

**SECTION 31 OF THE ITA 58 OF 1962**  
**[DATE 30 NOVEMBER 2022]**

**31. Tax payable in respect of international transactions to be based on arm's length principle**

**(1) For the purposes of this section -**

**'affected transaction'** means any transaction, operation, scheme, agreement or understanding where:

- (a)** that transaction, operation, scheme, agreement or understanding has been directly or indirectly entered into or effected between or for the benefit of either or both-
    - (i) (aa) a person that is a resident; and  
(bb) any other person that is not a resident;
    - (ii) (aa) a person that is not a resident; and  
(bb) any other person that is not a resident that has a permanent establishment in the Republic to which the transaction, operation, scheme, agreement or understanding relates;
    - (iii) (aa) a person that is a resident; and  
(bb) any other person that is a resident that has a permanent establishment outside the Republic to which the transaction, operation, scheme, agreement or understanding relates; or
    - (iv) (aa) a person that is not a resident; and  
(bb) any other person that is a controlled foreign company in relation to any resident,
- and those persons are connected persons [*or associated enterprises*] in relation to one another; and  
[*"or associated enterprises" insertion effective from 1 January 2023: see s66(1) of Act 20 of 2021*].
- (b)** any term or condition of that transaction, operation, scheme, agreement or understanding is different from any term or condition that would have existed had those persons been independent persons dealing at arm's length;

**'associated enterprise'** means an associated enterprise as contemplated in Article 9 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development;  
[*'associated enterprise' inserted by s37(1)(b) of Act 34 of 2019 with effect from 1 January 2023 - See s78(1) of Act 23 of 2020 and s66(1) of Act 20 of 2021*].

**'financial assistance'** includes any-

- [*'financial assistance' definition preceding (a) substituted by section 82(1)(a) of Act 31 of 2013 with effect from 1 April 2014*]
- (a)** debt; or  
[*(a) substituted by section 64(1)(a) of Act 22 of 2012 with effect from 1 January, 2013*]
  - (b)** security or guarantee.

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**(2) Where-**

- (a)** any transaction, operation, scheme, agreement or understanding constitutes an affected transaction; and
- (b)** any term or condition of that transaction, operation, scheme, agreement or understanding-
  - (i)** is a term or condition contemplated in paragraph (b) of the definition of 'affected transaction'; and

- (ii) results or will result in any tax benefit being derived by a person that is a party to that transaction, operation, scheme, agreement or understanding or by any resident in relation to a controlled foreign company contemplated in subparagraph (iv) of the definition of 'affected transaction',  
[(ii) substituted by section 31(1) of Act 23 of 2020 with effect from 1 January 2021].

the taxable income or tax payable by any person contemplated in paragraph (b)(ii) that derives a tax benefit contemplated in that paragraph must be calculated as if that transaction, operation, scheme, agreement or understanding had been entered into on the terms and conditions that would have existed had those persons been independent persons dealing at arm's length.

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**(3) To the extent that there is a difference between-**

- (a) any amount that is, after taking subsection (2) into account, applied in the calculation of the taxable income of any resident that is a party to an affected transaction; and
- (b) any amount that would, but for subsection (2), have been applied in the calculation of the taxable income of the resident contemplated in paragraph (a),

the amount of that difference must, if that person is a resident and the other person to the affected transaction is a person as contemplated in paragraph (a)(i)(bb) or (a)(iii)(bb) of the definition of 'affected transaction'—

- (i) if that resident is a company, 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; or
- (ii) if that resident is a person other than a company, be deemed, for purposes of Part V, to be a donation made by that resident to that other person,  
[(b)(ii) substituted by section 56 of Act 25 of 2015]

on the last day of the period of six months following the end of the year of assessment in respect of which that adjustment is made: Provided that where the amount of that difference was prior to 1 January 2015 deemed to be a loan that constitutes an affected transaction, so much of that loan as has not been repaid before 1 January 2015 must—

- (a) if that resident is a company, be deemed to be a dividend consisting of a distribution of an asset in specie that was declared and paid by that resident to that other person; or
- (b) if that resident is a person other than a company, be deemed, for purposes of Part V, to be a donation made by that resident to that other person, on 1 January 2015.  
[(3) following paragraph (b) substituted by s50(1)(a) of Act 43 of 2014 with effect from 1 January 2015]

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**(4) For the purposes of subsection (2), where any transaction, operation, scheme, agreement or understanding has been directly or indirectly entered into or effected as contemplated in that subsection in respect of-**

- (a) the granting of any financial assistance; or
- (b) intellectual property as contemplated in the definition of 'intellectual property ' in section 23(1) or knowledge,

**'connected person'** means a connected person as defined in section 1:

**Provided that** the expression 'and no holder of shares holds the majority voting rights in the company' in paragraph (d)(v) of that definition must be disregarded.

