividends paid by that registered micro business to holders of its shares during the year of assessment in which that dividend is paid does not exceed R200 000 [s 64EB(2)(a)(viii)]. Section 64EB(2)(a)(viii) was deleted with effect from 8 January 2016.
- A person that is not a resident and the dividend is paid by a foreign company on a listed share (see **4.1.10**) [s 64EB(2)(a)(ix)]. Section 64EB(2)(a)(ix) was deleted with effect from 8 January 2016.
- A portfolio of a collective investment scheme in securities (see **4.1.11**) [s 64EB(2)(a)(x)].
- Any person to the extent that the dividend constitutes income of that person (see **4.1.12**) [s 64EB(2)(a)(xi)].
- Any person to the extent that the dividend was subject to STC [s 64EB(2)(a)(xii)]. Section 64EB(2)(a)(xii) was deleted with effect from 8 January 2016.
- Any fidelity or indemnity fund contemplated in s 10(1)(d)(iii) that is exempt from normal tax (see **4.1.14**) [s 64EB(2)(a)(xiii)].
- A small business funding entity as contemplated in s 10(1)(cQ) (see **4.1.9**) [s 64EB(2)(a)(xiv)].

Under s 64E(1) dividends tax is levied on dividends paid by any company other than a headquarter company. Therefore only dividends deemed to have been paid by persons listed

above which are a 'company' as defined in s 1(1) will potentially be subject to dividends tax under s 64E(1).

**Example – Deemed dividend – Dividend announced or declared before a share is borrowed – Amounts paid on or after 4 July 2013 but before years of assessment commencing on or after 1 January 2019**

*Facts:*

Company A Ltd declared a dividend of R800 000 on 4 October year 1 to foreign holders of its shares. The dividend was payable to holders of shares registered on 21 October year 1. On 7 October year 1 the foreign holders of shares lent the shares in Company A Ltd to Company B, a resident. During the lending period, Company B received the dividend of R800 000 and paid R740 000 in the form of a manufactured dividend to the foreign holders of shares for the shares borrowed.

*Result:*

*Dividends tax*

The dividend of R800 000 paid by Company A Ltd to Company B was exempt from dividends tax under s 64F(1)(a), since Company B is a resident (see **4.1.1**).

The manufactured dividend of R740 000 paid by Company B to the foreign holders of shares was deemed to be a dividend paid by Company B for the benefit of the foreign holders of shares under s 64EB(2). Under s 64G(1) (see **5.2.1**) Company B had to withhold dividends tax of R148 000 ( $R740\,000 \times 20\%$ <sup>173</sup>) from the dividend that was deemed to be paid by Company B for the benefit of the foreign holders of shares. The dividend of R740 000 that was deemed to be a dividend paid by Company B could have been subject to dividends tax at a reduced rate as a result of the application of a tax treaty under s 64G(3) (see **5.2.3**).

*Normal tax*

Under para (ff) of the proviso to s 10(1)(k)(i) the dividend received by Company B of R800 000 was not exempt from normal tax. Company B could possibly have claimed a deduction under s 11(a) of R740 000 paid to the foreign holders of shares for the shares borrowed.

*Amounts paid in respect of years of assessments commencing on or after 1 January 2019*

Section 64EB(2) applies when a person that is listed in s 64EB(2)(a) (the borrower – see list of specified borrowers above) borrows from another person or acquires a listed share under a collateral arrangement entered into with another person and a dividend in respect of that share or any amount determined with reference to a dividend in respect of that share is received by or accrues to that person.

Under s 64EB(2), for the purposes of dividends tax, any amount paid by that person to that other person not exceeding that dividend or amount determined with reference to a dividend

<sup>173</sup> The rate of dividends tax is 20% in respect of dividends paid on or after 22 February 2017.

in respect of that share is deemed to be a dividend paid by that person for the benefit of that other person.<sup>174</sup>

### 3.8.3 The purchase of a share cum dividend [s 64EB(3)]

See Issue 3 of this guide for amounts paid before 4 July 2013.

*Amounts paid on or after 4 July 2013 but before years of assessment commencing on or after 1 January 2019*

Section 64EB(3) provided that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquired a share in a listed company (or any right in respect of that share) from another person after a dividend was announced or declared in respect of that share, and
- that acquisition was part of a resale agreement between the person acquiring the share and that other person or any other company forming part of the same group of companies as that other person,

that other person or other company was deemed to be the beneficial owner of the dividend.

The Act defines ‘resale agreement’ in s 64EB(4) as the acquisition of a share by any person subject to an agreement under which that person undertakes to dispose of that share or any other share of the same kind and of the same or equivalent quality at a future date.

#### **Example – Deemed dividend – The purchase of a share *cum dividend* – Amounts paid on or after 4 July 2013 but before years of assessment commencing on or after 1 January 2019**

##### *Facts:*

Company A Ltd declared a dividend of R1 million on 4 October year 1 to foreign holders of its shares. The dividend was payable to holders of shares registered on 21 October year 1 and was paid on 24 October year 1. On 7 October year 1 the foreign holders of shares sold the shares *cum dividend* in Company A Ltd to Company B, a resident, for R1,2 million. Company A Ltd paid the dividend of R1 million on 24 October year 1 to Company B. On 28 October year 1 the foreign holders of shares repurchased the same shares from Company B for R275 000.

##### *Result:*

##### *Dividends tax*

Under s 64EB(3) the foreign holders of shares were deemed to be the beneficial owners of the dividend of R1 million paid by Company A Ltd to Company B.

Under s 64G(1) (see 5.2.1) Company A Ltd had to withhold dividends tax of R200 000 (R1 million × 20%<sup>175</sup>) from the amount of the dividend paid to Company B, because the foreign holders of shares were deemed to be the beneficial owners of the dividend. The dividend of R1 million could have been subject to dividends tax at a reduced rate under s 64G(3) (see 5.2.3). If Company A Ltd made use of a regulated intermediary, the regulated intermediary and not Company A Ltd had to withhold the dividends tax under s 64H(1).

<sup>174</sup> Section 64EB(2) was amended for amounts paid on or after 1 January 2021 in respect of shares borrowed or acquired under a collateral arrangement to include the wording ‘any amount determined with reference to a dividend in respect of that share’.

<sup>175</sup> The rate of dividends tax is 20% in respect of dividends paid on or after 22 February 2017.

*Normal tax*

Under para (hh) of the proviso to s 10(1)(k)(i) the dividend of R1 million was not exempt from normal tax.

*Amounts paid in respect of years of assessment commencing on or after 1 January 2019*

Section 64EB(3) provides that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquires a share in a listed company (or any right in respect of that share) from another person;
- that acquisition is part of a resale agreement between the person acquiring that share and that other person or to any other company forming part of the same group of companies as that other person; and
- a dividend in respect of that share is received by or accrues to that person,

that other person or other company is deemed to be the beneficial owner of that dividend.

## Chapter 4

### Exemption from dividends tax and relief from double taxation (ss 64F, 64FA and 108)

#### 4.1 Exemption from dividends tax for dividends other than dividends comprising distribution of assets *in specie* [s 64F(1)]

A dividend will be exempt from dividends tax under s 64F(1)<sup>176</sup> to the extent that it does not consist of a dividend *in specie* and if the beneficial owner is any one of the persons listed in s 64F(1) (see 4.1.1 – 4.1.15). The beneficial owner of a dividend is the person entitled to the benefit of the dividend attaching to a share (see 2.3.1).

A dividend may under certain circumstances qualify for exemption from dividends tax under more than one of the paragraphs of s 64F(1), for example:

- Section 64F(1)(a) and (l) if the beneficial owner is a resident company and the dividend constitutes income of that company.
- Section 64F(1)(a) and (c) if the beneficial owner is a resident company that is approved by the Commissioner under s 30(3) as a public benefit organisation.

Should more than one exemption apply, the dividend will be exempt only once from dividends tax.

The beneficial owner must submit the relevant declaration forms under s 64G(2)(a) or s 64H(2)(a) to the company or regulated intermediary for dividends tax not to be withheld from the dividend.

Exemption from dividends tax for dividends *in specie* is provided for in s 64FA(1) (see 4.3.1).

#### 4.1.1 A resident company [s 64F(1)(a)]

A dividend is exempt from dividends tax if the beneficial owner is a resident<sup>177</sup> company.<sup>178</sup> The exemption applies irrespective of whether the company paying the dividend and the company receiving the dividend as the beneficial owner are within the same group of companies.

The following are examples of companies that fall within the definition of ‘company’ in s 1(1) (see 3.1.1):

- A state-owned company, a private company, a personal liability company, a public company and a non-profit company incorporated under the Companies Act (para (a) of the definition of ‘company’). This may include –
  - a body corporate established under s 36 of the Sectional Titles Act 95 of 1986; and
  - a share block company established under the Companies Act.

<sup>176</sup> Before 1 April 2013, dividends were exempt under s 64F. Section 64F was renumbered to s 64F(1) with the introduction of s 64F(2) with effect from 1 April 2013.

<sup>177</sup> See 2.2.2 for the definition of ‘resident’.

<sup>178</sup> See Binding Private Rulings 327 ‘Tax Implications of a Group Restructuring’ and 346 ‘Tax Implications Resulting from the Elimination of Intra-Group Loans’.

- A domesticated company, which is a company whose registration has been transferred to South Africa (para (a) of the definition of 'company').
- A mutual bank incorporated under the Mutual Banks Act 124 of 1993 (para (a) of the definition of 'company').
- Any co-operative registered under the Co-operatives Act 91 of 1981 or the Co-operatives Act 14 of 2005 (para (c) of the definition of 'company').
- Any association (other than an association, company or body corporate formed under South African law and a close corporation) formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public (para (d) of the definition of 'company'). Such companies may include the following:
  - An association of persons formed solely for purposes of managing the collective interests common to all its members and which has been approved by the Commissioner under s 10(1)(e)(i)(cc).
  - A recreational club comprising a society or association the sole or principal object of which is to provide social and recreational amenities or facilities for its members and which has been approved by the Commissioner under s 30A(2).
  - An 'entity' as defined in s 30B(1), excluding a trust, approved by the Commissioner under s 30B(2). Such an entity may include a mutual loan association, fidelity or indemnity fund, trade union, chamber of commerce or industry (or an association of such chambers) and a local publicity association. Also included is a society or other association of persons established to promote the common interests of persons, being members of that society or association of persons, carrying on any particular kind of business, profession or occupation.
- Any association, corporation, company or body corporate incorporated or formed under foreign law that has its place of effective management in South Africa [para (b) of the definition of 'company' read with para (b) of the definition of 'resident' in s 1(1)].
- Any close corporation established under the Close Corporations Act (para (f) of the definition of 'company').

A resident company that is an undisclosed partner in an *en-commandite* partnership must disclose its status as a company in order for the exemption under s 64F(1)(a) to apply.

#### **Example 1 – Exemption from dividends tax – Section 64F(1)(a)**

##### *Facts:*

Individual X holds all the shares in Company A, Company A holds all the shares in Company B and Company B holds all the shares in Company C. Company C pays a dividend of R200 000 to Company B, Company B pays a dividend of R200 000 to Company A and Company A pays a dividend of R200 000 to Individual X. All the companies are residents.

##### *Result:*

Dividends tax is levied only on the dividend of R200 000 paid by Company A to Individual X. The dividends paid to Company A and Company B are exempt from dividends tax under s 64F(1)(a), since the beneficial owners of the dividends are resident companies.

**Example 2 – Exemption from dividends tax – Section 64F(1)(a)***Facts:*

Trust A, a vesting trust, holds all the shares in Company M. Company X is the sole beneficiary of Trust A. Both companies are residents. Company M paid a dividend of R100 000 to Trust A.

*Result:*

Company X is the beneficial owner of the dividend of R100 000 under s 25B(1), since it has a vested right to the dividend (see 2.3.1). The dividend of R100 000 is exempt from dividends tax under s 64F(1)(a), since Company X is a resident.

**Example 3 – Exemption from dividends tax – Section 64F(1)(a)***Facts:*

Trust B's year of assessment ends on the last day of February. Trust B, a discretionary trust, holds all the shares in Company M. Company A is a beneficiary of Trust B. Both companies are residents. Company M paid a dividend of R100 000 to Trust B on 30 June year 1. The trustees of Trust B vested the dividend in Company A on 28 February year 2.

*Result:*

Under s 25B(1) and (2) Company A is the beneficial owner of the dividend of R100 000, since the dividend was vested in Company A during Trust B's year of assessment ending on 28 February year 2 (see 2.3.1). The exemption under s 64F(1)(a) therefore applies. The dividend is not exempt from normal tax under para (ee) of the proviso to s 10(1)(k)(i) with the result that the exemption under s 64F(1)(l) also applies (see 4.1.12 a.).

**Note:**

Should the trustees vest the dividend in Company A after Trust B's year of assessment ending on 28 February year 2, Trust B will be the beneficial owner of the dividend and the exemption under s 64F(1)(a) will not apply.

**4.1.2 The government in the national, provincial or local sphere [s 64F(1)(b)]**

A dividend is exempt from dividends tax if the beneficial owner is the government of South Africa in the national, provincial or local sphere.<sup>179</sup> This exemption is in line with the exemption from normal tax provided for in s 10(1)(a).

Section 40(1) of the Constitution of the Republic of South Africa, 1996 stipulates that government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated.<sup>180</sup>

State institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution of the Republic of South Africa, 1996 (for example, the SAHRC and Public Protector) are excluded from the ambit of ss 10(1)(a) and 64F(1)(b). Public entities referred to in Schedule 2 of the Public Finance Management Act 1 of 1999 are similarly excluded (for example, Eskom, IDC, SABC, Sapo, SAA, Telkom and Transnet amongst others).

<sup>179</sup> Section 64F(1)(b) was amended by s 70(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015 to bring the wording of s 64F(1)(b) in line with that of s 10(1)(a).

<sup>180</sup> See Chapters 5, 6 and 7 of the Constitution and the definition of 'municipality' in s 1(1). In *Minister of Defence & Military Veterans v Thomas* 2015 (10) BCLR 1172 (CC), 2016 (1) SA 103 the Constitutional Court considered the meaning of 'government'.

### 4.1.3 A public benefit organisation [s 64F(1)(c)]

A dividend is exempt from dividends tax if the beneficial owner is a public benefit organisation approved by the Commissioner under s 30(3).<sup>181</sup> The Act defines ‘public benefit organisation’ in s 30(1) as follows:

- ‘ “[P]ublic benefit organisation” means any organisation—
- (a) which is—
    - (i) a non-profit company as defined in section 1 of the Companies Act or a trust or an association of persons that has been incorporated, formed or established in the Republic; or
    - (ii) any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country;
  - (b) of which the sole or principal object is carrying on one or more public benefit activities, where—
    - (i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;
    - (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and
    - (iii) . . . . .
  - (c) where—
    - (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);
    - (ii) . . . . .
    - (iii) . . . . .’

A public benefit organisation which has been approved under s 30(3) qualifies for the exemption under s 64F(1)(c) even if it is constituted as a trust. A branch of a foreign exempt organisation which has been approved as a public benefit organisation will likewise be exempt under s 64F(1)(c).

### 4.1.4 An environmental rehabilitation trust [s 64F(1)(d)]

A dividend is exempt from dividends tax if the beneficial owner is a trust contemplated in s 37A whose object it is to apply its property solely for the rehabilitation of mining areas upon their closure. The receipts and accruals of an environmental rehabilitation trust are exempt from normal tax under s 10(1)(cP).

The rehabilitation of mining areas includes the rehabilitation of land upon premature closure, decommissioning and final closure, and post-closure coverage of any latent and residual environmental impacts on areas covered under any of the specified<sup>182</sup> permits, rights, reservations or permissions to restore one or more areas to their natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development.

<sup>181</sup> See Binding Private Ruling 324 ‘Disposal and Acquisition of Shares by a Public Benefit Organisation’.

<sup>182</sup> Section 37(A)(1)(d)(i)(aa).



#### 4.1.5 Certain institutions, boards or bodies exempt from normal tax [s 64F(1)(e)]

A dividend is exempt from dividends tax if the beneficial owner is an institution, board or body contemplated in s 10(1)(cA) which has been approved by the Commissioner. These are the following:

- Any institution, board or body (other than a ‘company’ as defined in the Companies Act, any co-operative, close corporation, trust or water services provider) established by or under any law and which, in the furtherance of its sole or principal object –
  - conducts scientific, technical or industrial research;
  - provides necessary or useful commodities, amenities or services to the State (including any provincial administration) or members of the general public; or
  - carries on activities (including the rendering of financial assistance by way of loans or otherwise) designed to promote commerce, industry or agriculture or any branch thereof.

#### 4.1.6 Certain funds exempt from normal tax [s 64F(1)(f)]

A dividend is exempt from dividends tax if the beneficial owner is a fund contemplated in s 10(1)(d)(i) or (ii).<sup>183</sup>

##### *Section 10(1)(d)(i)*

Section 10(1)(d)(i) refers to –

- a ‘pension fund’, ‘pension preservation fund’, ‘provident fund’, ‘provident preservation fund’ or ‘retirement annuity fund’ which are all defined in s 1(1); and
- a ‘beneficiary fund’ defined in s 1 of the Pension Funds Act 24 of 1956.

The following funds, amongst others, constitute a pension fund under the definition of ‘pension fund’ in s 1(1):

- A pension, provident or dependants’ fund or pension scheme established by South African law.<sup>184</sup> The Act refers to these entities being established by ‘law’. In context of this definition ‘law’ means any South African law. In ITC 1788<sup>185</sup> the court had to decide whether the appellant was an entity exempt from income tax under s 10(1)(cA) on the basis that it was ‘an institution, board or body established by or under any law’. Bertelsmann J found that the words ‘any law’ in the latter expression referred only to South African statutes. He stated the following:<sup>186</sup>

‘The entire purpose of the Income Tax Act is to control the revenue accruing to the state from taxes levied upon the income of the citizenry. To give recognition to creatures created by foreign statutes without any qualification or definition might seriously endanger the object of the entire Income Tax Act.’

- A fund not established under South African law, established on or after 1 July 1986 and registered under the Pension Funds Act 24 of 1956, and approved by the Commissioner.<sup>187</sup>

<sup>183</sup> It is outside the scope of this guide to provide detailed commentary on s 10(1)(d)(i) and (ii).

<sup>184</sup> Paragraphs (a)(i) and (d) of the definition of ‘pension fund’ in s 1(1).

<sup>185</sup> (2004) 67 SATC 161 (G).

<sup>186</sup> At 164.

<sup>187</sup> Paragraph (c) of the definition of ‘pension fund’ in s 1(1).

A dividend will not be exempt from dividends tax under s 64F(1)(f) if the beneficial owner is a pension fund established under foreign law which is not registered under the Pension Funds Act 24 of 1956 and approved by the Commissioner.

A pension preservation fund, a provident fund (established on or after 1 July 1986), a provident preservation fund and a retirement annuity fund (established on or after 1 July 1986) must all be registered under the Pension Funds Act 24 of 1956 and must be approved by the Commissioner.

#### *Section 10(1)(d)(iii)*

Section 10(1)(d)(ii) refers to a benefit fund. The Act defines 'benefit fund' in s 1(1) as follows:

‘ “[B]enefit fund” means—

- (a) any friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956), or any fund established before 13 June 1986 which is not so registered solely because of the provisions of section 2(2)(a) of that Act; or
- (b) any medical scheme registered under the provisions of the Medical Schemes Act;’

#### **4.1.7 Certain persons exempt from normal tax [s 64F(1)(g)]**

A dividend is exempt from dividends tax if the beneficial owner is a person contemplated in s 10(1)(t). The persons exempt under s 10(1)(t) are the following:

- The Council for Scientific and Industrial Research [s 10(1)(t)(i)].
- The South African Inventions Development Corporation [s 10(1)(t)(ii)].
- The South African National Roads Agency Limited incorporated under s 3 of the South African National Roads Agency Limited and National Roads Act 7 of 1998 [s 10(1)(t)(iii)].
- The Armaments Corporation of South Africa Limited, contemplated in s 2(1) of the Armaments Corporation of South Africa, Limited Act 51 of 2003 [s 10(1)(t)(v)].
- Any company all the issued shares of which are held by the Armaments Development and Production Corporation of South Africa Limited, if the operations of such company are conducted in pursuance of, or are ancillary or complementary to the objects of the said Corporation [s 10(1)(t)(vi)].
- Any traditional council or traditional community established or recognised or deemed to have been established or recognised under the Traditional Leadership and Governance Framework Act 41 of 2003, or any 'tribe' as defined in s 1 of that Act [s 10(1)(t)(vii)].
- Any water services provider [s 10(1)(t)(ix)].
- The Development Bank of Southern Africa established on 23 June 1983 [s 10(1)(t)(x)].
- The following funds or association established or licensed under the Compensation for Occupational Injuries and Diseases Act 130 of 1993:
  - The compensation fund established by s 15 of that Act.
  - The reserve fund established by s 19 of that Act.
  - A mutual association licensed under s 30 of that Act, to carry on the business of insurance of employers against their liabilities to employees, if the compensation paid by the mutual association is identical to compensation that

would have been payable in similar circumstances under that Act [s 10(1)(t)(xvi)].

- The National Housing Finance Corporation established in 1996 by the National Department of Human Settlements [s 10(1)(t)(xvii)].<sup>188</sup>

### Example 1 – Exemption from dividends tax – Section 64F(1)(a) and (f)

#### Facts:

Company X is listed on the JSE and has an issued capital of 1 million ordinary shares. Of these ordinary shares, 600 000 are held by natural persons who are residents, 300 000 by South African retirement funds and 100 000 by resident companies. Company X paid a dividend of R5 a share to holders of its shares.

#### Result:

The dividends paid to the natural persons of R3 million (600 000 × R5) are subject to dividends tax. The dividends paid to the retirement funds of R1,5 million (300 000 × R5) and to the resident companies of R500 000 (100 000 × R5) are both exempt from dividends tax under s 64F(1)(f) and s 64F(1)(a) respectively.

### Example 2 – Exemption from dividends tax

#### Facts:

Company Y is listed on the JSE. It paid a dividend of R2,5 million to holders of its shares as follows:

	R
ABC Municipality	300 000
The Sunshine Hospice which is a public benefit organisation approved by the Commissioner under s 30(3)	400 000
The Mining Rehabilitation Trust contemplated in s 37A	200 000
The Industrial Research Foundation contemplated in s 10(1)(cA)	850 000
XYZ Provident Fund contemplated in s 10(1)(d)(i)	250 000
The Council for Scientific and Industrial Research	400 000
Natural persons	<u>100 000</u>
Total amount of dividend	<u>2 500 000</u>

#### Result:

The dividend of R100 000 paid to natural persons is subject to dividends tax. The dividend paid to the other holders of shares is exempt from dividends tax, as follows:

- ABC Municipality – s 64F(1)(b)
- The Sunshine Hospice – s 64F(1)(c)
- The Mining Rehabilitation Trust – s 64F(1)(d)
- The Industrial Research Foundation – s 64F(1)(e)
- XYZ Provident Fund – s 64F(1)(f)
- The Council for Scientific and Industrial Research – s 64F(1)(g)

<sup>188</sup> With effect from 1 April 2016.

#### 4.1.8 A holder of shares in a registered micro business [s 64F(1)(h)]

A dividend up to a specified amount is exempt from dividends tax if the beneficial owner is a holder of shares in a 'registered micro business', as defined in para 1 of the Sixth Schedule, paying that dividend.

A micro business under the turnover tax system is subject to a low rate of tax on a gross basis without deductions. The turnover tax applies to businesses with an annual turnover of up to R1 million. The turnover tax system is essentially a package that consists of a turnover tax as a substitute for income tax and CGT.<sup>189</sup>

The exemption from dividends tax applies to the extent that the aggregate amount of dividends paid by a company that is a registered micro business to all holders of shares in that registered micro business during the year of assessment in which the dividend is paid does not exceed R200 000. The amount of dividends paid by a registered micro business that exceeds R200 000 during a year of assessment will be subject to dividends tax.

#### Example – Exemption from dividends tax – Section 64F(1)(h)

##### *Facts:*

Company M's year of assessment ends on the last day of February. Company M is registered as a micro business. It paid a dividend of R500 000 to all holders of its shares on 10 April year 1. No further dividends were paid by Company M during its year of assessment ending on 28 February year 2.

##### *Result:*

An amount equal to R200 000 of the dividend paid to the holders of shares is exempt from dividends tax under s 64F(1)(h) and the balance of R300 000 (R500 000 – R200 000) is subject to dividends tax.

Under s 64G(1) (see 5.2.1) Company M must withhold dividends tax from 60% (R300 000 / R500 000 × 100) of the dividend paid to each holder of its shares.

#### 4.1.9 A small business funding entity [s 64F(1)(i)]

A dividend is exempt from dividends tax if the beneficial owner is a small business funding entity contemplated in s 10(1)(cQ).<sup>190</sup> The Act defines 'small business funding entity' in s 1(1) as follows:

' "[S]mall business funding entity" means any entity, approved by the Commissioner in terms of section 30C;'

Under s 10(1)(cQ) certain receipts and accruals on or after 1 March 2015 of a small business funding entity approved by the Commissioner under s 30C<sup>191</sup> are exempt from normal tax.

Under s 30C(1) the Commissioner must approve a small business funding entity for the purposes of s 10(1)(cQ) if the following requirements are met:

- The entity is a trust or an association of persons or a 'non-profit company' as defined in s 1 of the Companies Act that has been incorporated, formed or established in South Africa.

<sup>189</sup> See the *Tax Guide for Micro Businesses* 2016 / 2017.

<sup>190</sup> Section 64F(1)(i) came into operation on 1 March 2015.

<sup>191</sup> Section 30C came into operation on 1 March 2015.

- The sole or principal object of the entity is the provision of funding for small, medium and micro-sized enterprises which is –
  - provided for the benefit of or is widely accessible to small, medium and micro-sized enterprises;
  - provided on a non-profit basis and with an altruistic or philanthropic intent; and
  - not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the entity, otherwise than by way of reasonable remuneration payable to that fiduciary or employee.
- The entity has submitted to the Commissioner a copy of the constitution or written instrument under which it has been established.
- The constitution or written instrument must comply with specified requirements.

The Act defines ‘small, medium or micro-sized enterprise’ referred to above in s 1(1) as follows:

‘ “[S]mall, medium or micro-sized enterprise” means any—

- (a) person that qualifies as a micro business as defined in paragraph 1 of the Sixth Schedule; or
- (b) any person that is a small business corporation as defined in section 12E(4);’

#### **Example – Exemption from dividends tax – Section 64F(1)(i)**

*Facts:*

Company A, a small business funding entity approved by the Commissioner under s 30C, is the beneficial owner of a dividend of R30 000 declared and paid to it by resident Company B.

