

LEGAL UPDATE

Have Cross-Border Payments for Royalties and Fees Become Less Stringently Controlled?

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Towards the end of 2024, the Financial Surveillance Department of the South African Reserve Bank (FinSuv) relaxed the requirements for SA residents seeking to make cross-border payments to related non-resident parties in respect of royalties and fees. This was done by means of the publication of [Exchange Control Circular No. 13/2024](#) (Circular No. 13/2024) by the FinSurv on 26 November 2024, which introduced amendments to, inter alia, Section B.3 (C) of the Currency and Exchanges Manual for Authorised Dealers.

Circular No. 13/2024 provides updated guidance to Authorised Dealers on how transactions between SA residents and related non-residents should be processed and reported to the FinSurv. In that regard, with regard to transactions involving related parties, the said Section B.3 (C) (as amended by Circular No. 13/2024) requires Authorised Dealers to obtain confirmation from senior management of SA resident companies that transfer pricing documentation is maintained as prescribed by the South African Revenue Service (SARS) and as expanded on in the most recent edition of the Organisation for Economic Cooperation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. With regard to cross-border *ad hoc* services rendered between related parties, Authorised Dealers are required to obtain written confirmation from senior management of SA resident companies that the transaction under consideration was concluded at fair and market related prices. Furthermore, Authorised Dealers are now required to:

- ensure that the royalties and/or fees payable are appropriately reported on the FinSurv Reporting System; and
- in respect of all related party transactions, submit a return (containing the details of the non-resident and the SA resident involved in the transaction under consideration) to the FinSurv on a quarterly basis.

Prior to the amendment to Section B.3 (C), SA residents, acting through their Authorised Dealers, were required to obtain prior approval from the FinSurv before making cross-border payments to related non-residents in respect of royalties or fees. This often resulted in unnecessary delays in view of the fact that the Authorised Dealer and the FinSurv had to be aligned on the content and merits of a resident company's application. The amendment effected to Section B.3 (C) by Circular No. 13/2024 means that approval for cross-border payments to related non-residents in respect of royalties or fees, in accordance with agreements concluded at arm's length and at fair market related prices providing for the licensing of intellectual property by a related non-resident to an SA resident or the rendering of services by a related non-resident to an SA resident, can now be granted by Authorised Dealers themselves without the need to defer to the FinSurv, the aim being to make the approval process quicker and more efficient.

In practice, the amendment effected to Section B.3 (C) by Circular No. 13/2024 also resulted in the abandonment by Authorised Dealers of the erstwhile requirement for annual renewals of approvals granted by Authorised Dealers in respect of the payment of royalties or fees in circumstances like these. By virtue of the wording of Circular No. 13/2024, Authorised Dealers are seemingly empowered to grant so-called 'evergreen' approvals, that is, approvals that are valid for the entire duration of the underlying agreement between the parties pursuant to which the royalties or fees are payable. These approvals could be valid for as long as –

1. the underlying agreement remains valid and/or unamended;
2. the parties to the underlying agreement remain unrelated (this only applies if the parties to the underlying agreement were unrelated when the approval is granted); and
3. relevant transfer pricing documentation is maintained as prescribed by SARS (this only applies if the parties to the underlying agreement were related when the approval is granted).

Should the factual position referred to in 1, 2, or 3 (as applicable) change, then the SA resident party is required to notify the Authorised Dealer of such change. It is believed that one of the reasons for the amendment brought about by Circular No. 13/2024 was that annual renewals had become an administrative burden for residents and Authorised Dealers alike, often disrupting the flow of funds between residents and non-residents. It seemed that the concept of 'evergreen' approvals was intended to ease this administrative burden so that funds can flow thereunder until the expiry of the underlying agreement.

In our experience, however, the concept of 'evergreen' approvals has been applied inconsistently by different Authorised Dealers, where some of them grant 'evergreen' approvals and others still require applicants to request the annual renewal of approvals – one Authorised Dealer initially granted 'evergreen' approvals but subsequently reverted to the practice of requiring applicants to request annual renewals of approvals, even in circumstances where an 'evergreen' approval had been granted. This has led to confusion as regards the interpretation of Section B.3 (C) as amended by Circular No. 13/2024 as far as 'evergreen' approvals are concerned.

It has been a little over a year since the amendment was made and it would seem that it has indeed made cross-border payments to non-residents in respect of royalties or fees less controlled and quicker. Despite the confusion regarding 'evergreen' approvals, the amendment to Section B.3 (C) does reduce red tape and is a welcome one.



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