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# The impact of dividends withholding tax reclaim processes on foreign investment returns: exploring the complexities and challenges

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A RESEARCH REPORT SUBMITTED TO THE FACULTY OF COMMERCE, LAW AND MANAGEMENT IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF COMMERCE (SPECIALISING IN TAXATION)

# The impact of dividends withholding tax reclaim processes on foreign investment returns: exploring the complexities and challenges

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## Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment for the degree of Master of Commerce (specialising in Taxation) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree of examination in any other university.

_____

Vuyowethu Tony Maxongo
June 2023

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**Abstract**

Investors continually seek opportunities for portfolio growth, long-term capital appreciation, return on investments, and/or diversification in their investment portfolio. This investor outlook often leads investors to invest in shares outside of their local stock exchange or invest in dual-listed shares. With advances in technology, cross-border transactions have increased, making it easier for resident investors to purchase shares in foreign markets and for non-resident investors to purchase shares in local markets.

Withholding taxes are taxes which are withheld for payments of dividends to shareholders. Dividends withholding taxes, however, have the potential to reduce an investor's return on investment due to the complexities involved in the process of claiming a refund in instances where dividends tax has been incorrectly withheld. The complexities in the refund process often include the time-consuming process of submitting appropriate documentation to support the claim, the long timeframe for processing refunds, forfeiture of the refund as a result of failing to claim within the specified timeframe, burdensome administrative procedure to be followed, language barriers in claiming a refund in a foreign jurisdiction, unfamiliar legal requirements and the potential for tax authorities to conduct audits and reviews to verify the legitimacy of the refund claim.

This research report examines the complexities of dividend withholding tax reclaim processes and the impact on foreign investment returns. To achieve this aim, the research report is grounded in a systematic literature review approach. This approach involves a rigorous analytical methodology that aggregates, interprets and synthesises data extracted from the literature in applicable legislation, book chapters, journal articles and case law. The report analyses a sample of two double tax agreements concluded by South Africa. The first tax treaty is with the Netherlands (SARS 2009), a developed country, and the second tax treaty is with Namibia (SARS 1999), a developing country.

The findings of this report indicate that the complexities of the dividend withholding tax reclaim processes significantly impact foreign investors' returns on investment. The report highlights the need for greater transparency and consistency in these processes, including the reduction of documentation requirements and the development of efficient electronic systems.

The report's implications are essential for policymakers, financial institutions, and foreign investors, emphasising the importance of improving the efficiency and effectiveness of dividend withholding tax reclaim processes to support cross-border investments.

**Key words:** Beneficial owner, contributed tax capital, dividend, dividend *in specie*, dividends tax, dividend withholding tax, Double Tax Agreements (DTA), Income Tax Act 58 of 1962,

resident, return on investment, Organization for Economic Cooperation and Development (OECD), withholding tax

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## Glossary of Terms and Abbreviations

| | |
|---|---|
| B-BBEE | Broad-Based Black Economic Empowerment Act of 2003 |
| BEPS | Base Erosion and Profit Shifting |
| BRICS | Brazil, Russia, India, China and South Africa |
| DMTRA Act | Disaster Management Tax Relief Administration Act of 2020 |
| DTA | Double Tax Agreement |
| EU | European Union |
| FDI | Foreign Direct Investment |
| GDP | Gross Domestic Product |
| IOSCO | International Organization of Securities Commissions |
| JSE | Johannesburg Stock Exchange |
| MFN | Most Favoured Nation |
| OECD | Organisation for Economic Co-operation and Development |
| OECD Model | Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital |
| RFC | Request For Correction |
| RSA | Republic of South Africa |
| SADC | Southern African Development Community |
| SARS | South African Revenue Services |
| SENS | Stock Exchange News Service |
| STC | Secondary tax on companies |
| UNCTAD | United Nations Conference for Trade and Development |
| UN Model | United Nations Model Double Taxation Convention between Developed and Developing Countries |
| TA Act | Tax Administration Act 28 of 2011 |

# Chapter 1 Introduction

## 1.1 Background

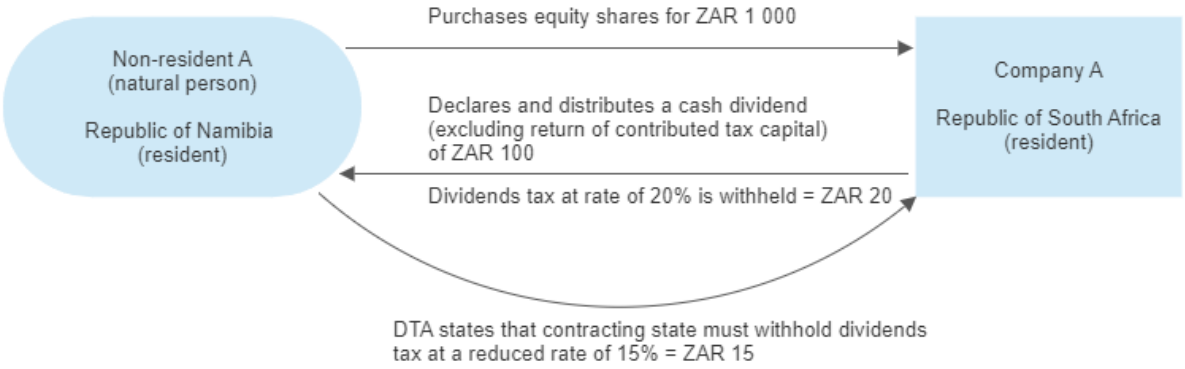
Governments, both within South Africa and internationally, bear a significant responsibility to address the issue of double taxation, ensuring the protection of foreign investors' returns on investments, particularly in the context of online trading (Sommer 1996). In the contemporary era of rapid connectivity and technological advancements, electronic commerce (e-commerce) has emerged as a pivotal facilitator, enabling investors to engage in online trading across global markets through digital platforms. These platforms have revolutionised the traditional, in-person, brick-and-mortar transactions, empowering investors to conduct virtual and online transactions with utmost ease and convenience (Unsal and Movassaghi 2001). By a mere click of a button, an investor can access a trading platform, monitor the performance of listed shares worldwide, connect with brokers, and make online share purchases. Notably, an array of electronic platforms is available to facilitate online trading activities involving shares, currencies, and derivative financial instruments. Prominent examples of such platforms include EasyEquities (n.d.) and Standard Bank's online platform (Standard Bank n.d.), which serve as indispensable tools for investors in their pursuit of financial transactions.

Apart from the ease with which an investor can trade online, continual advancements in international systems used to transmit payments such as the Society for Worldwide Interbank Financial Telecommunication (SWIFT) have meant that cash dividends paid to investors are no longer collected by investors in the form of bank notes and coins. Rather, in today's digitalised economic environment, cash dividends are electronically transferred to the shareholder's bank account which can be located anywhere in the world. Many investors, however, overlook the immediate cash flow impact of withholding taxes on dividend income received (Fundsmith 2021). Withholding taxes on dividend income reduce the flow of cash funds to investors resulting in investors diverting their funds to countries with lower or no withholding tax on dividends, such as the British Virgin Islands, Cayman Islands, and Bermuda (Hines 2005).

In the realm of dual-listed shares, investors may face the predicament of encountering double taxation on their dividends. This predicament arises when both the country of listing and the country of incorporation impose dividends withholding tax. Nonetheless, to address and alleviate this issue, an extensive network of tax treaties has been established across various jurisdictions on a global scale. These treaties, referred to as double tax agreements (DTAs) serve the purpose of preventing instances of double taxation on income, thereby safeguarding the interests of investors and facilitating international investment flows. Not all countries,

however, comply with these DTAs as evidenced by the abuse of tax treaties noted in the past, which necessitated the adoption of anti-avoidance rules contained in domestic law.[1] Under these tax treaties, if the rate of dividends withholding tax imposed by a specific jurisdiction surpasses the maximum rate permitted by the treaty, shareholders have the right to claim a refund of the excess tax paid from that jurisdiction.

Figure 1 illustrates what happens when a company declares a cash dividend to a foreign investor. In Figure 1 below, non-resident A who is a natural person situatuated in Namibia with a dividends tax rate of 20%[1] purchases all the equity shares in Company A for ZAR 1 000. Company A is situated in South Africa where the dividends tax rate is 20%. Company A declares and pays a cash dividend of ZAR 100. Company A should withhold dividends tax of ZAR 20. According to article 10(2) of the Convention between the Republic of South Africa and the Republic of Namibia for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital' (1999) (DTA entered into between South Africa and Namibia) states that South Africa has the taxing right and must withhold dividends tax at a reduced rate of 15% (SARS 1999). Namibia may also tax the dividends according to the DTA at a rate of 20% per s 45(b) of the Republic of Namibia Income Tax Act 24 of 1981 (Republic of Namibia 1981: s 45(b)).



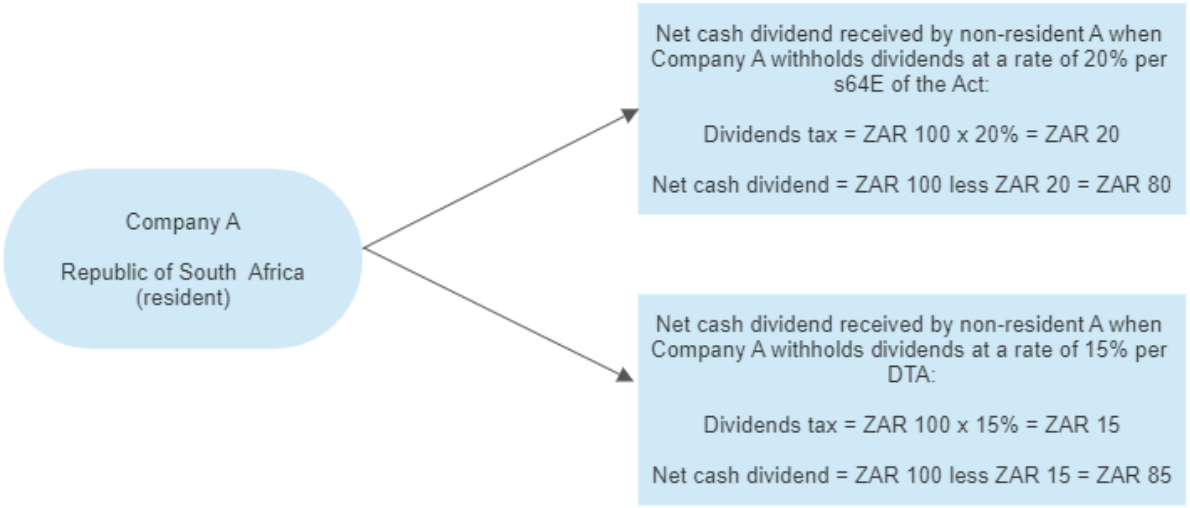

Source: Own

**Figure 1: Resident company declaring dividends to a non-resident**

Figure 1 illustrates the cashflow impact of the cash dividend of ZAR 100 that is received by non-resident A. In Figure 2, it can be seen that if Company A withholds dividends at a rate of 20% in terms of s 64E of the Income Tax Act, 58 of 1962 of South Africa(Republic of South Africa 1962: s64E), then the net cash dividend received by non-resident A amounts to ZAR

[1] Paragraphs 100-103 of the Commentary on Article 1 of the UN Model Convention. As noted above, one method of providing a measure of certainty to taxpayers with respect to the possible application of anti-abuse rules is through an advance rulings process.

80. If, however, Company A withholds dividends at a rate of 15% as per Article 10(3) of the DTA between South Africa and the Netherlands, the net cash dividend received amounts to ZAR 85. Non-resident A will receive ZAR 5 less if Article 10 of the DTA is not applied. DTAs therefore have the potential to reduce to the actual dividends tax that is withheld and can lead to higher net cash dividend receipts for non-residents.




Source: Own

**Figure 2: Net cash dividend received by non-resident**

If Company A withholds dividends withholding tax at a rate of 20% instead of at 15% then non-resident A can claim a refund for dividends withholding tax. Non-resident A will have to make the necessary declaration and undertaking and submit the relevant documentation timeously in South Africa (Republic of South Africa 1962: s 64FA); however the process is not without challenges. The complexities of the refund claims process, the duration of the process, and the cost-benefit analysis for foreign investors such as non-resident A necessitate a focus on streamlining the process. The complexities of the dividends withholding tax reclaims process that can arise include excessive documentation requirements, differing claims processes in each jurisdiction, and the unlikelihood of succeeding in obtaining refunds rightfully due to investors. The need to reduce complexities in the reclaims process is vital to increase foreign direct investment and improve the flow of funds between trade partners. For developing countries such as South Africa, foreign direct investment is important as it is necessary to support the country's growth and development objectives.

