DLA CLIFFE DEKKER HOFMEYR

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TAX ALERT

RENEWABLE ENERGY TAX ALLOWANCE EXTENDED FOR SUPPORTING STRUCTURES

The Taxation Laws Amendment Bill 2012 (TLAB) proposes an amendment to s12B of the Income Tax Act, No 58 of 1962 (Act) to provide a capital allowance in relation to supporting structures for renewable energy projects.

Section 12B of the Act, as it is currently drafted, provides a capital allowance in respect of machinery, plant, implements, utensils or articles used, among others, in the production of renewable energy on a 50/30/20 basis. With regard to the significant amounts to be spent on infrastructure relating to renewable energy projects, it becomes critically important for taxpayers to accurately identify all assets falling under the accelerated capital allowance regime.

With effect from 1 January 2013, supporting structures associated with machinery and plant, that are dedicated to the production of renewable energy, will also be included under the accelerated capital allowance regime. The Explanatory Memorandum to the TLAB states that the supporting structures must be mounted or fixed to the machinery or plant and must be integrated with that machinery or plant. It is further a requirement that the useful life of the supporting structure be limited to the useful life of the underlying plant and machinery.

The Explanatory Memorandum states that, as a technical matter, only plant and machinery are deductible under s12B of the Act and not any supporting structures. The aforementioned statement does not necessarily hold true as one would be able to argue that, depending on the type of renewable energy involved (such as wind, solar etc) the supporting structures would in any event constitute plant or machinery. The difficulty under s12B of the Act is that there are no judicial decisions on what constitutes plant or machinery for purposes of that section, as opposed to the wealth of case law on s12C of the Act, dealing with plant and machinery used in the process of manufacture.

What one would find in practice, specifically with regard to the current IPP Programme, is that successful bidders would be required to return the land on which the renewable energy infrastructure was built back to its original state on expiry of the power purchase

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agreement. This would mean that any supporting structure would in any event have a useful life equal to the plant or machinery used to generate electricity from renewable resources. Although the specific inclusion of supporting structures under s12B of the Act is welcomed, it still places the onus on the taxpayer to prove to SARS that the relevant supporting structure is used in the production of renewable energy.

Given the amounts involved, it is recommended that taxpayers approach SARS for a Binding Private Ruling to obtain clarity as to the plant, machinery and supporting structures qualifying for the accelerated capital allowance regime under s12B of the Act.

Establishing what constitutes plant or machinery is but one part of the equation as the most difficult aspect under s12B of the Act, in my view, would be to establish which assets are used in the 'generation of electricity', which in its simplest form boils down to where the process of electricity generation starts and where that process ends. As no definition of 'electricity' exists in the Act, it may be useful for SARS to issue an interpretation note on s12B of the Act and possibly deal with the section as it applies to the use of different renewable energy technologies.

Ruaan van Eeden

WIDESPREAD DIESEL REBATE AUDITS IN MINING SECTOR

SARS is at the moment carrying out wide-spread diesel rebate audits in the mining sector.

On completion of such an audit the mining company usually receives a 'Letter of audit findings' to which it must respond. Where SARS disputes the mining company's entitlement to the rebates claimed, SARS threatens an adjustment in relation to so-called 'ineligible purchases' under s75(1A) of the Customs and Excise Act, No 91 of 1964 (Customs Act) read with Schedule 6/Part 3. SARS furthermore indicates that additional tax (potentially 200%) might be imposed in terms of s60(1) of the Value-Added Tax Act, Act No 89 of 1991 (VAT Act) and that, in addition, forfeiture could be applied under s75(4A)(h)(i) of the Customs Act.

It appears that SARS' application of the diesel rebate provisions follows a 'black letter' approach, that is the provisions of the Customs Act and the Schedule governing the diesel rebate regime are applied literally. This flies in the face of the case *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise and Another [1985] 1 All SA 398 (A)*, which specifically dealt with the interpretation of the Customs Act and its regulations. Van Heerden JA held that "... I have little doubt that it could not have been the intention to grant a rebate subject to compliance with each and every provision of the Act and the regulations". The BP case thus suggests a practical purposive approach rather than a 'tick box' mentality when it comes to policing the requirements of the diesel rebate scheme.

Causing particular difficulty is the requirement that diesel rebate claims can only be made "by a person who is in possession of the necessary authorisation granted in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)". The question here pertains to the exact nature of the 'necessary authorisation' that is statutorily required under Schedule 6/Part 3/Note 6 (b)(iii), including the exact circumstances under which such 'authorisation' should be required for diesel rebate purposes. Our discussions with SARS confirm that it interprets the 'necessary authorisation' requirement to mean that the person/entity claiming the diesel rebates should also be the exact same person/entity in whose name such 'authorisation' had been issued under the MPRDA (previously under the Minerals Act).

