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Legal Counsel

Income Tax

**Comprehensive Guide to
Dividends Tax
(Issue 2)**



South African Revenue Service

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Preface

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

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

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

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

- The Taxation Laws Amendment Act 15 of 2016 which was promulgated on 19 January 2017 (as per GG 40562).
- The Tax Administration Laws Amendment Act 16 of 2016 which was promulgated on 19 January 2017 (as per GG 40563).

The rate of dividends tax was increased from 15% to 20% in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 for dividends paid on or after 22 February 2017. The increased rate of 20% has been used where appropriate in anticipation that the rate will remain 20% when the draft bill is finalised and promulgated.

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

For more information you may –

- visit the SARS website at www.sars.gov.za;
- visit your local SARS branch;
- contact your own tax advisor or tax practitioner;
- contact the SARS National Contact Centre –
 - if calling locally, on 0800 00 7277; or
 - if calling from abroad, on +27 11 602 2093 (only between 8am and 4pm South African time).

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ABBREVIATIONS

In this guide unless the context indicates otherwise –

- ‘**Close Corporations Act**’ means the Close Corporations Act 69 of 1984;
- ‘**Companies Act, 1973**’ means the Companies Act 61 of 1973;
- ‘**Companies Act**’ means the Companies Act 71 of 2008;
- ‘**domestic dividend**’ means a ‘dividend’ as defined in s 1(1);
- ‘**Financial Markets Act**’ means the Financial Markets Act 19 of 2012;
- ‘**income tax**’ means the normal tax on taxable income before taking into account any taxable capital gain;
- ‘**Mineral and Petroleum Resources Development Act**’ means the Mineral and Petroleum Resources Development Act 28 of 2002;
- ‘**Schedule**’ means a Schedule to the Act;
- ‘**section**’ means a section of the Act;
- ‘**Securities Services Act**’ means the Securities Services Act 36 of 2004 which was repealed by s 111 of the Financial Markets Act with effect from 3 June 2013;
- ‘**Share Blocks Control Act**’ means the Share Blocks Control Act 59 of 1980;
- ‘**TA Act**’ means the Tax Administration Act 28 of 2011;
- ‘**tax treaty**’ means an agreement for the avoidance of double taxation entered into between South Africa and another country;
- ‘**the Act**’ means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

References to statutory provisions

para	paragraph
paras	paragraphs
s	section
ss	sections

Acronyms

CGT	capital gains tax, being the portion of normal tax attributable to the inclusion in taxable income of a taxable capital gain
CTC	‘contributed tax capital’ as defined in s 1(1)
GG	<i>Government Gazette</i>
GN	Government Notice
JSE	The securities exchange operated by JSE Ltd
OECD	Organisation for Economic Co-operation and Development
STC	secondary tax on companies previously levied under s 64B

Legal references

(A)	Appellate Division of the Supreme Court of South Africa
ACLR	Australian Company Law Reports
AD	Reports of the Appellate Division of the Supreme Court of South Africa
(C)	Cape Provincial Division of the Supreme Court of South Africa
CA	Court of Appeal
CIR	Commissioner for Inland Revenue

CPD	Reports of the Cape Provincial Division of the Supreme Court of South Africa
C: SARS	Commissioner for the South African Revenue Service
(EC)	Eastern Cape Tax Court
FCA	Federal Court of Canada: Appeal Division
F.C.R.	Canada Federal Court Reports
ITAT	Income Tax Appellate Tribunal (India)
(N)	Natal Tax Court or Natal Special Court
(NSW)	New South Wales Court of Appeal
(NMH)	Namibia High Court
SA	South African Law Reports
SATC	South African Tax Cases Reports
(SCA)	Supreme Court of Appeal
SIR	Secretary for Inland Revenue
(T)	Transvaal Provincial Division of the Supreme Court of South Africa
TCC	Tax Court of Canada

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Chapter 1

Introduction to dividends tax

1.1 Methods of taxing dividends

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

Internationally there are many ways in which dividends are taxed. The three main methods of taxing dividends are outlined below.² In South Africa, all three of these methods have been applied at different times.

1.1.1 The imputation system

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

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

1.1.2 The classical system

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

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

1.1.3 The corporate level system

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

¹ OECD *Model Tax Convention on Income and on Capital*: Condensed Version (2014) OECD Publishing at page 7 in para 1.

² See also the *Comprehensive Guide to Secondary Tax on Companies*.

STC fell in this category and came into operation on 17 March 1993.³ STC was a second-stage tax on corporate profits. The first stage 'normal tax' was imposed on the taxable income of a company. STC was imposed when a resident company distributed after-tax profits to its holders of shares. Companies that were not residents were not liable to pay STC on the dividends they declared.

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

The following types of dividends were potentially subject to STC:

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

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

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

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

1.2 Replacement of STC with dividends tax

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

Dividends tax⁴ is a classical method of taxing dividends. The company pays normal tax on its profits and withholds a further amount of dividends tax on behalf of its holders of shares assuming no exemptions apply when a cash dividend is distributed to them. By contrast, assuming no exemptions apply, the company is subject to dividends tax on any dividend *in specie* distributed by it. Dividends tax is a stand-alone tax and is not a payment towards a person's normal tax liability.

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

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

³ STC legislation was contained in ss 64B and 64C in Part VII of Chapter II of the Act. Part VII of Chapter II of the Act was repealed by s 68(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 April 2017.

⁴ Dividends tax was introduced by s 56(1) of the Revenue Laws Amendment Act 60 of 2008 with the insertion of Part VIII of Chapter II of the Act. Chapter II was amended by the substitution of Part VIII by s 53(1) of the Taxation Laws Amendment Act 17 of 2009.

Dividends tax is levied on dividends paid by companies that are residents (other than headquarter companies). Dividends tax is also payable on a foreign dividend to the extent that the foreign dividend does not constitute the distribution of an asset *in specie* and it is paid to residents by foreign companies in respect of listed shares. Dividends tax is levied at the rate of 20% of the amount of the dividend paid.⁵

Certain dividends are subject to dividends tax at the rate of 0%, for example, certain dividends paid by oil and gas companies⁶ and international shipping companies.⁷ Dividends paid to non-residents may be subject to a reduced rate of tax under a tax treaty. Depending on the facts, a dividend may qualify for an exemption from dividends tax.

1.3 Reasons for the change from STC to dividends tax

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

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

- Companies that are residents were placed at a disadvantage compared to their international counterparts which did not bear any adverse accounting profit reduction when paying dividends.
- Some commentators claimed that STC resulted in an uncompetitive corporate tax rate.
- Non-resident holders of shares (particularly small portfolio investors) were often unable to obtain tax relief from double taxation under South Africa's tax treaties because STC was not a tax on the holder of shares.⁸
- Foreign investors were generally unfamiliar with STC because it is not a tax commonly encountered in other jurisdictions.
- Tax-exempt entities indirectly bore the effect of STC imposed on dividends received.

1.3.2 A change in the tax base

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

⁵ The Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 provides for an increase in the rate of dividends tax from 15% to 20% on any dividend paid on or after 22 February 2017. It is anticipated that this amendment will be passed and promulgated and accordingly the rate of dividends tax is 20% unless an exemption or reduced rate is applicable.

⁶ Paragraph 3(1) of the Tenth Schedule (see 3.1.3).

⁷ Section 12Q(3) (see 3.1.5).

⁸ In *Volkswagen of South Africa (Pty) Ltd v C: SARS* [2008] JOL 21746 (T), (2008) 70 SATC 195 (T) the court found that STC was a tax on a company declaring a dividend and not a tax on the shareholder receiving the dividend. It was not a tax on dividends as contemplated in the tax treaty and accordingly fell outside the ambit of Article 7 of the tax treaty. See also para 3.2 of Binding General Ruling (Income Tax): 9 (Issue 2) dated 13 February 2013 '*Taxes on income and substantially similar taxes for purposes of South Africa's Tax Treaties*'.

1.4 Differences between STC and dividends tax

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

- STC was a tax levied at company level while dividends tax is, with the exception of a dividend *in specie*, a tax levied on the beneficial owner of the dividend attaching to a share. A company that declares a dividend was liable for STC while the beneficial owner of a dividend is liable for dividends tax. The beneficial owner is liable for dividends tax even though the company that declares and pays the dividend, or the regulated intermediary, may be liable to withhold dividends tax.
- STC was a tax payable by a company on the net amount of a dividend declared by that company. The net amount was the amount that remained after reducing a dividend declared by the sum of dividends received or accrued during the dividend cycle. Dividends tax, on the other hand, is a tax that is imposed on the amount of a dividend paid to the beneficial owner of the dividend attaching to a share.
- Under the STC system dividends paid between resident companies were exempt from STC if the parties formed part of a domestic group of companies and the declaring company was a controlled group company which elected that the exemption applied. By contrast, under the dividends tax system all dividend payments between resident companies are exempt from dividends tax unless the anti-avoidance provisions in s 64EB apply (see 3.8).

Example 1 – Differences between STC and dividends tax – Dividend paid in cash

Facts:

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

Result:

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

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

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

Facts:

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

Result:

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

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

1.5 Implementation of dividends tax

Dividends tax came into operation on 1 April 2012⁹ and applies to any dividend declared and paid by a company on or after that date.¹⁰

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

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

The final dividend cycle for STC ended on 31 March 2012 after which no more STC credits (see 2.3.6) could be created under the STC system. STC credits in existence at the end of the final dividend cycle could, however, still be used after that date up until 31 March 2015 under dividends tax legislation. This was possible when a company that was a resident with an STC credit declared and paid a dividend on or after 1 April 2012 to another company that was a resident because the STC credits 'rolled-over' from the company paying the dividend to the company receiving the dividend (see 6.1.5).

1.6 Dividends tax vs normal tax

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

Normal tax

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

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

⁹ As determined by the Minister by GN 1073 in GG 34873 of 20 December 2011.

¹⁰ Section 53(2) of the Taxation Laws Amendment Act 17 of 2009 as amended by s 148 of the Taxation Laws Amendment Act 7 of 2010. See 3.9 and Binding Private Ruling 121 dated 14 September 2012 'Secondary Tax on Companies or Dividends Tax'.

Generally, domestic dividends received by or accrued to holders of shares are exempt from normal tax under s 10(1)(k)(i). However, there are some exceptions to this rule such as certain dividends received from REITs¹¹ and controlled companies,¹² certain dividends paid to employees on restricted equity instruments under s 8C or in respect of services rendered, cessations of dividends to companies and certain dividends received as part of a securities lending arrangement or other similar derivative arrangements.¹³

Foreign dividends may be exempt under s 10B.¹⁴ A foreign dividend received by or accrued to a person will, subject to s 10B(4), (5) and (6), be exempt from normal tax under s 10B(2) –

- if that person (whether alone or together with any other company forming part of the same group of companies as that person) holds at least 10% of the total equity shares and voting rights in the company declaring the foreign dividend (the 'participation exemption'), that foreign dividend is in respect of an equity share and the foreign company is not entitled to a deduction for the dividend in the country in which it is effectively managed [s 10B(2)(a) and the provisos to s 10B(2)];
- if that person is a foreign company and the foreign dividend is paid or declared by another foreign company that is resident in the same country as that foreign company and the foreign company is not entitled to a deduction for the dividend in the country in which it is effectively managed [s 10B(2)(b) and the proviso to s 10B(2)];
- if that person is a resident then to the extent that the foreign dividend does not exceed all the amounts included in that resident's income under s 9D which relate to the net income of the controlled foreign company declaring the dividend or other companies which are included in s 9D because of an indirect holding through that controlled foreign company less the amounts specified in s 10B(2)(c) and calculating net income without reference to s 10B(3) [s 10B(2)(c)];
- to the extent that the foreign dividend is received by or accrues to that person in respect of a listed share and does not consist of a distribution of an asset *in specie*. The exemption is equitable because foreign dividends (excluding dividends *in specie*) paid by non-resident listed companies are generally subject to dividends tax [s 10B(2)(d)]; or
- to the extent that the foreign dividend is received by or accrues to a company that is a resident in respect of a listed share and consists of the distribution of an asset *in specie* [s 10B(2)(e)].

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

- $26 / 41$ ¹⁵ Natural persons, deceased estates, insolvent estates and trusts.

¹¹ The term 'REIT' is defined in s 1(1).

¹² The term 'controlled company' is defined in s 25BB(1).

¹³ See s 10(1)(k)(i) for detail.

¹⁴ Section 10B applies to specified dividends and foreign dividends received by or accrued to a natural person, deceased estate, insolvent estate or trust on or after 1 March 2012 and received by or accrued to any other person on or after 1 April 2012. See Interpretation Note 93 'The Taxation of Foreign Dividends' for a discussion of s 10B.

¹⁵ The Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 proposes changing this proportion to $25 / 45$ with effective from years of assessment commencing on or after 1 March 2017.

- 13 / 28¹⁶ Companies, and long-term insurers in respect of their company policyholder funds, corporate funds and risk policy funds.¹⁷
- 15 / 30¹⁸ Long-term insurers in respect of their individual policyholder funds.

The effect of the partial exemption under s 10B(3) is that foreign dividends received by or accrued to a person, that are not exempt under s 10B(2), will generally be subject to a maximum rate of tax of 20%¹⁹ thus giving a result similar to that produced by dividends tax.

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

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

Although not discussed in detail in this guide, the various sections of the Act and paragraphs of the Eighth Schedule aimed at combatting tax avoidance arising in relation to dividends should be kept in mind when entering into share or dividend transactions. These include the following:

- Section 8E – Dividends on certain shares and equity instruments deemed to be income in relation to a recipient of such dividends.
- Section 8EA – Dividends on third-party backed shares deemed to be income in relation to recipients of such dividends.
- Section 8F – Interest on hybrid debt instruments deemed to be dividends *in specie* (see 3.7.2 e.).
- Section 8FA – Hybrid interest deemed to be dividends *in specie* (see 3.7.2 f.).
- Section 10(1)(k)(i), paras (dd) and (jj) of the proviso – Dividends received by or accrued to a person in respect of a restricted equity instrument as defined in s 8C.
- Section 10(1)(k)(i), para (ee) of the proviso – Dividends received by or accrued to a company in consequence of a cession of the right to that dividend or the exercise of a discretionary power by a trustee of a trust.
- Section 10(1)(k)(i), paras (ff) and (gg) of the proviso – Dividends received by or accrued to a company on borrowed shares.
- Section 10(1)(k)(i), para (hh) of the proviso – A company incurs an obligation to pay dividends when the obligation is determined wholly or partly with reference to dividends received or accrued.

¹⁶ The Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 proposes changing this proportion to 8 / 28 with effective from years of assessment commencing on or after 1 March 2017.

¹⁷ The risk policy holder fund was inserted by s 15(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2016.

¹⁸ The Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 proposes changing this proportion to 10 / 30 with effective from years of assessment commencing on or after 1 March 2017.

¹⁹ Applying the proposed amendments to s 10B(3) in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017.

- Section 10(1)(k)(i), para (ii) of the proviso – Dividends received by or accrued to a person in respect of services rendered or to be rendered or in respect of or by virtue of employment or the holding of any office.
- Section 22B – Dividends treated as income on disposal of certain shares.
- Section 24BA(3)(b) – Transactions under which assets are acquired as consideration for shares issued.
- Paragraph 19 of the Eighth Schedule – Losses on disposal of certain shares.
- Paragraph 43A of the Eighth Schedule – Dividends treated as proceeds on disposal of certain shares.

See **3.8** for a discussion of s 64EB which aims to combat dividends tax avoidance.

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Chapter 2

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

2.1 Introduction

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

The following definitions are discussed below:

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

Company Law reform

Under the Companies Act, 1973, dividends could be declared only from profits available for distribution.²¹ Under s 46(1)(b) of the Companies Act a company is now prohibited from making a distribution²² only if it reasonably appears that the company will not satisfy the solvency and liquidity tests provided for in that Act immediately after completing the proposed distribution. It follows that the Companies Act allows a company to declare a dividend even if no profits are available for distribution.

Dividends vs CTC

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

The definition of 'dividend' in s 1(1) that came into operation on 1 January 2011, and which has been amended with effect from 1 April 2012, treats any amount transferred or applied by a company that is a resident in respect of a share as a dividend unless, amongst others, it results in a reduction of CTC. This rule includes amounts transferred or applied during the lifetime of a company as well as amounts transferred or applied during liquidation, winding-up or deregistration of a company.

²⁰ The definition of 'regulated intermediary' was amended by s 73(1) of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016 to include a portfolio of a hedge fund collective investment scheme in para (g) of that definition.

²¹ See the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of 'profits available for distribution'.

²² The term 'distribution' is defined in s 1 of the Companies Act.

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

A transfer or application by a company of an amount comprising a dividend may be subject to dividends tax while a transfer or application of an amount of CTC may have CGT consequences for the holders of shares.

2.2 Definitions [s 1(1)]

2.2.1 Definition – ‘company’

‘[C]ompany’ includes—

- (a) any association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in the Republic or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law; or
- (b) any association, corporation or company incorporated under the law of any country other than the Republic or any body corporate formed or established under such law; or
- (c) any co-operative; or
- (d) any association (not being an association referred to in paragraph (a) or (f)) formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public; or
- (e) any—
 - (i)
 - (ii) portfolio comprised in any investment scheme carried on outside the Republic that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement in terms of which members of the public (as defined in section 1 of the Collective Investment Schemes Control Act) are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest; or
 - (iii) portfolio of a collective investment scheme in property that qualifies as a REIT as defined in para 13.1(x) of the JSE Limited Listings Requirements; or
- (f) a close corporation,

but does not include a foreign partnership;’

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

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

2.2.2 Definition – ‘contributed tax capital’

‘ “[C]ontributed tax capital”, in relation to a class of shares in a company, means—

- (a) in relation to a class of shares issued by a company, in the case of a foreign company that becomes a resident on or after 1 January 2011, an amount equal to the sum of—
- (i) the market value of all the shares in that company of that class immediately before the date on which that company becomes a resident;
 - (ii) the consideration received by or accrued to that company for the issue of shares of that class on or after the date on which that company becomes a resident; and
 - (iii) if the shares of that class include or consist of shares that were converted from another class of shares of that company to that class of shares—
 - (aa) any consideration received by or accrued to that company in respect of that conversion; and
 - (bb) the amount contemplated in subparagraph (cc) that was determined in respect of shares of the other class of shares that were so converted,
- reduced by so much of that amount as—
- (aa) the company has transferred on or after the date on which the company becomes a resident for the benefit of any person holding a share in that company of that class in respect of that share;
 - (bb) has by the date of the transfer been determined by the directors of the company or by some other person or body of persons with comparable authority to be an amount so transferred; and
 - (cc) in the case of a convertible class of shares some of the shares of which have been converted to another class of shares, so much of the amount contemplated in this paragraph in respect of that convertible class of shares immediately prior to that conversion as bears to that amount the same ratio as the number of shares so converted bears to the total number of that convertible class of shares prior to that conversion; or
- (b) in relation to a class of shares issued by a company, in the case of any other company, an amount equal to the sum of—
- (i) the stated capital or share capital and share premium of that company immediately before 1 January 2011 in relation to shares in that company of that class issued by that company before that date, less so much of that stated capital or share capital and share premium as would have constituted a dividend, as defined before that date, had the stated capital or share capital and share premium been distributed by that company immediately before that date;
 - (ii) the consideration received by or accrued to that company for the issue of shares of that class on or after 1 January 2011; and
 - (iii) if the shares of that class include or consist of shares that were converted from another class of shares of that company to that class of shares—
 - (aa) any consideration received by or accrued to that company in respect of that conversion; and
 - (bb) the amount contemplated in subparagraph (cc) that was determined in respect of shares of the other class of shares that were so converted,

reduced by so much of that amount as—

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

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

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

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

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

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

- is incorporated, established or formed in South Africa; or
- has its place of effective management in South Africa.²³

Certain companies are specifically excluded from the definition of 'resident' in para (b) of the definition of that term.

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

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

- the market value of all the shares in that company of that class immediately before the date on which the company becomes a resident;
- the consideration received by or accrued to that company for the issue of shares of that class on or after the date on which the company becomes a resident

²³ See Interpretation Note 6 'Resident – Place of Effective Management (Companies)'.

(see **b.** below for a discussion of consideration received by or accrued to a company for the issue of shares); and

- any consideration received by or accrued to that company on the conversion of shares from another class to that class of shares and an amount of CTC relating to the shares so converted immediately before the conversion (see **b.** below for a discussion of the increase of CTC on the conversion of a class of shares);²⁴
- reduced by the amounts transferred on or after the date on which the company becomes a resident for the benefit of any person holding a share in that company of that class in respect of that share, as determined by the date of transfer by the directors of the company or by any other person or persons with comparable authority to be a reduction of CTC (see **b.** below for a discussion of CTC transferred); and
- reduced by an amount of CTC relating to shares converted to another class of shares (see **b.** below for a discussion of CTC reduced on the conversion of a class of shares).²⁵

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

Facts:

Company A transferred its place of effective management from Mauritius to South Africa on 29 April 2016. The market value of the issued shares of Company A was R1 million on 28 April 2016. Company A issued further shares on 29 April 2016 for R500 000. Company A made a distribution of R200 000 to its holders of shares on 31 May 2016 and the board of directors determined that the distribution reduced the CTC of Company A.

Result:

The CTC of Company A on 31 May 2016 is calculated as follows:

	R
Market value of shares on 28 April 2016	1 000 000
Consideration received for shares issued on 29 April 2016	500 000
Less: Distribution of CTC on 31 May 2016	<u>(200 000)</u>
CTC of Company A on 31 May 2016	<u>1 300 000</u>

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

The CTC in relation to a class of shares issued by a company that is a resident is an amount equal to –

- the stated capital or share capital and share premium of that company immediately before 1 January 2011 in relation to shares in that company of that class issued by that company before that date;
- *less* so much of that stated capital or share capital and share premium as would have constituted a ‘dividend’ as defined before 1 January 2011 had the stated capital or share capital and share premium been distributed by that company immediately before 1 January 2011 (‘tainted’ stated capital, or ‘tainted’ share capital and ‘tainted’ share premium);
- *plus* the consideration received by or accrued to that company for the issue of shares of that class on or after 1 January 2011;

²⁴ This element of the definition was inserted by s 1(1)(d) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

²⁵ This element of the definition was inserted by s 1(1)(e) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

- *plus* any consideration received by or accrued to that company on the conversion of shares from another class of shares to that class and a proportionate amount of CTC immediately before conversion relating to the shares so converted;²⁶
- *less* CTC transferred on or after 1 January 2011 for the benefit of any person holding a share in that company of that class in respect of that share, as determined by the date of transfer by the directors of the company or by any person or persons with comparable authority to be a reduction of CTC; and
- *less* an amount of CTC relating to shares converted to another class of shares.²⁷

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

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

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

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

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

Under the definition of 'dividend' in s 1 as it read before its amendment on 1 January 2011,²⁸ any amount transferred from a company's reserves or undistributed profits to the company's stated capital, share capital or share premium account was deemed to be a profit available for distribution for tax purposes and retained its nature as capital or revenue profits, as the case may be. Reserves or undistributed profits so transferred are generally referred to as 'tainted' stated capital, 'tainted' share capital or 'tainted' share premium (capitalised profits). The return of such an amount to the holders of shares in the company was treated as a dividend for those holders of shares and not as a return of capital. The purpose was to ensure that distributable reserves retained their character despite being transferred to the stated capital, share capital or share premium account.²⁹

²⁶ This element of the definition was inserted by s 1(1)(g) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

²⁷ This element of the definition was inserted by s 1(1)(h) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015.

²⁸ Paragraph (i) of the first proviso to the definition of 'dividend'.

²⁹ See *Liberty Investors Ltd (In members' voluntary liquidation) v C: SARS 2006 (2) SA 1 (SCA)*, 67 SATC 313.

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

- Any amount transferred on or after 1 January 1974 (but before 1 January 2011) from the company's reserves or undistributed profits (excluding share premium) to its stated capital, share capital or share premium account. It includes the following types of transfers:
 - Transfers which did not result in the paying up of capitalisation shares, for example, with par value shares, a transfer to the share premium account or, with no par value shares, a transfer to the stated capital account.³⁰
 - Transfers which resulted in the paying up of equity capitalisation shares. An amount applied in paying up capitalisation shares that were non-equity shares was not regarded as 'tainted' share capital because the issue of non-equity capitalisation shares, for example, non-participating preference shares, was a 'dividend' as defined in para (b) of the definition of 'dividend' as it read before 1 January 2011.³¹ The definition of 'equity share capital' in s 1, before its substitution on 1 January 2011 with the definition of 'equity share', meant, in relation to a company, its issued share capital and in relation to a close corporation, its members' interest, excluding any part thereof which, neither as respects dividends nor as respects capital carried any right to participate beyond a specified amount in a distribution, and the expression 'equity shares' was to be construed accordingly.
- Any portion of the equity share capital and share premium of a company (the resultant company) that acquired all the assets from another company (the amalgamated company) arising from an 'amalgamation transaction' as defined in s 44(1), that was deemed to be a profit not of a capital nature available for distribution under s 44(9A).³²
- Less any reduction in the company's stated capital, or share capital or share premium, before 1 January 2011 to the extent that it represented a distribution of its 'tainted' stated capital or 'tainted' share capital or 'tainted' share premium. A reduction in a company's stated capital, or share capital or share premium, could have occurred as a result of the –
 - acquisition, cancellation or redemption of some of its issued shares;
 - reduction in the nominal value of its share capital; or
 - repayment of all or a portion of its share premium account.

³⁰ Under s 75(1)(b) of the Companies Act, 1973 a company could increase its share capital constituted by shares of no par value by transferring reserves or profits to the stated capital account, with or without a distribution of shares.

³¹ Read with paras (e) and (h) of the definition of 'dividend'.

³² Section 44(9A) was deleted by s 63(1)(b) of the Taxation Laws Amendment Act 7 of 2010 with effect from 1 January 2011.

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

Facts:

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

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

Result:

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

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

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

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

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

CTC of a company is increased by the consideration received by or accrued to that company for the issue of its shares on or after 1 January 2011.

In *Ogus v SIR*³³ the word ‘consideration’ was held, in the context of donations tax, to mean the *quid pro quo* given under a reciprocal obligation.

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

- cash;
- the market value of an asset received by or accrued to the company;³⁴ or
- the value of services provided to the company.

Section 40 of the Companies Act governs the consideration payable for shares. Before a company may issue shares the board must determine the consideration for the shares,

³³ 1978 (3) SA 67 (T), 40 SATC 100.

³⁴ See *WH Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA), 61 SATC 43; *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9; *C: SARS v Brummeria Renaissance (Pty) Ltd & others* 2007 (6) SA 601 (SCA), 69 SATC 205 and *C: SARS v Labat Africa Ltd* [2012] 1 All SA 613 (SCA), 74 SATC 1.

which consideration must be 'adequate'.³⁵ It is only when shares are fully paid that the company may issue the relevant shares. However, as noted above, payment need not be only in the form of cash, but could include payment in the form of assets or the rendering of services. Few difficulties should arise in recognising payments in the form of assets transferred or services rendered as consideration for the issue of shares, which would constitute CTC. However, difficulty can be experienced when the consideration for the shares is in the form of –

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

When the consideration is in the form of such an instrument, future services, future benefits or future payment, the consideration for the shares is regarded as having been received by the company only to the extent that the value of the instrument has been realised or the subscribing party to the agreement has fulfilled its obligations under the agreement.³⁶

Importantly, as soon as the company receives the instrument or agreement in respect of future services, future benefits or future payment, it is required to issue the shares and transfer them to a third party to be held in trust and later transfer them to the subscribing party in accordance with the trust arrangement.³⁷ Notwithstanding that the shares are required to be issued before the receipt of any actual consideration by the company, certain restrictions apply in relation to those shares. These restrictions will apply until such time as the value of the instrument is wholly or partially realised or the future services, future benefits or future payments are effected. Thus, for example, voting rights associated with the shares may not be exercised, the shares may not be transferred and distributions may not be made until the subscribing party has met its obligations.³⁸

Shares that have been issued but held in trust in these circumstances may be transferred to the subscribing party only when and to the extent that the instrument has become negotiable or the subscribing party has fulfilled its obligations under the agreement.³⁹

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

The CTC of a company is not increased if capitalisation shares are issued by that company, since no consideration is received for the issue of capitalisation shares.⁴⁰

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

Facts:

Individual X contributed R100 cash for shares in company Y.

Result:

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

³⁵ Section 40(1)(a) of the Companies Act.

³⁶ Section 40(5)(a) of the Companies Act.

³⁷ Section 40(5)(b) of the Companies Act.

³⁸ Section 40(6) of the Companies Act.

³⁹ Section 40(6)(d)(ii) of the Companies Act.

⁴⁰ See Binding Private Ruling 201 dated 13 August 2015 'Issue of Capitalisation Shares'.

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

Facts:

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

Result:

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

Note:

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

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

Facts:

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

Result:

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

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

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

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

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

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

In order for a transfer to constitute a reduction of a company's CTC, the directors or any person or persons with comparable authority must by the date of transfer determine that such a transfer constitutes a transfer of CTC. Without this determination, no reduction of CTC can occur and the amount transferred will be a dividend potentially subject to dividends tax, or STC if transferred before 1 April 2012. In order for this determination to be valid it must be made by the date of transfer.

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

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

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

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

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

- shares in the company itself (for example, capitalisation shares); or
- the acquisition by a listed company of its own securities on the JSE under the circumstances contemplated in subparagraph (b) of para 5.67(B) of s 5 of the JSE Limited Listings Requirements (see **2.2.3** and **2.2.9**).

Example 1 – CTC transferred to holders of shares

Facts:

Company A's balance sheet reflects the following:

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

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

Result:

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

Example 2 – CTC transferred to holders of shares

Facts:

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

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

Result:

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

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

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

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

Note:

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

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

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

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

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

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

Result:

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

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

Note:

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

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

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

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

CTC is defined in relation to a class of shares issued by a company.⁴¹ A company that has issued several classes of shares must maintain a separate record of CTC on a per-class basis. CTC created by virtue of an ordinary share issue cannot, for example, be allocated or reallocated to preference shares. Similarly, distributions in respect of preference shares cannot be used to reduce the CTC associated with ordinary shares.

When a company makes a distribution out of CTC in respect of a given class of shares, the CTC distributed will be allocated *pro rata* to the holders of that class of shares. That is, the amount transferred for the benefit of or on behalf of a person beneficially owning the shares must not exceed an amount that bears to the total amount of CTC attributable to that class of shares immediately before the transfer, the same ratio as the number of shares held by that person to the total number of shares in that class.

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

Facts:

Company Z has CTC of R600 000. X and Y respectively hold 60% and 40% of the shares in Company Z. Company Z transferred R300 000 to X and Y and the board of directors determined by the date of transfer that R200 000 constituted a transfer of the company's CTC. R100 000 (R300 000 – R200 000) constituted a dividend.

Result:

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

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

Note:

The CTC distributed is allocated *pro-rata* between holders X and Y in accordance with the percentage of shares held by each holder in Company Z.

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

Facts:

Company A has two holders of ordinary shares (B and C) and one holder of preference shares (D). B owns 25 ordinary shares and C owns the remaining 75 ordinary shares. Company A has CTC of R380 000 relating to its ordinary shares and R150 000 relating to its preference shares. A distribution of R200 000 was made to the holders of ordinary shares under a resolution passed by the board of directors stating that R60 000 of the distribution constituted a reduction in CTC.

⁴¹ Under s 37(1) of the Companies Act all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.

Result:

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

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

The CTC associated with the ordinary shares is reduced to R320 000 ($R380\,000 - R60\,000$) after the distribution.

The dividend portions of the distributions are calculated as follows:

	R
Dividend transferred to B [$(R200\,000 - R60\,000) \times 25\%$]	35 000
Dividend transferred to C [$(R200\,000 - R60\,000) \times 75\%$]	<u>105 000</u>
Total dividend distribution ($R200\,000 - R60\,000$)	<u>140 000</u>

The CTC associated with the preference shares is unaffected.

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

Y holds 50 ordinary shares in Company X. Company X has a total issued capital of 250 ordinary shares. The CTC in respect of the ordinary shares is R400 000. Under a share buy-back, Y surrenders all 50 shares for R100 000. The board of directors determines that the R100 000 is distributed from CTC.

Result:

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

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

Upon formation Company A issued five ordinary shares to B at R100 000 a share. The issue of the five shares to B resulted in CTC of R500 000 ($5 \times R100\,000$) for Company A. A few months later Company A issued five ordinary shares to C at R80 000 a share. The issue of the five shares to C resulted in an increase in CTC of R400 000 ($5 \times R80\,000$) for Company A. B and C are the only holders of shares in Company A. Two years later Company A distributed R200 000 to holders of its shares and by the date of transfer the directors determined that R90 000 was a distribution of CTC.

Result:

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

	R
CTC allocated to B ($R90\,000 \times 50\%$) (Note)	45 000
CTC allocated to C ($R90\,000 \times 50\%$) (Note)	45 000

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

Note:

5 shares / 10 shares (total number of shares in that class of shares).

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

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

Result:

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

d. Reductions in CTC

In order for a transfer from a company to a holder of shares to constitute a reduction of CTC and accordingly not comprise a dividend, the definition of CTC requires that the directors or persons with comparable authority determine that the transfer constitutes a transfer of CTC. Without this determination, which could, for example, take the form of a company resolution, no reduction of CTC can occur and the amount so transferred will constitute a dividend potentially subject to dividends tax, or STC if transferred before 1 April 2012. In essence, therefore, this requirement amounts to a unilateral company election. In order for this determination to be valid, it must be made by the date of the transfer by the company to the holders of shares. The determination of what constitutes CTC or a dividend may well be divorced from reality and is done independently of any accounting or company law considerations. A company may, for example, be able to return share premium to its holders of shares as a dividend by not determining that such return of share premium constitutes a transfer of CTC. Similarly, profits can be distributed from an accounting perspective but be determined to be a transfer from CTC for tax purposes assuming the taxpayer has sufficient CTC available.

e. Company reorganisation rules

Special rules apply for the calculation of CTC in an –

- asset-for-share transaction under s 42 (see **10.2**);
- amalgamation transaction under s 44 (see **10.3.1**); and
- unbundling transaction under s 46 (see **10.4.1**).

2.2.3 Definition – ‘dividend’

‘**[D]ividend**’ means any amount transferred or applied by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company, whether that amount is transferred or applied—

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

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

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

(iii) constitutes an acquisition by the company of its own securities by way of a general repurchase of securities as contemplated in subparagraph (b) of paragraph 5.67(B) of section 5 of the JSE Limited Listings Requirements, where that acquisition complies with any applicable requirements prescribed by paragraphs 5.68 and 5.72 to 5.84 of section 5 of the JSE Limited Listings Requirements;

(iv)

(v)

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

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

A dividend is any –

- amount (see **a.** below),
- transferred or applied by a company that is a resident (see **b.** below),
- for the benefit or on behalf of any person (see **c.** below),
- in respect of any share in that company (see **d.** below).

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

a. Amount

The meaning of the word 'amount' was judicially considered in *WH Lategan v CIR*⁴² in relation to its use in the definition of 'gross income' and the following dictum of Watermeyer J has been cited with authority in a number of other cases:⁴³

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

In *Cactus Investments (Pty) Ltd v CIR*⁴⁴ the court held that in order to comprise an 'amount', rights of a non-capital nature must be 'capable of being valued in money'. Similarly in *CIR v People's Stores (Walvis Bay) (Pty) Ltd*⁴⁵ the court held that in order to be included in gross income an amount must be of such a nature that a value can be attached to it in money.

In *C: SARS v Brummeria Renaissance (Pty) Ltd & others*⁴⁶ it was held that it did not follow that if a receipt or accrual cannot be turned into money, it had no money value.⁴⁷ The 'turn into money' test was merely one of the tests for determining whether an accrual had a money value. The court confirmed that the test was objective, not subjective.

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

⁴² 1926 CPD 203, 2 SATC 16 at 19.

⁴³ See *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301, 13 SATC 21 at 34 and *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 at 21.

⁴⁴ 1999 (1) SA 315 (SCA), 61 SATC 43.

⁴⁵ 1990 (2) SA 353 (A), 52 SATC 9.

⁴⁶ 2007 (6) SA 601 (SCA), 69 SATC 205.

⁴⁷ See Interpretation Note 58 'The *Brummeria* Case and the Right to Use Loan Capital Interest Free'.

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

- Shares held by a company in another company. See, however, **10.3.2** for special rules dealing with the transfer of shares as part of an ‘amalgamation transaction’ under s 44 and **10.4.2** for special rules dealing with transfer of shares as part of an ‘unbundling transaction’ under s 46.
- Debentures.
- Other movable or immovable assets.
- A loan account owing to the company.⁴⁸

The value to be placed on the transfer of assets as a dividend *in specie* is their market value⁴⁹ (see **3.3** for a discussion of s 64E(3) dealing with the amount of a dividend *in specie* for dividends tax purposes).

b. Transferred or applied by a company that is a resident

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

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

c. For the benefit or on behalf of any person

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

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

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

d. In respect of any share in that company

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

The amount transferred or applied by a company must be transferred or applied ‘in respect of’ a share in that company. It was held by Howie P in *Stevens v C: SARS*⁵⁰ that there is no material difference between the expressions ‘in respect of’ and ‘by virtue of’ in para (c) of the definition of ‘gross income’ in s 1(1) and that they both connote a causal relationship.⁵¹ Applying this construction to the definition of ‘dividend’, it is arguable that there must be a causal relationship between the amount transferred or applied and the share.

An amount which is unrelated to a taxpayer’s shareholding will not be derived ‘in respect of’ a share. For example, the purchase by a company of an asset at an arm’s length price from

⁴⁸ See Binding Private Ruling 198 dated 7 July 2015 ‘Distribution of a Debit Loan Account in Anticipation of Deregistration of a Company’.

⁴⁹ *Lace Proprietary Mines Ltd v CIR* 1938 AD 267, 9 SATC 349.

⁵⁰ 2007 (2) SA 554 (SCA), 69 SATC 1 at 7.

⁵¹ See also *De Villiers v CIR* 1929 AD 227, 4 SATC 86.

a holder of shares on the same terms offered to the public would not constitute a dividend because the amount transferred by the company to that holder would not have been transferred 'in respect of' the holder's shares in the company but by virtue of the arm's length acquisition by the company of the asset.

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

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

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

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

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

Facts:

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

Result:

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

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

Facts:

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

Result:

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

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

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

- a common law dividend;
- a return of share capital, share premium or stated capital that is not determined to be a distribution of the company's CTC;
- the difference between the market value of an asset and its selling price when the asset is sold at less than market value to the holder of a share or to another person on behalf of such holder;
- a donation of cash or assets to a holder of a share or to some other person on such holder's behalf;
- the waiver of debt owed by a holder of a share; and
- a fractional share payment in respect of a scrip dividend⁵² (see Example 3 below).

The granting of a *bona fide* loan to the holder of a share will not comprise a dividend as defined in s 1(1). The failure to charge interest at the official rate can, however, result in a deemed dividend under s 64E(4). Similarly, the buy-back by a company of its own shares will not be a distribution, since the company acquires the shares as *quid pro quo*. However, such a buy-back of shares is specifically included in para (b) of the definition.

Example 1 – Any amount transferred or applied by way of a distribution*Facts:*

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

Result:

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

Example 2 – Any amount transferred or applied by way of a distribution*Facts:*

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

Result:

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

⁵² The term 'scrip dividend' as defined in the Definitions of the JSE Limited Listings Requirements means a cash dividend incorporating an election on the part of shareholders to receive either capitalisation shares or cash, with the default election being either shares or cash.

Note:

Before 1 January 2011 s 64B(5)(c)(ii) provided an exemption from STC for a dividend declared in the course or anticipation of liquidation, winding up, deregistration or final termination of the corporate existence of a company out of capital profits attributable to the disposal of an asset before 1 October 2001 or if disposed of after that date out of the portion of the capital profit which accrued before 1 October 2001. A similar exemption existed if the dividend was declared out of revenue profits earned in years of assessment ending on or before 31 March 1993. For the period commencing on or after 1 January 2011 until 31 March 2012 these exemptions no longer applied for STC purposes.

A similar exemption is also not provided for under dividends tax legislation.

Example 3 – Any amount transferred or applied by way of a distribution*Facts:*

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

Individual X held 100 ordinary shares in Company A and elected to receive the scrip alternative. Individual X was entitled to 1,25880 ($100 \times 1,25880\%$) new ordinary shares subject to rounding. 'Rounding' for companies listed on the JSE means that instead of receiving fractional share entitlements, fractional share entitlements are rounded down and fractions are paid out in cash. The fractional share payment, which is paid in cash, is equal to the fractional entitlement multiplied by the fraction rate.

The fraction rate for Company A's scrip dividend is R20,1369821. Accordingly, after automatically applying rounding, Individual X received 1 scrip share and a fractional share payment of R5,2114510 ($0,25880 \times R20,1369821$).

Result:

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

The fractional share payment of R5,2114510 to Individual X, who elected the scrip alternative, is a cash payment and constitutes a dividend under para (a) of the definition of 'dividend' in s 1(1). The distribution of the 1 scrip share is excluded from the definition of 'dividend' under para (ii) of the exclusions from the definition of 'dividend', since it constitutes a share in Company A (see **2.2.3 f.**).

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

Paragraph (b) of the definition of ‘dividend’ specifically includes any consideration given by a company to holders of its shares for the buy-back of its own shares.⁵³ The purchase of shares by a subsidiary company in its holding company is not a share buy-back for purposes of the definition of ‘dividend’, since the subsidiary company is not buying back its own shares.⁵⁴

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

Example 1 – Any amount transferred or applied as consideration for the acquisition of any share in the company

Facts:

Company C has issued share capital of 100 000 shares of R1 each all of which are held by D. The board of directors of Company C passed a resolution awarding land and buildings with a book value of R60 000 and a market value of R90 000 to D in return for the acquisition of some of Company C’s own shares.

Result:

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

Example 2 – Any amount transferred or applied as consideration for the acquisition of any share in the company

Facts:

Company D has an issued share capital of 100 000 shares of R1 each. Company D bought back 10% of its shares at R2 a share. The directors did not use any part of the company’s CTC for the purposes of the buy-back.

Result:

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

f. Exclusions from the definition of ‘dividend’

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

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

⁵³ Certain share buy-backs have been identified as reportable arrangements – see GN 39650 of 3 February 2016 for detail.

⁵⁴ Paragraphs 5.67 to 5.81 of s 5 of the JSE Limited Listings Requirements must, however, be complied with by the holding company if a subsidiary company purchases shares in that holding company because under para 5.67(B) such purchase of shares is regarded as a repurchase of securities under the JSE Limited Listings Requirements (see below).

Reduction of CTC (para (i) of the exclusions)

The definition of 'dividend' does not include any amount transferred or applied by a company to the extent that the amount so transferred or applied results in a reduction of CTC. An amount transferred or applied by a company for the benefit of or on behalf of any person in respect of a share will result in a reduction of CTC in relation to that class of shares only if the directors of the company or some other person or body of persons with comparable authority has by the date of transfer determined that the amount so transferred, reduced the CTC of the company.⁵⁵

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

The distribution of an amount of CTC by a company will constitute a return of capital for a holder of shares for CGT purposes. Under a share buy-back the return of capital will comprise the proceeds on disposal of the shares under para 35 of the Eighth Schedule assuming that the amount is of a capital nature. While an amount received by or accrued to a holder of shares under a general repurchase by a listed company is not a return of capital as defined, it is treated in the same way as a return of capital for CGT purposes, that is, as proceeds. In a situation other than a share buy-back the return of capital is treated as a reduction in the base cost of the shares under para 76B of the Eighth Schedule. A return of capital received or accrued after the shares have been disposed of following the deregistration or liquidation of the company is treated as a capital gain under para 77 of the Eighth schedule.⁵⁶

Example 1 – Dividend despite the absence of profits

Facts:

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

Result:

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

Example 2 – Notional nature of CTC

Facts:

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

Result:

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

⁵⁵ See Binding Private Ruling 234 dated 23 May 2016 'Asset-for-Share and Unbundling Transactions not Regulated by Sections 42 and 46'.

⁵⁶ See Chapter 18 of the *Comprehensive Guide to Capital Gains Tax* dealing with company distributions.

Example 3 – Reduction of CTC

Facts:

The following appears in the balance sheet of Company A:

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

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

Result:

Company A paid R150 000 to holders of its shares, made up as follows:

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

Note:

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

Transfer by a company of its own shares (para (ii) of the exclusions)

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

This form of transfer does not result in an outflow of overall value from the company, since all of the underlying assets remain within the company. In *CIR v Collins*⁵⁷ Innes CJ stated the following in relation to the issue of bonus shares by a company:

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

If a company issues shares as part of a scrip dividend, the shares issued will be excluded from the definition of 'dividend' under para (ii) of the exclusions from the definition of that term. However, a fractional share payment by a company in respect of a scrip dividend is a cash payment and not a share in the company and is therefore not excluded from the definition of 'dividend' under para (ii) of the exclusions from the definition of that term (see Example 3 in 2.2.3 e.)

⁵⁷ 1923 AD 347, 32 SATC 211 at 218.

Example – Transfer by a company of its own shares

Facts:

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

Result:

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

Note:

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

- the cost price of trading stock when the shares are held on revenue account; and
- their base cost for CGT purposes.

Acquisition by a listed company of its own securities on the JSE by way of a general repurchase of its shares (para (iii) of the exclusions)

The definition of 'dividend' excludes any amount transferred or applied by a company to holders of its shares to the extent that the amount so transferred or applied constitutes a general repurchase by that company of its own securities as contemplated in subparagraph (b) of para 5.67(B) of s 5 of the JSE Limited Listings Requirements, if that acquisition complies with the requirements prescribed by paras 5.68 and 5.72 to 5.84 of s 5 of the JSE Limited Listings Requirements.⁵⁸ These requirements include the following:

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

⁵⁸ Paragraphs 5.82 to 5.84 of s 5 of the JSE Limited Listings Requirements were repealed with effect from 30 September 2014.

