DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

15 February 2013

IN THIS ISSUE

ADVANCE TAX RULINGS – MANDATORY EXCLUSION LIST UPDATED

The Tax Administration Act, No 28 of 2011 (TAA) provides a list of scenarios where the Commissioner may reject an application for an advance tax ruling.

Despite the wording of the legislation providing that the Commissioner 'may' reject an application in the particular scenarios, it appears from the South African Revenue Service (SARS) Comprehensive Guide to Advance Tax Rulings that the Commissioner is unlikely to exercise his discretion and consider an application falling within these particular circumstances.

A list of additional considerations in respect of which the Commissioner may reject an application for an advance tax ruling was gazetted on 8 February 2013. The list provides an interesting insight into the type of transactions that SARS and/or National Treasury do not have a definitive view on the relevant issues or are concerned it may be subject to abuse by taxpayers (bearing in mind that advance tax rulings may only be relied upon by the applicant concerned). Some of the interesting issues in respect of which taxpayers cannot obtain an advance tax ruling include:

- The deductibility of expenditure relating to the taking over of liabilities or of provisions on the acquisition of a business.
- The qualifying allowance, contemplated in s24C of the Income Tax Act, No 58 of 1962, in respect of future expenditure, that the Commissioner may determine.
- The validity of the treatment of amounts as 'salary sacrifices' for remuneration purposes.
- Any exercise of the Commissioner's discretion under s58(1) of the Income Tax Act, concerning the adequacy of consideration given for the disposal of property; and
- Applications concerning the attribution, allocation or apportionment of expenditure or input tax (from an income tax or value-added tax perspective), excluding a request for an alternative apportionment method in terms of s41B of the Value-Added Tax Act, No 89 of 1991.

The advance tax ruling division has previously provided rulings on some of these issues such as Binding Private Ruling (BPR) 095: Adequate consideration as contemplated under s58, BPR 106: Application of s24C to a maintenance trust, BPR 006: Application of s24C in the context of a repair and maintenance contract and Binding Class Ruling 029: Deductibility of contingent liabilities. In addition, the question of whether the seller is entitled to a deduction of expenditure relating to the taking over of liabilities or of provisions on the acquisition of a business has been considered by the courts (see *Ackermans Ltd v Commissioner for South African Revenue Service (2010 (1) SA (1) SCA*) and draft legislation was proposed by National Treasury at one point to specifically deal with this issue. Notably, the draft legislation was never enacted.

As mentioned above, the non-rulings list provides an interesting insight into the type of transactions that are currently subject to debate. One should also be mindful that before submitting an application for an advance tax ruling application, taxpayers should ensure that the proposed transaction does not fall within this list or one of the other precluded transactions set out in s80 of the TAA. If it does, an applicant will forfeit the applicable application fee.

Andrew Lewis

THE DISTRIBUTION OF SHARES IN AN UNBUNDLING TRANSACTION – BINDING CLASS RULING 37

BCR 37, dated 23 January 2013, dealt with the question of whether the transfer of equity shares in an unbundling transaction will be exempt from dividends tax and securities transfer tax (STT) in the hands of the shareholder.

The Applicant was a listed public company and the Co-Applicant a private company, both of which were incorporated as residents in South Africa. The Co-Applicant was a wholly-owned subsidiary of the Applicant. The Applicant wanted to transfer its shares in the Co-Applicant to its own shareholders. Subsequent to the transfer of the equities to the Applicant's shareholders, the Co-Applicant would establish a primary listing on the Johannesburg Stock Exchange and a secondary listing on the New York Stock Exchange of depository receipts, which could potentially have affected the application of s46 of the ITA..

The South African Revenue Service (SARS) confirmed that the transaction constituted an unbundling transaction in terms of s46(1) of the Income Tax Act, No 58 of 1962 (ITA). Section 46(1) defines an unbundling transaction as any transaction in terms of which an 'unbundling' company, in this case the Applicant, transfers its full equity shareholding in an 'unbundled' company, the Co-Applicant, to its shareholders in accordance with the effective interest held by the shareholders in the unbundling company. In terms of the definition of an 'unbundling transaction', s46(1)(a) provides for a resident unbundling in which both companies are required to be South African residents, as in the present instance.

SARS ruled that the distribution of the Applicant's shares would be disregarded for purposes of determining dividends tax, as described under s46(5) of the ITA and furthermore that the distribution would be exempt from STT under s8(1)(a)(iv) of the STT Act.

Section 46(3) of the ITA requires that shareholders of the unbundling company, allocate part of the base cost of the shares held in the unbundling company (old shares), to the shares now also held in the unbundled company (new shares). The new shares are deemed to have been acquired on the same date as the old shares. The base cost of the new shares is calculated based on a formula.

Danielle Botha

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
Director
National Practice Head
T +27 (0)11 562 1063
E emil.brincker@dlacdh.com

Alastair Morphet
Director
T +27 (0)11 562 1391
E alastair.morphet@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@dlacdh.co

Johan van der Walt
Director
T +27 (0)11 562 1177
E johan.vanderwalt@dlacdh.com

Ruaan van Eeden
Director
T +27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Andrew Lewis
Senior Associate
T +27 (0)11 562 1085
E andrew.lewis@dlacdh.com

Danielle Botha
Associate
T +27 (0)11 562 1380
E danielle.botha@dlacdh.com

Heinrich Louw
Associate
T +27 (0)11 562 1085
E heinrich.louw@dlacdh.com

Tessmerica Moodley
Associate
T +27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Carmen Moss-Holdstock
Associate
T + 27 (0)11 562 1614
E carmen.moss-holdstock@dlacdh.com

Nicole Paulsen
Associate
T + 27 (0)11 562 1386
E nicole.paulsen@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com