

Tax and Legal News



The importance of the word “due and payable” given the cash flow impact of COVID-19

The COVID-19 pandemic and the resultant lockdown has had and will continue to have a negative effect on the South African economy and the livelihoods of its citizens. In order to alleviate the burden that the lockdown will have on South African businesses, it is important for businesses to manage the cash flow shortfalls that will inevitably result from the lockdown.

It is important from a cash flow perspective for management to be cognisant of any agreements or declarations that may give rise to withholding taxes on interest, dividends or royalties. This is to ensure that the liability for these withholding taxes does not arise prior to cash being available to settle these liabilities. The key tax principle for management to be aware of is that the liability for withholding taxes is triggered on the earlier of the date that the dividend/interest/royalty is paid and the date when it becomes “due and payable”. This means that it is possible for the withholding tax to be due to the South African Revenue Services (**SARS**) before the dividend/interest/royalty is even paid.

The phrase “due and payable” has not been defined in the Income Tax Act No. 58 of 1962 (the **Act**) and it is therefore not entirely clear what this means. There are many judicial decisions as to the meaning of this phrase, from which it is apparent that the answer turns on the specific facts of each case. Below we consider a guideline that has been established in case law and which assists with the meaning of the words.

In *Singh v C:SARS*^[1], it was stated that:

“The 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’.”

Therefore, an amount may be due but not necessarily payable. SARS’s current view is that, for an amount to be due and payable, the amount must be owed and the recipient must also have a right to claim payment of the amount.^[2] Thus, an amount becomes ‘due’ when the stipulated date for payment has arrived.^[3] SARS holds this view across withholding taxes i.e. in relation to dividends, interest and royalties.

The withholding obligation will only arise when both conditions are met (i.e. the withholding tax must be both due and payable). Businesses should therefore be mindful during the lockdown period that any agreements that give rise to withholding tax obligations are considered in detail.

The following is a simple scenario illustrating the implication of the words “due and payable”, given the cash flow impact of COVID-19:

B (a non-SA resident) loans an amount to Co D (an SA resident taxpayer) on 1 March 2019. In terms of the written loan agreement, B is entitled to interest of 5% per annum on the loan balance, payable annually on 1 April. Interest is determined monthly and capitalised to the loan account.

Moving to our present circumstances, due to COVID-19 related cash flow issues, Co D does not have the cash reserves to pay the interest on 1 April 2020. In this scenario, even though the interest has not yet been paid on 1

April, interest withholding tax will still be triggered on 1 April 2020, as this is when the interest became due and payable. 15% interest withholding tax will thus need to be paid to SARS by 31 May 2020 (subject to any relief in terms of a relevant double tax agreement). This tax, as well as penalties and interest which may be levied by SARS if the withholding tax is not paid when it is due, is a cash flow that management should be aware of.

Should you have any queries or require any assistance relating to the above, please do not hesitate to contact us.

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Regards
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FOOTNOTES

[¹] 2003 (4) SA 520 (SCA), 65 SATC 203 at 216.

² Draft Interpretation Note on Withholding Tax on Interest, page 12.

³ At para 9.38, SILKE, LexisNexis (Electronic version).

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[³] At para 9.38, SILKE, LexisNexis (Electronic version).