A JSE-listed company can buy back its own shares in several ways, not all of which are contemplated in subparagraph (b) of para 5.67(B) or which need to comply with paras 5.68 and 5.72 to 5.81, of s 5 of the JSE Limited Listings Requirements. For example, the following buy-backs by a JSE-listed company of JSE-listed shares are not excluded from the definition of 'dividend' in s 1(1):

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

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

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

Facts:

Individual A held 100 listed shares in Company B Ltd which were acquired on 1 August 2012 at R10 a share. Individual A decided to sell the shares through a broker and the shares were purchased on 15 June 2016 on the open market by Company B Ltd at R25 a share.

Result:

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

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

2.2.4 Definition – ‘equity share’

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

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

2.2.5 Definition – ‘foreign dividend’

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

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

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

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

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

A ‘foreign company’ as defined in s 1(1) means any company which is not a resident.

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

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

Specifically excluded from the definition of ‘foreign dividend’ is, amongst other things, the issue by a foreign company of its own shares as capitalisation shares (para (iii) of the exclusions).⁵⁹

2.2.6 Definition – ‘JSE Limited Listings Requirements’

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

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

⁵⁹ See Interpretation Note 93 ‘The Taxation of Foreign Dividends’.

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

2.2.7 Definition – 'listed company'

' "[L]isted company" means a company where its shares or depository receipts in respect of its shares are listed on—

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

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

' "[D]epository receipt" or "DR" means an instrument representing an issuer's securities, where the instrument confers rights in respect of such securities;

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

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

...

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

...

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

...

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

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

An 'exchange' is defined in s 1 of the Financial Markets Act as follows:

' "[E]xchange" means a person who constitutes, maintains and provides an infrastructure—

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

The JSE, ZARX (Pty) Ltd and 4 Africa Exchange (Pty) Ltd are the only exchanges currently licensed under s 9 of the Financial Markets Act.⁶⁰

A 'recognised exchange' is defined in para 1 of the Eighth Schedule as follows:

' "[R]ecognised exchange" means—

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

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

2.2.8 Definition – 'listed share'

' "[L]isted share" means a share that is listed on an exchange as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act;⁶¹

The JSE, ZARX (Pty) Ltd and 4 Africa Exchange (Pty) Ltd are the only exchanges currently licensed under s 9 of the Financial Markets Act.⁶²

2.2.9 Definition – 'return of capital'

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

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

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

- (i) shares in the company; or
- (ii) an acquisition by the company of its own securities by way of a general repurchase of securities as contemplated in subparagraph (b) of paragraph 5.67(B) of section 5 of the JSE Limited Listings Requirements, where that acquisition complies with any applicable requirements prescribed by paragraphs 5.68 and 5.72 to 5.84 of section 5 of the JSE Limited Listings Requirements;'

A 'return of capital' means any amount transferred by a company that is a resident in respect of a share in that company and which results in a reduction of CTC, but excluding any amount which constitutes shares in the company itself or specified circumstances which

⁶⁰ The Financial Services Board Press Release dated 1 September 2016 announced that ZARX (Pty) Ltd and 4 Africa Exchange (Pty) Ltd had been granted exchange licences with conditions.

⁶¹ See above.

⁶² See above.

involve the acquisition of its own shares. Since the definition of 'dividend' in s 1(1) excludes a reduction of CTC, a return of capital and a dividend are mutually exclusive.

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

- Both terms apply to amounts transferred by a company that is a resident in respect of the company's issued shares, regardless of whether the transfer arises from a distribution made by the company or from the repurchase by the company of its own shares.
- Both terms exclude the transfer by a company of its own shares (for example, capitalisation shares),⁶³ as well as a buy-back by a company of its own JSE-listed shares by way of a general repurchase (see **2.2.3 f.** for a discussion of the acquisition by a listed company of its own securities on the JSE by way of a general repurchase of its shares).

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

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

With effect from 1 April 2012 (the commencement date of most of the substantive dividends tax provisions) returns of capital and foreign returns of capital that are received by a holder of shares before disposal of the relevant share are dealt with under para 76B of the Eighth Schedule as a reduction in base cost. Should the return of capital or foreign return of capital exceed the base cost of the share the excess is treated as a capital gain. A transitional rule contained in para 76B(1) of the Eighth Schedule re-establishes the base cost of pre-valuation date shares in order that the base cost reduction method can be applied.

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

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

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

⁶³ See Binding Private Ruling 201 dated 13 August 2015 'Issue of Capitalisation Shares'.

2.2.10 Definition – ‘share’

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

The term ‘proprietary interest’ is not defined in the Act. Its ordinary meaning is described as –

‘[a]dvantage, profit, right, or share held by the owner of a tangible or intangible asset or property with all associated rights’.⁶⁴

In *Standard Bank of South Africa Ltd & Another v Ocean Commodities Inc & others* Corbett JA stated the following regarding the meaning of a share:⁶⁵

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

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

- An association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law (para (a) of the definition of ‘company’).
- An association, corporation or company incorporated under the law of any country other than South Africa or any body corporate formed or established under such law. This includes a co-operative incorporated under foreign law (para (b) of the definition of ‘company’).
- A ‘co-operative’ as defined in s 1(1) which means any association of persons registered under s 27 of the Co-operatives Act 91 of 1981 or s 7 of the Co-operatives Act 14 of 2005 (para (c) of the definition of ‘company’).
- An association (other than an association, corporation or company incorporated under South African law, a body corporate formed or established under South African law or a close corporation) formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public (para (d) of the definition of ‘company’).
- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement in terms of which members of the public (as defined in s 1 of the Collective Investment Schemes Control Act), are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest (para (e)(ii) of the definition of ‘company’).
- A portfolio of a collective investment scheme in property that qualifies as a REIT as defined in para 13.1(x) of the JSE Limited Listings Requirements (para (e)(iii) of the definition of ‘company’).
- A close corporation (para (f) of the definition of ‘company’).

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

⁶⁴ <http://www.businessdictionary.com/definition/proprietary-interest.html> [Accessed 11 September 2017].

⁶⁵ 1983 (1) SA 276 (A) at 288.

2.3 Definitions (s 64D)

2.3.1 Definition – ‘beneficial owner’

‘ “[B]eneficial owner” means the person entitled to the benefit of the dividend attaching to a share;’

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

The term ‘beneficial owner’ was considered in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd in which Holmes JA stated the following*:⁶⁶

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

The term ‘beneficial owner’ should, however, not be interpreted too widely or out of context. Not every person that benefits from the holding of shares by another will necessarily be the beneficial owner of a dividend. In *Her Majesty the Queen v Prévost Car Inc.*⁶⁷ the taxpayer paid dividends to its Dutch shareholder, which then paid a similar amount of dividends to its corporate shareholders, residents of Sweden and of the United Kingdom. The court held that the Dutch shareholder, and not the corporate shareholders of the Dutch shareholder, was the beneficial owner of the dividend paid to the Dutch shareholder. The judge referred to the judgment in *Prévost Car Inc. v Her Majesty the Queen*⁶⁸ in which it was held that the beneficial owner of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received.

It was held in *Velcro Canada Inc. v Her Majesty the Queen*⁶⁹ that –

- in looking at the beneficial ownership issue one must apply the test as set out in *Prévost*, and in doing so, one must look to the ordinary meaning of individual words, that is, ‘possession’, ‘use’, ‘risk’ and ‘control’;
- the person who is the beneficial owner is the person who enjoys and assumes all the attributes of ownership; and
- only if the interest in the item in question gives that party the right to control the item without question, will it meet the threshold set in *Prévost*.

Cessionary of a dividend

Ownership in shares can be transferred by a contract of cession provided that there is the necessary intention to pass ownership.⁷⁰ Similarly, the rights attaching to shares can also be ceded.⁷¹ The cession of a right to dividends can be done under a pledge, cession or other security obligation. There must be a legal obligation to pass a dividend on to a third party for such third party to be considered the beneficial owner of the dividend. The third party will not become the beneficial owner of the dividend that has been ceded should the holder of the shares have a discretion, but not an obligation, to pass the dividend on to the third party (but see below as regards a discretionary trust arrangement).

⁶⁶ 1976 (1) SA 441 (A) at 453A-B.

⁶⁷ 2009 FCA 57, [2010] 2 F.C.R. 65.

⁶⁸ (2008) TCC 231.

⁶⁹ (2012) TCC 57.

⁷⁰ *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A).

⁷¹ ITC 1378 (1983) 45 SATC 230 (T).

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

See **3.8** for a discussion on deemed dividends which arise in the context of a cession of a dividend when the dividend is announced or declared before the cession.

Beneficiary of a trust

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

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

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

Dividends tax would have been withheld or paid on the date the dividend was originally deemed to have been 'paid' for dividends tax purposes because the trust had not at that time vested the dividends in the beneficiary. Therefore, if the dividend is subsequently vested in a beneficiary that is exempt under s 64F(1) or s 64FA(1)(a) within the same year of assessment in which the dividend was received by or accrued to the trust, the trust may claim a refund under s 64L or s 64M from the company paying the dividend or from the regulated intermediary (see **8.2** and **8.3**).⁷² Sections 64L and 64M state that 'so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable *to the person to whom the dividend was paid*'. It is therefore the trust and not the beneficiary who may claim the refund (see Example 2 in **5.2.2 c.** and Example 3 in **8.2.4**). The trust can subsequently pay the dividends tax recovered to the beneficiaries. For a dividend that constitutes the distribution of an asset *in specie*, the company that paid the dividend can claim a refund from SARS under s 64LA (see **8.4**).

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

- at the date the dividend is deemed to be paid for dividends tax purposes, the beneficiary does not have a vested right to the dividend; or

⁷² See Binding Private Rulings 118 dated 14 May 2012 'Withholding of Dividends Tax', 125 dated 25 October 2012 'Vesting by Discretionary Trust of Dividend Rights to the Beneficiary of the Trust' and 129 dated 10 December 2012 'Beneficial Owner of Dividends'.

- the trustees of a discretionary trust do not exercise their discretion to vest the dividend in the beneficiary during the same year of assessment of the trust in which the dividend is received by or accrues to the trust.⁷³

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

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

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

Usufructuary of a share

The usufructuary (the person entitled to a usufruct) of a share will be the beneficial owner of a dividend. A 'usufruct' has been defined as –⁷⁴

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

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

Partners of an en commandite partnership

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

2.3.2 Definition – 'dividend'

' "[D]ividend" means any dividend or foreign dividend as defined in section 1 that is—

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

The definition of 'dividend' in s 64D includes both a 'dividend' and certain 'foreign dividends' as defined in s 1(1) [(see 2.2.3 for a discussion of a 'dividend' as defined in s 1(1) and 2.2.5 for a discussion of a 'foreign dividend' as defined in s 1(1)].

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

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

⁷³ See para (ee) of the proviso to s 10(1)(k)(i) which is an anti-avoidance provision dealing with the exercise of a discretionary power by a trustee of a trust in specific situations.

⁷⁴ *Brunsdon's Estate v Brunsdon's Estate & others* 1920 CPD at 174.

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

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

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

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

A foreign dividend paid by a foreign company in respect of a listed share is not subject to dividends tax to the extent that the dividend consists of a distribution of an asset *in specie*. A foreign company, the shares of which are listed shares, must not withhold dividends tax from the distribution of an asset *in specie*. It would in any event be impracticable to impose a withholding obligation in respect of an asset other than cash. Such a foreign dividend is included in a person's gross income under para (k) of the definition of 'gross income' in s 1(1), but may be wholly exempt from normal tax under s 10B(2)(e) if the dividend is received by or accrues to a company that is a resident⁷⁵ or may otherwise be partially exempt from normal tax under s 10B(3). A rebate under s 6quat can potentially be deducted from normal tax payable by a resident whose taxable income includes a foreign dividend that is not fully exempt under s 10B (see 9.3).⁷⁶

2.3.3 Definition – 'dividend cycle'

' "[D]ividend cycle" means a dividend cycle as defined in section 64B;'

A 'dividend cycle' as previously defined in s 64B(1) represents the period for which a company's STC liability was determined for STC purposes. A dividend cycle is not tied to a company's year of assessment and ended only if and when a dividend accrued to or, with a deemed dividend under s 64C, was deemed to be declared to a holder of shares. A dividend cycle could therefore range from a few days to many years. The definition of 'dividend cycle' in s 64B(1) provided rules for determining when the dividend cycle of a company began and ended. Separate rules exist for long-term insurers.

The definition of 'dividend cycle' was also relevant during the changeover from STC to dividends tax, and specifically for purposes of s 64J, in determining the 'STC credit' of a company (see 6.1.2). The STC credit could be utilised to reduce dividends tax in respect of dividends paid on or before 31 March 2015. A company's STC credit is deemed to be nil on or after 1 April 2015.

The STC legislation in ss 64B and 64C was repealed with effect from 1 April 2017.

Table 1 – When a dividend cycle began and ended (companies other than long-term insurers)⁷⁷

Dividend cycle	Begins	Ends
First	For a dividend declared on or after 17 March 1993, on the later of the following dates – <ul style="list-style-type: none"> • 1 September 1992; • when a dividend (other than a dividend <i>in specie</i> or 	When – <ul style="list-style-type: none"> • the first dividend accrues to the holder of shares concerned; or • the amount is deemed to have been distributed as

⁷⁵ On or after 1 March 2014.

⁷⁶ See Interpretation Note 93 'The Taxation of Foreign Dividends'.

⁷⁷ Reproduced from the *Comprehensive Guide to Secondary Tax on Companies*.

	<p>preference dividend) was declared after 1 September 1992 but before 17 March 1993, the day following the declaration;</p> <ul style="list-style-type: none"> • the date of incorporation, formation or establishment of the company; • the date on which the company became a resident. 	contemplated in s 64C(6).
Subsequent	Immediately after the end of the previous dividend cycle.	<p>When –</p> <ul style="list-style-type: none"> • the subsequent dividend declared accrues to the holder of shares; or • the amount is deemed to have been distributed as contemplated in s 64C(6).

Table 2 – When the dividend cycle began and ended (long-term insurers)

Dividend cycle	Begins	Ends
First	<p>For a dividend ('the first dividend') declared out of profits derived during years of assessment commencing on or after 1 July 1993, on the later of –</p> <ul style="list-style-type: none"> • the later of the date on which the company was incorporated, formed or established or 1 July 1993; and • the day following the date of declaration of the last dividend (other than a dividend <i>in specie</i> or preference dividend) declared before the first dividend. 	<p>When –</p> <ul style="list-style-type: none"> • the first dividend accrues to the holder of shares concerned; or • the amount is deemed to have been distributed as contemplated in s 64C(6).
Subsequent	Immediately after the end of the previous dividend cycle.	<p>When –</p> <ul style="list-style-type: none"> • the subsequent dividend declared accrues to the holder of shares; or • the amount is deemed to have been distributed as contemplated in s 64C(6).

The proviso to the definition of 'dividend cycle' in s 64B(1) provided that –

- any dividend cycle of a company that had commenced and that had not ended before 1 April 2012 was deemed to have ended on 31 March 2012 and was deemed to be the final dividend cycle of that company; and

- if a dividend cycle of a company ended on 31 March 2012, that dividend cycle was deemed to be the final dividend cycle of that company.

The proviso ensured that the final dividend cycle of a company for STC purposes ended on 31 March 2012.

Example 1 – Dividend cycle of a company

Facts:

Company A was incorporated on 2 April 2007 and declared the following dividends:

- R100 000 on 31 March 2008
- R250 000 on 31 March 2009

No further dividends were declared by Company A.

Result:

The dividend cycles of Company A are as follows:

- Cycle 1: 2 April 2007 to 31 March 2008
- Cycle 2: 1 April 2008 to 31 March 2009
- Cycle 3: 1 April 2009 to 31 March 2012. This cycle was deemed to have ended on 31 March 2012 and was the final dividend cycle of Company A for STC purposes.

Example 2 – Dividend cycle of a company

Facts:

Company A, a listed company, was incorporated on 1 April 2011 and declared a dividend of R500 000 on 14 March 2012. The dividend accrued to holders of shares on 5 April 2012 (record date) and was paid on 10 April 2012.

Result:

The dividend cycle of Company A is 1 April 2011 to 31 March 2012. The cycle was deemed to have ended on 31 March 2012 even though the dividend accrued to holders of shares on 5 April 2012.

Note:

The dividend declared on 14 March 2012 was subject to STC, since it was declared before 1 April 2012. The STC of R50 000 ($R500\,000 \times 10\%$) was payable on or before 30 April 2012.

2.3.4 Definition – ‘effective date’

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

The effective date on which dividends tax came into operation is 1 April 2012.⁷⁸ Dividends tax is levied on dividends declared and paid by a company on or after 1 April 2012. Dividends declared before 1 April 2012 are subject to STC.

2.3.5 Definition – ‘regulated intermediary’

‘ “[R]egulated intermediary” means any—

- (a) central securities depository participant contemplated in section 32 of the Financial Markets Act;

⁷⁸ GN 1073 in GG 34873 of 20 December 2011.

- (b) authorised user as defined in section 1 of the Financial Markets Act;
- (c) approved nominee contemplated in section 76(3) of the Financial Markets Act;
- (d) nominee that holds investments on behalf of clients as contemplated in section 9.1 of Chapter 1 and section 8 of Chapter 11 of the Codes of Conduct for Administrative and Discretionary Financial Service Providers, 2003 (Board Notice 79 of 2003) published in *Government Gazette* No. 25299 of 8 August 2003;
- (e) portfolio of a collective investment scheme in securities;
- (f) transfer secretary that is a person other than a natural person and that has been approved by the Commissioner subject to such conditions and requirements as may be determined by the Commissioner; or
- (g) a portfolio of a hedge fund collective investment scheme; or⁷⁹

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

The investment intermediary structure in respect of listed companies in South Africa is explained as follows:⁸⁰

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

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

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

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

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

- ensure that the South African financial markets are fair, efficient and transparent;
- increase confidence in the South African financial markets by –
 - requiring that securities services be provided in a fair, efficient and transparent manner; and
 - contributing to the maintenance of a stable financial market environment;

⁷⁹ Paragraph (g) of the definition was inserted by s 73(1) of the Taxation Laws Amendment Act 25 of 2015 with effect from 1 April 2015.

⁸⁰ SAICA 'Dividends Tax 1998. Preparing for 1 April 2012' (October 2011) Issue 146 *SAICA Integritax Newsletter* at page 6.

- promote the protection of regulated persons, clients and investors;
- reduce systemic risk; and
- promote the international competitiveness of the South African financial markets and of securities services in South Africa.

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

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

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

CSDPs must meet certain criteria prescribed by STRATE and must obtain approval from the Financial Services Board. Approved equities CSDPs are listed on the STRATE website.⁸¹

b. Authorised user [para (b)]

An 'authorised user' is defined in s 1 of the Financial Markets Act and means a person authorised by a licensed exchange to perform one or more securities services in terms of the exchange rules, and includes an external authorised user, where appropriate. An 'external authorised user' as defined in s 1 of the Financial Markets Act means a foreign person who is authorised by a supervisory authority⁸² to perform a service or services similar to one or more securities services as defined in that Act and who is subject to the laws of a country other than South Africa, which laws –

- establish a regulatory framework equivalent to that established by that Act; and
- are supervised by a supervisory authority.

The term 'authorised user' includes authorised share brokers.

c. Approved nominee [para (c)]

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

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

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

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

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

⁸¹ www.strate.co.za.

⁸² As defined in s 1 of that Act.

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

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

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

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

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

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

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

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

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

f. Transfer secretary [para (f)]

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

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

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

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

The term 'portfolio of a hedge fund collective investment scheme' is defined in s 1(1)⁸³ and means any portfolio held by any hedge fund business that qualifies as a declared collective investment scheme in terms of s 63 of the Collective Investment Schemes Control Act.

2.3.6 Definition – 'STC credit'

' "[S]TC credit" means an amount determined in terms of section 64J(2);'

The STC credit of a company determined under s 64J(2) is an amount equal to –

- the amount of dividends that accrued and which are deemed to have accrued as determined under s 64B(3) to a company during the dividend cycle of the company ending on 31 March 2012, but without regard to any dividend referred to in s 64B(3A) [s 64J(2)(a)];
- *less* the amount of dividends declared by that company during the dividend cycle ending on 31 March 2012 as determined under s 64B(2), limited to the amount determined in the first bullet point [s 64J(2)(a)];
- *plus* dividends that accrue to that company on or after 1 April 2012, in respect of which the company received a notification no later than the date that the dividend is paid from the person paying the dividend of the amount by which the dividend reduces the STC credit of the company that paid and declared the dividend [s 64J(2)(b)];
- *less* the amount of dividends declared and paid by that company on or after 1 April 2012, limited to the net amount of the amounts in the preceding three bullet points [s 64J(2)].

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

See **Chapter 6** for a discussion of s 64J.

⁸³ The definition was inserted by s 4(1)(zL) of the Taxation Laws Amendment Act 31 of 2013 with effect from 1 April 2015.

Chapter 3

Levy of dividends tax, liability for dividends tax and transitional arrangements (ss 8F(2)(a), 8FA(2)(a), 9H(3), 12Q(3), 24BA(3)(b), 25BB(6), 26B(2), 31(3), 64E, 64EA and 64EB)

3.1 Application and rate of dividends tax [ss 12Q(3), 25BB(6), 26B(2) and 64E(1)]

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

- known as the dividends tax, and
- calculated at the rate of 20%⁸⁴ of the amount of any dividend paid by any company other than a headquarter company.

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

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

Example 1 – Calculation of dividends tax

Facts:

On 15 March 2017 Company A declared a dividend of R100 000 to holders of its shares who are natural persons, payable on 31 March 2017.

Result:

Dividends tax is calculated as follows:

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

Example 2 – Calculation of dividends tax

Facts:

B, a natural person, holds all the shares in Company A and owes R500 000 on loan account to Company A. Company A waived R300 000 of this debt on 15 March 2017.

Result:

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

Example 3 – Calculation of dividends tax

Facts:

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

⁸⁴ It was proposed in clause 11(1) of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 that the rate of dividends tax be increased from 15% to 20% with effect from 22 February 2017.

Result:

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

3.1.1 Companies liable to pay dividends tax

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

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

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

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

- A state-owned company, a private company, a personal liability company and a public company (para (a) of the definition of 'company'). A non-profit company is prohibited from distributing its income and property to its members.⁸⁵
- A domesticated company which is a company whose registration has been transferred to South Africa (para (a) of the definition of 'company'). Under s 13(5) of the Companies Act it is treated as if it had been originally incorporated and registered under the Companies Act.
- A share block company which is a 'company' as defined in the Companies Act even though it must comply with the Share Blocks Control Act (para (a) of the definition of 'company'). A dividend may arise when a share block company converts to a normal company and the share block company distributes its property to its members, or when a share block company transfers a unit to a member of the share block company in which case the disposal of such unit may be exempt from dividends tax under s 64FA(1)(d) (see **4.3.1**).
- A mutual bank incorporated under the Mutual Banks Act 124 of 1993 (para (a) of the definition of 'company').
- An association, corporation, company or body corporate incorporated or formed under foreign law, for example, a co-operative incorporated under foreign law (para (b) of the definition of 'company'). As noted above, a foreign dividend paid by a foreign company will potentially be subject to dividends tax only if the foreign dividend is paid in respect of a listed share and to the extent that the foreign dividend does not consist of a distribution of an asset *in specie*.
- A co-operative (para (c) of the definition of 'company') to the extent that the amount of the dividend was not included in the 'income' of the beneficial owner [see **4.1.12** for a discussion of s 64F(1)(j)].

⁸⁵ See the definition of 'non-profit company' in s 1 of the Companies Act.

- A portfolio of a collective investment scheme in property that qualifies as a REIT as defined in para 13.1(x) of the JSE Limited Listings Requirements (see 3.1.4 for a discussion on dividends paid by a 'REIT') (para (e)(iii) of the definition of 'company').
- A close corporation established under the Close Corporations Act (para (f) of the definition of 'company').

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

- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities. Such a portfolio is a 'company'⁸⁶ as defined in s 1(1) but it is not allowed to list its shares on an exchange which means that a dividend paid by such a portfolio will not constitute a 'dividend' as defined in s 64D.
- A 'headquarter company' as defined in s 1(1) is not subject to dividends tax, since it is specifically excluded under s 64E(1) (see 3.1.2).

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

A dividend paid by a headquarter company is not subject to dividends tax. A 'headquarter company' is defined in s 1(1) as follows:⁸⁷

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

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

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

⁸⁶ Paragraph (e)(ii) of the definition of 'company'.

⁸⁷ See Interpretation Note 87 'Headquarter Companies'.

exceeds R5 million, 50% or more of the gross income must consist of one or both of the following –

- any rental, dividend, interest, royalty or service fee paid or payable by any foreign company in which the company, whether alone or together with any other company forming part of the same group of companies, held at least 10% of the equity shares and voting rights; or
- any proceeds from the disposal of any interest in equity shares in any foreign company in which the headquarter company, whether alone or together with any other company forming part of the same group of companies, held at least 10% of the equity shares and voting rights, or of any intellectual property licensed to such a foreign company [s 9(2)(c)].

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

Section 26B(2) provides that dividends tax levied on the amount of a 'dividend' as defined in s 64D, which is paid as contemplated in s 64E(2), by an oil and gas company out of amounts attributable to its oil and gas income, must be determined in accordance with the Act but subject to the Tenth Schedule.

An 'oil and gas company' is defined in para 1 of the Tenth Schedule as follows:

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

The term 'oil and gas income' is defined in para 1 of the Tenth Schedule as follows:

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

An 'oil and gas right' is defined in para 1 of the Tenth Schedule as follows:

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

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

Dividends paid out of amounts not derived from an oil and gas company's oil and gas income will be subject to dividends tax at the rate of 20%⁸⁸ contemplated in s 64E(1) if a reduced rate or exemption is not applicable.

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

In *Western Platinum Ltd v C: SARS*⁸⁹ the Supreme Court of Appeal had to decide in what circumstances interest may be characterised as 'income derived from mining operations'. The court confirmed the finding of the court *a quo* that in order to qualify as mining income, the income had to be directly connected to the mining source. The same test should be applied to determine whether other income derived by an oil and gas company was derived from 'oil and gas income'.

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

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

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

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

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

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

Example – Dividend paid by an oil and gas company

Facts:

Company C is an oil and gas company that derived oil and gas income net of expenses of R300 million and dividend income net of expenses, not directly connected to the oil and gas source, of R30 million during its 2017 year of assessment ending on 31 March. Company C paid a dividend of R10 million on 31 March 2017 to holders of its shares that are all residents and natural persons.

Result:

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

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

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

Dividends tax at 0% = nil.

⁸⁸ It was proposed in clause 11(1) of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 that the rate of dividends tax be increased from 15% to 20% with effect from 22 February 2017.

⁸⁹ [2004] 4 All SA 611 (SCA), 67 SATC 1.

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

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

R10 million × R30 million / R330 million = R909 091.

Dividends tax at 20% = R181 818,20.

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

Two types of real estate investment entities operate in South Africa, namely, property unit trusts (portfolios of a collective investment scheme in property) and property loan stock companies. A portfolio of a collective investment scheme in property was included in the definition of 'company' in s 1(1) with effect from years of assessment commencing on or after 1 April 2013. Paragraph (e)(iii) of the definition of 'company' in s 1(1) was, however, amended with effect from years of assessment commencing on or after 1 January 2015 to provide that only a portfolio of a collective investment scheme in property that qualifies as a REIT as defined in para 13.1(x) of the JSE Limited Listings Requirements, is a company. It follows that a collective investment scheme in property that does not qualify as a REIT does not constitute a company with effect from years of assessment commencing on or after 1 January 2015. A distribution from such a scheme would therefore not constitute a 'dividend' as defined in s 1(1) and would not attract dividends tax.

A 'REIT' as defined in s 1(1) means –

'... a company—

- (a) that is a resident; and
- (b) the shares of which are listed—
 - (i) on an exchange (as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act); and
 - (ii) as shares in a REIT as defined in the JSE Limited Listings Requirements'.

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

The terms 'linked unit' and 'controlled company' are defined respectively in s 1(1) and s 25BB(1) as follows:

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

' "[C]ontrolled company" means a company that is a subsidiary, as defined in IFRS, of a REIT;'

The abbreviation 'IFRS' is defined in s 1(1) and means –

'the International Financial Reporting Standards issued by the International Accounting Standards Board;'

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

The meaning of the word 'control' is discussed in paras 5 – 18 of IFRS 10. It is stated in para 5 that an investor, regardless of the nature of its involvement with an entity (the investee), must determine whether it is a parent by assessing whether it controls the investee. Paragraph 6 stipulates that an investor controls an investee when it is exposed or

has rights to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee.

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

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

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

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

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

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

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

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

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

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

Example – Dividends and interest paid by a REIT

Facts:

REIT A paid a dividend of R200 000 and interest of R19 800 000 on debentures forming part of linked units to its linked-unit holders on 31 March 2017. The linked units in REIT A are held equally by residents and non-residents.

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

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

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

Dividends tax

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

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

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

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

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

Dividends tax

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

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

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

Section 12Q(3) provides that the rate of dividends tax in s 64E⁹⁰ that is paid by an international shipping company on the amount of a dividend derived from international shipping income must not exceed 0% of the amount of that dividend. The amount of a dividend derived from any other income of an international shipping company is liable to dividends tax at the rate of 20% under s 64E(1).

⁹⁰ This reference should be s 64E(1).

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

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

‘ “[b]international shipping company” means a company that is a resident that holds a share or shares in one or more South African ships that are utilised in international shipping;’⁹¹

‘ “[b]international shipping income” means the receipts and accruals of a person derived from international shipping;’

‘ “South African ship” means a ship which is registered in the Republic in accordance with Part 1 of Chapter 4 of the Ship Registration Act, 1998 (Act No. 58 of 1998).’⁹²

In *Western Platinum Ltd v C: SARS*⁹³ the Supreme Court of Appeal had to decide in what circumstances interest may be characterised as ‘income derived from mining operations’. The court confirmed the finding of the court *a quo* that in order to qualify as mining income, the income had to be directly connected to the mining source. The same test should be applied to determine whether income derived by an international shipping company is income derived from international shipping and therefore ‘international shipping income’.

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

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

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

‘Total amount of dividend paid by international shipping company x international shipping income net of expenses / total income net of expenses’

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

‘Total amount of dividend paid by international shipping company x other income not directly connected to the international shipping source net of expenses / total income net of expenses’

Example – Dividend paid by an international shipping company

Facts:

Company A is an international shipping company that derived net income from international shipping of R100 million net of expenses and interest of R10 million net of expenses, not directly connected to its international shipping source, during its 2017 year of assessment ending on 31 March. Company A paid a dividend of R5 million on 31 March 2017 to holders of its shares that are all residents and natural persons.

⁹¹ Under s 15(1)(a) of the Ship Registration Act 58 of 1998 the property in a ship is divided into 64 shares for the purposes of the registration of a ship.

⁹² The definition of ‘South African ship’ was substituted by s 27 of the Taxation Laws Amendment Act 25 of 2015 with effect from date of promulgation, namely, 8 January 2016.

⁹³ [2004] 4 All SA 611 (SCA), 67 SATC 1.

Result:

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

'Total amount of dividend paid by international shipping company × net income from international shipping / total income net of expenses'

R5 million × R100 million / R110 million = R4 545 455.

Dividends tax at 0% = nil.

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

'Total amount of dividend paid by international shipping company × interest income / total income net of expenses'

R5 million × R10 million / R110 million = R454 545.

Dividends tax at 20% = R90 909,00.

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

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

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

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

A listed foreign company will be liable to account for dividends tax only if the relevant share is listed on the JSE or another exchange licensed under s 9 of the Financial Markets Act (essentially a dual listing). The JSE, ZARX (Pty) Ltd and 4 Africa Exchange (Pty) Ltd are the only exchanges currently licensed under s 9 of the Financial Markets Act.⁹⁴

A resident company listed on the JSE pays a dividend one business day after the 'record date'.⁹⁵

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

Facts:

Company E Ltd declared a dividend in cash of R100 000 on 7 February 2017, payable to holders of shares registered on Friday 24 February 2017 (record date). The dividend was paid to holders of shares on Monday 27 February 2017, the next business day.

Result:

Under s 64E(2)(a)(i) the dividend is deemed to be paid on the date on which the dividend is paid by Company E Ltd, namely, 27 February 2017.

⁹⁴ The Financial Services Board Press Release dated 1 September 2016 announced that ZARX (Pty) Ltd and 4 Africa Exchange (Pty) Ltd had been granted exchange licences with conditions.

⁹⁵ Schedule 18 to the JSE Limited Listings Requirements.

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

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

- is paid; or
- becomes due and payable.

In *Marra Developments Ltd v BW Rofe (Pty) Ltd* it was held that –⁹⁶

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

A delay may exist between –

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

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

Paid

An amount can be paid in a variety of ways, including in cash, in kind, in the form of set-off or by crediting a loan account. There is generally little difficulty in determining the date of payment when the dividend is paid in cash. However, the date of payment can be more difficult to establish when payment is in a form other than cash. ITC 1688⁹⁷ set out some useful principles for determining the date of payment when payment is in the form of set-off, cheque or loan account.

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

In delivering his judgment Galgut J stated the following about the nature of payments generally:⁹⁸

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

Payment can of course be made other than in cash or by cheque. There are a number of possibilities. To take but one, it might happen for example that a shareholder owes his company money, and that the company thereafter becomes indebted to the shareholder by

⁹⁶ (1977) 3 ACLR 185 CA (NSW).

⁹⁷ (1999) 62 SATC 478 (N).

⁹⁸ At 481.

the declaration of a dividend. In such a case the company may elect to effect a set-off, provided of course all of the other requisites for a set-off are present. One such requisite is that both debts must be fully due. In such a case the shareholder would have no choice because, as was said in *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 472B-C, set-off operates *ipso jure*,⁹⁹ and it is effective from the date upon which the parties became mutually indebted to each other. It would therefore operate without the shareholder's consent, and what is more it would operate immediately upon the declaration of the dividend. If the debt owing by the shareholder is recorded in a loan account with the company, then the set-off will be recorded by crediting the taxpayer's loan account in the amount concerned.

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

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

In summary, the court held that payments in a form other than cash, cheque¹⁰⁰ or set-off can discharge a debt only with the creditors consent. Based on the facts of the case the court found that this took place when the respective resolutions were passed and not when the physical crediting of the loan account took place and accordingly found in favour of the appellant.

In concluding the court stated the following:¹⁰¹

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

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

⁹⁹ By operation of law.

¹⁰⁰ Subject to certain qualifications not relevant to the decision.

¹⁰¹ At 482.

Due and payable

The declaration of a dividend creates a debt owing to a holder of a share. Such a debt arises out of a formal act performed by a company.¹⁰² A dividend declared by a company that is not listed is generally due on the date on which the dividend is declared.

It has been held that the word 'payable' can have different meanings. In *CIR v Janke*¹⁰³ Stratford J quoted¹⁰⁴ the judgment of Searle J in *Stafford v Registrar of Deeds*:¹⁰⁵

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

In *Singh v C: SARS* Olivier JA stated that –¹⁰⁶

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

An amount may be due under a contract (*dies credit*) but not payable (*dies venit*). An amount will be payable only when the time for payment arrives. For an amount to be 'due and payable' the amount must not only be owing, but a person must have the right to claim payment of it.¹⁰⁷

Example 1 – Date on which dividend is deemed to be paid

Facts:

Company F, an unlisted company, declared a dividend of R50 000 on 31 March 2017, payable to holders of its shares on 15 April 2017. The dividend was actually paid to the holders of shares on 18 April 2017.

Result:

Under s 64E(2)(a)(ii) the dividend is deemed to be paid by Company F on the earlier of the date on which the dividend is paid (18 April 2017) or becomes due and payable (15 April 2017). The dividend is therefore deemed to be paid on 15 April 2017.

Example 2 – Date on which dividend is deemed to be paid

Facts:

Company A, an unlisted company, declared a dividend of R200 000 on 31 March 2017 payable to holders of its shares on 31 May 2017. The dividend declaration was cancelled on 29 May 2017.

Result:

The dividend became due and payable on 31 May 2017 but was cancelled before that date by Company A. Dividends tax can therefore not be levied on the amount of the dividend which was cancelled on 29 May 2017.

¹⁰² *Boyd v CIR* 1951 (3) SA 525 (A), 17 SATC 366 at 377; *South African Iron and Steel Industrial Corp Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd & others* 1993 (4) SA 705 (NMH) at 711 and 713.

¹⁰³ 1930 AD 474, 4 SATC 269.

¹⁰⁴ At SATC 276.

¹⁰⁵ 1913, C.P.D. 329.

¹⁰⁶ 2003 (4) SA 520 (SCA), 65 SATC 203 at 216.

¹⁰⁷ L Mitchell 'Cash Consideration Only' (2005) 19 *Tax Planning* 84.

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

Company M, an unlisted company, declared a dividend of R500 000 on 10 May 2017, payable to holders of its shares on 31 May 2017. Owing to cash flow problems, the dividend was paid by Company M to the holders of shares only on 30 June 2017.

Result:

Under s 64E(2)(a)(ii) the dividend is deemed to have been paid on the earlier of the date on which it is paid (30 June 2017) or the date on which the dividend becomes due and payable (31 May 2017). The dividend is therefore deemed to be paid on 31 May 2017.

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

Company C, an unlisted company, declared a dividend of R100 000 on 30 June 2016, payable to D, the sole holder of its shares, on 29 July 2016. On 31 August 2016 Company C paid the dividend by crediting D's loan account with R100 000.

Result:

Under s 64E(2)(a)(ii) the dividend is deemed to be paid on the earlier of the date on which the dividend is paid (31 August 2016) or the date on which the dividend becomes due and payable (29 July 2016). The dividend is thus deemed to be paid on 29 July 2016.

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

To the extent that a dividend consists of a distribution of an asset *in specie*, it is deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable (see 3.2.1 for a discussion of the words 'paid' and 'due and payable').

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

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

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

On 30 August 2016 the directors of Company A approved the distribution of assets *in specie* to holders of shares in the company and determined that the assets were to be transferred to those holders on 30 September 2016. The assets were transferred on 4 October 2016.

Result:

The dividend paid by Company A consists of the distribution of an asset *in specie*. Under s 64E(2)(b) the dividend is deemed to be paid by Company A on the earlier of the date on which the dividend is paid (4 October 2016 – the date the assets were transferred) or becomes due and payable (30 September 2016 – the date that the assets were due to be transferred). The dividend became due and payable on 30 September 2016 but was paid only on 4 October 2016. The dividend is therefore deemed to be paid on 30 September 2016.

3.3 Amount of distribution of an asset *in specie* [s 64E(3)]**3.3.1 A financial instrument listed on a recognised exchange [s 64E(3)(a)]**

The amount of a dividend *in specie* consisting of the distribution of a financial instrument¹⁰⁸ which is listed on a recognised exchange¹⁰⁹ and for which a price is quoted on that exchange, is deemed to be equal to the ruling price of that financial instrument on that recognised exchange at close of business on the last business day before the date that the dividend is deemed to be paid.

Example – Amount of the distribution of an asset *in specie* – Financial instrument**Facts:**

Company A, a resident, holds shares in Company B, a listed company. Company A declared a dividend on 3 June 2016 consisting of the distribution on 17 June 2016 of 100 000 shares held by Company A in Company B. Company A transferred the shares on Friday 17 June 2016. The ruling price per share was R3 on 3 June 2016, R2,98 on 15 June 2016 and R2,99 on 17 June 2016. Tuesday 16 June 2016 was a public holiday.

Result:

The dividend paid by Company A consists of the distribution of an asset *in specie*. The dividend is deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable [s 64E(2)(b)]. The dividend was due and payable on 17 June 2016 and was also paid on that date.

The amount of the dividend is equal to the ruling price of the shares on the last business day before the date that the dividend is deemed to be paid, that is the ruling price on Wednesday 15 June 2016. The amount of the dividend paid by Company A is R298 000 (100 000 shares × R2,98).

3.3.2 Other assets [s 64E(3)(b)]

The amount of a dividend declared and paid by a company that is a resident and which consists of a distribution of an asset *in specie* other than an asset referred to in s 64E(3)(a), namely, certain financial instruments (see 3.3.1), is deemed to be equal to the market value of the asset on the date that the dividend is deemed to be paid.

When a resident company sells an asset at less than its market value to a person in respect of a share in the company, the difference between the market value and the selling price of the asset will constitute a dividend for dividends tax purposes.

Special rules apply under s 64E(4)(b) to determine the amount of a dividend that is deemed to have been paid when a debt owed by specified parties to a company has arisen by virtue of a share held in that company (see 3.4.2).

¹⁰⁸ The term 'financial instrument' is defined in s 1(1).

¹⁰⁹ As defined in para (1) of the Eighth Schedule.

Example 1 – Amount of the distribution of an asset *in specie* – Other assets*Facts:*

On 30 August 2016 the directors of Company A approved the distribution of assets *in specie* to holders of shares in the company and determined that the assets were to be transferred to those holders on 30 September 2016. The assets were transferred on 30 September 2016. The market value of the assets was R100 000 on 30 August 2016 and R90 000 on 30 September 2016.

Result:

Under s 64E(2)(b) the dividend is deemed to be paid by Company A on the earlier of the date on which the dividend is paid or becomes due and payable. The dividend became due and payable and was also paid on 30 September 2016. Under s 64E(3)(b) the amount of the dividend is deemed to be equal to the market value of the assets on the date that the dividend is deemed to have been paid, being 30 September 2016. The amount of the dividend is therefore R90 000.

Example 2 – Amount of the distribution of an asset *in specie* – Other assets*Facts:*

On 31 May 2017 the liquidator of Company Z distributed assets with a market value of R500 000 to holders of shares in the company.

Result:

Under s 64E(2)(b) the dividend is deemed to be paid by Company Z on the date of the distribution of the assets *in specie* to the holders of shares, namely, 31 May 2017. Under s 64E(3)(b) the amount of the dividend is deemed to be R500 000 which is equal to the market value of the assets on 31 May 2017, the date the dividend is deemed to have been paid.

3.4 Company deemed to have paid a dividend – Amount owing on a debt [s 64E(4)]**3.4.1 Company deemed to have paid a dividend – Amount owing on a debt [s 64E(4)(a)]**

A company is deemed to have paid a dividend if an amount is owing to that company during any year of assessment by –

- a person (other than a company) that is a resident and a connected person in relation to that company [s 64E(4)(a)(i)]; or
- a person (other than a company) that is a resident and a connected person in relation to the person mentioned above [s 64E(4)(a)(ii)],

if that debt arises by virtue of any share held in that company by the person who is a connected person in relation to that company referred to in s 64E(4)(a)(i).¹¹⁰

The word 'debt' is not defined in the Act. It is described as follows in *The Shorter Oxford English Dictionary on Historical Principles*:¹¹¹

[D]ebt 1 Something owed or due; something (as money, goods, or service) which one person is under an obligation to pay or render to another. **2** A liability or obligation to pay or render something; the condition of being so liable or obligated.'

¹¹⁰ See Interpretation Note 67 'Connected Persons' for a discussion of the definition of 'connected person'.

¹¹¹ A Stevenson 6 ed (2007) Oxford University Press in vol 1.

A debt owing to a company will be deemed to be a dividend paid by the company only if the debt arose by virtue of a share held in the company by a person referred to in s 64E(4)(a)(i). It follows that an amount owing to a company will not be subject to dividends tax if the debt arose for a business or a commercial reason and not 'by virtue of a share held' in the company by a person referred to in s 64E(4)(a)(i). Whether or not a debt arose by virtue of a share held in a company by a person referred to in s 64E(4)(a)(i) will depend on the facts of each case.

The company to which the debt is owed may be a resident or a non-resident. However, an amount owing by a resident connected person to a foreign company in the circumstances described above is not subject to dividends tax. No liability for dividends tax arises because the amount is deemed to be a distribution of an asset *in specie* under s 64E(4)(b)(i) (see 3.4.2) and does not constitute a 'dividend' as defined in s 64D. Such a debt may, however, be subject to the transfer pricing rules in s 31 which apply to tax payable on international transactions which are not conducted under the arm's length principle.

Example 1 – Deemed dividend – Amount owing on a debt

Facts:

Company K granted an interest-free loan of R100 000 to Individual L, a resident. Individual L holds 60% of the equity shares in Company K.

Result:

Individual L is a connected person in relation to Company K under para (d)(iv) of the definition of 'connected person' in s 1(1). Under s 64E(4)(a) and (b)(i) Company K is deemed to have paid a dividend *in specie* equal to the amount determined under s 64E(4)(b)(ii).

Example 2 – Deemed dividend – Amount owing on a debt

Facts:

Company A advanced an interest-free loan of R50 000 to B. B is C's sister. C holds 20% of the equity shares in Company A. B and C are residents.

Result:

B and C are connected persons in relation to each other under para (a)(i) of the definition of 'connected person' in s 1(1). C is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person'. Under s 64E(4)(a) and (b)(i) Company A is deemed to have paid a dividend *in specie* equal to the amount determined under s 64E(4)(b)(ii).

Example 3 – Deemed dividend – Amount owing on a debt

Facts:

Trust A holds 100% of the member's interest in ABC Close Corporation (ABC CC). Individual D is a discretionary beneficiary of Trust A and Trust B. ABC CC made an interest-free loan to Trust B.

Result:

Under s 64E(4)(a) ABC CC will be deemed to have paid a dividend if an amount is owing to it on a debt by a person who is a connected person in relation to a person who is a connected person in relation to ABC CC. Trust A is a connected person in relation to ABC CC under para (d)(vi)(aa) of the definition of 'connected person' in s 1(1). Trust A and Trust B are connected persons in relation to each other under para (b)(ii) of the definition of 'connected person'. ABC CC is deemed to have paid a dividend under s 64E(4)(a), since it granted an interest-free loan to a person (Trust B) that is a connected person in relation to a person (Trust A) that is a connected person in relation to ABC CC. The amount of the dividend, which is deemed to be a dividend *in specie*, is determined under s 64E(4)(b)(ii).

