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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

IMMIGRATION, EMIGRATION AND EXCHANGE CONTROL: WHAT YOU NEED TO KNOW

In the globalised world we live in, it has become more common for persons to immigrate to and emigrate from their countries of birth. During 2014 for example, approximately 69,216 persons were issued with temporary residence permits by the South African government, while 4,136 persons received permanent residence permits, according to 2015 statistics released by Statistics South Africa. In 2016, Stats SA also released statistics indicating that for the period 2006 to 2016, the most emigrants left South Africa between 2011 and 2015.

WHEN PROCEEDS ACCRUE

Judgment was delivered in the tax court on 30 May 2017 in the matter of *M v Commissioner for the South African Revenue Service* (case number 14005, as yet unreported). The case dealt with the familiar question of whether proceeds had accrued in a particular year of assessment, even though payment was only received in a subsequent year of assessment.

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IMMIGRATION, EMIGRATION AND EXCHANGE CONTROL: WHAT YOU NEED TO KNOW

From a legal perspective, there are a number of things to consider when a person immigrates to or emigrates from South Africa.

In the globalised world we live in, it has become more common for persons to immigrate to and emigrate from their countries of birth. During 2014 for example, approximately 69,216 persons were issued with temporary residence permits by the South African government, while 4,136 persons received permanent residence permits, according to 2015 statistics released by Statistics South Africa (Stats SA). In 2016, Stats SA also released statistics indicating that for the period 2006 to 2016, the most emigrants left South Africa between 2011 and 2015.

South Africa's exchange control regime is governed by the Exchange Control Regulations, 1961 read with the Currency and Exchanges Manual for Authorised Dealers.

From a legal perspective, there are a number of things to consider when a person immigrates to or emigrates from South Africa. One of the things to consider is the exchange control (Excon) rules that are applicable to such persons. South Africa's Excon regime is governed by the Exchange Control Regulations, 1961 (Regulations) read with the Currency and Exchanges Manual for Authorised Dealers (AD Manual). The AD Manual came into effect on 1 August 2016 and was last amended on 17 April 2017. This article is not meant to be a detailed discussion of all the Excon rules that might be applicable, but does highlight the most important ones that should be taken into account.

Immigrants

In terms of the AD Manual, immigrants are defined as natural persons who emigrated from countries outside the Common Monetary Area (CMA) with the firm intention of taking up or having taken up permanent residence in South Africa. The CMA consists of Lesotho, Namibia, South Africa and Swaziland.

In terms of sB.5(B) of the AD Manual, upon arrival, immigrants are required to declare to an Authorised Dealer (AD), whether they possess foreign assets and, if so, give an undertaking that they will not place such foreign assets at the disposal of a third party normally resident in South Africa.

New immigrants must in due course provide the AD with documentary evidence substantiating that they have been granted permanent residence in South Africa and should be regarded as immigrants with effect from the date of their arrival in South Africa. According to the AD Manual, an AD includes a person, in relation to any transaction in foreign exchange, that is authorised by the Financial Surveillance Department of the South African Reserve Bank (FinSurv), to deal in foreign exchange. According to s(A).2(A) of the AD Manual, there are currently 27 banks in South Africa that are authorised to act as ADs.

The benefit of making the declaration to an AD is that if an immigrant decides to leave South Africa within five years of the date of their immigration, they can retransfer or re-export all of their own assets that were introduced or imported during the five year period as long as they can also substantiate why they originally introduced or imported such assets. An immigrant will also be allowed to transfer assets abroad in excess of those imported or introduced in South Africa, provided they can satisfy the AD concerned that they will be leaving South Africa permanently and that the assets to be transferred are reasonable in relation to the growth resulting from such individual's business or employment activities and/or is market related.

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IMMIGRATION, EMIGRATION AND EXCHANGE CONTROL: WHAT YOU NEED TO KNOW

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A person who has applied for emigration will be regarded as an emigrant from South Africa on the date on which permanent residence was granted in their new country of residence.

After five years of the date of their immigration, immigrants will be regarded as emigrants from South Africa and will qualify for the prescribed emigration facilities. There are also specific rules that apply to immigrants where they wish to make payments abroad.