## 1.2 Research significance

As of February 2022, there were more than 231 members in the International Organization of Securities Commissions (IOSCO), an organisation that was established in 1974 and which regulates more than 90% of the world's securities markets. According to statistics from the World Bank (2020), the total value of shares traded during 2020 in South Africa was reported at USD 293 832 160 000.[2]

According to the annual World Investment Report published by the United Nations Conference for Trade and Development (UNCTAD, n.d.), Africa scored USD 83 billion of FDI flows in 2021. South Africa scored USD 40.8 billion of that total FDI in 2021 which amounts to 49% of the total FDI for Africa (OECD n.d.). This is largely due to the diversification within South Africa of economic policy and gross domestic product (GDP). The impact of the 2019 COVID-19 pandemic resulted in decreased foreign direct investment in South Africa. Foreign direct investment flows have, however, increased since 2020 as countries such as South Africa have eased lockdown regulations. According to data published by the World Bank (n.d.a), South Africa experienced growth in foreign direct investment (FDI) net inflows from USD 3.1 billion in 2020 to USD 41.3 billion in 2021. The upward trend on foreign direct investment is, however, impacted negatively by the energy crisis in the Republic, which has resulted in disruption to large parts of the economy due to implementation of loadshedding, the high unemployment rate and fragile economic conditions in the Republic (Akpeji et al 2020).

As part of its foreign direct investment strategy, South Africa has objectives of addressing inequality caused by apartheid through the Broad-Based Black Economic Empowerment Act of 2003 (B-BBEE) Madzimure and Tlaka 2022). B-BBEE contributes to the diversity that attracts foreign investment as it encourages economic participation of previously disadvantaged groups. Furthermore, South Africa, along with the Federative Republic of Brazil, the Russian Federation, the Republic of India, and the People's Republic of China, are part of BRICS. BRICS is a grouping of the world's leading emerging market economies. BRICS received a total of USD 355 billion FDI inflows according to the annual World Investment Report published by UNCTAD(UNCTAD 2023), of which South Africa received 12%. Table 1 summarises the total foreign direct investment inflows received by BRICS during 2021.

**Table 1: Foreign Direct Investment inflows in BRICS during 2021**

[2] Stocks traded, total value (current US$) - South Africa (no date) World Bank Open Data.

| Region/Economy | FDI inflows (USD millions) | Percentage |
|---|---|---|
| Brazil | 50,367.42 | 14% |
| Russia | 38,239.68 | 11% |
| India | 44,735.15 | 13% |
| China | 180,957.00 | 51% |
| Republic of South Africa | 40,888.77 | 12% |
| Total | 355 188.0 | 100% |

Source:UNCTAD 2023, *BRICS Investment Report*, page 6

This research report highlights the cashflow impact of the complexities and challenges in the withholding tax reclaim processes for non-residents who have paid dividend withholding taxes to the South African Revenue Service (SARS). Furthermore, the report highlights the need for greater transparency and consistency in dividends withholding tax reclaim processes, including the reduction of documentation requirements and the improvement of electronic systems utilised in the reclaim process. Currently, taxpayers need to submit a declaration and an undertaking in the prescribed format when submitting a request for a refund, exemption or reduced withholding tax on dividends. An improvement in this process is suggested in the report in order to improve turnaround times for processing the information.

### 1.3 The research question

This research report analyses the legal complexities and challenges surrounding the dividend withholding tax reclaim process relating to South Africa and the negative cashflow impact this has on investment returns for foreign investors.

The sub-questions below will assist in addressing the research question:

1. When does the liability to pay dividends tax to SARS arise?

   This sub-question is answered by explaining what a 'dividend' is as defined in the South African Income Tax Act 58 of 1962 (Republic of South Africa 1962), explaining the history of dividends tax and tax compliance in relation to dividends tax per the South African Income Tax Act 58 of 1962. The practical challenges experienced by tax practitioners will also be discussed.

2. How do DTAs which South Africa entered into affect the withholding tax which South Africa can legally withhold?

   This sub-question is answered by examining the DTA between South Africa and the Netherlands, and the DTA between South Africa and Namibia. In relation to both DTAs, Article 10 of the DTA will be applied. These DTAs were selected on the basis of one country being a developed country (the Netherlands) and the other being a developing

country (Namibia). South Africa is a developing country with a high income inequality, whereas Namibia is also a developing country, but it is smaller and less economically diverse than South Africa. The Netherlands, however, is a developed country with a strong economy and a well-developed tax system. The selection of one developing country and one developed country allows for comparisons to be made between refund processes, and allows for areas of improvement to be identified in order to streamline the refund process for withholding taxes on dividends. Furthermore, both countries are main trade partners with South Africa.[3]

While South Africa, Namibia and the Netherlands levy dividends tax on dividends paid to non-residents, there are differences in the applicable tax rates, the availability of tax treaties and exemptions, and the overall impact on foreign investors. In terms of South Africa's Income Tax Act 58 of 1962, dividends tax is levied at a rate of 20% on the amount of any dividend paid by a resident company to a non-resident; or by a non-resident company to a non-resident where the shares in respect of which the dividends are paid are listed on a South African exchange. In comparison, dividends withholding tax is levied at a rate of 20% on the gross amount of any dividend paid by a Namibian company to a non-resident shareholder and a reduced rate of 10% if at least 25% of shares are held in the Namibian company and the shareholder is a company[2]. In contrast, in the Netherlands, dividends tax is levied at a rate of 15% on dividends paid to non-residents[4], subject to any reduction or exemption under an applicable tax treaty. Another significant difference is that the Netherlands has a broad participation exemption for dividend income received by Dutch resident companies, which means that certain dividends received by a Dutch company are exempt from Dutch corporate income tax. South Africa does not have such a participation exemption, but it does have a local dividend exemption and a foreign dividend exemption which exempts from income tax certain foreign dividends received by South African residents if certain requirements are met.

3. What is the process for claiming a refund of withholding tax in South Africa and how does the process compare to Namibia and Netherlands?

   The refund process of South Africa is, however, generally regarded as slow and cumbersome, which may deter foreign investors. In the Netherlands, the refund

[3] Top South African Trading Partners 2021.

[4] Dutch Dividend Withholding Tax Act of 1965, Article 5

process is seen to be more streamlined and efficient. The Netherlands also forms part of the European Union (EU) which invests heavily to define and standardise procedures within the EU for withholding tax refunds. Namibia also has a refund process, but the refund process is seen to not be as well-established as the processes available in South Africa and the Netherlands.

4. What practical challenges do investors face in the dividend withholding tax reclaims process?

   This sub-question is answered by providing a comprehensive analysis of the challenges faced by investors in the dividend withholding tax reclaims process including the after tax cashflow impact. The sub-question references Henry v Great Northern Railway Co (1857) 27 LJ Ch 1, 18 (Knight Bruce LJ) to support the analysis.

### 1.4 Research method and design

#### 1.4.1 Approach

In this research report, a qualitative research approach is utilised. Qualitative research[5] is a method of inquiry that emphasizes understanding and interpreting the meaning that individuals and groups ascribe to social phenomena. This approach is often used to explore complex social and cultural issues, and is characterised by its emphasis on in-depth interviews, observation, and analysis of text and other non-numerical data. Unlike quantitative research, which is concerned with collecting and analysing numerical data, qualitative research is more concerned with exploring the richness and complexity of people's experiences and perspectives. Through this approach, the goal is to gain a deeper understanding of the subject matter, rather than simply measuring it.

The qualitative research approach used in this research report is doctrinal research and is grounded in the interpretivist paradigm, which is an approach to social research that emphasizes the importance of understanding the subjective experiences and meanings that individuals attach to social phenomena. The interpretivist paradigm assumes that social reality is not an objective, fixed, and measurable entity, but rather a dynamic and subjective construct that is shaped by individual perceptions, values, and cultural contexts. In other words, the interpretivist paradigm holds an epistemological belief that reality is based on the subjective experience of the external world, meaning that the knowledge we have is shaped by our individual experiences and the meanings we attach to those experiences.

[5] Gale.com. (2023). Quantitative and qualitative research approaches in education - Document - Gale Ebooks.

Furthermore, this research approach also adopts an ontological belief that reality is socially constructed. This means that the report recognises that social reality is created and maintained through social processes and interactions. The research, therefore, aims to explore and analyse the social constructions of reality by examining various texts, rather than attempting to measure or quantify social phenomena. Through this approach, the report seeks to uncover the complex and dynamic ways in which social reality is constructed and how individuals navigate it, and how their experiences and perspectives can be shaped by social and cultural factors.

### 1.4.2 Design

The method used to collect data for this research report will be a systematic literature review. This will involve conducting secondary research by analysing policy documents, journal articles, book chapters, blogs and other relevant publications to address the research question. Systematic literature reviews are highly structured and comprehensive, employing rigorous analytical methods to select relevant articles, and were thus selected as the preferred method for this research report. Systematic literature reviews are known for their transparency, replicability, and thoroughness.

This research will use the Google Scholar, Emerald, and Science Direct databases to obtain a wide range of literature relevant to the research question. Examples of articles, books and case law that will be used in this research include *ABC (Pty) Ltd v Commissioner: South African Revenue Service*, Computershare and Federal Tax Administration (n.d.). The literature search strategy involved using key terms to identify research articles that were within the scope of this research. The initial screening of articles was based on the scope of the research report, with any unrelated articles being removed from consideration. The second screening involved reviewing titles, abstracts, and full-text articles, with duplicated articles being removed.

The data extracted from the final selection of articles was aggregated, interpreted, and synthesised to provide insights into the research question. The use of a systematic literature review in this research report provided a comprehensive and thorough approach to identifying and analysing existing literature on the topic of interest. The approach allowed for a synthesis of existing knowledge on the topic, which informed the development of further research questions and provided insight into potential areas for future research.

## 1.5 Research limitations

This report only examines the reclaim process for withholding tax paid by a non-resident who receives dividends that are subject to withholding tax per South Africa's Income Tax Act 58 of

1962. The report limited its comparison to two DTAs, ‘Convention between the Republic of South Africa and the Kingdom of the Netherlands for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital’ of 2009, and Convention between the Republic of South Africa and the Republic of Namibia for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital’ of 1999. The researcher does not attempt to change investors’ tax behaviour.

### 1.6 Chapter Outline

The rest of the report will be structured as follows: Chapter 2 centres around the topic of dividend withholding taxes, specifically their purpose within the context of South Africa. This includes an examination of the dividends tax as outlined in s 64E of the Income Tax Act 58 of 1962, as well as a discussion of the impact of Double Tax Agreements (DTAs) on the dividends tax withheld.

Chapter 3 explores the fundamental purpose of DTAs, which are contractual agreements established between two countries (or contracting states) to prevent or alleviate the issue of double taxation on the same income. In particular, the chapter focuses on the DTAs that exist between South Africa (RSA) and the Netherlands, and between RSA and Namibia. The rationale for choosing these countries lies in their contrasting nature, as the Netherlands represents a developed country within the European Union, while Namibia represents a developing country and one of RSA's primary trading partners[6]. The chapter also provides a brief overview of the OECD Model Tax Convention on Income and on Capital (OECD 2017), which serves as a basis for DTA formulation.

Chapter 4 outlines the dividends withholding tax reclaim process for RSA. The discussion delves into the complexities of the process, including the excess documentation requirements, refund process duration, the possibility of not receiving a refund, and the issue of tax on dividends withheld at incorrect rates. The chapter analyses the differences and similarities noted in the dividends withholding tax reclaim processes for RSA, Namibia, and the Netherlands. The chapter highlights the similarities and differences in terms of the required documentation, with an emphasis on contrasting developed countries (the European Union) and developing countries (Africa).

Building upon Chapter 4, Chapter 5 discusses the practical challenges experienced by investors in the refund process along with the mitigating factors implemented to overcome the challenge as well as the impact these challenges have on foreign investment.

[6] Top South African Trading Partners 2021.

In the final chapter of the report, the findings of the research are summarized, and concluding remarks are made on the complexities and cash flow impact of withholding tax reclaims for foreign investors.

## Chapter 2 The liability for dividends withholding tax in South Africa

### 2.1 Introduction

This chapter introduces dividends tax within the context of South Africa. The chapter focuses on the taxation of dividends declared and paid to foreign investors and the compliance requirements in terms of the South African Income Tax Act, 58 of 1962.

This chapter discusses the reform from secondary tax on companies (STC) to dividends withholding tax. With effect from 01 April 2012, STC on companies was replaced with dividends tax as contained in part VIII of the South African Income Tax Act 58 of 1962. Essentially, STC was a secondary tax imposed on companies that were 'resident' for South African tax purposes and was payable over and above normal tax. Dividends tax on the other hand is a separate tax from normal tax and is considered a final withholding tax, although amounts may be refunded in certain circumstances (Republic of South Africa 1962: s 64L-M).