An amount owing by a company that is a resident to another company that is a resident on a debt which arose by virtue of a share, is not deemed to be a dividend paid by the company that provided the debt under s 64E(4)(a), since that provision applies only if the debtor is not a company. This outcome is in line with the exemption from dividends tax under s 64F(1)(a) and s 64FA(1)(a) which exempts a dividend that is paid to a company that is a resident (see 4.1.1).

An amount owing by a connected person who is not a resident (including a company) to another company that is a resident on a debt which arose by virtue of a share, is not deemed to be a dividend paid by the company under s 64E(4)(a) because the provision applies only to connected persons who are resident. The debt may, however, be subject to the application of s 31 which applies to international transactions which are not based on the arm's length principle.

3.4.2 Nature and amount of dividend deemed to have been paid [s 64E(4)(b)]**a. Nature of dividend deemed to have been paid [s 64E(4)(b)(i)]**

The amount of a dividend that is deemed to have been paid under s 64E(4)(a) (see 3.4.1), is deemed to consist of a distribution of an asset *in specie*.

When the deemed distribution is by a company that is a resident, that company is liable for dividends tax under s 64EA(b) (see 3.7.2).

b. Amount of dividend deemed to have been paid [s 64E(4)(b)(ii)]

The amount of a dividend that is deemed to have been paid under s 64E(4)(a) (see 3.4.1) is deemed to be equal to the greater of –

- the market-related interest (essentially this means interest determined at the 'official rate of interest' as defined in para 1 of the Seventh Schedule) in respect of that debt, less the amount of interest that is payable to that company on that debt for that year of assessment; or
- nil (when the interest that is payable exceeds the market-related interest).

A dividend is deemed to have been paid for each year of assessment for which non-market-related interest is payable in respect of the debt (see 3.4.4 for the meaning of 'market-related interest').

Example 1 – Amount of dividend deemed to have been paid**Facts:**

Company G's year of assessment ends on the last day of February. Company G advanced a loan of R1 million on 1 March of a specific year to Individual P, a resident and the sole holder of its shares, at a rate of interest of 6%. The loan is repayable after two years. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule is 10% in year 1 and 9% in year 2.

Result:

Individual P is a connected person in relation to Company G under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company G is deemed to have paid dividends under s 64E(4)(a), since an amount is owing by a resident connected person in respect of a debt which arose by virtue of that connected person's shareholding in Company G. The amount of those dividends is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividends deemed to have been paid will be R40 000 [R1 million × 4% (10% – 6%)] in year 1 and R30 000 [R1 million × 3% (9% – 6%)] in year 2 under s 64E(4)(b)(ii).¹¹²

Company G is liable for dividends tax under s 64EA(b). Dividends tax payable by Company G on the dividend *in specie* is R8 000 (R40 000 × 20%) in year 1 and R6 000 (R30 000 × 20%) in year 2.

Note:

The dividends will be exempt from dividends tax under s 64F(1)(f) if Individual P is also an employee and the deemed dividend has been taxed as a fringe benefit in the employee's hands under para (i) of the definition of gross income in s 1(1) and paras 2(f) and 11 of the Seventh Schedule (see 4.1.12 d.).

Example 2 – Amount of dividend deemed to have been paid**Facts:**

Company H's year of assessment ends on the last day of February. Company H advanced a loan of R20 million on 1 March of a specific year at a rate of interest of 2% to LJ Trust, which was formed in South Africa. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule was 8%. The loan was repaid on 1 March of the subsequent year. LJ Trust and Company H are connected persons in relation to each other. The loan was advanced to LJ Trust by virtue of the shares LJ Trust held in Company H.

Result:

Company H is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid under s 64E(4)(b)(ii)¹¹³ is R1,2 million [R20 million × 6% (8% – 2%)]. Dividends tax payable by Company H on the dividend *in specie* is R240 000 (R1,2 million × 20%).

Example 3 – Amount of dividend deemed to have been paid**Facts:**

Company A's year of assessment ends on the last day of February. Company A advanced an interest-free loan of R2 million on 1 March 2012 to Individual B, the sole holder of its shares who was a resident. The loan was advanced by virtue of Individual B's holding of shares. The loan was repaid on 28 February 2013. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule was 6,5% for the year of assessment ended on 28 February 2013 and that the loan did not attract STC on 1 March 2012.

¹¹² Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

¹¹³ Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

Result:

Individual B is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company A is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid is R119 167 $[(R2 \text{ million} \times 6,5\%) \times 11 / 12]$ under s 64E(4)(b)(ii).¹¹⁴ Dividends tax payable by Company A on the dividend *in specie* is R17 875,05 $(R119 167 \times 15\%)$.

Note:

Dividends tax is calculated for 11 months, since dividends tax came into operation only on 1 April 2012.

Example 4 – Amount of dividend deemed to have been paid**Facts:**

Company B's year of assessment ends on 31 May. Company B advanced a loan of R1 million on 1 June 2016 to Individual C, who is a connected person in relation to Company B and a resident. The loan was repaid on 31 May 2017. The loan carried interest at 6,5% from 1 June 2016 to 28 February 2017 but was interest-free for the period 1 March 2017 to 31 May 2017. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule was 6,5% for the full period of the loan. Individual C holds 25% of the equity shares in Company B and the loan arose by virtue of the holding of shares.

Result:

Company B is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid is R16 250 $[\{(R1 \text{ million} \times (6,5\% - 6,5\%) \times 9 / 12\}^{115} + \{[R1 \text{ million} \times (6,5\% - 0\%)] \times 3 / 12\}]$ under s 64E(4)(b)(ii).¹¹⁶ Dividends tax payable by Company B on the dividend *in specie* is R3 250,00 $(R16 250 \times 20\%)$.

Example 5 – Amount of dividend deemed to have been paid**Facts:**

Company M's year of assessment ends on the last day of February. Company M advanced a loan of R2 million on 1 March 2015 at a rate of interest of 8,5% to Trust N, the sole holder of its shares and a resident. The loan, which arose by virtue of Trust N's holding of shares in Company M, was repaid on 29 February 2016. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule was 6,5% for the full period of the loan.

Result:

Trust N is a connected person in relation to Company M under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company M is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

¹¹⁴ Section 64E(4)(b)(i) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

¹¹⁵ That is, a nil deemed dividend for the period during which the loan carried interest at 6,5%.

¹¹⁶ Section 64E(4)(b)(ii) deems the amount to be the greater of the amount as calculated in the example and nil. The amount calculated is therefore the amount of the dividend.

The amount of the dividend deemed to have been paid under s 64E(4)(b)(ii) is the greater of –

- (R40 000) [(R2 million × 6.5%) – (R2 million × 8.5%)]; or
- nil.

Dividends tax payable by Company M is nil.

3.4.3 Deemed date of payment of deemed dividend [s 64E(4)(c)]

A dividend that is deemed to have been paid by a company under s 64E(4)(a) is deemed under s 64E(4)(c) to have been paid on the last day of the year of assessment of the company during which such debt was owing to that company.

Example – Deemed date of payment of deemed dividend

Facts:

Company K's year of assessment ends on the last day of February. Individual T holds 60% of the equity shares in Company K. Company K made an interest-free loan to Individual T, a resident, of R100 000 on 31 August 2016. The loan was advanced as a result of Individual T's significant holding of shares in Company K. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule was 6%. The loan was repaid on 28 February 2017.

Result:

Individual T is a connected person in relation to Company K under para (d)(iv) of the definition of 'connected person' in s 1(1).

Company K is deemed to have paid a dividend under s 64E(4)(a). The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i).

The amount of the dividend deemed to have been paid is R3 000 ($R100\ 000 \times 6\% \times 6 / 12$) under s 64E(4)(b)(ii).

The deemed dividend of R3 000 is deemed to have been paid on 28 February 2017 under s 64E(4)(c), which is the last day of Company K's year of assessment during which the deemed dividend was determined.

Dividends tax of R600 ($R3\ 000 \times 20\%$) was payable by Company K on the dividend *in specie* on or before 31 March 2017 under s 64K(1)(b) (see 7.1.2), since the company will be liable for dividends tax under s 64EA(b) (see 3.7.2).

3.4.4 Meaning of 'market-related interest' [s 64E(4)(d)]

For purposes of s 64E(4), 'market-related interest' in relation to any debt owed to a company means the amount of interest that would have been payable to that company on the amount owing to that company for a period during a year of assessment had interest for that period been payable at the 'official rate of interest' as defined in para (1) of the Seventh Schedule.

The term 'official rate of interest' is defined in para 1 of the Seventh Schedule as follows:¹¹⁷

'[O]fficial rate of interest' means—

- (a) in the case of a debt which is denominated in the currency of the Republic, a rate of interest equal to the South African repurchase rate plus 100 basis points; or
- (b) in the case of a debt which is denominated in any other currency, a rate of interest that is the equivalent of the South African repurchase rate applicable in that currency plus 100 basis points:

Provided that where a new repurchase rate or equivalent rate is determined, the new rate of interest applies for the purposes of this definition from the first day of the month following the date on which that new repurchase rate or equivalent rate came into operation.'

Table – Official rates of interest

Date from	Date to	Rate (%)
1 March 2011	31 July 2012	6,5
1 August 2012	31 January 2014	6,0
1 February 2014	31 July 2014	6,5
1 August 2014	31 July 2015	6,75
1 August 2015	30 November 2015	7
1 December 2015	31 January 2016	7,25
1 February 2016	31 March 2016	7,75
1 April 2016	31 July 2017	8
1 August 2017	Until change in repo rate	7,75

3.4.5 Debt owing previously subject to STC [s 64E(4)(e)]

An amount owing to a company by a qualifying connected person in respect of a debt (see 3.4.1) will not be deemed to be a dividend for purposes of s 64E(4)(a) to the extent that the amount was deemed to be a dividend that was 'subject to' STC. Thus, while an amount may continue to be owing by a qualifying connected person to a company subsequent to the introduction of dividends tax at an interest rate that is less than the prevailing market-related interest rate, that debt will not trigger a liability for dividends tax if the amount of the debt was 'subject to' STC before its replacement with dividends tax.

A deemed dividend could have arisen for STC purposes under s 64C(2)(g) when a company made a loan or granted an advance to a holder of shares or to a connected person in relation to that holder at a rate of interest less than the 'official rate of interest' as defined in para 1 of the Seventh Schedule. The amount of the deemed dividend for STC purposes would have been the capital amount of the loan. STC would have been levied under s 64B(2) on the amount of the deemed dividend.

To qualify for the exclusion from dividends tax, the amount of the debt must have been 'subject to' STC. The meaning of 'subject to' is not defined in the Act. While these words have also not received judicial consideration in South Africa, it is evident from an analysis of foreign case law¹¹⁸ that what is required is that STC must have been imposed on the amount of the debt. It is not sufficient that the amount owing was within the scope of STC but because of an exemption that applied in relation to the amount owing, no STC was payable. The deemed dividend could, for example, have been exempt from STC under s 64C(4) or the net amount of the dividend determined under s 64B(3) could have been nil because of dividends received by or that accrued to the company during the relevant dividend cycle.

¹¹⁷ Paragraphs (a) and (b) of the definition were substituted by s 93(b) of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016, to substitute the word 'loan' with 'debt'.

¹¹⁸ See *Paul Weiser v HM Revenue and Customs* [2012] UKFTT 501 (TC) and L Kruger 'Interest-free and Low-interest Shareholder Loans' (September 2014) 5 *Business Tax and Company Law Quarterly* 21.

Example 1 – Amount of debt owing previously subject to STC*Facts:*

Company C's year of assessment ends on 31 March. Company C granted an interest-free loan of R2 million to the sole holder of its shares, Individual B, on 1 April 2011. The loan is repayable only in 10 years' time. The loan was deemed to be a dividend under s 64C(2)(g) and STC of R200 000 (R2 million × 10%) was levied on 1 April 2011 which is the date that the loan was made available under s 64C(6)(e). Assume an 'official rate of interest' of 6%.

Result:

Under s 64E(4)(e) Company C is deemed not to have paid a dividend under s 64E(4)(a), since the amount owing of R2 million was deemed to be a dividend declared by Company C under s 64C(2)(g) that was subject to STC.

Example 2 – Amount of debt owing previously subject to STC*Facts:*

Company D's year of assessment ends on 31 March. Company D granted an interest-free loan of R2 million to the sole holder of its shares, Individual A, on 1 April 2011. The loan is repayable only in 10 years' time. The loan was deemed to be a dividend under s 64C(2)(g) and potentially fell within the ambit of STC on 1 April 2011, which is the date that the loan was made available under s 64C(6)(e). However, no STC was payable because the loan reduced the market value of all the assets of the company to an amount that was less than the liabilities of the company and the exemption in s 64C(4)(c) applied. Assume an 'official rate of interest' of 6%.

Result:

Under s 64E(4)(a) Company D is deemed to have paid a dividend. Section 64E(4)(e) does not apply to change this outcome, since the amount owing of R2 million was not 'subject to' STC. The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i). The amount of the dividend deemed to have been paid is R120 000 [R2 million × (6% - 0%)] The deemed dividend is deemed to have been paid on 31 March 2013. A deemed dividend must be determined for each year of assessment until the loan is repaid or interest equal to or greater than the official rate of interest is charged.

3.5 Amount of dividend denominated in a currency other than the currency of South Africa [s 64E(5)]

An amount of a dividend denominated in any currency other than the rand, must be translated to rand by applying the spot rate applicable at the time that the dividend is paid. The term 'spot rate' is defined in s 1(1) as follows:

‘ “[S]pot rate” means the appropriate quoted exchange rate at a specific time by any authorised dealer in foreign exchange for the delivery of currency;’

Example – Amount of dividend denominated in a currency other than the currency of South Africa*Facts:*

Company K is a foreign company and its shares are listed on the JSE. Company K paid a dividend of \$100 000 on those shares to Individual L, a resident, on 3 September 2016. The spot rate on 3 September 2016 was \$1 = R13,6768.

Result:

The dividend is deemed to have been paid by Company K on 3 September 2016 under s 64E(2)(a)(i). Under s 64E(5) the amount of the dividend paid on 3 September 2016 is R1 367 680 ($\$100\ 000 \times 13,6768$).

3.6 Company and regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)]

3.6.1 Company deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)(a)]

A company that pays a dividend to any person and that withholds dividends tax from that payment under s 64G(1) is, for purposes of dividends tax, deemed to have paid the amount so withheld to that person. Dividends tax is therefore levied on and withheld from the gross amount of the dividend.

For normal tax purposes the gross amount of the dividend, which includes the amount of dividends tax withheld, is included in the beneficial owner's gross income¹¹⁹ notwithstanding that the beneficial owner does not physically receive the full amount of the dividend declared by the company. The full amount is not received because of the withholding of dividends tax by the company from the gross dividend payable.

Consequently, assuming the beneficial owner is subject to dividends tax at the rate of 20%, the beneficial owner will receive only 80% of the amount of the dividend after dividends tax is withheld by the company. The full amount of the dividend must nevertheless be included in the beneficial owner's gross income.

Example – Company deemed to have paid the amount of dividends tax withheld to the beneficial owner

Facts:

Company A declared a cash dividend of R100 000 to Individual B. Company A withheld dividends tax of R20 000 ($R100\ 000 \times 20\%$) from the dividend payable to Individual B under s 64G(1) and paid the net amount of the dividend of R80 000 ($R100\ 000 - R20\ 000$) to Individual B.

Result:

Under s 64E(6)(a) Company A is deemed to have paid the dividends tax withheld of R20 000 to Individual B. Dividends tax at the rate of 20% was withheld from the gross amount of the dividend. The total amount of the dividend paid to Individual B that is included in Individual B's gross income under para (k) of the definition of 'gross income' is R100 000 (R80 000 actual receipt plus R20 000 dividends tax withheld).

3.6.2 Regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner [s 64E(6)(b)]

A regulated intermediary that makes payment of a dividend to any person and that withholds dividends tax from that payment under s 64H(1) must, for purposes of dividends tax, be deemed to have paid the amount so withheld to that person. Dividends tax is therefore levied on and withheld from the gross amount of the dividend.

For normal tax purposes the gross amount of the dividend, which includes the amount of dividends tax withheld, is included in the beneficial owner's gross income¹²⁰ notwithstanding

¹¹⁹ Paragraph (k) of the definition of 'gross income' in s 1(1).

¹²⁰ Paragraph (k) of the definition of 'gross income' in s 1(1).

that the beneficial owner does not physically receive the full amount of the dividend declared by the company. The full amount is not received because of the withholding of dividends tax by the regulated intermediary from the gross dividend payable.

Consequently, assuming the beneficial owner is subject to dividends tax at the rate of 20%, the beneficial owner will receive only 80% of the amount of the dividend after dividends tax is withheld by the regulated intermediary. The full amount of the dividend must nevertheless be included in the beneficial owner's gross income.

Example – Regulated intermediary deemed to have paid the amount of dividends tax withheld to the beneficial owner

Facts:

Regulated Intermediary A received a dividend of R100 000 from Company B which it is required to pay, net of dividends tax, to Individual C. Regulated Intermediary A withheld dividends tax of R20 000 ($R100\ 000 \times 20\%$) from the dividend under s 64H(1) and paid the net amount of the dividend of R80 000 ($R100\ 000 - R20\ 000$) to Individual C.

Result:

Under s 64E(6)(b) Regulated Intermediary A is deemed to have paid the dividends tax withheld of R20 000 to Individual C. Dividends tax at the rate of 20% was withheld from the gross amount of the dividend. The total amount of the dividend paid to Individual C that is included in Individual B's gross income under para (k) of the definition of 'gross income' is therefore R100 000 (R80 000 actual receipt plus R20 000 dividends tax withheld).

3.7 Liability for dividends tax (ss 8F(2), 8FA(2), 9H(3)(c)(iii), 24BA(3)(b), 31(3), 64E(4)(b)(i) and 64EA)

Subject to s 64J(7), the following persons are liable for dividends tax:

- A beneficial owner of a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie* [s 64EA(a)].
- A company that is a resident that declares and pays a dividend, to the extent that the dividend consists of a distribution of an asset *in specie* [s 64EA(b)].

See 6.1.7 for a discussion of s 64J(7) which deals with the failure to withhold dividends tax owing to an inaccurate notification of an STC credit.

3.7.1 Dividend in cash – Beneficial owner liable for dividends tax [s 64EA(a)]

A beneficial owner of a dividend is, to the extent that the dividend does not consist of a distribution of an asset *in specie*, liable for dividends tax on that dividend notwithstanding that the dividends tax is withheld by the company declaring the dividend or the regulated intermediary (see Chapter 5). The incidence of dividends tax on a cash dividend thus falls on the beneficial owner and not the company paying the dividend. This principle is important for a non-resident beneficial owner wishing to claim a tax credit for the dividends tax withheld in South Africa in the non-resident beneficial owner's country of residence (assuming this is catered for by the tax legislation of the beneficial owner's country of residence or under a tax treaty) and for purposes of enabling qualifying beneficial owners to claim exemption from dividends tax or a reduced rate under a tax treaty.

3.7.2 Dividends *in specie* – Company declaring and paying dividend liable for dividends tax [ss 8F(2), 8FA(2), 9H(3)(d)(iii), 24BA(3)(b), 31(3), 64E(4)(b)(i) and 64EA(b)]

A company that is a resident that declares and pays a dividend is, to the extent that the dividend consists of a distribution of an asset *in specie*, liable for dividends tax on that

dividend. The incidence of dividends tax is thus the same as under STC for a dividend *in specie*. See **a. – f.** below for examples of deemed distributions of assets *in specie*.

A foreign company that declares and pays a dividend that consists of a distribution of an asset *in specie* is not liable for dividends tax on that dividend, since a distribution of this nature is not included in the definition of 'dividend' in s 64D for dividends tax purposes (see **2.3.2**). Such a foreign dividend constitutes gross income of the beneficial owner and is subject to normal tax but may be –

- exempt in full under s 10B(2)(a), (c) or (e);¹²¹ or
- in any other case, partially exempt under s 10B(3).

a. Debt owing to a company [s 64E(4)(b)(i)]

The amount of a dividend that is deemed to have been paid by a company under s 64E(4)(a) on a debt owing to that company (see **3.4.1**), is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i) (see **3.4.2**). The company that is deemed to have paid a dividend under s 64E(4)(a) is liable for dividends tax on that dividend.

b. A company that ceases to be a resident or that becomes a headquarter company [s 9H(3)(c)(iii)]

Section 9H(3)(c)(iii) provides that a company must, on the date immediately before the day on which it ceased to be a resident or became a headquarter company, for the purposes of s 64EA(b), be deemed to have declared and paid a dividend that consists solely of a distribution of an asset *in specie* to the persons holding shares in that company in accordance with their effective interests in the shares in the company. The amount of the distribution of the asset *in specie* is deemed to be equal to –

- the market value of all the shares in that company on that date,
- less the sum of the CTC of all the classes of shares in the company as at that date.

Immovable property in South Africa, assets of a permanent establishment in South Africa and certain securities derived from employment are excluded from the calculation above under s 9H(4)¹²².

Example – Company ceases to be a resident – Company liable for dividends tax

Facts:

Company A ceased to be a resident on 1 June 2017 as a result of transferring its place of effective management to Mauritius on that date. The balance sheet of Company A reflected the following assets and liabilities as at 31 May 2017:

	R
Cash	200 000
Equity shares in companies at market value	3 000 000
Debt owing to Company A	<u>7 000 000</u>
Total assets	<u>10 200 000</u>
Liabilities	6 000 000

Company A's CTC amounted to R1 million.

¹²¹ Section 10B(2)(e) applies to foreign dividends received or accrued on or after 1 April 2014.

¹²² Before 12 December 2013 any interest or right of whatever nature to or in immovable property situated in South Africa, including an interest in immovable property contemplated in para 2(2) of the Eighth Schedule, was excluded under s 9H(4)(b).

Result:

Under s 9H(3)(c)(iii)(aa) the amount of the dividend *in specie* deemed to have been declared and paid by Company A on 31 May 2017 is calculated as follows:

	R
Market value of shares in Company A (10 200 000 – 6 000 000)	4 200 000
Less: CTC	<u>(1 000 000)</u>
Dividend <i>in specie</i> deemed to have been declared and paid by Company A	<u>3 200 000</u>

Under s 64EA(b) Company A is liable for dividends tax of R640 000 (R3,2 million × 20%) and had to pay the amount to SARS by 30 June 2017 under s 64K(1)(b).

c. Transactions under which assets are acquired as consideration for shares issued [s 24BA(3)(b)]

Section 24BA applies when –

- a company issues shares in that company to a person as consideration for an asset acquired from that person; and
- the consideration for that asset, determined as indicated below, is different from the consideration that would have applied had that asset been acquired in exchange for the issue of those shares under a transaction between independent persons dealing at arm's length.

The consideration for the asset must be determined before taking into account any other transaction, operation, scheme, agreement or understanding that directly or indirectly affects that consideration.

When s 24BA applies, s 24BA(3)(b) provides that, notwithstanding para 11(2)(b)¹²³ of the Eighth Schedule, to the extent that the market value of the shares immediately after that issue exceeds the market value of that asset immediately before the disposal, the amount of the excess is, for purposes of dividends tax, deemed to be a dividend as defined in s 64D which –

- consists of a distribution of an asset *in specie*; and
- is paid by the company issuing the shares on the date of that issue.

Section 24BA(3)(b) therefore deems the excess referred to above to –

- be a dividend as defined in s 64D;
- consist of a distribution of an asset *in specie*; and
- be paid by the issuing company on the date of that issue.

Section 24BA(3)(b) does not deem any person to be a recipient of the deemed dividend and, taking the purpose of the provision into account, SARS' view is that the parameters of the deemed dividend are not extended to include a deemed recipient.¹²⁴ See **4.3.3 a.** for the impact this has on possible exemptions from dividends tax under s 64FA(1) and a possible reduction in the rate of dividends tax under s 64FA(2).

Section 24BA does not apply when a company acquires an asset from a person if –

- that company and that person form part of the same group of companies immediately after that company acquires that asset (see **4.3.1** for a discussion of

¹²³ Under para 11(2)(b) of the Eighth Schedule there is no disposal of an asset by a company in respect of the issue of a share in the company.

¹²⁴ *Chotabhai v Union Government & another* 1911 AD 13; *Daud & another v Tanzania Postal Bank* [2008] 2 EA 77 (CAT); *Kuber Tobacco Products (P) Ltd v DCIT* AIT–2009–11–ITAT.

a 'group of companies') or that person holds all the shares in that company immediately after that company acquires that asset; or

- para 38 of the Eighth Schedule applies which deals, amongst other things, with transactions between connected persons not at an arm's length price.¹²⁵

Example – Assets acquired as consideration for shares issued – Deemed dividend *in specie*

Facts:

Company A and Company B are residents who are not connected persons in relation to each other. Company A and Company B entered into an agreement under which Company B acquired an asset from Company A on 28 February 2017 in exchange for the issue of shares by Company B on the same date. The market value of Company A's asset immediately before the transaction was R1 million and the market value of the shares issued by Company B was R3 million immediately after the transaction.

Result:

Under s 24BA(3)(b) the difference between the market value of the asset exchanged and the market value of the shares issued of R2 million (R3 million – R1 million) is, for purposes of dividends tax only, deemed to be a dividend as defined in s 64D. The dividend is deemed to consist of a distribution of an asset *in specie* and is deemed to be paid by Company B on the date of the issue of the shares, namely, 28 February 2017. Company B is liable for dividends tax under s 64EA(b).

The exemption under s 64FA(1)(a) does not apply, since s 24BA does not deem a person to be the recipient or beneficial owner of the deemed dividend.¹²⁶

Note:

Section 24BA would not have applied had Company A and Company B formed part of the same group of companies or if Company A held all the shares in Company B immediately after the transaction [s 24BA(4)].

d. Interest on hybrid debt instruments deemed to be dividends *in specie* [s 8F(2)]

Under s 8F(2)(a) an amount of interest incurred by a company on a hybrid debt instrument is, on or after the date that the instrument becomes a hybrid debt instrument –¹²⁷

- deemed for the purposes of the Act to be a dividend *in specie* declared and paid by that company on the last day of the year of assessment of that company; and
- not deductible under the Act.

Section 8F(2)(b) provides that the amount of interest incurred by a company on a hybrid debt instrument is also deemed for the purposes of the Act to be a dividend *in specie* that is declared and paid in respect of a share on the last day of the year of assessment of the company that incurred the interest to the person to whom the amount accrued.

The amount of the interest that is deemed under s 8F(2)(a) to be a dividend *in specie* declared and paid by the company incurring the interest expense will be liable to dividends tax under s 64E(1). This dividend may qualify for an exemption from dividends tax under s 64FA(1)(a) or (b) or be subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaties are met (see **4.3.1, 4.3.2 and 4.3.3**). The company incurring the interest expense would be liable for dividends tax under s 64EA(b) because the interest expense is deemed to be a dividend *in specie*.

¹²⁵ Section 24BA(4).

¹²⁶ See **4.3.3 a**.

¹²⁷ The term 'hybrid debt instrument' is defined in s 8F(1).

Under s 64K(1)(b) dividends tax must be paid to the Commissioner by the last day of the month following the month during which the dividend is paid by the company. As noted above, the dividend is deemed to have been declared and paid on the last day of the year of assessment of the company during which the interest expense was incurred. The dividends tax, if applicable, must therefore be paid on or before the last day of the first month of the year of assessment following the year of assessment in which the dividend was deemed to be paid.

The amount of interest that accrues to a person and that is deemed to be a dividend *in specie* must be included in the person's gross income under para (k) of the definition of 'gross income' in s 1(1). The deemed dividend *in specie* may qualify for exemption under s 10(1)(k)(i).

Section 8F(3) provides that s 8F does not apply to an instrument under specific circumstances.

Example – Interest on hybrid debt instrument deemed to be a dividend *in specie*

Facts:

Company A incurred interest of R20 million on an instrument evenly during its year of assessment ending on 31 March 2017. On 1 October 2016 the instrument became a 'hybrid debt instrument'.

Result:

Under s 8F(2)(a) interest of R10 million ($R20 \text{ million} \times 6 / 12$) incurred by Company A on the hybrid debt instrument is deemed to be a dividend *in specie* declared and paid by Company A on 31 March 2017. Depending on the facts of the particular case, the interest of R10 million that is deemed to be a dividend *in specie* may be exempt from dividends tax under s 64FA(1)(a) or (b) or subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaties are met. Assuming that the dividend does not qualify for an exemption or a reduction in the rate of dividends tax in this example, the deemed dividend is subject to dividends tax at a rate of 20% under s 64E(1). Company A is liable for dividends tax of R2 million ($R10 \text{ million} \times 20\%$) under s 64EA(b) that must be paid to the Commissioner under s 64K(1)(b) on or before 30 April 2017.

Under s 8F(2)(b) the interest of R10 million is deemed to be a dividend *in specie* that is declared and paid on 31 March 2017 in respect of a share to the person to whom the interest on the hybrid debt instrument accrued. This amount must be included in that person's gross income under para (k) of the definition of 'gross income' in s 1(1). The amount of the interest that is deemed to be a dividend *in specie* may qualify for an exemption under s 10(1)(k)(i).

e. Hybrid interest deemed to be dividends *in specie* [s 8FA(2)]

Under s 8FA(2)(a) an amount of interest incurred by a company, on or after the date that the interest becomes hybrid interest –¹²⁸

- is deemed for the purposes of the Act to be a dividend *in specie* declared and paid by that company on the last day of that year of assessment; and
- not be deductible in terms of the Act.

Section 8FA(2)(b) provides that an amount of hybrid interest incurred by a company is also deemed for the purposes of the Act to be a dividend *in specie* that is declared and paid in respect of a share on the last day of that year of assessment of the company that incurred the interest, to the person to whom that interest accrued.

¹²⁸ The term 'hybrid interest' is defined in s 8FA(1).

The amount of interest deemed under s 8FA(2)(a) to be a dividend *in specie* declared and paid by the company incurring the interest expense will be liable to dividends tax under s 64E(1). This dividend may qualify for an exemption from dividends tax under s 64FA(1)(a) or (b) or be subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and any applicable tax treaty are met (see **4.3.1, 4.3.2 and 4.3.3**). The company incurring the interest expense is liable for dividends tax under s 64EA(b) because the interest expense is deemed to be a dividend *in specie*.

Under s 64K(1)(b) dividends tax must be paid to the Commissioner by the last day of the month following the month during which the dividend is paid by the company. As noted above, the dividend is deemed to have been declared and paid on the last day of the year of assessment of the company during which the interest expense was incurred. The dividends tax, if applicable, must therefore be paid on or before the last day of the first month of the year of assessment following the year of assessment in which the dividend was deemed to be paid.

The amount of interest that accrues to a person and which is deemed to be a dividend *in specie* must be included in the person's gross income under para (k) of the definition of 'gross income' in s 1(1). The deemed dividend *in specie* may qualify for exemption under s 10(1)(k)(i).

Section 8FA(3) provides that s 8FA does not apply to interest owed on an instrument in specific circumstances.

Example – Hybrid interest deemed to be a dividend *in specie*

Facts:

Company X incurred interest of R10 million on an instrument during its year of assessment ending on 31 March 2017. The interest became 'hybrid interest' on 1 October 2016.

Result:

Under s 8FA(2)(a) the hybrid interest of R5 million ($R10 \text{ million} \times 6 / 12$) incurred by Company X is deemed to be a dividend *in specie* declared and paid by Company X on 31 March 2017. Depending on the facts of the particular case the hybrid interest of R5 million that is deemed to be a dividend *in specie* may be exempt from dividends tax under s 64FA(1)(a) or (b) or subject to a reduced rate of tax under s 64FA(2) if the requirements of those sections and applicable tax treaties are met. Assuming that the dividend does not qualify for an exemption or a reduction in the rate of dividends tax in this example, the deemed dividend is subject to dividends tax at a rate of 20% under s 64E(1). Company X is liable for dividends tax of R1 million ($R5 \text{ million} \times 20\%$) under s 64EA(b) that must be paid to the Commissioner under s 64K(1)(b) on or before 30 April 2017.

Under s 8FA(2)(b) interest of R5 million is deemed to be a dividend *in specie* that is declared and paid on 31 March 2017 in respect of a share to the person to whom the hybrid interest accrued. This amount must be included in the person's gross income under para (k) of the definition of 'gross income' in s 1(1). The hybrid interest that is deemed to be a dividend *in specie* may qualify for exemption under s 10(1)(k)(i).

f. Transfer pricing adjustments deemed to be a dividend consisting of a distribution of an asset *in specie* [s 31(3)]

Section 31 applies to any international transaction between connected persons not dealing at arm's length if any person that is a party to that transaction, operation, scheme, agreement or understanding derives a tax benefit from it. Section 31(2) requires taxpayers to –

- determine whether the actual terms and conditions of any transaction, operation, scheme, agreement or understanding meeting the requirements of para (a) of the

definition of 'affected transaction'¹²⁹ differ from the terms and conditions that would have existed if the parties had been independent persons dealing at arm's length; and

- to calculate their taxable income based on the arm's length terms and conditions of the affected transaction if there is a difference which results or will result in a tax benefit for one of the parties to the affected transaction.

Section 31(3) provides for a secondary adjustment to be made to the extent that there is a difference in the amount applied in calculating taxable income (that is, an arm's length amount) under s 31(2) and amount which would have been applied had s 31(2) not applied. It states that the amount of the difference must, if the person is a resident and the other person to the affected transaction is not a resident or is a resident that has a permanent establishment outside South Africa to which the affected transaction relates –

- be deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person if the resident is a company [s 31(3)(i)]; or
- be deemed for the purposes of donations tax, to be a donation made by that resident to that other person if the resident is a person other than a company [s 31(3)(ii)],

on the last day of the period of six months following the end of the year of assessment for which the adjustment is made.¹³⁰

In applying the deeming provisions above it is apparent that the requirements of ss 64E(1) and 64EA(b) (see 3.1.1 and 3.7.2) have been met and that, in the absence of an exemption or a reduced rate of dividends tax applying (see 4.3.1, 4.3.2 and 4.3.3), the deemed dividend will be subject to dividends tax at a rate of 20%.

For completeness, it is also noted that in the case of a deemed donation under s 31(3)(ii), Part V of the Act, which includes the exemptions from donations tax, must be considered in determining if donations tax is payable. Practically the exemptions are unlikely to apply but it will depend on the facts of each case.

If the difference referred to under s 31(3) was deemed before 1 January 2015 to be a loan that constituted an affected transaction then to the extent it had not been repaid before 1 January 2015, it was –¹³¹

- deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person on 1 January 2015 if the resident is a company [para (a) of the proviso to s 31(3)]; or
- deemed for the purposes of donations tax, to be a donation made by that resident to that other person on 1 January 2015 if the resident is a person other than a company [para (b) of the proviso to s 31(3)].

The same principles regarding the availability of an exemption of dividends tax or donations tax, as appropriate, or a reduction in the rate of dividends tax as discussed above apply.

¹²⁹ The term 'affected transaction' is defined in s 31(1).

¹³⁰ Section 31(3) was amended by s 50(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2015. The amended s 31(3) therefore applies to years of assessment ending on or after 1 January 2015 as the determination of taxable income would be on or after that date.

¹³¹ Under the proviso to s 31(3).

Example – Transfer pricing adjustment deemed to be a dividend consisting of a distribution of an asset *in specie*

Facts:

Company A, a resident, entered into an agreement with Company B, a foreign company on 31 January 2016 which resulted in a transfer pricing adjustment of R20 million made under s 31(2) to the taxable income of Company A for its 2016 year of assessment that ended on 30 April.

Result:

Under s 31(3)(i) the amount of R20 million is deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by Company A to Company B on 31 October 2016, which is the last day of a period of six months following the end of its 2016 year of assessment.

Under ss 64E(1) and 64EA(b) Company A is liable to pay dividends tax of R3 million (R20 million × 15%). The dividends tax had to be paid to SARS on or before 30 November 2016 under s 64K(1)(b).

Note:

If the transfer pricing adjustment of R20 million was deemed before 1 January 2015 to be a loan that constituted an affected transaction, so much of the deemed loan that was not repaid before 1 January 2015 must be deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by Company A to Company B on 1 January 2015, under para (a) of the proviso to s 31(3).

3.8 Deemed dividends (s 64EB)

Section 64EB is an anti-avoidance provision that is deemed to have come into operation on 1 September 2012. It applies to transactions entered into on or after that date and amounts paid on or after 1 October 2012 on transactions entered into before 1 September 2012.

See also 3.7.2 b., c., d., e. and f. for circumstances in which various sections deem certain amounts to be a dividend consisting of a distribution of an asset *in specie*.

3.8.1 Cession of a dividend [s 64EB(1)]

Amounts paid before 4 July 2013

Section 64EB(1) provided that, for the purposes of dividends tax, if –

- a person that is a beneficial owner listed in s 64F acquires the right to a dividend by way of a cession; and
- that dividend is announced or declared before that acquisition,

that dividend was deemed to be a dividend paid for the benefit of the person ceding that right.

Section 64EB(1) did not apply to any cession in respect of a share if the right to that dividend was ceded together with all of the rights attaching to that share.

Amounts paid on or after 4 July 2013

Section 64EB(1) provides that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquires the right to a dividend by way of a cession; and
- the dividend is either announced or declared before that acquisition,

the person ceding the right is deemed to be the beneficial owner of that dividend.

Section 64EB(1) does not apply to any cession in respect of a share if the person to whom those rights are ceded holds all the rights attaching to the share after the cession.

Example – Deemed dividend – Cession of a dividend

Facts:

Company A Ltd declared a dividend of R1 million on 4 October 2016 to non-resident holders of its shares. The dividend was payable to holders registered on 21 October 2016. Payment date was 24 October 2016. The non-resident holders of shares ceded the right to the dividend on 5 October 2016 to Company B, a resident, for consideration of R925 000. Company A Ltd paid the dividend of R1 million on 24 October 2016 to Company B. On 24 October 2016 Company B paid R925 000 to the non-resident holders of shares for the cession of the dividend.

Result:

Dividends tax:

The dividend of R1 million paid by Company A Ltd to Company B on 24 October 2016 is deemed to be a dividend paid for the benefit of the non-resident holders of shares under s 64EB(1).

Under s 64G(1) (see 5.2.1) Company A Ltd must withhold dividends tax of R150 000 (R1 million × 15%) from the dividend actually paid to Company B, but deemed to have been paid to the non-resident holders of shares. The dividend deemed to have been paid to the non-resident holders of shares may be subject to dividends tax at a reduced rate as a result of the application of a tax treaty under s 64G(3) (see 5.2.3). If Company A Ltd made use of a regulated intermediary, the regulated intermediary must withhold dividends tax under s 64H(1).

Normal tax:

While the non-resident holders of the shares are deemed under s 64EB(1) to be the beneficial owners of the shares for dividends tax purposes, Company B is for all other tax purposes the recipient of the dividends. Under para (ee) of the proviso to s 10(1)(k)(i) the receipt of the dividend by Company B is not exempt from normal tax. Company B may possibly claim a deduction under s 11(a) of R925 000 paid to the non-resident holders of shares for the cession of the dividend.

3.8.2 Amount paid for a borrowed share in a listed company [s 64EB(2)]

Amounts paid before 4 July 2013

Section 64EB(2) provided that, for the purposes of dividends tax, if –

- a person that was a beneficial owner listed in s 64F borrowed a share in a listed company from another person after a dividend was announced or declared,
- so much of any amount paid by the person for that borrowed share as did not exceed the amount of the dividend,

was deemed to be a dividend paid for the benefit of that other person.

Example – Deemed dividend – Amount paid for a borrowed share in a listed company

Facts:

Company A Ltd declared a dividend of R800 000 on 2 April 2013 to foreign holders of its shares. The dividend was payable to holders registered on 26 April 2013. On 3 April 2013 the foreign holders of shares lent the shares in Company A Ltd to Company B, a company that is a resident. During the lending period, Company B received the dividend of R800 000 and paid R740 000 in the form of a manufactured dividend to the foreign holders of shares for the shares borrowed.

Result:

Dividends tax:

The dividend of R800 000 paid by Company A Ltd to Company B was exempt from dividends tax under s 64F(1)(a), since Company B is a resident (see 4.1.1).

The amount of R740 000 paid by Company B to the foreign holders of shares for the shares borrowed was deemed to be a dividend paid by Company B to the foreign holders of shares under s 64EB(2). Under s 64G(1) (see 5.2.1) Company B was required to withhold dividends tax of R111 000 ($R740\,000 \times 15\%$) from the manufactured dividend paid to the foreign holders of shares. The dividend of R740 000 paid by Company B may have been subject to dividends tax at a reduced rate as a result of the application of a tax treaty under s 64G(3) (see 5.2.3).

Normal tax:

Under para (ff) of the proviso to s 10(1)(k)(i) the receipt by Company B of the dividend of R800 000 on the shares lent to it was not exempt from normal tax. Company B may possibly be entitled to a deduction under s 11(a) of R740 000 paid to the foreign holders of shares for the shares borrowed.

Amounts paid on or after 4 July 2013

Section 64EB(2) applies when a person that is listed in s 64EB(2)(a) (the borrower – see list of specified borrowers below) borrows a share in a listed company from another person (the lender) and a dividend is either announced or declared by the listed company before that share is borrowed. Under s 64EB(2), for the purposes of dividends tax, any amount paid by the borrower to the lender not exceeding the amount of the dividend in respect of the borrowed share is deemed to be a dividend paid by the borrower for the benefit of the lender.

The persons specified in s 64EB(2)(a) are the following:

- A company that is a resident (see 4.1.1) [s 64EB(2)(a)(i)].
- The government of South Africa in the national, provincial or local sphere (see 4.1.2) [s 64EB(2)(a)(ii)].
- A public benefit organisation approved by the Commissioner under s 30(3) (see 4.1.3) [s 64EB(2)(a)(iii)].
- A trust contemplated in s 37A, namely, an environmental rehabilitation trust (see 4.1.4) [s 64EB(2)(a)(iv)].
- An institution, board or body contemplated in s 10(1)(cA) approved by the Commissioner which is exempt from normal tax (see 4.1.5) [s 64EB(2)(a)(v)].
- A fund contemplated in s 10(1)(d)(i) or (ii) that is exempt from normal tax (see 4.1.6) [s 64EB(2)(a)(vi)].
- A person contemplated in s 10(1)(t) that is exempt from normal tax (see 4.1.7) [s 64EB(2)(a)(vii)].

- A holder of shares in a registered micro business, as defined in the Sixth Schedule, paying that dividend, to the extent that the aggregate amount of dividends paid by that registered micro business to holders of its shares during the year of assessment in which that dividend is paid does not exceed R200 000 [s 64EB(2)(a)(viii)]. Section 64EB(2)(a)(viii) was deleted with effect from 8 January 2016.
- A person that is not a resident and the dividend is paid by a foreign company on a listed share (see **4.1.10**) [s 64EB(2)(a)(ix)]. Section 64EB(2)(a)(ix) was deleted with effect from 8 January 2016.
- A portfolio of a collective investment scheme in securities (see **4.1.11**) [s 64EB(2)(a)(x)].
- Any person to the extent that the dividend constitutes income of that person (see **4.1.12**) [s 64EB(2)(a)(xi)].
- Any person to the extent that the dividend was subject to STC [s 64EB(2)(a)(xii)]. Section 64EB(2)(a)(xii) was deleted with effect from 8 January 2016.
- Any fidelity or indemnity fund contemplated in s 10(1)(d)(iii) that is exempt from normal tax (see **4.1.14**) [s 64EB(2)(a)(xiii)].
- A small business funding entity as contemplated in s 10(1)(cQ) (see **4.1.9**) [s 64EB(2)(a)(xiv)].

Under s 64E(1) dividends tax is levied only on dividends paid by any company other than a headquarter company. Therefore only dividends deemed to have been paid by persons listed above which are a 'company' as defined in s 1(1) will potentially be subject to dividends tax under s 64E(1).

Example – Deemed dividend – Dividend announced or declared before a share is borrowed

Facts:

Company A Ltd declared a dividend of R800 000 on 4 October 2016 to foreign holders of its shares. The dividend was payable to holders of shares registered on 21 October 2016. On 7 October 2016 the foreign holders of shares lent the shares in Company A Ltd to Company B, a company that is a resident. During the lending period, Company B received the dividend of R800 000 and paid R740 000 in the form of a manufactured dividend to the foreign holders of shares for the shares borrowed.

Result:

Dividends tax:

The dividend of R800 000 paid by Company A Ltd to Company B is exempt from dividends tax under s 64F(1)(a), since Company B is a resident (see **4.1.1**).

The manufactured dividend of R740 000 paid by Company B to the foreign holders of shares is deemed to be a dividend paid by Company B for the benefit of the foreign holders of shares under s 64EB(2). Under s 64G(1) (see **5.2.1**) Company B must withhold dividends tax of R111 000 ($R740\,000 \times 15\%$) from the dividend that is deemed to be paid by Company B for the benefit of the foreign holders of shares. The dividend of R740 000 that is deemed to be a dividend paid by Company B may be subject to dividends tax at a reduced rate as a result of the application of a tax treaty under s 64G(3) (see **5.2.3**).

Normal tax:

Under para (ff) of the proviso to s 10(1)(k)(i) the receipt by Company B of the dividend of R800 000 lent to it is not exempt from normal tax. Company B may possibly claim a deduction under s 11(a) of R740 000 paid to the foreign holders of shares for the shares borrowed.

3.8.3 The purchase of a share cum dividend [s 64EB(3)]*Amounts paid before 4 July 2013*

Section 64EB(3) provided that, for the purposes of dividends tax, if –

- a person that was a beneficial owner listed in s 64F acquired a share in a listed company (or any right in respect of that share) from another person after a dividend was announced or declared in respect of that share, and
- that acquisition was part of an arrangement under which that share or a share of the same kind or of the same or equivalent quality had to be disposed of to that other person or to any other company forming part of the same group of companies as that other person,

that dividend was deemed to be a dividend paid to that other person.

