

REPORT No. 167-2016-SUNAT/5D0000

SUBJECT:

Within the framework of the agreement to avoid double taxation signed by Peru with the Swiss Confederation, and in relation to the interest generated by a loan made by a legal entity resident in Switzerland, which is not a bank, to a legal entity resident in Peru (related companies), the following question arises: If the payment to the Peruvian tax authority made under the express mandate of the second paragraph of Article 76° of the Income Tax Law, i.e., when the interest has been recorded as an expense but has not been effectively paid to the non-resident, is subject to the maximum rate of 15% established in the second paragraph of Article 11° of the aforementioned agreement..

LEGAL BASIS:

- Single Consolidated Text of Income Tax Law, approved by Supreme Decree No. 179-2004-EF, published on December 8, 2004, and its amendments (hereinafter, “the LIR”).
- Agreement between the Republic of Peru and the Swiss Confederation to avoid double taxation in relation to Income and Wealth Taxes and its protocol, signed on September 21, 2012, approved by Legislative Resolution No. 30143 on December 27, 2013, and ratified by Supreme Decree No. 008-2014-RE on February 28, 2014 (hereinafter, “the DTA”).

ANALYSIS:

1. Subparagraph c) of Article 9° of the LIR establishes that regardless of the nationality or domicile of the parties involved in the operations and the place of conclusion or fulfillment of the contracts, income from capital, as well as interest, commissions, premiums, and any additional amounts to the agreed interest on loans, credits, or other financial operations, are considered Peruvian-source income when the capital is placed or economically used in the country, or when the payer is a resident entity in the country.

In turn, subparagraph j) of Article 56° of the LIR stipulates that the income tax on legal entities not domiciled in the country, concerning interest paid to foreign companies by private companies in the country for loans granted by a foreign company with which it is related, will be determined by applying a tax rate of thirty percent (30%).

On the other hand, the first paragraph of Article 76° of the LIR indicates that individuals or entities that pay or credit non-resident beneficiaries with Peruvian-source income of any nature must withhold and remit the corresponding taxes to the tax authority on a final basis, within the deadlines

established by the Tax Code for monthly obligations, as referred to in Articles 54° and 56° of the law, as applicable.

From the cited regulations, it follows that when income from Peruvian sources is paid or credited to non-resident entities, the payer must withhold the corresponding income tax and remit it to the tax authority on a final basis, within the deadlines set by the Tax Code for monthly obligations. The withholding tax rate, in the case of interest payments made by private companies in the country for loans granted by a related foreign company, will be 30%.

2. Furthermore, the second paragraph of Article 76° of the LIR establishes that taxpayers who account for royalties and fees for services⁽¹⁾, technical assistance, use rights, or other similar payments made to non-residents, must remit to the tax authority the amount equivalent to the withholding tax in the month in which the accounting entry is made, regardless of whether the respective payments to the non-residents are made or not.

In this regard, it should be noted that the obligation described constitutes a mechanism for taxpayers who account for expenses or costs related to the aforementioned concepts, to remit the amount equivalent to the withholding tax that would have been due if the payments or credits for the mentioned income had been made to non-residents at the same time as the accounting entry. In the case of accounting for interest expenses that must be paid to foreign entities by private companies in Peru for loans granted by a foreign company with which they are related, the equivalent amount to be remitted will be 30% of these, as stated in the previous paragraph.

3. Now, in order to address the query at hand, it is necessary to clarify whether the maximum rate established in paragraph 2 of Article 11° of the DTA is applicable in this case.

In this regard, paragraph 1 of Article 11 of the DTA establishes that interest arising from one Contracting State (in this case, Peru) and paid to a resident of the other Contracting State (in this case, Switzerland) may be subject to taxation in that other state (Switzerland). However, paragraph 2 of the same article stipulates that such interest may also be subject to taxation in the Contracting State from which it originates (Peru), according to the legislation of that state. Nevertheless, if the effective beneficiary is a resident of the other Contracting State (Switzerland), the tax imposed cannot exceed 15 percent

¹ It should be noted that interest is regarded as the consideration or compensation for a service: specifically, a credit service (Report No. 176-2004-SUNAT/2B0000, available on the SUNAT Portal: www.sunat.gob.pe).

(15 %) of the gross amount of the interest⁽²⁾.

Based on the cited regulations, it is clear that the provision in paragraph 2 of Article 11 of the DTA applies primarily to interest that has already been paid, in this case, from Peru to a resident of Switzerland.

4. However, since the amount of the obligation established in the second paragraph of Article 76 of the Income Tax Law (LIR) is determined by considering the equivalent amount of the withholding that would have arisen had the income been paid or credited to the non-resident, in this case, the interest generated by loans granted to domiciled companies, the maximum rate established in the aforementioned provision would also apply when determining the amount to be paid according to the second paragraph of Article 76 of the LIR.

In this regard, it should be noted what this Tax Administration has already pointed out⁽³⁾ in response to another inquiry, namely that non-domiciled taxpayers referred to in the second paragraph of Article 76 of the LIR must present their Certificates of Residence to the domiciled company so that the benefits under applicable DTAs may be considered when complying with the provisions of that rule.

Therefore, regarding the interest generated by a loan made by a legal entity resident in Switzerland, which is not a bank, to a legal entity resident in Peru (related companies), the payment to the Peruvian tax authority required by the second paragraph of Article 76 of the LIR (i.e., when interest has been recorded as an expense but not actually paid to the non-resident) is subject to the maximum rate of 15% established by paragraph 2 of Article 11 of the DTA, provided that the non-domiciled company presents the domiciled company with its Certificate of Residence proving that it is a resident of Switzerland.

² It should be noted that paragraph 5 of Article 11 of the DTC provides that the provisions of paragraphs 1, 2, and 3 shall not apply if the beneficial owner of the interest, a resident of a Contracting State, carries on business in the other Contracting State from which the interest arises through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as appropriate, shall apply.

³ As stated in the first conclusion of Report No. 094-2015-SUNAT/5D0000.

CONCLUSION:

Regarding the interest generated by a loan made by a legal entity resident in Switzerland that is not a bank to a legal entity resident in Peru (related companies), the payment to the Peruvian tax authority required under the second paragraph of Article 76 of the LIR (i.e., when the interest is recorded as an expense but not actually paid to the non-resident) is subject to the maximum rate of 15% established in paragraph 2 of Article 11 of the DTA, provided that the non-domiciled company presents its Certificate of Residence to the domiciled company, proving it is a resident of Switzerland.

Lima, 10 OCT. 2016

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Income Tax: DTA (Double Taxation Agreements)