### 2.2 Secondary tax on companies (STC)

South Africa has experienced several tax reforms over the years and among those tax reforms was the change in the dividends tax regime from STC to dividend tax.[7] This change was influenced by the tax regimes in other jurisdictions globally and to attract foreign direct investment by eliminating the perception that South Africa had higher corporate taxes and lower accounting profits.[8]

STC came into effect on 17 March 1993 and applied to all dividends declared on or after 17 March 1993 and those declared before but paid after 17 March 1993.[9] STC was a tax imposed on the resident company declaring the dividend and did not vest in the recipient shareholder. A 'resident' is defined in s 1 of the South African Income Tax Act 58 of 1962 and for a natural person, it is someone who is 'ordinarily resident' in South Africa or meets the requirements of the physical presence test. A person other than a natural person, such as a company, is considered to be a resident for South African tax purposes if they are incorporated, established, or formed in South Africa. Furthermore 'resident' means that a natural person and any person other than a natural person must not be deemed to be exclusively a resident of another country per the DTAs entered into as part of the requirements of the definition of a 'resident'.

[7] South African Government (2012)

[8] External guide a quick guide to dividends tax

[9] Companies 69. secondary tax on companies (STC) August 1994

STC was introduced at a rate of 25% when the corporate tax rate was 48% at the time. The corporate tax rate was reduced to 40% on the introduction of STC to attract foreign investment and stimulate growth in South Africa by company profits being re-invested, rather than declared as a dividend[10]. Please refer to Table 2 below for a summary of STC rates and related periods.

Effective 22 June 1994, the STC rate was increased from 15% to 25% as a result of companies not being deterred to declare dividends[11]. The STC rate decreased thereafter until it was at a rate of 10% from 01 October 2007[12].

**Table 2: Summary of STC rates**

| **Period** | **STC rate (%)** |
|---|---|
| 17 March 1993 – 21 June 1994 | 15% |
| 22 June 1994 – 13 March 1996 | 25% |
| 14 March 1996 – 30 September 2007 | 12.5% |
| 1 October 2007 | 10% |

Source: South African Revenue Service

STC was not a popular type of dividend tax and as such, was not considered to be in line with international standards and practices.[13] Two other countries had a similar tax on dividends at the time when STC was applicable in South Africa, the Republic of India (country in south Asia), and the Republic of Estonia (country in western Europe).[14] Under the old regime, dividends that were subject to tax were 'dividends' as defined in s 1 of the South African Income Tax Act 58 of 1962 and amounts deemed to be dividends in terms of s 64C of the South African Income Tax Act 58 of 1962.

### 2.3 Definition of a 'dividend'

A 'dividend' is defined in terms of s 1(1) of the South African Income Tax Act 58 of 1962 and is essentially a payment by a company to a shareholder in respect of a share(s) held in that company, excluding the return of contributed tax capital. A dividend may either be in cash or a distribution in a form other than cash, otherwise referred to as a dividend in specie.

[10] National Treasury (2008) 'Dividends versus return of capital: revising the base for taxable distributions

[11] Davidson, S. 1996. A note on the secondary tax on companies. South African journal of Economic and Management Sciences, 18:11-23

[12] SARS - Comprehensive guide to secondary tax on companies – Issue 3 page 3

[13] SARS – External guide: A quick guide to dividends tax – page 3

[14] Vanek, M. (2009) Dividend withholding tax: the implications: dividend withholding taxes. Tax Breaks Vol. 2009, No.282

‘Contributed tax capital’ is also defined in s 1 of the South African Income Tax Act 58 of 1962 and in essence is consideration received by the company for the issue of shares.

The definition of a dividend is considered somewhat complicated and requires interpretation for better understanding.[15] The complexity stems from the structure of the definition which has specific inclusions and exclusions. With reference to case law for interpretation of the term ‘dividend’, the report considers the case of Henry v Great Northern Railway Co (1857) 27 LJ Ch 1, 18 (Knight Bruce LJ).[16] In this case it was held that a dividend meant ‘a share of profits’. The term ‘profits’ is not defined in South African Income Tax Act 58 of 1962 and one needs to look at common law for the meaning of the term. Moreover, in Re Spanish Prospecting Co Ltd[1911] 1 Ch 92 (CA)[HHA p597],[17] the court held that profits are essentially a gain made by a business during the year and this gain can be ascertained by comparing the assets of the business as at two dates, usually by an interval of a year. Furthermore, in Rushden Heel Co Ltd. v Keene (Inspector of Taxes) Rushden Heel Co Ltd. v IRC 1 [1946] 2 All ER 141, 25 ATC 337,[18] it was held that profits should not be confused with receipts and that profits are derived by deducting all expenses from the receipts. It is clear from the common law that the determination of what constitutes ‘profits’ is complex. The annual financial statements of a company which are prepared in accordance with the relevant accounting standards assist in ascertaining what ‘profits’ are for a company by reference to the statement of profit and loss.

In terms of the definition of a ‘dividend’ per the South African Income Tax Act 58 of 1962, a distribution in a form other than cash is excluded; however, a dividend is any amount paid by a resident company to any person (natural person or corporate) in respect of a share in that company. Key factors of this definition include the term ‘amount’. The report also considers further case law to assist in ascertaining what an ‘amount’ is as envisaged in the definition of a ‘dividend’ per the South African Income Tax Act 58 of 1962. In Lategan WH v. CIR, 1926 S.A.T.C.2 16 (1926),[19] the principle is that the term ‘amount’ includes not only money but other property which could be given a monetary value. In CIR v. Butcher Bros (Pty) Ltd, 1945 A.D. 301, 13 S.A.T.C. 21 (1945),[20] the principle in the Lategan case was reiterated in that an amount was needed to have an ascertainable monetary value.

There are however a few exclusions from the definition of a ‘dividend’ per the South African Income Tax Act 58 of 1962. What is not considered to be a ‘dividend’ includes amounts that

[15] Paragraph 23 of the commentaries to Article 10(3)

[16] Henry v Great Northern Railway Co (1857) 27 LJ Ch 1, 18 (Knight Bruce LJ)

[17] [1911] 1 Ch 92 at 98

[18] 1 [1946] 2 All ER 141, 25 ATC 337

[19] 1926 CPD 203, 2 SATC 16 at 19

[20] 1945 AD 301, 13 SATC 21 at 34

result in a reduction of contributed tax capital, amounts that constitute shares in the company, or amounts that constitute a share buy-back by a company of its own shares.

The valuation of a cash dividend is straightforward; however the valuation of a dividend as specie in somewhat complicated. S 64E (3) and s 64E (4) of the South African Income Tax Act 58 of 1962 provides guidance on the valuation of a dividend in specie. Dividends may be denominated in foreign currency and need to be translated to the currency of South Africa (the rand) at the spot rate on the payment date per s 64E (5) of the South African Income Tax Act 58 of 1962. The discussion on determining the value of a dividend is expanded in s 2.3.4 of this report.

### 2.4 Dividends tax

#### 2.4.1 Implementation and motive for dividends tax

The Minister of Finance who at the time was Trevor Manuel announced in his 2007 Budget speech that secondary tax on companies (STC) would be replaced with dividends tax.[21] The motive for replacing STC with dividends tax was that STC was complicated for investors to understand and made South Africa's corporate tax greater than that of other jurisdictions as a result of STC being an additional normal tax. To make South Africa more attractive to foreign investors and to align its dividend tax regime with international standards and best practices, STC was replaced with dividends tax as a result.

Dividends Tax came into effect on 01 April 2012. Dividends tax is a withholding tax which is triggered by the payment of a 'dividend' as defined in S 1 of the South African Income Tax Act 58 of 1962, or a 'deemed dividend' as envisaged in s 31(3)(i) of the South African Income Tax Act 58 of 1962. Withholding taxes serve as a critical mechanism for governments to prevent tax evasion and ensure timely tax collection, particularly from non-residents.[22] In most cases withholding taxes on income are paid by non-residents because withholding taxes have a number of benefits which include encouraging voluntary tax compliance, reducing the collection cost incurred by tax revenue authorities, and preventing dry spells in the fiscal conditions of a government by ensuring that tax revenue is collected throughout the fiscal year. There are several types of withholding taxes and these withholding taxes can be final taxes or advance payments of tax liabilities. For instance, withholding tax on royalties (Republic of South Africa 1962: s 49B) and payments to foreign entertainers and sportspersons (Republic of South Africa 1962: s 47B) serve as examples of final taxes, while

[21] Secondary tax on companies 1533. the new dividend tax June 2007 – issue 94 (no date) 1533.

[22] Dušek, L., 2003. Do Governments Grow when They Become More Efficient?: Evidence from Tax Withholding (Doctoral dissertation, University of Chicago, Department of Economics).

withholding taxes on the disposal of immovable property by a non-resident (Republic of South Africa 1962: s 35A) serve as advance payments of normal tax. Despite withholding taxes' effectiveness in ensuring revenue collection and preventing tax evasion, withholding taxes significantly impact returns for foreign (non-resident) investors.

A non-resident is any person who is not a resident. The term 'resident' is defined under s 1 of the Income Tax Act 58 of 1962. A natural person is considered a 'resident' for South African tax purposes if they are 'ordinarily resident' in South Africa or meet the requirements of the physical presence test and they are not deemed to be exclusively a resident of another country for the purposes of the application of any tax treaty. A person (other than a natural person) is considered a 'resident' for South African tax purposes if they are incorporated, established, or formed in South Africa, or have their place of effective management in South Africa.

The term 'ordinarily resident' Is not defined in the South African Income Tax Act 58 of 1962. However, case law provides guidance on what the term 'ordinarily resident' means. Two cases which assist in giving meaning to the term 'ordinarily resident' are Cohen v. Commissioner, 39 TC 1055 - Tax Court 1963,[23] and Commissioner for Inland Revenue v. Kuttel, 54 S.A.T.C. 298 (1992)[24]. The principle from Cohen v CIR is that a taxpayer's ordinary residence is the country to which (s)he would naturally and as a matter of course return from his/her wanderings. The CIR v Kuttel case confirms the principle established in the Cohen case but further states that a person is 'ordinarily resident' where (s)he has his/her usual or principal residence.

The history of Dividends Tax has been explained as well as what constitutes a dividend, and briefly what dividends tax is. The next point of discussion is to explain what a dividend is and the rate at which dividends tax is withheld in South Africa.

### 2.4.2 Dividends tax rate and liability for dividends tax

On implementation of the dividends tax on 1 April 2012, the rate was set at 15%.[25] The dividends tax rate was increased to 20% effective 22 February 2017[26] and the levy of tax is governed by s 64E of the South African Income Tax Act 58 of 1962. In the instance of cash dividends, the liability for dividends tax rests with the beneficial owner while the liability for a dividend in specie lies in the hands of the company declaring the dividend, not the beneficial owner (Republic of South Africa 1962: s 64EA). This is unlike STC, which placed the liability with resident company which paid dividends.

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[23] Cohen v CIR 1946 AD 174, 13 SATC 362

[24] CIR v Kuttel 1992 (3) SA 242 (A), 54 SATC 298

[25] SARS, DT-Gen-01-G03 - A Quick Guide to Dividends Tax - External Guide

[26] South African Revenue Service. (n.d.). Dividends Tax.

A ‘beneficial owner’ is defined in s 64D of the South African Income Tax Act 58 of 1962 and the concept of ‘beneficial owner’ is also found in Articles 10, 11, and 12 of the OECD Model Tax Convention. In terms of the South African Income Tax Act 58 of 1962, it is defined as ‘the person entitled to the benefit of the dividend attaching to a share’ (Republic of South Africa 1962: s 64D). The term ‘beneficial owner’ is not defined in the OECD model nor in most tax treaties. For South African tax purposes, the term is defined in s 64D of the South African Income Tax Act 58 of 1962 as the person entitled to the benefit of the dividend attaching to a share. The Netherlands do make use of the term ‘beneficial owner’ in their various Income Tax Acts but also do not define the term. The beneficial owner can therefore be someone other than the registered shareholder. The definition of a ‘beneficial owner’ is a rather complex term as it has given rise to different interpretations by courts and tax administrations and has necessitated clarification of the term in OECD model tax convention.[27] Identification of the beneficial owner is therefore important in the case where a cash dividend is declared by a resident company for reasons which include the following:

1. identification of the person liable for the dividend tax;
2. assists in determining whether the dividend is exempt from dividends tax (Republic of South Africa 1962: s 64F-FA); and
3. assists in determining whether a dividend is subject to a reduced dividends tax rate by application of a DTA.[28]

A share may be certified (issued with a share certificate) or uncertified (no share certificate issued).[29] In the past, companies issued share certificates as proof of ownership but with the advancement in technology and how easy it is to trade company shares, physical share certificates have become obsolete. No share certificates are issued but instead a share register is kept electronically to keep track of share ownership. The distinction between two (certified and uncertified share) can aid in identification of the beneficial owner of a dividend.

In order to comply with the South African Income Tax Act 58 of 1962, dividends tax must be paid over to SARS by the last day of the month following the month when the dividend is paid by the company or regulated intermediary. Failure to pay within the stipulated timelines will attract interest on the balance of the tax outstanding (Republic of South Africa 1962: s 64K (6)). Now that the liability of dividends tax has been clarified, the next part is understanding how the value of a dividend is determined.