Example – Deemed dividend – The purchase of a share *cum dividend**Facts:*

Company A Ltd declared a dividend of R1 million on 1 October 2012 to foreign holders of its shares. The dividend was payable to holders of shares registered on 26 October 2012. Payment date was 29 October 2012. On 2 October 2012 the foreign holders of shares sold the shares *cum dividend* in Company A Ltd to Company B, a resident, for R1,2 million. Company A Ltd paid the dividend of R1 million on 29 October 2012 to Company B. On 31 October 2012 the foreign holders of shares repurchased the same shares from Company B for R275 000.

Result:

Under s 64EB(3) the dividend of R1 million paid by Company A Ltd to Company B was deemed to be paid to the foreign holders of shares.

Under s 64G(1) (see 5.2.1) Company A Ltd had to withhold dividends tax of R150 000 (R1 million × 15%) from the amount of the dividend deemed to be paid to the foreign holders of shares. The dividend of R1 million deemed to be paid to the foreign holders of shares may have been subject to dividends tax at a reduced rate under s 64G(3) (see 5.2.3). If Company A Ltd made use of a regulated intermediary, the regulated intermediary would have been required to withhold dividends tax under s 64H(1).

Amounts paid on or after 4 July 2013

Section 64EB(3) provides that, for the purposes of dividends tax, when –

- a person contemplated in s 64F(1) acquires a share in a listed company (or any right in respect of that share) from another person after a dividend is announced or declared in respect of that share, and
- that acquisition is part of a resale agreement between the person acquiring the share and that other person or any other company forming part of the same group of companies as that other person,

that other person or other company is deemed to be the beneficial owner of the dividend.

A 'resale agreement' is defined in s 64EB(4) and means the acquisition of a share by any person subject to an agreement under which that person undertakes to dispose of that share or any other share of the same kind and of the same or equivalent quality at a future date.

Example – Deemed dividend – The purchase of a share *cum dividend*

Facts:

Company A Ltd declared a dividend of R1 million on 4 October 2016 to foreign holders of its shares. The dividend was payable to holders of shares registered on 21 October 2016. Payment date was 24 October 2016. On 7 October 2016 the foreign holders of shares sold the shares *cum dividend* in Company A Ltd to Company B, a resident, for R1,2 million. Company A Ltd paid the dividend of R1 million on 24 October 2016 to Company B. On 28 October 2016 the foreign holders of shares repurchased the same shares from Company B for R275 000.

Result:

Dividends tax

Under s 64EB(3) the foreign holders of shares are deemed to be the beneficial owners of the dividend of R1 million paid by Company A Ltd to Company B.

Under s 64G(1) (see **5.2.1**) Company A Ltd must withhold dividends tax of R150 000 (R1 million × 15%) from the amount of the dividend paid to Company B, because the foreign holders of shares are deemed to be the beneficial owners of the dividend. The dividend of R1 million may be subject to dividends tax at a reduced rate under s 64G(3) (see **5.2.3**). If Company A Ltd made use of a regulated intermediary, the regulated intermediary and not Company A Ltd must withhold the dividends tax under s 64H(1).

Normal tax

Under para (hh) of the proviso to s 10(1)(k)(i) the full dividend of R1 million is not exempt from normal tax.

3.9 Transitional arrangements: Replacement of STC with dividends tax

Dividends tax came into operation on 1 April 2012 and is levied on any dividend declared and paid by a company on or after that date.¹³²

A dividend that was declared by a company before 1 April 2012 but paid to holders of shares only on or after 1 April 2012 is not subject to dividends tax but is subject to STC, since it was declared before 1 April 2012.

¹³² Dividends tax legislation was first introduced by s 56(1) of the Revenue Laws Amendment Act 60 of 2008 but subsequently substituted by s 53(1) of the Taxation Laws Amendment Act 17 of 2009. Section 148 of the Taxation Laws Amendment Act 7 of 2010 amended s 53(2) of the Taxation Laws Amendment Act 17 of 2009 to provide that dividends tax legislation applies in respect of any dividend declared and paid on or after the effective date (1 April 2012).

The term 'declared' was defined in s 64B(1) for STC purposes as follows:

' "[D]eclared", in relation to any dividend (including a dividend *in specie*), means the approval of the payment or distribution thereof by the directors of the company or by some other person with comparable authority or, in the case of the liquidation of a company, by the liquidator thereof;¹³³

When the directors of a company recommend a dividend, subject to approval by the holders of the company's shares, such recommendation does not constitute the declaration of a dividend. It is stated in *Income Tax in South Africa* that –¹³⁴

'it is considered that where a dividend is proposed by the directors, the proposal does not constitute a declaration as it is merely an indication of a later declaration...'

When the directors have the authority to approve a dividend and subsequent approval by holders of the company's shares is not required, such approval would constitute the declaration of a dividend.

The STC legislation was repealed with effect from 1 April 2017.

Example 1 – Dividend declared before 1 April 2012

Facts:

Company B declared a dividend on 30 March 2012, payable to holders of its shares on 16 April 2012. The dividend was paid to the holders of shares on 16 April 2012.

Result:

The dividend declared by Company B was subject to STC under s 64B(2), since the dividend was declared before 1 April 2012.

Example 2 – Dividend declared before 1 April 2012

Facts:

Listed Company A declared a dividend on 14 March 2012, payable to holders of shares registered in the company's share register on Thursday 5 April 2012. Listed Company A paid the dividend to holders of its shares on Tuesday 10 April 2012.¹³⁵

Result:

The dividend declared by Listed Company A was subject to STC under s 64B(2) because it was declared before 1 April 2012.

¹³³ See also Binding Private Ruling 121 dated 14 September 2012 'Secondary Tax on Companies or Dividends Tax'.

¹³⁴ D Clegg and R Stretch *Income Tax in South Africa* [online] (My LexisNexis: March 2014) in para 13.7.3.

¹³⁵ Friday 6 April 2012 and Monday 9 April 2012 were public holidays. Payment date for resident companies on the JSE is record date (last date to register) plus one business day.

Chapter 4

Exemption from dividends tax and relief from double taxation (ss 64F, 64FA and 108)

4.1 Exemption from dividends tax for dividends other than dividends *in specie* [s 64F(1)]

A dividend will be exempt from dividends tax under s 64F(1)¹³⁶ to the extent that it does not consist of a dividend *in specie* and if the beneficial owner is any one of the persons listed in s 64F(1) (see 4.1.1 – 4.1.15). The beneficial owner of a dividend is the person entitled to the benefit of the dividend attaching to a share (see 2.3.1).

A dividend may under certain circumstances qualify for exemption from dividends tax under more than one of the paragraphs of s 64F(1), for example,:

- Section 64F(1)(a) and (l) if the beneficial owner is a resident company and the dividend constitutes income of that company.
- Section 64F(1)(a) and (c) if the beneficial owner is a resident company that is approved by the Commissioner under s 30(3) as a public benefit organisation.
- Section 64F(1)(k) and (l) if the beneficial owner is a portfolio of a collective investment scheme in securities and the dividend constitutes income of that portfolio under s 25BA(1)(b)(ii).

Should more than one exemption apply, the dividend will be exempt only once from dividends tax.

The beneficial owner must submit the relevant declaration forms under s 64G(2)(a) or s 64H(2)(a) to the company or regulated intermediary for dividends tax not to be withheld from the dividend.

Exemption from dividends tax for dividends *in specie* is provided for in s 64FA(1) (see 4.3.1).

4.1.1 A company that is a resident [s 64F(1)(a)]

A dividend is exempt from dividends tax if the beneficial owner is a company that is a resident.¹³⁷ The exemption applies irrespective of whether the company paying the dividend and the company receiving the dividend as the beneficial owner are within the same group of companies.

The following are examples of companies that fall within the definition of 'company' in s 1(1) (see 3.1.1):

- A state-owned company, a private company, a personal liability company, a public company and a non-profit company incorporated under the Companies Act (para (a) of the definition of 'company'). This may include –
 - a body corporate established under s 36 of the Sectional Titles Act 95 of 1986; and
 - a share block company established under the Companies Act.
- A domesticated company, which is a company whose registration has been transferred to South Africa (para (a) of the definition of 'company').
- A mutual bank incorporated under the Mutual Banks Act 124 of 1993 (para (a) of the definition of 'company').

¹³⁶ Before 1 April 2013, dividends were exempt under s 64F. Section 64F was renumbered to s 64F(1) with the introduction of s 64F(2) with effect from 1 April 2013.

¹³⁷ See 2.2.2 for the definition of 'resident'.

- Any co-operative registered under the Co-operatives Act 91 of 1981 or the Co-operatives Act 14 of 2005 (para (c) of the definition of 'company').
- Any association (other than an association, company or body corporate formed under South African law and a close corporation) formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public (para (d) of the definition of 'company'). Such companies may include:
 - An association of persons formed solely for purposes of managing the collective interests common to all its members and which has been approved by the Commissioner under s 10(1)(e)(i)(cc).
 - A recreational club comprising a society or association the sole or principal object of which is to provide social and recreational amenities or facilities for its members and which has been approved by the Commissioner under s 30A(2).
 - An 'entity' as defined in s 30B(1), excluding a trust, approved by the Commissioner under s 30B(2). Such an entity may include a mutual loan association, fidelity or indemnity fund, trade union, chamber of commerce or industry (or an association of such chambers) and a local publicity association. Also included is a society or other association of persons established to promote the common interests of persons, being members of that society or association of persons, carrying on any particular kind of business, profession or occupation.
- Any association, corporation, company or body corporate incorporated or formed under foreign law that has its place of effective management in South Africa [para (b) of the definition of 'company' read with para (b) of the definition of 'resident' in s 1(1)].
- Any close corporation established under the Close Corporations Act (para (f) of the definition of 'company').

A resident company that is an undisclosed partner in an *en-commandite* partnership must disclose its status as a company in order for the exemption under s 64F(1)(a) to apply.

Example 1 – Exemption from dividends tax – Section 64F(1)(a)

Facts:

Individual X holds all the shares in Company A, Company A holds all the shares in Company B and Company B holds all the shares in Company C. Company C pays a dividend of R200 000 to Company B, Company B pays a dividend of R200 000 to Company A and Company A pays a dividend of R200 000 to Individual X. All the companies are residents.

Result:

Dividends tax is levied only on the dividend of R200 000 paid by Company A to Individual X. The dividends paid to Company A and Company B are exempt from dividends tax under s 64F(1)(a), since the beneficial owners of the dividends are companies that are residents.

Example 2 – Exemption from dividends tax – Section 64F(1)(a)

Facts:

Trust A is a vesting trust and holds all the shares in Company M. Company X is the sole beneficiary of Trust A. Both companies are residents. Company M paid a dividend of R100 000 to Trust A.

Result:

Company X is the beneficial owner of the dividend of R100 000 under s 25B(1), since it has a vested right to the dividend (see 2.3.1). The dividend of R100 000 is exempt from dividends tax under s 64F(1)(a), since Company X is a resident.

Example 3 – Exemption from dividends tax – Section 64F(1)(a)*Facts:*

Trust B's year of assessment ends on the last day of February. Trust B is a discretionary trust and holds all the shares in Company M. Company A is a beneficiary of Trust B. Both companies are residents. Company M paid a dividend of R100 000 to Trust B on 30 June 2016. The trustees of Trust B vested the dividend in Company A on 28 February 2017.

Result:

Under s 25B(1) and (2) Company A will be the beneficial owner of the dividend of R100 000, since the dividend is vested in Company A during Trust B's 2017 year of assessment (see 2.3.1). The exemption under s 64F(1)(a) will therefore apply. The dividend will not be exempt from normal tax under para (ee) of the proviso to s 10(1)(k)(i) with the result that the exemption under s 64F(1)(l) may also apply (see 4.1.12 a.).

Note:

Should the trustees vest the dividend distributed by Company M after the 2017 year of assessment of Trust B in Company A, Trust B will be the beneficial owner of the dividend and the exemption under s 64F(1)(a) will not apply.

4.1.2 The government in the national, provincial or local sphere [s 64F(1)(b)]

A dividend is exempt from dividends tax if the beneficial owner is the government of South Africa in the national, provincial¹³⁸ or local sphere.¹³⁹ This exemption is in line with the exemption from normal tax provided for in s 10(1)(a).

Section 151 of the Constitution of the Republic of South Africa, 1996 determines that the local sphere of government consists of municipalities. A 'municipality' is defined in s 1(1) as follows:

‘ “[M]unicipality” means a municipality which is within a category listed in section 155(1) of the Constitution of the Republic of South Africa, 1996, and which is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);’

State institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution of the Republic of South Africa, 1996 (for example, the SAHRC and Public Protector) are excluded from the ambit of ss 10(1)(a) and 64F(1)(b). Public entities referred to in Schedule 2 of the Public Finance Management Act 1 of 1999 are similarly excluded (for example, Eskom, IDC, SABC, Sapo, SAA, Telkom and Transnet amongst others).

¹³⁸ As determined in Chapter 6 of the Constitution of the Republic of South Africa, 1996.

¹³⁹ Section 64F(1)(b) was amended by s 70(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 20 January 2015 to bring the wording of s 64F(1)(b) in line with that of s 10(1)(a).

4.1.3 A public benefit organisation [s 64F(1)(c)]

A dividend is exempt from dividends tax if the beneficial owner is a public benefit organisation approved by the Commissioner under s 30(3). A 'public benefit organisation' is defined in s 30(1) as follows:

- “[P]ublic benefit organisation” means any organisation—
- (a) which is—
 - (i) a non-profit company as defined in section 1 of the Companies Act or a trust or an association of persons that has been incorporated, formed or established in the Republic; or
 - (ii) any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country;
 - (b) of which the sole or principal object is carrying on one or more public benefit activities, where—
 - (i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;
 - (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and
 - (iii)
 - (c) where—
 - (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);
 - (ii)
 - (iii)

A public benefit organisation which has been approved under s 30(3) qualifies for the exemption under s 64F(1)(c) even if it is constituted as a trust. A branch of a foreign exempt organisation which has been approved as a public benefit organisation will likewise be exempt under s 64F(1)(c).

4.1.4 An environmental rehabilitation trust [s 64F(1)(d)]

A dividend is exempt from dividends tax if the beneficial owner is a trust contemplated in s 37A whose object it is to apply its property solely for the rehabilitation of mining areas upon their closure. The receipts and accruals of an environmental rehabilitation trust are exempt from normal tax under s 10(1)(cP).

The rehabilitation of mining areas includes the rehabilitation of land upon premature closure, decommissioning and final closure, and post-closure coverage of any latent and residual environmental impacts on areas covered under any of the specified¹⁴⁰ permits, rights, reservations or permissions to restore one or more areas to their natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development.

¹⁴⁰ Section 37(A)(1)(d)(i)(aa).

4.1.5 Certain institutions, boards or bodies exempt from normal tax [s 64F(1)(e)]

A dividend is exempt from dividends tax if the beneficial owner is an institution, board or body contemplated in s 10(1)(cA) which has been approved by the Commissioner. These are:

- Any institution, board or body (other than a company as defined in the Companies Act, any co-operative, close corporation, trust or water services provider) established by or under any law and which, in the furtherance of its sole or principal object –
 - conducts scientific, technical or industrial research;
 - provides necessary or useful commodities, amenities or services to the State (including any provincial administration) or members of the general public; or
 - carries on activities (including the rendering of financial assistance by way of loans or otherwise) designed to promote commerce, industry or agriculture or any branch thereof.

4.1.6 Certain funds exempt from normal tax [s 64F(1)(f)]

A dividend is exempt from dividends tax if the beneficial owner is a fund contemplated in s 10(1)(d)(i) or (ii).

Section 10(1)(d)(i)

Section 10(1)(d)(i) refers to –

- a 'pension fund', 'pension preservation fund', 'provident fund', 'provident preservation fund' or 'retirement annuity fund' which are all defined in s 1(1); and
- a 'beneficiary fund' defined in s 1 of the Pension Funds Act 24 of 1956.

The following funds, amongst others, constitute a pension fund under the definition of 'pension fund' in s 1(1):

- A pension, provident or dependants' fund or pension scheme established by South African law.¹⁴¹ The Act refers to these entities being established by 'law'. In context of this definition 'law' means any South African law. In ITC 1788¹⁴² the court had to decide whether the appellant was an entity exempt from income tax under s 10(1)(cA) on the basis that it was 'an institution, board or body established by or under any law'. Bertelsmann J found that the words 'any law' in the latter expression referred only to South African statutes. He stated the following:¹⁴³

'The entire purpose of the Income Tax Act is to control the revenue accruing to the state from taxes levied upon the income of the citizenry. To give recognition to creatures created by foreign statutes without any qualification or definition might seriously endanger the object of the entire Income Tax Act.'

- A fund not established under South African law, established on or after 1 July 1986 and registered under the Pension Funds Act 24 of 1956, and approved by the Commissioner.¹⁴⁴

A dividend will not be exempt from dividends tax under s 64F(1)(f) if the beneficial owner is a pension fund established under foreign law which is not registered under the Pension Funds Act 24 of 1956 and approved by the Commissioner.

¹⁴¹ Section 1(1) definition of 'pension fund', para (a)(i).

¹⁴² (2004) 67 SATC 161 (G).

¹⁴³ At 164.

¹⁴⁴ Section 1(1) definition of 'pension fund', para (c).

A pension preservation fund, a provident fund (established on or after 1 July 1986), a provident preservation fund and a retirement annuity fund (established on or after 1 July 1986) must all be registered under the Pension Funds Act 24 of 1956 and must be approved by the Commissioner.

Section 10(1)(d)(ii)

Section 10(1)(d)(ii) refers to a benefit fund. A 'benefit fund' is defined in s 1(1) as follows:

' "[B]enefit fund" means—

- (a) any friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956), or any fund established before 13 June 1986 which is not so registered solely because of the provisions of section 2(2)(a) of that Act; or
- (b) any medical scheme registered under the provisions of the Medical Schemes Act;'

4.1.7 Certain persons exempt from normal tax [s 64F(1)(g)]

A dividend is exempt from dividends tax if the beneficial owner is a person contemplated in s 10(1)(t). The persons exempt under s 10(1)(t) are the following:

- The Council for Scientific and Industrial Research [s 10(1)(t)(i)].
- The South African Inventions Development Corporation [s 10(1)(t)(ii)].
- The South African National Roads Agency Limited incorporated under s 3 of the South African National Roads Agency Limited and National Roads Act 7 of 1998 [s 10(1)(t)(iii)].
- The Armaments Corporation of South Africa Limited, contemplated in s 2(1) of the Armaments Corporation of South Africa, Limited Act 51 of 2003 [s 10(1)(t)(v)].
- Any company all the issued shares of which are held by the Armaments Development and Production Corporation of South Africa Limited, if the operations of such company are conducted in pursuance of, or are ancillary or complementary to the objects of the said Corporation [s 10(1)(t)(vi)].
- Any traditional council or traditional community established or recognised or deemed to have been established or recognised under the Traditional Leadership and Governance Framework Act 41 of 2003, or any 'tribe' as defined in s 1 of that Act [s 10(1)(t)(vii)].
- Any water services provider [s 10(1)(t)(ix)].
- The Development Bank of Southern Africa established on 23 June 1983 [s 10(1)(t)(x)].
- The following funds or association established or licensed under the Compensation for Occupational Injuries and Diseases Act 130 of 1993:
 - The compensation fund established by s 15 of that Act.
 - The reserve fund established by s 19 of that Act.
- A mutual association licensed under s 30 of that Act, to carry on the business of insurance of employers against their liabilities to employees, if the compensation paid by the mutual association is identical to compensation that would have been payable in similar circumstances under that Act [s 10(1)(t)(xvi)].
- The National Housing Finance Corporation established in 1996 by the National Department of Human Settlements [s 10(1)(t)(xvii)].¹⁴⁵

¹⁴⁵ With effect from 1 April 2016.

Example 1 – Exemption from dividends tax*Facts:*

Company X is listed on the JSE and has an issued capital of 1 million ordinary shares. Of these ordinary shares, 600 000 are held by natural persons who are residents, 300 000 by South African retirement funds and 100 000 by companies that are residents. Company X paid a dividend of R5 a share to holders of its shares.

Result:

The dividends paid to the natural persons of R3 million (600 000 × R5) are subject to dividends tax. The dividends paid to the retirement funds of R1,5 million (300 000 × R5) and to the companies that are residents of R500 000 (100 000 × R5) are both exempt from dividends tax under s 64F(1)(f) and s 64F(1)(a) respectively.

Example 2 – Exemption from dividends tax*Facts:*

Company Y is listed on the JSE. It paid a dividend of R2,5 million to holders of its shares as follows:

	R
ABC Municipality	300 000
The Sunshine Hospice which is a public benefit organisation approved by the Commissioner under s 30(3)	400 000
The Mining Rehabilitation Trust contemplated in s 37A	200 000
The Industrial Research Foundation contemplated in s 10(1)(cA)	850 000
XYZ Provident Fund contemplated in s 10(1)(d)(i)	250 000
The Council for Scientific and Industrial Research	400 000
Natural persons	<u>100 000</u>
Total amount of dividend	<u>2 500 000</u>

Result:

The dividend of R100 000 paid to natural persons is subject to dividends tax. The dividend paid to the other holders of shares is exempt from dividends tax, as follows:

- ABC Municipality – s 64F(1)(b)
- The Sunshine Hospice – s 64F(1)(c)
- The Mining Rehabilitation Trust – s 64F(1)(d)
- The Industrial Research Foundation – s 64F(1)(e)
- XYZ Provident Fund – s 64F(1)(f)
- The Council for Scientific and Industrial Research – s 64F(1)(g)

4.1.8 A holder of shares in a registered micro business [s 64F(1)(h)]

A dividend up to a specified amount is exempt from dividends tax if the beneficial owner is a holder of shares in a registered 'micro business', as defined in para 1 of the Sixth Schedule, paying that dividend.

A micro business under the turnover tax system is subject to a low rate of tax on a gross basis without deductions. The turnover tax applies to businesses with an annual turnover of up to R1 million. The turnover tax system is essentially a package that consists of a turnover tax as a substitute for income tax and CGT.¹⁴⁶

¹⁴⁶ See the *Tax Guide for Micro Businesses 2016 / 2017*.

The exemption from dividends tax applies to the extent that the aggregate amount of dividends paid by a company that is a registered micro business to all holders of shares in that registered micro business during the year of assessment in which the dividend is paid does not exceed R200 000. The amount of dividends paid by a registered micro business that exceeds R200 000 during a year of assessment will be subject to dividends tax.

Example – Exemption from dividends tax – Section 64F(1)(h)

Facts:

Company M's year of assessment ends on the last day of February. Company M is registered as a micro business. It paid a dividend of R500 000 to all holders of its shares on 10 April 2016. No further dividends were paid by Company M during its 2017 year of assessment.

Result:

An amount equal to R200 000 of the dividend paid to the holders of shares is exempt from dividends tax under s 64F(1)(h) and the balance of R300 000 (R500 000 – R200 000) is subject to dividends tax.

Under s 64G(1) (see 5.2.1) Company M must withhold dividends tax from 60% (R300 000 / R500 000) of the dividend paid to each holder of its shares.

4.1.9 A small business funding entity [s 64F(1)(j)]

A dividend is exempt from dividends tax if the beneficial owner is a small business funding entity contemplated in s 10(1)(cQ).¹⁴⁷ The term 'small business funding entity' is defined in s 1(1) as follows:

‘ “[S]mall business funding entity” means any entity, approved by the Commissioner in terms of section 30C;’

Under s 10(1)(cQ) certain receipts and accruals on or after 1 March 2015 of a small business funding entity approved by the Commissioner under s 30C¹⁴⁸ are exempt from normal tax.

Under s 30C(1) the Commissioner must approve a small business funding entity for the purposes of s 10(1)(cQ) if the following requirements are met:

- The entity is a trust or an association of persons or a non-profit company as defined in s 1 of the Companies Act that has been incorporated, formed or established in South Africa.
- The sole or principal object of the entity is the provision of funding for small, medium and micro-sized enterprises which is –
 - provided for the benefit of or is widely accessible to small, medium and micro-sized enterprises;
 - provided on a non-profit basis and with an altruistic or philanthropic intent; and
 - not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the entity, otherwise than by way of reasonable remuneration payable to that fiduciary or employee.
- The entity has submitted to the Commissioner a copy of the constitution or written instrument under which it has been established.

¹⁴⁷ Section 64F(1)(i) came into operation on 1 March 2015.

¹⁴⁸ Section 30C came into operation on 1 March 2015.

- The constitution or written instrument must comply with specific requirements.

The term 'small, medium or micro-sized enterprise' referred to above is defined in s 1(1) as follows:

‘ “[S]mall, medium or micro-sized enterprise” means any—

- person that qualifies as a micro business as defined in paragraph 1 of the Sixth Schedule; or
- any person that is a small business corporation as defined in section 12E(4);’

Example – Exemption from dividends tax – Section 64F(1)(i)

Facts:

Company A, a small business funding entity approved by the Commissioner under s 30C, is the beneficial owner of a dividend of R30 000 declared and paid to it by resident Company B.

Result:

The dividend of R30 000 is exempt from dividends tax under s 64F(1)(i), since the beneficial owner is a small business funding entity contemplated in s 10(1)(cQ).

4.1.10 Dividend paid by a foreign company to a person that is not a resident [s 64F(1)(j)]

A dividend is exempt from dividends tax if –

- the beneficial owner is a person that is not a resident; and
- the dividend is paid by a foreign company in respect of a listed share to the extent the dividend is not the distribution of an asset *in specie*.¹⁴⁹

As is the case with all the exemptions under s 64F(1), the beneficial owner must submit the relevant declaration forms under s 64G(2)(a) or s 64H(2)(a) to the company or regulated intermediary for dividends tax not to be withheld from the dividend.

Example – Exemption from dividends tax – Section 64F(1)(j)

Facts:

Company S, a foreign company, is listed on the JSE. Company S declared a cash dividend of R5 million to Company A, a foreign company.

Result:

The dividend of R5 million is exempt from dividends tax under s 64F(1)(j), since it is a dividend paid by a foreign company on a listed share to a person that is not a resident.

4.1.11 A portfolio of a collective investment scheme in securities [s 64F(1)(k)]

A dividend is exempt from dividends tax if the beneficial owner is a portfolio of a collective investment scheme in securities (CISS). A CISS will be the beneficial owner of a dividend under s 25BA(1)(b) if it does not on-distribute the dividend to its unit holders within 12 months of the dividend having accrued to the CISS.

¹⁴⁹ To the extent the dividend constitutes the distribution of an asset *in specie* it is not a 'dividend' as defined in s 64D and is not subject to dividends tax.

While the dividend will be exempt from dividends tax in these circumstances, s 25BA(1)(b)(ii) deems the dividend to be income of a CISS if the CISS does not on-distribute the dividend within 12 months of its accrual. The dividend is deemed to accrue to the CISS on the last day of the period of 12 months, since it is at that date only that it is possible to determine whether the dividend accrues to the CISS or the CISS unit holder. The CISS will be liable for normal tax on the dividend deemed to have been derived by it at the end of the 12 month period because the CISS will not be able to claim the exemption under s 10(1)(k)(i), since the dividend is deemed to be income. The subsequent distribution of these taxed amounts by the CISS to its unit holders is not subject to normal tax and dividends tax because –

- the CISS is not a ‘company’ as defined in s 1(1) and the distribution cannot constitute a ‘dividend’; and
- s 10(1)(B) provides that any amount received by or accrued to a CISS unit holder under a distribution from that CISS is exempt from normal tax if that amount is deemed to have accrued to that CISS under s 25BA(1)(b) and that amount was subject to normal tax in that portfolio.¹⁵⁰

As noted previously,¹⁵¹ should the CISS on-distribute the dividend within the stipulated 12-month period, the dividend is deemed to have accrued directly from the company to the CISS unit holder on the date of the distribution by the CISS. Although the CISS unit holder is treated as the beneficial owner, no dividends tax need be withheld by the company that paid the dividend because the payment of the dividend will have been made to the CISS, a regulated intermediary.¹⁵² When, however, the CISS, as regulated intermediary, on-distributes the dividend to the CISS unit holder it will need to withhold dividends tax unless the dividend is exempt from dividends tax because of an applicable exemption, or dividends tax is required to be withheld at a reduced rate as a result of the application of a tax treaty.¹⁵³ See also 5.4. for the withholding of dividends tax by a CISS.

Example – Exemption from dividends tax – Section 64F(1)(k)

Facts:

A CISS holds shares in Company X which is a resident. The CISS’s year of assessment commences on 1 March. On 11 March 2016 the CISS received a dividend of R1 million from Company X. The CISS on-distributed the dividend to the unit holders on 18 March 2017.

Result:

The dividend of R1 million received by the CISS is exempt from dividends tax under s 64F(1)(k). The dividend was not distributed to the unit holders within 12 months of its accrual. The dividend is deemed to have accrued to the CISS on 10 March 2017 (the last day of the period of 12 months from date of receipt of the dividend) under s 25BA(1)(b)(i) and is included in the income of the CISS under s 25BA(1)(b)(ii). The subsequent on-distribution of the dividend to the unit holders is exempt from dividends tax because such on-distribution will not be a ‘dividend’, but a distribution of after-tax income of the CISS.

¹⁵⁰ Section 10(1)(B) was amended by s 23(1)(l) of the Taxation Laws Amendment Act 31 of 2013 and s 14(1)(f) of the Taxation Laws Amendment Act 43 of 2014. The amendment dealing with the requirement that the amount must be subject to normal tax in the CISS applies to amounts received or accrued by the CISS unit holder on or after 1 March 2015.

¹⁵¹ See 2.3.1.

¹⁵² Section 64G(2)(c).

¹⁵³ Section 64H.

4.1.12 Any person to the extent that the dividend constitutes income of that person [s 64F(1)(l)]

A dividend is exempt from dividends tax to the extent that it constitutes 'income' of a person.

A dividend received by or accrued to a person will constitute 'income' in the circumstances mentioned below (a. – d.).

The exemption under s 64F(1)(l) does not apply to a foreign dividend paid by a foreign company on a listed share to the extent that the foreign dividend does not consist of a distribution of an asset *in specie* (and accordingly is a dividend for purposes of dividends tax, see 2.3.2). Such a foreign dividend is exempt from normal tax under s 10B(2)(d). The exemption under s 64F(1)(l) will not therefore apply since the foreign dividend is not included in 'income' of the beneficial owner.

Not all circumstances under which a dividend will constitute 'income' are discussed in this guide.

a. Dividends not exempt under s 10(1)(k)(i)

A domestic dividend received by or accrued to a person is included in that person's gross income¹⁵⁴ and is subject to normal tax if the exemption under s 10(1)(k)(i) does not apply.

The proviso to s 10(1)(k)(i) stipulates that the exemption will not apply (that is, the dividend will constitute income subject to normal tax) in the paragraphs mentioned below.

Paragraph (aa) of the proviso to s 10(1)(k)(i)

A dividend received by or accrued to a resident that was distributed by a REIT or a controlled company as defined in s 25BB(1) is not exempt from normal tax under s 10(1)(k)(i).¹⁵⁵ A 'dividend' contemplated in para (b) of the definition of 'dividend', namely, a share buy-back, is excluded from para (aa) and is therefore exempt under s 10(1)(k)(i).

Paragraphs (dd) and (jj)¹⁵⁶ of the proviso to s 10(1)(k)(i)

Under specific circumstances, a dividend received by or accrued to a person on a restricted equity instrument is not exempt from normal tax under s 10(1)(k)(i).

Paragraph (ee) of the proviso to s 10(1)(k)(i)

A dividend received by or accrued to a company in consequence of a cession of the right to that dividend or the exercise of a discretionary power by a trustee of a trust is not exempt from normal tax under s 10(1)(k)(i), unless the cession or exercise results in that company holding all of the rights attaching to a share.

Paragraph (ff) of the proviso to s 10(1)(k)(i)

A dividend received by or accrued to a company on a share borrowed by that company is not exempt from normal tax under s 10(1)(k)(i).

A dividend of this nature will also be exempt from dividends tax under s 64F(1)(a) if the beneficial owner is a company that is a resident (see 4.1.1).

The anti-avoidance provisions of s 64EB(2) will however apply when a company that is a resident borrows a share in a listed company and a dividend is announced or declared before the share is borrowed (see 3.8.2).

¹⁵⁴ Paragraph (k) of the definition of 'gross income' in s 1(1).

¹⁵⁵ In contrast, a dividend received by or accrued to a person that is not a resident that was distributed by a REIT or a controlled company is exempt from normal tax (see 3.1.4).

¹⁵⁶ Paragraph (jj) of the proviso to s 10(1)(k)(i) applies to amounts received or accrued on or after 1 March 2017.

Paragraph (gg) of the proviso to s 10(1)(k)(i)

Dividends received by or accrued to a company on a share held by that company are not exempt from normal tax under s 10(1)(k)(i) to the extent that the aggregate of those dividends does not exceed the *net* of –

- the aggregate of amounts incurred by that company as compensation for any distribution on any other share borrowed by that company, other than a share on which any dividends were received by or accrued to that company as contemplated in para (ff) of the proviso to s 10(1)(k)(i), when the share so borrowed and the share so held are identical shares; and
- the amount accrued to that company as compensation for any distribution on any other shares lent out that are identical to the share so borrowed.

A dividend of this nature will also be exempt from dividends under tax s 64F(1)(a) if the beneficial owner is a company that is a resident (see 4.1.1).

The anti-avoidance provisions of s 64EB(2) will apply when a company that is a resident borrows a share in a listed company and a dividend is announced or declared before the share is borrowed (see 3.8.2).

Paragraph (hh) of the proviso to s 10(1)(k)(i)

Dividends received by or accrued to a company on a share are not exempt from normal tax under s 10(1)(k)(i) to the extent that –

- the aggregate of those dividends does not exceed an amount equal to the aggregate of any deductible expenditure incurred by that company or any amount taken into account that has the effect of reducing income of a covered person¹⁵⁷ in the application of s 24JB(2), and
- the amount of that expenditure or reduction is determined directly or indirectly with reference to the dividend in respect of an identical share to that share.

The deductible expenditure so incurred or the amount of the reduction referred to above must be reduced by any amount of income accrued to the company in respect of any distribution in respect of any other share that is an identical share in relation to that share.

Paragraph (ii) of the proviso to s 10(1)(k)(i)

A dividend is not exempt from normal tax under s 10(1)(k)(i)¹⁵⁸ if it is received by or accrued to a person in respect of services rendered or to be rendered or in respect of or by virtue of employment or the holding of any office, other than a dividend received or accrued in respect of –

- a restricted equity instrument as defined in s 8C held by that person; or
- a share held by that person.

b. Dividends on certain shares or third-party backed shares deemed to be income in relation to recipients thereof under s 8E or s 8EA

A dividend or foreign dividend received by or accrued to a person on a share or equity instrument is deemed to be an amount of income accrued to that person if that share or equity instrument constitutes –

- a 'hybrid equity instrument' as defined in s 8E(1) at any time during a year of assessment [s 8E(2)]; or

¹⁵⁷ The term 'covered person' is defined in s 24JB(1).

¹⁵⁸ See Binding Private Ruling 209 dated 21 October 2015 'Dividends Tax: Distribution of Dividends to Employees through a Discretionary Trust'.

- a 'third-party backed share' as defined in s 8EA(1) at any time during a year of assessment [s 8EA(2)].

c. Amounts distributed by a co-operative

Certain amounts distributed by a co-operative by way of a bonus must be included in the 'gross income' of the person who becomes entitled to them under s 27(8)(a). These amounts will also constitute 'income' of that person.

d. Amounts taxed as a fringe benefit in the hands of an employee under the Seventh Schedule

Paragraph 2(f) of the Seventh Schedule provides that for the purposes of that Schedule and of para (i) of the definition of 'gross income' in s 1(1), a taxable benefit shall be deemed to have been granted by an employer to that employer's employee in respect of the employee's employment with the employer, if as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer a debt other than –

- a debt for purposes of the payment by the employee of any consideration in respect of any qualifying equity share contemplated in s 8B to comply with the minimum requirements of the Companies Act; or
- the payment of any securities transfer tax payable in respect of that share; or
- a debt in respect of which a subsidy is payable as contemplated in subpara (gA),

has been incurred by the employee, whether in favour of the employer or in favour of any other person by arrangement with the employer or any associated institution¹⁵⁹ in relation to the employer, and either –

- no interest is payable by the employee on the debt; or
- interest is payable by the employee on the debt at a rate of lower than the official rate of interest.¹⁶⁰

Paragraph 11(1)¹⁶¹ of the Seventh Schedule determines that the cash equivalent of the value of the taxable benefit derived in the circumstances mentioned above is the amount of interest that would have been payable on the amount owing in respect of the debt for the year of assessment if the employee had been obliged to pay interest on such amount during such year at the official rate of interest, less the amount of interest actually incurred by the employee on the debt for that year.

A deemed dividend determined under s 64E(4) on an amount owing on a debt to a company will be exempt under s 64F(1)(l) if the beneficial owner of that deemed dividend is a person in whose income a fringe benefit referred to above is included (see also **Example 1** in **3.4.2 b.)**)

4.1.13 Any person to the extent that the dividend was subject to STC [s 64F(1)(m)]

A dividend is exempt from dividends tax under s 64F(1)(m) to the extent that it was subject to STC. This exemption ensures that double taxation does not arise when the same dividend has already been 'subjected to' STC. A dividend declared before 1 April 2012 but paid on or after 1 April 2012 that was subject to STC is exempt from dividends tax under s 64F(1)(m). As to the meaning of 'subject to', see **3.4.5**.

This provision does not exempt a dividend that is paid by crediting it to a loan account that was previously subject to STC, from dividends tax (see **Example 2** below).

¹⁵⁹ The term 'associated institution' is defined in para 1 of the Seventh Schedule.

¹⁶⁰ The term 'official rate of interest' is defined in para 1 of the Seventh Schedule.

¹⁶¹ Paragraph 11(1) was substituted by s 98(b) of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016 (date of promulgation) to substitute the word 'loan' with 'debt'.

Example 1 – Exemption from dividends tax – Section 64F(m)*Facts:*

Company A declared a dividend of R500 000 on 30 March 2012, payable to holders of shares on 2 April 2012. Company A paid STC of R50 000 ($R500\,000 \times 10\%$) to the Commissioner on 30 April 2012.

Result:

The dividend paid by Company A on 2 April 2012 is exempt from dividends tax under s 64F(m), since the dividend was subject to STC.

Note:

The dividend is exempt under s 64F(m) and not s 64F(1)(m) because the renumbering of s 64F to s 64F(1) applies from 1 April 2013 only.

Example 2 – Exemption from dividends tax – Section 64F(1)(m)*Facts:*

Company X's year of assessment ends on 31 March. On 1 April 2011 Company X advanced an interest-free loan of R1 million to Individual Y, the sole holder of its shares. Under s 64C(2)(g) Company X was deemed to have declared a dividend of R1 million on 1 April 2011 and it paid STC of R100 000 ($R1\text{ million} \times 10\%$) to SARS on 31 May 2011. Company X subsequently paid an actual dividend of R1 million on 31 March 2013 which was credited to the loan account of Individual Y thus repaying the loan in full.

Result:

The actual dividend paid by Company X on 31 March 2013 is not exempt from dividends tax under s 64F(m) because it is a different dividend from the 'deemed dividend' that was subject to STC under s 64C(2)(g).

The deemed dividend that was subject to STC is not a dividend as defined in s 64D but is deemed to be a dividend paid under s 64E(4)(a). However, s 64E(4)(e) prevents the triggering of further deemed dividends on the interest-free loan that was subject to STC. It does not, however, prevent the actual dividend of R1 million that was credited to the loan account from being subject to dividends tax.

The repayment of the loan on or after 1 April 2012 does not increase the STC credit of the company – see **6.1.2**.

Note:

Company X might have been able to make use of the exemption from STC under s 64C(4)(f) because the loan was repaid by not later than the end of the immediately succeeding year of assessment (2013) following the year of assessment (2012) during which the loan was advanced. This exemption would be available only if it has not been used by Company X during any previous year of assessment. The exemption in s 64E(4)(e) would not apply if the exemption in s 64C(4)(f) had applied as the interest-free loan would not have been subject to STC and a dividend would be deemed to have been paid for the period 1 April 2012 to 31 March 2013 under s 64E(4)(a) (see **3.4**).

4.1.14 A fidelity or indemnity fund [s 64F(1)(n)]

A dividend is exempt from dividends tax if the beneficial owner is a fidelity or indemnity fund contemplated in s 10(1)(d)(iii). A fidelity or indemnity fund must be approved by the Commissioner under s 30B to qualify for exemption under s 10(1)(d)(iii).

Example – Exemption from dividends tax – Section 64F(1)(n)*Facts:*

ABC Indemnity Fund, which has been approved by the Commissioner under s 30B, holds and is the beneficial owner of the shares in Company C. Company C paid a dividend to ABC Indemnity Fund.

Result:

The dividend of R300 000 paid by Company C to ABC Indemnity Fund is exempt from dividends tax under s 64F(1)(n) because the beneficial owner of the dividend is an Indemnity Fund which has been approved by the Commissioner under s 30B.

4.1.15 A natural person in respect of a dividend paid on a tax-free investment [s 64F(1)(o)]

A dividend paid on a tax-free investment contemplated in s 12T(1)¹⁶² is exempt from dividends tax if the beneficial owner is a natural person or deceased or insolvent estate of that person.¹⁶³ Any amount received by or accrued to a natural person or deceased or insolvent estate of that person on a tax-free investment is similarly exempt from normal tax under s 12T(2).

The term ‘tax free investment’ is defined in s 12T(1) as follows:

‘**[T]ax free investment**’ means any financial instrument or policy as defined in section 29A—

- (a) administered by a person or entity designated by notice by the Minister in the *Gazette*;¹⁶⁴
- (b) owned by—
 - (i) a natural person; or
 - (ii) the deceased estate or insolvent estate of a natural person that is deemed to be one and the same person as that natural person in respect of the contributions made by that person; and
- (c) that complies with the requirements of the Regulations contemplated in subsection (8).¹⁶⁵

Under s 12T(4) contributions in respect of tax-free investments must be made in cash and are limited to R30 000 in aggregate during any year of assessment and to R500 000 in aggregate.¹⁶⁶

Example – Exemption from dividends tax – Section 64F(1)(o)*Facts:*

Individual A invested R30 000 in shares that qualified as a ‘tax free investment’ as defined in s 12T(1) during the 2017 year of assessment. A dividend of R3 000 was paid to Individual A on the investment on 28 February 2017.

¹⁶² Section 12T came into operation on 1 March 2015.

¹⁶³ Section 64F(1)(o) applies to dividends paid on or after 1 March 2015.

¹⁶⁴ See GN R.170 GG 38507 and GN 171 in GG 38508 of 25 February 2015.

¹⁶⁵ See GN R.172 GG 38509 of 25 February 2015 and R. 209 GG 39765 of 1 March 2016.

¹⁶⁶ The draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 proposes to change the amount of R30 000 to R33 000 with effect from years of assessment commencing on or after 1 March 2017.

Result:

The dividend of R3 000 is exempt from dividends tax under s 64F(1)(o), since it was paid on a tax free investment and the beneficial owner is a natural person.

4.2 Exemption from dividends tax for dividends paid by a 'REIT' or a controlled company [s 64F(2)]

A dividend paid by a 'REIT' or a controlled company and received or accrued before 1 January 2014 is exempt from dividends tax to the extent that the dividend did not consist of the distribution of an asset *in specie* [see 3.1.4. for a discussion of para (aa) of the proviso to s 10(1)(k)(i), s 25BB, s 64F(1)(l) and s 64F(2)].

Example – Exemption from dividends tax – Section 64F(2)

Facts:

XYZ REIT qualified as a REIT as defined in s 1(1) for its 2014 year of assessment ending on 31 March 2014. XYZ REIT paid interest of R10 million on its linked units on 28 June 2013 to its beneficial owners. Interest of R4 million was paid to residents and interest of R6 million was paid to persons who are not residents.

Result:

The interest of R10 million paid by XYZ REIT is deemed to be a dividend paid by the REIT under s 25BB(6)(c) for dividends tax purposes.

The interest received by the beneficial owners is deemed to be a dividend received by them under s 25BB(6)(a) and is included in their 'gross income' under para (k) of the definition of 'gross income' in s 1(1).

Under para (aa) of the proviso to s 10(1)(k)(i) the deemed dividends of R4 million received by the beneficial owners who are residents are not exempt from normal tax. These dividends are exempt from dividends tax under s 64F(2) and s 64F(1)(l).

The deemed dividends of R6 million received by the persons who are not residents are exempt from normal tax under s 10(1)(k)(i). These dividends are also exempt from dividends tax under s 64F(2), since they were received before 1 January 2014.

4.3 Exemption from and reduction of dividends tax for dividends *in specie* (s 64FA)

4.3.1 Exemption from dividends tax for dividends *in specie* [s 64FA(1)]

A dividend is exempt from dividends tax to the extent that it consists of a distribution of an asset *in specie* and –

- the portion of the dividend that constitutes a distribution of an asset *in specie* would have been exempt from dividends tax under s 64F, if that portion had not constituted a distribution of an asset *in specie* (see **a.** below);
- the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that declares and pays the dividend (see **b.** below);
- it constitutes a disposal as contemplated in para 51A of the Eighth Schedule (see **c.** below); or
- it constitutes a disposal of immovable property by a share block company to its member under para 67B(2) of the Eighth Schedule (see **d.** below).

a. Beneficial owner would have qualified for exemption under s 64F [s 64FA(1)(a)]

A dividend is exempt from dividends tax to the extent that it consists of a distribution of an asset *in specie* if the person to whom the payment is made has, by the date of payment¹⁶⁷ of the dividend, submitted to the company that declares and pays the dividend –

- a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been exempt from dividends tax under s 64F (see 4.1) (the declaration of exemption) [s 64FA(1)(a)(i)]; and
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner ceases to be the beneficial owner (the written undertaking) [s 64FA(1)(a)(ii)].

