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31 March 2024

To: The National Treasury
240 Madiba Street
Pretoria
0181

To: The South African Revenue Service
Lehae La SARS
299 Bronkhorst Street
PRETORIA
0181

Via email: National Treasury: 2024AnnexCProp@treasury.gov.za
SARS: acollins@sars.gov.za

RE: RESPONSE TO PUBLICATION OF THE 2024 DRAFT GLOBAL MINIMUM TAX BILL

Dear Colleagues,

We attach the comments from the SAIT International Business Tax Technical Work Group (**the WG**) on the proposals contained in the draft Global Minimum Tax Bill and the draft Global Minimum Tax Administration Bill, as it pertains to the introduction and implementation of the GloBE Model Rules in the South African context.

We value the opportunity to participate in the legislative process and look forward to further engagement, where appropriate.

Please do not hesitate to contact us should you need further information.

Yours sincerely,

SAIT International Tax Technical Work Group

All references refer to the draft Global Minimum Tax Bill (the draft Bill), the draft Global Minimum Tax Administration Bill (the draft Administration Bill) and the GloBE Model Rules.

1. CLARIFICATION REGARDING THE MEANING OF EFFECTIVE DATE

[Applicable provision: Section 23(2) of the draft Bill]

1.1. Comment

1.1.1. Section 23(2) of the draft Bill states that the Global Minimum Tax Act, 2024

> "*is deemed to have come into operation on 1 January 2024 and applies to Fiscal Years beginning on or after that date*. "

1.1.2. A fiscal year, also commonly referred to as a financial year, is a 12-month accounting period that a business uses for financial and tax reporting purposes. However, due to varying determining factors such as the business's activities, revenue cycle and other factors, a fiscal year need not necessarily be a calendar year.

1.1.3. Moreover, section 1(1) of the Income Tax Act, No. 58 of 1962 (**the Act**), states that a financial year and year of assessment for tax purposes correspond. Granted, most companies' tax years of assessments are the same as a company's fiscal year, however, there are exceptions.

1.1.4. By way of example, a company with a June 2024 year end would only apply this Global Minimum Tax rule to their 2025 year as that is the first Fiscal year that commences after 1 January 2024. This would inevitably delay the collection of this Global Minimum Tax.

1.2. Submission

1.2.1. We request that clarity be provided on whether the retrospective start date of 1 January 2024 is meant to apply to years of assessment beginning on or after 1 January 2024.

2. AMBULATORY APPROACH

[Applicable provisions: the the draft Explanatory Memorandum on the Global Minimum Tax Bill ('**draft EM'**)]

2.1. Comment

2.1.1. The draft EM states that in order "*to ensure the Republic adheres to its commitment to implement and administer the GloBE Model Rules consistently with the outcomes provided for under the GloBE Model Rules and the Commentary (as updated from time to time through Administrative Guidance), it has been decided to incorporate the GloBE Model Rules into the Republic's legislation by reference to the GloBE Model Rules, Commentary and Agreed Administrative Guidance*. [Own emphasis]

2.1.2. Additionally, the draft EM states that "*the current wording of the draft Bill proposes*

to adopt an ambulatory approach to applying the GloBE Model Rules and Commentary. An ambulatory approach means that the reference in domestic law automatically updates every time the Commentary and Administrative Guidance is updated. [Own emphasis]. This approach, we understand, has been conscientiously devised to ensure the consistent application of the GloBE rules in line with the policy intention.

2.1.3. Legality of the "Automatic" nature of the proposed ambulatory approach

2.1.3.1. Whilst we are not constitutional or administrative legal experts, we understand that there are various legal and constitutional processes involved in amending and promulgating legislation. This applies to the amending and promulgation of legislation such as the Global Minimum Tax Act.

2.1.3.2. By simply incorporating and referencing non-legally binding Organisation for Economic Co-Operation and Development (**OECD**) documents (as listed in the overview section of the draft EM) instead of writing the full provisions into the law, may potentially not withstand scrutiny from the South African courts – due to the provisions being not only vague but fluid in nature. In the event that a dispute arises between a taxpayer and the Revenue Authority in respects of the application of the provisions of the Global Minimum Tax Act, a South African court/ judge that is approached to adjudicate on this statute would need to be presented with a plethora of files that contain guidance and other publications of the OECD in order to gain an understanding of the nature of the dispute. This is unprecedented and may result in the delay of finalisation of such matters.

2.1.3.3. Furthermore, the automatic nature of the proposed ambulatory approach implies that unilateral acts of an independent organisation like the OECD will be legislated into our domestic law without going through necessary legislative processes, which may flout the sovereignty of our South African legislature. It is our view that this would hinder both legal and tax certainty.