[(Proviso in section 31(4) substituted by section 82(b) of Act 31 of 2013)]

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**(5) Where any transaction, operation, scheme, agreement or understanding has been entered into between a headquarter company and-**

**(a)** any other person that is not a resident and that transaction, operation, scheme, agreement or understanding is in respect of the granting of financial assistance by that other person to that headquarter company, this section does not apply to so much of that financial assistance that is directly applied as financial assistance to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights;

*[(a) amended by section 64(1)(b) of Act 22 of 2012 with effect from 1 January 2013)]*

**(b)** any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of financial assistance by that headquarter company to that foreign company, this section does not apply to that financial assistance;

*[(b) amended by section 64(1)(c) of Act 22 of 2012 with effect from 1 January 2013)]*

**(c)** any other person that is not a resident and that transaction, operation, scheme, agreement or understanding is in respect of the granting of the use, right of use or permission to use any intellectual property as defined in section 23I(1) by that other person to that headquarter company, this section does not apply to the extent that the headquarter company-

**(i)** grants that use, right of use or permission to use that intellectual property to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights; and

**(ii)** does not make use of that intellectual property otherwise than as contemplated in subparagraph (i); or

*[(c) added by section 64(1)(d) of Act 22 of 2012 with effect from 1 January 2013)]*

**(d)** any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10 per cent of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of the use, right of use or permission to use any intellectual property as defined in section 23I(1) by that headquarter company to that foreign company, this section does not apply to that granting to that foreign company

*[(d) added by s64(1)(d) of Act 22 of 2012 with effect from 1 January 2013)]*

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**(6) Where any transaction, operation, scheme, agreement or understanding that comprises the granting of-**

**(a)** financial assistance; or

**(b)** the use, right of use or permission to use any intellectual property as defined in section 23I,

by a person that is a resident (other than a headquarter company) to a controlled foreign company in relation to that resident or in relation to a company that forms part of the same group of companies as that resident, this section must not be applied in calculating the taxable income or tax payable by that resident in respect of any amount received by or accrued to that resident in terms of that transaction, operation, scheme, agreement or understanding if:

*[(6) following (b) and preceding (i) substituted by s82(1)(c) of Act 31 of 2013 with effect from 1 April 2014)]*

(i).....

*[(6)(i) deleted by section 82(1)(d) of Act 31 of 2013 with effect from 1 April 2014)]*

(ii) that controlled foreign company has a foreign business establishment as defined in section 9D(1); and

(iii) the aggregate amount of tax payable to all spheres of government of any country other than the Republic by that controlled foreign company in respect of any foreign tax year of that controlled foreign company during which that transaction, operation, scheme, agreement or understanding exists is at least 67,5 per cent of the amount of normal tax that would have been payable in respect of any taxable income of that controlled foreign company had that controlled foreign company been a resident for that foreign tax year:

*[(6)(iii) preceding the proviso substituted by s 37(1)(c) of Act 34 of 2019 with effect from 1 January 2020)]*

**Provided** that the aggregate amount of tax so payable must be determined-

(aa) after taking into account any applicable agreement for the prevention of double taxation and any credit, rebate or other right of recovery of tax from any sphere of government of any country other than the Republic; and

(bb) after disregarding any loss in respect of a year other than that foreign tax year or from a company other than that controlled foreign company.

*[(6) added by section 64(1)(e) of Act 22 of 2012 with effect from 1 January 2013)]*

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## **(7) Where -**

(a) any transaction, operation, scheme, agreement or understanding has been entered into between a company that is a resident (for purposes of this subsection referred to as resident company') or any company that forms part of the same group of companies as that resident company and any foreign company in which that resident company (whether alone or together with any other company that forms part of the same group of companies as that resident company) directly or indirectly holds in aggregate at least 10 per cent of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of financial assistance that constitutes a debt owed by that foreign company to that resident company or any company that forms part of the same group of companies as that resident company;

(b) that foreign company is not obliged to redeem that debt in full within 30 years from the date the debt is incurred;

*[(b) amended by section 50(1)(b) of Act 43 of 2014)]*

(c) the redemption of the debt in full by the foreign company is conditional upon the market value of the assets of the foreign company not being less than the market value of the liabilities of the foreign company; and

*[(c) amended by section 50(1)(b) of Act 43 of 2014)]*

(d) no interest accrued in respect of the debt during the year of assessment,

*[(d) added by section 50(1)(b) of Act 43 of 2014)*

**this section must not apply to that debt.**

*[(7) added by section 82(1)(e) of Act 31 of 2013 with effect from 1 April 2014)]*

## **Evolution of section 31**

*(amended by section 23(1) of Act 21 of 1995)*

*(amended by section 37(1) of Act 30 of 1998)*

*(amended by section 31(1) of Act 53 of 1999)*

*(amended by section 37 of Act 59 of 2000)*

*(amended by section 16 of Act 5 of 2001)*

*(amended by section 46 of Act 45 of 2003)*

*(amended by section 44(1) of Act 35 of 2007)*

*(amended by section 43(1) of Act 60 of 2008)*

*(**substituted** by section 56(1) of Act 7 of 2010 with effect from 1 October 2011, which amendment was subsequently repealed by section 165 of Act 24 of 2011 with effect from 1 October 2011)*

*(**substituted** by section 57(1) of Act 24 of 2011 with effect from 1 April 2012)*