Double taxation agreements and substance requirements in Ghana

Double Taxation Agreements (DTAs) are international agreements which seek to prevent taxpayers from being taxed more than once on the same income in more than one jurisdiction. To prevent persons or entities from setting up companies in a jurisdiction merely as a conduit to enjoy the DTA benefits, anti-treaty abuse provisions are usually inserted in municipal laws. This article discusses DTAs and the substance requirements in Ghana.

Detailed discussion

DTAs are international agreements or treaties between two or more countries for the avoidance of payment of taxes by the same taxpayer on the same income in more than one state. The Revenue Administration Act, 2019, Act 915 (as amended), defines an "international arrangement" to mean a treaty or agreement between the Government of Ghana and a foreign government providing for relief of international double taxation and the prevention of fiscal evasion, among others. DTAs are therefore international arrangements.

DTAs have been associated with international trade, higher foreign direct investments, tax reliefs and tax credits. As a result, countries conclude these agreements to avail themselves and their citizens of the benefits afforded thereby. It is, therefore, not surprising that Ghana has DTAs with eleven (11) eleven countries which are currently in force, namely,

- Belgium,
- Denmark,
- France,
- Germany,
- Italy,
- Mauritius,
- The Netherlands,
- Singapore,
- South Africa,
- Switzerland and
- The United Kingdom.

Execution of DTAs

DTAs, like normal agreements, are concluded by signing. Nonetheless, the procedure for enforcement of a DTA is determined by the type of state. Whereas monist states require a mere signing of the DTA by an authorized person to be enforceable, dualist states adopt a two-pronged approach for the enforceability of a DTA – that is, the signing of the agreement by an authorised person and the incorporation of the agreement into the laws of the state by ratification.

Consequently, Ghana, being a dualist state, does not recognise a DTA to be enforceable just by the mere signing thereof. The 1992 Constitution of the Republic of Ghana empowers the President, or a person authorised by the President, to execute DTAs on behalf of the state. However, a DTA signed by the President or the President's authorised representative is not enforceable either in Ghana or internationally against a person in Ghana unless it has been ratified by an Act of the Parliament of Ghana, or by a resolution of Parliament supported by the votes of more than fifty percent of all the members of Parliament. Ratification of a DTA, therefore, makes the DTA a part of the tax laws of Ghana.

Entitlement to DTA benefits

Once a DTA has been ratified, persons in Ghana and the other Contracting state can avail themselves of the benefits it offers. However, mere citizenship of persons in Ghana and the other Contracting State does not mean automatic qualification to avail oneself of the benefits under the agreement from Ghana's perspective. This is the result of the anti-treaty abuse provisions usually incorporated in the tax laws of countries to prevent persons from 'shopping' for a suitable country to establish a business merely as a vehicle to take advantage of the benefits accorded residents of such country.

To this end, the anti-treaty abuse rule has been incorporated in Act 915 to require any person which intends to take advantage of a benefit under a DTA to satisfy the following conditions; namely:

a. the person must be a resident of the other Contracting State, and
b. fifty per cent (50%) or more of the underlying ownership of the entity must be held by an individual(s) or an entity (in which no person has a membership interest)

who are themselves resident in the other contracting state or Ghana.

"Underlying ownership" in relation to an entity is defined under Act 915 as "membership interest owned in the entity, directly or indirectly through one or more interposed entities, by individuals or by entities in which no person has a membership interest"

The assessment of whether these conditions have been met has to be performed at the point in time where the transaction takes place. As such, once the conditions are satisfied, an entity can avail itself of the benefits under the relevant DTA.

The anti-treaty abuse provision is in line with the OECD Model Tax Convention. The tax authority in Ghana (the Ghana Revenue Authority or GRA), applies strict substance requirements in determining whether a person qualifies for the benefits under a DTA. Consequently, the GRA usually scrutinises with eagle eyes the relevant transaction which is the subject-matter for accessing a benefit under a DTA. The GRA ascertains whether there is sufficient substance to afford the person seeking to avail itself of the benefits under the relevant DTA the opportunity.

Pursuant to the above, the Commissioner-General (CG) of the GRA has issued draft Practice Notes (PN) on the requirements for obtaining DTA benefits in Ghana. These include:

- The taxpayer must be liable to tax in the treaty country of which that taxpayer is a resident;
- The income in question is not exempted from tax in Ghana;
- The tax in question is covered by the DTA;
- The benefit is not specifically excluded under the DTA; and
- The benefit is claimed within the time stipulated by the treaty or domestic laws.

In the draft PN, treaty benefits will be denied if:

- Based on facts and circumstances, it is discovered that the taxpayer's residency was obtained for the sole purpose of accessing benefits under the DTA (treaty shopping); or
- It is discovered after careful review of the case that one of the principal purposes of the arrangement or a transaction or business is to take advantage of the treaty or abuse its provisions.

In addition to the above, the draft PN requires the following to be satisfied in order to benefit from the treaty withholding tax rates:

a. Beneficial Owner

The draft PN provides that "the beneficial owner of the income must be a resident of the other treaty partner, even if the income was not paid directly to him. Where a dividend is paid by a Ghanaian company directly to a resident of Ghana's treaty partner but for the benefit of a resident of Ghana or another country, the treaty rate on dividend will not be applicable. On the other hand, the treaty rate will be applicable if the dividend is paid to a resident of another country but for the benefit of a resident of the treaty country".

b. Absence of Permanent Establishment (PE)

The draft PN provides that "the income must not relate to a PE, which the beneficiary has in the paying country. The treaty WHT will not be applicable where the non-resident beneficial owner of the income carries on a business in Ghana through a PE and the income is connected to that PE".

The CG, per the draft PN, appears to have dispensed with the requirement to have more than 50% of the underlying ownership of the entity being held by an individual(s) or entity (in which no person has a membership interest) who are themselves resident in the other Contracting State or Ghana. Thus, the anti-treaty shopping provisions and general anti-tax avoidance provisions must be satisfied in order to benefit from the DTA.

Conclusion

DTAs provide enormous benefits to countries and persons or entities resident in these countries. However, the enforcement of the agreement in Ghana is not simplistic. Mere residency of a person or entity in Ghana or the other Contracting State does not grant automatic entitlement of benefits under the agreement. Therefore, individuals or entities must ensure that they satisfy the prescribed conditions to enable them avail themselves of the benefits, and must set up structures that satisfy the substance requirements in both the DTA and in Ghana.

Contacts

Ernst & Young Advisory Services Limited

EY Ghana

Robin McCone
Partner
Accounting Compliance and Reporting
robin.mccone@gh.ey.com
+233 577 708090

Isaac Nketiah Sarpong
Partner
International & Transactions Tax Services
isaac.sarpong@gh.ey.com
+233 577 653377