[27] Clarification of the meaning of ‘’beneficial owner’’ in the OECD model tax convention – OECD.org
[28] Income Tax Act 58 of 1962, s 64G(2), s 64H(2) and Article 10 of Double Tax Agreements
[29] Daya, L. (July 2009) Refinements to the withholding mechanism for dividend tax

### 2.4.3 Determining the value of a dividend

The value of a cash dividend is straightforward to determine and is determined as the value per share as declared, multiplied by the number of shares held for a particular shareholder. On the other hand, in specie dividends present the complexity of determining the value of the dividends declared. Where the dividend is denominated in a currency other than the currency of South Africa (ZAR), the amount of the dividend must be translated from the foreign currency to ZAR (denoted as R) by applying the spot rate at the time that the South African Income Tax Act 58 of 1962 deems the dividend to be paid. There are specific dividend deeming provisions and valuation methods prescribed by the South African Income Tax Act 58 of 1962 (Republic of South Africa 1962: s 64E (3)).

The South African Income Tax Act 58 of 1962 differentiates between two different types of assets in specie, namely listed financial instruments, and any assets other than listed financial instruments. In the case of listed financial instruments, which are assets (e.g., gold commodity) listed on a recognised exchange such as the Johannesburg Stock Exchange (JSE), the dividend amount is deemed to be the quoted price at close of business on the last business day before the dividend is deemed to be paid (Republic of South Africa 1962: s 64E(2)). In the case of assets in specie other than listed financial instruments, the dividend amount is deemed to be the market value of the asset distributed. The term ‘market value’ is defined in paragraph 1 of the Eighth Schedule in the South African Income Tax Act 58 of 1962. Paragraph 31 of the Eighth Schedule provides general rules on how market value is determined (Republic of South Africa 1962: par 31 Eighth Schedule).

Another important difference to be noted between a cash dividend and in specie dividend is the net cash outflow for the company declaring the dividend. In the case of a cash dividend, the net cash outflow is equal to the gross amount of the dividend. If the company declares a cash dividend of ZAR 1 000, the company must withhold 20% from the payment (assuming no exemptions of DTA reductions are applicable) and pay this amount to SARS by the end of the month following the month in which the dividend is deemed to be paid. The net cash outflow for the company is ZAR 1 000 (ZAR 200 paid to SARS as dividends tax and ZAR 800 paid to the recipient). When an asset in specie with a market value of ZAR 1 000 is distributed, withholding tax of 20% is still triggered; however, it is the liability of the company declaring the dividend, not the beneficial owner. The net outflow for the company amounts to ZAR 1 200 (R200 cash paid to SARS as dividends tax and ZAR 1 000 asset value distributed to the recipient which represents the market value of the asset). Thus, the cash outflow is different, but the outflow of value from the company is the same, as the assets of the company reduce equally.

### 2.4.4 Reduction or exemption in dividends tax

Cash dividends and in specie dividends declared and distributed by a resident company may be subject to an exemption or reduction (Republic of South Africa 1962: s 64F-FA) from dividends tax in terms of the South African Income Tax Act 58 of 1962, or application of DTAs. Cash dividends are exempt from dividends tax per S 64F of the above Act if the beneficial owner is a resident company, one of the three spheres of government, a public benefit organization, a trust, or a micro business just to name a few exemptions. In specie dividends on the other hand are exempt or subject to reduction if the beneficial owner has submitted the necessary declaration and undertaking required in the prescribed format.

Double Tax Agreements (DTAs) also have the potential to reduce or exempt dividends tax based on the provisions contained within the separate agreements that countries have entered into[30]. Article 10 in the DTAs that South Africa has entered into with other countries contains provisions relating to dividends. The provisions are specific to each country and may reduce the dividends tax to 0%, as in the case of the DTA between South Africa and the State of Kuwait.[31] The DTA between South Africa and the Netherlands[32] contains a 'most favoured nation' (MFN) clause which can effectively result in an exemption from the Netherlands or South African dividends tax (provided that the requirements as to beneficial ownership and shareholding in the company declaring the dividends are met)[33].

### 2.4.5 Declaration of dividends tax to SARS

Dividends tax should be paid to SARS by the company declaring the dividend or the regulated intermediary on or before the last day of the month following the month in which the dividend was paid. The dividends tax payments should be supported by the submission of both the DTR01 and DTR02 return via e-filing (electronic submission) [34]. The DTR01 is a Dividends Tax Transaction information declaration form which provides details of the dividend transactions. The information provided on the DTR01 form includes the following:

- Taxpayer name
- Tax period
- Indication of whether the dividend is a cash, in specie, or s 64EB (2) dividend

[30] Double taxation agreements; protocols (2023) South African Revenue Service.

[31] Agreement between the Republic of South Africa and the government of the State of Kuwait for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income

[32] Convention between the Republic of South Africa and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital

[33] Hattingh, J., 2019. ABC Proprietary Ltd v Commissioner for the South African Revenue Services. International Tax Law Reports (2019), 22, pp.155-175.

[34] SARS, DT-Gen-01-G03 - A Quick Guide to Dividends Tax - External Guide

- The number of beneficial owners of the dividends disaggregated to detailed number of individual beneficial owners (natural persons), non-individual shareholders (juristic persons) and payments to regulated intermediaries
- Details of the submitting entity which include trading name, registration number and address
- Details of the entity declaring the dividend
- Details of dividend declared

The information provided in the DTR01 form feeds into the DTR02 which is the Dividends Tax Return. The e-filing tool is a smart electronic tool utilised by taxpayers to file their taxes electronically, rather than manually, which is time consuming. Some information required on the tool is standard; however, the bulk is driven by questions to be answered on the tool. The responses determine whether sections of the form are applicable (and therefore need to be completed) or not.

The company or regulated intermediary has the ability to manually change information on the DTR02 form before submission should it become aware of an error or missing information. However, in the case of refunds which relate to a prior tax period, the cells are locked and may not be edited. The process to follow is for the company or regulated intermediary to submit a Request for Correction (RFC) via e-filing[35]. The company or regulated intermediary can then complete and submit the correction. The RFC must be submitted within the four year period after the dividend was declared in order to be considered. The RFC process is further complicated by the situations in which it not allowed, which include the following: where an audit or verification case was completed, or a revised declaration was done by SARS. These are factors that the company and regulated intermediary need to take into account when they receive requests for dividends tax refunds from beneficial owners, as it impacts the chances of successfully claiming a refund from SARS.

### 2.5 Conclusion

This chapter introduced dividends tax in the context of South African tax regulations to highlight its purpose domestically, but also within the international tax framework. Important concepts for understanding dividends tax were also discussed such as the 'beneficial owner' concept and the valuation of a dividend. The main difference between dividends tax and STC is that STC was levied on the companies on the declaration of dividends, whereas dividends tax is levied on shareholders when they receive the dividends. Chapter 3 will build on Chapter 2 by discussing DTAs and how they may reduce the dividends tax withheld. Chapter 3 focuses

[35] SARS, 'Request for Correction and Notice of Objection Guide'

on the DTAs that exist between the Republic of South Africa (RSA) and The Netherlands, and between RSA and Namibia.

## Chapter 3 How Double Tax Agreements (DTAs) which South Africa has entered into affect the withholding tax which South Africa can legally withhold

### 3.1 Introduction

Countries have different tax laws which may lead to double taxation of the same income (i.e., in the country of residence and in the country which is the source of the income). DTAs are instruments that are used internationally to regulate the taxing rights between two counties in order to avoid or eliminate the double taxation.[36]

This chapter analyses the DTAs concluded by South Africa and how they affect the dividends tax that South Africa can legally withhold, the focus being on the DTA concluded between South Africa and Namibia, and the DTA concluded between South Africa and the Netherlands. This chapter also briefly outlines the different models on which DTAs are based and highlights the differences or main characteristics of each model.

The objective of this chapter is to explore the practical implications of the DTAs South Africa has entered into with the aforementioned countries. The motivation for electing these two contracting states was explained in Chapter 1 of this report. The prevention or alleviation of double taxation can be achieved unilaterally or bilaterally. A unilateral prevention or alleviation of double taxation is achieved with the use of tax rebates such as the s 6 quat rebate per the South African Income Tax Act 58 of 1962.[37] In contrast, a bilateral prevention or alleviation of double taxation is achieved using DTAs.

### 3.2 History of DTAs and the different models

There are different models on which DTAs are based, primarily the United Nations Model Double Taxation Convention between Developed and Developing Countries[38] (UN model) and the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital[39] (OECD Model). In addition, most countries have their own model DTAs for the purpose of negotiating DTAs[40] which may be a combination of the UN model and OECD model.

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[36] OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017

[37] Income Tax Act 58 of 1962, s 64 quat

[38] United Nations, Department of Economic and Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries (New York: United Nations, 2011)

[39] Organisation for Economic Co-operation and Development, Model Tax Convention on Income and Capital (Paris: OECD, 2014)

[40] Quak, E.J. and Timmis, H., 2018. Double taxation agreements and developing countries.

The UN model[41] between developed and developing countries has its foundations in model tax treaties developed by the League of Nations in 1928. The model tax treaty conventions by the League of Nations were pursued in the Organisation for European Economic Co-Operation (OECC) now known as the Organisation for Economic Co-operation and Development (OECD). The UN Model and OECD Model[42] are similar and have a significant number of common provisions. The OECD model is a widely used one for negotiating DTAs between contracting states with 38 member countries across the globe and over 30 other countries referred to as observers.[43] These two leading models show the importance of consistency which is required when dealing with international taxation as the different tax models in different countries result in complexities in taxation, and possibly taxation of the same income by different tax authorities[44] which defeats the purpose of concluding DTAs.

Whilst the UN model and OECD model are similar in many respects, they differ in one major aspect, which is the tax regime they favour. The OECD Model favours capital-exporting countries and acts as a mechanism to transfer revenue from developing countries to developed countries by restricting the taxing rights of the source country[45]. In other words, the OECD model favours residence-based taxation. The UN model favours capital-importing countries as it imposes fewer restrictions on the taxing rights of the source country. In other words, the UN model favours source-based taxation over residence-based taxation[46]. Source-based taxation has been proven to favour developing countries over developed countries by allowing the developing countries to retain taxing rights and therefore not erode their tax base.[47]

The OECD model and UN model largely influence the development of DTAs across the globe with the OECD having 38 member countries, the United Nations (UN) being the world's largest intergovernmental organization which has 193 member countries and 2 non-member observers[48]. There are a number of countries, such as South Africa, which are not members

[41] United Nations Model Double Taxation Convention between Developed and Developing Countries (2017)

[42] OECD (2019), Model Tax Convention on Income and on Capital 2017

[43] OECD.org – List of OECD member countries – Ratification of the Convention on the OECD

[44] Whittaker D, 1982, "An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy"

[45] Daurer, V. and Krever, R., 2014. Choosing between the UN and OECD tax policy models: An African case study. African Journal of International and Comparative Law, 22(1), pp.1-21.

[46] The United Nations Conference on Trade and Development (UNCTAD) IIA Issued Paper Series "Taxation"

[47] Eyitayo-Oyesode, O.A., 2020. Source-based taxing rights from the OECD to the UN model conventions: Unavailing efforts and an argument for reform. Law and Development Review, 13(1), pp.193-227.

[48] SAICA, 2001, Residence basis of Taxation935. double taxation agreements October 2001

of the OECD but who are in conformity with the OECD model tax convention, referred to as countries with observer status.[49]

South Africa is not a member state of the OECD but has to a significant extent adopted the OECD model as the basis for negotiating its DTAs[50]. The minor adjustments made are to retain a portion of the taxing rights to some income streams such as dividends.

### 3.3 Relationship between DTAs and domestic laws

DTAs are instruments of international law. The main purpose of DTAs is the avoidance of double taxation of income and capital. They achieve this by modifying domestic laws but in order to achieve this, the DTAs need to be incorporated into domestic law in some countries by the domestic legislators[51]. In South Africa, DTAs are incorporated into South African law through s 108 of the South African Income Tax Act 58 of 1962 in conjunction with s 231 of the Constitution of the Republic of South Africa[52].

The relationship between a DTA and domestic laws is complex, but the basic principle in the event that provision(s) of a DTA are in conflict with domestic laws is that the DTA should prevail. However, the laws in each country are different and the domestic law may grant domestic legislators the power to override the provisions of a tax treaty[53]. Each DTA will need to be analyses on a case by case basis. An important concept to note is that DTAs do not impose tax. Tax is imposed by domestic law and the DTA simply limits the tax imposed[54].