Emigrants

Section B.2(J) of the AD Manual states that if a person is a South African resident for Excon purposes and intends to emigrate and take up permanent residence in another country (outside the CMA), they must apply before departure, in order to receive the facilities and benefits set out in the AD Manual.

All emigration applications must be accompanied by a duly completed Form MP336(b) signed by the applicant, together with a duly electronically completed "Tax Clearance Certificate – Emigration". Where an emigrant's remaining assets are declared on the Form MP336(b), the AD under whose administration the emigrant's remaining assets are placed must notify all applicable parties of the emigrant's status and ensure that any proceeds derived from such assets are credited to the emigrant's capital account. The AD also has certain duties where the emigrant owned securities and financial instruments listed on the JSE Limited.

At the time of emigration and after all an emigrant's assets have been brought under the administration of an AD, the emigrant will be granted a number of facilities, including the following:

- In the case of a family unit, a foreign capital allowance of up to R20 million per calendar year will be available after all local liabilities have been provided for and a travel allowance applicable to each member of the family unit, on the basis of and subject to the prescribed limits;
- In the case of single persons, a foreign capital allowance of up to R10 million per calendar year will be available, after all local liabilities have been provided for and a travel allowance on the basis of and subject to the prescribed limit;
- The travel allowance referred to may only be granted once and not more than 60 days prior to the emigrant's departure; and
- Foreign assets held by emigrants at the time of departure need not be deducted from the foreign capital allowance referred to above.

An emigrant may export household and personal effects, motor vehicles, caravans, trailers, motorcycles, stamps, coins and minted gold bars (excluding coins that are legal tender in South Africa) per family unit or single person within the overall insured value of R2 million under cover of a SARS Customs Declaration. Where a person wishes to export assets in excess of this value, they must apply to FinSurv for approval. If an emigrant has any assets remaining in South Africa at the time of their emigration, there are also specific provisions that will apply.

A person who has applied for emigration will be regarded as an emigrant from South Africa on the date on which permanent residence was granted in their new country of residence. If a South African Excon resident has been permanently outside the CMA for a period of more than five years, the person must, on completion of the necessary declaration and undertaking discussed above, be regarded by FinSurv as a new immigrant to South Africa.

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While some might perceive the formal process of immigrating or emigrating from an Excon perspective as cumbersome, one should keep in mind that there are benefits of doing things "by the book".

The AD Manual also contains a section dealing with the requirements that are applicable where an emigrant receives income. Income is defined broadly for purposes of sB.3(B) of the AD Manual but includes, among others, income in the form of interest, profits, dividends, income distributions from close corporations, directors' fees or members' fees, income received from testamentary and inter vivos trusts, and rental income from fixed property.

Comment

The purpose of this article is merely to highlight the Excon considerations that a person should take into account if they decide to immigrate to or emigrate from South Africa. While some might perceive the formal process of immigrating or emigrating from an Excon perspective as cumbersome, one should keep in mind that there are benefits of doing things "by the book", so to speak. It is important for immigrants and emigrants to also consider the tax and other legal consequences that could apply to their immigration or emigration.

Louis Botha

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WHEN PROCEEDS ACCRUE

While the judgment is not by any means ground-breaking, it serves as additional authority for some of the established principles, and touches on some finer points, regarding the suspension of performance.

In generic terms, a right to performance can accrue, even though performance is only due, or performance can only be claimed or enforced, at a future date.

Judgment was delivered in the tax court on 30 May 2017 in the matter of *M v Commissioner for the South African Revenue Service* (case number 14005, as yet unreported). The case dealt with the familiar question of whether proceeds had accrued in a particular year of assessment, even though payment was only received in a subsequent year of assessment.

While the judgment is not by any means ground-breaking, it serves as additional authority for some of the established principles, and touches on some finer points, regarding the suspension of performance.

In this case the taxpayer had sold certain immovable properties during its 2013 year of assessment. It was a term of the agreements of sale that the buyer would only make payment of the purchase consideration against transfer of the relevant immovable property – a term that is relatively common. Transfer was only given in the 2014 year of assessment.

