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GROSSING UP WITHHOLDING TAXES NECESSARY: By Jonathan Hore

Resident entities which deal with non-resident consultants frequently meet circumstances where the non-residents do not want to suffer Botswana withholding taxes (hereinafter WHTs). The reason for such moves is obvious; the WHTs negatively impact their cashflows by reducing the amount they receive. Secondly, the quantum could also be an issue as most WHTs are pegged at 15% unless if there is a Double Taxation Avoidance Agreement which reduces the tax rate. Lastly, most of such suppliers do not have those WHTs in their home countries and they hear of them when they trade with African countries. Experience shows that grossing-up is a solution to striking a balance between having the service and complying with the tax laws.

THE WHTs CONCEPT

The Income Tax Act imposes, among others, withholding taxes on payments made by a resident of Botswana to a non-resident person who provides them with management or consultancy services, interest-bearing loans, commercial royalties and entertainment fees. Management or consultancy fees is alternatively referred to as technical fees and it encompasses payments such as management fees, IT, engineering, mechanical services and administrative services. The resident payer is obliged to make tax deductions and pay the tax to BURS by the 15th day of the month following that in which payment is made to the non-resident payee. It must be noted that there is no WHT until payment to the service provider is made. Technically, WHTs are triggered by payment and not accrual as is the case in other countries. The payer should give the payee a BURS-stamped tax certificate in the form of an ITW 9 form. Whilst system generated certificates may also be granted to such persons, BURS-stamped copies are more authentic when it comes to international transactions. The problem that resident payers of services meet is that the payees may refuse to suffer Botswana taxes and that is when grossing up comes in.

GROSSING-UP

In practice, most service providers will agree to the deduction of WHTs in Botswana as they know that they are not the only providers of such services. However, there are those non-resident services providers who know very well that they are the only or one of a few providers of certain professional services and they usually refuse to suffer Botswana WHTs. One may say that they are breaking the law by refusing to suffer the taxes but technically, they would not have broken any law. This is so as the responsibility to deduct WHTs is shouldered on the payer and not on the payee. Secondly, if the payer does not deduct WHTs, then they should gross-up so as to comply with the tax laws.

ADMINISTRATIVE MATTERS

The following administrative matters need to be considered when grossing-up:

Grossing-up increases costs: It is known that when one grosses-up a payment, they bear the WHT on behalf of the non-resident supplier. This is done by taking the amount paid to the supplier as net of tax. For example, a payment of P1m paid to South Africa (WHT rate is 10%) will be taken as 90% of a certain figure, which would gross-up to P1.11m. In other words, the resident entity pays the non-resident P1m and also bears P0.11m from its coffers as WHTs due to BURS.

Don't release ITW9s: Where a non-resident refuses to suffer local WHTs, there is no need to issue them with an ITW9 form as they would not have incurred WHTs in Botswana. The concept of WHTs is that a tax certificate is issued where the payee suffers taxes in Botswana.

Payer choses to gross-up: As alluded to above, there are some special scarce service providers who simply do not want to suffer WHTs. The resident person has to make a conscious decision to bear the taxes on behalf the supplier mainly because they need the consultant more than the supplier needs the resident entity. In other words, if the resident person does not manage to source the services of that non-resident person, they may suffer in their business by either failing to have some special skill that is not locally available or failing to access a platform which is so critical to their existence.

Consider this in budgeting: Local entities which require services of non-residents who do not want to suffer WHTs should consider the WHTs as a cost in budgeting. If such costs are operational, they are tax deductible if the resident entity pays income tax. Alternatively, if the services relate directly to capital equipment, they are capitalized and capital allowances can be claimed on such cost.

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