

TAX AND EXCHANGE CONTROL ALERT

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EXCHANGE CONTROL CIRCULAR ISSUED IN RESPECT OF SPECIAL VOLUNTARY DISCLOSURE PROGRAMME

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CUSTOMS AND EXCISE HIGHLIGHTS

A brief weekly overview of the Customs and Excise environment.

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The Circular has warned that any party involved in a matter currently under investigation by FinSurv may not apply for exchange control relief under the SVDP.



On 13 July 2016 the Financial Surveillance Department (FinSurv) of the South African Reserve Bank (SARB) issued exchange control circular no. 6/2016 (Circular) regarding details and information required in an application for exchange control relief submitted as part of the joint tax and exchange control Special Voluntary Disclosure Programme (SVDP) which was announced by the Minister of Finance in the 2016 Budget Speech.

The SVDP will run for a period of six months from 1 October 2016 to 31 March 2017 (SVDP Period). The SVDP will afford South African residents (individuals, sole proprietorships, partnerships, deceased estates, insolvent estates, South African trusts, close corporations and companies) and former residents the opportunity to disclose their foreign assets held in contravention of the Exchange Control Regulations, 1961 (Regulations) so as to regularise their affairs from an exchange control perspective.

According to the Circular, applications for exchange control relief under the SVDP must be made pursuant to the provisions of Regulation 24. Applications and the relevant supporting documents must be submitted electronically to the SVDP unit via the South African Revenue Service's (SARS) eFiling system, alternatively at any SARS branch. The Circular states that separate electronic application forms for the tax and exchange control relief have been created. The SVDP unit will be jointly operated by FinSurv and SARS.

The Circular has warned that any party involved in a matter currently under investigation by FinSurv may not apply for exchange control relief under the SVDP. Further, no applications for exchange control relief under the SVDP may be made prior to the official commencement date of the SVDP, namely 1 October 2016.

Applications may be made in a personal or representative capacity, however, any application made in a representative capacity will require proof of authority. The relevant proof must be submitted with the SVDP application.

According to the Circular, FinSurv may grant relief to a South African resident in terms of Regulation 24, provided that:

- the unauthorised foreign assets for which the relief is sought were held on or before 29 February 2016;
- applications are made within the SVDP Period;
- the declaration made by the applicant is voluntary;
- the applicant makes full disclosure of all unauthorised foreign assets and stipulates the source of these assets and includes details of the manner in which the assets were transferred and retained abroad;
- the applicant furnishes all documentation and information as stipulated in the SVDP application form, including:
 - the market value of the unauthorised foreign asset as at 29 February 2016 in the foreign currency of the country in which such asset is situated;

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Applicants will be liable to pay a levy based on the market value of the unauthorised foreign assets as at 29 February 2016.



- a description of the identifying characteristics and location of the unauthorised foreign asset;
 - a valuation certificate by a valuator of the country where the unauthorised foreign asset is located, or a valuation by a sphere of government in the country where such asset is located, or an original or certified statement of account indicating the balance or market value, or any other form of proof of the value of that asset as the Treasury may on good cause shown allow to be submitted; and
 - a sworn affidavit or solemn declaration of the contravention; and
 - the applicant furnishes any additional information relating to the unauthorised foreign assets as may be required in terms of the SVDP.
- Applicants will be liable to pay a levy based on the market value of the unauthorised foreign assets as at 29 February 2016. The following conditions will apply to the levy:
- a levy of 5% will be payable on the value of the unauthorised foreign assets or the sale proceeds thereof if such assets are repatriated to South Africa. The levy must be paid from foreign-sourced funds;
 - a levy of 10% will be payable on the value of the unauthorised foreign assets if such assets are retained abroad. The levy must be paid from foreign-sourced funds;
 - a levy of 12% will be payable on the value of the unauthorised foreign assets in circumstances where the 10% levy is not paid from foreign-sourced funds;
 - applicants may not deduct any exchange control allowance or any remaining portion thereof from the leviable amount;
 - the levy may not be reduced by any fees or commissions;
 - the levy must be paid within three months from the date of receipt of notification from FinSurv;
 - where the 5% or 10% levy is payable, the levy must be repatriated to South Africa to an account held at a local authorised dealer (such as a commercial bank) and must be converted in South Africa at the ruling spot exchange rate; and
 - the Rand proceeds of the foreign currency introduced by means of the 5% or 10% levy or the Rand value of the 12% levy must be paid by the authorised dealer into an account held at the Corporation for Public Deposits (CPD) established in terms of s2 of the Corporation for Public Deposits Act, No 46 of 1984.

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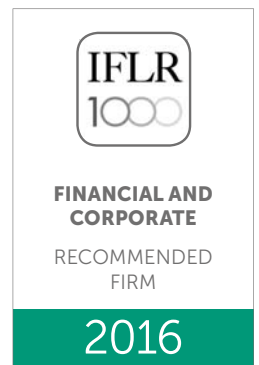
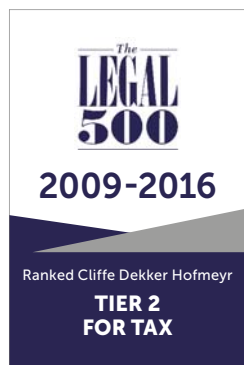
Applicants aggrieved by FinSurv's decision to refuse an application or to declare void any applications previously approved may lodge a written objection with the Head of FinSurv.

In instances where the unauthorised foreign assets are denominated in multiple foreign currencies, applicants will be permitted to convert those foreign currency amounts to United States Dollar (USD) for purposes of the levy and by using the rate of exchange as at 29 February 2016. The conversion rate of major foreign currencies to USD as at 29 February 2016 will be published on the SARB website.