The Commissioner has not issued forms to be used for declarations of exemption and written undertakings but has prescribed the required wording and minimum information to be provided in the forms which must be prepared by the company, regulated intermediary or beneficial owner.¹⁶⁸

When a dividend that consists of a distribution of an asset *in specie* is paid to a regulated intermediary which pays the dividend to the beneficial owner, the declaration of exemption and the written undertaking must still be submitted to the company that paid the dividend, since the company is liable for dividends tax under s 64EA(b).

Example 1 – Exemption from dividends tax – Section 64FA(1)(a)

Facts:

Company A holds 20% of the equity shares in Company B, both companies are residents. Company B paid a dividend on 30 January 2017 that constituted a distribution of an asset *in specie* of R100 000 to Company A. Company A submitted the declaration of exemption and the written undertaking to Company B on 15 January 2017.

Result:

Company B is deemed to have paid a dividend of R100 000 under s 64E(3)(b). The dividend is exempt from dividends tax under s 64FA(1)(a), since Company A submitted the declaration of exemption and the written undertaking to Company B by the date of payment of the dividend.

Example 2 – Exemption from dividends tax – Section 64FA(1)(a)

Facts:

Company X holds 20% of the equity shares in Company Y. Company Y is not a listed company. Company X distributed the shares held in Company Y as a dividend *in specie* to holders of its shares on 31 March 2017. The transaction does not qualify as an ‘amalgamation transaction’ under s 44 or an ‘unbundling transaction’ under s 46. The market value of the shares was R12 million on 31 March 2017. The shares in Company X are equally held by Individual A who is a resident and Company B that is a resident. Company B submitted the declaration of exemption and the written undertaking to Company X on 22 March 2017.

¹⁶⁷ Date of payment means the date that a dividend is deemed to be paid as determined under s 64E(2)(b).

¹⁶⁸ See para 14 of the ‘Business Requirements Specification (BRS): Administration of Dividends Tax’ for details.

Result:

Company X is deemed to have paid a dividend of R12 million under s 64E(3)(b). The dividend paid to Company B is exempt from dividends tax under s 64FA(1)(a), since Company B submitted the declaration of exemption and the written undertaking to Company X by the date of payment of the dividend.

Under s 64EA(b) Company X is liable to pay dividends tax of R1,2 million (R12 million × 50% × 20%) to the Commissioner on the dividend *in specie* of R6 million paid to Individual A.

b. Beneficial owner forms part of the same group of companies [s 64FA(1)(b)]

A dividend is exempt from dividends tax to the extent that it constitutes a distribution of an asset *in specie* if the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that declares and pays the dividend. The exemption therefore applies to a resident group of companies.

A beneficial owner that forms part of a group of companies does not have to submit the declaration of exemption and the written undertaking referred to in s 64FA(1)(a) in order for the dividend to be exempt from dividends tax.

The definition of 'group of companies' in s 41(1) starts with the definition of that term in s 1(1) and proceeds to exclude certain companies and types of shares by way of a proviso. The relationship between the remaining companies must be examined to determine if those companies form part of the same 'group of companies' as defined in s 1(1).¹⁶⁹ A 'group of companies' in s 1(1) is defined as two or more companies in which one company (the controlling group company) directly or indirectly holds shares in at least one other company (the controlled group company), to the extent that –

- at least 70% of the equity shares in each controlled group company are directly held by the controlling group company, one or more other controlled group companies or any combination thereof; and
- the controlling group company directly holds at least 70% of the equity shares in at least one controlled group company.

The definition of 'group of companies' is narrowed for the purposes of s 41 and certain types of companies are *excluded* under para (i) of the proviso, namely,:

- A co-operative [para (i)(aa) of the proviso].
- Any association formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public but excluding any association incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part of South Africa, or any close corporation [para (i)(aa) of the proviso].
- A portfolio comprised in any investment scheme carried on outside South Africa that is comparable to a portfolio of a collective investment scheme in participation bonds or a portfolio of a collective investment scheme in securities in pursuance of any arrangement under which members of the public¹⁷⁰ are invited or permitted to contribute to and hold participatory interests in that portfolio through shares, units or any other form of participatory interest [para (i)(aa) of the proviso].

¹⁶⁹ See Interpretation Note 75 'Exclusion of Certain Companies and Shares from a "Group of Companies" as Defined in Section 41(1)'.

¹⁷⁰ As defined in s 1 of the Collective Investment Schemes Control Act 45 of 2002.

- A portfolio of a collective investment scheme in property that qualifies as a REIT as defined in para 13.1 (x) of the JSE Limited Listings Requirements [para (i)(aa) of the proviso].¹⁷¹
- A 'non-profit company' as defined in s 1 of the Companies Act [para (i)(bb) of the proviso].
- A company if any amount constituting gross income of whatever nature would be exempt from tax under s 10 were it to be received by or to accrue to that company [para (i)(cc) of the proviso].
- A company that is a public benefit organisation or a recreational club that has been approved by the Commissioner under s 30 or s 30A [para (i)(dd) of the proviso].
- Any association, corporation or company incorporated under the law of any country other than South Africa or any body corporate formed or established under such law, unless that association, corporation, company or body corporate has its place of effective management in South Africa [para (i)(ee) of the proviso].
- A company that has its place of effective management outside South Africa [para (i)(ff) of the proviso].¹⁷²

In addition, under para (ii) of the proviso to the definition of 'group of companies' in s 41(1) certain shares are deemed not to be equity shares and must therefore not be taken into account in determining whether a company forms part of a group of companies. These are shares that are –

- held as trading stock; or
- subject to a contractual obligation or option to be sold or purchased by any person at a price other than their market value at the time of sale or purchase.

A dividend constituting a distribution of an asset *in specie* paid to a beneficial owner that is a resident company not forming part of the same group of companies as the company that declares and pays the dividend, may be exempt under s 64FA(1)(a).

Example 1 – Exemption from dividends tax – Section 64FA(1)(b)

Facts:

Company A holds all the shares in Company B. Both companies are residents. Company B distributed a dividend *in specie* to Company A.

Result:

The dividend is exempt from dividends tax under s 64FA(1)(b), since it is distributed to Company A which forms part of the same group of companies as Company B. Company A is not required to submit a declaration of exemption or written undertaking with Company B in order for Company B to enjoy the exemption.

¹⁷¹ Effective from years of assessment commencing on or after 1 April 2013. The words 'that qualifies as a REIT' are effective from years of assessment commencing on or after 1 January 2015. The words 'as defined in para 13.1(x) of the JSE Limited Listing Requirements' are effective from 1 January 2015.

¹⁷² Transactions entered into on or after 1 January 2013.

Example 2 – Exemption from dividends tax – Section 64FA(1)(b)*Facts:*

Company A holds 70% of the equity shares in Company B and 70% of the equity shares in Company C. Company B holds 70% of the equity shares in Company D and Company C holds 30% of the equity shares in Company D. All the companies are residents. Company D distributed a dividend *in specie* to holders of its shares.

Result:

Companies A, B, C and D form part of the same group of companies, since they satisfy the requirements of the definition of 'group of companies' in s 41(1). The dividend *in specie* is exempt from dividends tax under s 64FA(1)(b), since it is distributed to companies forming part of the same group of companies as Company D. Companies B and C do not have to submit a declaration of exemption or written undertaking to Company D in order for Company D to enjoy the exemption.

Example 3 – Exemption from dividends tax – Section 64FA(1)(b)*Facts:*

Company A holds 70% of the equity shares in Company B and 70% of the equity shares in Company C. Company B holds 70% of the equity shares in Company D and Company C holds 30% of the equity shares in Company D. All the companies, except for Company A, are residents. Company D distributed a dividend *in specie* to holders of its shares.

Result:

Company A is excluded from the group of companies by para (i)(ee) of the proviso to the definition of 'group of companies' in s 41(1). Company C is also excluded from the group of companies, since it does not hold at least 70% of the equity shares in Company D, as required by the definition of 'group of companies' in s 1(1). Companies B and D form part of the same group of companies, since they satisfy the requirements of the definition of 'group of companies' in ss 1(1) and 41(1).

The dividend *in specie* paid to Company B is exempt from dividends tax under s 64FA(1)(b), since Company B forms part of the same 'group of companies' as defined in s 41(1) as Company D. Company D is liable for dividends tax on the dividend *in specie* paid to Company C unless Company C submits a declaration of exemption and a written undertaking under s 64FA(1)(a) that the dividend would have been exempt from dividends tax if it had not constituted the distribution of an asset *in specie*.

c. Dividend constitutes a disposal of an interest in a residence under para 51A of the Eighth Schedule [s 64FA(1)(c)]

A dividend *in specie* is exempt from dividends tax to the extent that it constitutes a disposal as contemplated in para 51A of the Eighth Schedule.

Paragraph 51A applies if –

- an interest in a residence is disposed of by a company on or after 1 October 2010 but no later than 31 December 2012;
- the residence to which the interest relates was mainly (more than 50%) used for domestic purposes during the period 11 February 2009 to the date of disposal, by one or more natural persons who are connected persons in relation to the company at the time of the disposal; and
- the company making the disposal has within a period of six months from the date of the disposal of the residence taken steps as contemplated in s 41(4) to liquidate, wind up or deregister the company.

The word 'residence' is defined in para 44 of the Eighth Schedule and means any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith.

A distribution *in specie* of a residence contemplated in para 51A of the Eighth Schedule qualifies for exemption under s 64FA(1)(c). Other modes of disposal such as a sale of the property and subsequent distribution of a dividend to the holders of shares are not covered by the exemption under s 64FA(1)(c). The distribution of assets other than a residence will also not qualify for the exemption under s 64FA(1)(c).

See the *Guide to the Disposal of a Residence from a Company or Trust* (1 October 2010 to 31 December 2012) for a discussion of para 51A of the Eighth Schedule.

Example 1 – Exemption from dividends tax – Section 64FA(1)(c)

Facts:

C is the only member of ABC Close Corporation (ABC CC). ABC CC owns a residence which C and C's spouse used mainly for domestic purposes from 11 February 2009 to date. ABC CC distributed the residence *in specie* to C on 31 December 2012. The market value of the residence on 31 December 2012 was R1,5 million. The residence was transferred into C's name in the deeds registry on 31 May 2013.

Result:

The distribution of the residence *in specie* is a 'dividend' as defined in ss 1(1) and 64D. The amount of the dividend under s 64E(3)(b) is deemed to be equal to the market value of the residence on 31 December 2012 of R1,5 million. The dividend is, however, exempt from dividends tax under s 64FA(1)(c). For the purposes of para 51A the disposal occurred on 31 December 2012, which is the time of disposal under para 13(1)(e) of the Eighth Schedule. The disposal therefore occurred within the cut-off date of 31 December 2012 and the subsequent registration of the residence in C's name after 31 December 2012 is irrelevant.

Example 2 – Exemption from dividends tax – Section 64FA(1)(c)

Facts:

B is the only member of DEF Close Corporation (DEF CC). DEF CC owns a residence which B and B's spouse used mainly for domestic purposes from 11 February 2009 to date of disposal of the residence by DEF CC. DEF CC disposed of the residence to B on 30 April 2012 at book value of R1 million. The market value of the residence on date of disposal was R1,5 million. The book value of the residence is represented by a nominal member's interest of R100 and the balance by a member's loan account.

Result:

The benefit of R500 000 (R1,5 million – R1 million) obtained by B on acquisition of the residence from DEF CC constitutes a 'dividend' as defined in ss 1(1) and 64D. The dividend *in specie* of R500 000 is, however, exempt from dividends tax under s 64FA(1)(c), since it relates to the disposal of a residence under para 51A of the Eighth Schedule. No further dividends tax consequences arise because there are no residual profits in DEF CC after the sale to B at book value.

d. Dividend constitutes a disposal of immovable property by a share block company to its member under para 67B(2) of the Eighth Schedule [s 64FA(1)(d)]

A dividend *in specie* is exempt from dividends tax to the extent that it constitutes a disposal of immovable property by a share block company to its member as contemplated in para 67B(2) of the Eighth Schedule.

A 'share block company' is defined in para 67B(1) of the Eighth Schedule as 'a "share block company" as defined in s 1 of the Share Blocks Control Act'. A 'share block company' is defined in s 1 of the Share Blocks Control Act as 'a company the activities of which comprise or include the operation of a share block scheme'.

Under the Share Blocks Control Act, the share block company is the owner of its immovable property. The members of a share block company have, by virtue of their shareholding in the share block company, the right to use an exclusive area as well as the common-use areas of the immovable property held by the company. A member may by special resolution under s 8(1)(c) of the Share Blocks Control Act convert the shares in the share block company to direct ownership in the property. The share block company may alienate or cede the immovable property by way of a distribution or by way of a sale to the member.

Paragraph 67B applies if a person who holds a right of exclusive use of a specified part of the immovable property of a share block company, which right is conferred by reason of the ownership of a share by that person in that share block company, acquires ownership of that specified part of immovable property from that share block company as a result of a disposal made by the share block company. Paragraph 67B applies to the extent that the ownership that a person acquires in the immovable property relates to the same underlying immovable property previously held by that person by way of a share in the share block company.

A distribution *in specie* of a specified part of immovable property by a share block company under the circumstances mentioned above will be exempt from dividends tax under s 64FA(1)(d).¹⁷³

Example – Exemption from dividends tax – Section 64FA(1)(d)

Facts:

X holds a share in Share Block Company XYZ together with a right of use over a unit in a block of flats owned by the company. The holders of shares pass a special resolution under s 8(1)(c) of the Share Blocks Control Act in which they resolve to transfer the unit to X under a sectional title scheme. Under item 8(2)(b) of Schedule 1 to the Share Blocks Control Act, X waives the right of use of the unit thus restoring full title in the unit to the share block company. Share Block Company XYZ subsequently transfers the unit to X under item 8(1) of Schedule 1.

Result:

To the extent that the transfer of the unit to X falls under para 67B(2) of the Eighth Schedule and comprises a 'dividend' as defined in s 64D consisting of a distribution of an asset *in specie* it will be exempt from dividends tax under s 64FA(1)(d).

¹⁷³ Section 64FA(1)(d) applies in respect of dividends paid on or after 1 January 2013.

4.3.2 Reduced rate of dividends tax [s 64FA(2)]

A company that declares and pays a dividend that consists of a distribution of an asset *in specie* is liable for dividends tax at a reduced rate on the portion of the dividend that constitutes the distribution of an asset *in specie* if the person to whom the payment is made has, by the date of payment of the dividend,¹⁷⁴ submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,¹⁷⁵ that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax) [s 64FA(2)(a)] (see 4.4); and
- a written undertaking in such form as may be prescribed by the Commissioner¹⁷⁶ to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64FA(2)(b)].

See 4.4.2 for considerations in the application of relief under a tax treaty for dividends *in specie*.

Example – Reduced rate of dividends tax – Dividend *in specie*

Facts:

Company A distributed an asset *in specie* with a market value of R2 million to Company B, the sole holder of its shares on 30 September 2016. Company B is not a resident and is incorporated in Mauritius. On 20 September 2016 Company B submitted the declaration that the dividend is subject to a reduced rate of tax as a result of the tax treaty between South Africa and Mauritius together with the written undertaking to inform Company A of changes affecting the exemption or if Company B ceases to be the beneficial owner.

Result:

The distribution of the asset *in specie* by Company A constitutes a 'dividend' as defined in ss 1(1) and 64D. Company A is liable for dividends tax under s 64EA(b), since the dividend consists of a distribution of an asset *in specie*. Under s 64FA(2) the dividend of R2 million paid to Company B is subject to dividends tax at a reduced rate of 5%,¹⁷⁷ since Company B submitted the declaration that the dividend is subject to a reduced rate of tax and also submitted the written undertaking to Company A on 20 September 2016, which was before the date of payment of the dividend.

Company A must pay dividends tax of R100 000 (R2 million × 5%) to the Commissioner on or before 31 October 2016 under s 64K(1)(b) (see 7.1.2).

¹⁷⁴ Date of payment means the date that a dividend is deemed to be paid as determined under s 64E(2)(b).

¹⁷⁵ See the 'Business Requirements Specification (BRS): Administration of Dividends Tax' for the required wording and minimum information to be provided in the declaration and written undertaking.

¹⁷⁶ See above.

¹⁷⁷ Article 10(2) of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mauritius for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

4.3.3 Application of section 64FA(1) and (2) if an amount is deemed to be a dividend consisting of a distribution of an asset *in specie*

Certain provisions in the Act deem certain amounts that are not dividends to be dividends for a specified purpose, for example, for purposes of the Act or for purposes of dividends tax. In this regard see, for example, 3.1.4, 3.7.2 and 3.8. Whether a deemed dividend is subject to dividends tax and, if so, whether it qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2), depends on the facts of each case, the specific deeming provision and, if applicable, the wording of the specific tax treaty (see 4.4.2).

By way of example, in a., b. and c. below, some of the aspects regarding the application of s 64FA(1) and (2) in the context of three different deemed dividend provisions, namely, s 8F(2), s 24BA(3)(b) and s 31(3) are considered.

a. Application of s 64FA to a deemed dividend *in specie* under s 24BA(3)(b)

If the circumstances in 3.7.2 c. apply, s 24BA(3)(b) deems the excess amount referred to in 3.7.2 c. to –

- be a dividend as defined in s 64D;
- consist of a distribution of an asset *in specie*; and
- be paid by the issuing company¹⁷⁸ on the date of that issue of shares.

Section 24BA(3)(b) does not deem any person to be a recipient of the deemed dividend and, taking the purpose of the provision into account, SARS' view is that the parameters of the deemed dividend are not extended to include a deemed recipient.

Applying the deeming provisions above, it is apparent that the requirements of ss 64E(1) and 64EA(b) (see 3.1.1 and 3.7.2) will be met and that, in the absence of an exemption or a reduced rate of dividends tax applying, the deemed dividend will be subject to dividends tax at a rate of 20%. The issuing company will not qualify for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) on a deemed dividend consisting of the distribution of an asset *in specie* which arises under s 24BA(3)(b). For s 64FA(1) or (2) to apply (see 4.3.1 and 4.3.2), the person to whom the payment is made must submit a declaration by the beneficial owner and the written undertaking referred to in that section to the company that is deemed to have declared and paid the deemed dividend. As noted above, there is no deemed recipient under s 24BA(3)(b) which means that there is no beneficial owner and therefore the requirements of s 64FA(1) or (2) cannot be met.

In addition, even if it is assumed that there is a deemed recipient, the market value excess which is deemed to be a dividend would not be considered to be 'attaching to a share'. The market value excess attaches to the underlying transaction in which the asset was acquired as consideration for shares issued and not to a share. There is no direct link or cause between the market value excess and a share. The immediate cause of the excess is the underlying transaction.

As a result of the relief not being available under s 64FA(1) and (2), it is irrelevant whether the specific requirements in a potentially applicable tax treaty are met, for example, the tax treaty definition of 'dividend' and the possible requirement for a specific holding in the capital or voting rights of a company.

¹⁷⁸ The company issuing shares as contemplated in s 24BA(2)(a).

b. Application of s 64FA to a deemed dividend *in specie* under s 8F(2)

As noted in **3.7.2 (d)**, under s 8F(2)(a) an amount of interest incurred by a company on a hybrid debt instrument is, on or after the date that the instrument becomes a hybrid debt instrument –¹⁷⁹

- deemed for the purposes of the Act to be a dividend *in specie* declared and paid by that company on the last day of the year of assessment of that company; and
- not deductible under the Act.

Section 8F(2)(b) provides that the amount of interest incurred by a company on a hybrid debt instrument is also deemed for the purposes of the Act to be a dividend *in specie* that is declared and paid in respect of a share on the last day of the year of assessment of the company that incurred the interest to the person to whom that amount accrued.

Applying the above deeming provisions, it is apparent that the requirements of ss 64E(1) and 64EA(b) (see **3.1.1** and **3.7.2**) will be met and that, in the absence of an exemption or a reduced rate of dividends tax applying, the deemed dividend will be subject to dividends tax at a rate of 20%.

For s 64FA(1) or (2) to apply (see **4.3.1** and **4.3.2**), the beneficial owner must submit the declaration and written undertaking referred to in that section to the company that is deemed to have declared and paid the deemed dividend *in specie*. The term 'beneficial owner' is defined in s 64D and means 'the person entitled to the benefit of the dividend attaching to a share.' This requirement is met because s 8F(2)(b) deems the interest, which is an actual benefit, to have been declared and paid in respect of a share. Whether the other requirements of s 64FA(1) or (2) are met will depend on the facts of each case and the wording of the particular tax treaty, if applicable.

The wording in ss 8F(2) and 8FA(2) relating to the deemed dividend is the same. The commentary in this section is therefore also relevant in determining whether an amount deemed to be a dividend *in specie* under s 8FA(2) qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2).

c. Application of s 64FA to a deemed dividend *in specie* under s 31(3)

Section 31 provides that the tax payable in respect of certain international transactions must be based on arm's length principles. As noted in **3.7.2 f.**, s 31(3) provides for a secondary adjustment to be made to the extent that there is a difference in the amount applied in calculating taxable income (that is, an arm's length amount) under s 31(2) and the amount which would have been applied had s 31(2) not applied. It states that the amount of the difference must, if the person is a resident and the other person to the affected transaction is not a resident or is a resident that has a permanent establishment outside South Africa to which the affected transaction relates –

- be deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person if the resident is a company [s 31(3)(i)]; or
- be deemed for the purposes of donations tax, to be a donation made by that resident to that other person if the resident is a person other than a company [s 31(3)(ii)],

on the last day of the period of six months following the end of the year of assessment for which the adjustment is made.¹⁸⁰

¹⁷⁹ The term 'hybrid debt instrument' is defined in s 8F(1).

¹⁸⁰ Section 31(3) was amended by s 50(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 January 2015. It therefore applies to years of assessment ending on or after 1 January 2015 as the determination of taxable income would be on or after that date.

In applying the deeming provisions above it is apparent that the requirements of ss 64E(1) and 64EA(b) (see 3.1.1 and 3.7.2) have been met and that, in the absence of an exemption or a reduced rate of dividends tax applying, the deemed dividend will be subject to dividends tax at a rate of 20%.

A resident company will not qualify for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) on a deemed dividend *in specie* which arises under s 31(3)(i). For s 64FA(1) or (2) to apply (see 4.3.1 and 4.3.2), the beneficial owner must submit the declaration and written undertaking referred to in that section to the company that is deemed to have declared and paid the deemed dividend *in specie*. The term 'beneficial owner' is defined in s 64D and means 'the person entitled to the benefit of the dividend attaching to a share.' A recipient of a deemed dividend *in specie* under s 31(3)(i) is not entitled to the benefit of the dividend because there is no benefit. There is no benefit because the deemed dividend *in specie*, which results from a difference determined between two taxable income calculations, is a figure calculated for tax purposes only which has resulting dividends tax implications. An actual benefit arises for the other party to an affected transaction (the recipient) when an expense is overpriced or income is understated, but this actual benefit is different to and distinct from the dividend which is deemed to arise under s 31(3)(i). The actual benefit arises before and irrespective of whether the Act deems a dividend to arise under s 31(3). Neither s 31(2) nor s 31(3) re-characterise the underlying expense or income to be a dividend; the deemed dividend under s 31(3)(i) arises over and above the underlying transaction. In addition, even if one assumes there is a benefit, that benefit would not be considered to be 'attaching to a share'. It attaches to the 'affected transaction' that gave rise to the application of s 31(2) and (3)(i) and not to a share. There is no direct link or cause between the benefit and a share. The immediate cause of the adjustment in s 31(2) is the underlying transaction which was not conducted on an arm's length basis.

In the absence of a 'beneficial owner' as defined in s 64D, the requirements of s 64FA(1) and (2) cannot be met. In assessing whether a reduced rate of dividends tax applies, without a beneficial owner it is irrelevant whether the specific requirements in a potentially applicable tax treaty are met. The requirements include, for example, the tax treaty definition of 'dividend' and the possible requirement for a specific holding in the capital or voting rights of a company (see 4.4). In assessing whether an exemption from dividends tax applies, in addition to the absence of a beneficial owner, for completeness it is noted that an affected transaction falling within the ambit of s 31 is a transaction which is unlikely to meet the requirements of s 64F as referred to in s 64FA(1).

For completeness it is also noted that in the case of a deemed donation under s 31(3)(ii), Part V of the Act, which includes the exemptions, must be considered in determining if donations tax is payable. Practically the exemptions are unlikely to apply but it will depend on the facts of each case.

If the difference referred to under s 31(3) was deemed before 1 January 2015 to be a loan that constituted an affected transaction then, to the extent it had not been repaid before 1 January 2015, it was –¹⁸¹

- deemed to be a dividend consisting of a distribution of an asset *in specie* declared and paid by that resident to that other person on 1 January 2015 if the resident is a company [para (a) of the proviso to s 31(3)]; or
- deemed for the purposes of donations tax, to be a donation made by that resident to that other person on 1 January 2015 if the resident is a person other than a company [para (b) of the proviso to s 31(3)].

¹⁸¹ Under the proviso to s 31(3).

The same principles regarding the availability of an exemption from dividends tax or donations tax, as appropriate, or a reduction in the rate of dividends tax as discussed above apply.

4.4 Prevention of or relief from double taxation (s 108)

4.4.1 Cash dividends

Under s 108 South Africa may enter into a tax treaty with another country for the relief of double taxation. Dividends tax on a dividend that does not consist of a distribution of an asset *in specie* is a tax on income and potentially qualifies for relief under a tax treaty.¹⁸²

A dividend that does not consist of a distribution of an asset *in specie* paid by a company that is a resident to a person who is not a resident may be subject to dividends tax at a reduced rate under a tax treaty if the declarations and written undertakings as referred to in ss 64G(3) and 64H(3) have been submitted to the company or regulated intermediary paying the dividend (see 5.2.3 and 5.3.3). Certain amounts that are deemed to be a dividend received by or accrued to a person may also be subject to dividends tax at a reduced rate under a tax treaty, for example, interest to be settled in cash which is received by or accrued to a person during a year of assessment commencing on or after 1 April 2013 on a debenture forming part of a linked unit in a REIT or a resident controlled company (see 3.1.4).

For relief under a tax treaty to apply, the requirements specified in the relevant tax treaty must be met. Examples of these requirements include the following:¹⁸³

- A minimum holding of the capital of the company paying the dividend – whether the holding must be direct or can be indirect depends on the relevant tax treaty.
- A minimum holding of the voting power in the company paying the dividend – whether the holding must be direct or can be indirect depends on the relevant tax treaty.
- The definition of 'dividend'.

Depending on the relevant tax treaty, a beneficial owner of a dividend that is a foreign company will often be entitled to a lower rate of dividends tax than a beneficial owner other than a company.

Example – Relief from double taxation – Dividend in cash

Facts:

Individual X, a resident, holds 80% of the equity shares in Company Y. Company Z, a company that is a resident of Switzerland, holds the remaining 20% of the equity shares. Company Y declares a dividend of R10 million to holders of its shares.

Result:

The dividend of R8 million (R10 million × 80%) declared to Individual X is subject to dividends tax at a rate of 20%. The dividend of R2 million (R10 million × 20%) declared to Company Z is subject to dividends tax at a reduced rate of 5% under Article 10(2) of the tax treaty with the Swiss Confederation.¹⁸⁴

¹⁸² See Binding General Ruling (Income Tax) 9 (Issue 3) dated 3 February 2017 'Taxes on income and substantially similar taxes for purposes of South Africa's tax treaties' in para 3.1.

¹⁸³ See the various tax treaties in force and 'Dividends Tax: Summary of withholding tax rates per South African Double Taxation Agreements currently in force'.

¹⁸⁴ Convention between the Republic of South Africa and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income dated 6 March 2009.

4.4.2 Dividends *in specie*

A resident company paying a dividend *in specie* is liable for dividends tax under s 64EA(b). The incidence of the tax therefore falls on the company paying the dividend rather than on the holder of shares in the company. Generally a non-resident holder of shares would not be able to secure a tax credit under a tax treaty for dividends tax in these circumstances, since it is not liable for the dividends tax.¹⁸⁵

A company that pays a dividend *in specie* may be entitled to an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) if the portion of the dividend that constitutes a dividend *in specie* would have been entitled to an exemption or a reduced rate of dividends tax under an applicable tax treaty had the dividend not constituted a distribution of an asset *in specie* and the person to whom the payment is made supplies the company with the necessary declaration and written undertaking (see 4.3.2).

Under s 64EA(a) to the extent a dividend does not constitute a distribution of an asset *in specie*, the beneficial owner is liable for dividends tax. Therefore, in assessing whether a dividend constituting a distribution of an asset *in specie* qualifies for a reduced rate under s 64FA(2), s 64FA(2)(a) requires that the dividend must be considered as not constituting the distribution of an asset *in specie* and to assess whether all the requirements specified in the tax treaty which apply to the beneficial holder of the dividend are met. The requirements would include, amongst others, the definition of 'dividend' for purposes of the tax treaty and any minimum holdings in respect of capital or voting rights in the company declaring the dividend. Especially in the context of deemed distributions of assets *in specie*, the requirement in s 64FA(2)(a) to treat a dividend *in specie* as not being a distribution of an asset *in specie* does not mean it is treated as a cash dividend. The actual characteristics of the distribution of the asset *in specie*, including any characteristics which are specifically deemed to exist, are applied in assessing whether the requirements referred to above are met.

Amounts deemed to be a dividend consisting of a distribution of an asset in specie

Certain provisions in the Act deem certain amounts that are not dividends to be dividends for a specified purpose, for example, for purposes of the Act or for purposes of dividends tax. Whether the deemed dividend is liable to dividends tax and, if so, qualifies for an exemption from dividends tax under s 64FA(1) or a reduced rate of dividends tax under s 64FA(2) will depend on the facts of each case, the specific deeming provision and, if applicable, the wording of the applicable tax treaty and in particular the dividends article of that tax treaty. See 4.3.3 for possible relief under a tax treaty in respect of amounts deemed to be a dividend consisting of a distribution of an asset *in specie*.

¹⁸⁵ Some countries have controlled foreign company legislation similar to s 9D or may have a full imputation system for taxing foreign dividends. Under a full imputation system for taxing dividends, the foreign dividend is grossed up to an amount equal to the proportionate share of the underlying pre-tax corporate profits. In these circumstances the article dealing with the elimination of double taxation may provide a tax credit for the underlying corporate tax which should include any dividends tax paid by the distributing company.

Chapter 5

Withholding of dividends tax (ss 64G, 64H and 64I)

5.1 Introduction

A company that is a resident that declares and pays a dividend is liable for dividends tax on that dividend under s 64EA(b) to the extent that the dividend consists of a distribution of an asset *in specie*. Since the company and not the beneficial owner is liable for dividends tax on a distribution of an asset *in specie*, no withholding of dividends tax will occur. Dividends tax on a distribution of an asset *in specie* will be paid by the company to the Commissioner as a principal taxpayer and not as a withholding agent.

A company that declares and pays a dividend must withhold an amount of dividends tax under s 64G(1) from the payment of the dividend calculated as contemplated in s 64E except to the extent that the dividend consists of a distribution of an asset *in specie*. Dividends tax must be withheld notwithstanding that the beneficial owner is liable for dividends tax under s 64EA(a). However, if the dividend is paid to a regulated intermediary, the primary withholding obligation shifts to the regulated intermediary under s 64H(1).

Previously a company [under s 64G(1)(b)] or regulated intermediary [under s 64H(1)(b)] was not required or entitled to withhold dividends tax if the dividend was not subject to dividends tax as a result of the application of the STC credit under s 64J of the company that declared and paid the dividend. The STC credit of a company on or after 1 April 2015 is deemed to be nil (see **Chapter 6**).

Withholding of dividends tax by the company or regulated intermediary can be eliminated or reduced upon timely receipt of –

- a declaration that the dividend is exempt from dividends tax under s 64F or that the dividend is subject to a reduced rate of tax as a result of the application of a tax treaty; and
- a written undertaking to forthwith inform the company or regulated intermediary in writing should the circumstances affecting the exemption or the reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.

5.2 Withholding of dividends tax by companies declaring and paying dividends, excluding distributions of assets *in specie* (s 64G)

5.2.1 General rule [s 64G(1)]

As a general rule, a company that declares and pays a dividend must withhold an amount of dividends tax from that payment, calculated in accordance with s 64E, except to the extent that the dividend consists of a distribution of an asset *in specie*.

Under s 64G(1)(b) a company must not withhold dividends tax if the dividend is not subject to dividends tax as a result of the application of the STC credit contemplated in s 64J of the company that paid and declared the dividend. The STC credit of a company on or after 1 April 2015 is deemed to be nil (see **Chapter 6**).

5.2.2 No withholding requirement for a company that declares and pays a dividend [s 64G(2)]

A company must not withhold any dividends tax from the payment of a dividend if –

- the person to whom the payment is made has submitted to the company a declaration by the beneficial owner that the dividend is exempt from dividends tax under s 64F and a written undertaking that it will inform the company should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (see **a.** below);
- the beneficial owner forms part of the same ‘group of companies’, as defined in s 41, as the company that paid the dividend (see **b.** below); or
- the payment is made to a regulated intermediary (see **c.** below).

a. Dividend is exempt from dividends tax – Declaration by beneficial owner [s 64G(2)(a)]

A company must not withhold any dividends tax from the payment of a dividend if the person to whom the payment is made has, by a date determined by the company¹⁸⁶ or if the company did not determine a date, by the date of payment of the dividend,¹⁸⁷ submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,¹⁸⁸ that the dividend is exempt from dividends tax under s 64F (the declaration of exemption) [s 64G(2)(a)(aa)]; and
- a written undertaking in such form as may be prescribed by the Commissioner¹⁸⁹ to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64G(2)(a)(bb)].

A company may rely on a declaration of exemption for all future dividends payable by a company to a beneficial owner until the beneficial owner advises the company that –

- the circumstances affecting the exemption applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

A company must withhold dividends tax from the payment of a dividend if the declaration of exemption and the written undertaking are not submitted by a beneficial owner by the date determined by the company, or if not determined, by the date of payment of the dividend.

The late submission of a declaration of exemption does not necessarily result in a final withholding tax. A late declaration of exemption can sometimes be used by the person to whom the dividend was paid to claim a refund of dividends tax from the company under s 64L (see **8.2**).

¹⁸⁶ This date must be on or before the date of payment of the dividend.

¹⁸⁷ Date of payment of the dividend means the date that a dividend is deemed to be paid as determined under s 64E(2)(a).

¹⁸⁸ See the ‘Business Requirements Specification (BRS): Administration of Dividends Tax’.

¹⁸⁹ See the ‘Business Requirements Specification (BRS): Administration of Dividends Tax’.

Example – No withholding requirement for company that declares and pays a dividend – Declaration of exemption by beneficial owner

Facts:

Company M declared and paid a dividend of R3 million to ABC Pension Fund, the sole holder of its shares. ABC Pension Fund submitted the declaration of exemption and the written undertaking to Company M within the required time. The dividend is exempt from dividends tax under s 64F(1)(f).

Result:

Under s 64G(2)(a) Company M must not withhold dividends tax from the dividend of R3 million paid to ABC Pension Fund, since it received the declaration of exemption and the written undertaking from ABC Pension Fund within the required time.

b. Beneficial owner forms part of the same group of companies as the company that paid the dividend [s 64G(2)(b)]

A company must not withhold any dividends tax from the payment of a dividend if the beneficial owner forms part of the same 'group of companies', as defined in s 41, as the company that paid the dividend. A domestic group of companies will therefore benefit from this exemption (see 4.3.1 b. for a discussion of a 'group of companies').

A beneficial owner that forms part of the same group of companies as the company that paid a dividend does not have to submit the declaration of exemption and the written undertaking referred to in s 64G(2)(a) in order to qualify for an exemption from dividends tax.

Example – No withholding requirement for company that declares and pays a dividend – Group of companies

Facts:

Company X holds all the shares in Company Y and both companies are residents. Company Y declared and paid a dividend of R100 000 to Company X. Company X did not complete a declaration of exemption or written undertaking form.

Result:

Under s 64G(2)(b) Company Y must not withhold dividends tax from the dividend of R100 000 paid to Company X, since Company Y and Company X form part of the same 'group of companies' as defined in s 41. Company X is not required to complete a declaration of exemption or written undertaking form.

c. Payment made to a regulated intermediary [s 64G(2)(c)]

A company must not withhold dividends tax from the payment of a dividend if the payment is made to a regulated intermediary. Section 64H(1) shifts the liability to withhold dividends tax from the company that paid a dividend to the regulated intermediary if the dividend is paid to the regulated intermediary.

A company that pays a dividend to a person that is not a regulated intermediary, for example, a trust, which in turn makes payment to a regulated intermediary, must withhold dividends tax from that payment, since the dividend is not directly paid to the regulated intermediary. A company will be relieved from the obligation to withhold dividends tax under s 64G(2)(c) only if payment of the dividend is made directly to a regulated intermediary.

Example 1 – No withholding requirement for a company that declares and pays a dividend – Payment to a regulated intermediary

Facts:

Company A Ltd paid a dividend of R1 million on 27 March 2017 to Regulated Intermediary A. Regulated Intermediary A paid the dividend to the beneficial owners on 28 March 2017.

Result:

Under s 64G(2)(c) Company A Ltd must not withhold dividends tax from the dividend of R1 million paid to Regulated Intermediary A, since the liability to withhold dividends tax shifts to Regulated Intermediary A under s 64H(1).

Example 2 – No withholding requirement for a company that declares and pays a dividend – Indirect payment to a regulated intermediary

Facts:

ABC Trust's year of assessment ends on the last day of February. On 20 February 2017 Company B Ltd paid a dividend of R1 million to ABC Trust which held all its shares. ABC Trust vested the dividend in its beneficiaries who are resident companies and paid the dividend to Regulated Intermediary A on 21 February 2017. Regulated Intermediary A paid the dividend to the beneficial owners on 27 February 2017.

Result:

Withholding requirements

Company B Ltd must withhold dividends tax of R150 000 (R1 million × 15%¹⁹⁰) from the dividend paid to ABC Trust. Section 64G(2)(c) does not apply, since the dividend is not paid directly to Regulated Intermediary A.

ABC Trust must not withhold dividends tax from the payment made to Regulated Intermediary A because dividends tax was already withheld by Company B Ltd and ABC Trust is not a 'regulated intermediary' as defined in s 64D. Regulated Intermediary A must also not withhold any dividends tax, since it was already withheld by Company B Ltd.

Normal tax implications for the resident companies

The dividends distributed by ABC Trust are included in the gross income of the resident companies under para (k) of the definition of 'gross income' in s 1(1). The dividends are not exempt from normal tax because of para (ee)(B) of the proviso to s 10(1)(k)(i).

Dividends tax implications for the resident companies

The resident companies became the beneficial owners of the dividends under s 25B(1) and (2) because the trust distributed them during the same year of assessment in which they were received by or accrued to the trust.

The dividends are exempt from dividends tax under s 64F(1)(a) and (j).

ABC Trust can claim a refund from Company B Ltd under s 64L(1) for the dividends tax withheld from the dividends and can subsequently pay the dividends tax recovered to the resident companies (see 2.3.1 and 8.2.1), if the resident companies provided the relevant declarations of exemption and written undertakings to ABC Trust so that it could submit them as required.

¹⁹⁰ The rate of dividends tax was increased from 15% to 20% in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 for dividends paid on or after 22 February 2017. It is anticipated that the rate will remain 20% when the draft Bill is finalised and promulgated.

5.2.3 Reduced rate of tax – Application of a tax treaty [s 64G(3)]

A company must withhold dividends tax from the payment of a dividend at a reduced rate if the person to whom the payment is made has by a date determined by the company¹⁹¹ or, if the company did not determine a date, by the date of payment of the dividend,¹⁹² submitted to the company –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,¹⁹³ that the dividend is subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax¹⁹⁴); and
- a written undertaking in such form as may be prescribed by the Commissioner¹⁹⁵ to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking).

See 4.4 for considerations in the application of a tax treaty to dividends.

A company may rely on the declaration that the dividend is subject to a reduced rate of tax for all future dividends payable by a company to the beneficial owner until the beneficial owner informs the company that –

- the circumstances affecting the reduced rate applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

The late submission of the declaration that the dividend is subject to a reduced rate of tax does not necessarily result in a final withholding tax. A late declaration that the dividend is subject to a reduced rate of tax can sometimes be used by the beneficial owner to claim a refund from the company under s 64L (see 8.2).

Example – Withholding of dividends tax at a reduced rate – Application of a tax treaty

Facts:

Company Y, a non-resident, holds 70% of the equity shares in Company X while Company Z, a resident, holds the balance of 30%. Company X declared a dividend of R1 million on 1 July 2016, payable to holders of shares registered on 4 July 2016, and did not determine a date for the submission of declarations that the dividend is exempt from dividends tax or subject to dividends tax at a reduced rate of tax. On 4 July 2016 Company X paid the dividends to holders of its shares. Company Y submitted the declaration that the dividend is subject to a reduced rate of tax of 5% and the written undertaking to Company X on 5 July 2016 and Company Z submitted the declaration of exemption and the written undertaking to Company X on 30 June 2016.

Result:

Under s 64G(3) Company X must not withhold dividends tax from the dividend of R300 000 (R1 million × 30%) paid to Company Z because Company Z submitted the declaration of exemption and the written undertaking to Company X by the date of payment of the dividend. The dividend paid to Company Z is exempt from dividends tax under s 64F(1)(a).

¹⁹¹ This date must be on or before the date of payment of the dividend.

¹⁹² Date of payment of the dividend means the date that a dividend is deemed to be paid as determined under s 64E(2)(a).

¹⁹³ See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

¹⁹⁴ See Binding Private Ruling 148 dated 19 June 2013 'Dividends Tax Rate – Permanent Establishment in South Africa'.

¹⁹⁵ See above.

Company X must withhold dividends tax of R105 000 [R700 000 (R1 million × 70%) × 15%] from the dividend payable to Company Y because Company Y did not submit the declaration that the dividend is subject to a reduced rate of tax and the written undertaking to Company X by the date of payment of 4 July 2016.

Company Y may be able to claim a refund of the excess dividends tax withheld of R70 000 [(R105 000 – R35 000 (R700 000 × 5%)] under s 64L.

5.3 Withholding of dividends tax by regulated intermediaries (s 64H)

5.3.1 General rule [s 64H(1)]

A company that declares a dividend and pays it to a regulated intermediary must not withhold dividends tax from that payment, since the regulated intermediary assumes the withholding responsibility.

Under s 64H(1)(a) a regulated intermediary that pays a dividend that was declared by a company must withhold an amount of dividends tax from that payment, calculated in accordance with s 64E, except to the extent that the dividend consists of a distribution of an asset *in specie*.

A regulated intermediary must not withhold dividends tax under s 64H(1)(b) if the dividend is not subject to dividends tax as a result of the application under s 64J of the STC credit of the company that paid and declared a dividend. The STC credit of a company on or after 1 April 2015 is deemed to be nil (see **Chapter 6**).

5.3.2 No withholding requirement for a regulated intermediary [s 64H(2)]

A regulated intermediary must not withhold any dividends tax from the payment of a dividend if –

- the person to whom the payment is made has submitted to the regulated intermediary a declaration by the beneficial owner that the dividend is exempt from dividends tax under s 64F, or that the payment is made to a vesting trust and the sole beneficiary of that vesting trust is another regulated intermediary (see **a.** below); or
- the payment is made to another regulated intermediary (see **b.** below).

a. Declaration by beneficial owner – Dividend is exempt from dividends tax [s 64H(2)(a)]

A regulated intermediary must not withhold dividends tax from the payment of a dividend if the person to whom the payment is made has, by a date determined by the regulated intermediary¹⁹⁶ or if the regulated intermediary did not determine a date, by the date of payment of the dividend,¹⁹⁷ submitted to the regulated intermediary –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,¹⁹⁸ that the dividend is exempt from dividends tax under s 64F (the declaration of exemption), or a declaration that the payment is made to a vesting trust of which the sole beneficiary is another regulated intermediary [s 64H(2)(a)(aa)]; and

¹⁹⁶ This date must be on or before the date of payment of the dividend.

¹⁹⁷ Date of payment of the dividend means the date that a dividend is deemed to be paid as determined under s 64E(2)(a).

¹⁹⁸ See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

- a written undertaking, in such form as may be prescribed by the Commissioner,¹⁹⁹ to forthwith inform the regulated intermediary in writing should the circumstances affecting the exemption applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking) [s 64H(2)(a)(bb)].

A regulated intermediary may rely on a declaration of exemption for all future dividends payable by that regulated intermediary until the beneficial owner informs the regulated intermediary that –

- the circumstances affecting the exemption applicable to the beneficial owner have changed; or
- there has been a change in beneficial ownership.

The late submission of a declaration of exemption does not necessarily result in a final withholding tax. A late declaration of exemption can sometimes be used by the person to whom the dividend was paid to claim a refund from the regulated intermediary under s 64M (see 8.3).

A collective investment scheme in securities may hold many of its financial instruments through a wholly controlled vesting trust in which it is the sole beneficiary. The reference to a vesting trust in s 64H(2)(a)(aa) ensures that dividends tax must not be withheld from a dividend paid to a vesting trust of which a CISS is the sole beneficiary. The CISS or its unit holders will be the beneficial owners of the dividends and not the vesting trust.

Example – No withholding requirement for a regulated intermediary – Payment to a vesting trust

Facts:

Company A paid a dividend to Regulated Intermediary A which paid the dividend to Vesting Trust A. Regulated Intermediary B is the sole beneficiary of Vesting Trust A. By the date of payment of the dividend Vesting Trust A submitted a declaration by Regulated Intermediary B to Regulated Intermediary A that Regulated Intermediary B is the sole beneficiary of Vesting Trust A.

