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Uganda: when can domestic laws override tax treaties?

by Celia Becker and Rachel Musoke

In the case of *White Sapphire Ltd/Crane Bank Ltd vs the Commissioner General of the Uganda Revenue Authority* ("**URA**"), the Ugandan High Court considered the notoriously controversial anti-avoidance provisions, in terms of which the benefits of a double tax agreement ("**DTA**") concluded by Uganda would not be available where at least 50% of the underlying ownership of the resident of the other contracting state is not held by individuals resident in such other contracting state.

The judgment, delivered on 6 December 2017, held that although the provisions of the DTA between Uganda and Mauritius would apply to dividends declared from Uganda, the anti-avoidance provisions of the Uganda Income Tax Act ("**UITA**") are also applicable and the matter was to be resolved by mutual agreement between the URA and Mauritius Revenue Authority ("**MRA**").

In the case at hand, dividends were declared by Crane Bank, a Ugandan commercial bank, to its Mauritius-incorporated shareholder, White Sapphire Ltd, which in turn is 100% held by a Kenyan resident individual. Crane Bank withheld 10% withholding tax on the dividends, as provided for by the DTA, while the URA insisted on levying 15% withholding tax as per the UITA.

Although the judge agreed that the provisions of the DTA may be applied to the dividends declared, the anti-avoidance provisions of section 88(5) of the UITA can also be legally applied. In terms of these provisions, treaty benefits would not be available where at least 50% of the underlying ownership of the resident of the other contracting state is not held by individuals resident in such other contracting state (with effect from 2016, these provisions have been amended to a beneficial ownership and economic substance test).

It was held that this is a scenario catered for by article 26 of the DTA, in terms of which a person who considers that the actions of one or both of the contracting states will result in taxation not in accordance with the DTA for him or her, may present his or her case to the competent authority of the contracting state he or she is a resident of and such authority shall endeavour, if the objection appears to be justified, to resolve the case by mutual agreement with the competent authority of the other contracting state. In light of this, the judge referred the case to be resolved by mutual agreement between the URA and the MRA.

Although it is promising that the Ugandan courts have, for the first time, considered the interaction of DTAs and domestic anti-avoidance provisions, it is disappointing that the issue has not been resolved, but merely passed on to the URA and MRA to address. Mutual agreement procedures between tax authorities are typically drawn-out processes with no guaranteed outcome.

Furthermore, Crane Bank was taken over by Bank of Uganda in October 2016 after liquidity problems, and was sold to Development Finance Company of Uganda Bank in January 2017. In light of this, the

URA may not be keen to pursue the matter, as it would be difficult to enforce its claim against White Sapphire, which may not have any Ugandan assets or investments.