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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

"I MISSED THE SVDP DEADLINE...WHAT DO I DO NOW?"

On 31 August 2017, the window period for the Special Voluntary Disclosure Programme (SVDP) came to an end. The SVDP consisted of a tax component (Tax SVDP) and an exchange control component (Excon SVDP). Applicants had to submit separate applications in order to declare their offshore assets and income, and to regularise their affairs from a tax and exchange control (Excon) perspective. From September 2017, the South African Revenue Service (SARS) will start receiving taxpayer information from other countries in terms of the Common Reporting Standard.

CUSTOMS AND EXCISE HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment since our last instalment.

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From a tax perspective, persons can make use of the regular Voluntary Disclosure Programme (Tax VDP) to declare their offshore income to SARS.

CRS is aimed at curbing tax evasion on a global basis, and South Africa has adopted the wide approach regarding the CRS in its domestic legal framework. South African financial institutions must report on all foreign account holders and foreign controlling persons of entity account holders, irrespective of whether South Africa has an international tax agreement with their jurisdiction of residence or whether the jurisdiction is currently a CRS participating jurisdiction.

If persons did not declare their offshore assets and income in terms of the Tax SVDP and the Excon SVDP to regularise their tax and Excon affairs, there are still other options at their disposal. So what are the options?

Tax Voluntary Disclosure Programme

From a tax perspective, persons can make use of the regular Voluntary Disclosure Programme (Tax VDP) to declare their offshore income to SARS. The provisions pertaining to the Tax VDP are contained in Chapter 16 Part B of the Tax Administration Act, No 28 of 2011 (TAA). The Tax VDP has been available for a number of years and can be utilised to remedy any "default", which is defined in s225 of the TAA as "the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission or adoption resulted in an understatement". In turn, an "understatement" is defined in s221 of the TAA as "any prejudice to SARS or the fiscus as a result of:

- a default in rendering a return;
- an omission from a return;
- an incorrect statement in a return;
- if no return is required, the failure to pay the correct amount of 'tax'; or
- an 'impermissible avoidance arrangement'."

In terms of s226 of the TAA, the Tax VDP is not available where a person has received a notice of commencement of an audit or criminal investigation into their tax affairs, which is still ongoing, if the default which they wish to declare is related to the audit or investigation. However, if a senior SARS official is of the view that the "default" would not otherwise have been detected during the audit or investigation, and the Tax VDP application would be in the interest of good management of the tax system and the best use of SARS's resources, a person can still declare the default in terms of the Tax VDP.

There are also a number of requirements in s227 of the TAA that need to be met in order for the voluntary disclosure made in terms of a Tax VDP application to be valid. Some of the requirements are that the default declared must not have occurred

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Where SARS discovers the default in the ordinary course, the understatement penalty will range between 10% and 200%.

within five years of the disclosure of a similar default, the disclosure must not result in a refund being due by SARS, and must be full and complete in all material respects.

The benefits and relief available in terms of the Tax VDP

In terms of the Tax VDP, the following relief will apply where an application is successful:

- firstly, SARS must not pursue criminal prosecution for a tax offence arising from the default;
- secondly, SARS is required to grant relief as provided for in column 5 or 6 of the understatement penalty percentage table in s223 of the TAA, which makes reference to the penalties that apply if a voluntary disclosure is made before or after notification of an audit or criminal investigation; and
- thirdly, SARS must grant 100% relief in respect of administrative non-compliance penalties under Chapter 15 of the TAA.

An administrative non-compliance penalty could arise for example where a person failed to submit a return where they should have done so.

If for example a person decides not to declare their offshore income in terms of the Tax VDP, the consequences could be severe. With regard to understatement penalties, if a successful Tax VDP application is made, the understatement penalty will range between 0% and 10%, depending on the behaviour that gave rise to the default. However, where SARS discovers the default in the ordinary course, the understatement penalty will range between 10% and 200%, depending on the behaviour that gave rise to the default and whether it is a standard case, repeat case or if the taxpayer was obstructive. This amount will have to be paid in addition to the tax and interest payable as a result of the offshore income that was not declared.

Where a person must pay an administrative non-compliance penalty, the penalty could range between R250 to R16,000

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per month, depending on the person's taxable income, and will be imposed for each month in which the non-compliance existed. The benefits of declaring one's offshore income in terms of the Tax VDP are therefore clear.

Excon: Voluntary disclosure of unauthorised assets

From an Excon perspective, a person can at any stage come forward and declare foreign assets which they hold in contravention of South Africa's exchange control laws, also referred to as unauthorised assets. On 11 September 2017, the South African Reserve Bank's (SARB) FinSurv SVDP Unit issued a document setting out the procedure for regularising unauthorised assets that were not declared before 31 August 2017 (SARB Notice). There are two options available to potential applicants.