The South African Revenue Service (SARS) assessed the taxpayer on the basis that the purchase consideration accrued during the 2013 year of assessment, and should have been included in gross income for that year. It was not in dispute that the accruals were not of a capital nature. Alternatively, SARS argued that the purchase consideration is deemed to have accrued in terms of s24(1) of the Income Tax Act, No 58 of 1962 (Income Tax Act) – the application of which we do not consider for present purposes.

The taxpayer disputed SARS's assessments and the matter eventually proceeded to the tax court.

The taxpayer contended that the purchase consideration only accrued when it became entitled to receive payment, which was upon transfer.

We know from the cases of *WH Lategan v CIR 2 SATC 16* and *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 52 SATC 9 that an entitlement to payment constitutes something that can "accrue", even though actual payment is only due in future.

We also know that the proviso to the definition of "gross income" in s1 of the Income Tax Act provides that where a person becomes entitled to any amount payable in the future, the amount is deemed to accrue during the year that the person becomes so entitled to the amount, as opposed to the future date for payment.

In generic terms, a right to performance can accrue, even though performance is only due, or performance can only be claimed or enforced, at a future date.

The court acknowledged that where the actual right to performance is wholly suspended, for example by means of a suspensive condition to the effect that a buyer first obtains a loan, there can be no accrual. In such a situation the seller would not be entitled to anything until such time that the condition is met (ignoring for present purposes the principle of fictitious fulfilment).

However, the taxpayer argued that it only became entitled to payment (ie the right to performance only accrued) after it had given transfer of the immovable property. It would appear that the taxpayer's argument was that the entitlement to payment was suspended by the condition that, or contingent upon, the taxpayer first giving transfer.

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WHEN PROCEEDS ACCRUE

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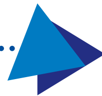
The flaw in the taxpayer's case was that, on the evidence, the agreements were reciprocal, in that the seller had to give transfer and the buyer had to pay the purchase consideration.



The court's view was that the entitlement to payment accrued on the later of the date that all suspensive conditions were fulfilled or any statutory permissions required to give transfer were obtained. Importantly, the "entitlement to payment vested in the taxpayer as soon as the contract became enforceable at the instance of either party". At that point the taxpayer could tender transfer, and enforce payment. The buyer could likewise enforce specific performance and tender payment.

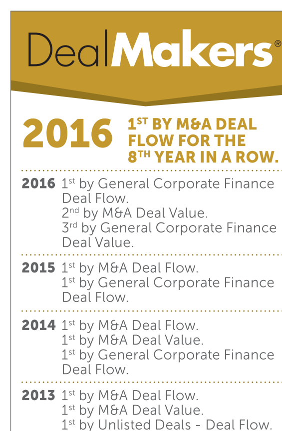
On the particular facts, the court found that the date upon which the conveyancers were ready to lodge transfer documents at the deeds office, was the date upon which it can appropriately be said that the taxpayer's entitlement to payment vested.

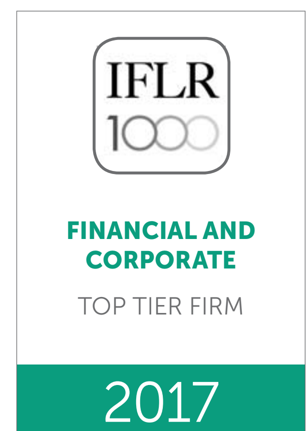
It is interesting to note that the accountant member of the court took a somewhat stricter approach. In her view, the taxpayer became entitled to payment upon the agreements becoming unconditional – ie when all suspensive conditions were fulfilled. The obtaining of any statutory permissions was, in her opinion, merely an obligation imposed on the taxpayer in terms of the agreements.

In my view, it may in certain circumstances, and depending on the wording of the particular agreement, be possible to delay an accrual, even where the agreement has become unconditional - for example, where payment is contingent upon the happening of an uncertain future event.

In this regard, there may have been some merit in the taxpayer's contentions. However, the flaw in the taxpayer's case was that, on the evidence, the agreements created reciprocal obligations, in that the seller had to give transfer and the buyer had to pay the purchase consideration. The entitlement to payment of the purchase consideration was not as such suspended pending transfer of the immovable properties, even though the taxpayer could not enforce payment without tendering transfer.

Heinrich Louw





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