DLA CLIFFE DEKKER HOFMEYR

# TAX

# ALERT

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## SUCCESSIVE CORPORATE REORGANISATION TRANSACTIONS

A number of advance tax rulings have recently been released by the South African Revenue Service (SARS) relating to the corporate tax roll-over relief rules contained in s41 to 47 of the Income Tax Act, No 58 of 1962 (Act). The most recent ruling in this regard is Binding Private Ruling No 168 (BPR 168), which was released on 17 April 2014.

The facts in BPR 168 are relatively simple. Company A had acquired assets from company B in exchange for the issue of equity shares in company A in terms of an 'asset-for-share transaction' as defined in s42 of the Act. It was proposed that company A would thereafter dispose of the assets acquired to a group company in terms of an 'intra-group transaction' as defined in s45 of the Act. The disposal would take place within 18 months of the 'asset-for-share transaction'.

The issue that arises is that, generally, when a person (company A) acquires assets in terms of s42 of the Act, there are restrictions imposed on the disposal of those assets within 18 months. The question, which has been debated by taxpayers and tax practitioners for a number of years, is whether this restriction on the disposal of the assets is still applicable where the assets are subsequently disposed of in terms of a further transaction to which one of the corporate tax roll-over rules applies.

If one considers the wording in s42(7) of the Act, it specifically states that where a company disposes of a capital asset within a period of 18 months after acquiring that asset in terms of an 'asset-for-share transaction', all or a portion of the capital gain realised from the disposal of those assets will be ring-fenced and may not be set off against any assessed loss of the acquiring company (company A). S42(7) of the Act does not contain an explicit exemption for the subsequent disposal of those assets in terms of s45 of the Act (or any of the other corporate tax roll-over relief provisions).

It follows that, on a strict interpretation of s42(7) of the Act, it is not possible for company A to subsequently dispose of the assets acquired in terms of an 'asset-for-share transaction' to a group company within 18 months without triggering s42(7) of the Act.

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There is further support for this interpretation if one considers that other provisions in s42 of the Act explicitly indicate when it is possible to implement a subsequent corporate transaction without triggering the relevant anti-avoidance provision. For instance, s42(6) of the Act provides that, should a person cease to hold a qualifying interest in the company within 18 months of the 'asset-for-share transaction', any roll-over relief obtained by virtue of s42 of the Act would effectively be reversed. However, s42(6) explicitly indicates that one may cease to hold a qualifying interest if the shares in the company are disposed of (or the qualifying interest lost) as a result of a transaction in terms of s45 (intra-group transaction), s46 (unbundling transaction) or s47 (liquidation distribution) of the Act. There is no express exception in respect of s42 or s44 of the Act (amalgamation transaction).

Despite the plain wording of s42(7) of the Act and the lack of an explicit exemption, it was ruled in BPR 168 that s42(7) will have a 'nil effect' on the disposal of the assets by company A to the group company under s45 notwithstanding the fact that the disposal may take place within 18 months of having been acquired by company A via an 'asset-for-share transaction'.

BPR 168 thus appears to suggest that it is possible to implement subsequent corporate restructurings within 18 months of an 'asset-for-share transaction' in s42 of the Act. In addition, it appears to suggest that one may be entitled to implement multiple s42 transactions.

However, it should be appreciated that binding private rulings are only binding between SARS and the applicant to the ruling. Also, it is not necessarily clear what SARS means when it states that s42(7) of the Act 'will have nil effect' on the disposal of the assets by company A. Does SARS mean that s42(7) is applicable but will have no effect on the taxpayer? Alternatively, does SARS mean that as a result of the application of s45 of the Act, s42(7) of the Act will have a nil effect on the disposal of the assets?

The other interesting ruling made in BPR 168 is that company A will not be subject to tax on any recoupment on the disposal of the assets to the group company, including the recoupment of any allowances claimed by company A and company B in respect of such assets. Where a taxpayer acquires assets and disposes of them within a short period of time or it was always contemplated that the assets will be sold (it was just a question of when), there is risk that these assets may be considered revenue assets and the proceeds from the disposal thereof should be subject to income tax. There may have been some doubt on the part of company A as to whether the disposal of the assets in a relatively short period of time would still qualify for the roll-over relief in s45 of the Act, especially if these assets are no longer considered capital assets or do not constitute trading stock as defined.