Result:

Company A and Regulated Intermediary A must not withhold dividends tax from the dividend under ss 64G(2)(c) and 64H(2)(a) respectively. Company A is making payment to a regulated intermediary and Regulated Intermediary A is making payment to a vesting trust of which the sole beneficiary is another regulated intermediary.

b. Dividend paid to another regulated intermediary [s 64H(2)(b)]

A regulated intermediary must not withhold dividends tax from the payment of a dividend if the payment is made to another regulated intermediary, since the latter regulated intermediary becomes liable to withhold dividends tax.

Example – No withholding requirement for regulated intermediary – Payment to another regulated intermediary

Facts:

Company X paid a dividend to Regulated Intermediary A which paid the dividend to Regulated Intermediary B. Regulated Intermediary B paid the dividend to Company Y, a company that is a resident.

¹⁹⁹ See above.

Result:

Company X and Regulated Intermediary A must not withhold dividends tax from the dividend under ss 64G(2)(c) and 64H(2)(b) respectively as both entities are making payment to a regulated intermediary.

Regulated Intermediary B must withhold dividends tax from the dividend paid to Company Y unless the declaration of exemption and the written undertaking is received by Regulated Intermediary B by the date determined by Regulated Intermediary B, or if not determined, by the date of payment of the dividend [s 64H(2)(a)].

5.3.3 Reduced rate of tax – Application of a tax treaty [s 64H(3)]

A regulated intermediary must withhold dividends tax from the payment of a dividend at a reduced rate if the person to whom the payment is made has, by a date determined by the regulated intermediary²⁰⁰ or if the regulated intermediary did not determine a date, by the date of payment of the dividend,²⁰¹ submitted to the regulated intermediary –

- a declaration by the beneficial owner, in such form as may be prescribed by the Commissioner,²⁰² that the dividend is subject to that reduced rate as a result of the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax); and
- a written undertaking, in such form as may be prescribed by the Commissioner,²⁰³ to forthwith inform the regulated intermediary in writing should the circumstances affecting the reduced rate applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner (the written undertaking).

A regulated intermediary may rely on a declaration that the dividend is subject to a reduced rate of tax for all future dividends payable by that regulated intermediary until the beneficial owner advises the regulated intermediary that –

- the circumstances affecting the reduced rate of tax applicable to the beneficial owner change; or
- there has been a change in beneficial ownership.

The late submission of a declaration that the dividend is subject to a reduced rate of tax does not necessarily result in a final withholding tax. A late declaration can sometimes be used by the person to whom the dividend was paid to claim a refund from the regulated intermediary under s 64M (see **8.3**).

²⁰⁰ This date must be on or before the date of payment of the dividend.

²⁰¹ Date of payment of the dividend means the date that a dividend is deemed to be paid as determined under s 64E(2)(a).

²⁰² See the 'Business Requirements Specification (BRS): Administration of Dividends Tax'.

²⁰³ See above.

Example – No withholding requirement for regulated intermediary – Declaration by the beneficial owner that the dividend is subject to a reduced rate of tax

Facts:

On 25 January 2017 XYZ Ltd paid a dividend to Regulated Intermediary A. On 26 January 2017 Regulated Intermediary A paid the dividend to ABC Pension Fund which is a resident and to Company M that is not a resident. Regulated Intermediary A did not determine a date for the submission of declarations of exemption or declarations that the dividend is subject to a reduced rate of tax. ABC Pension Fund submitted the declaration of exemption and the written undertaking to Regulated Intermediary A on 5 January 2017. Company M submitted the declaration that the dividend is subject to a reduced rate of tax and the written undertaking to Regulated Intermediary A on 15 January 2017.

Result:

Under s 64H(2)(a) Regulated Intermediary A must not withhold dividends tax from the dividend paid to ABC Pension Fund, since the declaration of exemption and the written undertaking were submitted to Regulated Intermediary A before the date of payment of the dividend.

Regulated Intermediary A must withhold dividends tax at a reduced rate under s 64H(3) from the dividend paid to Company M, since the declaration that the dividend is subject to a reduced rate of tax and the written undertaking were submitted to Regulated Intermediary A before the date of payment of the dividend.

5.4 Withholding of dividends tax by a portfolio of a collective investment scheme in securities and a portfolio of a hedge fund collective investment scheme

Withholding of dividends tax by a portfolio of a collective investment scheme in securities

A 'portfolio of a collective investment scheme in securities' (CISS) is included in the definition of 'regulated intermediary' in s 64D (see 2.3.5). The position of a CISS differs from other regulated intermediaries. Whether a CISS must potentially withhold dividends tax from the subsequent payment of the dividends derived by it to its unit holders depends on whether the distribution occurs within 12 months of the accrual of the dividends to the CISS.

A CISS is not viewed as a company for purposes of the Act,²⁰⁴ therefore any distribution by it is not a dividend for dividends tax purposes. Under s 25BA(1)(a) dividends that are on-distributed to the unit holders not later than 12 months after their accrual to the CISS are deemed to have accrued directly to the unit holders and not the CISS. The CISS is a regulated intermediary and must withhold dividends tax from these distributions under s 64H(1).²⁰⁵

Dividends not on-distributed to the unit holders within 12 months after accrual are deemed to be income in the CISS under s 25BA(1)(b)(ii) and therefore subject to normal tax. These dividends are exempt from dividends tax under s 64F(1)(k) because the CISS is deemed to be the beneficial owner in these circumstances under s 25BA(1)(b)(i) (see 4.1.11) and s 64F(1)(l) (see 4.1.12). Subsequent distributions by the CISS of these taxed amounts to the CISS' unit holders are free of tax (see 4.1.11). The company paying the dividend to the CISS would not have been required to withhold dividends tax on any dividend paid to a CISS under s 64G(2)(c), because the CISS is a regulated intermediary.

²⁰⁴ A CISS is not a 'company' as defined in s 1(1).

²⁰⁵ As the beneficial owner of the dividend the CISS unit holder may qualify for an exemption from dividends tax or for a reduced rate of dividends tax – see **Chapter 4**.

Example 1 – Withholding of dividends tax by a CISS*Facts:*

On 13 March 2017 Listed Company A paid a dividend of R15 million to a CISS. On 31 May 2017, the CISS distributed the dividend to unit holders of which 80% are natural persons and 20% are companies. All unit holders are residents. The companies submitted the declarations that the dividend is exempt from dividends tax under s 64F and the written undertakings to the CISS in February 2017.

Result:

Listed Company A must not withhold any dividends tax under s 64G(2)(c) because the payment is made to a CISS which is a regulated intermediary.

The dividend is deemed to have accrued directly to the unit holders under s 25BA(1)(a), since it was distributed within 12 months after accrual to the CISS. The CISS, as the regulated intermediary, must generally withhold dividends tax from dividends paid to the unit holders under s 64H(1). However, under s 64H(2)(a) the CISS must not withhold any dividends tax from the dividends paid to companies that are residents if these companies submitted the declarations of exemption and the written undertakings by the date determined by the regulated intermediary or, if not determined, by the date of payment of the dividend. The CISS must therefore withhold dividends tax from the dividend which is on-distributed to unit holders that are natural persons but not from the dividend which is on-distributed to unit holders that are companies.

Example 2 – Withholding of dividends tax by a CISS*Facts:*

A CISS holds shares in Company X which is a resident. On 11 March 2016 the CISS received dividends of R800 000 from Company X. The CISS distributed dividends totalling R600 000 to its unit holders, all resident natural persons, on 30 November 2016. The excess of R200 000 (R800 000 – R600 000) was retained by the CISS and distributed to the unit holders who are natural persons on 14 March 2017.

Result:

Under s 64G(2)(c) Company X must not withhold any dividends tax because the payment is made to a CISS which is a regulated intermediary.

The CISS must withhold dividends tax of R90 000 (R600 000 × 15%) under s 64H(1) from the dividends distributed on 30 November 2016 to the unit holders who are all natural persons.

The remaining dividends of R200 000, distributed to unit holders who are natural persons more than 12 months after they accrued to the CISS, will be taxed as income of the CISS under s 25BA(1)(b)(ii) but will be exempt from dividends tax under s 64F(1)(k) and (l) when distributed to the unit holders. The CISS is the beneficial owner of the dividends under these circumstances.

Withholding of dividends tax by a portfolio of a hedge fund collective investment scheme (with effect from 1 April 2015)

A 'portfolio of a hedge fund collective investment scheme' (hedge fund CIS) is included in the definition of 'regulated intermediary' in s 64D (see 2.3.5). The position of a hedge fund CIS is similar to that of a CISS. Whether a hedge fund CIS must potentially withhold dividends tax from the subsequent payment of the dividends derived by it to its unit holders depends on whether the distribution occurs within 12 months of the accrual of the dividends to the hedge fund CIS.

A hedge fund CIS is not viewed as a company for purposes of the Act,²⁰⁶ therefore any distribution by it is not a dividend for dividends tax purposes. Under s 25BA(1)(a) dividends that are on-distributed to the unit holders not later than 12 months after their accrual to the hedge fund CIS are deemed to have accrued directly to the unit holders and not the hedge fund CIS. The hedge fund CIS is a regulated intermediary and must withhold dividends tax from these distributions under s 64H(1).²⁰⁷

Dividends not on-distributed to the unit holders within 12 months after accrual are deemed to be income in the hedge fund CIS under s 25BA(1)(b)(ii) and therefore subject to normal tax. These dividends are exempt from dividends tax under s 64F(1)(l), since the dividends constitute income of the hedge fund CIS (see 4.1.12). Subsequent distributions by the hedge fund CIS of these taxed amounts to the unit holders are free of tax. The company paying the dividend to the hedge fund CIS would not have been required to withhold dividends tax on any dividend paid to a hedge fund CIS under s 64G(2)(c), because the hedge fund CIS is a regulated intermediary.

Example 1 – Withholding of dividends tax by a Hedge fund CIS

Facts:

On 3 April 2017 Listed Company A paid a dividend of R15 million to a hedge fund CIS. On 31 May 2017, the hedge fund CIS distributed the dividend to unit holders of which 80% are natural persons and 20% are companies. All unit holders are residents. The companies submitted the declarations that the dividend is exempt from dividends tax under s 64F and the written undertakings to the hedge fund CIS in March 2017.

Result:

Listed Company A must not withhold any dividends tax under s 64G(2)(c) because the payment is made to a hedge fund CIS which is a regulated intermediary. The dividend is deemed to have accrued directly to the unit holders under s 25BA(1)(a), since it was distributed within 12 months after accrual to the hedge fund CIS. The hedge fund CIS, as the regulated intermediary, must generally withhold dividends tax from dividends paid to the unit holders under s 64H(1). However, under s 64H(2)(a) the hedge fund CIS must *not withhold* any dividends tax from the dividends paid to companies that are residents if these companies submitted the declarations of exemption and the written undertakings by the date determined by the regulated intermediary, or if not determined, by the date of payment of the dividend. The hedge fund CIS must therefore withhold dividends tax from the dividend which is on-distributed to unit holders that are natural persons but not from the dividend which is on-distributed to unit holders that are companies.

Example 2 – Withholding of dividends tax by a Hedge fund CIS

Facts:

A Hedge fund CIS holds shares in Company X which is a resident. On 29 April 2016 the hedge fund CIS received dividends of R800 000 from Company X. The hedge fund CIS distributed dividends totalling R600 000 to its unit holders, all resident natural persons, on 30 November 2016. The excess of R200 000 (R800 000 – R600 000) was retained by the hedge fund CIS and distributed to the unit holders who are natural persons only on 15 May 2017.

Result:

Under s 64G(2)(c) Company X must not withhold any dividends tax because the payment is made to a hedge fund CIS which is a regulated intermediary.

²⁰⁶ A hedge fund CIS is not a 'company' as defined in s 1(1).

²⁰⁷ As the beneficial owner of the dividend the hedge fund CIS unit holder may qualify for an exemption from dividends tax or for a reduced rate of dividends tax – see **Chapter 4**.

The hedge fund CIS must withhold dividends tax of R90 000 (R600 000 × 15%) under s 64H(1) from the dividends distributed on 30 November 2016 to the unit holders who are all natural persons.

The remaining dividends of R200 000 distributed, to unit holders who are natural persons, more than 12 months after they accrued to the hedge fund CIS, will be taxed as income of the CIS under s 25BA(1)(b)(ii) but will be exempt from dividends tax under s 64F(1)(l) when distributed to the unit holders.

5.5 Withholding of dividends tax by long-term insurers (s 64I)

5.5.1 Withholding of dividends tax by long-term insurers on cash dividends (s 64I)

Section 64I provides that to the extent that a dividend, which does not consist of a distribution of an asset *in specie*, is paid to an 'insurer' as defined in s 29A, namely, a long-term insurer, –

- the insurer must be deemed to be a regulated intermediary,²⁰⁸ and
- the dividend must, to the extent that the dividend is allocated to an individual policyholder fund as contemplated in s 29A(4)(b), be deemed to be paid to a natural person that is a resident by the insurer on the date that the dividend is paid to the insurer.

Under s 64G(2)(c) or s 64H(2)(b) respectively, a company or regulated intermediary must not withhold dividends tax from the payment of a dividend to an insurer because the insurer is deemed to be a regulated intermediary in relation to dividends paid to it.

The date that the dividend is paid to the long-term insurer is either the date that the dividend is paid by –

- the company that declares and pays the dividend to the long-term insurer; or
- a regulated intermediary to the long-term insurer.

A long-term insurer receives dividends for the ultimate benefit of –

- the untaxed policyholder fund [s 29A(4)(a)];
- the individual policyholder fund [s 29A(4)(b)];
- the company policyholder fund [s 29A(4)(c)];
- the corporate fund (holders of its shares) [s 29A(4)(d)]; and
- the risk policy fund [s 29A(4)(e)].²⁰⁹

A dividend received by a long-term insurer that is allocated to the respective policyholder funds will not be paid out to the policyholders, but the amount of the dividend will accumulate for the benefit of the policyholders.

The following sections will apply to the long-term insurer to the extent it allocates a dividend or a portion of a dividend, which did not constitute the distribution of an asset *in specie*, to the individual policyholder fund and is therefore deemed to have paid a dividend:

- Section 64H (withholding of tax by regulated intermediaries)
- Section 64J (STC credit)

²⁰⁸ The company paying the dividend to the long-term insurer is not liable to withhold dividends tax under s 64G(2)(c) because the insurer is deemed to be a regulated intermediary under s 64I.

²⁰⁹ The risk policy fund was inserted by s 47(1)(i) of the Taxation Laws Amendment Act 43 of 2014 with effect from years of assessment commencing on or after 1 January 2016.

- Section 64K (payment and recovery of tax)
- Section 64M (refund of tax on dividends paid by regulated intermediaries)

To the extent a long-term insurer allocates a dividend to the untaxed policyholder fund, the company policyholder fund, the corporate fund or the risk policy fund, it is still deemed to be a regulated intermediary under s 64I. Unlike dividends allocated to the individual policyholder fund, dividends allocated to these funds are not deemed under s 64I to be a dividend paid by the long-term insurer and therefore no dividends tax consequences arise as a result of the allocation to either of these funds.

A long-term insurer must withhold dividends tax from the amount of a dividend allocated to a policyholder fund only to the extent that the dividend does not consist of a distribution of an asset *in specie* and is allocated for the benefit of an individual policyholder fund. Under s 64H(1)(b) and s 64J(1) a long-term insurer must not withhold any dividends tax from a dividend or portion thereof that reduced the STC credit of the company that declared and paid the dividend (see 6.1.1 and **Example 2** in 6.1.4).

Example – Withholding of dividends tax by a long-term insurer

Facts:

XYZ Long-term Insurer receives dividends from ABC Ltd, for the benefit of its policyholders, as follows:

- Untaxed policyholders – R3 million
- Company policyholders – R0,5 million
- Individual policyholders – R4 million

Result:

Under s 64H(1), read with s 64I, XYZ Long-term Insurer is required to withhold dividends tax of R800 000 (R4 million × 20%) from the dividend that is allocated to the individual policyholder fund. Dividends tax must not be withheld from the dividend of R3 million allocated to the untaxed policyholder fund and the dividend of R0,5 million allocated to the company policyholder fund.

5.5.2 Dividends *in specie* paid to a long-term insurer

A company that pays a dividend that consists of a distribution of an asset *in specie* to a long-term insurer is potentially liable for dividends tax under s 64EA(b).

A dividend that consists of a distribution of an asset *in specie* will be exempt from dividends tax under s 64FA(1)(a) if the beneficial owner is a company and the declaration form and written undertaking are submitted to the company paying the dividend as required under s 64FA(1)(a).

A long-term insurer is a 'company' as defined in s 1(1). A dividend paid to a long-term insurer that consists of a distribution of an asset *in specie* may therefore be exempt from dividends tax irrespective of which policyholder fund the long-term insurer subsequently allocates the dividend to. The long-term insurer must submit the declaration form and the written undertaking as required under s 64FA(1)(a) in order for the dividend to qualify for the exemption from dividends tax.

Chapter 6

STC credit (s 64J)

6.1 STC credit (s 64J)

In addition to the exemptions from dividends tax provided for in ss 64F and 64FA, relief was previously granted for dividends paid by resident companies with unused STC credits.

The use of STC credits ensured that the after-tax profits of a company that were distributed to holders of shares that are companies and subjected to STC at that time were not again subject to dividends tax when on-distributed by those companies to holders of their shares.

The STC credit of a company on or after 1 April 2015 is deemed to be nil (see 6.1.5).

6.1.1 Dividend not subject to dividends tax as a result of an STC credit [s 64J(1)]

A dividend paid by a company whether –

- in cash; or
- *in specie*,

is not subject to dividends tax to the extent that –

- the dividend does not exceed the STC credit of the company [s 64J(1)(a)], and
- the company has by the date of payment of the dividend²¹⁰ notified the person to whom the dividend is paid (a regulated intermediary or the beneficial owner) of the amount by which the dividend reduces the STC credit of that company [s 64J(1)(b)].

As noted above, the STC credit of a company on or after 1 April 2015 is deemed to be nil. This means that s 64J(1) does not apply to dividends paid on or after this date, since any dividend paid on or after 1 April 2015 will always exceed a nil amount.

The Act did not prescribe the manner of notification referred to in s 64J(1)(b). The manner of notification by a company was required to be of such a nature that any beneficial owner would have had ready access to it. Manners of notification may have included the JSE news services (SENS); a communication in electronic format via the central securities depository system of STRATE Ltd; communication via the company's website; e-mail correspondence; written letters or certificates.

Example 1 – Use of STC credit – Dividend in cash

Facts:

On 15 February 2013 Company A paid a dividend of R100 000 to holders of its shares who are natural persons.

The STC credit of Company A on 1 April 2012 was R80 000. Company A notified holders of its shares on 14 February 2013 that its STC credit would be reduced by R80 000 as a result of the dividend to be paid on 15 February 2013 and that 80% (R80 000 / R100 000) of the dividend to be paid to each holder of shares would not be subject to dividends tax as a result of the use of its STC credit.

²¹⁰ Date of payment of the dividend means the date that a dividend is deemed to be paid as determined under s 64E(2).

Result:

Under s 64J(1) 80% of the dividend paid by Company A was not subject to dividends tax as a result of the use of the STC credit of Company A. Under s 64G(1) Company A had to withhold dividends tax of R3 000 ($R20\,000 \times 15\%$) from the remaining portion of the dividend of R20 000 ($R100\,000 - R80\,000$) that was subject to dividends tax. The dividends received by the holders of shares amounted to R97 000 ($R100\,000 - R3\,000$). However, under s 64E(6)(a) Company A must be deemed to have paid the full amount of the dividend of R100 000 to the holders of the shares (see 3.6.1).

Example 2 – Use of STC credit – Dividend *in specie***Facts:**

On 30 November 2012 Company A distributed an asset *in specie* with a market value of R1 million to the sole holder of its shares, Individual B. At the time Company A had an STC credit of R400 000 and notified Individual B on 15 November 2012 that its STC credit would be reduced by R400 000 as a result of the dividend to be paid on 30 November 2012.

Result:

Under s 64J(1), 40% ($R400\,000 / R1\,000\,000 \times 100$) of the dividend paid by Company A was not subject to dividends tax as a result of the use of the STC credit of Company A. Company A is liable for dividends tax under s 64EA(b) and had to pay dividends tax of R90 000 [$(R1\,000\,000 - R400\,000) \times 15\%$]. The STC credit of Company A was reduced to nil under s 64J(2).

6.1.2 Calculation of STC credit [s 64J(2)]

The STC credit of a company, prior to being deemed to be nil on 1 April 2015 (see 6.1.5), was an amount equal to –

- the amount of dividends that accrued and which were deemed to have accrued as determined under s 64B(3)²¹¹ ('incoming dividends') to a company during the dividend cycle of the company ending on 31 March 2012, but without regard to any dividend referred to in s 64B(3A) [s 64J(2)(a)];
- less the amount of dividends declared by that company during the dividend cycle ending on 31 March 2012 as determined under s 64B(2), limited to the amount determined in the first bullet [s 64J(2)(a)];
- plus dividends that accrued to that company on or after 1 April 2012 in respect of which the company received a notification, no later than the date that the dividend is paid, from the person paying the dividend of the amount by which the dividend reduced the STC credit of the company that paid and declared the dividend [s 64J(2)(b)];
- less the amount of dividends declared and paid by that company on or after 1 April 2012, which will not amount to a negative figure [s 64J(2)].

Previously s 64C(5) provided that the amount of any repayment on a loan which had been deemed a dividend and subject to STC be treated as an 'incoming dividend'. Section 64C(5) was not effective from 1 April 2012, therefore the amount of any repayment in these circumstances on or after 1 April 2012 was not treated as an 'incoming dividend' and did not increase the STC credit of the company. See **Example 2** in 4.1.13.

²¹¹ Part VII of Chapter II of the Act, which includes ss 64B and 64C, was repealed from 1 April 2017 by s 68(1) of the Taxation Laws Amendment Act 43 of 2014.

Dividends that accrued to a long-term insurer

Previously under s 64B(13), the amounts taken into account for dividends that accrued to a long-term insurer under s 64B(3) during the dividend cycle ending on 31 March 2012, were limited to dividends that accrued on shares constituting assets in its corporate fund (see 6.1.4 for dividends that accrued to a long-term insurer on or after 1 April 2012).

Dividends that were deemed to have accrued under s 64B(3)

The following amounts of dividends were deemed to have accrued to a company under s 64B(3) during the dividend cycle of the company ending on 31 March 2012:

- Excess amount of dividends that accrued over dividends that were declared under s 64B(3) during previous dividend cycles.
- Amounts represented by the repayment of loans under s 64C(5) that were previously deemed to be dividends declared under s 64C(2)(g). Repayment of loans on or after 1 April 2012 did not increase the STC credit of a company.
- Dividends declared by a company before 1 April 2012 that accrued to holders of shares only after that date. These dividends were deemed to have accrued to holders of shares on 31 March 2012.

Dividends excluded as 'incoming dividends' under s 64B(3A)

Under s 64B(3A) certain dividends were excluded as 'incoming dividends', the reason being that these dividends would not have been subject to STC at the time the companies declared them. STC credits for dividends tax purposes were limited to dividends that were previously subject to STC. The following are the dividends which were referred to in s 64B(3A):

- Dividends declared by a 'fixed property company', other than dividends distributed out of profits of a capital nature, that were allowed as a deduction under s 11(s) for the 'fixed property company' that declared them. These tax-deductible dividends were exempt from STC under s 64B(5)(b). A 'fixed property company' that declared dividends out of profits of a capital nature was subject to STC on the dividends so declared and these dividends were allowable as dividends that accrued to a holder of shares that is a company for purposes of s 64B(2) and (3) [s 64B(3A)(a)] [see the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of s 64B(3A)(a)].
- Dividends declared by a 'controlled group company' to a shareholder forming part of the same 'group of companies', if the 'controlled group company' elected the exemption under s 64B(5)(f) [s 64B(3A)(a)]²¹² [see the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of s 64B(3A)(a)].
- Dividends declared before 1 January 2010 that were taxable under s 10(1)(k)(i)(bb)²¹³ [s 64B(3A)(b)]²¹⁴ [see the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of s 64B(3A)(b)].
- Dividends which accrued to a borrower as contemplated in the definition of 'securities lending arrangement'²¹⁵ on a share which was borrowed in terms of

²¹² A 'controlled group company' is defined in s 1(1) and a 'group of companies' as previously defined in s 64B(1) meant a 'group of companies' as defined in s 41(1). A 'shareholder' meant a 'shareholder' as previously defined in s 41(1).

²¹³ Paragraph (bb) of the proviso to s 10(1)(k)(i) was deleted by s 13(1)(g) of the Taxation Laws Amendment Act 17 of 2009 with effect from years of assessment commencing on or after 1 January 2010.

²¹⁴ Section 64B(3A)(b) was deleted by s 51(1)(b) of the Taxation Laws Amendment Act 17 of 2009 with effect from 1 January 2010.

²¹⁵ A 'securities lending arrangement' is defined in s 1(1).

that arrangement [s 64B(3A)(c)] [see the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of s 64B(3A)(c)].

- Certain foreign dividends which accrued to a company [s 64B(3A)(d)] [see the *Comprehensive Guide to Secondary Tax on Companies* for a discussion of s 64B(3A)(d)].
- Dividends declared by a headquarter company, since a headquarter company was not liable for STC under s 64B(2) [s 64B(3A)(e)].

Amalgamation and unbundling transaction dividends

The company reorganisation rules relating to amalgamation transactions under s 44 and unbundling transactions under s 46 provided an exemption from STC for qualifying distributions. The *quid pro quo* for this concession was that corporate recipients of such exempt dividends were not permitted to claim them as 'incoming dividends'.²¹⁶

Dividends that accrued on or after 1 April 2012 but before 1 April 2015

The STC credit of a company increased on or after 1 April 2012, but before 1 April 2015, by the amount of a dividend declared and paid on or after 1 April 2012 by another company with an STC credit if that other company notified the company of the amount by which the dividend reduced the STC credit of that company.

Utilisation of STC credit before 1 April 2015

A company with an STC credit that declared and paid a dividend on or after 1 April 2012, had to apportion its STC credit proportionally to dividends declared by it. It follows that a company could not use the STC credit only when it would have been to the advantage of certain holders of shares to do so.²¹⁷ Every dividend declared by a company reduced its STC credit²¹⁸ until it was exhausted or until its termination on 1 April 2015 (see 6.1.5).

Example 1 – Calculation of STC credit

Facts:

The following dividends accrued to or were declared by Company X:

	R
Dividend accrued from Company A on 31 January 2012	350 000
Deemed dividend received [repayment of loan by holder of shares on 30 March 2012, previously deemed to be a dividend declared by Company X for STC purposes under s 64C(2)(g)]	200 000
Dividend accrued from Company M on 20 April 2012 (Company M gave notification that the dividend reduced its STC credit by R185 000)	185 000
Dividend declared by Company X on 30 March 2012	(250 000)
Dividend declared by Company X on 31 May 2012	(225 000)

²¹⁶ The 'incoming dividend' was disallowed under s 44(9)(b) (amalgamation transactions) and s 46(5)(b) (unbundling transactions).

²¹⁷ Section 64J(3).

²¹⁸ Section 64J(2).

Result:

The STC credit of Company X on 31 May 2012 is calculated as follows:	R
Dividend accrued from Company A on 31 January 2012	350 000
Deemed dividend received on 30 March 2012	<u>200 000</u>
Dividends accrued or received before 1 April 2012	550 000
Less: Dividend declared on 30 March 2012	<u>(250 000)</u>
STC credit on 31 March 2012	300 000
Dividend accrued on 20 April 2012	185 000
Less: Dividend declared on 31 May 2012	<u>(225 000)</u>
STC credit of Company X on 31 May 2012	<u>260 000</u>

Example 2 – Amount by which the STC credit of a company is reduced**Facts:**

All the holders of Company A's shares are natural persons. Company A's STC credit on 31 March 2012 was R80. Company A received a dividend of R20 from Company B on 28 February 2013 along with notification that Company B's STC credit had been reduced by R20.

On 1 February 2013 Company A declared a dividend of R100 which it paid to holders of its shares on 1 March 2013. Company A did not notify holders of its shares that its STC credit had been reduced.

Company A declared a second dividend of R120 on 28 August 2013.

Result:

The dividend paid on 1 March 2013 was fully subject to dividends tax. Under s 64J(1) Company A was unable to reduce the amount of the dividend subject to dividends tax because it did not notify holders of its shares to whom the dividend was paid of the amount by which the dividend reduced its STC credit.

The dividend paid on 28 August 2013 was also fully subject to dividends tax. Under s 64J(2) Company A's STC credit at the date of payment, before taking the second dividend into account, was nil, determined as follows:

	R
STC credit at 31 March 2012	80
Dividend received with necessary notification on 28 February 2013	<u>20</u>
	100
Less: Dividend paid on 1 March 2013	<u>(100)</u>
STC credit after payment of dividend	<u>Nil</u>

6.1.3 Amount by which the STC credit is reduced [s 64J(3)]

For purposes of the notification in s 64J(1)(b) and s 64J(2)(b), the amount by which a dividend paid to a person or a company reduced the STC credit of the company declaring and paying a dividend was deemed to be equal to –

- $A \times B / C$,
- A = the amount by which the STC credit of that company was reduced as a result of the payment of that dividend to all holders of shares,
- B = the dividend paid by that company to that person or company, and
- C = total dividend paid to all holders of shares.

The STC credit was allocated *pro rata* amongst all holders of shares within the same class that were entitled to the dividend. This method of allocation applied irrespective of whether

or not those holders of shares were exempt from dividends tax or subject to dividends tax at a reduced rate.

The use of an STC credit was dependent on the company that declared and paid a dividend providing information to the person that received the dividend on the percentage of the dividend that would be exempt.

Failure to notify the person that received the dividend of the percentage of the dividend that was exempt from dividends tax as a result of the use of the STC credit, resulted in the denial of STC credits for such person while the STC credit of the company that paid the dividend was still reduced.

Example 1 – Amount by which the STC credit of a company is reduced

Facts:

The equity shares in Company C are equally held by SA Pension Fund and natural persons who are residents. Company C has an STC credit of R400 000 and paid a dividend of R600 000 to holders of its shares on 25 April 2013. Company C notified holders of its shares on 25 April 2013 that its STC credit had been reduced by R400 000 and that 66,67% ($R400\,000 / R600\,000 \times 100$) of the amount of the dividend paid to each holder of shares represents a reduction of the STC credit of Company C.

Result:

A dividend of R300 000 ($R600\,000 \times 50\%$) accrued to SA Pension Fund and R300 000 accrued to the natural persons. SA Pension Fund therefore received a dividend of R300 000 of which R200 000 ($R300\,000 \times 66,67\%$) was not subject to dividends tax by virtue of the use of the STC credit of Company C under s 64J(1). The remaining portion of the dividend of R100 000 ($R300\,000 - R200\,000$) was exempt under s 64F(1)(f) assuming the conditions for exemption were fulfilled.

A dividend of R300 000 accrued to the natural persons of which R200 000 ($R300\,000 \times 66,67\%$) is not subject to dividends tax by virtue of the use of the STC credit of Company C under s 64J(1). The remaining portion of the dividend of R100 000 ($R300\,000 - R200\,000$) was subject to dividends tax. Dividends tax of R15 000 ($R100\,000 \times 15\%$) was withheld under s 64G(1) and R285 000 ($R300\,000 - R15\,000$) was paid to the natural persons. Under s 64E(6)(a) Company C was deemed to have paid the full amount of the dividend of R300 000 to the natural persons (see 3.6.1).

Example 2 – Amount by which the STC credit of a company is reduced

Facts:

The equity shares in Company E are equally held by Company A and Individual P who are both residents. Company E, which had an STC credit of R500 000, declared and paid a dividend of R900 000 in 2013. Company E notified the holders of shares that 55,56% ($R500\,000 / R900\,000 \times 100$) of the amount of the dividend paid to each holder of shares represented a reduction of Company E's STC credit. Company A submitted the declaration of exemption and the written undertaking referred to in s 64G(2)(a) to Company E by the date of payment of the dividend.

Result:

A dividend of R450 000 ($R900\,000 \times 50\%$) accrued to each holder of shares of which R250 000 ($R450\,000 \times 55,56\%$) was not subject to dividends tax by virtue of the use of the STC credit of Company E under s 64J(1). The balance of the dividend of R200 000 ($R450\,000 - R250\,000$) that accrued to each holder of shares was subject to dividends tax unless an exemption under s 64F(1) applied.

Dividends tax of R30 000 ($R200\,000 \times 15\%$) was withheld by Company E under s 64G(1) from the dividend paid to Individual P. Dividends tax was not withheld from the dividend paid to Company A, since Company A submitted the declaration and the written undertaking to Company E by the date of payment of the dividend.

Note:

Company A's STC credit increased by R250 000 under s 64J(2)(b). If Company A had subsequently paid a dividend to holders of its shares before 1 April 2015, Company A would have used its STC credit against that dividend.

Example 3 – Amount by which the STC credit of a company is reduced – Dividends *in specie*

Facts:

The equity shares in Company A are equally held by Company B and Individual C who are both residents. On 31 March 2014 Company A, which had an STC credit of R1 million, distributed an asset *in specie* to each holder of shares. The market value of the assets was R1,5 million each on 31 March 2014. Company A notified the holders of shares that 33.33% ($R1\text{ million} / R3\text{ million} \times 100$) of the amount of the dividend paid to each holder of shares represented a reduction of the STC credit of Company A. Company B submitted the declaration of exemption and the written undertaking referred to in s 64FA(1)(a) to Company A on 30 March 2014.

Result:

A dividend *in specie* of R1,5 million was paid to each holder of shares. R500 000 of the dividend *in specie* ($R1,5\text{ million} \times 33.33\%$) was not subject to dividends tax by virtue of the use of Company A's STC credit under s 64J(1). The balance of R1 million ($R1,5\text{ million} - R500\,000$) was subject to dividends tax unless an exemption under s 64FA(1) applied.

Under s 64EA(b) Company A was liable for dividends tax of R150 000 ($R1\text{ million} \times 15\%$) in respect of the dividend *in specie* paid to Individual C. Dividends tax was not payable in respect of the dividend *in specie* paid to Company B, since the dividend was exempt under s 64FA(1)(a).

Note:

The STC credit of Company B at that time increased by R500 000 under s 64J(2)(b). If Company B had subsequently paid a dividend to holders of its shares before 1 April 2015, Company B would have used its STC credit against that dividend.

6.1.4 STC credit of a long-term insurer [s 64J(4)]

Before the STC credit of a company was deemed to be nil on 1 April 2015 (see 6.1.5), when determining the STC credit of a company that was a long-term insurer as contemplated in s 29A,²¹⁹ the amount taken into account for dividends that accrued to that company on or after 1 April 2012 and which reduced the STC credit of the company declaring and paying the dividend, was limited to dividends that accrued on shares constituting assets in the corporate fund of that company (see 6.1.2 for dividends that accrued before 1 April 2012).

²¹⁹ A long-term insurer contemplated in s 29A is a person registered or deemed to be registered as a long-term insurer under the Long-term Insurance Act 52 of 1998.

Dividends that accrued to a long-term insurer on or after 1 April 2012 and before 1 April 2015 on shares constituting assets in the funds listed below could therefore not be taken into account in determining the STC credit of a long-term insurer:²²⁰

- The untaxed policyholder fund
- The individual policyholder fund
- The company policyholder fund

All dividends, other than the distribution of assets *in specie*, received by a long-term insurer are deemed to be received in its capacity as regulated intermediary (see 5.5.1).

Example 1 – STC credit – Dividends received by a long-term insurer

Facts:

After applying s 64B(13) ABC Long-term Insurer had an STC credit of R3 million on 1 April 2012. The following dividends accrued to ABC Long-term Insurer on 20 April 2012 from a company which notified ABC Long-term Insurer that the dividends reduced its STC credit:

	R
Dividends that accrued on shares in the corporate fund	1 500 000
Dividends that accrued on the policyholder funds	5 000 000

Result:

The STC credit of ABC Long-term Insurer on 20 April 2012 was calculated as follows:

	R
STC credit on 1 April 2012	3 000 000
Dividends that accrued on shares in the corporate fund	<u>1 500 000</u>
STC credit on 20 April 2012	<u>4 500 000</u>

Dividends that accrued on shares allocated to the policyholder funds were not added to the STC credit of ABC Long-term Insurer under s 64J(4).

Example 2 – STC credit – Dividends received by a long-term insurer

Facts:

Shares held by Long-term Insurer X in Company A are allocated as follows on 1 January 2015:

- 2 000 shares to the corporate fund
- 6 000 shares to the individual policyholder fund
- 1 000 shares to the company policyholder fund
- 1 000 shares to the untaxed policyholder fund

Company A declared a dividend on 1 January 2015 to holders of its shares of R100 a share. Long-term Insurer X received the following dividends and was notified by Company A that 90% of the dividend reduced its STC credit:

	R
Dividends – shares in the corporate fund (2 000 × R100)	200 000
Dividends – the individual policyholder fund (6 000 × R100)	600 000
Dividends – the company policyholder fund (1 000 × R100)	100 000
Dividends – the untaxed policyholder fund (1 000 × R100)	100 000

²²⁰ The risk policy fund was introduced only with effect from years of assessment commencing on or after 1 January 2016 and therefore is not relevant in this context.

Result:

Under s 64J(1) 90% of the dividend allocated to the individual policyholder fund was not subject to dividends tax as a result of the use of the STC credit of Company A. Company A was not and did not withhold dividends tax from the dividend paid to Long-term Insurer X under s 64G(2)(c), since payment is made to a regulated intermediary (see 5.5.1).

Long-term Insurer X was required to withhold dividends tax from 10% (100% – 90%) of the dividends allocated to the individual policyholder fund under s 64H(1), read with s 64I. Dividends of R60 000 (R600 000 × 10%) allocated to the individual policyholder fund were therefore subject to dividends tax and Long-term Insurer X was required to withhold dividends tax of R9 000 (R60 000 × 15%).

Dividends allocated to the company policyholder fund, the untaxed policyholder fund and the corporate fund were not subject to dividends tax under s 64I because the allocations were not deemed to be dividends paid by Long-term Insurer X.

Note:

The STC credit of Long-term Insurer X increased by R180 000 (R200 000 × 90%) under s 64J(4) on 1 January 2015 and would have been used by Long-term Insurer X when it declared and paid dividends to holders of its shares before 1 April 2015.

6.1.5 Termination of STC credit [s 64J(5)]

The STC credit of a company on or after the third anniversary of the effective date (1 April 2012) is deemed to be nil. All STC credits have therefore terminated on 1 April 2015.

A company that declared and paid a dividend on or before 31 March 2015 must have used its STC credit. A company that declared a dividend on or before 31 March 2015 but did not pay it on or before 31 March 2015 could not use its STC credit against that dividend, since the dividend was paid on or after 1 April 2015 on which date the STC credit of a company is deemed to be nil. The liability for dividends tax is determined on the date that a dividend is deemed to be paid as determined under s 64E(2).

Example – Termination of STC credit**Facts:**

Company X had an STC credit on 1 April 2012 of R3 million. Dividends of R500 000 accrued to Company X on 31 March 2015 and Company X was notified that the full amount of the dividend received reduced the STC credit of the company that declared and paid the dividend.

Result:

The STC credit of Company X on 1 April 2015 is deemed to be nil. If Company X paid a dividend on 31 March 2015, it could still use its STC credit on 31 March 2015 of R3,5 million (R3 million + R500 000).

6.1.6 STC credit – Company that is a resident [s 64J(6)]

For the purposes of s 64J a 'dividend' means a dividend contemplated in para (a) of the definition of 'dividend' in s 64D. Such a dividend means a dividend paid by a company that is a resident. This means that STC credits could be used only by a resident company against a dividend paid by that company.

The STC credit of a company that was a resident was increased on or after 1 April 2012 by dividends declared and paid on or after that date, and before 1 April 2015, by a company that was a resident if the latter company provided the notification referred to in s 64J(1)(b). A

dividend paid by a foreign company did not increase the STC credit of a company to which such dividend was paid.

6.1.7 Inaccurate notification of an STC credit [s 64J(7)]

Under s 64J(1)(b) a company that declared and paid a dividend had to, by the date of payment of the dividend, notify the person to whom the dividend was paid of the amount by which the dividend reduced the STC credit of the company.

Section 64J(7) provides that to the extent that an amount of dividends tax was not withheld by a person from the payment of a dividend as a result of an inaccurate notification provided by the company that declared and paid the dividend, that company is liable for the amount of dividends tax not withheld.

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Chapter 7

Payment and recovery of dividends tax and record-keeping (s 64K; and ss 25, 29, 91(2) and (4), 92, 95(1), 99(1), 157, 180, 189, 210 and 222 of the TA Act)

7.1 Payment and recovery of dividends tax (s 64K; and ss 25, 91(2) and (4), 92, 95(1), 99(1), 157, 180, 189, 210 and 222 of the TA Act)

7.1.1 Liability of a beneficial owner to pay dividends tax [s 64K(1)(a)]

A beneficial owner who is liable for any amount of dividends tax under s 64EA(a) (see 3.7.1) must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company that declared the dividend.

The word 'month' means a calendar month.²²¹ Thus the date for payment will always end on the last day of the relevant month, regardless of whether that month has 28, 29, 30 or 31 days.

Electronic payments can be made on the last day of a month, whether that day is a Saturday or Sunday, provided that they will be reflected in SARS's accounts on the last day of the month. Payments by cheque must be made no later than the last business day of a month, since these payments cannot be processed on a Saturday or Sunday.²²²

The beneficial owner is relieved of the liability to pay dividends tax to the Commissioner if it is paid by any other person, for example, the company that declared and paid the dividend or a regulated intermediary that paid the dividend to the beneficial owner.

Example 1 – Liability of beneficial owner to pay dividends tax

Facts:

Company A declared and paid a dividend of R100 000 on 31 March 2017 to beneficial owners who are all natural persons and residents. Company A must withhold dividends tax under s 64G(1) from the payment of the dividend. Company A paid dividends tax of R20 000 (R100 000 × 20%) to the Commissioner on 28 April 2017.

Result:

Under s 64K(1)(a) the beneficial owners are relieved from the liability to pay dividends tax of R20 000 to the Commissioner, since dividends tax was withheld by Company A under s 64G(1) and paid to the Commissioner under s 64K(1)(c) (see 7.1.3).

Example 2 – Liability of beneficial owner to pay dividends tax

Facts:

Trust X applied to SARS to be approved as a public benefit organisation under s 30(3). Trust X would have been exempt from dividends tax under s 64F(1)(c) if it had been approved as a public benefit organisation. SARS, however, did not approve the application, since Trust X did not meet all the requirements of s 30(3). Company Y paid a dividend of R1 million to Trust X on 1 July 2016. Company Y did not withhold dividends tax under s 64G(2)(a), since Trust X submitted a declaration of exemption and the written undertaking referred to in s 64G(2)(a) to Company Y.

²²¹ As defined in s 2 of the Interpretation Act 33 of 1957.

²²² See, however, GN 415 in GG 37690 of 30 May 2014 issued under s 162(2) of the TA Act dealing with restrictions of payments by cheque.

Result:

Trust X is the beneficial owner of the dividend and is liable under s 64EA(a) for dividends tax. Trust X must pay dividends tax of R150 000 (R1 million × 15%) to the Commissioner under s 64K(1)(a), since Company Y did not withhold any dividends tax under s 64G(1)(a).

7.1.2 Liability of a company that declares and pays a dividend consisting of a distribution of an asset *in specie* to pay dividends tax [s 64K(1)(b)]

A company that is liable for any amount of dividends tax under s 64EA(b) on the payment of a dividend that consists of a distribution of an asset *in specie* (see 3.7.2), must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company.

Example – Liability of a company to pay dividends tax – Distribution of an asset *in specie*

Facts:

On 31 August 2016 the directors of unlisted Company M approved the distribution of assets *in specie* to holders of the company's shares on 30 September 2016. The market value of the assets was R90 000 on 30 September 2016. All the holders of shares are residents and natural persons.

Result:

Under s 64E(2)(b) the dividend is deemed to be paid on the date that the assets are distributed to the holders of shares, namely, 30 September 2016. Under s 64E(3)(b) the amount of the dividend paid is deemed to be equal to the market value of the assets on the date of distribution, namely, R90 000.

Under s 64K(1)(b) Company M must pay dividends tax of R13 500 (R90 000 × 15%) to the Commissioner on or before 31 October 2016.

7.1.3 Liability of person withholding dividends tax [s 64K(1)(c)]

A company that withholds any amount of dividends tax under s 64G(1) from the payment of a dividend, must pay that amount, less any amount refundable under s 64L (see 8.2), to the Commissioner by the last day of the month following the month during which that dividend is paid by that company.

A regulated intermediary that withholds any amount of dividends tax under s 64H(1) from the payment of a dividend, must pay that amount, less any amount refundable under s 64M (see 8.3), to the Commissioner by the last day of the month following the month during which that dividend is paid by that regulated intermediary.

Example – Liability of person that withholds dividends tax

Facts:

Company A paid a dividend of R120 000 on 31 March 2017 to Regulated Intermediary A, which paid the dividend to natural persons who are residents, on 3 April 2017.

Result:

Regulated Intermediary A is liable to withhold dividends tax of R24 000 (R120 000 × 20%) under s 64H(1). Regulated Intermediary A must pay dividends tax to the Commissioner under s 64K(1)(c) by 31 May 2017, being the last day of the month following the month during which the dividend was paid by it to the natural persons.

The amount of dividends tax that must be paid to the Commissioner must be reduced by any amount of dividends tax that is refundable to a beneficial owner under –

- section 64L, by the company that paid the dividend; or
- section 64M, by a regulated intermediary that paid the dividend.

Example – Amount of dividends tax reduced by amount of dividends tax that is refundable

Facts:

On 3 April 2017 Regulated Intermediary A paid a dividend of R150 000 to holders of shares in Company X. Having received no declarations of exemption or declarations that the dividend was subject to a reduced rate of tax, Regulated Intermediary A withheld dividends tax of R30 000 (R150 000 × 20%) which it paid to the Commissioner on 31 May 2017.

