Tax clampdown on multinationals in Africa

Introduction

Many African governments have in recent years strengthened their efforts to have more control over the activities of multinational corporations which operate in their jurisdictions. The latest tool employed is that of tax. In line with international developments, many tax authorities in these jurisdictions have increased their efforts to target perceived tax avoidance and evasion. These efforts have taken various forms but a clear pattern is emerging: tax assessments are being raised on companies, often following, or together with, allegations of tax avoidance or evasion.

A new pattern emerging? Raising tax assessments

Under most local rules, where assessments are raised by a tax authority and objected to by a taxpayer, payment of the tax (in whole or in part) must nevertheless be made pending an appeal against the assessment. This gives the tax authorities a substantial cash flow advantage. While rules do allow the taxpayer to object to the advance tax payment, or to request a reduction of the amount, the discretion usually lies within the powers of the local tax authority to determine what amount of tax should be paid pending the appeal. Strict time limits apply and such a request must be made with great care. If not paid on time, penalties and interest can also arise.

Who is being targeted?

Multinationals with local operations, particularly where those operations are conducted through separate local operating entities, are the main target. Increasingly often, the overseas entity (as a direct or indirect shareholder in the local operating entity) faces the risk of tax on the basis of the alleged existence of a local permanent establishment or branch, or because it is alleged that its profits (or dividends) have a local source. In addition, private equity enterprises acquiring or disposing of local enterprises may face the risk of seller's capital gains tax or stamp duty, even where the acquisition or disposal is of overseas entities.

This is of particular concern for multinationals involved in industries including mining, energy and infrastructure (particularly those which have significant local cash flows); those which distribute dividends regularly; those which have substantial profits (even though they may not be tax-paying locally due to carried-forward losses); and those which enter into transactions, including acquisitions and disposals, in the local jurisdiction from time to time.

> *"Multinationals may face assessments for withholding tax, corporate income tax, stamp duty or capital gains tax without any proper legal foundation."*

The nature and grounds of assessments – a mixed bag

In a number of jurisdictions, tax assessments have been and are being raised for withholding tax, corporation tax, income tax, VAT and/or stamp duty on local transactions or, in the case of disposals, seller's capital gains tax. Assessments have been raised for some or all of these taxes, in some cases all at the same time and in other cases with some following on from others. Even though the relevant actions and transactions may occur offshore, or under the laws of other jurisdictions (such as where the entities concerned are headquartered, managed and controlled, or listed), the local tax authorities have found "novel" ways for treating these actions and transactions as arising within their jurisdictions.

Authorities have relied on various grounds, some of which are based on an incorrect or flawed understanding of the corporate operations and the relevant factual circumstances, and others of which rely on a broad (and incorrect) reading of the tax legislation.

Assessments have been raised claiming that taxes are due on one or more of the following grounds:

- the corporation being resident for tax purposes (which it may not be);
- the corporation having a permanent establishment or branch in the jurisdiction in question (which it may not have);
- the source of dividends being local operations (which may not be the case);
- seller's capital gains tax and/or stamp duty being payable on the acquisition or disposal of an overseas entity with local operations; and/or
- some tax avoidance or evasion arrangement having been carried out which justifies a broad interpretation of the local tax legislation and a widening of the local tax net.

A closer review of some assessments and a detailed analysis of the factual circumstances of the entities often indicate that many grounds can simply not be justified.

Once the assessments are raised, and even where they are challenged, there remains a risk that the tax authorities may seek to execute. Therefore, preventative steps may need to be taken, including seeking injunctive relief or a stay of execution.

How CC can assist

We have significant experience advising multinationals and private equity houses on a wide range of tax assessments raised by African tax authorities, including on their scope, legal basis and procedures. Working with our tax and dispute resolution teams and local experts, we are able to deal with legal, procedural, strategic and practical issues at local and international levels. In most cases, time is of the essence and swift action is needed. In ongoing cases, we represent clients in their pending disputes against African tax authorities. Current issues include:

- working with our tax dispute teams and local tax counsel to conduct local law challenges to tax assessments, including discussions with tax authorities and appeals before local tax tribunals and courts;
- advising on alternative remedies which may be available, including under:
  - double tax treaties;
  - bilateral investment treaties; and
  - development agreements with local governments;
- providing strategic advice to protect the multinational's position in the event that the tax authority seeks to enforce over and/or expropriate its assets;
- advising on related tax and tactical issues, including international knock-on tax consequences;
- advising on reputational considerations and risk management; and
- providing related corporate support and advice.

Our experience suggests a holistic approach to such matters (necessitating a firm that can cover all the bases) stands the best chance of mitigating the risk of an adverse outcome for the multinational.

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