

20 JANUARY 2017

# TAX AND EXCHANGE CONTROL ALERT

## IN THIS ISSUE

### SARS RULING ON TAX ON TAKING OVER CONTINGENT LIABILITIES IN SALE OF BUSINESS

The South African Revenue Service (SARS) has sought to provide guidance on a difficult tax issue: the assumption (taking over) of contingent liabilities on the acquisition of a business as a going concern. In this regard SARS has issued Interpretation Note 94 dated 19 December 2016 (IN).

### CUSTOMS AND EXCISE HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment.

# SARS RULING ON TAX ON TAKING OVER CONTINGENT LIABILITIES IN SALE OF BUSINESS

*The South African Revenue Service (SARS) has sought to provide guidance on a difficult tax issue: the assumption (taking over) of contingent liabilities on the acquisition of a business as a going concern.*

*SARS has issued Interpretation Note 94 dated 19 December 2016 (IN).*

**The South African Revenue Service (SARS) has sought to provide guidance on a difficult tax issue: the assumption (taking over) of contingent liabilities on the acquisition of a business as a going concern. In this regard SARS has issued Interpretation Note 94 dated 19 December 2016 (IN).**

The matter is best discussed by way of examples.

Example 1: The seller (S) runs a toy shop. He owns the shop building and a stock of toys. The value of the building is R60 and the value of the stock is R30. He owes a supplier R15. S has two employees: A manager and a sales person.

A buyer (B) wishes to buy the business of S as a going concern. The price of the business (ignoring things like goodwill) is R90 (that is, R60 for the building and R30 for the stock).

B pays the price in cash. He does not take over the obligation to pay the supplier.

S must account for income tax on the amount attributed to stock (R30) and must account for capital gains tax (CGT) on the amount attributed to the building (R60). (S must then settle the supplier).

B may deduct for income tax the amount attributed to stock. The amount attributed to the building is the base cost of the building for CGT purposes in his hands.

Example 2: The facts are the same as in Example 1. However, instead of paying the full price in cash, B assumes the liability to pay the supplier (R15) and pays the balance of the price (R75) in cash.

S and B will account for tax precisely in the same way as they would under Example 1. B will not be allowed an income tax deduction again when he pays the supplier in future.

Example 3: The facts are the same as in Example 2. However, S also has an obligation to pay the manager a bonus of R20 in two years' time if the manager has met certain sales targets at that time.

B would need to take over that obligation.

If S had not sold the business, he would have been able to deduct the amount for income tax if and when the manager met the sales target.

In terms of the IN, SARS suggests that the parties must account for tax as follows on the facts of Example 3:

- S must account for income tax or CGT on the amount of the agreed value of that obligation depending on whether the amount is attributed to the stock or to the building.
- S incurs no expenditure for the assumption of the obligation by B, and so may not deduct the liability for income tax.

# SARS RULING ON TAX ON TAKING OVER CONTINGENT LIABILITIES IN SALE OF BUSINESS

CONTINUED

*What is clear is that parties should take great caution when structuring sale of business agreements as it is likely that SARS will adopt the position set out in the IN.*



- B will incur expenditure only if and when the obligation materialises (if and when the manager meets the sales targets). The assumption of the obligation relates to the building and stock acquired and so B must at that future date claim an income tax deduction (to the extent that the assumption of the obligation is attributed to stock) and must add the amount to the base cost of the building for CGT (to the extent that the assumption of the obligation is attributed to the building).

However, it is possible to argue that SARS is conflating two things: (i) the obligation of B to pay the price, and (ii) the way that B settles that obligation. In Example 3, B has incurred an obligation to pay S the aggregate amount of R90, that is, R60 for the building and R30 for the stock. So, B incurs an expense of R90.

B settles the price partly in cash, and partly by the assumption of (i) the fixed liability to pay the supplier and (ii) the contingent liability to pay the manager the bonus if and when the sales targets are met in future. But the fact that B will settle

the price in that way does not change the fact that B has incurred the aggregate amount of the price. B has, in fact, taken over an obligation of which S has rid himself.

On this argument, S and B could account for tax in precisely the same way as they accounted for tax in Examples 1 and 2: S accounts for income tax on the amount attributed to stock and accounts for CGT on the amount attributed to the building. B may, at the time of the transaction, deduct for income tax the amount attributed to stock and must add the amount attributed to the building to the base cost of the building for CGT purposes.

When the obligation to pay the manager becomes fixed (when the manager meets the sales targets) B should not be able to deduct the expense at that time.

What is clear is that parties should take great caution when structuring sale of business agreements as it is likely that SARS will adopt the position set out in the IN.