Before paying the next dividend of another of its clients, Company Y, it received declarations of exemption and declarations from some of the holders of shares in Company X stating that dividends paid by Company X were subject to a reduced rate of tax. As a result it determined that dividends tax of R5 000 had been overpaid to the Commissioner in relation to the dividend paid on 3 April 2017.

On 3 May 2017 Regulated Intermediary A paid a dividend of R120 000 on behalf of Company Y and withheld dividends tax of R24 000 (R120 000 × 20%). It had not received any declarations of exemption or declarations that the dividend was subject to a reduced rate of tax for this dividend by date of payment of the dividend.

Result:

Under s 64K(1)(c) Regulated Intermediary A must pay dividends tax of R19 000 to the Commissioner by 30 June 2017 determined as follows:

	R
Dividends tax withheld on dividend paid to holders of shares in Company Y	24 000
Less: Dividends tax refundable to holders of shares in Company X	<u>(5 000)</u>
Dividends tax payable to Commissioner by 30 June 2017	<u>19 000</u>

7.1.4 Liability to submit a return / Third party returns [s 64K(1)(d) and (1A); and s 25 of the TA Act]

*Section 64K(1)(d)*²²³

With effect from 1 April 2012 to 19 December 2012

A person that was required to make payment of an amount of dividends tax was required, together with that payment, to submit a return to the Commissioner.

With effect from 20 December 2012 to 15 January 2014

A person that paid a dividend was required to submit a return of dividends tax to the Commissioner even if the liability for dividends tax was nil. The following persons were therefore required to submit a return for dividends tax:

- A company that paid a dividend that consisted of the distribution of an asset *in specie*.

²²³ Section 64K(1)(d) was amended by s 14 of the Tax Administration Laws Amendment Act 21 of 2012 with effect from 20 December 2012 and by s 5 of the Tax Administration Laws Amendment Act 39 of 2013 with effect from 16 January 2014. It was deleted by s 5(a) of the Tax Administration Laws Amendment Act 44 of 2014 with effect from 20 January 2015.

- A company that paid a dividend that did not consist of the distribution of an asset *in specie*.
- A regulated intermediary that paid a dividend that was declared by a company.

With effect from 16 January 2014 to 19 January 2015

A person that –

- paid a dividend; or
- received a dividend that was exempt under s 64F,

was required to submit a return to the Commissioner by the last day of the month following the month during which the dividend was paid or received.

The following persons were, for example, therefore required to submit a return for dividends tax:

- A company that paid a dividend that consisted of the distribution of an asset *in specie*.
- A company that paid a dividend that did not consist of the distribution of an asset *in specie*.
- A regulated intermediary that paid a dividend that was declared by a company.
- A person that received a dividend that did not consist of the distribution of an asset *in specie* that was exempt under s 64F.

A person that received a dividend that consisted of the distribution of an asset *in specie* that was exempt under s 64FA was not required to submit a return for dividends tax during this period.

Section 64K(1)(d) was repealed²²⁴ and replaced by s 64K(1A) with effect from 20 January 2015.²²⁵

Section 64K(1A) with effect from 20 January 2015 (see below for additional amendments to s 64K(1A)(b) which were effective from 8 January 2016 and 19 January 2017)

A person that has –

- paid a dividend [s 64K(1A)(a)]; or
- received a dividend that is exempt or partially exempt from dividends tax under s 64F or s 64FA [s 64K(1A)(b)],

must submit a return in respect of that dividend to the Commissioner by the last day of the month following the month during which the dividend is paid or received.

The following persons must therefore, for example, submit a return for dividends tax:

- A company that pays a dividend that consists of the distribution of an asset *in specie*.
- A company that pays a dividend that does not consist of the distribution of an asset *in specie*.
- A regulated intermediary that pays a dividend that was declared by a company.

²²⁴ Section 64K(1)(d) was deleted by s 5(a) of the Tax Administration Laws Amendment Act 44 of 2014 with effect from 20 January 2015.

²²⁵ Section 64K(1A) was inserted by s 5(b) of the Tax Administration Laws Amendment Act 44 of 2014 with effect from 20 January 2015.

- A person that received a dividend that does not consist of the distribution of an asset *in specie* that is exempt under s 64F.
- A person that received a dividend that consists of the distribution of an asset *in specie* that is exempt under s 64FA.

Section 64K(1A) with effect from 8 January 2016

Section 64K(1A)(b) was amended²²⁶ in relation to dividends received to apply only to dividends contemplated in para (a) of the definition of 'dividend' in s 64D(1). Therefore, the requirement to submit a return for dividends tax in respect of a dividend received by a person applies only to a dividend received which had been paid by a resident company. This means that a person that received a foreign dividend paid by a foreign company²²⁷ must not submit a return for dividends tax under s 64K(1A)(b).

Section 64K(1A) with effect from 19 January 2017

Section 64K(1A) was amended²²⁸ to provide that a person that received a dividend derived from a tax free investment contemplated in s 12T (see **4.1.15**) must not submit a return for dividends tax.

Section 25 of the TA Act

A person who is required to submit a return under a tax Act [which includes the Act and therefore includes the return previously required by s 64K(1)(d) and currently required by s 64K(1A)] or by the Commissioner must do so in the prescribed form and manner and by the date specified in the tax Act, or by the date specified by the Commissioner in the public notice requiring the submission of the return.²²⁹

Section 64K(1A) provides that a return for dividends tax must be submitted by the last day of the month following the month during which a dividend is paid or a dividend that is exempt or partially exempt under s 64F or s 64FA in the circumstances discussed above is received.

7.1.5 Personal liability of withholding agent (s 157 of the TA Act)

A withholding agent (company that declared and paid a dividend or a regulated intermediary that paid a dividend), is personally liable for dividends tax –

- withheld under s 64G(1) or s 64H(1) and not paid to the Commissioner; or
- which should have been withheld under s 64G(1) or s 64H(1) but was not withheld.²³⁰

The withholding agent will be relieved from the personal liability only if the tax is paid by someone else, for example, the beneficial owner (see **7.1.1**).

Section 157(2) of the TA Act provides that an amount paid or recovered from a withholding agent under s 157(1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of his liability under the relevant tax Act.

²²⁶ Section 64K(1A)(b) was amended by s 4 of the Tax Administration Laws Amendment Act 23 of 2015.

²²⁷ See para (b) of the definition of 'dividend' in s 64D.

²²⁸ Section 64K(1A)(b) was amended by s 3 of the Tax Administration Laws Amendment Act 16 of 2016.

²²⁹ See *A Quick Guide to Dividends Tax* for details regarding the submission of returns for dividends tax.

²³⁰ Section 64K(3) which dealt with the liability for dividends tax on failure to withhold or on failure to pay over to the Commissioner, was repealed by para 55 of Schedule 1 to the TA Act with effect from 1 October 2012.

Example – Personal liability of withholding agent*Facts:*

Company B paid a dividend of R200 000 to natural persons who are residents and withheld dividends tax of R40 000 (R200 000 × 20%) from that payment under s 64G(1), but did not pay the dividends tax to the Commissioner.

Result:

Under s 157(1)(a) of the TA Act Company B is personally liable for payment of dividends tax of R40 000 as if it is due by it, unless dividends tax is paid by the beneficial owners.

7.1.6 Declarations to be submitted to the Commissioner [s 64K(4)]

When, as a result of the application of a tax treaty, –

- a company or a regulated intermediary withheld dividends at a reduced rate under s 64G(3) or s 64H(3) respectively, from the payment of a dividend, or
- a company that is liable under s 64EA(b) for dividends tax on a dividend that consists of the distribution of an asset *in specie*, paid dividends tax at a reduced rate under s 64FA(2),

that company or regulated intermediary must submit to the Commissioner any declaration –

- submitted to that company or that regulated intermediary by or on behalf of a beneficial owner, and
- relied upon by that company or that regulated intermediary in determining the amount of dividends tax so withheld,
- at the time and in the manner prescribed by the Commissioner.

These declarations must be kept for record purposes and be submitted to SARS only on request.

7.1.7 Estimation of assessments (ss 91(4) and 95(1) of the TA Act)

The Commissioner may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer –

- fails to submit a return for dividends tax as required; or
- submits a return for dividends tax or information relating to it that is incorrect or inadequate.²³¹

Section 91(4) of the TA Act provides that if a taxpayer does not or is not required to submit a return, SARS may make an assessment based on an estimate under s 95 of that Act if that taxpayer fails to pay the tax required under a tax Act.

7.1.8 Interest on late payment of dividends tax (s 64K(6); and Chapter 12 of the TA Act)

A company, regulated intermediary or beneficial owner that fails to pay dividends tax within the required period must pay interest at the prescribed rate on the amount of the dividends tax outstanding at the prescribed rate reckoned from the end of that period to the date that the dividends tax is paid. The person that fails to pay dividends tax will be the person liable for interest on the late payment of dividends tax.

The prescribed rate under s 189(3) of the TA Act is the interest rate that the Minister may from time to time fix by notice in the *Gazette* under s 80(1)(b) of the Public Finance

²³¹ Section 95(1) of the TA Act.

Management Act 1 of 1999. Section 64K(6), which deals with interest on late payment of dividends tax, is to be repealed by para 55 of Schedule 1 to the TA Act on a date to be proclaimed by the President in the *Gazette*. Interest is to be levied under Chapter 12 of the TA Act.

Example – Interest on late payment of dividends tax

Facts:

Company D paid a dividend of R500 000 to Regulated Intermediary A on 8 August 2016. Regulated Intermediary A withheld dividends tax of R75 000 (R500 000 × 15%) and paid the net dividend of R425 000 (R500 000 – R75 000) to the beneficial owners on 11 August 2016. Regulated Intermediary A paid dividends tax of R75 000 to SARS on 30 December 2016.

Result:

Under s 64K(1)(c) Regulated Intermediary A should have paid dividends tax of R75 000 to the Commissioner by 30 September 2016 but paid it only on 30 December 2016. Regulated Intermediary A must pay interest under s 64K(6) at the prescribed rate for the period 1 October 2016 to 30 December 2016 as a result of the late payment of dividends tax.

7.1.9 Assessment and recovery of tax; and understatement and administrative penalties (ss 91(2), 92, 95(1), 99(1), 210 and 222 of the TA Act)

a. Additional assessments (ss 91(2), 92, 95(1) and 99(1) of the TA Act)

Section 92 of the TA Act

Under s 92 of the TA Act SARS must issue an additional assessment if SARS is satisfied that an assessment for dividends tax does not reflect the correct application of the Act to the prejudice of SARS or the *fiscus*.

Section 95(1) of the TA Act

Under s 95(1) of the TA Act SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer –

- fails to submit a return for dividends tax; or
- submits a return for dividends tax or information that is incorrect or inadequate (see 7.1.7).

Under s 99(1) of the TA Act an assessment for dividends tax may not be made five years after the date of assessment of an original assessment by way of self-assessment by the taxpayer or, if no return is received, by SARS. Under s 91(2) of the TA Act the submission of a dividends tax return is an original self-assessment of a dividends tax liability. The period referred to in s 99(1) may be extended under certain circumstances.²³²

Section 99(2)(b) of the TA Act provides that under self-assessment SARS's ability to raise an assessment will not be restricted to the extent that the fact that the full amount of tax chargeable was not assessed, was due to –

- fraud;
- intentional or negligent misrepresentation;
- intentional or negligent non-disclosure of material facts; or
- the failure to submit a return.

²³² See s 99(3) and (4) which were inserted by s 51(c) of the Tax Administration Laws Amendment Act 23 of 2015 with effect from 8 January 2016.

SARS and the taxpayer can agree to extend the five-year prescription period provided this is done before the period expires.²³³

b. Understatement penalty (s 222 of the TA Act)

Section 222(1) of the TA Act provides that, in the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the understatement penalty determined under s 222(2) of the TA Act unless the understatement results from a *bona fide* inadvertent error. The term 'understatement' is defined in s 221 of the TA Act and means any prejudice to SARS or the *fiscus* as a result of –

- a default in rendering a return;
- an omission from a return;
- an incorrect statement in a return;
- if no return is required, the failure to pay the correct amount of tax; or
- an impermissible avoidance arrangement.²³⁴

An understatement penalty under s 222 of the TA Act can therefore be imposed on dividends tax if any of the events listed above occurs.

Under s 222(2) of the TA Act, the understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in s 223 of the TA Act to each shortfall determined in relation to each understatement in a return. For dividends tax the shortfall will be determined under s 222(3)(a) of the TA Act as the difference between the amount of tax properly chargeable for the tax period and the amount of tax that would have been chargeable for the tax period if the understatement was accepted. The understatement penalty percentage determined under s 223(1) of the TA Act ranges from 0% to 200% and is dependent on the presence of certain behaviours on the part of the person required to account for the relevant shortfall in dividends tax.

Example 1 – Assessment for dividends tax and levy of understatement penalty and interest

Facts:

Company G distributed an asset with a market value of R250 000 to the sole holder of its shares, a natural person who is a resident, on 30 June 2016. Company G failed to pay dividends tax to the Commissioner on the distribution of the asset and did not submit a return for dividends tax.

Result:

The distribution of the asset *in specie* constitutes a 'dividend' as defined in ss 1(1) and 64D.

Under s 64E(3)(b) the amount of the dividend *in specie* is deemed to be equal to the market value of the asset on date of distribution. Company G is deemed to have paid a dividend of R250 000 on 30 June 2016 under s 64E(2)(b).

Company G is liable to pay dividends tax under s 64EA(b) of R37 500 (R250 000 × 15%) to SARS by 31 July 2016 under s 64K(1)(b).

²³³ Section 99(2)(c) of the TA Act.

²³⁴ An impermissible avoidance arrangement was inserted by s 61(c) of the Tax Administration Laws Amendment Act 16 of 2016.

SARS is entitled to –

- issue an estimated original assessment to Company G for dividends tax of R37 500 ($R250\,000 \times 15\%$) under s 91(4) read with s 95(1)(a) of the TA Act;
- levy an understatement penalty under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax under s 64K(6) from 1 August 2016 until the date of payment of the dividends tax.

Example 2 – Assessment for dividends tax and levy of understatement penalty and interest

Facts:

Company A's year of assessment ends on the last day of February. Company A made an interest-free loan to Individual B, a resident, of R1 million on 1 March 2016. The loan was repaid on 28 February 2017. Individual B holds 60% of the shares in Company A. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule for the 2017 year of assessment was 8%. Company A submitted a return for dividends tax in respect of a deemed dividend of R40 000 and paid dividends tax of R6 000 on 31 March 2017.

Result:

Individual B is a connected person in relation to Company A under para (d)(iv) of the definition of 'connected person' in s 1(1).

Under s 64E(4)(a) Company A is deemed to have paid a dividend. The amount of the dividend is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i) and the amount of the dividend is R80 000 ($R1\text{ million} \times 8\%$) under s 64E(4)(b)(ii). Under s 64E(4)(c) the dividend is deemed to have been paid on the last day of the year of assessment, namely, 28 February 2017.

Company A was required to have paid dividends tax of R16 000 ($R80\,000 \times 20\%$) under s 64K(1)(b) to SARS on or before 31 March 2017, but paid only R6 000 to SARS on that date.

Under s 91(2) of the TA Act the submission of the dividends tax return is an original self-assessment of Company A's tax liability.

SARS is entitled to –

- issue an additional assessment under s 92 of the TA Act to Company A for underpaid dividends tax of R10 000 ($R16\,000 - R6\,000$);
- levy an understatement penalty on the under-declaration of the amount of dividends tax under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax of R10 000 under s 64K(6) from 1 April 2017 until the date of payment of the dividends tax.

Example 3 – Assessment for dividends tax and levy of understatement penalty

Facts:

Company A's year of assessment ends on the last day of February. Company A made an interest-free loan to Individual B, a resident, of R1 million on 1 March 2016. Individual B holds 60% of the shares in Company A. Assume that the 'official rate of interest' as defined in para 1 of the Seventh Schedule for the year of assessment is 8%. Company A did not submit a return for dividends tax and did not pay any amount of dividends tax.

Result:

Under s 64E(4)(a) Company A is deemed to have paid a dividend that is deemed to consist of a distribution of an asset *in specie* under s 64E(4)(b)(i). Under s 64E(4)(b)(ii) the amount of that dividend is deemed to be R80 000 (R1 million × 8%).

SARS is entitled to –

- issue an estimated original assessment to Company A for dividends tax of R16 000 (R80 000 × 20%) under s 91(4) read with s 95(1)(a) of the TA Act;
- levy an understatement penalty under s 222(1) of the TA Act; and
- charge interest on the late payment of dividends tax of R16 000 under s 64K(6) from 1 April 2017 until the date of payment of the dividends tax.

c. Administrative penalties (s 210 of the TA Act)

Under s 210(1) of the TA Act, SARS must impose a ‘fixed amount penalty’ in accordance with the Table in s 211 of that Act, if a non-compliance as referred to in s 210(2) exists. Section 210(2) of the TA Act provides that non-compliance is failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued by the Commissioner other than the circumstances listed in s 210(a), (b) and (c). Failure to submit a return for dividends tax is not currently listed as non-compliance in a public notice issued by the Commissioner.

Penalties for failure to submit a return may not be imposed under s 210 of the TA Act if penalties are imposed either under s 213 of the TA Act (penalty on amount of unpaid tax) or s 222 of the TA Act (understatement penalty).

7.1.10 Liability of financial management for dividends tax debt (s 180 of the TA Act)

A person is personally liable for an outstanding dividends tax debt to the extent that the person’s negligence or fraud resulted in the failure to pay dividends tax if –

- the person controls or is regularly involved in the management of the overall financial affairs of a company; and
- a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of that company.²³⁵

7.2 Duty to keep records (s 29 of the TA Act)

A person must keep the records, books of account or documents that –²³⁶

- enable the person to observe the requirements of ss 64D to 64N;
- are specifically required under ss 64D to 64N or by the Commissioner by public notice; and
- enable SARS to be satisfied that the person has observed these requirements.

The requirements to keep records, books of account or documents for a tax period apply to a company, regulated intermediary or beneficial owner who –²³⁷

- has submitted a return for dividends tax for the tax period;
- is required to submit a return for dividends tax for the tax period and has not submitted such return; or

²³⁵ Section 64K(8) which dealt with personal liability was repealed by para 55 of Schedule 1 to the TA Act with effect from 1 October 2012.

²³⁶ Section 29(1) of the TA Act.

²³⁷ Section 29(2) of the TA Act.

- is not required to submit a return for dividends tax but has, during the tax period, received dividends or engaged in any activity that is liable to dividends tax.

Records, books of account or documents must be retained by the company, regulated intermediary or beneficial owner that –²³⁸

- has submitted a return for dividends tax, for a period of five years from the date of submission of the return; and
- is not required to submit a return for dividends tax, for a period of five years from the end of the relevant tax period.

The following declarations are submitted, received or relied on under dividends tax legislation²³⁹ and must be retained as discussed above:

- A declaration by the beneficial owner to the company or regulated intermediary under s 64G(2)(a)(aa) or s 64H(2)(a)(aa) that the dividend is exempt from dividends tax under s 64F.
- A declaration by the beneficial owner under s 64FA(1)(a)(i) that the portion of the dividend that constitutes a distribution of an asset *in specie* would have, if that portion had not constituted a distribution of an asset *in specie*, been exempt from dividends tax under s 64F.
- A declaration under s 64H(2)(a)(aa) by a regulated intermediary to another regulated intermediary that pays a dividend, that the payment is made to a vesting trust of which the sole beneficiary is the first-mentioned regulated intermediary.
- A declaration to the company or regulated intermediary by the beneficial owner under s 64G(3) or s 64H(3) that the dividend is subject to a reduced rate of tax as a result of the application of a tax treaty.
- A declaration by the beneficial owner under s 64FA(2)(a) that the portion of the dividend that constitutes a distribution of an asset *in specie* would have, if that portion had not constituted a distribution of an asset *in specie*, been subject to a reduced rate of tax as a result of the application of a tax treaty.
- A written undertaking by the beneficial owner under s 64G(2)(a)(bb), s 64G(3), s 64FA(1)(a)(ii) or s 64FA(2)(b) to inform a company in writing should the circumstances affecting the exemption or reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.
- A written undertaking by the beneficial owner under s 64H(2)(a)(bb) or s 64H(3) to inform a regulated intermediary in writing should the circumstances affecting the exemption or reduced rate of tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner.
- A notification under s 64J(1)(b) by a company to the person to whom a dividend is paid of the amount by which the dividend reduces the STC credit of the company that paid the dividend.
- A declaration of an amount of CTC transferred to the holders of shares as determined by the directors of a company or any other person with comparable authority, to be an amount so transferred (definition of 'contributed tax capital' in s 1(1) and para 76(4) of the Eighth Schedule).
- Proof, in the form and manner prescribed by the Commissioner, of any tax paid to any sphere of government of any country other than South Africa that is deducted as a rebate under s 64N(1) from dividends tax payable.

²³⁸ Section 29(3) of the TA Act.

²³⁹ Sections 64D to 64N.

Chapter 8

Refund of dividends tax (ss 64L, 64LA and 64M; and s 190 of the TA Act)

8.1 Introduction to refund of dividends tax

8.1.1 Introduction to refund of dividends tax withheld from the payment of a cash dividend

An amount of dividends tax withheld by a company or regulated intermediary from the payment of a dividend that does not consist of the distribution of an asset *in specie* may, notwithstanding the provisions of Chapter 13 of the TA Act,²⁴⁰ be refunded to the person to whom the dividend was paid under either s 64L²⁴¹ or s 64M,²⁴² if –

- the declaration that the dividend is exempt from dividends tax; or
- the declaration that the dividend is subject to dividends tax at a reduced rate under a tax treaty,

has not been submitted within time to the company or regulated intermediary.

The amount which may be refunded is equal to the amount which would not have been withheld had the declarations been submitted by the date required.

In order for the amount of dividends tax withheld to be refunded, the –

- declarations referred to above; and
- the written undertaking to forthwith inform the company or the regulated intermediary should the circumstances affecting the exemption from dividends tax applicable to the beneficial owner change or the beneficial owner cease to be the beneficial owner,

must be submitted within a period of three years after payment of the dividend.

An amount of dividends tax withheld by a company or regulated intermediary from the payment of a dividend will be refunded under s 64L(1A) and s 64M(1A) respectively if a rebate of foreign taxes on dividends which should have been deducted under s 64N from the dividends tax to be withheld was not so deducted, provided such rebate is claimed within three years after the payment of the dividend (see **8.2.1** and **8.3.1**).

The manner in which dividends tax is refunded and recovered depends on whether dividends tax was withheld by the company that declared and paid the dividend or by a regulated intermediary that paid the dividend. When a refund is claimed in respect of dividends tax withheld by a –

- company that declared and paid a dividend, that company must refund dividends tax to the person to whom the dividend was paid under s 64L (see **8.2**), or
- regulated intermediary that paid the dividend, that regulated intermediary must refund dividends tax to the person to whom the dividend was paid under s 64M (see **8.3**).

²⁴⁰ Chapter 13 of the TA Act incorporates ss 190 and 191 of that Act which deal respectively with refunds of excess payments and refunds subject to set-off and deferral.

²⁴¹ Refund by companies.

²⁴² Refund by regulated intermediaries.

8.1.2 Introduction to refund of dividends tax paid by a company on a dividend *in specie*

Dividends tax paid by a company on a dividend *in specie* may be refunded under –

- s 64LA if dividends tax was paid by a company as a result of the company being unable to obtain the declarations and written undertakings referred to in s 64FA(1)(a) and (2) within the prescribed time (see 8.4); or
- s 190 of the TA Act when dividends tax was overpaid by a company in circumstances other than those referred to in s 64LA (see 8.5).

8.2 Refund of dividends tax on cash dividends declared and paid by companies (s 64L)

8.2.1 Refund of dividends tax withheld by a company that declared and paid a cash dividend [s 64L(1) and s 64L(1A)]

a. Refund of dividends tax – General rule [s 64L(1)]

When an amount is required to be withheld by a company under s 64G(1) from the payment of a dividend and the declaration referred to in –

- s 64G(2)(a) that the dividend is exempt from dividends tax (the declaration of exemption), or
- s 64G(3) that the dividend is subject to a reduced rate of tax in accordance with the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax),

is not submitted to the company by the required date, dividends tax at the rate of 20% must be withheld. However, when both the –

- declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax; and
- the written undertaking referred to in s 64G(2)(a)(bb) or s 64G(3),

are submitted to the company within three years after the payment of the dividend in respect of which they are made, so much of that amount as would not have been withheld had the declaration been submitted by the required date, is refundable *to the person to whom the dividend was paid* under s 64L(1).

Section 64L(1) applies in the circumstances mentioned above, notwithstanding the provisions of Chapter 13 (ss 190 and 191) of the TA Act.

b. Refund of dividends tax – Rebate for foreign taxes paid [s 64L(1A)]

Section 64L(1A) provides that if –

- a company withheld dividends tax from the payment of a dividend under s 64G(1), and
- a rebate for foreign taxes paid on that dividend should have been, but was not, deducted from that amount under s 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount is refundable *to the person to whom the dividend was paid*.

The amount of dividends tax withheld will be refunded under s 64L(1A) only if a rebate under s 64N is claimed within three years after the payment of the relevant dividend.²⁴³

²⁴³ Section 64L(1A) was inserted by s 15(1)(b) of the Tax Administration Laws Amendment Act 21 of 2012 and came into operation on 20 December 2012.

Example – Refund of dividends tax – Rebate for foreign taxes paid

Facts:

Company Y, incorporated in Australia, declared a dividend of R1 million on shares listed on the JSE to South African holders of its shares who are all natural persons. Each holder holds less than 10% of the shares in Company Y. Company Y did not make use of a regulated intermediary and withheld Australian tax of R150 000 (R1 million × 15%) from the dividend in accordance with the tax treaty between Australia and South Africa²⁴⁴ and issued certificates to the holders of shares indicating the amounts of Australian tax withheld from the dividends paid to them.

Company Y withheld dividends tax of R200 000 (R1 million × 20%) from the dividend paid to the beneficial owners under s 64G(1) and did not deduct the foreign taxes withheld of R150 000 as a rebate under s 64N. A month after payment of dividends tax of R200 000 to the Commissioner, Company Y realised that it did not apply the rebate under s 64N.

Result:

A rebate for foreign taxes on dividends of R150 000 should have been deducted by Company Y under s 64N(1) from dividends tax payable of R200 000. The amount of dividends tax of R150 000 that should not have been withheld by Company Y is refundable by Company Y to the South African holders of shares under s 64L(1A) because the rebate is claimed within three years of the payment of the dividend.

8.2.2 Sources of refunds of dividends tax by a company that withheld dividends tax [s 64L(2)]

A refund claimed under s 64L(1) or s 64L(1A) of dividends tax withheld by a company that declared and paid a dividend must be refunded by that company to the person to whom the dividend was paid. These refunds can come from one of two sources (see below). The company is required to make the refund only as and when the funds have been obtained from one of these sources.

A company that is required to make a refund of dividends tax previously withheld by it, must firstly make the refund from any amount of dividends tax withheld by that company within a period of one year after –

- the submission of the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax as well as the written undertaking referred to in s 64L(1)(c), or
- the claim for a rebate of foreign taxes on dividends referred to in s 64L(1A).

To the extent that the amount that is refundable exceeds the amount of dividends tax withheld from future dividends within the one year period, the excess must be refunded from an amount recovered by the company from the Commissioner under s 64L(3) [s 64L(2)(b)].²⁴⁵

²⁴⁴ Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income'.

²⁴⁵ Section 64L(2) was amended by s 15(1)(c) of the Tax Administration Laws Amendment Act 21 of 2012 with effect from 20 December 2012.

8.2.3 Dividends tax refundable to be recovered from the Commissioner [s 64L(3)]

To the extent that the amount of dividends tax refundable by a company to any person under s 64L(1) or s 64L(1A) exceeds the amount of dividends tax withheld by that company from future dividends within the one year period referred to in s 64L(2)(a), the company may recover the excess from the Commissioner. The company may request a refund in writing or its representative taxpayer may visit a branch office. The company will have to prove that insufficient dividends tax to cover the amount of the refund was withheld from dividends that were paid within the one year period. The request for a refund must be made by the company and not by the beneficial owner of the dividend.

8.2.4 Expiry date for recovery of dividends tax from the Commissioner [s 64L(4)]

No amount of dividends tax may be recovered from the Commissioner if the company that withheld dividends tax submits the claim for recovery to the Commissioner after the expiry of a period of four years reckoned from the date of payment of the dividend referred to in s 64L(1)(a) or s 64L(1A)(a).

Example 1 – Refund of dividends tax by company that withheld dividends tax

Facts:

Company M has five resident holders of shares, four of whom are natural persons and Company O. Each holder holds 20% of the equity shares in Company M. Company M declared a dividend of R60 000 to each holder of shares on 13 April 2017. The dividend was paid on 10 May 2017. Company O submitted the declaration of exemption and written undertaking to Company M on 17 May 2017. Company M declared another dividend of R100 000 on 9 June 2017 that was paid to the holders of its shares on 30 June 2017.

Result:

Under s 64G(1) Company M must withhold dividends tax of R48 000 ($R240\,000 \times 20\%$) from the dividend of R240 000 ($R60\,000 \times 4$) paid to the natural persons and R12 000 ($R60\,000 \times 20\%$) from the dividend of R60 000 paid to Company O. The declaration of exemption and the written undertaking to be submitted by Company O was not received by Company M by 10 May 2017. Under s 64K(1)(b) Company M must pay dividends tax of R60 000 ($R48\,000 + R12\,000$) to the Commissioner on or before 30 June 2017.

Company O can claim a refund of dividends tax from Company M under s 64L(1) because the declaration of exemption and the written undertaking were submitted to Company M within three years of payment of the dividend of R60 000. Under s 64L(2)(a) Company M must refund dividends tax of R12 000 from dividends tax of R16 000 [$R80\,000$ ($R100\,000 \times 80\%$) $\times 20\%$] that is to be withheld from the dividend that is to be paid to the four natural persons on 9 June 2017. Under s 64K(1)(c) Company M must pay dividends tax of R4 000 ($R16\,000 - R12\,000$) to the Commissioner on or before 31 July 2017.

Note:

Dividends tax is not withheld from the dividend of R20 000 ($R100\,000 \times 20\%$) to be paid to Company O on 9 June 2017 because the declaration of exemption and the written undertaking were submitted to Company M on 17 May 2017.

Example 2 – Refund of dividends tax by company that withheld dividends tax

Facts:

Company M has five resident holders of shares, four of whom are natural persons and Company O. Each holder holds 20% of the equity shares in Company M. Company M declared a dividend of R60 000 to each holder of shares on 13 April 2017. The dividend was paid on 10 May 2017. Company O submitted the declaration of exemption and written undertaking to Company M on 17 May 2017. Company M declared another dividend of R20 000 on 9 June 2017 that was paid to holders of its shares on 30 June 2017. Company M does not intend paying further dividends during 2017.

Result:

Under s 64L(1) Company M must refund dividends tax of only R3 200 [$R16\,000(R20\,000 \times 80\%) \times 20\%$] to Company O from dividends tax withheld from the dividend payable to the holders of shares on 30 June 2017. The difference of R8 800 [$(R60\,000 \times 20\%) - R3\,200$] must be recovered by Company M from the Commissioner under s 64L(2)(b) and (3) and refunded to Company O.

Note:

Dividends tax is not withheld from the dividend of R4 000 ($R20\,000 \times 20\%$) paid to Company O on 30 June 2017 because the declaration of exemption and the written undertaking was submitted to Company M on 17 May 2017.

Example 3 – Refund of dividends tax by company that withheld dividends tax

Facts:

Trust B's year of assessment ends on the last day of February. Trust B (a resident discretionary trust) holds 100% of the equity shares in Company A. Company C is one of the beneficiaries of Trust B. Trust B, Company A and Company C are residents. Company A declared a dividend of R500 000 on 13 April 2017, payable to Trust B on 28 April 2017. Company A withheld dividends tax of R100 000 ($R500\,000 \times 20\%$) from the dividend and paid R400 000 ($R500\,000 - R100\,000$) to Trust B. Trust B distributed the net dividend of R400 000 to Company C on 31 May 2017.

Result:

Company C obtained a vested right to the dividend during the 2018 year of assessment of Trust B under s 25B(1) and (2), as a result of the discretion exercised by the trustees of the trust. Company C became the beneficial owner of the dividend after the date that the dividend was paid by Company A to Trust B, but during the same year of assessment (2018) in which the dividend accrued to Trust B.

The dividend should have been exempt from dividends tax under s 64F(1)(a), because the beneficial owner is a company that is a resident (Company C).

Trust B may claim a refund from Company A under s 64L(1) if it submits the declaration of exemption and the written undertaking required under s 64G(2)(a) to Company A on or before 27 April 2020. Trust B can subsequently pay the dividends tax recovered to Company C (see 2.3.1 and 8.2.1).

Note:

Under para (ee) of the proviso to s 10(1)(k)(i) the dividend of R500 000 received by Company C is not exempt from normal tax unless Company C held all of the rights attaching to the shares after distribution of the dividends by Trust B.

8.3 Refund of dividends tax on dividends paid by regulated intermediaries (s 64M)

8.3.1 Refund of dividends tax withheld by regulated intermediaries [s 64M(1) and s 64M(1A)]

a. General rule – Refund of dividends tax by regulated intermediaries [s 64M(1)]

When an amount of dividends tax is required to be withheld by a regulated intermediary from the payment of a dividend and the declaration referred to in –

- s 64H(2)(a) that the dividend is exempt from dividends tax (the declaration of exemption), or
- s 64H(3) that the dividend is subject to a reduced rate of tax in accordance with the application of a tax treaty (the declaration that the dividend is subject to a reduced rate of tax),

is not submitted to the regulated intermediary by the required date, dividends tax at a rate of 20% must be withheld. However, when –

- the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax, and
- the written undertaking,

are submitted to the regulated intermediary within three years after the payment of the dividend in respect of which they are made, so much of that amount as would not have been withheld had the declaration referred to in s 64H(2)(a) or s 64H(3) been submitted by the required date, is refundable by the regulated intermediary *to the person to whom the dividend was paid* under s 64M(1).

Section 64M(1) applies in the circumstances mentioned above, notwithstanding the provisions of Chapter 13 (ss 190 and 191) of the TA Act.

b. Refund of dividends tax by regulated intermediaries – Rebate for foreign taxes paid [s 64M(1A)]

Section 64M(1A) provides that if –

- a regulated intermediary withheld dividends tax from the payment of a dividend under s 64H(1), and
- a rebate for foreign taxes paid on that dividend should have been, but was not, deducted from that amount under s 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount is refundable *to the person to whom the dividend was paid*.

The amount of dividends tax withheld will be refunded under s 64M(1A) only if a rebate under s 64N is claimed within three years after the payment of the relevant dividend.²⁴⁶

²⁴⁶ Section 64M(1A) was inserted by s 16(b) of the Tax Administration Laws Amendment Act 21 of 2012 and came into operation on 20 December 2012.

Example – Refund of dividends tax – Rebate for foreign taxes paid

Facts:

Company Y, incorporated in Australia, declared a dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents and are all natural persons. Each holder holds less than 10% of the shares in Company Y. Company Y withheld Australian tax of R150 000 (R1 million × 15%) from the dividend in accordance with the tax treaty between Australia and South Africa.²⁴⁷ Company Y paid the net dividend of R850 000 (R1 million – R150 000) to Regulated Intermediary B. No South African dividends tax was withheld by Company Y from the dividend paid to Regulated Intermediary B.

Regulated Intermediary B withheld dividends tax of R200 000 (R1 million × 20%) from the dividend paid to the beneficial owners under s 64H(1) and failed to deduct the foreign taxes withheld by Company Y as a rebate under s 64N. A month after payment of dividends tax of R200 000 to the Commissioner, Regulated Intermediary B realised that it had not applied the rebate under s 64N. Regulated Intermediary B claimed the rebate under s 64N on that date.

Result:

A rebate for foreign taxes on dividends of R150 000 should have been deducted by Regulated Intermediary B under s 64N(1) from dividends tax payable of R200 000. The amount of dividends tax of R150 000 that should not have been withheld by Regulated Intermediary B is refundable to the South African holders of shares under s 64M(1A).

8.3.2 Source of refunds of dividends tax by regulated intermediary that withheld dividends tax [s 64M(2)]

Any amount of dividends tax that is refundable under s 64M(1) or s 64M(1A) must be refunded by the regulated intermediary from any amount of dividends tax withheld by the regulated intermediary after the –

- submission by the beneficial owner of the declaration of exemption or the declaration that the dividend is subject to a reduced rate of tax as well as the written undertaking referred to in s 64M(1)(c); or
- the claim for a rebate of foreign taxes on dividends referred to in s 64M(1A).

The refunding of dividends tax by a regulated intermediary can come from one source only. This source is the withholding of dividends tax from future dividends paid by the regulated intermediary that are paid by any company to the regulated intermediary.

There is no right of recovery of dividends tax from the Commissioner for dividends tax withheld by a regulated intermediary.

Example – Refund of dividends tax by a regulated intermediary

Facts:

Regulated Intermediary A received a dividend of R12,5 million paid by J Ltd. R5 million of this amount was received on behalf of B Pension Fund which holds 40% of the shares in J Ltd. B Pension Fund did not submit a declaration of exemption in time and Regulated Intermediary A withheld dividends tax of R1 million (R5 million × 20%) from the dividend when it was paid to B Pension Fund on 31 March 2017. The declaration of exemption and the written undertaking were submitted by B Pension Fund on 28 April 2017.

²⁴⁷ Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income'.

Regulated Intermediary A received a dividend of R20 million on 31 May 2017 from W Ltd on behalf of holders of its shares and withheld dividends tax of R2,25 million.

Result:

Dividends tax of R1 million withheld by Regulated Intermediary A as a result of the late submission of the declaration of exemption and the written undertaking by B Pension Fund, must be refunded under s 64M(2) from dividends tax of R2,25 million withheld by Regulated Intermediary A from the dividend paid to the holders of shares in W Ltd. Regulated Intermediary A must pay dividends tax of R1,25 million (R2,25 million – R1 million) to the Commissioner in respect of the dividend paid by W Ltd.

8.4 Refund of dividends tax on dividends *in specie* (s 64LA)

A company that distributed a dividend *in specie* may have had to pay dividends tax on the distribution as a result of being unable to obtain –

- a declaration by the beneficial owner that the portion of the dividend that constitutes a distribution of an asset *in specie* would have been exempt from dividends tax under s 64F if it had not constituted a distribution of an asset *in specie* [s 64FA(1)(a)(i)];
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to above change or the beneficial owner cease to be a beneficial owner [s 64FA(1)(a)(ii)];
- a declaration by the beneficial owner that the portion of the dividend that constitutes a distribution of an asset *in specie* would have been subject to a reduced rate of tax as a result of the application of a tax treaty if it had not constituted a distribution of an asset *in specie* [s 64FA(2)(a)]; or
- a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to above change or the beneficial owner cease to be the beneficial owner [s 64FA(2)(b)].

The dividends tax overpaid as a result of the inability of the company to obtain the above documents in time is refundable to the company by SARS if claimed within three years of the date of payment of the tax and the documents are submitted to the company within that period. The refund rules in s 64LA take precedence over those in Chapter 13 of the TA Act.²⁴⁸

Example – Refund of dividends tax paid on a dividend *in specie* (s 64LA)

Facts:

Company A has five resident holders of shares, four of whom are natural persons and Company B. Each holder holds 20% of the equity shares in Company A. Company A declared a dividend consisting of the distribution of an asset *in specie* of R60 000 to each holder of shares on 13 April 2017. The dividend was paid on 11 May 2017. Company B submitted the declaration of exemption and written undertaking to Company A on 18 May 2017.

²⁴⁸ Section 64LA was inserted by s 6 of the Tax Administration Laws Amendment Act 44 of 2014 and applies with effect from 20 January 2015.

Result:

Company A has distributed dividends *in specie* totalling R300 000 (5 × R60 000).

Company A must pay dividends tax of R60 000 (R300 000 × 20%) under ss 64E(1) and 64EA(b) on the dividends of R300 000. The declaration of exemption and the written undertaking to be submitted by Company B was not received by Company A by 11 May 2017 with the result that Company A is obliged to pay dividends tax on the dividend paid to Company B.

Company A may claim a refund of dividends tax of R12 000 (R60 000 × 20%) from SARS under s 64LA because the declaration of exemption and the written undertaking were submitted to Company A within three years of payment of the dividends tax.

8.5 Refund of dividends tax on dividends *in specie* in circumstances other than those referred to in s 64LA (s 190 of the TA Act)

Under s 190(1) of the TA Act SARS must pay a refund if a person is entitled to a refund of –

- an amount properly refundable under a tax Act and if so reflected in an assessment [s 190(1)(a) of the TA Act]; or
- the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment [s 190(1)(b) of the TA Act].

Under s 190(4) of the TA Act an amount under s 190(1)(b) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of –

- an assessment by SARS, within three years from the later of the date of the assessment or the erroneous payment; or
- self-assessment, within five years from the later of the date the return had to be submitted or, if no return is required, payment had to be made under the relevant tax Act or the erroneous payment was made.²⁴⁹

The submission of a return is an original self-assessment of the tax liability under s 91(2) of the TA Act if a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability. A return submitted for dividends tax is an original self-assessment under s 91(2) of the TA Act.

Example – Refund of dividends tax in respect of a dividend paid by a company that constitutes a distribution of an asset *in specie* (s 190 of the TA Act)

Facts:

Company A distributed an asset with a market value of R1 million to the sole holder of its shares, a natural person, on 30 November 2016. Company A paid dividends tax of R225 000 to the Commissioner on 14 December 2016.

Result:

Under s 64E(1) and s 64E(3)(b) Company A is deemed to have paid a dividend of R1 million on 30 November 2016. Company A was liable for dividends tax of R150 000 (R1 million × 15%) under s 64EA(b). Company A erroneously made an over-payment of dividends tax of R75 000 (R225 000 – R150 000). Under s 190 of the TA Act SARS must pay a refund to Company A if it is entitled to the refund.

²⁴⁹ Section 190(4) of the TA Act was substituted by s 60(1)(b) of the Tax Administration Laws Amendment Act 23 of 2015 with effect from 1 October 2012.

Chapter 9

Rebate against normal tax or dividends tax in respect of foreign taxes on dividends (ss 6quat and 64N)

9.1 Summary of rebates against normal tax or dividends tax for foreign taxes on dividends (ss 6quat and 64N)

A person may qualify for a rebate against normal tax or dividends tax if a foreign dividend is received by or accrues to a person or a beneficial owner and if the foreign dividend is subject to normal tax or dividends tax. These rebates are summarised in the table below:

Rebate (section of the Act)	Rebate against normal tax or dividends tax	Foreign dividend subject to normal tax or dividends tax in South Africa	Person entitled to rebate
6quat	Normal tax	Normal tax	Resident in whose taxable income the foreign dividend is included
64N	Dividends tax	Dividends tax	Person that is liable for dividends tax

9.2 Rebate for foreign taxes on dividends (s 64N)

9.2.1 Rebate for foreign taxes on dividends paid by a foreign company [s 64N(1)]

A foreign dividend paid by a foreign company to a resident is liable to dividends tax to the extent the dividend does not consist of a distribution of an asset *in specie* if the share in respect of which the foreign dividend is paid is a listed share.

Section 64N(1) provides for a rebate which must be deducted from dividends tax payable in respect of the specific dividends as set out in the preceding paragraph if the foreign dividend was subject to foreign tax.

An amount of foreign tax (for example, foreign dividend withholding tax) will not qualify for both a rebate from normal tax under s 6quat and a rebate against dividends tax under s 64N because amounts falling within the ambit of s 64N are exempt under s 10B(2)(d) and therefore the amount will not be included in taxable income which is a requirement of s 6quat.

Example – Rebate for foreign taxes on dividends

Facts:

Company Y, incorporated in Australia, declared a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million × 50% × 20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax.

Company Y withheld Australian tax of R150 000 (R1 million × 15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between Australia and South Africa.²⁵⁰

Result:

Under ss 64N(1) and 64H(1) a rebate for foreign taxes on dividends must be deducted by Regulated Intermediary A from dividends tax of R100 000 which would otherwise be withheld from the dividends paid to the holders of shares who are natural persons. The amount of the rebate is R75 000, therefore dividends tax of R25 000 (R100 000 – R75 000 Australian tax) is to be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

Regulated Intermediary A pays R825 000 (R1 million – R150 000 Australian tax – R25 000 dividends tax) to the South African holders of shares.

Note:

The foreign dividends of R1 million that accrued to the holders of shares are included in their gross income under para (k) of the definition of 'gross income' in s 1(1) but are exempt from normal tax under s 10B(2)(d). The holders of shares will therefore not qualify for a rebate under s 6quat (see 9.3).

9.2.2 Amount of rebate for foreign taxes on dividends [s 64N(2)]

The amount of the rebate is equal to the amount of any tax paid to any sphere of government of any country other than South Africa, without any right of recovery by any person, in respect of a foreign dividend paid by a foreign company on a listed share.

A rebate will be allowed only to the extent that the amount of the foreign tax is proved to be payable to a sphere of government of a foreign country without a right of recovery (see 9.2.5).

To the extent that a beneficial owner receives a refund of foreign taxes or is the recipient of a benefit resulting in the removal or reduction of double taxation, the need to provide relief from double taxation diminishes.

In these circumstances the beneficial owner or any other person should not be able to recover the foreign taxes proved to be payable. The existence of a right of recovery, held either by the beneficial owner or any other person, means that the amount of the foreign tax liability will not be allowed as a rebate. For example, exercising a right to contest a foreign tax liability gives rise to a contingent right to recover the overpaid tax if successful. A rebate will not be permitted while the tax is in dispute and not yet finally determined.