### 3.4 Article 10 of DTAs

In a DTA, one of the income streams that are included is dividends. Article 10 in the OECD model and UN model regulate the taxing of dividends. Similarly, Article 10 of the DTA between South Africa and Namibia, and the DTA between South Africa and the Netherlands regulates the taxing of dividends. In terms of paragraph 1 of Article 10, dividends paid by a company which is a resident of the Contracting State to a resident of the other Contracting State may be taxed in that other State. Paragraph 2 of Article 10 allows dividends to be taxed in the Contracting State of which the company paying dividends is a resident if the beneficial owner

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[49] Steenkamp, L.A., 2017. An analysis of the applicability of OECD Model Tax Convention to non-OECD member countries: the South African case. Journal of Economic and Financial Sciences, 10(1), pp.83-93.

[50] West, C., 2016. Status Quo of South African Tax Treaty Policy. Status Quo of South African Tax Treaty Policy, International Taxation in China, (11).

[51] Du Plessis, I., 2015. The incorporation of double taxation agreements into South African domestic law. Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, 18(4), pp.1188-1204.

[52] The Constitution of the Republic of South Africa, 1996

[53] Arnold (2013b:8-9).

[54] Arnold (2013b:p. 8 para 37). 7

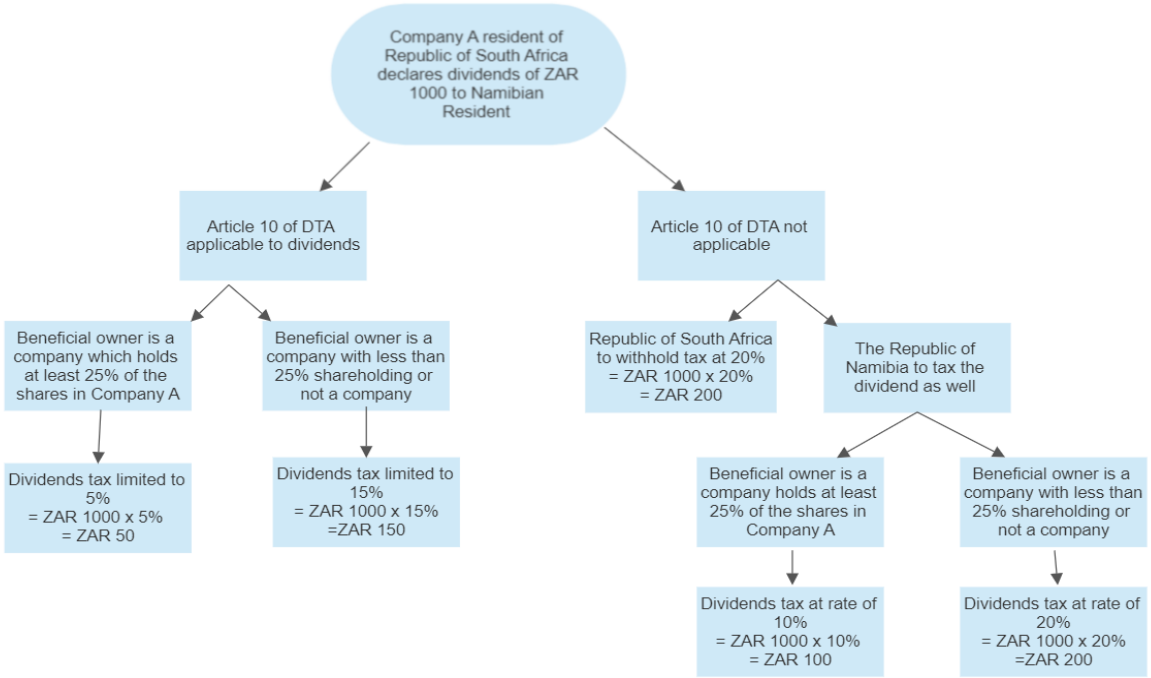
of the dividends is a resident of the other Contracting State with limits placed on the amount of dividend tax to be charged.

### 3.5 Agreement between South Africa and Namibia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains

The DTA between South Africa and Namibia became effective on 11 April 1999[55]. The provisions in Article 10 of the DTA are substantially the same as the provisions contained in article 10 of the UN and OECD model. Paragraph 2 of Article 10 of the DTA allows dividends to be taxed in the Contracting State of which the company paying dividends is a resident. However, if the recipient is the beneficial owner of the dividends, the dividends tax shall not exceed 5 percent of the gross dividends. If the beneficial owner is a company which holds more than 25 percent of the capital of the company paying the dividends, the dividends tax shall not exceed 15 percent of the gross dividends in all other cases.

Dividends tax is levied at 20 percent per s 64E of the South African Income Tax Act 58 of 1962, and the DTA between South Africa and Namibia has the potential to reduce the dividends to either 5 percent or 15 percent.

Figure 3 depicts the cash impact on the non-resident when a dividend is declared by a company resident in South Africa to a shareholder (beneficial owner of the dividend) resident in Namibia (impact of exchange rates and conversion are ignored for this demonstration).




[55] Double taxation agreements; protocols (2023) South African Revenue Service.

Source: Own

**Figure 3: Cash impact of DTA between Republic of South Africa and Republic of Namibia**

Figure 3 highlights the impact that the DTA has on the dividends tax when compared to a situation where the DTA provisions are not applicable.

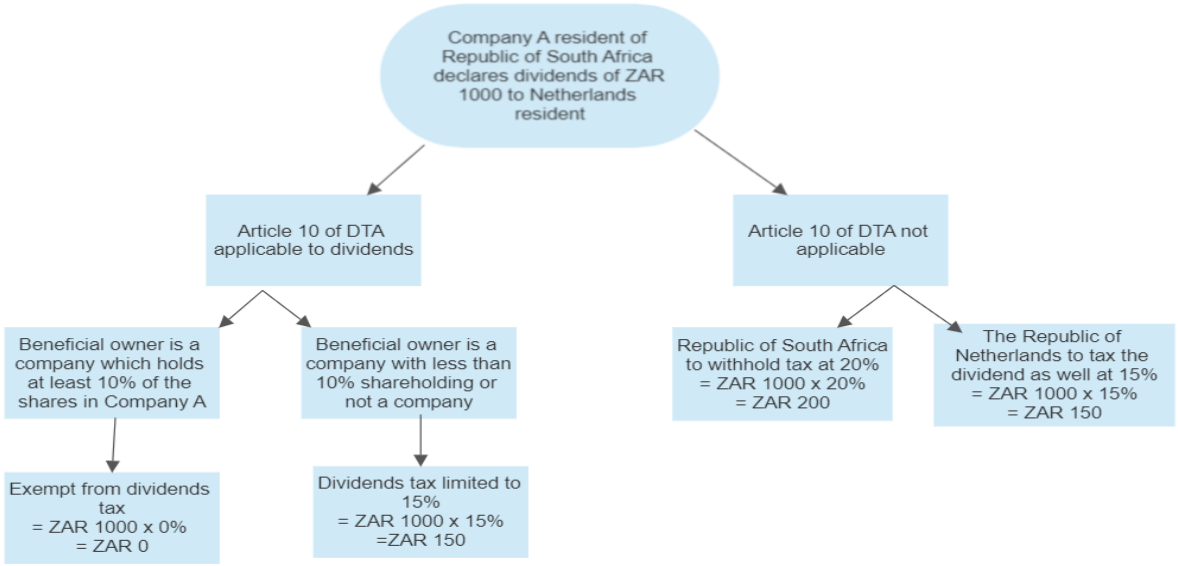
### 3.6 Convention between the Republic of South Africa and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital

The DTA between South Africa and the Netherlands[56] became effective on 28 December 2008. Paragraph 2 of Article 10 of the DTA allows dividends to be taxed in the Contracting State of which the company paying dividends is a resident. However, if the beneficial owner of the dividends is a resident of the other contracting state, then the dividends tax shall not exceed 15 percent of the gross dividends. Paragraph 3 of Article 10 of the DTA exempts the dividends from tax if the beneficial owner of the dividends is a foreign company whose shares are partly owned by the company paying the dividend (minimum shareholding of 10 percent).

Dividends tax is levied at 20 percent per s 64E of the South African Income Tax Act 58 of 1962 and the DTA between South Africa and the Netherlands has the potential to reduce the dividends to either 0 percent or 15 percent.

Figure 4 demonstrates the cash impact on the non-resident when a dividend is declared by a company resident in South Africa to a shareholder (beneficial owner of the dividend) resident in the republic of the Netherlands (impact of exchange rates and conversion are ignored for this demonstration).

[56] Double taxation agreements; protocols (2023) South African Revenue Service.




Source: Own

**Figure 4: Cash impact of DTA between Republic of South Africa and the Netherlands**

Figure 4 highlights the impact that the DTA has on the dividends tax compared to a situation where the DTA provisions are not applicable.

### 3.7 Conclusion

This chapter discussed DTAs and their purpose. It further discussed the roles of DTAs in the context of the relief measures they provide. The provisions of the DTAs entered into are important for determining the amount of dividends tax that can be legally withheld in South Africa. The provisions of the DTAs provide some relief for taxpayers by reducing their withholding tax liability on dividends when applied appropriately, but importantly, DTAs do not impose tax. Chapter 4 of this report explores the withholding tax reclaim process for South Africa along with the complexities that arise.

## Chapter 4 A comparison of the process for claiming a refund of dividends withholding tax in South Africa to the processes implemented by the Netherlands and Namibia

### 4.1 Introduction to refund of dividends tax

This chapter discusses the circumstances under which a refund may be claimed for a cash dividend or dividend in specie in South Africa. It further compares the refund process for dividends tax detailed for South Africa to the refund process for dividends tax in Namibia and the Netherlands.

### 4.2 The dividends tax refund process relating to cash dividends

The refund process of dividends tax withheld on cash dividends starts from the date when the dividend are initially declared. This section of Chapter 4 deals specifically with the refund process relating to a cash dividend with the dividend in specie refund process outlined thereafter. Dividends tax withheld on cash dividends may be refunded to the person to whom the dividend was paid by either the company (Republic of South Africa: s 64L) itself, or a regulated intermediary in the instance where the company declaring the dividend opted to make use of a regulated intermediary (Republic of South Africa: s 64M).

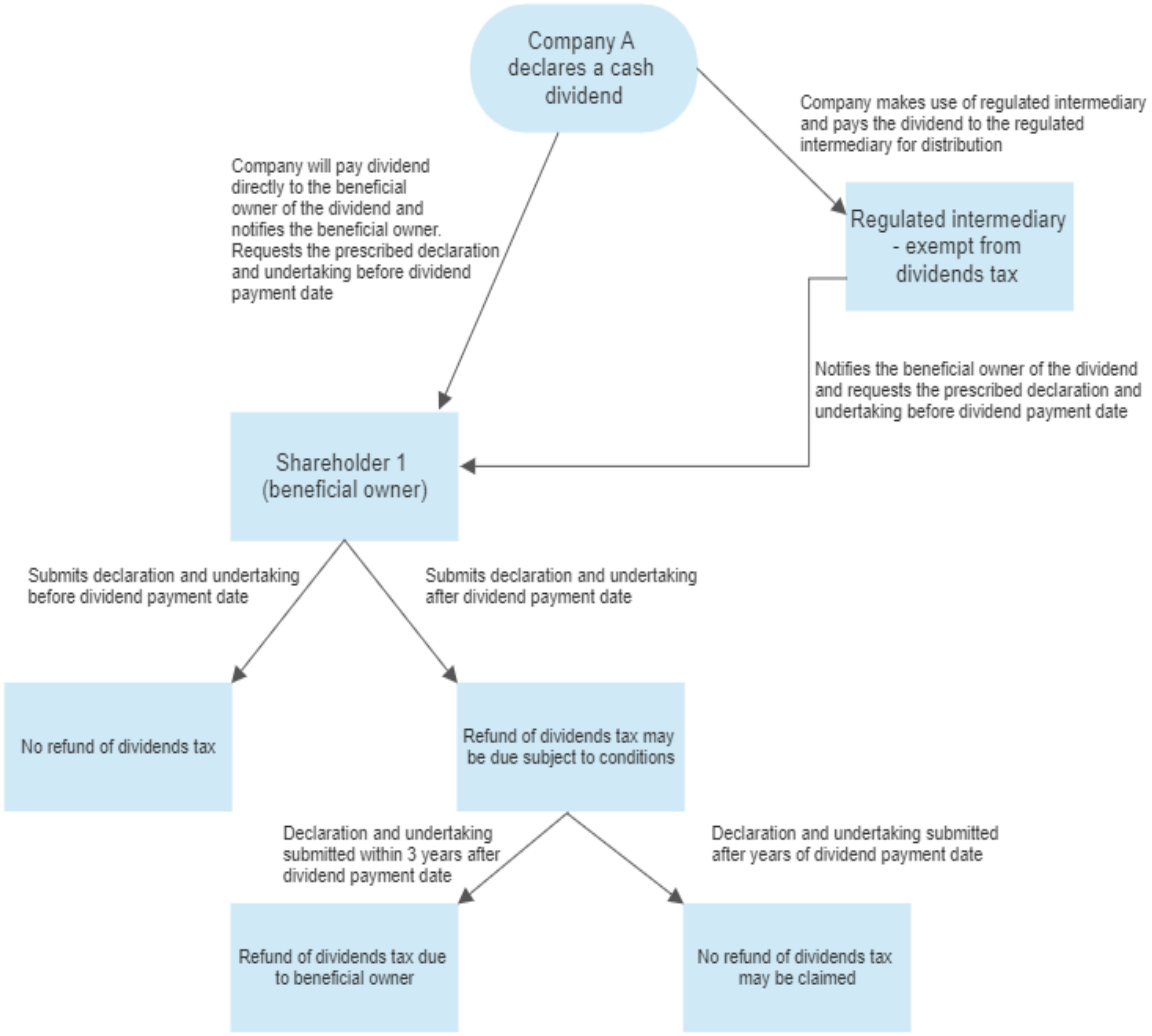
Figure 5 is a flow diagram indicating the refund process for cash dividends paid by either the company or regulated intermediary. The steps leading to the refund of the dividends tax withheld are as follows:

Step 1: The company declares a cash dividend (Company A per Figure 3 below). The company either pays the dividend directly to the shareholder (identified as the 'beneficial owner' for South African tax purposes) or a regulated intermediary. A regulated intermediary is a specified regulated person which administers dividend payments for a company to reduce the administrative burden for a company, as in the case of a listed entity with a large number of shareholders. An example of such a regulated intermediary is Compushare. The dividend transferred to the regulated intermediary is automatically exempt from dividends tax (Republic of South Africa: s 64G(2)(c)).