2.2. Submission

2.2.1.1. Clarity should be provided regarding how the necessary legal and administrative processes will be complied with each time that there is an update to the OECD documentation relevant to the Global Minimum tax.

3. CLARITY REGARDING APPLICATION OF THE GLOBE MODEL RULES

[Applicable provisions: Section 2(a) of the draft Bill]

3.1. Comment

3.1.1. We refer to Section 2(a) of the draft Bill states that the GloBe Model Rules will apply "*consistently with the most recent commentary to the GloBE Model Rules before the start of the Fiscal Year in which the time falls.*" This wording refers to the most recent commentary before the start of the fiscal year in which the time falls.

3.2. Submission

3.2.1. The meaning of the above-mentioned section is unclear. It is unclear whether this

section should be interpreted to mean that the taxpayer must apply the latest commentary before the year in which the applicable tax return is being completed for, or if the taxpayer should apply the commentary at the time that the tax return is being completed in (even though that time may be at a much later stage).

3.2.2. By way of example, a taxpayer may be performing the calculation sometime after the applicable fiscal year. At that point, the commentary which the taxpayer had applied for purposes of the calculation may have subsequently been updated by the OECD. We question which commentary should be used, the Commentary that the taxpayer should have relied upon for the basis of the calculation, or the updated commentary version that will be applicable at that time.

3.2.3. To further clarify, a taxpayer may not have relevant information on hand to perform the calculation during the year that commences on 1 January 2024. As a result, the taxpayer may perform the calculation in FY 2027. Thus, the question remains, whether the taxpayer should apply the latest commentary applicable before 1 January 2024 or the latest commentary applicable as at FY 2027.

3.2.4. We request that clarity be provided in this regard.

4. RECORD RETENTION REQUIREMENTS

[Applicable provisions: Section 9 of the draft Administration Bill]

4.1. Comment

4.1.1. The draft Global Minimum Tax Administration Bill extends both the record retention requirement and period of limitation to six years, respectively.

4.2. Submission

4.2.1. The above-mentioned extension(s) may potentially give rise to administrative difficulties for taxpayers, with specific reference to the record keeping requirement. Taxpayers may potentially be unable to assess what information / records are for purposes of the Global Minimum Tax Bill versus information that is applicable for other tax returns submissions. Failure to distinguish accordingly could potentially result in taxpayers' failure to retain the required records.

4.2.2. We therefore propose that the record retention requirements outlined in section 29(3) of the Tax Administration Act, No. 28 of 2011 be maintained for purposes of the Global Minimum Tax Act.

5. BUSINESS TAX INCENTIVES AND OTHER GOVERNMENT GRANTS

5.1. Comment

5.1.1. The draft Bill is silent as respects the treatment of tax incentives (and other government grants) when performing the necessary calculations. In its current form the draft Bill also does not consider the various types of tax incentives government grants which have been designed for various industries, that ultimately serve as a deduction against a taxpayer's taxable income.

5.1.2. By way of example, there are several tax incentives, such as the research and

development (R&D) incentive and the 12BA energy tax incentive (and other incentives) that could potentially result in multinationals being devoid of an effective tax rate of 15% - when applying the provisions of the GloBE Model Rules. This could result in top-up taxes being payable – which may potentially negate the effectiveness of the various incentives designed by the Government. *Prima facie*, taxpayers could be negatively impacted because of utilising the tax or government incentive regime.

5.2. Submission

5.2.1. We understand that the Government is seeking to implement the Global Minimum Tax Act in line with the recommendations of the OECD and in a coordinated and consistent manner as other jurisdictions. However, due regard must be given to our South African incentive regime.

5.2.2. We request clarity on how the current South African tax and government incentive regime will interact with the Global Minimum Tax Act.

6. EXCLUSION OF DOMESTIC TAXES ON FOREIGN INCOME

[Applicable provision: Section 13 of the draft Bill]

6.1. Comment

6.1.1. Section 13 of the draft Bill reads as follows: "***Exclusion of domestic taxes on foreign income***. - *The Adjusted Covered Taxes for each Domestic Constituent Entity, Domestic Joint Venture, and Domestic Joint Venture Subsidiary are to be calculated excluding tax accrued by Domestic Constituent Entities with respect to the income of, or dividends received from, Constituent Entities located in another jurisdiction*. [Own emphasis].