A further example includes the situation in which a foreign jurisdiction imposes a higher domestic rate of tax on a foreign dividend than that permitted under the provisions of the relevant tax treaty. A rebate for foreign taxes actually paid will be allowed but only to the extent specified in the relevant tax treaty.

The words 'right of recovery by any person' are interpreted very broadly and include any form of relief against a foreign tax liability. For example, a refund, credit, rebate, remission, or deduction, is considered to be a right of recovery. Any other form of economic benefit to which a person becomes entitled is also considered to be a 'right of recovery by any person'.

²⁵⁰ Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income'.

Example – Amount of rebate for foreign taxes on dividends*Facts:*

Company Y, incorporated in Australia, declares a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

Company Y pays the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million \times 50% \times 20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax provided for in s 64F(1).

Company Y withheld Australian tax of R150 000 (R1 million \times 15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between Australia and South Africa.²⁵¹

Result:

The amount of the rebate under s 64N(2) is equal to the amount of foreign taxes paid. Foreign taxes of R150 000 were withheld by Company Y from dividends paid to the natural persons and company holders of shares. Foreign taxes paid must be deducted from dividends tax to be withheld by Regulated Intermediary A. Dividends tax to be withheld by Regulated Intermediary A is calculated as follows:

	R
Dividends tax to be withheld by Regulated Intermediary A – Natural persons (R1 million \times 50% \times 20%)	100 000
Less: Rebate for foreign taxes on dividends – Natural persons (R1 million \times 50% \times 15%)	<u>(75 000)</u>
Dividends tax to be withheld and paid to SARS by Regulated Intermediary A	<u>25 000</u>

Note:

Foreign taxes of R75 000 that were withheld by Company Y from dividends paid to the company holders of shares are not allowed as a rebate against dividends tax to be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

9.2.3 Limitation on amount of rebate for foreign taxes on dividends [s 64N(3)]

The amount of the rebate must not exceed the amount of dividends tax imposed on the foreign dividend.

While a beneficial owner that is not liable for dividends tax as a result of the exemptions provided for under s 64F will qualify for a rebate under s 64N, the amount of the rebate will be nil under s 64N(3).

Example – Limitation on amount of rebate for foreign taxes on dividends*Facts:*

Company Y, incorporated in a foreign country with which South Africa does not have a tax treaty, declared a cash dividend of R1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

²⁵¹ Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income'.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R100 000 (R1 million \times 50% \times 20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. All resident companies complied with the requirements for exemption from dividends tax.

Company Y was obliged to withhold foreign tax at a rate of 25% and accordingly withheld foreign tax of R250 000 from the dividend paid to Regulated Intermediary A.

Result:

The amount of the rebate is equal to the amount of foreign taxes of R125 000 (R250 000 \times 50%) withheld from the dividends paid to holders of shares who are natural persons. The rebate is, however, limited under s 64N(3) to the amount of dividends tax of R100 000 withheld from dividends paid to holders of shares who are natural persons:

	R
Dividends tax payable by Regulated Intermediary A – Natural persons	100 000
Less: Rebate for foreign taxes, limited to amount of dividends tax	<u>(100 000)</u>
Dividends tax payable to SARS by Regulated Intermediary A	<u>Nil</u>

9.2.4 Translation of amounts of foreign taxes on dividends [s 64N(4)]

The rebate for foreign taxes is determined in rand by translating the foreign currency amount using the same rate used to translate the foreign dividend [s 64N(4)].

A dividend that does not consist of the distribution of an asset *in specie* paid by a listed company is deemed to be paid on the date it is paid [s 64E(2)(a)(i)]. A dividend denominated in foreign currency must be translated to rand at the spot rate at the time the dividend is paid [s 64E(5)]. It follows that the foreign taxes must also be translated to rand at the spot rate applicable when the dividend is paid.

Example – Translation of amounts of foreign taxes on dividends

Facts:

Company Y, incorporated in Australia, declared a cash dividend of AUD1 million on shares listed on the JSE to holders of its shares who are South African residents. 50% of the holders of shares are natural persons and 50% are companies, each holder holding less than 10% of the shares in Company Y.

The dividend of AUD1 million was converted from Australian dollar to South African rand at an exchange rate of AUD 1: R9,2400 when it was paid.

Company Y paid the dividend to Regulated Intermediary A resulting in a potential dividends tax liability of R924 000 (AUD1 million dividend \times 50% \times 9,2400 \times 20%) for the holders of shares who are natural persons without taking into account any rebates for foreign taxes. It is assumed that all resident companies complied with the requirements for exemption from dividends tax.

Company Y withheld Australian tax of AUD150 000 (AUD1 million \times 15%) from the dividend paid to Regulated Intermediary A in accordance with the tax treaty between Australia and South Africa.²⁵²

²⁵² Article 10(2)(b) of the 'Agreement between the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income'.

Result:

The foreign tax paid of AUD150 000 is translated to rand by using the spot rate of AUD 1: R9,2400. The foreign tax of R693 000 (AUD 150 000 foreign tax × 9,2400 × 50%) withheld from the rand dividend payable to the holders of shares who are natural persons is deductible against the dividends tax liability of R924 000. As a result of this set-off dividends tax of R231 000 (R924 000 – R693 000) must be withheld by Regulated Intermediary A from the dividends paid to the holders of shares who are natural persons.

9.2.5 Proof of foreign taxes on dividends [s 64N(5)]

A company or regulated intermediary must obtain proof, in the form and manner prescribed by the Commissioner, of any tax paid to any sphere of government of any country other than South Africa that is deducted as a rebate under s 64N(1) from dividends tax payable (see 9.2.2).

See the paragraph dealing with the evidence required for dividends tax in Interpretation Note 18 'Rebates and Deduction for Foreign Taxes on Income'.

The company or regulated intermediary must satisfy itself that an amount qualifies for a rebate under s 64N(1), since the company or regulated intermediary may be personally liable for an amount of dividends tax which should have been withheld, but was not so withheld, under s 157(1)(b) of the TA Act (see 7.1.5).

9.3 Rebate or deduction for foreign taxes on income (s 6quat)

Entitlement to a foreign tax credit under s 6quat arises for a resident in a year of assessment in which a foreign-sourced amount (including a foreign dividend) on which foreign taxes are payable, is included in the resident's taxable income.

Under s 6quat, any foreign taxes payable on a foreign dividend included in a resident's taxable income are set off against normal tax payable by the resident. While the rebate is generally limited to the normal tax on the amount included in a taxpayer's income, no regard must be had to the partial exemption of foreign dividends under s 10B(3).²⁵³

A rebate will not be allowed if the foreign dividend is exempt from normal tax under s 10B(2).

See Interpretation Note 18 'Rebates and Deduction for Foreign Taxes on Income' for a discussion of s 6quat.

²⁵³ Paragraph (ii) of the proviso to s 6quat(1A).

Chapter 10

Company reorganisation rules – CTC and dividends tax [ss 42(3A), 44(4A), 44(6)(c), 44(6)(e), 44(9)(a), 44(10), 46(3A) and 46(5)]

10.1 Introduction

The definition of ‘contributed tax capital’ in s 1(1) is discussed in 2.2.2. The company reorganisation rules, however, require special adjustments for the calculation of CTC, similar to other rules for the calculation of base cost, cost price and allowances on assets. Special rules apply for the calculation of CTC in an –

- asset-for-share transaction under s 42 (see 10.2);
- amalgamation transaction under s 44 (see 10.3.1); and
- unbundling transaction under s 46 (see 10.4.1).

Special rules apply also for dividends tax purposes when shares are distributed under an amalgamation transaction (see 10.3.2) and under an unbundling transaction (see 10.4.2).

10.2 CTC and asset-for-share transactions [s 42(3A)]

Section 42 provides relief from income tax and CGT if a transaction qualifies as an ‘asset-for-share transaction’ as defined in s 42(1). Paragraph (a) of the definition of ‘asset-for-share transaction’ includes a transaction in which a person disposes of an asset to a company that is a resident in exchange for the issue of equity shares in that company.

Under s 42(3A), an asset disposed of by a person to a company under para (a) of the definition of ‘asset-for-share transaction’ gives rise to special calculations of CTC of that company if the person disposing of an asset to that company –

- holds at least 10% of the equity shares that confer at least 10% of the voting rights of that company at the close of the day on which that asset is disposed of; or
- is a natural person who will be engaged on a full-time basis in the business of that company or of a controlled group company in relation to that company of rendering a service.

Under s 42(3A) the amount received by or accrued to the company for the issue of the shares under an asset-for-share transaction is deemed for the purposes of the definition of CTC to be equal to the –

- amount taken into account under s 11(a), s 22(1) or s 22(2) by the person who disposed of the asset, if the asset is trading stock; or
- base cost²⁵⁴ of the asset determined at the time of disposal if the asset is an asset other than trading stock.

In both circumstances, the amount of CTC will be the tax cost of the asset to the person who disposed of the asset and not its market value on the date of disposal.²⁵⁵

²⁵⁴ The term ‘base cost’ is defined in s 41(1).

²⁵⁵ See Binding Private Ruling 249 dated 27 September 2016 ‘Corporate Group Restructuring Involving Multiple Transactions’.

Example – Calculation of CTC in an asset-for-share transaction

Facts:

Individual J transferred an asset under para (a) of the definition of 'asset-for-share transaction' in s 42(1) to Company I in exchange for equity shares in Company I. At the end of the day on which the asset was disposed of by Individual J, Individual J held 30% of the equity shares in Company I. The base cost of the asset to Individual J was R10 000 immediately before the transaction and the market value of the asset was R15 000.

Result:

Under s 42(3A) the amount of CTC that is deemed to be received by or accrued to Company I for the issue of its shares under the asset-for-share transaction is equal to the base cost of the asset to Individual J of R10 000 and not its market value of R15 000.

Paragraph (i) of the proviso to s 42(3A) provides that s 42(3A) does not apply to any asset-for-share transaction under which a person disposes of an equity share in a listed company or in a portfolio of a collective investment scheme in securities (CISS) to any other company and after that disposal, together with any other asset-for-share transaction that is concluded –

- on the same terms as that asset-for-share transaction, and
- within a period of 90 days after that disposal,

that other company holds at least –

- 35% of the equity shares in that listed company or CISS, or
- 25% of the equity shares in that listed company or CISS if no person other than that other company holds an equal or greater amount of equity shares in the listed company or CISS.

Paragraph (ii) of the proviso²⁵⁶ provides that s 42(3A) does not apply to any asset-for-share transaction under which a person disposes of an asset to a portfolio of a hedge fund collective investment scheme.

When s 42(3A) does not apply to a specific transaction, the consideration received by or that accrues to a company for the issue of its shares (which represents its CTC) will be equal to the market value of the assets received or accrued (see 2.2.2 for a discussion of CTC).

10.3 Amalgamation transactions [ss 44(4A), 44(6)(c), 44(9)(a) and 44(10)]

10.3.1 CTC and amalgamation transactions [s 44(4A)]

An amalgamation transaction²⁵⁷ involves the disposal by an 'amalgamated' (or target) company of all its assets to a 'resultant' (or acquiring) company by means of an amalgamation, conversion or merger. The assets disposed of to a resultant company must be disposed of in exchange for–

- equity shares in the resultant company; or
- the assumption by the resultant company of certain specified debts of the amalgamated company.

The outcome of the transaction is that the existence of the amalgamated company is terminated.

²⁵⁶ Amended by s 62(1)(d) of the Taxation Laws Amendment Act 25 of 2015 with effect from 1 April 2015.

²⁵⁷ An 'amalgamation transaction' is defined in s 44(1).

Under s 44(4A) a portion of the CTC of the amalgamated company must be added to the CTC of the resultant company if the resultant company issues shares in exchange for the disposal of an asset to it. However, if the amalgamated company transfers CTC to its shareholders as part of the transaction, that portion of the CTC so transferred will not 'roll over' into the resultant company.

The proviso to s 44(4A) stipulates that when the amalgamated company is a portfolio of a collective investment scheme in property, the price at which the participatory interests were issued shall be added to the contributed tax capital of the class of shares issued by the resultant company.²⁵⁸

Example 1 – Calculation of CTC in an amalgamation transaction

Facts:

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under a s 44 amalgamation transaction in return for shares in Company B. The CTC in Company A was R200 000 and the CTC in Company B was R300 000. After the transaction Company A distributed its shareholding in Company B to its shareholders and its existence was terminated.

Result:

The CTC of Company A of R200 000 is added to the CTC of Company B under s 44(4A). The CTC of Company B after the amalgamation transaction is therefore R500 000 (R300 000 + R200 000).

Example 2 – Calculation of CTC in an amalgamation transaction

Facts:

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under a s 44 amalgamation transaction in return for shares in Company B. The CTC in Company A was R200 000 and the CTC in Company B was R300 000. Company A made a cash distribution of R80 000 to its shareholders as part of the amalgamation transaction which included a distribution of CTC of R50 000. After the transaction Company A distributed its shareholding in Company B to its shareholders and its existence was terminated.

Result:

Only R150 000 (R200 000 – R50 000) of the CTC of Company A will be 'rolled over' to Company B under s 44(4A). The CTC of R50 000 transferred to the shareholders will not 'roll over' to Company B. The CTC of Company B after the amalgamation transaction is therefore R450 000 (R300 000 + R150 000).

A special rule applies if the resultant company holds shares in the amalgamated company immediately before the amalgamation transaction. In these circumstances, all the CTC in the amalgamated company cannot be added to the CTC in the resultant company. The amount of CTC in the amalgamated company must first be reduced by the percentage shareholding of the resultant company in the amalgamated company immediately before the amalgamation. Effectively, this means that only a *pro-rata* portion of the CTC in the amalgamated company is 'rolled over' to the resultant company.

²⁵⁸ The proviso to s 44(4A) was inserted by s 93(1)(c) of the Taxation Laws Amendment Act 31 of 2013 and applies with effect from 24 October 2013.

The *pro-rata* portion of CTC in the amalgamated company that is 'rolled over' to the resultant company is calculated in accordance with the following formula:

'Amount of CTC of amalgamated company transferred to resultant company = value of shares in amalgamated company held by shareholders other than resultant company / value of all shares in amalgamated company × CTC of amalgamated company at the time of its termination.'

Example 3 – Calculation of CTC in an amalgamation transaction

Facts:

Company X disposed of all of its assets to Company Y in return for shares in Company Y under an amalgamation transaction. Company Y held 10% of the shares in Company X immediately before the transaction, with the remaining 90% being held by other shareholders. Following the transaction, the existence of Company X was terminated. The CTC of Company X at the time of its termination was R400 000 and the total value of the shares in Company X at that time was R1 million.

Result:

The amount of CTC of Company X that is 'rolled over' to Company Y is calculated as follows:

Value of shares in Company X held by shareholders other than Company Y / value of all shares in Company X × CTC of Company X.

$$[(R1 \text{ million} \times 90\%) / R1 \text{ million} \times R400 \text{ 000}] = R360 \text{ 000}$$

CTC 'rolled over' to Company Y = R360 000

10.3.2 Dividends tax and amalgamation transactions [ss 44(6)(c), 44(6)(e), 44(9)(a) and 44(10)]

a. Section 44(9)(a) (Before 24 October 2013)

Section 44(9)(a) provided that –

- if an amalgamated company disposes of equity shares in a resultant company that were acquired by the amalgamated company under an amalgamation transaction that was subject to s 44(2) or 44(3),
- to a shareholder as part of an amalgamation transaction,
- such disposal of equity shares must be disregarded in determining any liability for dividends tax (see also 2.2.3).

Example – Calculation of dividends tax in an amalgamation transaction

Facts:

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all of its assets to Company B under an amalgamation transaction in exchange for equity shares in Company B. Company A transferred the equity shares in Company B to its shareholders.

Result:

The transfer of the equity shares held by Company A in Company B to its shareholders is not subject to dividends tax, since it must be disregarded in determining any liability for dividends tax under s 44(9)(a).

Section 44(9)(a) was deleted²⁵⁹ with effect from 24 October 2013 because of the introduction of s 44(6)(c) which applies to transactions entered into on or after 4 July 2013 (see **10.3.2 c.**).

b. Section 44(10) (Before 4 July 2013) and s 44(6)(e) (With effect from 4 July 2013)

It may happen that a person will receive other consideration in addition to equity shares in the resultant company for the disposal of that person's shares in the amalgamated company. In these circumstances the other consideration is deemed under s 44(10) or s 44(6)(e) to be an amount transferred or applied²⁶⁰ by the amalgamated company for the benefit or on behalf of that person in respect of a share held by that person in the amalgamated company for purposes of the definitions of 'dividend', 'foreign dividend', 'foreign return of capital' and 'return of capital' as defined in s 1(1).

The amount of other consideration so deemed to be transferred or applied is limited to –

- the market value of all the assets of the amalgamated company immediately before the amalgamation, conversion or merger,
- less the liabilities and CTC of all classes of shares of the amalgamated company immediately before the amalgamation, conversion or merger.

Section 44(10) was deleted²⁶¹ with effect from 4 July 2013 and therefore applied only to transactions entered into before 4 July 2013. Section 44(6)(e), which contains similar provisions to those of s 44(10), applies with effect from transactions entered into on or after 4 July 2013.

Example – Consideration for equity shares in an amalgamation transaction

Facts:

Company A and Company B are independent of each other with neither company holding any shares in the other. Company A disposed of all its assets and liabilities to Company B in exchange for cash of R55 000 and shares in Company B with a market value of R5 000. Company A distributed the shares in Company B and cash of R55 000 to its shareholders on 1 March 2013 after which Company A was liquidated.

Before the amalgamation transaction Company A's assets had a market value of R80 000, its liabilities amounted to R20 000 and its CTC amounted to R10 000.

Result:

The transfer of the equity shares by Company A to its shareholders is not subject to dividends tax because it must be disregarded under s 44(9)(a). The cash amount transferred to the shareholders for the disposal of the equity shares in Company A is treated as a dividend, the amount of which is calculated as follows:

	R
Market value of the assets of Company A	80 000
Less: Liabilities of Company A	(20 000)
Less: CTC of Company A	(10 000)
Amount of cash consideration treated as a dividend under s 44(10)	<u>50 000</u>

Note:

Although an amount of cash of R55 000 was transferred to the shareholders of Company A, only R50 000 is treated as a 'dividend' that is potentially subject to dividends tax.

²⁵⁹ By s 93(1)(f) of the Taxation Laws Amendment Act 31 of 2013.

²⁶⁰ The words 'or applied' were inserted with the substitution of s 44(10) with s 44(6)(e).

²⁶¹ By s 93(1)(g) of the Taxation Laws Amendment Act 31 of 2013.

c. Section 44(6)(c) (On or after 4 July 2013)

Section 44(6)²⁶² applies when a person that holds an equity share in an amalgamated company acquires an equity share in the resultant company by virtue of that shareholding and pursuant to an amalgamation transaction.

Section 44(6)(c) provides that an equity share in the resultant company that is acquired by a person in the circumstances mentioned above is deemed not to be an amount transferred or applied by the amalgamated company for the benefit or on behalf of that person in respect of the share held by that person in the amalgamated company.

Section 44(6)(c) has the effect that an equity share acquired by a person in the circumstances mentioned does not constitute a 'dividend' as defined in s 1(1) and is, therefore, not subject to dividends tax or normal tax.²⁶³

10.4 Unbundling transactions [ss 46(3A) and 46(5)]

10.4.1 CTC and unbundling transactions [s 46(3A)]

Section 46 regulates the tax consequences of qualifying unbundling transactions. An unbundling transaction²⁶⁴ essentially involves a company (the unbundling company) distributing all the equity shares held in another company (the unbundled company) to the shareholders in the unbundling company.

Section 46(3A) regulates the calculation of CTC of both the unbundling company and the unbundled company after a distribution of equity shares in an unbundling transaction. The CTC of the unbundling company must be allocated between the unbundling company and the unbundled company on a proportional basis in accordance with the relative market values of the shares in the unbundling company and the unbundled company.

To the extent the unbundled company's shares are held by the unbundling company, the unbundled company will not retain its CTC before the unbundling transaction. That portion of the CTC is effectively replaced by the proportional amount of CTC discussed in the preceding paragraph.

In the event that a portion of the unbundled company's equity shares are held by shareholders other than the unbundling company immediately before the unbundling transaction, a *pro-rata* portion of the CTC attributable to those equity shares is retained by the unbundled company under s 46(3A)(b)(ii).

Example 1 – Calculation of CTC in an unbundling transaction

Facts:

Company A holds all the equity shares in Company B. All the equity shares in Company B are unbundled to the shareholders of Company A. The CTC of Company A is R750 000 and the CTC of Company B is R500 000 before the unbundling transaction. The market value of the shares in Company A is R1 500 000 before the unbundling transaction and R1 million immediately after the unbundling transaction and the market value of the shares in Company B is R500 000 before the unbundling transaction.

²⁶² Section 44(6) was substituted by s 93(1)(d) of the Taxation Laws Amendment Act 31 of 2013 and applies to transactions entered into on or after 4 July 2013.

²⁶³ See Binding Private Rulings 210 dated 11 November 2015 'Liquidation Distribution Followed by an Amalgamation Transaction' and 231 dated 10 May 2016 'Corporate Restructurings by way of Asset-For-Share and Amalgamation Transactions'.

²⁶⁴ An 'unbundling transaction' is defined in s 46(1).

Result:

Under s 46(3A) the CTC of Company A must be allocated between Company A and Company B on a proportional basis in accordance with the relative market values of the shares in Company A and Company B.

CTC of Company A after the unbundling transaction:

The CTC of Company A after the unbundling transaction is calculated as follows:

CTC of Company A before the unbundling transaction × market value of shares in Company A after the unbundling transaction / market value of shares in Company A before unbundling transaction.

$$[R750\,000 \times R1\,000\,000 / R1\,500\,000] = R500\,000.$$

The CTC of Company A of R750 000 is reduced to R500 000 after the unbundling transaction.

CTC of Company B after the unbundling transaction:

The CTC of Company B of R500 000 is 'lost' after the unbundling transaction. Company B, however, obtains new CTC, based on the former CTC of Company A, calculated as follows:

CTC of Company A before the unbundling transaction × market value of the shares in Company B before the unbundling transaction / total market value of shares in Company A before the unbundling transaction.

$$[R750\,000 \times R500\,000 / R1\,500\,000] = R250\,000$$

The new CTC of Company B is R250 000.

Example 2 – Calculation of CTC in an unbundling transaction*Facts:*

Company C holds 900 equity shares in Company D with the remaining 100 equity shares being held by Individual X. The CTC of Company C is R40 000 and the CTC of Company D is R8 000 before the unbundling transaction. The market value of the shares in Company C is R200 000 before the unbundling transaction and R150 000 immediately after the unbundling transaction. The market value of the shares in Company D is R50 000 before the unbundling transaction. All 900 equity shares of Company D held by Company C are unbundled to the shareholders of Company C. Individual X retains the 100 equity shares previously held.

Result:

Under s 46(3A) the CTC of Company C must be allocated between Company C and Company D on a proportional basis in accordance with the relative market values of the shares in Company C and Company D.

CTC of Company C after the unbundling transaction:

The CTC of Company C after the unbundling transaction is calculated as follows:

CTC of Company C before the unbundling transaction × market value of shares in Company C after the unbundling transaction / market value of shares in Company C before unbundling transaction.

$$[R40\,000 \times R150\,000 / R200\,000] = R30\,000.$$

The CTC of Company C of R40 000 is reduced to R30 000 after the unbundling transaction.

CTC of Company D after the unbundling transaction:

A portion of the CTC of Company D is retained by Company D by virtue of the 10% shareholding of Individual X in Company D. Company D also obtains new CTC based on the former CTC of Company C.

The portion of the CTC of Company D that is retained by Company D by virtue of the 10% shareholding of Individual X in Company D is calculated as follows:

$$[100 / 1\,000 \times R8\,000] = R800.$$

New CTC obtained by Company D is calculated as follows:

CTC of Company C before the unbundling transaction \times market value of the shares in Company D before the unbundling transaction / total market value of shares in Company C before the unbundling transaction.

$$[R40\,000 \times R50\,000 / R200\,000] = R10\,000.$$

Company D has CTC of R10 800 (R800 + R10 000) after the unbundling transaction.

10.4.2 Dividends tax and unbundling transactions [s 46(5)]

Section 46(5) provides that –

- if shares are distributed by an unbundling company,
- to a shareholder under an unbundling transaction,
- that distribution of shares must be disregarded in determining any liability for dividends tax (see **2.2.3**).²⁶⁵

²⁶⁵ See Binding Private Ruling 249 dated 27 September 2016 'Corporate Group Restructuring Involving Multiple Transactions'.

Annexure – Dividends tax legislation

Chapter II Part VIII Sections 64D to 64N of Income Tax Act 58 of 1962

64D. Definitions.—In this Part—

“**beneficial owner**” means the person entitled to the benefit of the dividend attaching to a share;

“**dividend**” means any dividend or foreign dividend as defined in section 1 that is—

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

“**dividend cycle**” means a dividend cycle as defined in section 64B;

“**effective date**” means the date on which this Part comes into operation;

“**regulated intermediary**” means any—

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

“**STC credit**” means an amount determined in terms of section 64J(2).

64E. Levy of tax.—(1) Subject to paragraph 3 of the Tenth Schedule, there must be levied for the benefit of the National Revenue Fund a tax, to be known as the dividends tax, calculated at the rate of 15 per cent²⁶⁶ of the amount of any dividend paid by any company other than a headquarter company.

(2) For the purposes of this Part, a dividend must, to the extent that the dividend—

- (a) does not consist of a distribution of an asset *in specie* and is declared by a company that is—
 - (i) a listed company, be deemed to be paid on the date on which the dividend is paid; or
 - (ii) not a listed company, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable; or
- (b) consists of a distribution of an asset *in specie*, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable.

²⁶⁶ The rate of dividends tax has been increased from 15% to 20% in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill of 2017 for dividends paid on or after 22 February 2017.

(3) Where a company declares and pays a dividend and that dividend consists of a distribution of an asset *in specie*, the amount of the dividend must, for the purposes of subsection (1), be deemed—

- (a) in the case of an asset which is a financial instrument listed on a recognised exchange as defined in paragraph 1 of the Eighth Schedule and for which a price was quoted on that exchange, to be equal to the ruling price of that financial instrument on that recognised exchange at close of business on the last business day before the date that the dividend is, in terms of subsection (2), deemed to be paid; or
- (b) in the case of an asset which is not an asset contemplated in paragraph (a), to be equal to the market value of the asset on the date that the dividend is, in terms of subsection (2), deemed to be paid.

(4)(a) Where, during any year of assessment, any amount is owing to a company by—

- (i) a person that is—
 - (aa) not a company;
 - (bb) a resident; and
 - (cc) a connected person in relation to that company; or
- (ii) a person that is—
 - (aa) not a company;
 - (bb) a resident; and
 - (cc) a connected person in relation to a person contemplated in subparagraph (i),

in respect of a debt, that company must, for the purposes of this Part, be deemed to have paid a dividend if that debt arises by virtue of any share held in that company by a person contemplated in subparagraph (i).

- (b) The amount of the dividend that is deemed to have been paid in terms of paragraph (a) must—
 - (i) be deemed to consist of a distribution of an asset *in specie*; and
 - (ii) for the purposes of subsection (1), be deemed to be equal to the greater of—
 - (aa) the market-related interest in respect of that debt, less the amount of interest that is payable to that company in respect of that debt for that year of assessment; or
 - (bb) nil.
- (c) Where during any year of assessment a company is deemed to have paid a dividend in terms of paragraph (a), that dividend must be deemed to have been paid on the last day of that year of assessment.
- (d) For the purposes of this subsection, “**market-related interest**”, in relation to any debt owed to a company means the amount of interest that would be payable to that company on the amount owing to that company in respect of that debt for a period during a year of assessment if the debt had been owed for that period at the official rate of interest as defined in paragraph (1) of the Seventh Schedule.
- (e) This subsection does not apply to the extent that the amount owing to a company in respect of a debt contemplated in paragraph (a) was deemed to be a dividend that was subject to the secondary tax on companies.

(5) For the purposes of subsection (1), where any amount of any dividend is denominated in any currency other than the currency of the Republic, that amount must be translated to the currency of the Republic by applying the spot rate applicable at the time that the dividend is paid.

(6) Where a—

- (a) company that makes payment of a dividend to any person withholds an amount of dividends tax from that payment in terms of section 64G(1); or
- (b) regulated intermediary that makes payment of a dividend to any person withholds an amount of dividends tax from that payment in terms of section 64H(1),

that company or regulated intermediary must, for the purposes of this Part, be deemed to have paid the amount so withheld to that person.

64EA. Liability for tax.—Subject to section 64J(7) any—

- (a) beneficial owner of a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie*; or
- (b) company that is a resident that declares and pays a dividend to the extent that the dividend consists of a distribution of an asset *in specie*,

is liable for the dividends tax in respect of that dividend.

64EB. Deemed beneficial owners of dividends.—(1) For the purposes of this Part, where—

- (a) a person that is contemplated in section 64F(1) acquires the right to a dividend by way of cession; and
- (b) that dividend is either announced or declared before that acquisition,

the person ceding that right is deemed to be the beneficial owner of that dividend: Provided that this subsection does not apply to any cession in respect of a share if the person to whom those rights are ceded holds all the rights attaching to the share after the cession.

(2) For the purposes of this Part, where—

- (a) a person that is—
 - (i) a company which is a resident;
 - (ii) the government of the Republic in the national, provincial or local sphere;
 - (iii) a public benefit organisation approved by the Commissioner in terms of section 30(3);
 - (iv) a trust contemplated in section 37A;
 - (v) an institution, board or body contemplated in section 10(1)(cA);
 - (vi) a fund contemplated in section 10(1)(d)(i) or (ii);
 - (vii) a person contemplated in section 10(1)(t);
 - (viii).....
 - (ix).....
 - (x) a portfolio of a collective investment scheme in securities;
 - (xi) any person to the extent that the dividend constitutes income of that person;
 - (xii).....
 - (xiii) any fidelity or indemnity fund contemplated in section 10(1)(d)(iii); or
 - (xiv) a small business funding entity as contemplated in section 10(1)(cQ), borrows a share in a listed company from another person; and
- (b) a dividend is either announced or declared before that share is borrowed,

any amount paid by that person to that other person not exceeding that dividend in respect of that borrowed share is deemed to be a dividend paid by that person for the benefit of that other person.

(3) For the purposes of this Part, where—

- (a) a person that is contemplated in section 64F(1) acquires a share in a listed company (or any right in respect of that share) from another person after a dividend is announced or declared in respect of that share; and
- (b) that acquisition is part of a resale agreement between the person acquiring that share and that other person or to any other company forming part of the same group of companies as that other person,

that other person or other company is deemed to be the beneficial owner of that dividend.

(4) For the purposes of this section, “**resale agreement**” means the acquisition of a share by any person subject to an agreement in terms of which that person undertakes to dispose of that share or any other share of the same kind and of the same or equivalent quality at a future date.

64F. Exemption from tax in respect of dividends other than dividends *in specie*.—(1) Any dividend is exempt from the dividends tax to the extent that it does not consist of a dividend *in specie* if the beneficial owner is—

- (a) a company which is a resident;
- (b) the government of the Republic in the national, provincial or local sphere;
- (c) a public benefit organisation approved by the Commissioner in terms of section 30(3);
- (d) a trust contemplated in section 37A;
- (e) an institution, board or body contemplated in section 10(1)(cA);
- (f) a fund contemplated in section 10(1)(d)(i) or (ii);
- (g) a person contemplated in section 10(1)(t);
- (h) a holder of shares in a registered micro business, as defined in the Sixth Schedule, paying that dividend, to the extent that the aggregate amount of dividends paid by that registered micro business to all holders of shares in that registered micro business during the year of assessment in which that dividend is paid does not exceed the amount of R200 000;
- (i) a small business funding entity as contemplated in section 10(1)(cQ);
- (iA) ...
- (j) a person that is not a resident and the dividend is a dividend contemplated in paragraph (b) of the definition of “dividend” in section 64D;
- (k) a portfolio of a collective investment scheme in securities;
- (l) any person to the extent that the dividend constitutes income of that person; or
- (m) any person to the extent that the dividend was subject to the secondary tax on companies;
- (n) any fidelity or indemnity fund contemplated in section 10(1)(d)(iii); or
- (o) a natural person or deceased estate or insolvent estate of that person in respect of a dividend paid in respect of a tax free investment as contemplated in section 12T(1).

(2) Any dividend paid by a REIT or a controlled company, as defined in section 25BB, and received or accrued before 1 January 2014 is exempt from the dividends tax to the extent that the dividend does not consist of a dividend *in specie*.

64FA. Exemption from and reduction of tax in respect of dividends *in specie*.—(1) Where a company declares and pays a dividend that consists of a distribution of an asset *in specie*, that dividend is exempt from the dividends tax to the extent that it constitutes a distribution of an asset *in specie* if—

- (a) the person to whom the payment is made has, by the date of payment of the dividend, submitted to the company—
 - (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been exempt from the dividends tax in terms of section 64F; and
 - (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to in subparagraph (i) change or the beneficial owner cease to be a beneficial owner;
- (b) the beneficial owner forms part of the same group of companies, as defined in section 41, as that company;

- (c) the dividend constitutes a disposal as contemplated in paragraph 51A of the Eighth Schedule; or
- (d) the dividend constitutes a disposal as contemplated in paragraph 67B(2) of the Eighth Schedule.

(2) A company that declares and pays a dividend that consists of a distribution of an asset *in specie* is liable for the dividends tax at a reduced rate in respect of the portion of the dividend that constitutes the distribution of an asset *in specie* if the person to whom the payment is made has, by the date of payment of the dividend, submitted to the company—

- (a) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset *in specie* would, if that portion had not constituted a distribution of an asset *in specie*, have been subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and
- (b) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to in paragraph (a) change or the beneficial owner cease to be the beneficial owner.

64G. Withholding of dividends tax by companies declaring and paying dividends.—

(1) Subject to subsections (2) and (3), a company that declares and pays a dividend must withhold an amount of dividends tax from that payment calculated as contemplated in section 64E except to the extent that—

- (a) the dividend consists of a distribution of an asset *in specie*; or
- (b) the dividend is not subject to the dividends tax by virtue of any STC credit contemplated in section 64J having been applied.

(2) A company must not withhold any dividends tax from the payment of a dividend contemplated in subsection (1) if—

- (a) the person to whom the payment is made has—
 - (i) by a date determined by the company; or
 - (ii) if the company did not determine a date as contemplated in subparagraph (i), by the date of payment of the dividend, submitted to the company—
- (aa) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is exempt from the dividends tax in terms of section 64F; and
- (bb) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the exemption applicable to the beneficial owner referred to in item (aa) change or the beneficial owner cease to be the beneficial owner;
- (b) the beneficial owner forms part of the same group of companies, as defined in section 41, as the company that paid the dividend; or
- (c) the payment is made to a regulated intermediary.

(3) A company must withhold dividends tax from the payment of a dividend contemplated in subsection (1) at a reduced rate if the person to whom the payment is made has—

- (a) by a date determined by the company; or
- (b) if the company did not determine a date as contemplated in paragraph (a), by the date of payment of the dividend,

submitted to the company—

- (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and

- (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the company in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to in subparagraph (i) change or the beneficial owner cease to be the beneficial owner.

64H. Withholding of dividends tax by regulated intermediaries.—(1) Subject to subsections (2) and (3), a regulated intermediary that pays a dividend that was declared by any other person must withhold an amount of dividends tax from that payment calculated as contemplated in section 64E except to the extent that—

- (a) the dividend consists of a distribution of an asset *in specie*; or
- (b) the dividend is not subject to the dividends tax by virtue of any STC credit contemplated in section 64J having been applied.

(2) A regulated intermediary must not withhold any dividends tax from the payment of a dividend contemplated in subsection (1) if—

- (a) the person to whom the payment is made has—
 - (i) by a date determined by the regulated intermediary; or
 - (ii) if the regulated intermediary did not determine a date as contemplated in subparagraph (i), by the date of payment of the dividend, submitted to the regulated intermediary—
 - (aa) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is exempt from the dividends tax in terms of section 64F or that the payment is made to a vesting trust of which the sole beneficiary is another regulated intermediary; and
 - (bb) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the regulated intermediary in writing should the circumstances affecting the exemption applicable to the beneficial owner in item (aa) change or the beneficial owner cease to be the beneficial owner; or
- (b) the payment is made to another regulated intermediary.

(3) A regulated intermediary must withhold dividends tax from the payment of a dividend contemplated in subsection (1) at a reduced rate if the person to whom the payment is made has—

- (a) by a date determined by the regulated intermediary; or
- (b) if the regulated intermediary did not determine a date as contemplated in paragraph (a), by the date of payment of the dividend,

submitted to the regulated intermediary—

- (i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the dividend is subject to that reduced rate as a result of the application of an agreement for the avoidance of double taxation; and
- (ii) a written undertaking in such form as may be prescribed by the Commissioner to forthwith inform the regulated intermediary in writing should the circumstances affecting the reduced rate applicable to the beneficial owner referred to in subparagraph (i) change or the beneficial owner cease to be the beneficial owner.

64I. Withholding of dividends tax by insurers.—If a dividend, to the extent that the dividend does not consist of a distribution of an asset *in specie*, is paid to an insurer as defined in section 29A, the insurer must be deemed to be a regulated intermediary and the dividend must, to the extent that the dividend is allocated to a fund contemplated in section 29A(4)(b), be deemed to be paid to a natural person that is a resident by the regulated intermediary on the date that the dividend is paid to the insurer.

64J. STC credit.—(1) A dividend paid by a company is not subject to the dividends tax to the extent that—

- (a) the dividend does not exceed the STC credit of the company; and
- (b) the company has by the date of payment notified the person to whom the dividend is paid of the amount by which the dividend reduces the STC credit of the company.

(2) The STC credit of a company is an amount equal to the sum of—

- (a) the amount by which the dividends accrued to that company as contemplated in section 64B(3) during the dividend cycle ending on the day immediately before the effective date, determined without regard to any dividend contemplated in section 64B(3A), exceed the dividends declared during that cycle by that company as contemplated in section 64B(2); and
- (b) the dividends accrued to that company on or after the effective date—
 - (i) in respect of which the company received a notification from the person paying the dividend of the amount by which the dividend reduces the STC credit of the company that paid and declared that dividend; and
 - (ii) if the notification contemplated in subparagraph (i) was received no later than the date that the dividend is paid,

reduced by the dividends declared and paid by the company on or after the effective date.

(3) For purposes of subsections (1)(b) and (2)(b), the amount by which the STC credit of a company is reduced is deemed to be equal to an amount which bears to the dividend paid by that company to the person or company contemplated in those subsections the same ratio as the amount by which the STC credit of that company is reduced as a result of the payment of that dividend to all holders of shares in that company bears to the total dividend paid to all holders of shares.

(4) In the determination of the STC credit of a company that is an insurer as defined in section 29A, the amount to be taken into account in terms of subsection (2)(b) in respect of dividends accrued to that company must be limited to dividends accrued on shares constituting an asset in the corporate fund of the company.

(5) The STC credit of a company on or after the third anniversary of the effective date is deemed to be nil.

(6) For the purposes of this section “**dividend**” means a dividend contemplated in paragraph (a) of the definition of “dividend” in section 64D.

(7) To the extent that any amount of dividends tax is not withheld by any person from the payment of any dividend by that person as a result of an inaccurate notification provided as contemplated in subsection (1)(b) by the company contemplated in that subsection, the company contemplated in that subsection is liable for that amount of dividends tax.

64K. Payment and recovery of tax.—(1)(a) If, in terms of section 64EA(a), a beneficial owner is liable for any amount of dividends tax in respect of a dividend, that beneficial owner must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company that declared the dividend, unless the tax has been paid by any other person.

(b) If, in terms of section 64EA(b), a company is liable for any amount of dividends tax in respect of a dividend, that company must pay that amount to the Commissioner by the last day of the month following the month during which that dividend is paid by the company.

(c) If, in terms of this Part, a person is required to withhold any amount of dividends tax in respect of a dividend, that person must pay that amount, less any amount refundable in terms of section 64L or 64M, to the Commissioner by the last day of the month following the month during which that dividend is paid by that person as contemplated in section 64G or 64H.

(d).....

(1A) If, in terms of this Part a person has—

- (a) paid a dividend; or
- (b) received a dividend contemplated in paragraph (a) of the definition of “dividend” in section 64D, other than a dividend derived from a tax free investment contemplated in section 12T, that is exempt or partially exempt from dividends tax in terms of section 64F or 64FA,

that person must submit a return in respect of that dividend to the Commissioner by the last day of the month following the month during which the dividend is paid or received.

(2) ...

(3)

(4) Where a person—

- (a) has, in terms of section 64G(3) or 64H(3), withheld dividends tax in accordance with a reduced rate in respect of the payment of any dividend; or
- (b) that is a company which was, in terms of section 64FA(2), liable for dividends tax at a reduced rate in respect of the declaration and payment of any dividend,

that person must submit to the Commissioner any declaration—

- (i) submitted to the person by or on behalf of a beneficial owner; and
- (ii) relied upon by the person in determining the amount of dividends tax so withheld,

at the time and in the manner prescribed by the Commissioner.

(5)

(6) If a person fails to pay any dividends tax within the required period, interest must be paid by that person on the balance of the tax outstanding at the prescribed rate reckoned from the end of that period.

(7)

(8)

64L. Refund of tax in respect of dividends declared and paid by companies.—

(1) Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) an amount is withheld by a company from the payment of a dividend in terms of section 64G(1);
- (b) a declaration contemplated in subsection (2)(a) or (3) of that section in respect of that dividend is not submitted to the company by the date contemplated in the relevant subsection; and
- (c) both the declaration and the written undertaking contemplated in section 64G(2)(a) or (3) are submitted to the company within three years after the payment of the dividend in respect of which they are made,

so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable to the person to whom the dividend was paid.

(1A) If—

- (a) an amount is withheld by a company from the payment of a dividend in terms of section 64G(1); and
- (b) a rebate in respect of foreign taxes paid on that dividend should have been deducted from that amount in terms of section 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount, is refundable to the person to whom the dividend was paid: Provided such rebate is claimed within three years after the payment of the relevant dividend.

(2) Any amount that is refundable in terms of subsection (1) or (1A) must be refunded by the company that withheld that amount to the person to whom the dividend was paid—

- (a) from any amount of dividends tax withheld by that company within a period of one year after the submission of the declaration contemplated in subsection (1)(c) or the claim of a rebate contemplated in subsection (1A); or
- (b) to the extent that the amount that is refundable exceeds the amount of dividends tax withheld as contemplated in paragraph (a), from an amount recovered by the company from the Commissioner in terms of subsection (3).

(3) Subject to subsection (4), if any amount is refundable to any person by a company in terms of subsection (1) or (1A) and that amount exceeds the amount of dividends tax withheld as contemplated in subsection (2)(a), the company contemplated in subsection (2) may recover the excess from the Commissioner.

(4) No amount may be recovered in terms of subsection (3) if the company submits the claim for recovery to the Commissioner after the expiry of a period of four years reckoned from the date of the payment contemplated in subsection (1)(a) or (1A)(a).

64LA. Refund of tax in respect of dividends *in specie*.— Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) dividends tax is paid by a company in respect of a dividend that consists of a distribution of an asset *in specie* as a result of the company being unable to obtain the declaration and written undertaking contemplated in section 64FA(1)(a) or (2) by the date contemplated in that section; and
- (b) both the declaration and the written undertaking are submitted to the company within three years after the payment of the tax,

so much of the amount of dividends tax paid as would not have been payable had that declaration and written undertaking been submitted by the date contemplated in section 64FA(1)(a) or (2) is refundable to the company by SARS if claimed within three years of the date of payment of the tax.

64M. Refund of tax in respect of dividends paid by regulated intermediaries.—

(1) Notwithstanding the provisions of Chapter 13 of the Tax Administration Act, if—

- (a) an amount is withheld by a regulated intermediary from the payment of a dividend in terms of section 64H(1);
- (b) a declaration contemplated in subsection (2)(a) or (3) of that section in respect of that dividend is not submitted to the regulated intermediary by the date contemplated in the relevant subsection; and
- (c) both the declaration and the written undertaking contemplated in section 64H(2)(a) or (3) are submitted to the regulated intermediary within three years after the payment of the dividend in respect of which they are made,

so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable to the person to whom the dividend was paid.

(1A) If—

- (a) an amount is withheld by a regulated intermediary from the payment of a dividend in terms of section 64H(1); and
- (b) a rebate in respect of foreign taxes paid on that dividend should have been deducted from that amount in terms of section 64N,

so much of that amount as would not have been withheld had that rebate been deducted from the amount, is refundable to the person to whom the dividend was paid: Provided such rebate is claimed within three years after the payment of the relevant dividend.

(2) Any amount that is refundable in terms of subsection (1) or (1A) must be refunded by the regulated intermediary contemplated in subsection (1)(a) or (1A)(a) from any amount of dividends tax withheld by the regulated intermediary after the submission of the declaration as contemplated in subsection (1)(c) or the claim of a rebate contemplated in subsection (1A).

64N. Rebate in respect of foreign taxes on dividends.—(1) A rebate determined in accordance with this section must be deducted from the dividends tax payable in respect of a dividend contemplated in paragraph (b) of the definition of “dividend” in section 64D.

(2) The amount of the rebate contemplated in subsection (1) is equal to the amount of any tax paid to any sphere of government of any country other than the Republic, without any right of recovery by any person, on a dividend contemplated in subsection (1).

(3) The amount of the rebate contemplated in subsection (2) must not exceed the amount of the dividends tax imposed in respect of the dividend contemplated in subsection (1).

(4) For the purposes of this section, the amount of any tax paid as contemplated in subsection (2) must be translated to the currency of the Republic by applying the exchange rate used to convert the amount of the dividend in respect of which that tax is paid to the currency of the Republic.

(5) A company or regulated intermediary must obtain proof of any tax paid to any sphere of government of any country other than the Republic and deducted from the dividends tax payable in terms of this section, in the form and manner prescribed by the Commissioner.

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