



TAX ALERT

ANOTHER ROUND OF EXCHANGE CONTROL AMNESTY

The Exchange Control Department of the South African Reserve Bank (SARB) is once again offering an opportunity to South African residents to regularise their exchange control affairs.

In line with the 2010 Budget Speech where the Minister of Finance announced a Tax and Exchange Control Voluntary Disclosure Programme (amnesty), SARB issued draft regulations for comment. Disclosure in terms of a similar Exchange Control amnesty ended on 29 February 2004.

The purpose of the Exchange Control amnesty is to afford South African residents - both natural persons and corporate entities - who are subject to the Exchange Control Regulations (Regulations) and who may have contravened the provisions thereof, the opportunity to come forward, disclose and regularise any contraventions by declaring and disclosing such contraventions in a prescribed manner before 31 October 2011. The Exchange Control amnesty applies to funds and assets held as at 28 February 2010.

Exchange Control contraventions will be regularised in the following manner:

- Persons who have contravened certain specific provisions of the Regulations will be entitled to regularise such contraventions by declaring and disclosing the contraventions to Authorised Dealers. Regularisation of these contraventions will not attract any levy.

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- In order to obtain administrative relief for loop structures and donations made to discretionary trusts, formal application to SARB must be made in terms of Regulation 24 of the Regulations. In this instance, a levy equal to 10% of the applicable funds or value of the foreign asset will be payable.
- General administrative relief may be obtained in terms of Regulation 24 in respect of any other contravention prior to 28 February 2010. A levy equal to 10% will be payable on the market value of the assets or funds held at 28 February 2010, and must be paid from funds held abroad. If the resident has no foreign funds available to pay the levy, then South African funds may be used to pay the levy and an additional 2% levy will be applicable. Where the resident exited funds in contravention of the Regulations and has no foreign assets, a levy of 12% on the amount exited will be payable.

Generally, the provisions of Regulation 24 will not be available to persons where there is a pending investigation by SARB into such person's affairs. Exchange Control amnesty will also not be applicable to assets which constitute bearer instruments.

It is noted that in terms of the previous Exchange Control amnesty one was entitled to pay the levy with South African funds or funds held abroad. It is further noted that with the previous Exchange Control amnesty, the levy was paid at the rate of 10% in the event that the applicant chose to retain the foreign assets abroad or at a rate of 5% where the applicant chose to repatriate the assets to South Africa. In this respect, the amnesty is more onerous to the applicant. Nevertheless, the amnesty is more favorable than the current penalties for non-compliance with the Exchange Control Regulation, which impose a penalty at a rate of between 20% and 40% on the funds in question.

Any comments in terms of the draft Exchange Control amnesty must be submitted to SARB by no later than 2 August 2010.

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FINAL INTERPRETATION NOTE ON THE BRUMMERIA JUDGMENT

When the judgment of the *CSARS v Brummeria Renaissance (Proprietary) Limited & Others* was released in 2007 there were a number of taxpayer's and tax consultants experiencing restless nights. In order to restore some calm, the South African Revenue Service released a draft interpretation note which has now been replaced with the final Interpretation Note No. 58, dated 30 June 2010 (the Note).

By way of background, in the *Brummeria* case the taxpayer had granted life rights over units in a sectional title scheme operating as a retirement village to the life-right holders. As a *quid pro quo*, the life-right holders advanced interest free loans to the taxpayer for so long as they occupied the units. Ultimately, the court held that the right of the taxpayer to use the loans interest free in exchange for the use of the life-rights constituted "*gross income*" in terms of section 1 of the Income Tax Act (the Act).

In this regard, the Note provides that the following principles were enunciated by the SCA in the *Brummeria* judgment:

- The word "*amount*" in the definition of "*gross income*" is to be interpreted widely.
- The right to use the loan capital interest free has a monetary value. It should be appreciated that it is the "*right*" to an interest free loan, and not the receipt of an interest free loan itself, which may constitute "*gross income*" for purposes of the Act.
- Even though the receipt or accrual of the right is in a form other than money, which cannot be alienated or turned into money, it does not mean that the receipt of the right has no monetary value. It follows that the judgment overturns that part of the *Stander v CIR* case where it was held that if subjectively a taxpayer was not capable of turning a right into money it had no value. The test is now whether or not objectively a right has a monetary value.

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- The value of the receipt or accrual in a form other than money constitutes an "amount" that "accrues" to the taxpayer and should be included in the gross income of the taxpayer.
- For a benefit of this nature to be taxable, the amount does not need to fall within paragraph (i) of the "gross income" definition in section 1 of the Act (ie. a "taxable benefit" as defined in the Seventh Schedule to the Act).
- The valuation method used to determine the value of the right to use an interest free loan. The Note specifically provides that the SCA neither accepted nor rejected the weighted-average prime overdraft rate of banks applied to the value of the right to the interest-free loan as the appropriate valuation method. The Note accepts that on each case an appropriate value method should be adopted for the particular facts and circumstances.

The Note highlights the fact that there are a number of issues which could not be pursued by the court and which were not argued by the taxpayer, including:

- The fact that the SCA did not, in the context of the appeal, consider the position of the life-right holders.
- Whether or not the nature of the rights under the transaction were of a capital or revenue nature. This issue was not raised before the SCA, however, the Note accepts that the value of a receipt or accrual in a form other than money would usually (other than in the present circumstances) be of a capital nature.
- The timing of the accrual in the hands of the taxpayer. The Note provides that the timing of the accrual in a form other than money must be determined in each individual case having regard to the law and the facts and circumstances of each case.

In particular, taxpayers will be relieved to see that the Note provides that the right to receive an interest-free loan in the context of a group of companies and shareholder's loans will not necessarily be affected by the *Brummeria* judgment. It is important that the interest-free loan is not received in exchange for goods sold, services rendered or some other benefit by the borrowing company.

Since the publication of the draft interpretation note, most of the concerns regarding the application of the *Brummeria* judgment and its effect on interest free loans have been addressed. However, the release of the Note serves as a gentle reminder of the principles established in the *Brummeria* judgment, which may find application where one does not necessarily suspect. In particular, it is important to take notice of the *Brummeria* judgment and the Note to the extent that one is receiving a right in exchange for goods sold, services rendered or some other benefit.

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