Step 2: The company or regulated intermediary notifies the beneficial owners of dividends regarding the dividends declared and notifies the beneficial owners of the cut-off date by when the prescribed declarations and undertakings must be submitted to the company or regulated intermediary. The declarations from the beneficial owner indicate that either the dividend is exempt from dividends tax, or is subject to a reduced rate by reason of the application of a DTA between South Africa and the country of residence of the beneficial owner.

Step 3: The beneficial owner then either submits the necessary declaration and undertaking by the cut-off date stipulated by the company or regulated intermediary or submits the declaration and undertaking late. When the declaration and undertaking are submitted on time, barring any human processing errors, the withholding tax on dividends is applied at the correct rate, resulting in no refunds being due to the beneficial owner. In a situation where the prescribed declaration and undertaking are submitted late, prescription rules are applicable per s 64L and s 64M of the South African Income Tax Act 58 of 1962. The declaration and undertaking must be received by the company or regulated intermediary within a period of 3 years from the date of payment of the dividend for a refund of dividends tax to be considered. In terms of s 7(1)(a) of the Disaster Management Tax Relief Administration Act of 2020 (DMTRA Act), the period of 'lock down' must not be taken into account when determining if the declaration form and undertaking were submitted within three years after the date of payment of the dividend.

Step 4: Once it has been established that the prescribed declaration and written undertaking have been received by the company or regulated intermediary, the next step is to determine the amount of dividends tax to be refunded to the beneficial owner. The amount to be refunded to the beneficial owner is calculated as per the amount that would not have been withheld had the declaration been submitted by the cut-off date stipulated by the company, or regulated intermediary. The amount must be refunded by the company (Republic of South Africa: s 64L(2)(a)) or regulated intermediary (Republic of South Africa: s 64M(2)(a)) from any amount of dividends tax withheld within a period of one year after the submission of the declaration by the beneficial owner of the dividend. Should the amount of dividends tax refundable to the beneficial owner exceed the amount of dividends tax withheld by the company or regulated intermediary within the one year stipulated above, the company (Republic of South Africa: s 64L(2)(b)) or regulated intermediary (Republic of South Africa: s 64M(2)(b)) must continue to pay the refund and recover the excess paid from SARS. Figure 5 summarises the steps outlined above.




Source: Own

**Figure 5 Dividends tax refund process on cash dividends**

### 4.3 The dividends tax refund process relating to in specie dividends

This section of Chapter 4 deals specifically with the refund process relating to in specie dividends distributed by the company. A regulated intermediary is not utilized for in specie dividends as these dividends are not in cash and have no administrative issues as in the case of cash dividends. Figure 4 below is a flow diagram indicating the refund process for in specie dividends distributed by the company. The steps leading to the refund of the dividends tax withheld are as follows:

Step 1: The company declares a in specie dividend (Company A per Figure 4 below). The company distributes the dividend directly to the shareholder (identified as the 'beneficial owner' for South African tax purposes).

Step 2: The company notifies the beneficial owners of in specie dividends regarding the dividends declared and notifies the beneficial owners of the cut-off date by when the prescribed declarations and undertakings must be submitted to the company or regulated intermediary. The declarations from the beneficial owner indicate that either the dividend is exempt from dividends tax, or is subject to a reduced rate by reason of the application of a DTA between South Africa and the country of residence of the beneficial owner.

Step 3: The beneficial owner then either submits the necessary declaration and undertaking by the cut-off date stipulated by the company, or submits the declaration and undertaking late. When the declaration and undertaking are submitted on time, barring any human processing errors, the withholding tax on dividends is applied at the correct rate resulting in no refunds being due to the beneficial owner. In a situation where the prescribed declaration and undertaking are submitted late, prescription rules are applicable per s 64LA[57] of the South African Income Tax Act 58 of 1962. The declaration and undertaking must be received by the company within a period of 3 years from the date of payment of the dividend for a refund of dividends tax to be considered. In terms of s 7(1)(a) of the DMTRA Act[58], the period of 'lock down' must not be taken into account when determining if the declaration form and undertaking were submitted within three years after the date of payment of the dividend. Figure 6 below is a summary of the steps outlined above.

[57] Income Tax Act 58 of 1962, s 64LA(b)

[58] Disaster Management Tax Relief Administration Act of 2020Disaster Management Tax Relief Administration Act of 2020, s 7(1)(a)

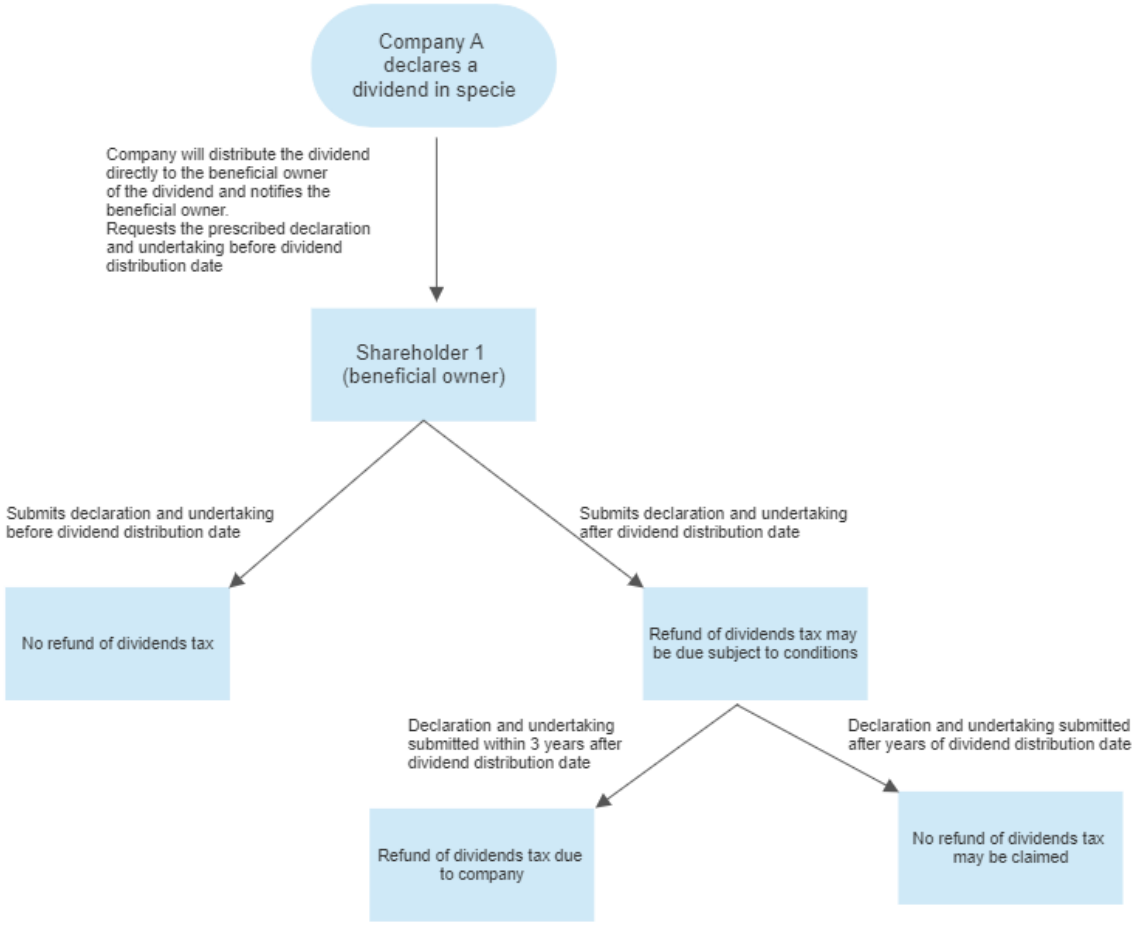



**Figure 6 Dividends tax refund process on in specie dividends**

### 4.4 Comparison of South Africa's dividends refund process to the dividends refund process of Namibia

The concept of Dividends Tax is referred to as Non-resident Shareholders' Tax (NRST) as per Part III of Namibia's Income Tax Act[59]. NRST is paid in respect of dividends declared by a company which is resident in Namibia, or a company which carries on business through a permanent establishment in Namibia, to a non-resident shareholder or beneficial owner of the dividend[60]. The liability for NSRT is consistent with the South Africa's Income Tax Act.

Namibia's Income Tax Act is not as complex and detailed as South Africa's Income Tax Act in relation to NSRT (for simplicity, herein after referred to as concept of dividends tax). The process leading up to a refund for dividends tax in Namibia also starts with the declaration of

[59] Republic of Namibia - Income Tax Act 24 of 1981, Part III

[60] Republic of Namibia - Income Tax Act 24 of 1981, s42

the dividend by the company. The following steps are summarised in the Figure 5 below for a cash dividend:

Step 1: The company declares a cash dividend (Company A per Figure 7 below). The company either pays the dividend directly to the beneficial owner shareholder, or an agent (similar concept to regulated intermediary per South Africa). An agent is defined in s1 of the Income Tax Act of the Republic of Namibia as including 'any partnership or company or any other body of persons corporate or unincorporate acting as an agent'[61].

Step 2: The company or agent notifies the shareholder regarding the dividends declared and notifies the shareholder of the cut-off date by when the supporting documents should be submitted where an exemption or reduction in dividends tax applies. The Income Tax Act of the Republic of Namibia does not specify what documents are required to substantiate the exemption or reduction in the dividends tax; however s72 of that Act specifies that the burden of proof lies with the person claiming such an exemption or reduction[62]. In terms of s62 of that Act, in the case of shareholders, supporting documentation would include a statement attached to the return submitted which details the number of shares held in that company declaring the dividend, the name and address of the shareholder and the dividends received.

Step 3: The shareholder then either submits the supporting documentation by the cut-off date stipulated by the company or agent, or submits the supporting documentation late. When the supporting documentation is submitted on time, barring any human processing errors, the withholding tax on dividends is applied at the correct rate, resulting in no refunds being due to the shareholder. In a situation where the supporting documentation is submitted late, prescription rules are applicable per s 71 of that Act, as an assessment would already have been issued. The appeal to the assessment must then be received by the Namibian Tax Authority within 90 days of date of payment of the dividend for a refund of dividends tax to be considered.

Step 4: Once it has been established that the supporting documentation has been received by the Namibian Tax Authority, the next step is to determine the amount of dividends tax to be refunded to the beneficial owner through the appeal process. The amount to be refunded to the beneficial owner is calculated as per the amount that would not have been withheld had the supporting documentation been submitted by the cut-off date stipulated by the company, or agent. Should the appeal succeed, the excess dividends tax withheld amount must be refunded by the Namibian Tax Authority.