Applicants aggrieved by FinSurv's decision to refuse an application or to declare void any applications previously approved may lodge a written objection with the Head of FinSurv and must deliver a notice of this objection within 30 days from the date of delivery of the FinSurv notice refusing administrative relief, or withdrawing or declaring void the previous relief granted.

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According to the Circular, confirmation of administrative relief will only be furnished once the applicable levy has been paid to the CPD and, where applicable, conditions imposed by the SARB have been met.



CUSTOMS AND EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs & Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

A brief weekly overview of the Customs and Excise environment.

Below are this week's selected Customs & Excise highlights:

- 1 Amendment of form DA260 & annexures: Excise account for "Other Fermented Beverages ...[&] ... Spirits Products" for the various types of excise warehouses.
- 2 ITAC published its "Guidelines Pertaining to Rebate of the Duty On Rebate Provisions in terms of Schedule 4 of the Customs and Excise Act" (presumed should read schedule 3). The guidelines has regard to item "311.40/5513.21/01.06 for rebate of duty on woven fabrics used for the manufacture of school shirts".
- 3 Draft Amendment Bills were published requiring comments by 8 August 2016, as follows (not a comprehensive list):
 - 3.1 Amendment of s35A of the Customs and Excise Act, No 91 of 1964 (Customs Act) as follows:

The current diamond stamp marker on cigarette containers will be replaced by suitable marking and tracking and tracing numbering on relevant tobacco product containers.
 - 3.2 Amendment of s105 of the Customs Act to replace the calculation of interest from where part of a month is rounded to the entire month, to a basis of daily balance owing.

3.3 Insert s119B to the Customs Act. The section relates to "Arrangements for Obtaining Undue Tax Benefits" and reads as follows:

- (1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any arrangement:
 - (a) has been entered into or carried out which has the effect of any person obtaining a tax benefit; and
 - (b) having regard to the substance of the arrangement:
 - (i) was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit; or
 - (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and
 - (c) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit, the Commissioner may determine the liability for duty imposed under this Act, and the amount thereof,

CUSTOMS AND EXCISE HIGHLIGHTS

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It will be interesting to see how the above section will be interpreted and/or utilised considering the common law rule that persons may structure their tax affairs in such a (lawful) manner as to pay less tax. The section may become a valuable weapon in the SARS arsenal, especially (but not limited to) the Valuation field within Customs.



as if the arrangement had not been entered into or carried out, or in such manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of that tax benefit.

(2) For the purposes of this section:

‘dealing at arm’s length’ means a transaction in the open market in which two or more independent persons acting in good faith, without regard to the liability for any tax, duty or levy, would freely and without conflict of interest agree to transact in the ordinary course of business;

‘arrangement’ includes any transaction, operation, scheme or understanding, whether enforceable or not, including all steps and transactions by which it is carried into effect; and

‘tax benefit’ includes:

- (a) any reduction in the liability of any person to pay any duty;
- (b) any increase in the entitlement of any person to a refund of any duty; or
- (c) any other avoidance, postponement or reduction of any liability for the payment of any tax, duty or levy imposed under this Act or by any other law administered by the Commissioner.

(3) An arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit unless and until the party obtaining a tax benefit proves that, reasonably considered in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the arrangement”.

It will be interesting to see how the above section will be interpreted and/or utilised considering the common law rule that persons may structure their tax affairs in such a (lawful) manner as to pay less tax. The section may become a valuable weapon in the SARS arsenal, especially (but not limited to) the Valuation field within Customs.

3.4 Amendment of s113 of the Customs Act prohibiting the importation and manufacture of cigarettes of a mass of 2kg/1000 cigarettes to 0.8kg/1000 cigarettes.

3.5 Insert item 412.09 in Schedule 1 to the Value Added Tax Act, No 89 of 1991, exempting VAT on certain bonded goods in specified cases of vis major or other exceptional circumstances. The item reads similar to the corresponding item in the Customs Act, as follows:

Goods in respect of which the customs duty, together with the fuel levy (where applicable), amounts to not less than R2 500, proved

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The National Treasury published a Policy Paper on "Taxation of Sugar Sweetened Beverages" (SSB). It proposes a tax on the mentioned products in variable manners, including a potential excise tax of "in the region of R2.29 per litre of SSB, or R0.0229 per gram of sugar contained in a litre of SSB".



to have been lost, destroyed or damaged on any single occasion in circumstances of VIS MAJOR or in such other circumstances as the Commissioner deems exceptional while such goods are:

- (a) in any customs and excise warehouse or in any appointed transit shed or under control of the Commissioner;
- (b) being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of the Customs and Excise Act; or
- (c) being stored in any rebate storeroom:

Provided that:

- (i) no compensation in respect of the customs duty, fuel levy or VAT on such goods has been paid or is due to the owner by any other person;
- (ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty or VAT; and

(iii) such goods did not enter into consumption and the importer of those goods was not liable for the tax imposed in terms of section 7(1)(b) when those goods were initially imported".

The item will be a welcome equivalent to the corresponding item in the Customs Act, especially for transporters of bonded goods and Customs bonded warehouses.

4 The National Treasury published a Policy Paper on "Taxation of Sugar Sweetened Beverages" (SSB). It proposes a tax on the mentioned products in variable manners, including a potential excise tax (likely on importation and local manufacture) of "in the region of R2.29 per litre of SSB, or R0.0229 (i.e. 2.29 cents) per gram of sugar contained in a litre of SSB". Written comments are required by 22 August 2016.

Petr Erasmus

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