Taxpayers and tax practitioners implementing corporate restructurings will be very interested in the rulings made by SARS in BPR 168, as well as binding private ruling 159, which was discussed in our Tax Alert on 31 January 2014. Taxpayers implementing corporate restructurings with multiple transaction steps should pay careful attention to these rulings made by SARS.

*Andrew Lewis*

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# TAX CLEARANCE CERTIFICATES AND A TAXPAYER'S ONLY REMEDY

Tax clearance certificates play an important role in our economy and are, almost without exception, a requirement when a person submits a tender or bid for doing business with government.

In this regard, tax clearance certificates had always been issued by the South African Revenue Service (SARS) in terms of internal policy. As there was no legislative framework governing the issue of tax clearance certificates, there was much uncertainty among taxpayers as to their entitlement to a tax clearance certificate. Also, it was not clear what recourse a taxpayer had in circumstances where a request for a tax clearance certificate had been denied or a tax clearance certificate revoked. This situation clearly jeopardised businesses who depended on tax clearance certificates when tendering or bidding for contracts.

We have previously reported on the case of *Zikhulise Cleaning Maintenance and Transport CC v Commissioner for the South African Revenue Service* (case no 28084/2012, delivered on 29 May 2012, GNP), in which the taxpayer's tax clearance certificate was revoked by SARS in light of allegations of fraud. The taxpayer brought an application in the High Court for an order declaring the decision to be of no force and effect pending a review application. The taxpayer argued that it was not afforded an opportunity to make representations to SARS before the decision was taken to revoke the tax clearance certificate. The court agreed with the taxpayer's submissions and granted the order.

Interestingly, the court noted that:

*"Whether the decision is reviewable, via the [P] romotion of Administrative Justice Act 3 of 2000 or through the principle of legality, is not something I need decide. The applicant was entitled to reasonable notice of SARS' intention to call the certificate into question and an opportunity to put its case to SARS."*

The Tax Administration Act, No 28 of 2011 (TAA) came into effect on 1 October 2012, and with it s256 of the TAA (amended as of 20 December 2012). S256 of the TAA deals fully with tax clearance certificates and prescribes the criteria for issuing and revoking tax clearance certificates.

On 3 March 2014 judgment was handed down in the North Gauteng High Court in the case of *Grant Chittenden N.O. and Kestrel Network Solutions (Pty) Ltd v Commissioner for the South African Revenue Service and another* (case no 12795/14). In this case the taxpayer applied for a tax clearance certificate but SARS refused. The taxpayer subsequently brought an application to the High Court for an order compelling SARS to issue a tax clearance certificate.

In contrast with the Zikhulise case, the court in Chittenden accepted that a decision on issuing a tax clearance certificate constitutes administrative action for purposes of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) and noted that if a taxpayer is dissatisfied with a decision by SARS, the taxpayer's recourse is to bring review proceedings under PAJA. Where no such proceedings are instated or where it has not yet been finalised, SARS's decision remains of full force and effect.

The court also noted that:

*"The fact that a refusal of a tax clearance certificate is likely to cause the taxpayer involved actual or impending harm does not entitle them to a mandamus compelling this court or the first respondent* [i.e. SARS] *to issue such a certificate."*

*continued*

The court reasoned that the taxpayer sought final relief, and not interim relief, but that in any event, s256 of the TAA does not provide for the issue of interim or provisional tax clearance certificates and therefore the court could not order the issue of such a certificate.

The court could not grant final relief because it would negatively impact on SARS' tax administration. Granting final relief would mean that taxpayer's whose requests for tax clearance certificates had been denied could approach a court to order the issue of such a certificate without the merits for refusal having been considered. The court, perhaps exaggerating, stated that:

*"Quite clearly that would cause chaos within the country and tax administration would come to a standstill."*

The importance of the Chittenden case lies in the fact that the court has confirmed that a taxpayer's only remedy for addressing issues relating to tax clearance certificates is to make use of the procedures in PAJA. Pending the outcome of such proceedings, SARS' decision stands and is fully valid. It is irrelevant whether the taxpayer is prejudiced while such proceedings are underway. Given the fact that review proceedings under PAJA could take many months to finalise, a taxpayer's business could be severely impacted as it might not be able to submit tenders or bids.

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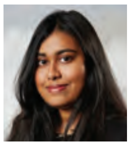

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