*Result:*

The dividend of R30 000 is exempt from dividends tax under s 64F(1)(i), since the beneficial owner is a small business funding entity contemplated in s 10(1)(cQ).

#### **4.1.10 Dividend paid by a foreign company to a person that is not a resident [s 64F(1)(j)]**

A dividend is exempt from dividends tax if –

- the beneficial owner is a person that is not a resident; and
- the dividend is paid by a foreign company in respect of a listed share to the extent the dividend does not constitute the distribution of an asset *in specie*.<sup>192</sup>

As is the case with all the exemptions under s 64F(1), the beneficial owner must submit the relevant declaration forms under s 64G(2)(a) or s 64H(2)(a) to the company or regulated intermediary for dividends tax not to be withheld from the dividend.

<sup>192</sup> To the extent the dividend constitutes the distribution of an asset *in specie* it is not a ‘dividend’ as defined in s 64D and is not subject to dividends tax.

**Example – Exemption from dividends tax – Section 64F(1)(j)***Facts:*

Company S, a foreign company, is listed on the JSE. Company S declared a cash dividend of R5 million to Company A, a foreign company.

*Result:*

The dividend of R5 million is exempt from dividends tax under s 64F(1)(j), since it is a cash dividend paid by a foreign company on a listed share to a person that is not a resident.

**4.1.11 A portfolio of a collective investment scheme in securities (before 17 January 2019) [s 64F(1)(k)]**

Before 17 January 2019, a dividend was exempt from dividends tax if the beneficial owner was a portfolio of a collective investment scheme in securities (CISS). A CISS is the beneficial owner of a dividend under s 25BA(1)(b) if it does not on-distribute the dividend to its unit holders within 12 months of the dividend having accrued to the CISS.

While the dividend was exempt from dividends tax in these circumstances, s 25BA(1)(b)(ii) deems the dividend to be income of a CISS if the CISS does not on-distribute the dividend within 12 months of its accrual. The dividend is deemed to accrue to the CISS on the last day of the period of 12 months, since it is at that date only that it is possible to determine whether the dividend accrues to the CISS or the CISS unit holder. The CISS will be liable for normal tax on the dividend deemed to have been derived by it at the end of the 12 month period because the CISS will not be able to claim the exemption under s 10(1)(k)(i), since the dividend is deemed to be income. The subsequent distribution of these taxed amounts by the CISS to its unit holders is not subject to normal tax and dividends tax because –

- the CISS is not a ‘company’ as defined in s 1(1) and the distribution cannot constitute a ‘dividend’; and
- s 10(1)(b) provides that any amount received by or accrued to a CISS unit holder under a distribution from that CISS is exempt from normal tax if that amount is deemed to have accrued to that CISS under s 25BA(1)(b) and that amount was subject to normal tax in that portfolio.<sup>193</sup>

As noted previously in 2.3.1, should the CISS on-distribute the dividend within the stipulated 12-month period, the dividend is deemed to have accrued directly from the company to the CISS unit holder on the date of the distribution by the CISS. Although the CISS unit holder is treated as the beneficial owner, no dividends tax need be withheld by the company that paid the dividend because the payment of the dividend will have been made to the CISS, a regulated intermediary.<sup>194</sup> When, however, the CISS, as regulated intermediary, on-distributes the dividend to the CISS unit holder it will need to withhold dividends tax unless the dividend is exempt from dividends tax because of an applicable exemption, or dividends tax is required to be withheld at a reduced rate as a result of the application of a tax treaty.<sup>195</sup>

<sup>193</sup> Section 10(1)(b) was amended by s 23(1)(l) of the Taxation Laws Amendment Act 31 of 2013 and s 14(1)(f) of the Taxation Laws Amendment Act 43 of 2014. The amendment dealing with the requirement that the amount must be subject to normal tax in the CISS applies to amounts received or accrued by the CISS unit holder on or after 1 March 2015.

<sup>194</sup> Section 64G(2)(c).

<sup>195</sup> Section 64H.

Section 64F(1)(k) was deleted with effect from 17 January 2019. If a CISS is the beneficial owner of a dividend under s 25BA(1)(b), the dividend is exempt from dividends tax under s 64F(1)(l) (see **4.1.12**).

See also **5.4** for the withholding of dividends tax by a CISS.

**Example – Exemption from dividends tax – Section 64F(1)(k) – Before 17 January 2019**

*Facts:*

A CISS holds shares in Company X which is a resident. The CISS's year of assessment commences on 1 March. On 11 March year 1 the CISS received a dividend of R1 million from Company X. The CISS on-distributed the dividend to the unit holders on 18 March year 2.

*Result:*

The dividend of R1 million received by the CISS is exempt from dividends tax under s 64F(1)(k)<sup>196</sup> and under s 64F(1)(l). The dividend was not distributed to the unit holders within 12 months of its accrual. The dividend is deemed to have accrued to the CISS on 10 March year 2 (the last day of the period of 12 months from date of receipt of the dividend) under s 25BA(1)(b)(i) and is included in the income of the CISS under s 25BA(1)(b)(ii). The subsequent on-distribution of the dividend to the unit holders is exempt from dividends tax because such on-distribution will not be a 'dividend', but a distribution of after-tax income of the CISS.

**4.1.12 Any person to the extent that the dividend constitutes income of that person [s 64F(1)(l)]**

A dividend is exempt from dividends tax to the extent that it constitutes 'income' of a person.

A dividend received by or accrued to a person will constitute 'income' in the circumstances indicated below (**a. – d.**), amongst others.

The exemption under s 64F(1)(l) does not apply to a foreign dividend paid by a foreign company on a listed share to the extent that the foreign dividend does not consist of a distribution of an asset *in specie* (and accordingly is a dividend for purposes of dividends tax, see **2.3.2**). Such a foreign dividend is exempt from normal tax under s 10B(2)(d). The exemption under s 64F(1)(l) will not apply, since the foreign dividend is not included in 'income' of the beneficial owner.

Not all circumstances under which a dividend will constitute 'income' are dealt with in this guide.

**a. Dividends not exempt under s 10(1)(k)(i)**

A domestic dividend received by or accrued to a person is included in that person's gross income<sup>197</sup> and is subject to normal tax if the exemption under s 10(1)(k)(i) does not apply.

The proviso to s 10(1)(k)(i) stipulates that the exemption will not apply (that is, the dividend will constitute income subject to normal tax) in the paragraphs indicated below.

<sup>196</sup> If the dividend was paid before the deletion of s 64F(1)(k) which was effective on 17 January 2019.

<sup>197</sup> Paragraph (k) of the definition of 'gross income' in s 1(1).

*Paragraph (aa) of the proviso to s 10(1)(k)(i)*

A dividend received by or accrued to a resident that was distributed by a REIT or a 'controlled company' as defined in s 25BB(1) is not exempt from normal tax under s 10(1)(k)(i).<sup>198</sup> A 'dividend' contemplated in para (b) of the definition of 'dividend' in s 1(1), namely, a share buy-back, is excluded from para (aa) and is therefore exempt under s 10(1)(k)(i).

*Paragraphs (dd), (jj) and (kk) of the proviso to s 10(1)(k)(i)*<sup>199</sup>

Under specified circumstances, a dividend received by or accrued to a person on a restricted equity instrument is not exempt from normal tax under s 10(1)(k)(i).

*Paragraph (ee) of the proviso to s 10(1)(k)(i)*

A dividend received by or accrued to a company in consequence of a cession of the right to that dividend or the exercise of a discretionary power by a trustee of a trust is not exempt from normal tax under s 10(1)(k)(i), unless the cession or exercise results in that company holding all of the rights attaching to a share.

*Paragraph (ff) of the proviso to s 10(1)(k)(i)*

A dividend received by or accrued to a company on a share borrowed by that company is not exempt from normal tax under s 10(1)(k)(i).<sup>200</sup>

A dividend of this nature will also be exempt from dividends tax under s 64F(1)(a) if the beneficial owner is a resident company (see **4.1.1**).

The anti-avoidance provisions of s 64EB(2) will, however, apply when a resident company borrows a share in a listed company (see **3.8.2**).

*Paragraph (gg) of the proviso to s 10(1)(k)(i)*

Dividends received by or accrued to a company on a share held by that company are not exempt from normal tax under s 10(1)(k)(i) to the extent that the aggregate of those dividends does not exceed the *net* of –

- the aggregate of amounts incurred by that company as compensation for any distribution on any other share borrowed by that company, other than a share on which any dividends were received by or accrued to that company as contemplated in para (ff) of the proviso to s 10(1)(k)(i), when the share so borrowed and the share so held are identical shares; and
- the amount accrued to that company as compensation for any distribution on any other shares lent out that are identical to the share so borrowed.

A dividend of this nature will also be exempt from dividends under tax s 64F(1)(a) if the beneficial owner is a resident company (see **4.1.1**).

The anti-avoidance provisions of s 64EB(2) will apply when a resident company borrows a share in a listed company (see **3.8.2**).

<sup>198</sup> In contrast, a dividend received by or accrued to a person that is not a resident that was distributed by a REIT or a controlled company is exempt from normal tax (see **3.1.4**).

<sup>199</sup> Paragraph (jj) of the proviso to s 10(1)(k)(i) applies to amounts received or accrued on or after 1 March 2017. Paragraph (kk) of the proviso applies with effect from 18 December 2017.

<sup>200</sup> See Binding Private Ruling 301 'Taxation of Dividends Received by a Borrower Under a Securities Lending Arrangement'.



*Paragraph (hh) of the proviso to s 10(1)(k)(i)*

Dividends received by or accrued to a company on a share are not exempt from normal tax under s 10(1)(k)(i) to the extent that –

- the aggregate of those dividends does not exceed an amount equal to the aggregate of any deductible expenditure incurred by that company or any amount taken into account that has the effect of reducing income of a covered person<sup>201</sup> in the application of s 24JB(2), and
- the amount of that expenditure or reduction is determined directly or indirectly with reference to the dividend in respect of an identical share to that share.

The deductible expenditure so incurred or the amount of the reduction referred to above must be reduced by any amount of income accrued to the company in respect of any distribution in respect of any other share that is an identical share in relation to that share.

*Paragraph (ii) of the proviso to s 10(1)(k)(i)*

A dividend is not exempt from normal tax under s 10(1)(k)(i)<sup>202</sup> if it is received by or accrued to a person in respect of services rendered or to be rendered or in respect of or by virtue of employment or the holding of any office, other than a dividend received or accrued in respect of –

- a ‘restricted equity instrument’ as defined in s 8C held by that person; or
- a share held by that person.

**b. Dividends on certain shares and equity instruments or third-party backed shares deemed to be income in relation to recipients thereof under s 8E or s 8EA**

A dividend or foreign dividend received by or accrued to a person on a share or equity instrument is deemed to be an amount of income accrued to that person if that share or equity instrument constitutes –

- a ‘hybrid equity instrument’ as defined in s 8E(1) at any time during a year of assessment [s 8E(2)]; or
- a ‘third-party backed share’ as defined in s 8EA(1) at any time during a year of assessment [s 8EA(2)].

**c. Amounts distributed by a co-operative**

Certain amounts distributed by a co-operative by way of a bonus must be included in the ‘gross income’ of the person who becomes entitled to them under s 27(8)(a). These amounts will also constitute ‘income’ of that person.

**d. Amounts taxed as a fringe benefit in the hands of an employee under the Seventh Schedule**

Paragraph 2(f) of the Seventh Schedule provides that for the purposes of that Schedule and of para (i) of the definition of ‘gross income’ in s 1(1), a taxable benefit shall be deemed to have been granted by an employer to that employer’s employee in respect of the employee’s employment with the employer, if as a benefit or advantage of or by virtue of such employment

<sup>201</sup> The Act defines ‘covered person’ in s 24JB(1).

<sup>202</sup> See Binding Private Ruling 209 ‘Dividends Tax: Distribution of Dividends to Employees through a Discretionary Trust’.

or as a reward for services rendered or to be rendered by the employee to the employer a debt other than –

- a debt for purposes of the payment by the employee of any consideration in respect of any qualifying equity share contemplated in s 8B to comply with the minimum requirements of the Companies Act; or
- the payment of any securities transfer tax payable in respect of that share; or
- a debt in respect of which a subsidy is payable as contemplated in subpara (gA),

has been incurred by the employee, whether in favour of the employer or in favour of any other person by arrangement with the employer or any associated institution<sup>203</sup> in relation to the employer, and either –

- no interest is payable by the employee on the debt; or
- interest is payable by the employee on the debt at a rate lower than the official rate of interest.<sup>204</sup>

Paragraph 11(1)<sup>205</sup> of the Seventh Schedule determines that the cash equivalent of the value of the taxable benefit derived in the circumstances indicated above is the amount of interest that would have been payable on the amount owing in respect of the debt for the year of assessment if the employee had been obliged to pay interest on such amount during such year at the official rate of interest, less the amount of interest actually incurred by the employee on the debt for that year.<sup>206</sup>

A deemed dividend determined under s 64E(4) on an amount owing on a debt to a company will be exempt under s 64F(1)(l) to the extent that a fringe benefit referred to above is included in the income of a beneficial owner referred to in s 64F(1)(l) (see also **Example 1** in **3.4.2 b.**)

#### **4.1.13 Any person to the extent that the dividend was subject to STC [s 64F(1)(m)]**

A dividend is exempt from dividends tax under s 64F(1)(m) to the extent that it was subject to STC. This exemption ensures that double taxation does not arise when the same dividend has already been ‘subjected to’ STC. A dividend declared before 1 April 2012 but paid on or after 1 April 2012 that was subject to STC is exempt from dividends tax under s 64F(1)(m). As to the meaning of ‘subject to’, see **3.4.5**.

This provision does not exempt a dividend that is paid by crediting it to a loan account that was previously subject to STC, from dividends tax (see **Example 2** below).

#### **Example 1 – Exemption from dividends tax – Section 64F(m)**

##### *Facts:*

Company A declared a dividend of R500 000 on 30 March 2012, payable to holders of shares on 2 April 2012. Company A paid STC of R50 000 (R500 000 × 10%) to the Commissioner on 30 April 2012.

<sup>203</sup> The Act defines ‘associated institution’ in para 1 of the Seventh Schedule.

<sup>204</sup> The Act defines ‘official rate of interest’ in s 1(1).

<sup>205</sup> Paragraph 11(1) was substituted by s 98(b) of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016 (date of promulgation) to substitute the word ‘loan’ with ‘debt’.

<sup>206</sup> Certain amounts are excluded under para 11(4) of the Seventh Schedule.

*Result:*

The dividend paid by Company A on 2 April 2012 is exempt from dividends tax under s 64F(m), since the dividend was subject to STC.

**Note:**

The dividend is exempt under s 64F(m) and not s 64F(1)(m) because the renumbering of s 64F to s 64F(1) applies from 1 April 2013 only.

**Example 2 – Exemption from dividends tax – Section 64F(1)(m)***Facts:*

Company X's year of assessment ends on 31 March. On 1 April 2011 Company X advanced an interest-free loan of R1 million to Individual Y, the sole holder of its shares. Under s 64C(2)(g) Company X was deemed to have declared a dividend of R1 million on 1 April 2011 and paid STC of R100 000 (R1 million × 10%) to SARS on 31 May 2011. Company X subsequently paid an actual dividend of R1 million on 31 March 2013 which was credited to the loan account of Individual Y thus repaying the loan in full.

*Result:*

The actual dividend paid by Company X on 31 March 2013 is not exempt from dividends tax under s 64F(m) because it is a different dividend from the 'deemed dividend' that was subject to STC under s 64C(2)(g).

The deemed dividend that was subject to STC is not a 'dividend' as defined in s 64D but is deemed to be a dividend paid under s 64E(4)(a). However, s 64E(4)(e) prevents the triggering of further deemed dividends on the interest-free loan that was subject to STC. It does not, however, prevent the actual dividend of R1 million that was credited to the loan account from being subject to dividends tax.

**Note:**

Company X might have been able to make use of the exemption from STC under s 64C(4)(f) because the loan was repaid by not later than the end of the immediately succeeding year of assessment (2013) following the year of assessment (2012) during which the loan was advanced. This exemption would be available only if it has not been used by Company X during any previous year of assessment. The exemption in s 64E(4)(e) would not apply if the exemption in s 64C(4)(f) had applied as the interest-free loan would not have been subject to STC and a dividend would be deemed to have been paid for the period 1 April 2012 to 31 March 2013 under s 64E(4)(a) (see 3.4).

**4.1.14 A fidelity or indemnity fund [s 64F(1)(n)]**

A dividend is exempt from dividends tax if the beneficial owner is a fidelity or indemnity fund contemplated in s 10(1)(d)(iii). A fidelity or indemnity fund must be approved by the Commissioner under s 30B to qualify for exemption under s 10(1)(d)(iii).

**Example – Exemption from dividends tax – Section 64F(1)(n)***Facts:*

ABC Indemnity Fund, which has been approved by the Commissioner under s 30B, holds and is the beneficial owner of the shares in Company C. Company C paid a dividend of R300 000 to ABC Indemnity Fund.

*Result:*

The dividend of R300 000 paid by Company C to ABC Indemnity Fund is exempt from dividends tax under s 64F(1)(n) because the beneficial owner of the dividend is an Indemnity Fund which has been approved by the Commissioner under s 30B.

#### 4.1.15 A natural person in respect of a dividend paid on a tax-free investment [s 64F(1)(o)]

A dividend paid on a tax-free investment contemplated in s 12T(1)<sup>207</sup> is exempt from dividends tax if the beneficial owner is a natural person or deceased or insolvent estate of that person.<sup>208</sup> Any amount received by or accrued to a natural person or deceased or insolvent estate of that person on a tax-free investment is similarly exempt from normal tax under s 12T(2).

The Act defines ‘tax free investment’ in s 12T(1) as follows:

‘ “[T]ax free investment” means any financial instrument or policy as defined in section 29A—

- (a) administered by a person or entity designated by notice by the Minister in the *Gazette*;<sup>209</sup>
- (b) owned by—
  - (i) a natural person; or
  - (ii) the deceased estate or insolvent estate of a natural person that is deemed to be one and the same person as that natural person in respect of the contributions made by that person; and
- (c) that complies with the requirements of the Regulations contemplated in subsection (8).<sup>210</sup>

Under s 12T(4) contributions in respect of tax-free investments must be made in cash and are limited to R36 000 in aggregate during any year of assessment and to R500 000 in aggregate.<sup>211</sup>

#### **Example – Exemption from dividends tax – Section 64F(1)(o)**

*Facts:*

Individual A invested R36 000 in shares that qualified as a ‘tax-free investment’ as defined in s 12T(1) during the year of assessment ending on 28 February year 1. A dividend of R3 000 was paid to Individual A on the investment on 28 February year 1.

*Result:*

The dividend of R3 000 is exempt from dividends tax under s 64F(1)(o), since it was paid on a tax-free investment and the beneficial owner is a natural person.

<sup>207</sup> Section 12T came into operation on 1 March 2015.

<sup>208</sup> Section 64F(1)(o) applies to dividends paid on or after 1 March 2015.

<sup>209</sup> See GN R.170 GG 38507 and GN 171 in GG 38508 of 25 February 2015.

<sup>210</sup> See GN R.172 GG 38509 of 25 February 2015 and R. 209 GG 39765 of 1 March 2016.

<sup>211</sup> The amount allowable for annual contributions increased from R30 000 to R33 000 with effect from years of assessment commencing on or after 1 March 2017 and to R36 000 with effect from years of assessment commencing on or after 1 March 2020.

## 4.2 Exemption from dividends tax for dividends paid by a 'REIT' or a controlled company – Received or accrued before 1 January 2014 [s 64F(2)]

A dividend paid by a 'REIT' or a controlled company and received or accrued before 1 January 2014 was exempt from dividends tax to the extent that the dividend did not consist of the distribution of an asset *in specie* [see 3.1.4 for commentary on para (aa) of the proviso to s 10(1)(k)(i), s 25BB, s 64F(1)(l) and s 64F(2)].

### Example – Exemption from dividends tax – Section 64F(2)

#### Facts:

XYZ REIT qualified as a 'REIT' as defined in s 1(1) for its 2014 year of assessment ending on 31 March 2014. XYZ REIT paid interest of R10 million on its linked units on 28 June 2013 to its beneficial owners. Interest of R4 million was paid to residents and interest of R6 million was paid to persons who are not residents.

#### Result:

The interest of R10 million paid by XYZ REIT is deemed to be a dividend paid by the REIT under s 25BB(6)(c) for dividends tax purposes.

The interest received by the beneficial owners is deemed to be a dividend received by them under s 25BB(6)(a) and is included in their 'gross income' under para (k) of the definition of 'gross income' in s 1(1).

Under para (aa) of the proviso to s 10(1)(k)(i) the deemed dividends of R4 million received by the beneficial owners who are residents are not exempt from normal tax. These dividends are exempt from dividends tax under s 64F(2) and s 64F(1)(l).

The deemed dividends of R6 million received by the persons who are not residents are exempt from normal tax under s 10(1)(k)(i). These dividends are also exempt from dividends tax under s 64F(2), since they were received before 1 January 2014.

## 4.3 Exemption from and reduction of dividends tax for dividends *in specie* (s 64FA)

### 4.3.1 Exemption from dividends tax for dividends *in specie* [s 64FA(1)]

A dividend is exempt from dividends tax to the extent that it consists of a distribution of an asset *in specie* and –

- the portion of the dividend that constitutes a distribution of an asset *in specie* would have been exempt from dividends tax under s 64F, if that portion had not constituted a distribution of an asset *in specie* (see a. below);<sup>212</sup>
- the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that declares and pays the dividend (see b. below);
- it constitutes a disposal as contemplated in para 51A of the Eighth Schedule (see c. below); or
- it constitutes a disposal of immovable property by a share block company to its member under para 67B(2) of the Eighth Schedule (see d. below).

<sup>212</sup> See Binding Private Ruling 295 'Distribution *In Specie* of a Share'.

**a. Beneficial owner would have qualified for exemption under s 64F [s 64FA(1)(a)]**

A dividend is exempt from dividends tax to the extent that it consists of a distribution of an asset *in specie* if the person to whom the payment is made has, before the dividend is paid,<sup>213</sup> submitted to the company that declares and pays the dividend –

- a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been exempt from dividends tax under s 64F (see 4.1) (the declaration of exemption) [s 64FA(1)(a)(i)]; and
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner ceases to be the beneficial owner (the written undertaking) [s 64FA(1)(a)(ii)].

The Commissioner has not issued forms to be used for declarations of exemption and written undertakings but has prescribed the required wording and minimum information to be provided in the forms which must be prepared by the company, regulated intermediary or beneficial owner.<sup>214</sup> Declarations and written undertakings are generally valid for five years only. See, however, the exceptions under s 64FA(3) in 4.3.3.

When a dividend that consists of a distribution of an asset *in specie* is paid to a regulated intermediary which pays the dividend to the beneficial owner, the declaration of exemption and the written undertaking must still be submitted to the company that paid the dividend, since the company is liable for dividends tax under s 64EA(b).

**Example 1 – Exemption from dividends tax – Section 64FA(1)(a)**

*Facts:*

Company A holds 20% of the equity shares in Company B. Both companies are residents. Company B paid a dividend on 30 January year 1 that constituted a distribution of an asset *in specie* of R100 000 to Company A. Company A submitted the declaration of exemption and the written undertaking to Company B on 15 January year 1.

*Result:*

Company B is deemed to have paid a dividend of R100 000 under s 64E(3)(b). The dividend is exempt from dividends tax under s 64FA(1)(a), since Company A submitted the declaration of exemption and the written undertaking to Company B before the dividend was paid.

<sup>213</sup> As determined under s 64E(2)(b).

<sup>214</sup> See para 14 of the 'Business Requirements Specification (BRS): Administration of Dividends Tax' for details.

**Example 2 – Exemption from dividends tax – Section 64FA(1)(a)***Facts:*

Company X holds 20% of the equity shares in Company Y. Company Y is not a listed company. Company X distributed the shares held in Company Y as a dividend *in specie* to holders of its shares on 31 March year 1. The transaction does not qualify as an ‘amalgamation transaction’ under s 44 or an ‘unbundling transaction’ under s 46. The market value of the shares was R12 million on 31 March year 1. The shares in Company X are equally held by Individual A who is a resident and Company B that is a resident. Company B submitted the declaration of exemption and the written undertaking to Company X on 22 March year 1.

*Result:*

Company X is deemed to have paid a dividend of R12 million under s 64E(3)(b). The dividend paid to Company B is exempt from dividends tax under s 64FA(1)(a), since Company B submitted the declaration of exemption and the written undertaking to Company X before the dividend was paid.

Under s 64EA(b) Company X is liable to pay dividends tax of R1,2 million (R12 million × 50% × 20%) to the Commissioner on the dividend *in specie* of R6 million paid to Individual A.

**b. Beneficial owner forms part of the same group of companies [s 64FA(1)(b)]**

A dividend is exempt from dividends tax to the extent that it constitutes a distribution of an asset *in specie* if the beneficial owner forms part of the same ‘group of companies’, as defined in s 41, as the company that declares and pays the dividend.<sup>215</sup> The exemption therefore applies to a resident group of companies.

A beneficial owner that forms part of a group of companies does not have to submit the declaration of exemption and the written undertaking referred to in s 64FA(1)(a) in order for the dividend to be exempt from dividends tax.

The definition of ‘group of companies’ in s 41(1) starts with the definition of that term in s 1(1) and proceeds to exclude certain companies and types of share by way of a proviso. The relationship between the remaining companies must be examined to determine if those companies form part of the same ‘group of companies’ as defined in s 1(1).<sup>216</sup> The Act defines ‘group of companies’ in s 1(1) as two or more companies in which one company (the controlling group company) directly or indirectly holds shares in at least one other company (the controlled group company), to the extent that –

- at least 70% of the equity shares in each controlled group company are directly held by the controlling group company, one or more other controlled group companies or any combination thereof; and
- the controlling group company directly holds at least 70% of the equity shares in at least one controlled group company.

<sup>215</sup> See Binding Private Ruling 351 ‘Waiver of an Intra Group Loan to, and Subsequent Liquidation Distribution by a Subsidiary’.

<sup>216</sup> See Interpretation Note 75 ‘Exclusion of Certain Companies and Shares from a “Group of Companies” as Defined in Section 41(1)’.