The first option is to regularise unauthorised assets via an Authorised Dealer, such as the bank at which a potential applicant holds its account. A potential applicant can approach an Excon consultant at its local bank to assist in drawing up an Excon application explaining the circumstances under which it acquired the unauthorised assets abroad. The SARB Notice also states that it would strengthen the applicant's case if a full, frank and verifiable disclosure is attached to the Excon application to explain the origin and existence of the unauthorised assets. CDH can also assist with the drafting of such applications, although the application has to be submitted to the SARB by the applicant's bank. It is also advised that where possible, the applicant attach recent documentary evidence confirming the current value of the unauthorised assets as well as their identity document and any other relevant paperwork that the applicant may have. The applicant must advise their bank to submit the Excon application for the attention of the Compliance and Enforcement Division of the SARB's Financial Surveillance Department (FinSurv).

The second option is to submit an email for the attention of FinSurv's Compliance and Enforcement Division at SARBFNSDept@resbank.co.za, attaching a full, frank and verifiable disclosure explaining the origin and existence of the unauthorised foreign assets. Where possible, the applicant must attach recent documentary evidence confirming the current value of the unauthorised assets as well as their identity document and any other relevant paperwork that the person may have.

Penalties payable to SARB where assets are regularised voluntarily

The SARB Notice states that while certain cases of non-compliance, such as foreign inheritances received from other South African residents, can be regularised without a penalty in some instances, it is possible that a penalty will be imposed. The size of the penalty for contraventions will be determined by the FinSurv's Compliance and Enforcement Division and as a general guideline, the minimum penalty is 10%, but in respect of serious contraventions where unauthorised assets are retained abroad, the penalty could be as high as 40%.

However, South African residents with unauthorised assets who do not voluntarily approach FinSurv for assistance may face the full force of the law. In this regard, the FinSurv is mandated to, where appropriate, recover the full amount of the contravention.

Although it is not clearly stated in the SARB Notice, one should bear in mind that a penalty will potentially only be payable on

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There are definite benefits in coming forward and voluntarily declaring one's offshore income and assets.

the portion of an offshore asset, which constitutes an unauthorised asset. If, for example, a person holds funds in a foreign bank account and 50% of the funds were sourced from a foreign inheritance, which might constitute an authorised asset for Excon purposes, but the remaining 50% constitutes an unauthorised asset, only the portion constituting an unauthorised asset needs to be regularised and a penalty will potentially only be payable on such portion.

Comment

As can be seen from our discussion above, there are definite benefits in coming forward and voluntarily declaring one's offshore income and assets. If, however, SARS and the SARB become aware of such assets and income through other means, such as the CRS, the consequences could be severe. Persons who own offshore assets and who have received offshore income should therefore ensure that from a tax perspective, they have declared all relevant offshore income to SARS as required by law and that from an Excon perspective, their offshore assets are held in a manner consistent with South Africa's Excon laws and if not, should consider regularising such assets.

Louis Botha, Candice Gibson and Nandipha Mzizi

Tax Indaba 2017

SAIT, along with other recognised professional bodies in South Africa, have come together to host the largest annual gathering bringing together the entire tax community.

The 2017 Tax Indaba takes place at the Sandton Convention Centre from 11 – 15 September. The event benefits professionals in the financial field who are seeking to refresh their knowledge and to learn about new tax-related developments. This includes tax practitioners and professionals, in-house tax staff members, government tax officials and tax academics.

CDH's Emil Brincker will be there to discuss the core elements of financing, including issues relating to the new hybrid share and hybrid debt anti-avoidance rules.

Mark Linington will discuss share buy-backs, while **Gerhard Badenhorst** will be providing input on the VAT implications of remuneration paid to executive and non-executive directors. **Johann Jacobs** will be tackling the trials and tribulations of dismantling trusts.

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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 and 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.

This week's selected highlights in the Customs and Excise environment since our last instalment.

1. Amendments of Schedule 1 Part 1 to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):
   - 1.1 Substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10 and 1101.00.90 to reduce the rate of customs duty on wheat and wheaten flour from 94.72c/kg to 37.93c/kg and 142.18c/kg to 56.90c/kg respectively;
   - 1.2 Substitution of tariff subheading 1701.1 to increase the rate of customs duty on raw sugar not containing added flavouring or colouring matter from free to 213.1c/kg.
2. The amendment of Rule 200.08 to the Act, to amend the places where container depots may be established to include Richards Bay and Saldanha Bay.

Petr Erasmus

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