*Ben Strauss*

**Best Lawyers  
2017 Edition**

Named "Law Firm of the Year" in the practice area of Real Estate Law.

Listed 36 of our lawyers across Cape Town and Johannesburg.

Emil Brincker listed as Lawyer of the Year for Tax Law.

Pieter Conradie listed as Lawyer of the Year for Arbitration and Mediation.

Francis Newham listed as Lawyer of the Year for M&A Law.

# CUSTOMS AND EXCISE HIGHLIGHTS

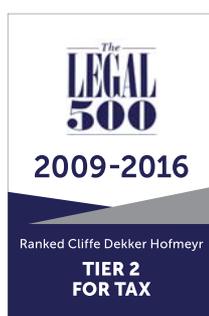
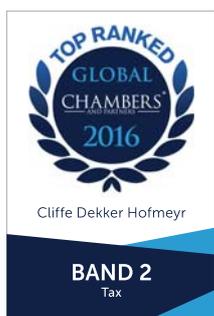
Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

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



Before we delve into the first Customs and Excise instalment of 2017, we would like to wish you a happy and prosperous new year. Without further ado, please find the selected highlights from the Customs and Excise environment below:

1. FTW reported that SARS aims to launch the new customs legislation during the first half of 2017. The process is planned to be phased in over a two year period and will commence with the registration, licensing and accreditation process, of which the first deliverable will be Customs Sufficient Knowledge. We remind readers that all current registration and licenses will have to be re-applied for under the new legislation. We will use this Alert to advise you as to when the process will commence. Should you wish us to inform you of the commencement via email, please send a request to [petr.erasmus@cdhlegal.com](mailto:petr.erasmus@cdhlegal.com). Naturally, we remain available to assist with such re-registration and/or re-licensing.
2. In the judgment of *Coconut Express CC v SARS and Others* 78 SATC 297 ([2016] 2 All SA 749 (KZD)), it was held (and/or confirmed) that:
  - 2.1 A court order in a taxpayer's favour does not allow such taxpayer to deviate from the provisions of the Customs and Excise Act, No 91 of 1964 (Act); and
  - 2.2 SARS may only detain goods to establish whether the goods are liable to forfeiture. Once SARS confirms that the goods are liable to forfeiture, the goods must be seized. If not liable to forfeiture, the goods must be forthwith released. SARS only has a reasonable period within which to finalise its investigation (and either release or seize) in this regard. Further, the same applies to provisional payments made for release of goods pending a SARS investigation.
3. Amendments to Schedule 1 Part 1 of the Act:
  - 3.1 Insertions and substitutions to headings 15.07 - .08 and 15.11 - .13 relating to various vegetable oils inserting new provisions for these products marketed and supplied for use in the process of cooking food; and



# CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

*National Treasury issued a media statement to inform interested parties that the current variable formula on import duties on wheat will continue to apply after 31 December 2016, until further notice.*



- 3.2 Insertions and substitutions to sub-heading 3005.10 relating to adhesive dressings and other articles having an adhesive layer, increasing the general rate of customs duty on adhesive bandages from free of duty to 10%.
4. A provisional payment of 13.9% in relation to safeguard duty was imposed on frozen bone-in portions of fowls of the species *Gallus Domesticus* of TH0207.14.9 up to and including 3 July 2017 imported from or originating in the European Union.
5. The Standing Committee on Finance and the Portfolio Committee on Health invited comments on the Taxation of Sugar Sweetened Beverages by 27 January 2017. Comments to Mr Allen Wicomb; Committee Secretary; 3rd Floor, 90 Plein Street, Cape Town, 8000; e-mail: awicomb@parliament.gov.za; tel: 021 403 3759; fax: 021 403 3942. We are available to assist in this regard.
6. Schedules 1, 2, 3, 4 and 5 to the Act were amended, to implement HS 2017 and to make provision for the effect of these changes on permits issued by ITAC. Rule 75 relating to rebates has also been amended to cater for the switch-over. The changes are effective from 1 January 2017.
7. Item 202.00 of the Schedule to the Rules for form DA260 in respect of wines has been substituted.
8. National Treasury issued a media statement to inform interested parties that the current variable formula on import duties on wheat will continue to apply after 31 December 2016, until further notice. The review process by ITAC is expected to be concluded very early in the first quarter of 2017, at which point a new revised formula will be implemented.
9. The Namibian Customs and Excise Act, 1998, was amended (and will come into operation on a date to be determined by the Minister by notice in the Gazette) to:
  - 9.1 Insert new definitions;
  - 9.2 Provide for the streamlining of customs controls and customs procedure for the better facilitation of trade and for risk management;
  - 9.3 Further address ethics and integrity requisites;
  - 9.4 Strengthen the provisions relating to the exchange of and access to information and confidentiality;
  - 9.5 Provide for the territorial application of the Act;
  - 9.6 Provide for the automation and the use of information technology in electronic commerce;
  - 9.7 Accommodate the One Stop Border post concept by providing for places of entry or exit in terms of international agreements with SADC member states and adjoining countries;

# CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

*More information relating to this week's selected highlights is available upon request.*



- 9.8 Provide for co-operation between government offices, ministries and agencies to facilitate the functioning of the national single window concept;
  - 9.9 Change the time frame for the report of arrival and lodging of declarations to the customs and excise office;
  - 9.10 Permit or require the declaration of goods imported overland to be lodged electronically and prior to importation;
  - 9.11 Simplify provisions requiring an importer or exporter to produce documents and pay duties;
  - 9.12 Provide for the registration of legal persons as authorised economic operators;
  - 9.13 Provide for the imposition of an environmental levy in respect of certain goods manufactured and imported into Namibia;
  - 9.14 Require that electronic documents and records be maintained; and
  - 9.15 Provide for incidental matters.
  10. By notice dated 6 January 2017, ITAC invited new importers to submit permit applications in terms of rebate item 460.11/00.00/01.00 [relating to used overcoats, car-coats, raincoats, anoraks, ski-jackets, duffle coats, mantles, three-quarter coats, greatcoats, hooded caps, trench coats, gabardines, padded waistcoats and parkas (but no other clothing articles)] classifiable under tariff headings 61.01, 61.02, 62.01, 62.02 and 6309.00.13, for 2017, within three weeks from the date of the notice. Interim guidelines, rules, conditions and application forms pertaining to the rebate provision were also published.
  11. On 11 January 2017 President Jacob Zuma has signed, among others, the following Bills into law:
    - 11.1 Taxation Laws Amendment Act - the Bill seeks to amend inter alia, the Act, in order to bring it in line with the new Taxation Laws Amendment Act;
    - 11.2 Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2016 - so as to amend rates of duty in Schedule 1 to the Act; and
    - 11.3 Tax Administration Laws Amendment Act, 2016 - so as to narrow the scope of provisions relating to Special Economic Zones in the Act and to align terminology therein with terminology used in the Special Economic Zones Act, 2014.
- More information relating to the above is available upon request.

*Petr Erasmus*

## OUR TEAM

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



**Emil Brincker**  
National Practice Head  
Director  
T +27 (0)11 562 1063  
E [emil.brincker@cdhlegal.com](mailto:emil.brincker@cdhlegal.com)



**Mark Linington**  
Private Equity Sector Head  
Director  
T +27 (0)11 562 1667  
E [mark.linington@cdhlegal.com](mailto:mark.linington@cdhlegal.com)



**Lisa Brunton**  
Senior Associate  
T +27 (0)21 481 6390  
E [lisa.brunton@cdhlegal.com](mailto:lisa.brunton@cdhlegal.com)



**Petr Erasmus**  
Director  
T +27 (0)11 562 1450  
E [petr.erasmus@cdhlegal.com](mailto:petr.erasmus@cdhlegal.com)



**Heinrich Louw**  
Senior Associate  
T +27 (0)11 562 1187  
E [heinrich.louw@cdhlegal.com](mailto:heinrich.louw@cdhlegal.com)



**Dries Hoek**  
Director  
T +27 (0)11 562 1425  
E [dries.hoek@cdhlegal.com](mailto:dries.hoek@cdhlegal.com)



**Mareli Treurnicht**  
Senior Associate  
T +27 (0)11 562 1103  
E [mareli.treurnicht@cdhlegal.com](mailto:mareli.treurnicht@cdhlegal.com)



**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
E [ben.strauss@cdhlegal.com](mailto:ben.strauss@cdhlegal.com)



**Louis Botha**  
Associate  
T +27 (0)11 562 1408  
E [louis.botha@cdhlegal.com](mailto:louis.botha@cdhlegal.com)



**Jerome Brink**  
Associate  
T +27 (0)11 562 1484  
E [jerome.brink@cdhlegal.com](mailto:jerome.brink@cdhlegal.com)



**Gigi Nyanin**  
Associate  
T +27 (0)11 562 1120  
E [gigi.nyanin@cdhlegal.com](mailto:gigi.nyanin@cdhlegal.com)



**Mark Morgan**  
Candidate Attorney  
T +27 (0)11 562 1374  
E [mark.morgan@cdhlegal.com](mailto:mark.morgan@cdhlegal.com)

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### 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@cdhlegal.com](mailto:jhb@cdhlegal.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@cdhlegal.com](mailto:ctn@cdhlegal.com)

©2017 1466/JAN