The definition of 'group of companies' is narrowed for the purposes of s 41 and the following types of company are *excluded* under para (i) of the proviso:

- A co-operative [para (i)(aa) of the proviso].
- Any association formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public but excluding any association incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part of South Africa, or any close corporation [para (i)(aa) of the proviso].
- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement under which members of the public<sup>217</sup> are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest [para (i)(aa) of the proviso].
- A portfolio of a collective investment scheme in property that qualifies as a 'REIT' as defined in the listing requirements of an 'exchange', as defined in s 1 of the Financial Markets Act and licensed under s 9 of that Act, where those listing requirements have been approved in consultation with the Director-General of the National Treasury and published by the appropriate authority, as contemplated in s 1 of the Financial Markets Act, under s 11 of that Act or by the Financial Sector Conduct Authority [para (i)(aa) of the proviso].<sup>218</sup>
- A 'non-profit company' as defined in s 1 of the Companies Act [para (i)(bb) of the proviso].
- A company if any amount constituting gross income of whatever nature would be exempt from tax under s 10 were it to be received by or to accrue to that company [para (i)(cc) of the proviso].
- A company that is a public benefit organisation or a recreational club that has been approved by the Commissioner under s 30 or s 30A [para (i)(dd) of the proviso].
- Any association, corporation or company incorporated under the law of any country other than South Africa or any body corporate formed or established under such law, unless that association, corporation, company or body corporate has its place of effective management in South Africa [para (i)(ee) of the proviso].
- A company that has its place of effective management outside South Africa [para (i)(ff) of the proviso].<sup>219</sup>

In addition, under para (ii) of the proviso to the definition of 'group of companies' in s 41(1) certain shares are deemed not to be equity shares and must therefore not be taken into

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<sup>217</sup> The Collective Investment Schemes Control Act 45 of 2002 defines 'members of the public' in s 1(1) of that Act.

<sup>218</sup> Effective from years of assessment commencing on or after 1 April 2013. The words 'that qualifies as a REIT' are effective from years of assessment commencing on or after 1 January 2015. The words 'as defined in para 13.1(x) of the JSE Limited Listing Requirements' are effective from 1 January 2015. The words 'the listing requirements of an exchange approved in consultation with the Minister and published by the Prudential Authority, as defined in s 1 of the Financial Markets Act, in terms of s 11 of that Act' apply with effect from 17 January 2019. The current wording of para (i)(aa) of the proviso applies with effect from the date of promulgation of the Taxation Laws Amendment Act 20 of 2021, namely 19 January 2022.

<sup>219</sup> Transactions entered into on or after 1 January 2013.



account in determining whether a company forms part of a group of companies. These are shares that are –

- held as trading stock; or
- subject to a contractual obligation or option to be sold or purchased by any person at a price other than their market value at the time of sale or purchase.

A dividend constituting a distribution of an asset *in specie* paid to a beneficial owner that is a resident company not forming part of the same group of companies as the company that declares and pays the dividend, may be exempt under s 64FA(1)(a).

#### **Example 1 – Exemption from dividends tax – Section 64FA(1)(b)**

*Facts:*

Company A holds all the shares in Company B. Both companies are residents. Company B distributed a dividend *in specie* to Company A.

*Result:*

The dividend is exempt from dividends tax under s 64FA(1)(b), since it is distributed to Company A which forms part of the same group of companies as Company B. Company A is not required to submit a declaration of exemption or written undertaking with Company B in order for the dividend to be exempt from dividends tax.

#### **Example 2 – Exemption from dividends tax – Section 64FA(1)(b)**

*Facts:*

Company A holds 70% of the equity shares in Company B and 70% of the equity shares in Company C. Company B holds 70% of the equity shares in Company D and Company C holds 30% of the equity shares in Company D. All the companies are residents. Company D distributed a dividend *in specie* to holders of its shares.

*Result:*

Companies A, B, C and D form part of the same group of companies, since they satisfy the requirements of the definition of ‘group of companies’ in s 41(1). The dividend *in specie* is exempt from dividends tax under s 64FA(1)(b), since it is distributed to companies forming part of the same group of companies as Company D. Companies B and C do not have to submit a declaration of exemption or written undertaking to Company D in order for the dividends to be exempt from dividends tax.

#### **Example 3 – Exemption from dividends tax – Section 64FA(1)(b)**

*Facts:*

Company A holds 70% of the equity shares in Company B and 70% of the equity shares in Company C. Company B holds 70% of the equity shares in Company D and Company C holds 30% of the equity shares in Company D. All the companies, except for Company A, are residents. Company D distributed a dividend *in specie* to holders of its shares.

**Result:**

Company A is excluded from the group of companies by para (i)(ee) of the proviso to the definition of 'group of companies' in s 41(1). Company C is also excluded from the group of companies, since it does not hold at least 70% of the equity shares in Company D, as required by the definition of 'group of companies' in s 1(1). Companies B and D form part of the same group of companies, since they satisfy the requirements of the definition of 'group of companies' in ss 1(1) and 41(1).

The dividend *in specie* paid to Company B is exempt from dividends tax under s 64FA(1)(b), since Company B forms part of the same 'group of companies' as defined in s 41(1) as Company D. Company D is liable for dividends tax on the dividend *in specie* paid to Company C unless Company C submits a declaration of exemption and a written undertaking under s 64FA(1)(a) that the dividend would have been exempt from dividends tax if it had not constituted the distribution of an asset *in specie*.

**c. Dividend constitutes a disposal of an interest in a residence on or before 31 December 2012 under para 51A of the Eighth Schedule [s 64FA(1)(c)]**

A dividend *in specie* is exempt from dividends tax to the extent that it constituted a disposal as contemplated in para 51A of the Eighth Schedule.

Paragraph 51A applied if –

- an interest in a residence was disposed of by a company on or after 1 October 2010 but no later than 31 December 2012;
- the residence to which the interest relates was mainly (more than 50%) used for domestic purposes during the period 11 February 2009 to the date of disposal, by one or more natural persons who were connected persons in relation to the company at the time of the disposal; and
- the company making the disposal had within a period of six months from the date of the disposal of the residence taken steps as contemplated in s 41(4) to liquidate, wind up or deregister the company.

The Act defines 'residence' in para 44 of the Eighth Schedule as any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith.

A distribution *in specie* of a residence contemplated in para 51A of the Eighth Schedule qualified for exemption under s 64FA(1)(c). Other modes of disposal such as a sale of the property and subsequent distribution of a dividend to the holders of shares were not covered by the exemption under s 64FA(1)(c). The distribution of assets other than a residence did also not qualify for the exemption under s 64FA(1)(c).

**Example 1 – Exemption from dividends tax – Section 64FA(1)(c)**

**Facts:**

C is the only member of ABC Close Corporation (ABC CC). ABC CC owned a residence which C and C's spouse used mainly for domestic purposes from 11 February 2009 to 31 December 2012. ABC CC distributed the residence *in specie* to C on 31 December 2012. The market value of the residence on 31 December 2012 was R1,5 million. The residence was transferred into C's name in the deeds registry on 31 May 2013.

*Result:*

The distribution of the residence *in specie* is a 'dividend' as defined in ss 1(1) and 64D. The amount of the dividend under s 64E(3)(b) is deemed to be equal to the market value of the residence on 31 December 2012 of R1,5 million. The dividend was, however, exempt from dividends tax under s 64FA(1)(c). For the purposes of para 51A the disposal occurred on 31 December 2012, which is the time of disposal under para 13(1)(e) of the Eighth Schedule. The disposal therefore occurred within the cut-off date of 31 December 2012 and the subsequent registration of the residence in C's name after 31 December 2012 is irrelevant.

**Example 2 – Exemption from dividends tax – Section 64FA(1)(c)***Facts:*

B is the only member of DEF Close Corporation (DEF CC). DEF CC owned a residence which B and B's spouse used mainly for domestic purposes from 11 February 2009 to date of disposal of the residence by DEF CC. DEF CC disposed of the residence to B on 30 April 2012 at book value of R1 million. The market value of the residence on date of disposal was R1,5 million. The book value of the residence is represented by a nominal member's interest of R100 and the balance by a member's loan account.

*Result:*

The benefit of R500 000 (R1,5 million – R1 million) obtained by B on acquisition of the residence from DEF CC constitutes a 'dividend' as defined in ss 1(1) and 64D. The dividend *in specie* of R500 000 was, however, exempt from dividends tax under s 64FA(1)(c), since it related to the disposal of a residence under para 51A of the Eighth Schedule. No further dividends tax consequences arose because there were no residual profits in DEF CC after the sale to B at book value.

**d. Dividend constitutes a disposal of immovable property by a share block company to its member under para 67B(2) of the Eighth Schedule [s 64FA(1)(d)]**

A dividend *in specie* is exempt from dividends tax to the extent that it constitutes a disposal of immovable property by a share block company to its member as contemplated in para 67B(2) of the Eighth Schedule.

The Act defines 'share block company' in para 67B(1) of the Eighth Schedule as 'a "share block company" as defined in s 1 of the Share Blocks Control Act'. A 'share block company' is defined in s 1 of the Share Blocks Control Act as 'a company the activities of which comprise or include the operation of a share block scheme'.

Under the Share Blocks Control Act, the share block company is the owner of its immovable property. The members of a share block company have, by virtue of their shareholding in the share block company, the right to use an exclusive area as well as the common-use areas of the immovable property held by the company. A member may by special resolution under s 8(1)(c) of the Share Blocks Control Act convert the shares in the share block company to direct ownership in the property. The share block company may alienate or cede the immovable property by way of a distribution or by way of a sale to the member.

Paragraph 67B applies if a person who holds a right of exclusive use of a specified part of the immovable property of a share block company, which right is conferred by reason of the ownership of a share by that person in that share block company, acquires ownership of that specified part of immovable property from that share block company as a result of a disposal

made by the share block company. Paragraph 67B applies to the extent that the ownership that a person acquires in the immovable property relates to the same underlying immovable property previously held by that person by way of a share in the share block company.

A distribution *in specie* of a specified part of immovable property by a share block company under the circumstances indicated above will be exempt from dividends tax under s 64FA(1)(d).<sup>220</sup>

#### **Example – Exemption from dividends tax – Section 64FA(1)(d)**

##### *Facts:*

X holds a share in Share Block Company XYZ together with a right of use over a unit in a block of flats owned by the company. The holders of shares pass a special resolution under s 8(1)(c) of the Share Blocks Control Act in which they resolve to transfer the unit to X under a sectional title scheme. Under item 8(2)(b) of Schedule 1 to the Share Blocks Control Act, X waives the right of use of the unit thus restoring full title in the unit to the share block company. Share Block Company XYZ subsequently transfers the unit to X under item 8(1) of Schedule 1.

##### *Result:*

To the extent that the transfer of the unit to X falls under para 67B(2) of the Eighth Schedule and comprises a 'dividend' as defined in s 64D consisting of a distribution of an asset *in specie* it will be exempt from dividends tax under s 64FA(1)(d).

#### **4.3.2 Reduced rate of dividends tax [s 64FA(2)]**

A company that declares and pays a dividend that consists of a distribution of an asset *in specie* is liable for dividends tax at a reduced rate on the portion of the dividend that constitutes the distribution of an asset *in specie* if the person to whom the payment is made has, before the dividend is paid,<sup>221</sup> submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,<sup>222</sup> that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax) [s 64FA(2)(a)] (see 4.4); and
- a written undertaking in such form as may be prescribed by the Commissioner<sup>223</sup> to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64FA(2)(b)].

Declarations that the dividend is subject to a reduced rate of tax and written undertakings are generally valid for five years only. See, however, the exceptions under s 64FA(3) in 4.3.3.

<sup>220</sup> Section 64FA(1)(d) applies in respect of dividends paid on or after 1 January 2013.

<sup>221</sup> As determined under s 64E(2)(b).

<sup>222</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax' for the required wording and minimum information to be provided in the declaration and written undertaking.

<sup>223</sup> See above.

See 4.4.2 for considerations in the application of relief under a tax treaty for dividends *in specie*.

#### **Example – Reduced rate of dividends tax – Dividend *in specie***

##### *Facts:*

Company A distributed an asset *in specie* with a market value of R2 million to Company B, the sole holder of its shares on 30 September year 1. Company B is not a resident and is incorporated in Mauritius. On 20 September year 1 Company B submitted the declaration that the dividend is subject to a reduced rate of tax as a result of the tax treaty between South Africa and Mauritius together with the written undertaking to inform Company A of changes affecting the exemption or if Company B ceases to be the beneficial owner.

##### *Result:*

The distribution of the asset *in specie* by Company A constitutes a ‘dividend’ as defined in ss 1(1) and 64D. Company A is liable for dividends tax under s 64EA(b), since the dividend consists of a distribution of an asset *in specie*. Under s 64FA(2) the dividend of R2 million paid to Company B is subject to dividends tax at a reduced rate of 5%,<sup>224</sup> since Company B submitted the declaration that the dividend is subject to a reduced rate of tax and the written undertaking to Company A on 20 September year 1, which was before the dividend was paid.

Company A must pay dividends tax of R100 000 (R2 million × 5%) to the Commissioner on or before 31 October year 1 under s 64K(1)(b) (see 7.1.2).

#### **4.3.3 Period of validity of declarations and written undertakings [s 64FA(3)]**

A declaration<sup>225</sup> and written undertaking submitted under s 64FA(1)(a) or (2) are not valid after a period of five years<sup>226</sup> from the date of the declaration, unless the company that is making the payment is subject to any of the following provisions, with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration:

- The Financial Intelligence Centre Act 38 of 2001.
- The Agreement between the Government of the Republic of South Africa and the Government of the United States of America to Improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act.
- The regulations for purposes of para (a) of the definition of ‘international tax standard’ in s 1 of the TA Act, namely, the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters.

<sup>224</sup> Article 10(2) of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

<sup>225</sup> Declaration of exemption or declaration that the dividend is subject to a reduced rate of tax.

<sup>226</sup> Section 64FA(3) applies with effect from 1 July 2020.

#### 4.3.4 Application of s 64FA(1) and (2) if an amount is deemed to be a dividend consisting of a distribution of an asset *in specie*

Certain provisions in the Act deem certain amounts that are not dividends to be dividends for a specified purpose, for example, for purposes of the Act or for purposes of dividends tax. In this regard see, for example, 3.1.4, 3.7.2 and 3.8. Whether a deemed dividend is subject to dividends tax and, if so, whether it qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2), depends on the facts of each case, the specific deeming provision and, if applicable, the wording of the specific tax treaty (see 4.4.2).

By way of example, in a., b. and c. below, some of the aspects regarding the application of s 64FA(1) and (2) in the context of four different deemed dividend provisions, namely, s 8F(2), s 8FA(2), s 24BA(3)(b) and s 31(3) are considered.

##### a. Application of s 64FA to a deemed dividend *in specie* under s 24BA(3)(b)

If the circumstances in 3.7.2 c. apply, s 24BA(3)(b) deems the excess amount referred to in 3.7.2 c. to –

- be a 'dividend' as defined in s 64D;
- consist of a distribution of an asset *in specie*; and
- be paid by the issuing company<sup>227</sup> on the date of that issue of shares.

Section 24BA(3)(b) does not deem any person to be a recipient of the deemed dividend and, taking the purpose of the provision into account, SARS's view is that the parameters of the deemed dividend are not extended to include a deemed recipient.

Applying the deeming provisions above, it is apparent that the requirements of ss 64E(1) and 64EA(b) (see 3.1.1 and 3.7.2) will be 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%. The issuing company will not qualify for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) on a deemed dividend consisting of the distribution of an asset *in specie* which arises under s 24BA(3)(b). For s 64FA(1) or (2) to apply (see 4.3.1 and 4.3.2), the person to whom the payment is made must submit a declaration by the beneficial owner and the written undertaking referred to in that section to the company that is deemed to have declared and paid the deemed dividend. As noted above, there is no deemed recipient under s 24BA(3)(b) which means that there is no beneficial owner and therefore the requirements of s 64FA(1) or (2) cannot be met.

In addition, even if it is assumed that there is a deemed recipient, the market value excess which is deemed to be a dividend would not be considered to be 'attaching to a share'. The market value excess attaches to the underlying transaction in which the asset was acquired as consideration for shares issued and does not attach to a share. There is no direct link or cause between the market value excess and a share. The immediate cause of the excess is the underlying transaction.

As a result of the relief not being available under s 64FA(1) or (2), it is irrelevant whether the specified requirements in a potentially applicable tax treaty are met, for example, the tax treaty definition of 'dividend' and the possible requirement for a specified holding in the capital or voting rights of a company.

<sup>227</sup> The company issuing shares as contemplated in s 24BA(2)(a).

**b. Application of s 64FA to a deemed dividend *in specie* under ss 8F(2) and 8FA(2)**

As noted in **3.7.2 d.**, under s 8F(2) an amount incurred by a company or which accrues to a person in respect of interest on or after the date that an instrument becomes a hybrid debt instrument –<sup>228</sup>

- is deemed to be a dividend *in specie* in respect of a share declared and paid by that company to the person to whom that amount accrued on the last day of the year of assessment of that company during which it was incurred;<sup>229</sup>
- not deductible;<sup>230</sup> and
- deemed to be a dividend *in specie* in respect of a share that accrues to that person on the date contemplated in the first bullet.<sup>231</sup>

Applying the above deeming provisions, it is apparent that the requirements of ss 64E(1) and 64EA(b) (see **3.1.1** and **3.7.2**) will be 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%.

For s 64FA(1) or (2) to apply (see **4.3.1** and **4.3.2**), 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 Act defines ‘beneficial owner’ in s 64D as ‘the person entitled to the benefit of the dividend attaching to a share’. This requirement is met because s 8F(2)(a) and (c) deem the interest, which is an actual benefit, to be a dividend *in specie* in respect of a share that is declared and paid to the person to whom it accrues. Whether the other requirements of s 64FA(1) or (2) are met will depend on the facts of each case and the wording of the particular tax treaty, if applicable.

The wording in ss 8F(2) and 8FA(2) relating to the deemed dividend is the same. The commentary in this section is therefore also relevant in determining whether an amount deemed to be a dividend *in specie* under s 8FA(2) qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2).

Various amendments were made to ss 8F and 8FA.<sup>232</sup> These amendments must be considered in light of the facts of a particular case and taking into account the effective date of the amendments.

**c. Application of s 64FA to a deemed dividend *in specie* under s 31(3)**

Section 31 provides that the tax payable in respect of specified international transactions must be based on arm’s length principles. As noted in **3.7.2 f.**, s 31(3) provides for a secondary adjustment to be made to the extent that there is a difference in the amount applied in calculating taxable income (that is, an arm’s length amount) under s 31(2) and the amount which would have been applied had s 31(2) not applied. Section 31(3) states that the amount of the difference must, if the person is a resident and the other person to the affected

<sup>228</sup> The Act defines ‘hybrid debt instrument’ in s 8F(1).

<sup>229</sup> Section 8F(2)(a).

<sup>230</sup> Section 8F(2)(b).

<sup>231</sup> Section 8F(2)(c).

<sup>232</sup> The Taxation Laws Amendment Acts 43 of 2014, 25 of 2015, 15 of 2016, 17 of 2017, 23 of 2018, 34 of 2019, 23 of 2020 and 20 of 2021.

transaction is not a resident or is a resident that has a permanent establishment outside South Africa to which the affected transaction relates –

- be deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person if the resident is a company [s 31(3)(i)]; or
- be deemed for the purposes of donations tax, to be a donation made by that resident to that other person if the resident is a person other than a company [s 31(3)(ii)],

on the last day of the period of six months following the end of the year of assessment for which the adjustment is made.<sup>233</sup>

The definition of ‘dividend’ in s 1(1) was amended with effect from 1 January 2019 to exclude a dividend consisting of a distribution of an asset *in specie* declared and paid as contemplated in s 31(3) from an ‘amount’ referred to in that definition. The amount contemplated in s 31(3)(b)(i) is, however, specifically included in the definition of ‘dividend’ in s 64D, to make such deemed dividend subject to dividends tax.

In applying the deeming provisions above it is apparent that the requirements of ss 64E(1) and 64EA(b) (see **3.1.1** and **3.7.2**) 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 s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) on a deemed dividend *in specie* which arises under s 31(3)(i). For s 64FA(1) or (2) to apply (see **4.3.1** and **4.3.2**), 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 Act defines ‘beneficial owner’ in s 64D as ‘the person entitled to the benefit of the dividend attaching to a share.’ A recipient of a deemed dividend *in specie* under s 31(3)(i) is not entitled to the benefit of the dividend because there is no benefit. There is no benefit because the deemed dividend *in specie*, which results from a difference determined between two taxable income calculations, is a figure calculated for tax purposes only which has resulting dividends tax implications. An actual benefit arises for the other party to an affected transaction (the recipient) when an expense is overpriced or income is understated, but this actual benefit is different to and distinct from the dividend which is deemed to arise under s 31(3)(i). The actual benefit arises before and irrespective of whether the Act deems a dividend to arise under s 31(3). Neither s 31(2) nor s 31(3) re-characterises the underlying expense or income to be a dividend; the deemed dividend under s 31(3)(i) arises over and above the underlying transaction. In addition, even if one assumes there is a benefit, that benefit would not be considered to be ‘attaching to a share’. The benefit attaches to the ‘affected transaction’ that gave rise to the application of s 31(2) and (3)(i) and not to a share. There is no direct link or cause between the benefit and a share. The immediate cause of the adjustment in s 31(2) is the underlying transaction which was not conducted on an arm’s length basis.

In the absence of a ‘beneficial owner’ as defined in s 64D, the requirements of s 64FA(1) and (2) cannot be met. In assessing whether a reduced rate of dividends tax applies, without a beneficial owner it is irrelevant whether the specified requirements in a potentially applicable tax treaty are met. The requirements include, for example, the tax treaty definition of ‘dividend’ and the possible requirement for a specified holding in the capital or voting rights of a company

<sup>233</sup> Section 31(3) was amended by s 50(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2015. It therefore applies to years of assessment ending on or after 1 January 2015, since the determination of taxable income would be on or after that date.



(see 4.4). In assessing whether an exemption from dividends tax applies, in addition to the absence of a beneficial owner, it is noted that an affected transaction falling within the ambit of s 31 is a transaction which is unlikely to meet the requirements of s 64F as referred to in s 64FA(1).

It is further noted that in the case of a deemed donation under s 31(3)(ii), Part V of the Act, which includes the exemptions from donations tax, must be considered in determining if donations tax is payable. Practically the exemptions are unlikely to apply but it will depend on the facts of each case.

If the difference referred to under s 31(3) was deemed before 1 January 2015 to be a loan that constituted an affected transaction then, to the extent it had not been repaid before 1 January 2015, it was –<sup>234</sup>

- deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person on 1 January 2015 if the resident is a company [para (a) of the proviso to s 31(3)]; or
- deemed for the purposes of donations tax, to be a donation made by that resident to that other person on 1 January 2015 if the resident is a person other than a company [para (b) of the proviso to s 31(3)].

The same principles regarding the availability of an exemption from dividends tax or donations tax, as appropriate, or a reduction in the rate of dividends tax as indicated above apply.

#### 4.4 Prevention of or relief from double taxation (s 108)

##### 4.4.1 Cash dividends

Under s 108 South Africa may enter into a tax treaty with another country for the relief of double taxation. Dividends tax on a dividend that does not consist of a distribution of an asset *in specie* is a tax on income and potentially qualifies for relief under a tax treaty.<sup>235</sup>

A cash dividend paid by a resident company to a person who is not a resident may be subject to dividends tax at a reduced rate under a tax treaty if the declarations and written undertakings as referred to in ss 64G(3) and 64H(3) have been submitted to the company or regulated intermediary paying the dividend (see 5.2.3 and 5.3.3). Certain amounts that are deemed to be a dividend received by or accrued to a person may also be subject to dividends tax at a reduced rate under a tax treaty, for example, interest to be settled in cash which is received by or accrued to a person during a year of assessment commencing on or after 1 April 2013 on a debenture forming part of a linked unit in a REIT or a resident controlled company and which is deemed to be a dividend under s 25BB(6)(a) (see 3.1.4).

For relief under a tax treaty to apply, the requirements specified in the relevant tax treaty must be met. Examples of these requirements include the following:<sup>236</sup>

- A minimum holding of the capital of the company paying the dividend – whether the holding must be direct or can be indirect depends on the relevant tax treaty.

<sup>234</sup> Under the proviso to s 31(3).

<sup>235</sup> See Binding General Ruling (Income Tax) 9 'Taxes on Income and Substantially Similar Taxes for Purposes of South Africa's Tax Treaties' in para 3.1.

<sup>236</sup> See the various tax treaties in force and 'Dividends Tax: Summary of Withholding Tax Rates per South African Double Taxation Agreements Currently in Force'.

- A minimum holding of the voting power in the company paying the dividend – whether the holding must be direct or can be indirect depends on the relevant tax treaty.
- The definition of ‘dividend’.

Depending on the relevant tax treaty, a beneficial owner of a dividend that is a foreign company will often be entitled to a lower rate of dividends tax than a beneficial owner other than a company.

#### **Example – Relief from double taxation – Cash dividend**

##### *Facts:*

Individual X, a resident, holds 80% of the equity shares in Company Y. Company Z, a company resident in Switzerland, holds the remaining 20% of the equity shares. Company Y declares a dividend of R10 million to holders of its shares.

##### *Result:*

The dividend of R8 million (R10 million × 80%) declared to Individual X is subject to dividends tax at a rate of 20%. The dividend of R2 million (R10 million × 20%) declared to Company Z is subject to dividends tax at a reduced rate of 5% under Article 10(2) of the tax treaty with the Swiss Confederation.<sup>237</sup>

#### **4.4.2 Dividends *in specie***

A resident company paying a dividend *in specie* is liable for dividends tax under s 64EA(b). The incidence of the tax therefore falls on the company paying the dividend rather than on the holder of shares in the company. Generally a non-resident holder of shares would not be able to secure a tax credit under a tax treaty for dividends tax in these circumstances, since it is not liable for the dividends tax.<sup>238</sup>

A company that pays a dividend *in specie* may be entitled to an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) if the portion of the dividend that constitutes a dividend *in specie* would have been entitled to an exemption or a reduced rate of dividends tax under an applicable tax treaty had the dividend not constituted a distribution of an asset *in specie* and the person to whom the payment is made provides the company with the necessary declaration and written undertaking (see 4.3.2).

Under s 64EA(a) to the extent a dividend does not constitute a distribution of an asset *in specie*, the beneficial owner is liable for dividends tax. Therefore, in assessing whether a dividend constituting a distribution of an asset *in specie* qualifies for a reduced rate under s 64FA(2), s 64FA(2)(a) requires that the dividend must be considered as not constituting the distribution of an asset *in specie* and to assess whether all the requirements specified in the tax treaty which apply to the beneficial holder of the dividend are met. The requirements would include, amongst others, the definition of ‘dividend’ for purposes of the tax treaty and any minimum holdings in respect of capital or voting rights in the company declaring the dividend.