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[61] Republic of Namibia - Income Tax Act 24 of 1981, s1

[62] Republic of Namibia - Income Tax Act 24 of 1981, s72

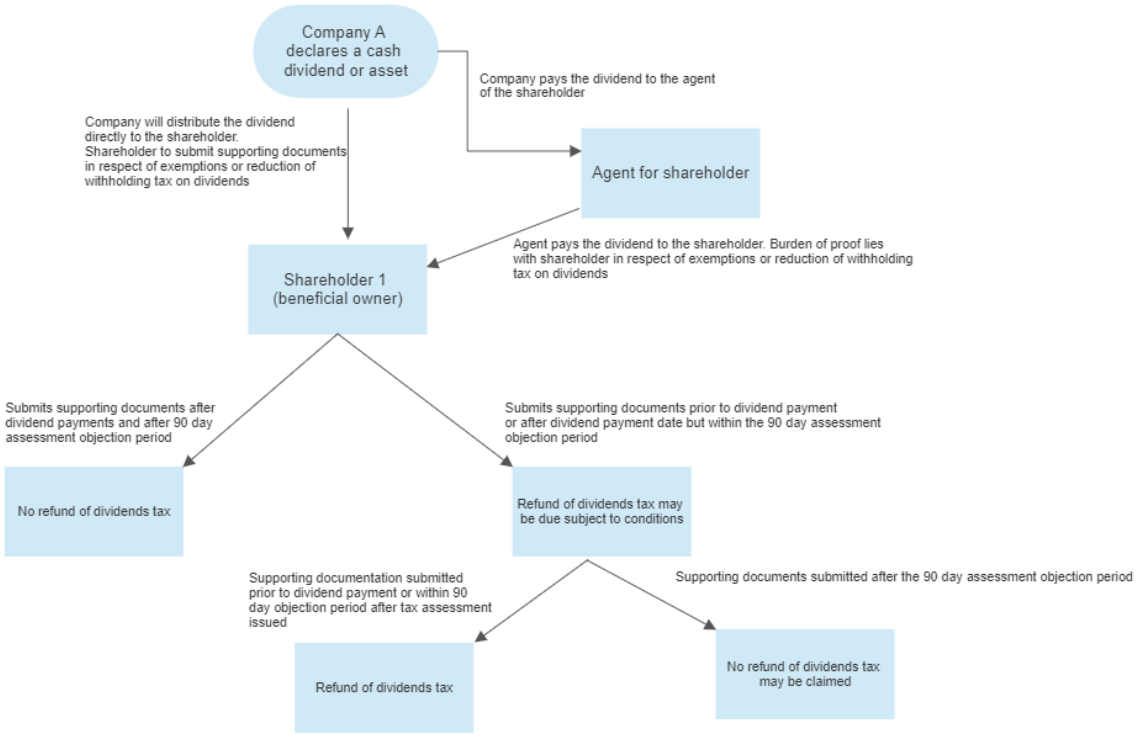


**Figure 7: Cut-off dates in the refund process for the Republic of Namibia**

### 4.5 Comparison of South Africa's dividends refund process to the dividends refund process of the Netherlands

Dividends tax in the Netherlands is levied at a rate of 15%, and the liability lies with the beneficial owner of the dividend. In contrast to South Africa where a dividend is identified as either a cash dividend or dividend in specie, the Netherlands identifies a dividend as either a 'participation' dividend or a 'portfolio' dividend[63]. A participation dividend is typically between a holding company and another company where the other company holds at least 10% or more of the shares. A portfolio dividend is one paid to shareholders other than those that meet the participation criteria.

The refund process starts at the point when the dividend is declared by the company resident in the Netherlands to non-resident shareholders. The following are the steps in the process which are summarised in Figure 8 below:

Step 1: A company resident in the Netherlands declares a dividend and notifies the shareholders. The non-resident shareholders are requested to submit IB92 Universeel[64] form in order to claim an exemption or reduction at source of the dividends tax. There are countries

[63] van Buggenum, G.P. and Daniels, A.G.M., 1986. Netherlands Government intends to revise the participation exemption. Intertax, 14, p.268.

[64] Universele Nederlandse uitvoeringsvoorschriften 2015 Inzake Belastingverdragen, Uitgezonderd (Universal Dutch Implementing Regulations 2015 on tax treaties)

that are specifically excluded from claiming this exemption or reduction at source such as South Africa, due to the DTA between the Netherlands and South Africa permitting the Netherlands to tax the dividends as well[65]. The exceptions will be detailed further in Chapter 5 in the discussion of complexities in the reclaim or refund process. At this point of the dividend refund process, there is no distinction in the dividend declared as the beneficial owners have not yet been identified.

Step 2: The company pays the dividend over to a bank for distribution. Banks are now responsible for distribution of dividends in the Netherlands due to the cum-ex scandal that took place[66]. More detail on the cum-ex scandal is provided in Chapter 5 of this report.

Step 3: The non-resident shareholders submit the IB92 Universeel form which is basically a certified declaration of residency with further details of the shareholder. The bank is then able to identify as this point whether the dividend to the non-resident shareholder is a participation dividend or portfolio dividend. Participation dividends are exempt from dividends tax, although portfolio dividends are subject to dividends tax at a rate of 15%. No dividends tax filing is required for participation dividends, but a tax filing is required for portfolio dividends.

[65] Explanation accompanying form IB 92 Universeel

[66] Jensen, M.N. and Lassen, S.H., 2019. Cum-ex transactions in European countries: theoretical issues and empirical evidence

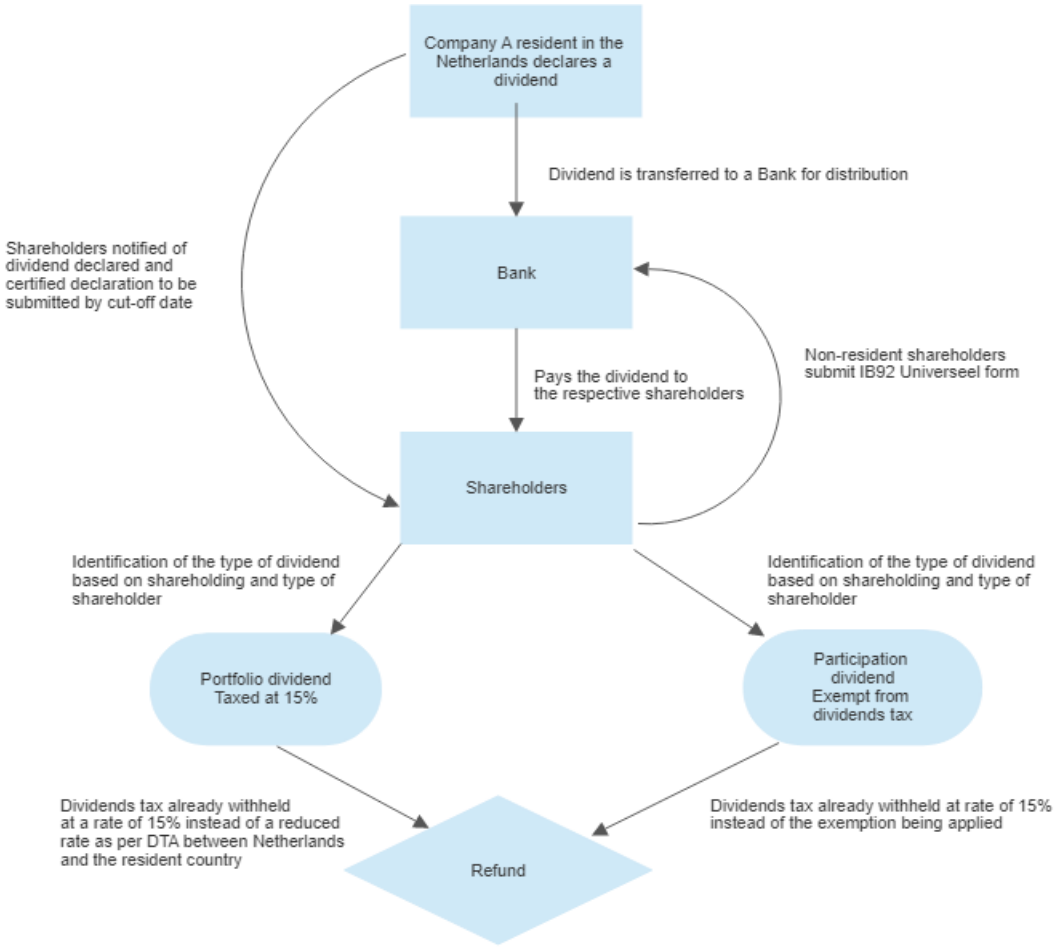


**Figure 8: Refund process for dividends tax in the Netherlands**

It is important to note that a refund for dividends tax is only possible if dividends tax is already collected at a rate of 15% which exceeds the rate per the respective countries' DTA with the Netherlands. A refund is claimed on the same IB92 Universeel form described above. A refund claim must be submitted within a period of three years after the dividend distribution[67].

### 4.6 Conclusion

This chapter outlined the refund processes for dividends tax for South Africa and the Netherlands. This allowed for comparisons to be made and for similarities to be noted. The refund processes are similar in terms of supporting documentation that is required in the process, although each country has its own set of forms to be completed and additional processes to be adhered to. Chapter 5 extends the discussion by addressing the practical challenges experienced by investors (i.e., shareholders) in the process of claiming the refunds of dividends tax.

[67] Netherlands, D.P., Jian-Cheng, K. and Bane, R., 2021. 2022 Dutch Tax Plan: Few policies proposed. International Tax Review.

## Chapter 5 Practical challenges experienced by investors who attempt to claim a refund of dividends withholding tax and the impact on foreign direct investment

### 5.1 Introduction

The refund process of dividends tax withheld discussed in Chapter 4 does not automatically result in the payment of refunds for non-residents who invested in shares. The success rates of the claims differ per country and are impacted by the complexities in the refund process specific to each country. This chapter explores the complexities that present practical challenges for investors (i.e., the non-residents from which dividends tax is withheld on the dividends they receive) specifically in South Africa, Namibia and the Netherlands. This chapter also discusses the impact that the challenges in the refund process have on foreign investment.

### 5.2 Overview of the complexities of the refund process

The complexities in the refund process are similar in some respects between the countries. Differences arise for a number of reasons such as the maturity of the tax system in each country, whether it is a developing or developed country, the systems used in each country, and how they are tailored to deal with ever changing laws and developments. These are discussed in depth below.

The complexities and practical challenges noted in the refund process in South Africa, Namibia and the Netherlands are:

#### 5.2.1 Familiarity with tax laws

The non-resident taxpayers may not be familiar with the tax laws of the other country in which they hold shares and receive dividends. It is the responsibility of each country's government or tax authority to ensure that its residents are educated with regard to their tax laws and to ensure access to information needed by taxpayers (including non-residents). In South Africa, SARS offers free education workshops[68] to all taxpayers at its branches across the country and on virtual platforms such as YouTube[69]. The workshops cover a wide range of topics and are presented on a regular basis.

The OECD highlighted the importance of taxpayer education in a book titled Building Tax Culture, Compliance and Citizenship: A Global Source Book on Taxpayer Education, Second

[68] Taxpayer and trader education (2023) South African Revenue Service. Available at: https://www.sars.gov.za/about/taxpayer-and-trader-education/ (Accessed: 25 May 2023).

[69] SARS TV – How to submit documents. Available at: https://www.youtube.com/user/sarstax/videos

Edition[70]. As noted by the contributors of the book referred to above, taxpayer education is intimately linked to local economic, social and cultural realities[71]. Countries run taxpayer education initiatives in order to reduce the lack of knowledge by taxpayers, and to improve compliance with relevant tax laws and regulations. Research by the OECD shows that countries surveyed noted a 53% increase in taxpayer morale as a result of education initiatives implemented by the respective countries. Please refer to Figure 9 below:

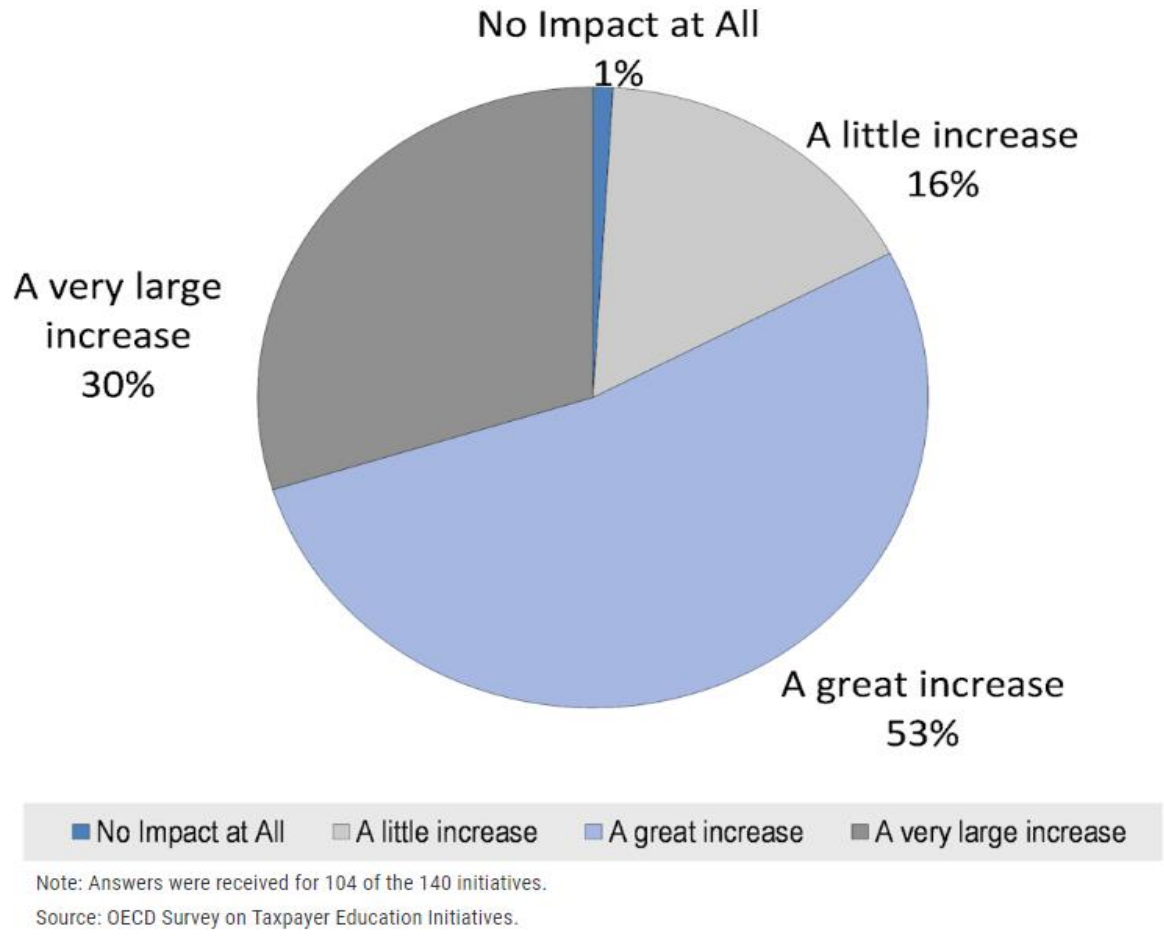


**Figure 9 Impact of taxpayer education initiatives on tax morale**

### 5.2.2 Administrative burden of paying dividends

The administrative burden for companies to administer the payment of dividends especially in the case of public or listed entities. Although there is no limit on the number of shareholders that a private company may have in terms of the Companies Act 71 of 2008 of South Africa[72],

[70] OECD. Publishing, 2015. Building Tax Culture, Compliance and Citizenship-A Global Source Book on Taxpayer Education. OECD Publishing.

[71] Building Tax Culture, Compliance and Citizenship : A Global Source Book on Taxpayer Education, Second Edition | OECD iLibrary.

[72] Companies Act 71 of 2008

the number of shareholders is usually a lot less than a public company or listed company[73]. For a public or listed company, there are a larger number of shareholders comprising natural persons (individuals), juristic persons (non-individuals) and regulated intermediaries to take into consideration. This presents a challenge for the company or regulated intermediary when trying to identify the beneficial owner of a dividend.

A private company, on the other hand, may comprise a handful of shareholders which makes it easier to identify the beneficial owner of a dividend[74] using the share register. The process of withholding dividends tax and paying the actual dividend is also made easier as a result of the lower count of shareholders in general in a private company. For a listed company, however, the shares are publicly traded and exchanging hands on a daily basis and although a share register is available to assist in identifying the beneficial owners, the number of shareholders can be excessive and the administration of the dividend requires dedicated resources. It is for that reason that public companies prefer to use the services of a regulated intermediary to facilitate the dividend payments.

### 5.2.3 Nature of shareholder impacts exemptions or deductions

The nature of the shareholders themselves presents another challenge as it impacts the exemptions or reductions in dividends tax (juristic versus natural person exemptions)[75]. The share register utilised by the companies declaring the dividend provides clarity on the nature of the shareholders. In addition, the declaration and undertaking required by South Africa also contains the details needed in order to identify the nature of the shareholder, to allow for proper exemptions and reductions of dividends tax.

### 5.2.4 Prescription risk

Prescription risk to be considered by the beneficial owner of the dividends. The risk has been discussed in Chapter 4 for each of the three countries which this report focuses on. The prescription risk is an important factor to consider for the beneficial owner of the dividend, as refunds for dividends tax cannot be claimed after this period. The prescription risk must also be considered by the company declaring the dividend or the regulated intermediary as they also cannot claim a refund from the tax authority after this period. To overcome this complexity, the companies declaring the dividend and the regulated intermediaries communicate deadlines to the beneficial owners. For entities listed on the JSE, a Stock Exchange News

[73] The Johannesburg Stock Exchange (JSE) is the largest stock exchange in Africa where public entities list their stock for trade in the market.

[74] Brand, A. (July 2012) Dividends withholding tax – the importance of identifying the beneficial owner of a dividend

[75] Cooper, G.S. and Gordon, R.K., 19 Taxation of Enterprises and Their Owners. In Tax Law Design and Drafting, Volume 2. International Monetary Fund.

Service (SENS) provides the user with access to company announcements such as mergers, take-overs, rights offers, capital issues, cautionaries, all of which have a direct impact on the movement in the market[76].

### 5.2.5 Documentation requirements and verification

The documentation required to support the request for the dividends tax refund. The beneficial owner must submit the declaration and undertaking in the prescribed format. The challenge is that SARS has not issued an actual form to be used but has prescribed the required wording and minimum information to be provided as companies and regulated intermediaries must prepare their own forms[77].

The declaring company or regulated intermediary must verify the support attached to the declaration and undertaking by the beneficial owner. The exercise may be technical as it requires specialised knowledge and investigations of the different tax laws in the different countries and therefore necessitates the use of an expert or specialist in the field of taxation. The taxpayers, company, and regulated intermediary employ specialised services of a tax practitioner to assist with this process which is time consuming, and costly.

### 5.2.6 Technological challenges

The move towards filing taxes electronically is a challenge for taxpayers who are not familiar or up to date with the use of technology. This is even more prevalent in African countries (South Africa and Namibia for the purposes of this report). As developing nations which are challenged by poverty, compounded by the effects of inequality which have deprived some racial groups from access to resources, the use of technology is often problematic. Taxpayers overcome this challenge by making use of specialised services of a tax practitioner. The tax practitioner is then authorised to file taxes and request refunds on behalf of the taxpayer.

### 5.2.7 Dividend cum-ex scandal

European countries are wary of paying dividends tax refunds as a result of the cum-ex transaction scandal. The cum-ex scandal related to traders using loopholes in the trade of shares which resulted in the collusion of banks, lawyers and stockbrokers trading shares with ('cum') and without ('ex') dividend rights. The trading happened closer to dividend pay-out date and would result in more than one shareholder receiving a refund of dividends tax on the same

[76] Watermeyer, R., 2011. The JSE Stock Exchange News Service: the impact of SENS announcements on trading activity on the JSE securities exchange (Master's thesis, University of Cape Town).

[77] SARS (2013)

share. Netherlands was once of the countries impacted by this scandal which necessitated a change to the laws around dividends tax refunds in Europe.

Germany changed its laws in 2012 which paved the way for other European countries to follow suit. Prior to Germany changing its laws in 2012, dividends tax was collected by the company issuing the shares and the certificate for tax refund (if applicable) was issued by the shareholder's bank. As the banks did not know whether the transactions they handled were ordinary transactions or a cum-ex transactions, they issued reimbursement certificates for both transactions. This system allowed multiple investors to claim back tax returns (through borrowing of shares) even though only one party actually paid the dividend tax. Germany changed its laws to make the depository banks responsible for both collecting the dividends tax and issuing of reimbursement certificates.

### 5.2.8 Most-favoured nation clause in DTA

The Most-Favoured Nation clause in the DTA between South Africa and the Netherlands presents a challenge as to the amount of dividends tax either of the nations can legally withhold. There is still no agreement as to the application of the clause, but in the case of ABC (Pty) Ltd v Commissioner: South African Revenue Service, it was reaffirmed that the MFN clause is binding in both nations. The impact of the MFN clause is that it results in no dividends tax being withheld.

### 5.2.9 Low success rates in refund claims

Low success rates in obtaining refunds as well as the length of time it takes for the process to be concluded presents a challenge for the investor. To overcome this challenge, companies and investors make use of specialised services (such as that of a tax practitioner) and employ dedicated resources in the case of individuals or companies with many investments in shares which bear dividends. Data regarding the success rates of dividends tax refund claims is not available in the market, although inferences can be made from case law judgements available. The process of appeal against a tax authority decision through the courts is time consuming due to the nature of the legal process, and it can drag on for years before it is finalised.

### 5.2.10 DTA shopping

Tax treaty (also referred to as DTA) shopping by investors in order to take advantage of lower dividends withholding taxes that are a result of DTAs between countries. In terms of the OECD, tax treaty shopping is undesirable for the following reasons: the principle of reciprocity is breached as a result of the benefits negotiated between the parties to a treaty being economically extended to a third jurisdiction in a manner which the parties did not intend; the tax base may be eroded as a result of inadequate taxation; and there is no incentive of the

third jurisdiction to enter into a DTA with the other countries as they obtain the benefit of another DTA without being party to the agreement. This issue is noted in the MFN clause in the DTA between South Africa and the Netherlands, which has necessitated the renegotiation of some tax treaties to address the issue[78]. To address the issue of tax treaty shopping, members of the Inclusive Framework on BEPS (Base Erosion and Profit Shifting)[79] are required to include provisions dealing with treaty shopping on their tax treaties to ensure a minimum level of protection against treaty abuse.

### 5.2.11 Language barrier

Understanding the local language of the jurisdiction concerned, as some countries do not use English as the official language of communication. Therefore the services of a translator are needed for countries in which information is only available in the local language[80].

The challenges and complexities discussed above may deter foreign investors from investing in shares, depending on the severity of the challenges experienced. The higher the dividends tax rate in a country, the less attractive it is for investment in shares. However, the conclusion of DTAs between countries addresses that issue by providing exemptions or reductions in the dividend tax rates. For investors in shares, the consideration and the renegotiation of DTAs by the countries are necessary to avoid disputes.

### 5.3 Conclusion

The literature review indicates that the complexities and challenges in the dividends tax reclaim process negatively impact foreign investment returns. There are however measures put in place to mitigate some of those challenges, such as the implementation of taxpayer education initiatives, the use of specialised services of tax practitioners to assist with claiming the refunds correctly and timeously, and the Inclusive Framework on BEPS to prevent tax treaty shopping by investors.

## Chapter 6 Conclusion

### 6.1 Introduction

[78] Hearson, M., 2015. Tax treaties in sub-Saharan Africa: a critical review.

[79] Christians, A. and Van Apeldoorn, L., 2018. The OECD inclusive framework. Bulletin for International Taxation, April/May.

[80] Selmier II, W.T. and Oh, C.H., 2012. International business complexity and the internationalization of languages. *Business Horizons*, *55*(2), pp.189-200.

This chapter summarises the findings based on the literature review and presents a conclusion based on the research objectives, the possible areas of improvement to dividends tax refund processes, and potential areas for future research.

The report has analysed the legal challenges and complexities in the reclaim processes for dividend withholding tax in South Africa, Namibia and the Netherlands impact foreign investment returns. It is clear that developing countries have a long way to go in improving their dividend reclaim processes in order to align with developed countries. Improvements required include the reduction of documentation required and aligning the documentation required with international best practices, improving systems and process of claiming refunds whilst prioritising taxpayer education of how the systems and processes function, improve sharing of information between countries to facilitate tax compliance and transparency, improving the negotiation of DTAs so that understanding from each party is improved and addressing language barriers that exist between countries.

### 6.2 Areas for possible future research

Future research is needed in aligning the tax legislation for countries with the requirements of the DTAs entered into. The research needs to commence with updating the terminology used in the tax legislation and aligning it with the terminology used in drafting the DTAs. The definition of terms such as ‘beneficial owner’ is important and needs to be included in domestic tax legislation. Further research needs to be conducted in improving the systems used in the dividend reclaim process. Developing countries especially need to understand how nations such as the European Union drive efficiencies in the reclaim process and see how those can be adapted within their respective countries. The respective countries also need to research ways of improving taxpayer education in the processes and systems used.

### 6.3 Conclusion

Foreign investors are negatively impacted by the complexities and challenges in the dividends tax reclaim process. The challenges and complexities which include excess documentation required, lack of taxpayers knowledges and long process time are just some of the factors which results in taxpayers achieving lower returns on the investments.

This research report highlights the importance of streamlining the dividends tax refund process which is currently cumbersome and lengthy. The excessive documentation required in the process, the manual documents needing to be completed and differences in the requirements between countries lengthens the process and deters investors from claiming refunds due to them. The use of specialised services or hiring dedicated resources such tax practitioners is a costly exercise which further reduces the returns for the foreign investor. When consistency

is achieved between the countries, the length of the process will be reduced and success rates in claiming refunds will improve for foreign investors.

This study has highlighted the differences in the models used to negotiate DTAs and how each model favours either residence-based taxation, source-based taxation, or a combination of both. The UN model and OECD model are the most widely used models internationally, which emphasises the importance of consistency.

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