6.1.2. While the heading of the section may be interpreted as referring to the exclusion of (all) domestic taxes on foreign income, the provision refers to tax accrued by Domestic Constituent Entities. This gives rise to the following questions:

6.1.2.1. Is it only domestic taxes on foreign income that are potentially excluded from Adjusted Covered Taxes (as the heading suggests) or is it potentially both domestic and foreign taxes on foreign income (subject further to the application of section 12 of the draft Bill) that are excluded from Adjusted Covered Taxes?

6.1.2.2. Is tax that has been paid (not accrued) by Domestic Constituent Entities on foreign income included in Adjusted Covered Taxes?

6.1.3. Moreover, it appears that the objective of section 13, to exclude certain taxes on foreign income is at odds with the objectives of the Model Rules and could potentially result in double taxation domestically; e.g., if a Domestic Constituent Entity excludes South African corporate income tax that it has accrued on income or dividends from a Constituent Entity located in another jurisdiction it could result in the Domestic Constituent Entity having an effective tax rate of less than 15 percent with top-up taxes due even though South African corporate income tax will also be paid in respect of that income or dividends.

6.2. Submission

6.2.1. We propose that Section 13 of the draft Bill be deleted.

6.2.2. Alternatively, if the intention is not for section 13 to result in the exclusion of domestic (and foreign) taxes paid (or accrued) on foreign income in all instances, the draft Bill should be amended to achieve National Treasury's actual objective, which objective should be aligned with the objectives of the GloBE Model Rules and should be communicated to taxpayers.

7. APPLICATION OF THE IIR

7.1. Top up tax calculation

[Applicable provisions: Article 2.1.1 of the Globe Model Rules]

7.1.1. Comment

7.1.1.1. In terms of article 2.1.1 of the Globe Model Rules, the Ultimate Parent Entity (UPE) of a multinational entity (MNE) group shall pay a tax in an amount equal to its Allocable Share of the Top-Up Tax of that Low-Taxed Constituent Entity for the Fiscal Year.

7.1.1.2. Most foreign jurisdictions have chosen to apply the DMTT which allows the top-up tax to be allocated and collected in the low-tax jurisdiction instead of collecting the additional tax at the level of the UPE. Where the low tax foreign jurisdiction has implemented the DMTT, the amount of top up tax due by the UPE should be reduced by the amount of the top-up tax due by the foreign constituent entities.

7.1.1.3. The formula used in the Bill to calculate the top up tax is different from the one set out in Article 5.2.3 of the Globe Model Rules. The formula has not subtracted the tax paid by a foreign low constituent entity under a DMTT from the Globe top up tax.

7.1.2. Submission

7.1.2.1. It is unclear from the draft bill, why this adjustment has been excluded from the GloBE top up tax calculation, especially when we have UPE's located in South Africa. We therefore recommend that SARS provides further guidance regarding this aspect.

7.2. Translation of the top up tax

[Applicable provision: Section 22 of the draft Bill]

7.2.1. Comment

7.2.1.1. To the extent that the top-up tax amount is in a foreign currency, the amounts shall be translated into Rands by using the average exchange rate for the fiscal year to which the tax relates.

7.2.2. Submission

7.2.2.1. Foreign currency differences will arise on the translation of foreign taxes. Given that the translation effects can potentially have a significant impact on the taxable income of the entity, we propose that the draft Bill should clarify whether the foreign currency differences arising from translating the foreign taxes are subject to tax (i.e. deductible or taxable).

8. CONSTITUENT ENTITY LIABILITY

[Applicable provisions: Part IV of the draft Bill]

8.1. Comment

8.1.1. In terms of the draft Bill, each domestic constituent entity is jointly and severally liable to pay a domestic top-up tax for each fiscal year of the MNE Group. A designated local entity may submit the Globe Information return to the Commissioner on behalf of all domestic constituent entities.

8.2. Submission

8.2.1. The draft Bill does not specify the entity responsible for making the actual top-up payment to SARS. Is the designated local entity submitting the GloBE information return responsible for making the top-up payment? Alternatively is each domestic constituent entity responsible for making the payment? We therefore request that SARS provide clarification in this regard.

9. MISCELLANEOUS COMMENTARY REGARDING THE IMPLEMENTATION OF THIS PROPOSED LEGISLATION

Several taxpayers have raised concerns regarding the practicality of implementing this legislation retrospectively to 1 January 2024.

The retrospective application will require multinational entities to gather a significant amount of information and to begin performing calculations based on pending legislation that may be amended numerous times before promulgation.

We therefore recommend that this legislation be promulgated speedily to provide tax certainty to multinational entities that fall within the scope of this legislation.

End.