<sup>237</sup> Convention Between the Republic of South Africa and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income dated 6 March 2009.

<sup>238</sup> Some countries have controlled foreign company legislation similar to s 9D or may have a full imputation system for taxing foreign dividends. Under a full imputation system for taxing dividends, the foreign dividend is grossed up to an amount equal to the proportionate share of the underlying pre-tax corporate profits. In these circumstances the article dealing with the elimination of double taxation may provide a tax credit for the underlying corporate tax which should include any dividends tax paid by the distributing company.

Especially in the context of deemed distributions of assets *in specie*, the requirement in s 64FA(2)(a) to treat a dividend *in specie* as not being a distribution of an asset *in specie* does not mean it is treated as a cash dividend. The actual characteristics of the distribution of the asset *in specie*, including any characteristics which are specifically deemed to exist, are applied in assessing whether the requirements referred to above are met.

*Amounts deemed to be a dividend consisting of a distribution of an asset in specie*

Certain provisions in the Act deem certain amounts that are not dividends to be dividends for a specified purpose, for example, for purposes of the Act or for purposes of dividends tax. Whether the deemed dividend is liable to dividends tax and, if so, qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) will depend on the facts of each case, the specific deeming provision and, if applicable, the wording of the applicable tax treaty and in particular the dividends article of that tax treaty. See 4.3.4 for possible relief under a tax treaty in respect of amounts deemed to be a dividend consisting of a distribution of an asset *in specie*.

## Chapter 5

### Withholding of dividends tax (ss 64G, 64H and 64I)

#### 5.1 Introduction

A resident company that declares and pays a dividend is liable for dividends tax on that dividend under s 64EA(b) to the extent that the dividend consists of a distribution of an asset *in specie*. Since the company and not the beneficial owner is liable for dividends tax on a distribution of an asset *in specie*, no withholding of dividends tax will occur. Dividends tax on a distribution of an asset *in specie* will be paid by the company to the Commissioner as a principal taxpayer and not as a withholding agent.

Section 64G(1) stipulates that a company that declares and pays a dividend must withhold an amount of dividends tax calculated as contemplated in s 64E from that payment, except to the extent that the dividend consists of a distribution of an asset *in specie*. Dividends tax must be withheld notwithstanding that the beneficial owner is liable for dividends tax under s 64EA(a). However, if the dividend is paid to a regulated intermediary, the primary withholding obligation shifts to the regulated intermediary under s 64H(1).

Withholding of dividends tax by the company or regulated intermediary can be eliminated or reduced if the person to whom the payment is made has, before the dividend is paid, submitted to the company or regulated intermediary –

- a declaration that the dividend is exempt from dividends tax under s 64F or under a tax treaty<sup>239</sup> or that the dividend is subject to a reduced rate of tax as a result of the application of a tax treaty; and
- a written undertaking to forthwith inform the company or regulated intermediary in writing should the circumstances affecting the exemption or the reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.

#### 5.2 Withholding of dividends tax by companies declaring and paying dividends, excluding distributions of assets *in specie* (s 64G)

##### 5.2.1 General rule [s 64G(1)]

As a general rule, a company that declares and pays a dividend must withhold an amount of dividends tax from that payment, calculated in accordance with s 64E, except to the extent that the dividend consists of a distribution of an asset *in specie*.

##### 5.2.2 No withholding requirement for a company that declares and pays a dividend [s 64G(2)]

A company must not withhold any dividends tax from the payment of a dividend if –

- the person to whom the payment is made has submitted to the company a declaration by the beneficial owner that the dividend is exempt from dividends tax under s 64F or a tax treaty<sup>240</sup> and a written undertaking that it will inform the company should the

<sup>239</sup> The declaration in respect of dividends paid on or after 1 January 2022 may indicate that the dividend is exempt under a tax treaty, if applicable.

<sup>240</sup> The declaration in respect of dividends paid on or after 1 January 2022 may indicate that the dividend is exempt under a tax treaty, if applicable.

circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (see **a.** below);

- the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that paid the dividend (see **b.** below); or
- the payment is made to a regulated intermediary (see **c.** below).

**a. Dividend is exempt from dividends tax – Declaration by beneficial owner [s 64G(2)(a)]**

A company must not withhold dividends tax from the payment of a dividend if the person to whom the payment is made has, before the dividend is paid,<sup>241</sup> submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,<sup>242</sup> that the dividend is exempt from dividends tax under s 64F or a tax treaty (the declaration of exemption) [s 64G(2)(a)(i)];<sup>243</sup> and
- a written undertaking in such form as may be prescribed by the Commissioner<sup>244</sup> to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64G(2)(a)(ii)].

A company may rely on a declaration of exemption for future dividends paid by it for a period of only five years from the date of the declaration unless any of the exceptions in s 64G(4)(a) to (c) apply (see **5.2.4**),<sup>245</sup> or until the beneficial owner advises the company that –

- the circumstances affecting the exemption applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

A company must withhold dividends tax from the payment of a dividend if the declaration of exemption and the written undertaking are not submitted by a beneficial owner before the dividend is paid.

The late submission of a declaration of exemption does not necessarily result in a final withholding tax. A late declaration of exemption can sometimes be used by the person to whom the dividend was paid to claim a refund of dividends tax from the company under s 64L (see **8.2**).

**Example 1 – No withholding requirement for company that declares and pays a dividend – Declaration of exemption by beneficial owner**

*Facts:*

Company M declared and paid a dividend of R3 million to ABC Pension Fund, the sole holder of its shares. ABC Pension Fund submitted the declaration of exemption and the written undertaking to Company M before the dividend was paid. The dividend is exempt from dividends tax under s 64F(1)(f).

<sup>241</sup> As determined under s 64E(2)(a).

<sup>242</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

<sup>243</sup> The declaration in respect of dividends paid on or after 1 January 2022 may indicate that the dividend is exempt under a tax treaty, if applicable.

<sup>244</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

<sup>245</sup> Section 64G(4) applies with effect from 1 July 2020.

*Result:*

Under s 64G(2)(a) Company M must not withhold dividends tax from the dividend of R3 million paid to ABC Pension Fund, since it received the declaration of exemption and the written undertaking from ABC Pension Fund before the dividend was paid.

**Example 2 – No withholding requirement for company that declares and pays a dividend – Declaration of exemption under a tax treaty by beneficial owner**

*Facts:*

Company M declared and paid a dividend of R3 million to ABC Pension Fund, the sole holder of its shares. ABC Pension Fund is a resident of a foreign country with whom South Africa has a tax treaty. It submitted the declaration that it is exempt from dividends tax under the relevant Article of the tax treaty between South Africa and the foreign country and the written undertaking to Company M before the dividend was paid.

*Result:*

Under s 64G(2)(a) Company M must not withhold dividends tax from the dividend of R3 million paid to ABC Pension Fund, since it received the declaration of exemption and the written undertaking from ABC Pension Fund before the dividend was paid.

**b. Beneficial owner forms part of the same group of companies as the company that paid the dividend [s 64G(2)(b)]**

A company must not withhold dividends tax from the payment of a dividend if the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that paid the dividend. A domestic group of companies will therefore benefit from this exemption (see **4.3.1 b.** for commentary on the meaning of 'group of companies').

A beneficial owner that forms part of the same group of companies as the company that paid a dividend does not have to submit the declaration of exemption and the written undertaking referred to in s 64G(2)(a) in order to qualify for an exemption from dividends tax.<sup>246</sup>

**Example – No withholding requirement for company that declares and pays a dividend – Group of companies**

*Facts:*

Company X holds all the shares in Company Y and both companies are residents. Company Y declared and paid a dividend of R100 000 to Company X. Company X did not submit a declaration of exemption or written undertaking form.

*Result:*

Under s 64G(2)(b) Company Y must not withhold dividends tax from the dividend of R100 000 paid to Company X, since Company Y and Company X form part of the same 'group of companies' as defined in s 41. Company X is not required to submit a declaration of exemption or written undertaking form.

**c. Payment made to a regulated intermediary [s 64G(2)(c)]**

A company must not withhold dividends tax from the payment of a dividend if the payment is made to a regulated intermediary. Section 64H(1) shifts the liability to withhold dividends tax

<sup>246</sup> See Binding Private Ruling 336 'Liquidation Distribution'.

from the company that paid a dividend to the regulated intermediary if the dividend is paid to the regulated intermediary.

A company that pays a dividend to a person that is not a regulated intermediary, for example, a trust, which in turn makes payment to a regulated intermediary, must withhold dividends tax from that payment, since the dividend is not directly paid to the regulated intermediary. A company will be relieved from the obligation to withhold dividends tax under s 64G(2)(c) only if payment of the dividend is made directly to a regulated intermediary.

**Example 1 – No withholding requirement for a company that declares and pays a dividend – Payment to a regulated intermediary**

*Facts:*

Company A Ltd paid a dividend of R1 million on 27 March year 1 to Regulated Intermediary A. Regulated Intermediary A paid the dividend to the beneficial owners on 28 March year 1.

*Result:*

Under s 64G(2)(c) Company A Ltd must not withhold dividends tax from the dividend of R1 million paid to Regulated Intermediary A, since the liability to withhold dividends tax shifts to Regulated Intermediary A under s 64H(1).

**Example 2 – No withholding requirement for a company that declares and pays a dividend – Indirect payment to a regulated intermediary**

*Facts:*

ABC Trust's year of assessment ends on the last day of February. On 20 February year 1 Company B Ltd paid a dividend of R1 million to ABC Trust which held all its shares. ABC Trust vested the dividend in its beneficiaries who are resident companies and paid the dividend to Regulated Intermediary A on 21 February year 1. Regulated Intermediary A paid the dividend to the beneficial owners on 27 February year 1.

*Result:*

*Withholding requirements*

Company B Ltd must withhold dividends tax of R200 000 (R1 million × 20%) from the dividend paid to ABC Trust. Section 64G(2)(c) does not apply, since the dividend is not paid directly to Regulated Intermediary A.

ABC Trust must not withhold dividends tax from the payment made to Regulated Intermediary A because dividends tax was already withheld by Company B Ltd and ABC Trust is not a 'regulated intermediary' as defined in s 64D. Regulated Intermediary A must also not withhold any dividends tax, since it was already withheld by Company B Ltd.

*Normal tax implications for the resident companies*

The dividends distributed by ABC Trust are included in the gross income of the resident companies under para (k) of the definition of 'gross income' in s 1(1). The dividends are not exempt from normal tax because of para (ee)(B) of the proviso to s 10(1)(k)(i).

*Dividends tax implications for the resident companies*

The resident companies became the beneficial owners of the dividends under s 25B(1) and (2) because the trust distributed them during the same year of assessment in which they were received by or accrued to the trust.

The dividends are exempt from dividends tax under s 64F(1)(a) and (l).

ABC Trust can claim a refund from Company B Ltd under s 64L(1) for the dividends tax withheld from the dividends and can subsequently pay the dividends tax recovered to the resident companies (see **2.3.1** and **8.2.1**), if the resident companies provided the relevant declarations of exemption and written undertakings to ABC Trust so that it could submit them as required.

### 5.2.3 Reduced rate of tax – Application of a tax treaty [s 64G(3)]

A company must withhold dividends tax from the payment of a dividend at a reduced rate if the person to whom the payment is made has, before the dividend is paid,<sup>247</sup> submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,<sup>248</sup> that the dividend is subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax<sup>249</sup>); and
- a written undertaking in such form as may be prescribed by the Commissioner<sup>250</sup> to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking).

See **4.4** for considerations in the application of a tax treaty to dividends.

A company may rely on the declaration that the dividend is subject to a reduced rate of tax for future dividends paid by it for a period of only five years from the date of the declaration unless any of the exceptions in s 64G(4)(a) to (c) apply (see **5.2.4**),<sup>251</sup> or until the beneficial owner informs the company that –

- the circumstances affecting the reduced rate applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

The late submission of the declaration that the dividend is subject to a reduced rate of tax does not necessarily result in a final withholding tax. A late declaration that the dividend is subject to a reduced rate of tax can sometimes be used by the beneficial owner to claim a refund from the company under s 64L (see **8.2**).

<sup>247</sup> As determined under s 64E(2)(a).

<sup>248</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

<sup>249</sup> See Binding Private Ruling 148 'Dividends Tax Rate – Permanent Establishment in South Africa'.

<sup>250</sup> See above.

<sup>251</sup> Section 64G(4) applies with effect from 1 July 2020.



### **Example – Withholding of dividends tax at a reduced rate – Application of a tax treaty**

#### *Facts:*

Company Y, a non-resident, holds 70% of the equity shares in Company X while Company Z, a resident, holds the balance of 30%. Company X declared a dividend of R1 million on 1 July year 1, payable to holders of shares registered on 4 July year 1. On 4 July year 1 Company X paid the dividends to holders of its shares. Company Y submitted the declaration that the dividend is subject to a reduced rate of tax of 5% and the written undertaking to Company X on 5 July year 1 and Company Z submitted the declaration of exemption and the written undertaking to Company X on 30 June year 1.

#### *Result:*

Under s 64G(3) Company X must not withhold dividends tax from the dividend of R300 000 (R1 million × 30%) paid to Company Z because Company Z submitted the declaration of exemption and the written undertaking to Company X before the dividend was paid. The dividend paid to Company Z is exempt from dividends tax under s 64F(1)(a).

Company X must withhold dividends tax of R140 000 [R700 000 (R1 million × 70%) × 20%] from the dividend payable to Company Y because Company Y did not submit the declaration that the dividend is subject to a reduced rate of tax and the written undertaking to Company X before the dividend was paid.

Company Y may be able to claim a refund of the excess dividends tax withheld of R105 000 [(R140 000 – R35 000 (R700 000 × 5%)] under s 64L.

### **5.2.4 Period of validity of declarations and written undertakings [s 64G(4)]**

A declaration<sup>252</sup> and written undertaking submitted under s 64G(2)(a) or (3) are not valid after a period of five years<sup>253</sup> from the date of the declaration, unless the company that is making the payment is subject to any of the following provisions, with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration:

- The Financial Intelligence Centre Act 38 of 2001.
- The Agreement between the Government of the Republic of South Africa and the Government of the United States of America to Improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act.
- The regulations for purposes of para (a) of the definition of ‘international tax standard’ in s 1 of the TA Act, namely, the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters.

### **5.3 Withholding of dividends tax by regulated intermediaries (s 64H)**

#### **5.3.1 General rule [s 64H(1)]**

A company that declares a dividend and pays it to a regulated intermediary must not withhold dividends tax from that payment, since the regulated intermediary assumes the withholding responsibility.

<sup>252</sup> Declaration of exemption or declaration that the dividend is subject to a reduced rate of tax.

<sup>253</sup> Section 64G(4) applies with effect from 1 July 2020.

Under s 64H(1) a regulated intermediary that pays a dividend that was declared by a company must withhold an amount of dividends tax from that payment, calculated in accordance with s 64E, except to the extent that the dividend consists of a distribution of an asset *in specie*.

### 5.3.2 No withholding requirement for a regulated intermediary [s 64H(2)]

A regulated intermediary must not withhold dividends tax from the payment of a dividend if –

- the person to whom the payment is made has, before the dividend is paid, submitted to the regulated intermediary a declaration by the beneficial owner that the dividend is exempt from dividends tax under s 64F or a tax treaty,<sup>254</sup> or that the payment is made to a vesting trust and the sole beneficiary of that vesting trust is another regulated intermediary, and the required written undertaking (see **a.** below);
- the payment is made to another regulated intermediary (see **b.** below); or
- the dividend is paid on a tax-free investment and exempt from dividends tax under s 64F(1)(o) (see **c.** below).

#### a. Declaration by beneficial owner – Dividend is exempt from dividends tax [s 64H(2)(a)]

A regulated intermediary must not withhold dividends tax from the payment of a dividend if the person to whom the payment is made has, before the dividend is paid,<sup>255</sup> submitted to the regulated intermediary –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,<sup>256</sup> that the dividend is exempt from dividends tax under s 64F or a tax treaty<sup>257</sup> (the declaration of exemption), or a declaration that the payment is made to a vesting trust of which the sole beneficiary is another regulated intermediary [s 64H(2)(a)(i)]; and
- a written undertaking, in such form as may be prescribed by the Commissioner,<sup>258</sup> to forthwith inform the regulated intermediary in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64H(2)(a)(ii)].

A regulated intermediary may rely on a declaration of exemption for future dividends paid by it for a period of only five years from the date of the declaration unless any of the exceptions in s 64H(4)(a) to (c) apply (see **5.3.4**) or until the beneficial owner informs the regulated intermediary that –

- the circumstances affecting the exemption applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

The late submission of a declaration of exemption does not necessarily result in a final withholding tax. A late declaration of exemption can sometimes be used by the person to

<sup>254</sup> The declaration in respect of dividends paid on or after 1 January 2022 may indicate that the dividend is exempt under a tax treaty, if applicable.

<sup>255</sup> As determined under s 64E(2)(a).

<sup>256</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

<sup>257</sup> The declaration in respect of dividends paid on or after 1 January 2022 may indicate that the dividend is exempt under a tax treaty, if applicable.

<sup>258</sup> See above.

whom the dividend was paid to claim a refund from the regulated intermediary under s 64M (see **8.3**).

A collective investment scheme in securities (CISS) may hold many of its financial instruments through a wholly controlled vesting trust in which it is the sole beneficiary. The reference to a vesting trust in s 64H(2)(a)(i) ensures that dividends tax must not be withheld from a dividend paid to a vesting trust of which a CISS is the sole beneficiary. The CISS or its unit holders will be the beneficial owners of the dividends and not the vesting trust.

**Example – No withholding requirement for a regulated intermediary – Payment to a vesting trust**

*Facts:*

Company A paid a dividend to Regulated Intermediary A which paid the dividend to Vesting Trust A. Regulated Intermediary B is the sole beneficiary of Vesting Trust A. Before the dividend was paid Vesting Trust A submitted a declaration by Regulated Intermediary B to Regulated Intermediary A that Regulated Intermediary B is the sole beneficiary of Vesting Trust A.

*Result:*

Company A and Regulated Intermediary A must not withhold dividends tax from the dividend under ss 64G(2)(c) and 64H(2)(a) respectively. Company A is making payment to a regulated intermediary and Regulated Intermediary A is making payment to a vesting trust of which the sole beneficiary is another regulated intermediary.

**b. Dividend paid to another regulated intermediary [s 64H(2)(b)]**

A regulated intermediary must not withhold dividends tax from the payment of a dividend if the payment is made to another regulated intermediary, since the latter regulated intermediary becomes liable to withhold dividends tax.

**Example – No withholding requirement for regulated intermediary – Payment to another regulated intermediary**

*Facts:*

Company X paid a dividend to Regulated Intermediary A which paid the dividend to Regulated Intermediary B. Regulated Intermediary B paid the dividend to Company Y, a resident company.

*Result:*

Company X and Regulated Intermediary A must not withhold dividends tax from the dividend under ss 64G(2)(c) and 64H(2)(b) respectively, since both entities are making payment to a regulated intermediary.

Regulated Intermediary B must withhold dividends tax from the dividend paid to Company Y unless the declaration of exemption and the written undertaking is received by Regulated Intermediary B before the dividend is paid [s 64H(2)(a)].

**c. Dividend paid on a tax-free investment [s 64H(2)(c)]**

A regulated intermediary must not withhold dividends tax from the payment of a dividend made on a tax-free investment that is exempt from dividends tax under s 64F(1)(o) (see **4.1.15**).

**Example – No withholding requirement for regulated intermediary – Payment of a dividend on a tax-free investment**

*Facts:*

Company X paid a dividend on a tax-free investment to Regulated Intermediary A which paid the dividend to the beneficial owner, Individual B.

*Result:*

Company X must not withhold dividends tax from the dividend under s 64G(2)(c), since the payment is made to a regulated intermediary.

Regulated Intermediary A must not withhold dividends tax from the dividend paid to Individual B, since the dividend is exempt under s 64F(1)(o) [s 64H(2)(c)].

**5.3.3 Reduced rate of tax – Application of a tax treaty [s 64H(3)]**

A regulated intermediary must withhold dividends tax from the payment of a dividend at a reduced rate if the person to whom the payment is made has, before the dividend is paid,<sup>259</sup> submitted to the regulated intermediary –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,<sup>260</sup> that the dividend is subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax); and
- a written undertaking, in such form as may be prescribed by the Commissioner,<sup>261</sup> to forthwith inform the regulated intermediary in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking).

A regulated intermediary may rely on a declaration that the dividend is subject to a reduced rate of tax for future dividends paid by it for a period of only five years from the date of the declaration unless any of the exceptions in s 64H(4)(a) to (c) apply (see **5.3.4**) or until the beneficial owner advises the regulated intermediary that –

- the circumstances affecting the reduced rate of tax applicable to the beneficial owner change; or
- there has been a change in beneficial ownership.

The late submission of a declaration that the dividend is subject to a reduced rate of tax does not necessarily result in a final withholding tax. A late declaration can sometimes be used by the person to whom the dividend was paid to claim a refund from the regulated intermediary under s 64M (see **8.3**).

<sup>259</sup> As determined under s 64E(2)(a).

<sup>260</sup> See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

<sup>261</sup> See above.

**Example – No withholding requirement for regulated intermediary – Declaration by the beneficial owner that the dividend is subject to a reduced rate of tax**

*Facts:*

On 25 January year 1 XYZ Ltd paid a dividend to Regulated Intermediary A. On 26 January year 1 Regulated Intermediary A paid the dividend to ABC Pension Fund which is a resident and to Company M that is not a resident. ABC Pension Fund submitted the declaration of exemption and the written undertaking to Regulated Intermediary A on 5 January year 1. Company M submitted the declaration that the dividend is subject to a reduced rate of tax and the written undertaking to Regulated Intermediary A on 15 January year 1.

*Result:*

Under s 64H(2)(a) Regulated Intermediary A must not withhold dividends tax from the dividend paid to ABC Pension Fund, since the declaration of exemption and the written undertaking were submitted to Regulated Intermediary A before the dividend was paid.

Regulated Intermediary A must withhold dividends tax at a reduced rate under s 64H(3) from the dividend paid to Company M, since the declaration that the dividend is subject to a reduced rate of tax and the written undertaking were submitted to Regulated Intermediary A before the dividend was paid.

**5.3.4 Period of validity of declarations and written undertakings [s 64H(4)]**

A declaration<sup>262</sup> and written undertaking submitted under s 64H(2)(a) or (3) are not valid after a period of five years<sup>263</sup> from the date of the declaration, unless the regulated intermediary is subject to any of the following provisions, with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration:

- The Financial Intelligence Centre Act 38 of 2001.
- The Agreement between the Government of the Republic of South Africa and the Government of the United States of America to Improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act.
- The regulations for purposes of para (a) of the definition of ‘international tax standard’ in s 1 of the TA Act, namely, the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters.

**5.4 Withholding of dividends tax by a portfolio of a collective investment scheme in securities and a portfolio of a hedge fund collective investment scheme**

*Withholding of dividends tax by a portfolio of a collective investment scheme in securities*

A ‘portfolio of a collective investment scheme in securities’ (CISS) is included in the definition of ‘regulated intermediary’ in s 64D (see **2.3.5**). The position of a CISS differs from other regulated intermediaries. Whether a CISS must potentially withhold dividends tax from the subsequent payment of the dividends derived by it to its unit holders depends on whether the distribution occurs within 12 months of the accrual of the dividends to the CISS.

<sup>262</sup> Declaration of exemption or declaration that the dividend is subject to a reduced rate of tax.

<sup>263</sup> Section 64H(4) applies with effect from 1 July 2020.

A CISS is not viewed as a company for purposes of the Act,<sup>264</sup> therefore any distribution by it is not a dividend for dividends tax purposes. Under s 25BA(1)(a) dividends that are on-distributed to the unit holders not later than 12 months after their accrual to the CISS are deemed to have accrued directly to the unit holders and not the CISS. The CISS is a regulated intermediary and must withhold dividends tax from these distributions under s 64H(1).<sup>265</sup>

Dividends not on-distributed to the unit holders within 12 months after accrual are deemed to be income of the CISS under s 25BA(1)(b)(ii) and therefore subject to normal tax. These dividends are exempt from dividends tax under s 64F(1)(l) because the CISS is deemed to be the beneficial owner in these circumstances under s 25BA(1)(b)(i) (see 4.1.11 and 4.1.12). Subsequent distributions by the CISS of these taxed amounts to the CISS' unit holders are free of tax (see 4.1.11). The company paying the dividend to the CISS would not have been required to withhold dividends tax from any dividend paid to a CISS under s 64G(2)(c), because the CISS is a regulated intermediary.

### **Example 1 – Withholding of dividends tax by a CISS**

#### *Facts:*

On 13 March year 1 Listed Company A paid a dividend of R15 million to a CISS. On 31 May year 1, the CISS distributed the dividend to unit holders of which 80% are natural persons and 20% are companies. All unit holders are residents. The companies submitted the declarations that the dividend is exempt from dividends tax under s 64F and the written undertakings to the CISS in February year 1.

#### *Result:*

Listed Company A must not withhold any dividends tax under s 64G(2)(c) because the payment is made to a CISS which is a regulated intermediary.

The dividend is deemed to have accrued directly to the unit holders under s 25BA(1)(a), since it was distributed within 12 months after accrual to the CISS. The CISS, as the regulated intermediary, must generally withhold dividends tax from dividends paid to the unit holders under s 64H(1). However, under s 64H(2)(a) the CISS must not withhold any dividends tax from the dividends paid to resident companies if these companies submitted the declarations of exemption and the written undertakings before the dividend was paid. The CISS must therefore withhold dividends tax from the dividend which is on-distributed to unit holders that are natural persons but not from the dividend which is on-distributed to unit holders that are companies.

### **Example 2 – Withholding of dividends tax by a CISS**

#### *Facts:*

A CISS holds shares in Company X which is a resident. On 11 March year 1 the CISS received dividends of R800 000 from Company X. The CISS distributed dividends totalling R600 000 to its unit holders, all resident natural persons, on 30 November year 1. The excess of R200 000 (R800 000 – R600 000) was retained by the CISS and distributed to the unit holders who are natural persons on 14 March year 2.

<sup>264</sup> A CISS is not a 'company' as defined in s 1(1).

<sup>265</sup> As the beneficial owner of the dividend the CISS unit holder may qualify for an exemption from dividends tax or for a reduced rate of dividends tax (see **Chapter 4**).