When it comes to additional tax and forfeiture SARS regards the claimant as having "...*falsely* applied for such refund or who uses or disposes of such fuel contrary to such provisions". It appears that SARS is relying on s75(4A)(h)(i) and (ii) of the Customs Act when it comes to imposing additional tax and applying forfeiture.

The meaning of 'falsely' in the above-mentioned section is crucial taking into account the magnitude of the potential additional tax and forfeiture amounts we have seen recently.

In *Commissioner of the South African Revenue Service v Formalito (Pty) Ltd [2006] 4 All SA 16 (SCA)* the SCA considered the meaning of 'false'. It held that: " ...'false' must mean untrue to the knowledge of the maker of the statement."

The above means that the diesel rebate claimant should have been subjectively aware that his/its actions amounted to deception/fraud in order to obtain rebates to which he/it was not entitled. An allegation of 'falsely applied' consequently requires of SARS to show that the claimant had the intent to fraudulently obtain the disputed diesel rebates. Each case will of course depend on its specific facts.

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The SCA also dealt in the *Formalito* case with forfeiture in the context of SARS' own policies on that score. The SCA held: "Had those guidelines been invoked the penalty in this case would have been less than twenty percent of the value of that actually declared forfeit by SARS. A deviation to that extent from its own policy by SARS is grossly unreasonable."

SARS on its website under "Customs Offences" distinguishes between 'Administrative Offences', 'Less Serious Offences' and 'Serious Offences'. In respect of 'serious offences' it states that these are "offences where there is evidence of *intentional conduct by the declarant* to achieve a specific objective, vis., the smuggling of goods and / or the evasion of duty, *knowing* that the conduct, action or declaration is unlawful. Gross negligence on behalf of the declarant." The afore-mentioned website information is accordingly in line with the *Formalito* case.

The *Formalito* case and SARS' own policy guidance indicate that forfeiture in relation to disputed diesel rebate claims should be the exception rather than the rule. Unfortunately one sees forfeiture being threatened in virtually all disputed diesel rebate matters.

SARS calculates the potential forfeiture amount using the then - prevailing retail price in respect of all 'ineligible purchases' of diesel. In one matter the diesel rebate adjustment amounted to R5,7 million. However, the 25% penalty amounted to R1,4 million and the s88(2)(a) forfeiture amount was R41,2 million. The claimant's total liability came to almost tenfold the value of the disputed diesel rebates.

Ironically, there is a document on the SARS website stating that "Customs do not impose penalties as a source of revenue for the State but is merely a measure to ensure compliance with the law". No wonder a recent press article referred to SARS' diesel rebate audits as a 'blitzkrieg' and 'extortionist tactics'.

The Commissioner himself in January this year made the following statement in an interview: "At the same time though, we are also in unison that we must work together to make it difficult for non-compliant local and international taxpayers who *subscribe to the principle of paying tax to the letter of the law rather than to the spirit of the law*."

Unfortunately, thus far diesel rebate claimants in the mining sector have only seen the letter of the law - the spirit of the law remains elusive.

Johan van der Walt

CONVERSION OF PAR VALUE SHARES TO NO PAR VALUE SHARES: SUBSTITUTIVE SHARE-FOR-SHARE TRANSACTIONS

In a recent binding class ruling regarding the conversion of ordinary par value shares to no par value shares, as directed under item 6 of Schedule 5, read with Regulation 31 of the Companies Act, No 71 of 2008 (Companies Act), SARS ruled that there will be "no disposal" on conversion for the shareholders as contemplated in paragraph 11(1)(a) of the Eighth Schedule to the Income Tax Act, No 58 of 1962 (Act). SARS further ruled that there will be no 'receipt' or 'accrual' for the shareholders under the definition of gross income in s1 of the Act, provided the converted shares are held on revenue account. Finally, the ruling provided that the conversion will not be a 'transfer' under s1 of the Securities Transfer Tax Act, No 25 of 2007. This ruling was obtained subject to the rights relating to the Applicant's shares remaining unchanged, as envisaged by item 6 of Regulation 31 of the Companies Act.

The draft Taxation Laws Amendment Bill, 2012 also proposes to insert provisions regulating, among others, the mandatory conversion of par value shares to shares of no par value as required under the Companies Act. These provisions are to be inserted under s43 of the Act. The rationale behind these provisions is that current rollover relief for recapitalisations is too narrow and not in line with the reorganisation rules, as the relief does not currently apply to shares held as trading stock and the permissible types are share consideration are too narrow, not making provision for share splits, consolidations or conversions. The change is also necessitated by the removal of par value shares under the Companies Act.

Under the proposed s43, the required conversion of shares under the Companies Act will fall under the definition of a "substitutive share-for-share transaction" and will *not* be treated as a deemed disposal event, the base cost remaining the same.

With the introduction of s43, taxpayers will no longer be advised to apply for a ruling regarding the consequences of a conversion of shares in terms of the Companies Act, as the tax consequences will be regulated by s43, should the draft provision be enacted.

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