*Result:*

Under s 64G(2)(c) Company X must not withhold any dividends tax because the payment is made to a CISS which is a regulated intermediary.

The CISS must withhold dividends tax of R120 000 (R600 000 × 20%) under s 64H(1) from the dividends distributed on 30 November year 1 to the unit holders.

The remaining dividends of R200 000, distributed to unit holders more than 12 months after they accrued to the CISS, will be taxed as income of the CISS under s 25BA(1)(b)(ii) but will not be subject to dividends tax, since the distribution to the unit holders does not constitute a dividend. The CISS is the beneficial owner of the dividends under these circumstances.

*Withholding of dividends tax by a portfolio of a hedge fund collective investment scheme (with effect from 1 April 2015)*

A 'portfolio of a hedge fund collective investment scheme' (hedge fund CIS) is included in the definition of 'regulated intermediary' in s 64D (see **2.3.5**). The position of a hedge fund CIS is similar to that of a CISS. Whether a hedge fund CIS must potentially withhold dividends tax from the subsequent payment of the dividends derived by it to its unit holders depends on whether the distribution occurs within 12 months of the accrual of the dividends to the hedge fund CIS.

A hedge fund CIS is not viewed as a company for purposes of the Act,<sup>266</sup> therefore any distribution by it is not a dividend for dividends tax purposes. Under s 25BA(1)(a) dividends that are on-distributed to the unit holders not later than 12 months after their accrual to the hedge fund CIS are deemed to have accrued directly to the unit holders and not the hedge fund CIS. The hedge fund CIS is a regulated intermediary and must withhold dividends tax from these distributions under s 64H(1).<sup>267</sup>

Dividends not on-distributed to the unit holders within 12 months after accrual are deemed to be income of the hedge fund CIS under s 25BA(1)(b)(ii) and therefore subject to normal tax. These dividends are exempt from dividends tax under s 64F(1)(l), since the dividends constitute income of the hedge fund CIS (see **4.1.12**). Subsequent distributions by the hedge fund CIS of these taxed amounts to the unit holders are free of tax. The company paying the dividend to the hedge fund CIS would not have been required to withhold dividends tax on any dividend paid to a hedge fund CIS under s 64G(2)(c), because the hedge fund CIS is a regulated intermediary.

**Example 1 – Withholding of dividends tax by a Hedge fund CIS**

*Facts:*

On 3 April year 1 Listed Company A paid a dividend of R15 million to a hedge fund CIS. On 31 May year 1, the hedge fund CIS distributed the dividend to unit holders of which 80% are natural persons and 20% are companies. All unit holders are residents. The companies submitted the declarations that the dividend is exempt from dividends tax under s 64F and the written undertakings to the hedge fund CIS in March year 1.

<sup>266</sup> A hedge fund CIS is not a 'company' as defined in s 1(1).

<sup>267</sup> As the beneficial owner of the dividend the hedge fund CIS unit holder may qualify for an exemption from dividends tax or a reduced rate of dividends tax (see **Chapter 4**).

**Result:**

Listed Company A must not withhold any dividends tax under s 64G(2)(c) because the payment is made to a hedge fund CIS which is a regulated intermediary. The dividend is deemed to have accrued directly to the unit holders under s 25BA(1)(a), since it was distributed within 12 months after accrual to the hedge fund CIS. The hedge fund CIS, as the regulated intermediary, must generally withhold dividends tax from dividends paid to the unit holders under s 64H(1). However, under s 64H(2)(a) the hedge fund CIS must *not withhold* any dividends tax from the dividends paid to resident companies if these companies submitted the declarations of exemption and the written undertakings before the dividend is paid. The hedge fund CIS must therefore withhold dividends tax from the dividend which is on-distributed to unit holders that are natural persons but not from the dividend which is on-distributed to unit holders that are companies.

**Example 2 – Withholding of dividends tax by a Hedge fund CIS****Facts:**

A Hedge fund CIS holds shares in Company X which is a resident. On 29 April year 1 the hedge fund CIS received dividends of R800 000 from Company X. The hedge fund CIS distributed dividends totalling R600 000 to its unit holders, all resident natural persons, on 30 November year 1. The excess of R200 000 (R800 000 – R600 000) was retained by the hedge fund CIS and distributed to the unit holders who are natural persons only on 15 May year 2.

**Result:**

Under s 64G(2)(c) Company X must not withhold any dividends tax because the payment is made to a hedge fund CIS which is a regulated intermediary.

The hedge fund CIS must withhold dividends tax of R120 000 (R600 000 × 20%) under s 64H(1) from the dividends distributed on 30 November year 1 to the unit holders.

The remaining dividends of R200 000 distributed more than 12 months after they accrued to the hedge fund CIS, will be taxed as income of the CIS under s 25BA(1)(b)(ii) but will not be subject to dividends tax under s 64F(1)(f), since the distribution to the unit holders does not constitute a dividend.

**5.5 Withholding of dividends tax by long-term insurers (s 64I)****5.5.1 Withholding of dividends tax by long-term insurers from cash dividends (s 64I)**

Section 64I provides that to the extent that a dividend, which does not consist of a distribution of an asset *in specie*, is paid to an ‘insurer’ as defined in s 29A, namely, a long-term insurer,<sup>268</sup> –

- the insurer must be deemed to be a regulated intermediary,<sup>269</sup> and
- the dividend must, to the extent that the dividend is allocated to an individual policyholder fund as contemplated in s 29A(4)(b), be deemed to be paid to a natural

<sup>268</sup> As defined in s 1 of the Long-term Insurance Act 52 of 1998, other than a foreign reinsurer conducting insurance business through a branch in the Republic under s 6 of that Act.

<sup>269</sup> The company paying the dividend to the long-term insurer is not liable to withhold dividends tax under s 64G(2)(c) because the insurer is deemed to be a regulated intermediary under s 64I.



person that is a resident by the insurer on the date that the dividend is paid to the insurer.

Under s 64G(2)(c) or s 64H(2)(b) respectively, a company or regulated intermediary must not withhold dividends tax from the payment of a dividend to an insurer because the insurer is deemed to be a regulated intermediary in relation to dividends paid to it.

The date that the dividend is paid to the long-term insurer is either the date that the dividend is paid by –

- the company that declares and pays the dividend to the long-term insurer; or
- a regulated intermediary to the long-term insurer.

A long-term insurer receives dividends for the ultimate benefit of –

- the untaxed policyholder fund [s 29A(4)(a)];
- the individual policyholder fund [s 29A(4)(b)];
- the company policyholder fund [s 29A(4)(c)];
- the corporate fund (holders of its shares) [s 29A(4)(d)]; and
- the risk policy fund [s 29A(4)(e)].<sup>270</sup>

A dividend received by a long-term insurer that is allocated to the respective policyholder funds will not be paid out to the policyholders, but the amount of the dividend will accumulate for the benefit of the policyholders.

The following sections will apply to the long-term insurer to the extent it allocates a dividend or a portion of a dividend, which did not constitute the distribution of an asset *in specie*, to the individual policyholder fund and is therefore deemed to have paid a dividend in its capacity as a ‘deemed’ regulated intermediary:

- Section 64H (withholding of tax by regulated intermediaries)
- Section 64K (payment and recovery of tax)
- Section 64M (refund of tax on dividends paid by regulated intermediaries)

To the extent a long-term insurer allocates a dividend to the untaxed policyholder fund, the company policyholder fund, the corporate fund or the risk policy fund, it is still deemed to be a regulated intermediary under s 64I. Unlike dividends allocated to the individual policyholder fund, dividends allocated to these funds are not deemed under s 64I to be a dividend paid by the long-term insurer and therefore no dividends tax consequences arise as a result of the allocation to either of these funds.

A long-term insurer must withhold dividends tax from the amount of a dividend allocated to a policyholder fund only to the extent that the dividend does not consist of a distribution of an asset *in specie* and is allocated for the benefit of an individual policyholder fund.

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<sup>270</sup> The risk policy fund was inserted by s 47(1)(i) of the Taxation Laws Amendment Act 43 of 2014 with effect from years of assessment commencing on or after 1 January 2016.

### Example – Withholding of dividends tax by a long-term insurer

*Facts:*

XYZ Long-term Insurer receives dividends from ABC Ltd, for the benefit of its policyholders, as follows:

- Untaxed policyholders – R3 million
- Company policyholders – R0,5 million
- Individual policyholders – R4 million

*Result:*

Under s 64H(1), read with s 64I, XYZ Long-term Insurer is required to withhold dividends tax of R800 000 (R4 million × 20%) from the dividend that is allocated to the individual policyholder fund. Dividends tax must not be withheld from the dividend of R3 million allocated to the untaxed policyholder fund and the dividend of R0,5 million allocated to the company policyholder fund.

### 5.5.2 Dividends *in specie* paid to a long-term insurer

A company that pays a dividend that consists of a distribution of an asset *in specie* to a long-term insurer is potentially liable for dividends tax under s 64EA(b).

A dividend that consists of a distribution of an asset *in specie* will be exempt from dividends tax under s 64FA(1)(a) if the beneficial owner is a company and the declaration form and written undertaking are submitted to the company paying the dividend as required under s 64FA(1)(a).

A long-term insurer is a 'company' as defined in s 1(1). A dividend paid to a long-term insurer that consists of a distribution of an asset *in specie* may therefore be exempt from dividends tax irrespective of which policyholder fund the long-term insurer subsequently allocates the dividend to. The long-term insurer must submit the declaration form and the written undertaking as required under s 64FA(1)(a) in order for the dividend to qualify for the exemption from dividends tax.

## **Chapter 6**

### **STC credit (s 64J) (1 April 2012 – 31 March 2015)**

The STC credit of a company is deemed to be nil on 1 April 2015. Section 64J was deleted with effect from 17 January 2019.

See previous issues of this guide for commentary on s 64J.

## Chapter 7

### Payment and recovery of dividends tax, assessments, non-compliance, record-keeping and electronic communication (s 64K; and ss 25, 29, 91(2), 92, 95(1), 99(1), 157, 180, 189, 210, 222 and 255 of the TA Act)

#### 7.1 Payment and recovery of dividends tax, assessments and non-compliance (s 64K; and ss 25, 91(2), 92, 95(1), 99(1), 157, 180, 189, 210 and 222 of the TA Act)

##### 7.1.1 Liability of a beneficial owner to pay dividends tax [s 64K(1)(a)]

A beneficial owner who is liable for any amount of dividends tax under s 64EA(a) (see 3.7.1) must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company that declared the dividend.

The word 'month' means a calendar month.<sup>271</sup> Thus the date for payment will always end on the last day of the relevant month, regardless of whether that month has 28, 29, 30 or 31 days.

Electronic payments can be made on the last day of a month, whether that day is a Saturday or Sunday, provided that they will be reflected in SARS's accounts on the last day of the month.

The beneficial owner is relieved of the liability to pay dividends tax to the Commissioner if it is paid by any other person, for example, the company that declared and paid the dividend or a regulated intermediary that paid the dividend to the beneficial owner.

#### **Example 1 – Liability of beneficial owner to pay dividends tax**

##### *Facts:*

Company A declared and paid a dividend of R100 000 on 31 March year 1 to beneficial owners who are all natural persons and residents. Company A must withhold dividends tax under s 64G(1) from the payment of the dividend. Company A paid dividends tax of R20 000 (R100 000 × 20%) to the Commissioner on 28 April year 1.

##### *Result:*

Under s 64K(1)(a) the beneficial owners are relieved from the liability to pay dividends tax of R20 000 to the Commissioner, since dividends tax was withheld by Company A under s 64G(1) and paid to the Commissioner under s 64K(1)(c) (see 7.1.3).

#### **Example 2 – Liability of beneficial owner to pay dividends tax**

##### *Facts:*

Trust X applied to SARS to be approved as a public benefit organisation under s 30(3). Trust X would have been exempt from dividends tax under s 64F(1)(c) in respect of dividends received as beneficial owner if it had been approved as a public benefit organisation. SARS, however, did not approve the application, since Trust X did not meet all the requirements of s 30(3). Company Y paid a dividend of R1 million to Trust X on 1 July year 1. Company Y did not withhold dividends tax under s 64G(2)(a), since Trust X submitted a declaration of exemption and the written undertaking referred to in s 64G(2)(a) to Company Y.

<sup>271</sup> The Interpretation Act 33 of 1957 defines 'month' in s 2 of that Act.

**Result:**

Trust X is the beneficial owner of the dividend and is liable under s 64EA(a) for dividends tax. Trust X must pay dividends tax of R200 000 (R1 million × 20%) to the Commissioner under s 64K(1)(a), since Company Y did not withhold any dividends tax under s 64G(1)(a).

### 7.1.2 Liability of a company that declares and pays a dividend consisting of a distribution of an asset *in specie* to pay dividends tax [s 64K(1)(b)]

A company that is liable for any amount of dividends tax under s 64EA(b) on the payment of a dividend that consists of a distribution of an asset *in specie* (see 3.7.2), must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company. See 3.2.2 for commentary on when a dividend *in specie* is deemed to be paid.

#### Example – Liability of a company to pay dividends tax – Distribution of an asset *in specie*

**Facts:**

On 31 August year 1 the directors of unlisted Company M approved the distribution of assets *in specie* to holders of the company's shares on 30 September year 1. The market value of the assets was R90 000 on 30 September year 1. All the holders of shares are residents and natural persons.

**Result:**

Under s 64E(2)(b) the dividend is deemed to be paid on the date that the assets are distributed to the holders of shares, namely, 30 September year 1. Under s 64E(3)(b) the amount of the dividend paid is deemed to be equal to the market value of the assets on the date of distribution, namely, R90 000.

Under s 64K(1)(b) Company M must pay dividends tax of R18 000 (R90 000 × 20%) to the Commissioner on or before 31 October year 1.

### 7.1.3 Liability of person withholding dividends tax [s 64K(1)(c)]

A company that withholds any amount of dividends tax under s 64G(1) from the payment of a dividend, must pay that amount, less any amount refundable under s 64L (see 8.2), to the Commissioner by the last day of the month following the month during which that dividend is paid by that company.

A regulated intermediary that withholds any amount of dividends tax under s 64H(1) from the payment of a dividend, must pay that amount, less any amount refundable under s 64M (see 8.3), to the Commissioner by the last day of the month following the month during which that dividend is paid by that regulated intermediary.

#### Example – Liability of person that withholds dividends tax

**Facts:**

Company A paid a dividend of R120 000 on 31 March year 1 to Regulated Intermediary A, which paid the dividend to natural persons who are residents, on 3 April year 1.

**Result:**

Regulated Intermediary A is liable to withhold dividends tax of R24 000 ( $R120\,000 \times 20\%$ ) under s 64H(1). Regulated Intermediary A must pay dividends tax to the Commissioner under s 64K(1)(c) by 31 May year 1, being the last day of the month following the month during which the dividend was paid by it to the natural persons.

The amount of dividends tax that must be paid to the Commissioner must be reduced by any amount of dividends tax that is refundable to a beneficial owner under –

- section 64L, by the company that paid the dividend; or
- section 64M, by a regulated intermediary that paid the dividend.

**Example – Amount of dividends tax reduced by amount of dividends tax that is refundable**

**Facts:**

On 3 April year 1 Regulated Intermediary A paid a dividend of R150 000 to holders of shares in Company X. Having received no declarations of exemption or declarations that the dividend was subject to a reduced rate of tax, Regulated Intermediary A withheld dividends tax of R30 000 ( $R150\,000 \times 20\%$ ) which it paid to the Commissioner on 31 May year 1.

Before paying the next dividend of another of its clients, Company Y, it received declarations of exemption and declarations from some of the holders of shares in Company X stating that dividends paid by Company X were subject to a reduced rate of tax. As a result it determined that dividends tax of R5 000 had been overpaid to the Commissioner in relation to the dividend paid on 3 April year 1.

On 3 May year 1 Regulated Intermediary A paid a dividend of R120 000 on behalf of Company Y and withheld dividends tax of R24 000 ( $R120\,000 \times 20\%$ ). It had not received any declarations of exemption or declarations that the dividend was subject to a reduced rate of tax for this dividend before the dividend was paid.

**Result:**

Under s 64K(1)(c) Regulated Intermediary A must pay dividends tax of R19 000 to the Commissioner by 30 June year 1 determined as follows:

	R
Dividends tax withheld on dividend paid to holders of shares in Company Y	24 000
Less: Dividends tax refundable to holders of shares in Company X	<u>(5 000)</u>
Dividends tax payable to Commissioner by 30 June year 1	<u>19 000</u>

**7.1.4 Liability to submit a return / Third party returns [s 64K(1A); and s 25 of the TA Act]**

See issue 3 of this guide for the requirements of submitting returns before 19 January 2017.

*Section 64K(1A) with effect from 19 January 2017*

Section 64K(1A) was amended<sup>272</sup> to provide that a person that received a dividend derived from a tax-free investment contemplated in s 12T (see **4.1.15**) must not submit a return for

<sup>272</sup> Section 64K(1A)(b) was amended by s 3 of the Tax Administration Laws Amendment Act 16 of 2016.

dividends tax. Therefore, a person that received a dividend that was exempt or partially exempt from dividends tax under s 64F or s 64FA was required to submit a return if the dividend was paid by a resident company and was not derived from a tax-free investment contemplated in s 12T [s 64K(1A)(b)].

A person that paid a dividend was required to submit a return for dividends tax [s 64K(1A)(a)].

#### *Section 64K(1A) with effect from 18 December 2017*

Section 64K(1A) was further amended<sup>273</sup> to provide that a return for dividends tax must be submitted by a person that has received a dividend that is exempt or partially exempt from dividends tax under s 64F or s 64FA if the dividend was paid by a resident company, unless the dividend received –

- is derived from a tax-free investment contemplated in s 12T; or
- is received by a pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or a 'beneficiary fund' defined in s 1 of the Pension Funds Act 24 of 1956, of which the receipts and accruals are exempt from normal tax under s 10(1)(d)(i).

A person that paid a dividend was required to submit a return for dividends tax [s 64K(1A)(a)].

#### *Section 64K(1A) with effect from 17 January 2019*

With effect from 17 January 2019, only a person that has paid a dividend must submit a return for dividends tax. The return must be submitted by the last day of the month following the month during which the dividend is paid.<sup>274</sup>

#### *Section 25 of the TA Act*

A person who is required to submit a return under a tax Act [which includes the Act and therefore includes the return currently required under s 64K(1A)] or by the Commissioner must do so in the prescribed form and manner and by the date specified in the tax Act, or by the date specified by the Commissioner in the public notice requiring the submission of the return.

Section 64K(1A) provides that a return for dividends tax must be submitted by the last day of the month following the month during which a dividend is paid.

### **7.1.5 Personal liability of withholding agent (s 157 of the TA Act)**

A withholding agent (company that declared and paid a dividend or a regulated intermediary that paid a dividend), is personally liable for dividends tax –

- withheld under s 64G(1) or s 64H(1) and not paid to the Commissioner; or
- which should have been withheld under s 64G(1) or s 64H(1) but was not withheld.<sup>275</sup>

The withholding agent will be relieved from the personal liability only if the tax is paid by someone else, for example, the beneficial owner (see **7.1.1**).

<sup>273</sup> Section 64K(1A) was amended by s 4 of the Tax Administration Laws Amendment Act 13 of 2017.

<sup>274</sup> Section 64K(1A) was amended by s 1 of the Tax Administration Laws Amendment Act 22 of 2018.

<sup>275</sup> Section 64K(3) which dealt with the liability for dividends tax on failure to withhold or on failure to pay over to the Commissioner, was repealed by para 55 of Schedule 1 to the TA Act with effect from 1 October 2012.

Section 157(2) of the TA Act provides that an amount paid or recovered from a withholding agent under s 157(1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of that taxpayer's liability under the relevant tax Act.

### **Example – Personal liability of withholding agent**

*Facts:*

Company B paid a dividend of R200 000 to natural persons who are residents and withheld dividends tax of R40 000 ( $R200\,000 \times 20\%$ ) from that payment under s 64G(1), but did not pay the dividends tax to the Commissioner.

*Result:*

Under s 157(1)(a) of the TA Act Company B is personally liable for payment of dividends tax of R40 000 as if it is due by it, unless dividends tax is paid by the beneficial owners.

### **7.1.6 Declarations to be submitted to the Commissioner [s 64K(4)]**

When, as a result of the application of a tax treaty, –

- a company or a regulated intermediary withheld dividends at a reduced rate under s 64G(3) or s 64H(3) respectively, from the payment of a dividend, or
- a company that is liable under s 64EA(b) for dividends tax on a dividend that consists of the distribution of an asset *in specie*, paid dividends tax at a reduced rate under s 64FA(2),

that company or regulated intermediary must submit to the Commissioner any declaration –

- submitted to that company or that regulated intermediary by or on behalf of a beneficial owner, and
- relied upon by that company or that regulated intermediary in determining the amount of dividends tax so withheld,

at the time and in the manner prescribed by the Commissioner.

These declarations must be kept for record purposes and be submitted to SARS only on request.

### **7.1.7 Estimation of assessments (s 95(1) of the TA Act)**

SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer –

- does not submit a return for dividends tax;
- submits a return for dividends tax or information relating to it that is incorrect or inadequate; or
- does not submit a response to a request for relevant material under s 46 of the TA Act, in relation to the taxpayer, after delivery of more than one request for such material.

### **7.1.8 Interest on late payment of dividends tax (s 64K(6); and Chapter 12 of the TA Act)**

A company, regulated intermediary or beneficial owner that fails to pay dividends tax within the required period must pay interest at the prescribed rate on the amount of the dividends tax outstanding at the prescribed rate reckoned from the end of that period to the date that the



dividends tax is paid. The person that fails to pay dividends tax will be the person liable for interest on the late payment of dividends tax.

The prescribed rate under s 189(3) of the TA Act is the interest rate that the Minister may from time to time fix by notice in the *Gazette* under s 80(1)(b) of the Public Finance Management Act 1 of 1999. Section 64K(6), which deals with interest on late payment of dividends tax, is to be repealed by para 55 of Schedule 1 to the TA Act on a date to be proclaimed by the President in the *Gazette*. Interest is to be levied under Chapter 12 of the TA Act.

#### **Example – Interest on late payment of dividends tax**

##### *Facts:*

Company D paid a dividend of R500 000 to Regulated Intermediary A on 8 August year 1. Regulated Intermediary A withheld dividends tax of R100 000 (R500 000 × 20%) and paid the net dividend of R400 000 (R500 000 – R100 000) to the beneficial owners on 11 August year 1. Regulated Intermediary A paid dividends tax of R100 000 to SARS on 30 December year 1.

##### *Result:*

Under s 64K(1)(c) Regulated Intermediary A should have paid dividends tax of R100 000 to the Commissioner by 30 September year 1 but paid it only on 30 December year 1. Regulated Intermediary A must pay interest under s 64K(6) at the prescribed rate for the period 1 October year 1 to 30 December year 1 as a result of the late payment of dividends tax.

### **7.1.9 Assessment and recovery of tax; and understatement and administrative penalties (ss 92, 99(1), 210 and 222 of the TA Act)**

#### **a. Additional assessments (ss 91(2), 92 and 99(1) of the TA Act)**

##### *Section 92 of the TA Act*

Under s 92 of the TA Act SARS must issue an additional assessment if SARS is satisfied that an assessment for dividends tax does not reflect the correct application of the Act to the prejudice of SARS or the *fiscus*.

##### *Section 99(1) of the TA Act*

Under s 99(1) of the TA Act an assessment for dividends tax may not be made five years after the date of assessment of an original assessment by way of self-assessment by the taxpayer or, if no return is received, by SARS. Under s 91(2) of the TA Act the submission of a dividends tax return is an original self-assessment of a dividends tax liability. The period referred to in s 99(1) may be extended under specified circumstances.<sup>276</sup>

Section 99(2)(b) of the TA Act provides that under self-assessment SARS's ability to raise an assessment will not be restricted to the extent that the fact that the full amount of tax chargeable was not assessed, was due to –

- fraud;
- intentional or negligent misrepresentation;
- intentional or negligent non-disclosure of material facts; or

<sup>276</sup> See s 99(3) and (4). See also section 7(1)(g) of the Disaster Management Tax Relief Administration Act 14 of 2020.

- the failure to submit a return.

SARS and the taxpayer can agree to extend the five-year prescription period provided this is done before the period expires.<sup>277</sup>

#### **b. Understatement penalty (s 222 of the TA Act)**

Section 222(1) of the TA Act provides that, in the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the understatement penalty determined under s 222(2) of the TA Act unless the understatement results from a *bona fide* inadvertent error. The TA Act defines 'understatement' in s 221 of that Act as any prejudice to SARS or the *fiscus* as a result of –

- failure to submit a return required under a tax Act or by the Commissioner;<sup>278</sup>
- an omission from a return;
- an incorrect statement in a return;
- if no return is required, the failure to pay the correct amount of tax; or
- an impermissible avoidance arrangement.<sup>279</sup>

An understatement penalty under s 222 of the TA Act can therefore be imposed on dividends tax if any of the events listed above occurs.

Under s 222(2) of the TA Act, the understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in s 223 of the TA Act to each shortfall determined in relation to each understatement in a return. For dividends tax the shortfall will be determined under s 222(3)(a) of the TA Act as the difference between the amount of tax properly chargeable for the tax period and the amount of tax that would have been chargeable for the tax period if the understatement was accepted. The understatement penalty percentage determined under s 223(1) of the TA Act ranges from 0% to 200% and is dependent on the presence of certain behaviours on the part of the person required to account for the relevant shortfall in dividends tax.

#### **Example 1 – Assessment for dividends tax and levy of understatement penalty and interest**

##### *Facts:*

Company G distributed an asset with a market value of R250 000 to the sole holder of its shares, a natural person who is a resident, on 30 June year 1. Company G failed to pay dividends tax to the Commissioner on the distribution of the asset *in specie* and did not submit a return for dividends tax.

##### *Result:*

The distribution of the asset *in specie* constitutes a 'dividend' as defined in ss 1(1) and 64D.

<sup>277</sup> Section 99(2)(c) of the TA Act.

<sup>278</sup> Paragraph (a) of the definition of 'understatement' was substituted with effect from 17 January 2019.

<sup>279</sup> An impermissible avoidance arrangement was inserted by s 61(c) of the Tax Administration Laws Amendment Act 16 of 2016.

Under s 64E(3)(b) the amount of the dividend *in specie* is deemed to be equal to the market value of the asset on date of distribution. Company G is deemed to have paid a dividend of R250 000 on 30 June year 1 under s 64E(2)(b).

Company G is liable to pay dividends tax under s 64EA(b) of R50 000 ( $R250\,000 \times 20\%$ ) to SARS by 31 July year 1 under s 64K(1)(b).

SARS is entitled to –

- issue an estimated original assessment to Company G for dividends tax of R50 000 ( $R250\,000 \times 20\%$ ) under s 95(1)(a) of the TA Act;
- levy an understatement penalty under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax under s 64K(6) from 1 August year 1 until the date of payment of the dividends tax.

### **Example 2 – Assessment for dividends tax and levy of understatement penalty and interest**

#### *Facts:*

Company A's year of assessment ends on the last day of February. Company A made an interest-free loan to Individual B, a resident, of R1 million on 1 March year 1. The loan was repaid on 28 February year 2. Individual B holds 60% of the equity shares in Company A. The 'official rate of interest' for the year of assessment ending on 28 February year 2 was 8%. Company A submitted a return for dividends tax in respect of a deemed dividend of R40 000 and paid dividends tax of R6 000 on 31 March year 2.

#### *Result:*

Individual B is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person' in s 1(1).

Under s 64E(4)(a) Company A is deemed to have paid a dividend. The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i) and the amount of the dividend is R80 000 ( $R1\,000\,000 \times 8\%$ ) under s 64E(4)(b)(ii). Under s 64E(4)(c) the dividend is deemed to have been paid on the last day of the year of assessment, namely, 28 February year 2.

Company A was required to have paid dividends tax of R16 000 ( $R80\,000 \times 20\%$ ) under s 64K(1)(b) to SARS on or before 31 March year 2, but paid only R6 000 to SARS on that date.

Under s 91(2) of the TA Act the submission of the dividends tax return is an original self-assessment of Company A's tax liability.

SARS is entitled to –

- issue an additional assessment under s 92 of the TA Act to Company A for underpaid dividends tax of R10 000 ( $R16\,000 - R6\,000$ );
- levy an understatement penalty on the under-declaration of the amount of dividends tax under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax of R10 000 under s 64K(6) from 1 April year 2 until the date of payment of the dividends tax.

### Example 3 – Assessment for dividends tax and levy of understatement penalty

#### Facts:

Company A's year of assessment ends on the last day of February. Company A made an interest-free loan to Individual B, a resident, of R1 million on 1 March year 1. Individual B holds 60% of the shares in Company A. The 'official rate of interest' for the year of assessment is 8%. Company A did not submit a return for dividends tax and did not pay any amount of dividends tax.

#### Result:

Under s 64E(4)(a) Company A is deemed to have paid a dividend that is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i). Under s 64E(4)(b)(ii) the amount of that dividend is deemed to be R80 000 (R1 million × 8%).

SARS is entitled to –

- issue an estimated original assessment to Company A for dividends tax of R16 000 (R80 000 × 20%) under s 95(1)(a) of the TA Act;
- levy an understatement penalty under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax of R16 000 under s 64K(6) from 1 April year 2 until the date of payment of the dividends tax.

### c. Administrative penalties (s 210 of the TA Act)

Under s 210(1) of the TA Act, SARS must impose a 'fixed amount penalty' in accordance with the Table in s 211 of that Act, if a 'non-compliance' as referred to in s 210(2) exists. Section 210(2) of the TA Act provides that non-compliance is failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued by the Commissioner other than the circumstances listed in s 210(a), (b) and (c). Failure to submit a return for dividends tax is not currently listed as non-compliance in a public notice issued by the Commissioner.

Penalties for failure to submit a return may not be imposed under s 210 of the TA Act if penalties are imposed either under s 213 of the TA Act (penalty on amount of unpaid tax) or s 222 of the TA Act (understatement penalty).

#### 7.1.10 Liability of financial management for dividends tax debt (s 180 of the TA Act)

A person is personally liable for an outstanding dividends tax debt to the extent that the person's negligence or fraud resulted in the failure to pay dividends tax if –

- the person controls or is regularly involved in the management of the overall financial affairs of a company; and
- a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of that company.<sup>280</sup>

<sup>280</sup> Section 64K(8) which dealt with personal liability was repealed by para 55 of Schedule 1 to the TA Act with effect from 1 October 2012.

## 7.2 Duty to keep records and rules for electronic communication (ss 29 and 255 of the TA Act)

A person must keep the records, books of account or documents that —<sup>281</sup>

- enable the person to observe the requirements of ss 64D to 64N;
- are specifically required under ss 64D to 64N or by the Commissioner by public notice; and
- enable SARS to be satisfied that the person has observed these requirements.

The requirements to keep records, books of account or documents for a tax period apply to a company, regulated intermediary or beneficial owner who —<sup>282</sup>

- has submitted a return for dividends tax for the tax period;
- is required to submit a return for dividends tax for the tax period and has not submitted such return; or
- is not required to submit a return for dividends tax but has, during the tax period, received dividends or engaged in any activity that is liable to dividends tax.

Records, books of account or documents must be retained by the company, regulated intermediary or beneficial owner that —<sup>283</sup>

- has submitted a return for dividends tax, for a period of five years from the date of submission of the return; and
- is not required to submit a return for dividends tax, for a period of five years from the end of the relevant tax period.

The following declarations are submitted, received or relied on under dividends tax legislation<sup>284</sup> and must be retained as indicated above:

- A declaration by the beneficial owner to the company or regulated intermediary under s 64G(2)(a)(i) or s 64H(2)(a)(i) that the dividend is exempt from dividends tax under s 64F or a tax treaty.
- A declaration by the beneficial owner under s 64FA(1)(a)(i) that the portion of the dividend that constitutes a distribution of an asset *in specie* would have, if that portion had not constituted a distribution of an asset *in specie*, been exempt from dividends tax under s 64F.
- A declaration under s 64H(2)(a)(i) by a regulated intermediary to another regulated intermediary that pays a dividend, that the payment is made to a vesting trust of which the sole beneficiary is the first-mentioned regulated intermediary.
- A declaration to the company or regulated intermediary by the beneficial owner under s 64G(3) or s 64H(3) that the dividend is subject to a reduced rate of tax as a result of the application of a tax treaty.
- A declaration by the beneficial owner under s 64FA(2)(a) that the portion of the dividend that constitutes a distribution of an asset *in specie* would have, if that portion

<sup>281</sup> Section 29(1) of the TA Act.

<sup>282</sup> Section 29(2) of the TA Act.

<sup>283</sup> Section 29(3) of the TA Act.

<sup>284</sup> Sections 64D to 64N.

had not constituted a distribution of an asset *in specie*, been subject to a reduced rate of tax as a result of the application of a tax treaty.

- A written undertaking by the beneficial owner under s 64G(2)(a)(ii), s 64G(3)(b), s 64FA(1)(a)(ii) or s 64FA(2)(b) to inform a company in writing should the circumstances affecting the exemption or reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.
- A written undertaking by the beneficial owner under s 64H(2)(a)(ii) or s 64H(3)(b) to inform a regulated intermediary in writing should the circumstances affecting the exemption or reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.
- A declaration of an amount of CTC transferred to the holders of shares as determined by the directors of a company or any other person with comparable authority, to be an amount so transferred (definition of 'contributed tax capital' in s 1(1) and para 76(4) of the Eighth Schedule).
- Proof, in the form and manner prescribed by the Commissioner, of any tax paid to any sphere of government of any country other than South Africa that is deducted as a rebate under s 64N(1) from dividends tax payable.

Under s 255(1) of the TA Act the Commissioner made by public notice<sup>285</sup> rules prescribing –

- the procedures for submitting a return in electronic format, electronic record retention and other electronic communications between SARS and other persons;
- requirements for an electronic or digital signature of a return or communication; and
- the procedures for electronic record retention by SARS.

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<sup>285</sup> GN 787 in GG 35733 of 1 October 2012.

## Chapter 8

### Refund of dividends tax (ss 64L, 64LA and 64M; and s 190 of the TA Act)

#### 8.1 Introduction to refund of dividends tax

##### 8.1.1 Introduction to refund of dividends tax withheld from the payment of a cash dividend

An amount of dividends tax withheld by a company or regulated intermediary from the payment of a dividend that does not consist of the distribution of an asset *in specie* may under specified circumstances, notwithstanding the provisions of Chapter 13 of the TA Act,<sup>286</sup> be refunded to the person to whom the dividend was paid under either s 64L<sup>287</sup> or s 64M,<sup>288</sup> if the reason for withholding dividends tax was that –

- the declaration that the dividend is exempt from dividends tax; or
- the declaration that the dividend is subject to dividends tax at a reduced rate under a tax treaty,

had not been submitted to the company or regulated intermediary before the dividend was paid.

The amount which may be refunded is equal to the amount which would not have been withheld had the declarations been submitted before the dividend was paid.

In order for the amount of dividends tax withheld to be refunded, the –

- declarations referred to above; and
- the written undertaking to forthwith inform the company or the regulated intermediary should the circumstances affecting the exemption from dividends tax or a reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner,

must be submitted within a period of three years after date of payment of the dividend.

An amount of dividends tax withheld by a company or regulated intermediary from the payment of a dividend will be refunded under s 64L(1A) and s 64M(1A) respectively if a rebate of foreign taxes on dividends which should have been deducted under s 64N from the dividends tax to be withheld was not so deducted, provided such rebate is claimed within three years after the date of payment of the dividend (see **8.2.1** and **8.3.1**).

The manner in which dividends tax is refunded and recovered depends on whether dividends tax was withheld by the company that declared and paid the dividend or by a regulated intermediary that paid the dividend. When a refund is claimed in respect of dividends tax withheld by a –

- company that declared and paid a dividend, that company must refund dividends tax to the person to whom the dividend was paid under s 64L (see **8.2**); or

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<sup>286</sup> Chapter 13 of the TA Act incorporates ss 190 and 191 of that Act which deal respectively with refunds of excess payments and refunds subject to set-off and deferral.

<sup>287</sup> Refund by companies.

<sup>288</sup> Refund by regulated intermediaries.

- regulated intermediary that paid the dividend, that regulated intermediary must refund dividends tax to the person to whom the dividend was paid under s 64M (see **8.3**).

### **8.1.2 Introduction to refund of dividends tax paid by a company on a dividend *in specie***

Dividends tax paid by a company on a dividend *in specie* may be refunded under –

- s 64LA if dividends tax was paid by a company as a result of the company being unable to obtain the declarations and written undertakings referred to in s 64FA(1)(a) and (2) before the dividend was paid (see **8.4**); or
- s 190 of the TA Act when dividends tax was overpaid by a company in circumstances other than those referred to in s 64LA (see **8.5**).

## **8.2 Refund of dividends tax on cash dividends declared and paid by companies (s 64L)**

### **8.2.1 Refund of dividends tax withheld by a company that declared and paid a cash dividend [s 64L(1) and s 64L(1A)]**

#### **a. Refund of dividends tax – General rule [s 64L(1)]**

When an amount is required to be withheld by a company under s 64G(1) from the payment of a dividend and the declaration referred to in –

- s 64G(2)(a) that the dividend is exempt from dividends tax (the declaration of exemption), or
- s 64G(3)(a) that the dividend is subject to a reduced rate of tax in accordance with the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax),

is not submitted to the company before the dividend is paid, dividends tax at the rate of 20% must be withheld. However, when both the –

- declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax; and
- the written undertaking referred to in s 64G(2)(a)(ii) or s 64G(3)(b),

are submitted to the company within three years after the date of payment of the dividend in respect of which they are made, so much of that amount as would not have been withheld had the declaration been submitted by the required date, is refundable *to the person to whom the dividend was paid* under s 64L(1).

Section 7(1)(a) of the Disaster Management Tax Relief Administration Act 14 of 2020 provides that the period of lock down must not be taken into account when determining if the declaration form and written undertaking were submitted to the Commissioner within three years after the date of payment of the dividend to which they were made. The period of ‘lock down’ is defined in s 1 of that Act as the period between 23H59 on 26 March 2020 until 23H59 on 30 April 2020.

Section 64L(1) applies in the circumstances indicated above, notwithstanding the provisions of Chapter 13 (ss 190 and 191) of the TA Act.



## b. Refund of dividends tax – Rebate for foreign taxes paid [s 64L(1A)]

Section 64L(1A) provides that if –

- a company withheld dividends tax from the payment of a dividend under s 64G(1), and
- a rebate for foreign taxes paid on that dividend should have been, but was not, deducted from that amount under s 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount is refundable *to the person to whom the dividend was paid*.

The amount of dividends tax withheld will be refunded under s 64L(1A) only if a rebate under s 64N is claimed within three years after the date of payment of the relevant dividend.

### Example – Refund of dividends tax – Rebate for foreign taxes paid

*Facts:*

Company Y, incorporated in Australia, declared a dividend of R1 million on shares listed on the JSE to South African holders of its shares who are all natural persons. Each holder holds less than 10% of the shares in Company Y. Company Y did not make use of a regulated intermediary and withheld Australian tax of R150 000 (R1 million × 15%) from the dividend in accordance with the tax treaty between South Africa and Australia<sup>289</sup> and issued certificates to the holders of shares indicating the amounts of Australian tax withheld from the dividends paid to them.

Company Y withheld dividends tax of R200 000 (R1 million × 20%) from the dividend paid to the beneficial owners under s 64G(1) and did not deduct the foreign taxes withheld of R150 000 as a rebate under s 64N. A month after payment of dividends tax of R200 000 to the Commissioner, Company Y realised that it did not apply the rebate under s 64N.

*Result:*

A rebate for foreign taxes on dividends of R150 000 should have been deducted by Company Y under s 64N(1) from dividends tax payable of R200 000. The amount of dividends tax of R150 000 that should not have been withheld by Company Y is refundable by Company Y to the South African holders of shares under s 64L(1A) because the rebate is claimed within three years of the payment of the dividend.

## 8.2.2 Sources of refunds of dividends tax by a company that withheld dividends tax [s 64L(2)]

A refund claimed under s 64L(1) or s 64L(1A) of dividends tax withheld by a company that declared and paid a dividend must be refunded by that company to the person to whom the dividend was paid. These refunds can come from one of two sources (see below). The company is required to make the refund only as and when the funds have been obtained from one of these sources.

<sup>289</sup> Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'.

A company that is required to make a refund of dividends tax previously withheld by it, must firstly make the refund from any amount of dividends tax withheld by that company within a period of one year after –

- the submission of the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax as well as the written undertaking referred to in s 64L(1)(c), or
- the claim for a rebate of foreign taxes on dividends referred to in s 64L(1A).

To the extent that the amount that is refundable exceeds the amount of dividends tax withheld from future dividends within the one year period, the excess must be refunded from an amount recovered by the company from the Commissioner under s 64L(3) [s 64L(2)(b)].

### **8.2.3 Dividends tax refundable to be recovered from the Commissioner [s 64L(3)]**

To the extent that the amount of dividends tax refundable by a company to any person under s 64L(1) or s 64L(1A) exceeds the amount of dividends tax withheld by that company from future dividends within the one year period referred to in s 64L(2)(a), the company may recover the excess from the Commissioner. The company may request a refund in writing or its representative taxpayer may visit a branch office. The company will have to prove that insufficient dividends tax to cover the amount of the refund was withheld from dividends that were paid within the one year period. The request for a refund must be made by the company that paid the dividend and not by the beneficial owner of the dividend.

### **8.2.4 Expiry date for recovery of dividends tax from the Commissioner [s 64L(4)]**

No amount of dividends tax may be recovered from the Commissioner if the company that withheld dividends tax submits the claim for recovery to the Commissioner after the expiry of a period of four years reckoned from the date of payment of the dividend referred to in s 64L(1)(a) or s 64L(1A)(a).

#### **Example 1 – Refund of dividends tax by company that withheld dividends tax**

##### *Facts:*

Company M has five resident holders of shares, four of whom are natural persons and Company O. Each holder holds 20% of the equity shares in Company M. Company M declared a dividend of R60 000 to each holder of shares on 13 April year 1. The dividend was paid on 10 May year 1. Company O submitted the declaration of exemption and written undertaking to Company M on 17 May year 1. Company M declared another dividend of R100 000 on 9 June year 1 that was due and payable and paid to the holders of its shares on 30 June year 1.

##### *Result:*

Under s 64G(1) Company M must withhold dividends tax of R48 000 ( $R240\,000 \times 20\%$ ) from the dividend of R240 000 ( $R60\,000 \times 4$ ) paid to the natural persons and R12 000 ( $R60\,000 \times 20\%$ ) from the dividend of R60 000 paid to Company O. The declaration of exemption and the written undertaking to be submitted by Company O was not received by Company M before the dividend was paid on 10 May year 1. Under s 64K(1)(b) Company M must pay dividends tax of R60 000 ( $R48\,000 + R12\,000$ ) to the Commissioner on or before 30 June year 1.

Company O can claim a refund of dividends tax from Company M under s 64L(1) because the declaration of exemption and the written undertaking were submitted to Company M within three years of date of payment of the dividend of R60 000. Under s 64L(2)(a) Company M must refund dividends tax of R12 000 from dividends tax of R16 000 [ $R80\,000 (R100\,000 \times 80\%) \times 20\%$ ] that is to be withheld from the dividend that is to be paid to the four natural persons on 30 June year 1. Under s 64K(1)(c) Company M must pay dividends tax of R4 000 ( $R16\,000 - R12\,000$ ) to the Commissioner on or before 31 July year 1.

**Note:**

Dividends tax is not withheld from the dividend of R20 000 ( $R100\,000 \times 20\%$ ) to be paid to Company O on 9 June year 1 because the declaration of exemption and the written undertaking were submitted to Company M on 17 May year 1.

**Example 2 – Refund of dividends tax by company that withheld dividends tax**

*Facts:*

Company M has five resident holders of shares, four of whom are natural persons and Company O. Each holder holds 20% of the equity shares in Company M. Company M declared a dividend of R60 000 to each holder of shares on 13 April year 1. The dividend was paid on 10 May year 1. Company O submitted the declaration of exemption and written undertaking to Company M on 17 May year 1. Company M declared another dividend of R20 000 on 9 June year 1 that was paid to holders of its shares on 30 June year 1. Company M does not intend paying further dividends during the next year.

*Result:*

Under s 64L(1) Company M must refund dividends tax of only R3 200 [ $R16\,000 (R20\,000 \times 80\%) \times 20\%$ ] to Company O from dividends tax withheld from the dividend payable to the holders of shares on 30 June year 1. The difference of R8 800 [ $(R60\,000 \times 20\%) - R3\,200$ ] must be recovered by Company M from the Commissioner under s 64L(2)(b) and (3) and refunded to Company O.

**Note:**

Dividends tax is not withheld from the dividend of R4 000 ( $R20\,000 \times 20\%$ ) paid to Company O on 30 June year 1 because the declaration of exemption and the written undertaking was submitted to Company M on 17 May year 1.

**Example 3 – Refund of dividends tax by company that withheld dividends tax**

*Facts:*

Trust B's year of assessment ends on the last day of February. Trust B (a resident discretionary trust) holds 100% of the equity shares in Company A. Company C is one of the beneficiaries of Trust B. Trust B, Company A and Company C are residents. Company A declared a dividend of R500 000 on 13 April year 1, payable to Trust B on 28 April year 1. Company A withheld dividends tax of R100 000 ( $R500\,000 \times 20\%$ ) from the dividend and paid R400 000 ( $R500\,000 - R100\,000$ ) to Trust B. Trust B distributed the net dividend of R400 000 to Company C on 31 May year 1.

**Result:**

Company C obtained a vested right to the dividend during Trust B's year of assessment ending on 28 February year 2 under s 25B(1) and (2), as a result of the discretion exercised by the trustees of the trust. Company C became the beneficial owner of the dividend after the date that the dividend was paid by Company A to Trust B, but during the same year of assessment in which the dividend accrued to Trust B.

The dividend should have been exempt from dividends tax under s 64F(1)(a), because the beneficial owner is a resident company (Company C).

Trust B may claim a refund from Company A under s 64L(1) if it submits the declaration of exemption and the written undertaking required under s 64G(2)(a) to Company A on or before 27 April year 4. Trust B can subsequently pay the dividends tax recovered to Company C (see 2.3.1 and 8.2.1).

**Note:**

Under para (ee) of the proviso to s 10(1)(k)(i) the dividend of R500 000 received by Company C is not exempt from normal tax unless Company C held all of the rights attaching to the shares after distribution of the dividends by Trust B.

**8.3 Refund of dividends tax on dividends paid by regulated intermediaries (s 64M)****8.3.1 Refund of dividends tax withheld by regulated intermediaries [s 64M(1) and s 64M(1A)]****a. General rule – Refund of dividends tax by regulated intermediaries [s 64M(1)]**

When an amount of dividends tax is required to be withheld by a regulated intermediary from the payment of a dividend and the declaration referred to in –

- s 64H(2)(a) that the dividend is exempt from dividends tax (the declaration of exemption), or
- s 64H(3)(a) that the dividend is subject to a reduced rate of tax in accordance with the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax),

is not submitted to the regulated intermediary before the dividend is paid, dividends tax at a rate of 20% must be withheld.

However, when –

- the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax, and
- the written undertaking,

are submitted to the regulated intermediary within three years after the date of payment of the dividend in respect of which they are made, so much of that amount as would not have been withheld had the declaration referred to in s 64H(2)(a) or s 64H(3)(a) been submitted before the dividend was paid, is refundable by the regulated intermediary *to the person to whom the dividend was paid* under s 64M(1).

Section 7(1)(a) of the Disaster Management Tax Relief Administration Act 14 of 2020 provides that the period of lock down must not be taken into account when determining if the declaration form and written undertaking were submitted to the Commissioner within three years after the date of payment of the dividend in respect of which they were made. The period of 'lock down' is defined in s 1 of that Act as the period between 23H59 on 26 March 2020 until 23H59 on 30 April 2020.

Section 64M(1) applies in the circumstances indicated above, notwithstanding the provisions of Chapter 13 (ss 190 and 191) of the TA Act.

**b. Refund of dividends tax by regulated intermediaries – Rebate for foreign taxes paid [s 64M(1A)]**

Section 64M(1A) provides that if –

- a regulated intermediary withheld dividends tax from the payment of a dividend under s 64H(1), and
- a rebate for foreign taxes paid on that dividend should have been, but was not, deducted from that amount under s 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount is refundable *to the person to whom the dividend was paid*.

The amount of dividends tax withheld will be refunded under s 64M(1A) only if a rebate under s 64N is claimed within three years after the date of payment of the relevant dividend.

**Example – Refund of dividends tax – Rebate for foreign taxes paid**

*Facts:*

Company Y, incorporated in Australia, declared a dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents and natural persons. Each holder holds less than 10% of the shares in Company Y. Company Y withheld Australian tax of R150 000 (R1 million × 15%) from the dividend in accordance with the tax treaty between South Africa and Australia.<sup>290</sup> Company Y paid the net dividend of R850 000 (R1 million – R150 000) to Regulated Intermediary B. No South African dividends tax was withheld by Company Y from the dividend paid to Regulated Intermediary B.

Regulated Intermediary B withheld dividends tax of R200 000 (R1 million × 20%) from the dividend paid to the beneficial owners under s 64H(1) and failed to deduct the foreign taxes withheld by Company Y as a rebate under s 64N. A month after payment of dividends tax of R200 000 to the Commissioner, Regulated Intermediary B realised that it had not applied the rebate under s 64N. Regulated Intermediary B claimed the rebate under s 64N on that date.

*Result:*

A rebate for foreign taxes on dividends of R150 000 should have been deducted by Regulated Intermediary B under s 64N(1) from dividends tax payable of R200 000. The amount of dividends tax of R150 000 that should not have been withheld by Regulated Intermediary B is refundable to the South African holders of shares under s 64M(1A).

<sup>290</sup> Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'.

### 8.3.2 Source of refunds of dividends tax by regulated intermediary that withheld dividends tax [s 64M(2)]

Any amount of dividends tax that is refundable under s 64M(1) or s 64M(1A) must be refunded by the regulated intermediary from any amount of dividends tax withheld by the regulated intermediary after the –

- submission by the beneficial owner of the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax as well as the written undertaking referred to in s 64M(1)(c); or
- the claim for a rebate of foreign taxes on dividends referred to in s 64M(1A).

The refunding of dividends tax by a regulated intermediary under s 64M can come from one source only. This source is the withholding of dividends tax from future dividends paid by the regulated intermediary that are paid by any company to the regulated intermediary.

There is no right of recovery of dividends tax from the Commissioner for dividends tax withheld by a regulated intermediary under s 64M.

#### Example – Refund of dividends tax by a regulated intermediary

##### Facts:

Regulated Intermediary A received a dividend of R12,5 million paid by J Ltd. R5 million of this amount was received on behalf of B Pension Fund which holds 40% of the shares in J Ltd. B Pension Fund did not submit a declaration of exemption before the dividend was paid and Regulated Intermediary A withheld dividends tax of R1 million (R5 million × 20%) from the dividend when it was paid to B Pension Fund on 31 March year 1. The declaration of exemption and the written undertaking were submitted by B Pension Fund on 28 April year 1.

Regulated Intermediary A received a dividend of R20 million on 31 May year 1 from W Ltd on behalf of holders of its shares and withheld dividends tax of R2,25 million.

##### Result:

Dividends tax of R1 million withheld by Regulated Intermediary A as a result of the late submission of the declaration of exemption and the written undertaking by B Pension Fund, must be refunded under s 64M(2) from dividends tax of R2,25 million withheld by Regulated Intermediary A from the dividend paid to the holders of shares in W Ltd. Regulated Intermediary A must pay dividends tax of R1,25 million (R2,25 million – R1 million) to the Commissioner in respect of the dividend paid by W Ltd.

### 8.4 Refund of dividends tax on dividends *in specie* (s 64LA)

A company that distributed a dividend *in specie* may have had to pay dividends tax on the distribution as a result of being unable to obtain –

- a declaration by the beneficial owner that the portion of the dividend that constitutes a distribution of an asset *in specie* would have been exempt from dividends tax under s 64F if it had not constituted a distribution of an asset *in specie* [s 64FA(1)(a)(i)]; and
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to above change or the beneficial owner cease to be a beneficial owner [s 64FA(1)(a)(ii)]; or

- a declaration by the beneficial owner that the portion of the dividend that constitutes a distribution of an asset *in specie* would have been subject to a reduced rate of tax as a result of the application of a tax treaty if it had not constituted a distribution of an asset *in specie* [s 64FA(2)(a)]; and
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to above change or the beneficial owner cease to be the beneficial owner [s 64FA(2)(b)].

The dividends tax overpaid as a result of the inability of the company to obtain the above documents in time is refundable to the company by SARS if claimed within three years of the date of payment of the dividend in respect of which they were made and the documents are submitted to the company within that period.<sup>291</sup> The refund rules in s 64LA take precedence over those in Chapter 13 of the TA Act.

#### **Example – Refund of dividends tax paid on a dividend *in specie* (s 64LA)**

##### *Facts:*

Company A has five resident holders of shares, four of whom are natural persons and Company B. Each holder holds 20% of the equity shares in Company A. Company A declared a dividend consisting of the distribution of an asset *in specie* of R60 000 to each holder of shares on 13 April year 1. The dividend was paid on 11 May year 1. Company B submitted the declaration of exemption and written undertaking to Company A on 18 May year 1.

##### *Result:*

Company A distributed dividends *in specie* totalling R300 000 (5 × R60 000).

Company A must pay dividends tax of R60 000 (R300 000 × 20%) under ss 64E(1) and 64EA(b) on the dividends of R300 000. The declaration of exemption and the written undertaking to be submitted by Company B was not received by Company A before the dividend was paid on 11 May year 1 with the result that Company A is obliged to pay dividends tax on the dividend paid to Company B.

Company A may claim a refund of dividends tax of R12 000 (R60 000 × 20%) from SARS under s 64LA because the declaration of exemption and the written undertaking were submitted to Company A within three years of date of payment of the dividend.

#### **8.5 Refund of dividends tax on dividends *in specie* in circumstances other than those referred to in s 64LA (s 190 of the TA Act)**

Under s 190(1) of the TA Act SARS must pay a refund if a person is entitled to a refund of –

- an amount properly refundable under a tax Act and if so reflected in an assessment [s 190(1)(a) of the TA Act]; or
- the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment [s 190(1)(b) of the TA Act].

<sup>291</sup> Section 64LA(b) has been amended with effect from 19 January 2022, namely the date of promulgation of the Tax Administration Laws Amendment Act 20 of 2021.

Under s 190(4) of the TA Act an amount under s 190(1)(b) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of –

- an assessment by SARS, within three years from the later of the date of the assessment or the erroneous payment;
- self-assessment, within five years from the later of the date the return had to be submitted or, if no return is required, payment had to be made under the relevant tax Act or the erroneous payment was made; or
- an erroneous payment claimed by a taxpayer within the periods referred to above, but not paid by SARS within these periods.<sup>292</sup>

The submission of a return is an original self-assessment of the tax liability under s 91(2) of the TA Act if a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability. A return submitted for dividends tax is an original self-assessment under s 91(2) of the TA Act.

**Example – Refund of dividends tax in respect of a dividend paid by a company that constitutes a distribution of an asset *in specie* (s 190 of the TA Act)**

*Facts:*

Company A distributed an asset with a market value of R1 million to the sole holder of its shares, a natural person, on 30 November year 1. Company A paid dividends tax of R225 000 to the Commissioner on 14 December year 1.

*Result:*

Under s 64E(1) and s 64E(3)(b) Company A is deemed to have paid a dividend of R1 million on 30 November year 1. Company A was liable for dividends tax of R200 000 (R1 million × 20%) under s 64EA(b). Company A erroneously made an over-payment of dividends tax of R25 000 (R225 000 – R200 000). Under s 190 of the TA Act SARS must pay a refund to Company A if it meets all the requirements of that section.

<sup>292</sup> Section 190(4) of the TA Act was substituted by s 60(1)(b) of the Tax Administration Laws Amendment Act 23 of 2015 with effect from 1 October 2012 and amended by s 21 of the Tax Administration Laws Amendment Act 22 of 2018 with effect from 17 January 2019.



## Chapter 9

### Rebate against normal tax or dividends tax in respect of foreign taxes on dividends (ss 6quat and 64N)

#### 9.1 Summary of rebates against normal tax or dividends tax for foreign taxes on dividends (ss 6quat and 64N)

A person may qualify for a rebate against normal tax or dividends tax if a foreign dividend is received by or accrues to a person or a beneficial owner and if the foreign dividend is subject to normal tax or dividends tax. These rebates are summarised in the table below:

Rebate (section of the Act)	Rebate against normal tax or dividends tax	Foreign dividend subject to normal tax or dividends tax in South Africa	Person entitled to rebate
6quat	Normal tax	Normal tax	Resident in whose taxable income the foreign dividend is included
64N	Dividends tax	Dividends tax	Person that is liable for dividends tax

#### 9.2 Rebate for foreign taxes on dividends (s 64N)

##### 9.2.1 Rebate for foreign taxes on dividends paid by a foreign company [s 64N(1)]

A foreign dividend paid by a foreign company to a resident is liable to dividends tax to the extent the dividend does not consist of a distribution of an asset *in specie* if the share in respect of which the foreign dividend is paid is a listed share.

Section 64N(1) provides for a rebate which must be deducted from dividends tax payable in respect of the specified dividends as set out in the preceding paragraph if the foreign dividend was subject to foreign tax.

An amount of foreign tax (for example, foreign dividend withholding tax) will not qualify for both a rebate from normal tax under s 6quat and a rebate against dividends tax under s 64N because amounts falling within the ambit of s 64N are exempt under s 10B(2)(d) and therefore the amount will not be included in taxable income, which is a requirement of s 6quat.

#### Example – Rebate for foreign taxes on dividends

##### Facts:

Company Y, incorporated in Australia, declared a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million  $\times$  50%  $\times$  20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax.

Company Y withheld Australian tax of R150 000 (R1 million  $\times$  15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between South Africa and Australia.<sup>293</sup>

*Result:*

Under ss 64N(1) and 64H(1) a rebate for foreign taxes on dividends must be deducted by Regulated Intermediary A from dividends tax of R100 000 which would otherwise be withheld from the dividends paid to the holders of shares who are natural persons. The amount of the rebate is R75 000 (R500 000  $\times$  15%), therefore dividends tax of R25 000 (R100 000 – R75 000 Australian tax) is to be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

Regulated Intermediary A pays R825 000 (R1 million – R150 000 Australian tax – R25 000 dividends tax) to the South African holders of shares.

**Note:**

The foreign dividends of R1 million that accrued to the holders of shares are included in their gross income under para (k) of the definition of 'gross income' in s 1(1) but are exempt from normal tax under s 10B(2)(d). The holders of shares will therefore not qualify for a rebate against normal tax under s 6quat(1) (see 9.3).

### 9.2.2 Amount of rebate for foreign taxes on dividends [s 64N(2)]

The amount of the rebate is equal to the amount of any tax paid to any sphere of government of any country other than South Africa, without any right of recovery by any person, in respect of a foreign dividend paid by a foreign company on a listed share.

A rebate will be allowed only to the extent that the amount of the foreign tax is proved to be payable to a sphere of government of a foreign country without a right of recovery (see 9.2.5).

To the extent that a beneficial owner receives a refund of foreign taxes or is the recipient of a benefit resulting in the removal or reduction of double taxation, the need to provide relief from double taxation diminishes.

In these circumstances the beneficial owner or any other person should not be able to recover the foreign taxes proved to be payable. The existence of a right of recovery, held either by the beneficial owner or any other person, means that the amount of the foreign tax liability will not be allowed as a rebate. For example, exercising a right to contest a foreign tax liability gives rise to a contingent right to recover the overpaid tax if successful. A rebate will not be permitted while the tax is in dispute and not yet finally determined.

<sup>293</sup> Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'.

A further example includes the situation in which a foreign jurisdiction imposes a higher domestic rate of tax on a foreign dividend than that permitted under the provisions of the relevant tax treaty. A rebate for foreign taxes actually paid will be allowed but only to the extent specified in the relevant tax treaty.

The words 'right of recovery by any person' are interpreted very broadly and include any form of relief against a foreign tax liability. For example, a refund, credit, rebate, remission, or deduction, is considered to be a right of recovery. Any other form of economic benefit to which a person becomes entitled is also considered to be a 'right of recovery by any person'.

### **Example – Amount of rebate for foreign taxes on dividends**

#### *Facts:*

Company Y, incorporated in Australia, declares a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

Company Y pays the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million  $\times$  50%  $\times$  20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax provided for in s 64F(1).

Company Y withheld Australian tax of R150 000 (R1 million  $\times$  15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between South Africa and Australia.<sup>294</sup>

#### *Result:*

The amount of the rebate under s 64N(2) is equal to the amount of foreign taxes paid. Foreign taxes of R150 000 were withheld by Company Y from dividends paid to the natural persons and company holders of shares. Foreign taxes paid must be deducted from dividends tax to be withheld by Regulated Intermediary A. Dividends tax to be withheld by Regulated Intermediary A is calculated as follows:

	R
Dividends tax to be withheld by Regulated Intermediary A – Natural persons (R1 million $\times$ 50% $\times$ 20%)	100 000
Less: Rebate for foreign taxes on dividends – Natural persons (R1 million $\times$ 50% $\times$ 15%)	<u>(75 000)</u>
Dividends tax to be withheld and paid to SARS by Regulated Intermediary A	<u>25 000</u>

#### **Note:**

Foreign taxes of R75 000 that were withheld by Company Y from dividends paid to the company holders of shares are not allowed as a rebate against dividends tax to be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

<sup>294</sup> Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'.

### 9.2.3 Limitation on amount of rebate for foreign taxes on dividends [s 64N(3)]

The amount of the rebate must not exceed the amount of dividends tax imposed on the foreign dividend.

While a beneficial owner that is not liable for dividends tax as a result of the exemptions provided for under s 64F will qualify for a rebate under s 64N, the amount of the rebate will be nil under s 64N(3).

#### Example – Limitation on amount of rebate for foreign taxes on dividends

##### Facts:

Company Y, incorporated in a foreign country with which South Africa does not have a tax treaty, declared a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million × 50% × 20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax.

Company Y was obliged to withhold foreign tax at a rate of 25% and accordingly withheld foreign tax of R250 000 (R1 000 000 × 25%) from the dividend paid to Regulated Intermediary A.

##### Result:

The amount of the rebate is equal to the amount of foreign taxes of R125 000 (R250 000 × 50%) withheld from the dividends paid to holders of shares who are natural persons. The rebate is, however, limited under s 64N(3) to the amount of dividends tax of R100 000 withheld from dividends paid to holders of shares who are natural persons:

	R
Dividends tax payable by Regulated Intermediary A – Natural persons	100 000
Less: Rebate for foreign taxes, limited to amount of dividends tax	(100 000)
Dividends tax payable to SARS by Regulated Intermediary A	<u>nil</u>

### 9.2.4 Translation of amounts of foreign taxes on dividends [s 64N(4)]

The rebate for foreign taxes is determined in rand by translating the foreign currency amount using the same rate used to translate the foreign dividend [s 64N(4)].

A dividend that does not consist of the distribution of an asset *in specie* paid by a listed company is deemed to be paid on the date it is paid [s 64E(2)(a)(i)]. A dividend denominated in foreign currency must be translated to rand at the spot rate at the time the dividend is paid [s 64E(5)]. It follows that the foreign taxes must also be translated to rand at the spot rate applicable when the dividend is paid.

### **Example – Translation of amounts of foreign taxes on dividends**

#### *Facts:*

Company Y, incorporated in Australia, declared a cash dividend of AUD1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

The dividend of AUD1 million was converted from Australian dollar to South African rand at an exchange rate of AUD 1: R9,2400 when it was paid.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R924 000 (AUD1 million dividend  $\times$  50%  $\times$  R9,2400  $\times$  20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax.

Company Y withheld Australian tax of AUD150 000 (AUD1 million  $\times$  15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between South Africa and Australia.<sup>295</sup>

#### *Result:*

The foreign tax paid of AUD150 000 is translated to rand by using the spot rate of AUD 1: R9,2400. The foreign tax of R693 000 (AUD 150 000 foreign tax  $\times$  R9,2400  $\times$  50%) withheld from the rand dividend payable to the holders of shares who are natural persons is deductible as a rebate against the dividends tax liability of R924 000. As a result of this set-off dividends tax of R231 000 (R924 000 – R693 000) must be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

### **9.2.5 Proof of foreign taxes on dividends [s 64N(5)]**

A company or regulated intermediary must obtain proof, in the form and manner prescribed by the Commissioner, of any tax paid to any sphere of government of any country other than South Africa that is deducted as a rebate under s 64N(1) from dividends tax payable (see 9.2.2).

See Interpretation Note 18 'Rebates and Deduction for Foreign Taxes on Income' for commentary on 'documentary proof required by SARS for foreign taxes'.

The company or regulated intermediary must satisfy itself that an amount qualifies for a rebate under s 64N(1), since the company or regulated intermediary may be personally liable for an amount of dividends tax which should have been withheld, but was not so withheld, under s 157(1)(b) of the TA Act (see 7.1.5).

<sup>295</sup> Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'.

### 9.3 Rebate or deduction for foreign taxes on income (s 6quat)

Entitlement to a rebate for foreign tax under s 6quat(1) arises for a resident in a year of assessment in which a foreign-sourced amount (including a foreign dividend) on which foreign taxes are payable, is included in the resident's taxable income.

Under s 6quat, any foreign taxes payable on a foreign dividend included in a resident's taxable income are set off against normal tax payable by the resident. While the rebate is generally limited to the normal tax on the amount included in a taxpayer's income, no regard must be had to the partial exemption of foreign dividends under s 10B(3).<sup>296</sup>

A rebate will not be allowed if the foreign dividend is exempt from normal tax under s 10B(2).

See Interpretation Note 18 'Rebates and Deduction for Foreign Taxes on Income' for commentary on s 6quat.

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<sup>296</sup> Paragraph (ii) of the proviso to s 6quat(1A).

## Chapter 10

### Company reorganisation rules – CTC and dividends tax [ss 42(3A), 44(4A), 44(6)(c), 44(6)(e), 46(3A) and 46(5)]

#### 10.1 Introduction

The definition of ‘contributed tax capital’ in s 1(1) is considered in 2.2.2. The company reorganisation rules, however, require special adjustments for the calculation of CTC, similar to other rules for the calculation of base cost, cost price and allowances on assets. Special rules apply for the calculation of CTC in an –

- asset-for-share transaction under s 42 (see 10.2);
- amalgamation transaction under s 44 (see 10.3.1); and
- unbundling transaction under s 46 (see 10.4.1).

Special rules apply also for dividends tax purposes when shares are distributed under an amalgamation transaction (see 10.3.2) and under an unbundling transaction (see 10.4.2).

#### 10.2 CTC and asset-for-share transactions [s 42(3A)]

Section 42 provides relief from income tax and CGT if a transaction qualifies as an ‘asset-for-share transaction’ as defined in s 42(1). Paragraph (a) of the definition of ‘asset-for-share transaction’ includes a transaction in which a person disposes of an asset to a resident company in exchange for the issue of equity shares in that company.

Under s 42(3A), an asset disposed of by a person to a company under para (a) of the definition of ‘asset-for-share transaction’ gives rise to special calculations of CTC of that company if the person disposing of an asset to that company –

- holds at least 10% of the equity shares that confer at least 10% of the voting rights of that company at the close of the day on which that asset is disposed of; or
- is a natural person who will be engaged on a full-time basis in the business of that company or of a controlled group company in relation to that company of rendering a service.

Under s 42(3A) the amount received by or accrued to the company for the issue of the shares under an asset-for-share transaction is deemed for the purposes of the definition of CTC to be equal to the –

- amount taken into account under s 11(a), s 22(1) or s 22(2) by the person who disposed of the asset, if the asset is trading stock; or
- base cost<sup>297</sup> of the asset determined at the time of disposal if the asset is an asset other than trading stock.

In both circumstances, the amount of CTC will be the tax cost of the asset to the person who disposed of the asset and not its market value on the date of disposal.<sup>298</sup>

<sup>297</sup> The Act defines ‘base cost’ in s 41(1).

<sup>298</sup> See Binding Private Ruling 249 ‘Corporate Group Restructuring Involving Multiple Transactions’.

### Example – Calculation of CTC under an asset-for-share transaction

#### *Facts:*

Individual J transferred an asset under para (a) of the definition of ‘asset-for-share transaction’ in s 42(1) to Company I in exchange for equity shares in Company I. At the end of the day on which the asset was disposed of by Individual J, Individual J held 30% of the equity shares in Company I. The base cost of the asset to Individual J was R10 000 immediately before the transaction and the market value of the asset was R15 000.

#### *Result:*

Under s 42(3A) the amount of CTC that is deemed to be received by or accrued to Company I for the issue of its shares under the asset-for-share transaction is equal to the base cost of the asset to Individual J of R10 000 and not its market value of R15 000.

Paragraph (i) of the proviso to s 42(3A) stipulates that s 42(3A) does not apply to any asset-for-share transaction under which a person disposes of an equity share in a listed company or in a portfolio of a collective investment scheme in securities (CISS) to any other company and after that disposal, together with any other asset-for-share transaction that is concluded –

- on the same terms as that asset-for-share transaction, and
- within a period of 90 days after that disposal,

that other company holds at least –

- 35% of the equity shares in that listed company or CISS, or
- 25% of the equity shares in that listed company or CISS if no person other than that other company holds an equal or greater amount of equity shares in the listed company or CISS.

Paragraph (ii) of the proviso<sup>299</sup> to s 42(3A) stipulates that s 42(3A) does not apply to any asset-for-share transaction under which a person disposes of an asset to a portfolio of a hedge fund collective investment scheme.

When s 42(3A) does not apply to a specific transaction, the consideration received by or that accrues to a company for the issue of its shares (which represents its CTC) will generally be equal to the market value of the assets received or accrued (see **2.2.2** for commentary on the meaning of ‘CTC’).

## 10.3 Amalgamation transactions [ss 44(4A), 44(6)(c) and 44(6)(e)]

### 10.3.1 CTC and amalgamation transactions [s 44(4A)]

An amalgamation transaction<sup>300</sup> involves the disposal by an ‘amalgamated’ (or target) company of all its assets to a ‘resultant’ (or acquiring) company by means of an amalgamation, conversion or merger. The assets disposed of to a resultant company must be disposed of in exchange for –

- equity shares in the resultant company; or

<sup>299</sup> Amended by s 62(1)(d) of the Taxation Laws Amendment Act 25 of 2015 with effect from 1 April 2015.

<sup>300</sup> The Act defines ‘amalgamation transaction’ in s 44(1).



- the assumption by the resultant company of certain specified debts of the amalgamated company.

The outcome of the transaction is that the existence of the amalgamated company is terminated.

Under s 44(4A) a portion of the CTC of the amalgamated company must be added to the CTC of the resultant company if the resultant company issues shares in exchange for the disposal of an asset to it. However, if the amalgamated company transfers CTC to its shareholders as part of the transaction, that portion of the CTC so transferred will not 'roll over' into the resultant company.

The proviso to s 44(4A) stipulates that when the amalgamated company is a portfolio of a collective investment scheme in property, the price at which the participatory interests were issued shall be added to the CTC of the class of shares issued by the resultant company.<sup>301</sup>

### **Example 1 – Calculation of CTC under an amalgamation transaction**

*Facts:*

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under an 'amalgamation transaction' as defined in s 44(1) in return for shares in Company B. The CTC of Company A and Company B before the transaction was R200 000 and R300 000 respectively. After the transaction Company A distributed its shareholding in Company B to its shareholders and Company A's existence was terminated.

*Result:*

The CTC of Company A of R200 000 is added to the CTC of Company B under s 44(4A). The CTC of Company B after the amalgamation transaction is therefore R500 000 (R300 000 + R200 000).

### **Example 2 – Calculation of CTC under an amalgamation transaction**

*Facts:*

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under an 'amalgamation transaction' as defined in s 44(1) in return for shares in Company B. The CTC of Company A and Company B before the transaction was R200 000 and R300 000 respectively. Company A made a cash distribution of R80 000 to its shareholders as part of the amalgamation transaction which included a distribution of CTC of R50 000. After the transaction Company A distributed its shareholding in Company B to its shareholders and Company A's existence was terminated.

*Result:*

Only R150 000 (R200 000 – R50 000) of the CTC of Company A will be 'rolled over' to Company B under s 44(4A). The CTC of R50 000 transferred to the shareholders will not 'roll over' to Company B. The CTC of Company B after the amalgamation transaction is R450 000 (R300 000 + R150 000).

<sup>301</sup> The proviso to s 44(4A) was inserted by s 93(1)(c) of the Taxation Laws Amendment Act 31 of 2013 and applies with effect from 24 October 2013.

A special rule applies if the resultant company holds shares in the amalgamated company immediately before the amalgamation transaction. In these circumstances, all the CTC in the amalgamated company cannot be added to the CTC in the resultant company. The amount of CTC in the amalgamated company must first be reduced by the percentage shareholding of the resultant company in the amalgamated company immediately before the amalgamation. Effectively, this means that only a *pro-rata* portion of the CTC in the amalgamated company is 'rolled over' to the resultant company.

The *pro-rata* portion of CTC in the amalgamated company that is 'rolled over' to the resultant company is calculated in accordance with the following formula:

'Amount of CTC of amalgamated company transferred to resultant company = value of shares in amalgamated company held by shareholders other than resultant company / value of all shares in amalgamated company × CTC of amalgamated company at the time of its termination.'

### Example 3 – Calculation of CTC under an amalgamation transaction

#### *Facts:*

Company X disposed of all of its assets to Company Y in return for shares in Company Y under an 'amalgamation transaction' as defined in s 44(1). Company Y held 10% of the shares in Company X immediately before the transaction, with the remaining 90% being held by other shareholders. Following the transaction, the existence of Company X was terminated. The CTC of Company X at the time of its termination was R400 000 and the total value of the shares in Company X at that time was R1 million.

#### *Result:*

The amount of CTC of Company X that is 'rolled over' to Company Y is calculated as follows:

Value of shares in Company X held by shareholders other than Company Y / value of all shares in Company X × CTC of Company X at the time of its termination.

CTC 'rolled over' to Company Y = R360 000 [R900 000 (R1 million × 90%) / R1 million × R400 000]

### 10.3.2 Dividends tax and normal tax – Amalgamation transactions [ss 44(6)(c) and 44(6)(e)]

#### a. Dividends tax and normal tax – Amalgamation transactions [s 44(6)(c)]

Section 44(6)<sup>302</sup> applies when a person that holds an equity share in an amalgamated company acquires an equity share in the resultant company by virtue of that shareholding and pursuant to an amalgamation transaction.

Section 44(6)(c) provides that an equity share in the resultant company that is acquired by a person in the circumstances indicated above is deemed not to be an amount transferred or applied by the amalgamated company for the benefit or on behalf of that person in respect of the share held by that person in the amalgamated company.

<sup>302</sup> Section 44(6) was substituted by s 93(1)(d) of the Taxation Laws Amendment Act 31 of 2013 and applies to transactions entered into on or after 4 July 2013.

Section 44(6)(c) has the effect that an equity share acquired by a person in the circumstances indicated does not constitute a 'dividend' as defined in s 1(1) and is, therefore, not subject to dividends tax or normal tax.<sup>303</sup>

**Example – Acquisition of equity shares pursuant to an amalgamation transaction**

*Facts:*

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under an 'amalgamation transaction' as defined in s 44(1) in exchange for equity shares in Company B. Company A transferred the equity shares in Company B to its shareholders pursuant to the amalgamation transaction.

*Result:*

Under s 44(6)(c) the acquisition by the shareholders of the equity shares in Company B does not constitute a 'dividend' as defined in s 1(1) and is therefore not subject to dividends tax or normal tax.

**b. Other consideration transferred or applied under amalgamation transactions [s 44(6)(e)]**

It may happen that a person is entitled to other consideration in addition to equity shares in the resultant company for the disposal of that person's shares in the amalgamated company. In these circumstances the other consideration is deemed under s 44(6)(e) to be an amount transferred or applied by the amalgamated company for the benefit or on behalf of that person in respect of a share held by that person in the amalgamated company for purposes of the definitions of 'dividend', 'foreign dividend', 'foreign return of capital' and 'return of capital' as defined in s 1(1).

The amount of other consideration so deemed to be transferred or applied is limited to –

- the market value of all the assets of the amalgamated company immediately before the amalgamation, conversion or merger,
- less the liabilities and CTC of all classes of shares of the amalgamated company immediately before the amalgamation, conversion or merger.

**Example – Acquisition of equity shares and distribution of other consideration pursuant to an amalgamation transaction**

*Facts:*

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all its assets and liabilities to Company B in exchange for cash of R55 000 and shares in Company B with a market value of R5 000. Company A distributed the shares in Company B and cash of R55 000 to its shareholders on 1 March year 1, pursuant to the amalgamation transaction, after which Company A was liquidated. Company A did not elect the distributions to the shareholders to be a reduction of its CTC.

<sup>303</sup> See Binding Private Rulings 210 'Liquidation Distribution Followed by an Amalgamation Transaction' and 231 'Corporate Restructurings by way of Asset-For-Share and Amalgamation Transactions'.

Before the amalgamation transaction Company A's assets had a market value of R80 000, its liabilities amounted to R20 000 and its CTC amounted to R10 000.

**Result:**

Under s 44(6)(c) the transfer of the equity shares by Company A to its shareholders does not constitute a 'dividend' as defined in s 1(1) and is therefore not subject to dividends tax or normal tax (see **10.3.2 a.**). The cash amount transferred to the shareholders is treated as a dividend, the amount of which is calculated as follows:

	R
Market value of the assets of Company A	80 000
Less: Liabilities of Company A	(20 000)
Less: CTC of Company A	<u>(10 000)</u>
Amount of cash consideration treated as a dividend under s 44(6)(e)	<u>50 000</u>

**Note:**

Although an amount of cash of R55 000 was transferred to the shareholders of Company A, only R50 000 is treated as a 'dividend' that is potentially subject to dividends tax. The dividend will generally be exempt from normal tax under s 10(1)(k)(i).

## 10.4 Unbundling transactions [ss 46(3A) and 46(5)]

### 10.4.1 CTC and unbundling transactions [s 46(3A)]

Section 46 regulates the tax consequences of qualifying unbundling transactions. An unbundling transaction<sup>304</sup> broadly involves a company (the unbundling company) distributing all the equity shares held in another company (the unbundled company) to the shareholders in the unbundling company.

Section 46(3A) regulates the calculation of CTC of both the unbundling company and the unbundled company after a distribution of equity shares under an unbundling transaction.<sup>305</sup> The CTC of the unbundling company must be allocated between the unbundling company and the unbundled company on a proportional basis in accordance with the relative market values of the shares in the unbundling company and the unbundled company.

To the extent the unbundled company's shares were held by the unbundling company before the unbundling transaction, the unbundled company will not retain its CTC. That portion of the CTC is effectively replaced by the proportional amount of CTC referred to in the preceding paragraph under s 46(3A)(b)(i).

In the event that a portion of the unbundled company's equity shares were held by shareholders other than the unbundling company immediately before the unbundling transaction, a *pro-rata* portion of the CTC attributable to those equity shares is retained by the unbundled company under s 46(3A)(b)(ii).

<sup>304</sup> The Act defines 'unbundling transaction' in s 46(1).

<sup>305</sup> See Binding Private Ruling 345 'Asset-For-Share Transactions Followed by an Unbundling Transaction and a Sale of Shares to a Third Party'.

### **Example 1 – Calculation of CTC under an unbundling transaction**

*Facts:*

Company A holds all the equity shares in Company B. All the equity shares in Company B are unbundled to the shareholders of Company A. The CTC of Company A is R750 000 and the CTC of Company B is R500 000 before the unbundling transaction. The market value of the shares in Company A is R1 500 000 before the unbundling transaction and R1 million immediately after the unbundling transaction and the market value of the shares in Company B is R500 000 before the unbundling transaction.

*Result:*

Under s 46(3A) the CTC of Company A must be allocated between Company A and Company B on a proportional basis in accordance with the relative market values of the shares in Company A and Company B.

***CTC of Company A after the unbundling transaction:***

The CTC of Company A after the unbundling transaction is calculated as follows under s 46(3A)(a):

CTC of Company A before the unbundling transaction × market value of shares in Company A after the unbundling transaction / market value of shares in Company A before the unbundling transaction:

$$R750\,000 \times R1\,000\,000 / R1\,500\,000 = R500\,000.$$

The CTC of Company A of R750 000 is reduced to R500 000 after the unbundling transaction.

***CTC of Company B after the unbundling transaction:***

Company B obtains new CTC, based on the former CTC of Company A, calculated as follows under s 46(3A)(b)(i):

CTC of Company A before the unbundling transaction × market value of the shares in Company B before the unbundling transaction / total market value of the shares in Company A before the unbundling transaction:

$$R750\,000 \times R500\,000 / R1\,500\,000 = R250\,000$$

Company B does not retain any of its own CTC of R500 000 after the unbundling transaction under s 46(3A)(b)(ii), since Company A held all its equity shares before the unbundling transaction:

CTC of Company B immediately before the unbundling transaction × shares held in Company B immediately before the unbundling transaction by persons other than the unbundling company / all shares held in Company B immediately before the unbundling transaction:

$$R500\,000 \times 0 / 100 = \text{nil}$$

Therefore, the new CTC of Company B after the unbundling transaction is R250 000 [R250 000 under s 46(3A)(b)(i) + nil under s 46(3A)(b)(ii)].

### **Example 2 – Calculation of CTC under an unbundling transaction**

#### *Facts:*

Company C holds 900 equity shares in Company D with the remaining 100 equity shares being held by Individual X. The CTC of Company C and Company D is R40 000 and R8 000 respectively before the unbundling transaction. The market value of the shares in Company C before and after the unbundling transaction is R200 000 and R150 000 respectively. The market value of the shares in Company D is R50 000 before the unbundling transaction. All 900 equity shares of Company D held by Company C are unbundled to the shareholders of Company C. Individual X retains the 100 equity shares previously held.

#### *Result:*

Under s 46(3A) the CTC of Company C must be allocated between Company C and Company D on a proportional basis in accordance with the relative market values of the shares in Company C and Company D.

#### ***CTC of Company C after the unbundling transaction:***

The CTC of Company C after the unbundling transaction is calculated as follows under s 46(3A)(a):

CTC of Company C before the unbundling transaction × market value of shares in Company C after the unbundling transaction / market value of shares in Company C before the unbundling transaction:

$$R40\ 000 \times R150\ 000 / R200\ 000 = R30\ 000.$$

The CTC of Company C of R40 000 is reduced to R30 000 after the unbundling transaction.

#### ***CTC of Company D after the unbundling transaction:***

A portion of the CTC of Company D is retained by virtue of the 10% shareholding of Individual X in Company D. Company D also obtains new CTC based on the former CTC of Company C.

The portion of the CTC of Company D that is retained by virtue of the 10% shareholding of Individual X in Company D is calculated as follows under s 46(3A)(b)(ii):

Shares held by Individual X in Company D / Total number of shares in Company D × CTC of Company D before the unbundling transaction:

$$100 / 1\ 000 \times R8\ 000 = R800.$$

New CTC obtained by Company D is calculated as follows under s 46(3A)(b)(i):

CTC of Company C before the unbundling transaction × market value of the shares in Company D before the unbundling transaction / total market value of the shares in Company C before the unbundling transaction:

$$R40\ 000 \times R50\ 000 / R200\ 000 = R10\ 000.$$

Company D has CTC of R10 800 (R800 + R10 000) after the unbundling transaction.

### **10.4.2 Dividends tax and unbundling transactions [s 46(5)]**

Section 46(5) provides that –

- if shares are distributed by an unbundling company,

- to a shareholder under an unbundling transaction,
- that distribution of shares must be disregarded in determining any liability for dividends tax (see **2.2.3**).<sup>306</sup>

Section 46(5) is subject to s 46(7). Section 46(7)(a)<sup>307</sup> stipulates that s 46 does not apply in the case of an ‘unbundling transaction’ contemplated in s 46(1)(a), in respect of any equity share that is distributed by an unbundling company to any shareholder that is a ‘disqualified person’ holding at least 5% of the equity shares in the unbundling company immediately before the unbundling transaction.

The Act defines ‘disqualified person’ in s 46(7)(b) as any of the following persons:

- A person that is not a resident.
- The government of the Republic in the national, provincial or local sphere, contemplated in s 10(1)(a) (see **4.1.2**).
- A ‘public benefit organisation’ as defined in s 30, approved by the Commissioner under that section (see **4.1.3**).
- A ‘recreational club’ as defined in s 30A, approved by the Commissioner under that section.
- A company or trust contemplated in s 37A (see **4.1.4**).
- A fund contemplated in s 10(1)(d)(i) or (ii) (see **4.1.6**).
- A person contemplated in s 10(1)(cA) (see **4.1.5**) or s 10(1)(t) (see **4.1.7**).

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<sup>306</sup> See Binding Private Rulings 249 ‘Corporate Group Restructuring Involving Multiple Transactions’, 345 ‘Asset-For-Share Transactions Followed by an Unbundling Transaction and a Sale of Shares to a Third Party’ and 361 ‘Asset-for-Share Transaction Followed by an Unbundling Transaction, the Issue of Capitalisation Redeemable Preference Shares and the Sale of Shares to a Third Party’.

<sup>307</sup> Section 46(7)(a) applies to unbundling transactions entered into on or after 28 October 2020.

## Annexure – Dividends tax legislation

### Chapter II Part VIII Sections 64D to 64N of Income Tax Act 58 of 1962

**64D. Definitions.**—In this Part—

“**beneficial owner**” means the person entitled to the benefit of the dividend attaching to a share;

“**dividend**” means any dividend or foreign dividend as defined in section 1, including any amount contemplated in section 31(3)(i), that is—

- (a) paid by a company that is a resident; or
- (b) paid by a foreign company—
  - (i) if the share in respect of which that foreign dividend is paid is a listed share; and
  - (ii) to the extent that that foreign dividend does not consist of a distribution of an asset *in specie*;

“**dividend cycle**” .....;

“**effective date**” means the date on which this Part comes into operation;

“**regulated intermediary**” means any—

- (a) central securities depository participant contemplated in section 32 of the Financial Markets Act;
- (b) authorised user as defined in section 1 of the Financial Markets Act;
- (c) approved nominee contemplated in section 76(3) of the Financial Markets Act;
- (d) nominee that holds investments on behalf of clients as contemplated in section 9.1 of Chapter 1 and section 8 of Chapter II of the Codes of Conduct for Administrative and Discretionary Financial Service Providers, 2003 (Board Notice 79 of 2003) published in *Government Gazette* No. 25299 of 8 August 2003;
- (e) portfolio of a collective investment scheme in securities;
- (f) transfer secretary that is a person other than a natural person and that has been approved by the Commissioner subject to such conditions and requirements as may be determined by the Commissioner; or
- (g) a portfolio of a hedge fund collective investment scheme.

“**STC credit**” .....

**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.

(2) For the purposes of this Part, a dividend must, to the extent that the dividend—

- (a) does not consist of a distribution of an asset *in specie* and is declared by a company that is—
  - (i) a listed company, be deemed to be paid on the date on which the dividend is paid;
  - or



- (ii) not a listed company, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable; or
  - (b) consists of a distribution of an asset *in specie*, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable.
- (3) Where a company declares and pays a dividend and that dividend consists of a distribution of an asset *in specie*, the amount of the dividend must, for the purposes of subsection (1), be deemed—
- (a) in the case of an asset which is a financial instrument listed on a recognised exchange as defined in paragraph 1 of the Eighth Schedule and for which a price was quoted on that exchange, to be equal to the ruling price of that financial instrument on that recognised exchange at close of business on the last business day before the date that the dividend is, in terms of subsection (2), deemed to be paid; or
  - (b) in the case of an asset which is not an asset contemplated in paragraph (a), to be equal to the market value of the asset on the date that the dividend is, in terms of subsection (2), deemed to be paid.
- (4)(a) Where, during any year of assessment, any amount is owing to a company by—
- (i) a person that is—
    - (aa) not a company;
    - (bb) a resident; and
    - (cc) a connected person in relation to that company; or
  - (ii) a person that is—
    - (aa) not a company;
    - (bb) a resident; and
    - (cc) a connected person in relation to a person contemplated in subparagraph (i),
- in respect of a debt, that company must, for the purposes of this Part, be deemed to have paid a dividend if that debt arises by virtue of any share held in that company by a person contemplated in subparagraph (i).
- (b) The amount of the dividend that is deemed to have been paid in terms of paragraph (a) must—
    - (i) be deemed to consist of a distribution of an asset *in specie*; and
    - (ii) for the purposes of subsection (1), be deemed to be equal to the greater of—
      - (aa) the market-related interest in respect of that debt, less the amount of interest that is payable to that company in respect of that debt for that year of assessment; or
      - (bb) nil.
  - (c) Where during any year of assessment a company is deemed to have paid a dividend in terms of paragraph (a), that dividend must be deemed to have been paid on the last day of that year of assessment.
  - (d) For the purposes of this subsection, “market-related interest”, in relation to any debt owed to a company means the amount of interest that would be payable to that company on the amount owing to that company in respect of that debt for a period during a year of assessment if the debt had been owed for that period at the official rate of interest.
  - (e) This subsection does not apply to the extent that the amount owing to a company in respect of a debt contemplated in paragraph (a) was deemed to be a dividend that was subject to the secondary tax on companies.
- (5) For the purposes of subsection (1), where any amount of any dividend is denominated in any currency other than the currency of the Republic, that amount must be translated to the currency of the Republic by applying the spot rate applicable at the time that the dividend is paid.

(6) Where a—

- (a) company that makes payment of a dividend to any person withholds an amount of dividends tax from that payment in terms of section 64G(1); or
- (b) regulated intermediary that makes payment of a dividend to any person withholds an amount of dividends tax from that payment in terms of section 64H(1),

that company or regulated intermediary must, for the purposes of this Part, be deemed to have paid the amount so withheld to that person.

**64EA. Liability for tax.—Any—**

- (a) beneficial owner of a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie*; or
- (b) company that is a resident that declares and pays a dividend to the extent that the dividend consists of a distribution of an asset *in specie*,

is liable for the dividends tax in respect of that dividend.

**64EB. Deemed beneficial owners of dividends.—**(1) For the purposes of this Part, where—

- (a) a person contemplated in section 64F(1) acquires the right to a dividend in respect of a share, including a dividend that has not yet been declared or has not yet accrued, by way of cession; and
- (b) an amount in respect of that dividend is received by or accrues to the person who acquired that right,

any person ceding that right is deemed to be the beneficial owner of that dividend: Provided that this subsection does not apply to any cession in respect of a share if the person to whom those rights are ceded holds all the rights attaching to the share after the cession.

(2) For the purposes of this Part, where—

- (a) a person that is—
  - (i) a company which is a resident;
  - (ii) the government of the Republic in the national, provincial or local sphere;
  - (iii) a public benefit organisation approved by the Commissioner in terms of section 30(3);
  - (iv) a trust contemplated in section 37A;
  - (v) an institution, board or body contemplated in section 10(1)(cA);
  - (vi) a fund contemplated in section 10(1)(d)(i) or (ii);
  - (vii) a person contemplated in section 10(1)(f);
  - (viii) .....
  - (ix) .....
  - (x) a portfolio of a collective investment scheme in securities;
  - (xi) any person to the extent that the dividend constitutes income of that person;
  - (xii) .....
  - (xiii) any fidelity or indemnity fund contemplated in section 10(1)(d)(iii); or
  - (xiv) a small business funding entity as contemplated in section 10(1)(cQ), borrows from another person or acquires a listed share in terms of a collateral arrangement entered into with another person; and
- (b) a dividend in respect of that share or any amount determined with reference to a dividend in respect of that share is received by or accrues to that person,

any amount paid by that person to that other person not exceeding that dividend or amount determined with reference to a dividend in respect of that share is deemed to be a dividend paid by that person for the benefit of that other person.

(3) For the purposes of this Part, where—

- (a) a person that is contemplated in section 64F(1) acquires a share in a listed company (or any right in respect of that share) from another person;
- (b) that acquisition is part of a resale agreement between the person acquiring that share and that other person or to any other company forming part of the same group of companies as that other person; and
- (c) a dividend in respect of that share is received by or accrues to that person.

that other person or other company is deemed to be the beneficial owner of that dividend.

(4) For the purposes of this section, “resale agreement” means the acquisition of a share by any person subject to an agreement in terms of which that person undertakes to dispose of that share or any other share of the same kind and of the same or equivalent quality at a future date.

**64F. Exemption from tax in respect of dividends other than dividends comprising distribution of assets *in specie*.**—(1) Any dividend is exempt from the dividends tax to the extent that it does not consist of a dividend that comprises a distribution of an asset *in specie* if the beneficial owner is—

- (a) a company which is a resident;
- (b) the government of the Republic in the national, provincial or local sphere;
- (c) a public benefit organisation approved by the Commissioner in terms of section 30(3);
- (d) a trust contemplated in section 37A;
- (e) an institution, board or body contemplated in section 10(1)(cA);
- (f) a fund contemplated in section 10(1)(d)(i) or (ii);
- (g) a person contemplated in section 10(1)(f);
- (h) a holder of shares in a registered micro business, as defined in the Sixth Schedule, paying that dividend, to the extent that the aggregate amount of dividends paid by that registered micro business to all holders of shares in that registered micro business during the year of assessment in which that dividend is paid does not exceed the amount of R200 000;
- (i) a small business funding entity as contemplated in section 10(1)(cQ);
- (iA) ...
- (j) a person that is not a resident and the dividend is a dividend contemplated in paragraph (b) of the definition of “dividend” in section 64D;
- (k) .....
- (l) any person to the extent that the dividend constitutes income of that person; or
- (m) any person to the extent that the dividend was subject to the secondary tax on companies;
- (n) any fidelity or indemnity fund contemplated in section 10(1)(d)(iii); or
- (o) a natural person or deceased estate or insolvent estate of that person in respect of a dividend paid in respect of a tax free investment as contemplated in section 12T(1).

(2) Any dividend paid by a REIT or a controlled company, as defined in section 25BB, and received or accrued before 1 January 2014 is exempt from the dividends tax to the extent that the dividend does not consist of a dividend that comprises a distribution of an asset *in specie*.

**64FA. Exemption from and reduction of tax in respect of dividends *in specie*.**—(1) Where a company declares and pays a dividend that consists of a distribution of an asset *in specie*, that dividend is exempt from the dividends tax to the extent that it constitutes a distribution of an asset *in specie* if—

- (a) the person to whom the payment is made has, before the dividend is paid, submitted to the company—
  - (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been exempt from the dividends tax in terms of section 64F; and
  - (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to in subparagraph (i) change or the beneficial owner cease to be a beneficial owner;
- (b) the beneficial owner forms part of the same group of companies, as defined in section 41, as that company;
- (c) the dividend constitutes a disposal as contemplated in paragraph 51A of the Eighth Schedule; or
- (d) the dividend constitutes a disposal as contemplated in paragraph 67B(2) of the Eighth Schedule.

(2) A company that declares and pays a dividend that consists of a distribution of an asset *in specie* is liable for the dividends tax at a reduced rate in respect of the portion of the dividend that constitutes the distribution of an asset *in specie* if the person to whom the payment is made has, before the dividend is paid, submitted to the company—

- (a) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and
- (b) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to in paragraph (a) change or the beneficial owner cease to be the beneficial owner.

(3) A declaration and written undertaking submitted in terms of subsection (1)(a) or (2) are no longer valid after a period of five years from the date of the declaration, unless the company that is making the payment is subject to the provisions of—

- (a) the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);
- (b) the Agreement Between the Government of the Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act; or
- (c) the regulations for purposes of paragraph (a) of the definition of “international tax standard” in section 1 of the Tax Administration Act,

with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration.

**64G. Withholding of dividends tax by companies declaring and paying dividends.—**

(1) Subject to subsections (2) and (3), a company that declares and pays a dividend must withhold an amount of dividends tax from that payment calculated as contemplated in section 64E except to the extent that the dividend consists of a distribution of an asset *in specie*.

(2) A company must not withhold any dividends tax from the payment of a dividend contemplated in subsection (1) if—

- (a) the person to whom the payment is made has, before the dividend is paid, submitted to the company—
  - (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is exempt from the dividends tax in terms of section 64F or an agreement for the avoidance of double taxation; and
  - (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to in subparagraph (i) change or the beneficial owner cease to be the beneficial owner;
- (b) the beneficial owner forms part of the same group of companies, as defined in section 41, as the company that paid the dividend; or
- (c) the payment is made to a regulated intermediary.

(3) A company must withhold dividends tax from the payment of a dividend contemplated in subsection (1) at a reduced rate if the person to whom the payment is made has, before the dividend is paid, submitted to the company—

- (a) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and
- (b) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing, should the circumstances affecting the reduced rate in paragraph (a) change or should the beneficial owner cease to be the beneficial owner.

(4) A declaration and written undertaking submitted in terms of subsection (2)(a) or (3) are no longer valid after a period of five years from the date of the declaration, unless the company that is making the payment is subject to the provisions of—

- (a) the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);
- (b) the Agreement Between the Government of the Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act; or
- (c) the regulations for purposes of paragraph (a) of the definition of “international tax standard” in section 1 of the Tax Administration Act,

with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration.

**64H. Withholding of dividends tax by regulated intermediaries.—**(1) Subject to subsections (2) and (3), a regulated intermediary that pays a dividend that was declared by any other person must withhold an amount of dividends tax from that payment calculated as contemplated in section 64E except to the extent that the dividend consists of a distribution of an asset *in specie*.

(2) A regulated intermediary must not withhold any dividends tax from the payment of a dividend contemplated in subsection (1) if—

- (a) the person to whom the payment is made has, before the dividend is paid, submitted to the regulated intermediary—
  - (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is exempt from the dividends tax in terms of section 64F or an agreement for the avoidance of double taxation, or that the payment is made to a vesting trust of which the sole beneficiary is another regulated intermediary; and
  - (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the regulated intermediary in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to in subparagraph (i) change or should the beneficial owner cease to be the beneficial owner;
- (b) the payment is made to another regulated intermediary; or
- (c) the dividend is exempt from dividends tax in terms of section 64F(1)(o).

(3) A regulated intermediary must withhold dividends tax from the payment of a dividend contemplated in subsection (1) at a reduced rate if the person to whom the payment is made has, before the dividend is paid, submitted to the regulated intermediary—

- (a) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and
- (b) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the regulated intermediary in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to in paragraph (a) change or should the beneficial owner cease to be the beneficial owner.

(4) A declaration and written undertaking submitted in terms of subsection (2)(a) or (3) are no longer valid after a period of five years from the date of the declaration, unless the regulated intermediary is subject to the provisions of—

- (a) the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);
- (b) the Agreement Between the Government of the Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to Implement the US Foreign Account Tax Compliance Act; or
- (c) the regulations for purposes of paragraph (a) of the definition of “international tax standard” in section 1 of the Tax Administration Act,

with regard to the person to whom the payment is made and takes account of these provisions in monitoring the continued validity of the declaration.

**64I. Withholding of dividends tax by insurers.**—If a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie*, is paid to an insurer as defined in section 29A, the insurer must be deemed to be a regulated intermediary and the dividend must, to the extent that the dividend is allocated to a fund contemplated in section 29A(4)(b), be deemed to be paid to a natural person that is a resident by the regulated intermediary on the date that the dividend is paid to the insurer.

**64J.** .....

**64K. Payment and recovery of tax.**—(1)(a) If, in terms of section 64EA(a), a beneficial owner is liable for any amount of dividends tax in respect of a dividend, that beneficial owner must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company that declared the dividend, unless the tax has been paid by any other person.

- (b) If, in terms of section 64EA(b), a company is liable for any amount of dividends tax in respect of a dividend, that company must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company.
- (c) If, in terms of this Part, a person is required to withhold any amount of dividends tax in respect of a dividend, that person must pay that amount, less any amount refundable in terms of section 64L or 64M, to the Commissioner by the last day of the month following the month during which that dividend is paid by that person as contemplated in section 64G or 64H.

(d).....

(1A) If, in terms of this Part a person has paid a dividend, that person must submit a return in respect of that dividend to the Commissioner by the last day of the month following the month during which the dividend is paid.

(2) ...

(3) .....

(4) Where a person—

- (a) has, in terms of section 64G(3) or 64H(3), withheld dividends tax in accordance with a reduced rate in respect of the payment of any dividend; or
- (b) that is a company which was, in terms of section 64FA(2), liable for dividends tax at a reduced rate in respect of the declaration and payment of any dividend,

that person must submit to the Commissioner any declaration—

- (i) submitted to the person by or on behalf of a beneficial owner; and
- (ii) relied upon by the person in determining the amount of dividends tax so withheld,

at the time and in the manner prescribed by the Commissioner.

(5) .....

(6) If a person fails to pay any dividends tax within the required period, interest must be paid by that person on the balance of the tax outstanding at the prescribed rate reckoned from the end of that period.

(7) .....

(8) .....

**64L. Refund of tax in respect of dividends declared and paid by companies.—**

(1) Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) an amount is withheld by a company from the payment of a dividend in terms of section 64G(1);
- (b) a declaration contemplated in subsection (2)(a) or (3) of that section in respect of that dividend is not submitted to the company by the date contemplated in the relevant subsection; and
- (c) both the declaration and the written undertaking contemplated in section 64G(2)(a) or (3) are submitted to the company within three years after the date of payment of the dividend in respect of which they are made,

so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable to the person to whom the dividend was paid.

(1A) If—

- (a) an amount is withheld by a company from the payment of a dividend in terms of section 64G(1); and

- (b) a rebate in respect of foreign taxes paid on that dividend should have been deducted from that amount in terms of section 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount, is refundable to the person to whom the dividend was paid: Provided such rebate is claimed within three years after the date of payment of the relevant dividend.

(2) Any amount that is refundable in terms of subsection (1) or (1A) must be refunded by the company that withheld that amount to the person to whom the dividend was paid—

- (a) from any amount of dividends tax withheld by that company within a period of one year after the submission of the declaration contemplated in subsection (1)(c) or the claim of a rebate contemplated in subsection (1A); or
- (b) to the extent that the amount that is refundable exceeds the amount of dividends tax withheld as contemplated in paragraph (a), from an amount recovered by the company from the Commissioner in terms of subsection (3).

(3) Subject to subsection (4), if any amount is refundable to any person by a company in terms of subsection (1) or (1A) and that amount exceeds the amount of dividends tax withheld as contemplated in subsection (2)(a), the company contemplated in subsection (2) may recover the excess from the Commissioner.

(4) No amount may be recovered in terms of subsection (3) if the company submits the claim for recovery to the Commissioner after the expiry of a period of four years reckoned from the date of the payment contemplated in subsection (1)(a) or (1A)(a).

**64LA. Refund of tax in respect of dividends *in specie*.—** Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) dividends tax is paid by a company in respect of a dividend that consists of a distribution of an asset *in specie* as a result of the company being unable to obtain the declaration and written undertaking contemplated in section 64FA(1)(a) or (2) by the date contemplated in that section; and
- (b) both the declaration and the written undertaking are submitted to the company within three years after the date of payment of the dividend in respect of which they are made,

so much of the amount of dividends tax paid as would not have been payable had that declaration and written undertaking been submitted by the date contemplated in section 64FA(1)(a) or (2) is refundable to the company by SARS if claimed within three years of the date of payment of the tax.

**64M. Refund of tax in respect of dividends paid by regulated intermediaries.—**

(1) Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) an amount is withheld by a regulated intermediary from the payment of a dividend in terms of section 64H(1);
- (b) a declaration contemplated in subsection (2)(a) or (3) of that section in respect of that dividend is not submitted to the regulated intermediary by the date contemplated in the relevant subsection; and
- (c) both the declaration and the written undertaking contemplated in section 64H(2)(a) or (3) are submitted to the regulated intermediary within three years after the date of payment of the dividend in respect of which they are made,

so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable to the person to whom the dividend was paid.

(1A) If—

- (a) an amount is withheld by a regulated intermediary from the payment of a dividend in terms of section 64H(1); and
- (b) a rebate in respect of foreign taxes paid on that dividend should have been deducted from that amount in terms of section 64N,



so much of that amount as would not have been withheld had that rebate been deducted from the amount, is refundable to the person to whom the dividend was paid: Provided such rebate is claimed within three years after the date of payment of the relevant dividend.

(2) Any amount that is refundable in terms of subsection (1) or (1A) must be refunded by the regulated intermediary contemplated in subsection (1)(a) or (1A)(a) from any amount of dividends tax withheld by the regulated intermediary after the submission of the declaration as contemplated in subsection (1)(c) or the claim of a rebate contemplated in subsection (1A).

**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.

(2) The amount of the rebate contemplated in subsection (1) is equal to the amount of any tax paid to any sphere of government of any country other than the Republic, without any right of recovery by any person, on a dividend contemplated in subsection (1).

(3) The amount of the rebate contemplated in subsection (2) must not exceed the amount of the dividends tax imposed in respect of the dividend contemplated in subsection (1).

(4) For the purposes of this section, the amount of any tax paid as contemplated in subsection (2) must be translated to the currency of the Republic by applying the exchange rate used to convert the amount of the dividend in respect of which that tax is paid to the currency of the Republic.

(5) A company or regulated intermediary must obtain proof of any tax paid to any sphere of government of any country other than the Republic and deducted from the dividends tax payable in terms of this section, in the form and manner prescribed by the Commissioner.