

# TAX AND EXCHANGE CONTROL ALERT

## IN THIS ISSUE

### THE GOLDEN RULE: SARS CLARIFIES A VENDOR'S ENTITLEMENT TO CLAIM INPUT TAX IN RESPECT OF SECOND-HAND GOLD

Subjection to certain exceptions, the Value-Added Tax Act, No 89 of 1991 entitles a vendor to claim a notional input tax deduction in respect of second-hand goods acquired under a non-taxable supply, where such second-hand goods are acquired from a resident of the Republic for the purpose of consumption, use or supply in the course of making taxable supplies.

# THE GOLDEN RULE: SARS CLARIFIES A VENDOR'S ENTITLEMENT TO CLAIM INPUT TAX IN RESPECT OF SECOND-HAND GOLD

*With effect from 1 April 2015, vendors were prohibited from claiming notional input tax deductions in respect of the acquisition of second-hand goods comprising of 'gold' or of 'goods containing gold'.*

*The definition of second-hand goods was accordingly amended with effect from 1 April 2017 in order to limit the extent of the exclusion.*



Subject to certain exceptions, the Value-Added Tax Act, No 89 of 1991 (VAT Act) entitles a vendor to claim a notional input tax deduction in respect of second-hand goods acquired under a non-taxable supply, where such second-hand goods are acquired from a resident of the Republic for the purpose of consumption, use or supply in the course of making taxable supplies.

However, with effect from 1 April 2015, vendors were prohibited from claiming notional input tax deductions in respect of the acquisition of second-hand goods comprising of 'gold' or of 'goods containing gold'. The exclusion was introduced to curb fraudulent notional input tax deductions in respect of the acquisition of gold and gold jewellery. The amendment, however, had a negative impact on legitimate transactions within the second-hand gold industry. The definition of second-hand goods was accordingly amended with effect from 1 April 2017 in order to limit the extent of the exclusion; thus allowing a notional input tax deduction in respect of the acquisition of second-hand goods in certain specific circumstances.

The term 'second-hand goods' is now defined in s1 of the VAT Act to mean, among other things, goods which were previously owned and used, but does not include:

- goods consisting solely of gold unless acquired for the sole purpose of supplying such goods in the same state without any further processing;
- gold coins contemplated in s11(1)(k) of the VAT Act; or
- any other goods containing gold unless those goods are acquired for the sole purpose of supplying those goods in the same or substantially the same state to another person.

## Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

# THE GOLDEN RULE: SARS CLARIFIES A VENDOR'S ENTITLEMENT TO CLAIM INPUT TAX IN RESPECT OF SECOND-HAND GOLD

CONTINUED

*Vendors acquiring second-hand gold or goods containing gold under a non-taxable supply are accordingly not entitled to claim a notional input tax deduction unless the exceptions to the definition of 'second-hand goods' are met.*



Vendors acquiring second-hand gold or goods containing gold under a non-taxable supply are accordingly not entitled to claim a notional input tax deduction in respect thereof unless the exceptions to the definition of 'second-hand goods' are met.

On 12 September 2017, the South African Revenue Service (SARS) issued Binding General Ruling (VAT) 43 (BGR43) which sets out and clarifies the circumstances under which the supply of gold is regarded as falling within the exceptions provided in the VAT Act's definition of 'second-hand goods'.

## **Goods consisting solely of gold**

BGR43 provides that goods consisting 'solely of gold' means that the goods must consist of at least 99.5% pure gold. In terms of BGR43, certified 24 carat gold items, gold bars, gold ingots and foreign 24 carat gold coins will be accepted as consisting 'solely of gold' for purposes of the definition of second-hand goods.

In order for a vendor to be able to claim a notional input tax deduction in respect of goods consisting solely of gold, such vendor must acquire the goods for the sole purpose of supplying it in the course or furtherance of his enterprise, in "the same state without any further processing". BGR43 provides that this means that the vendor may not melt the gold or subject the gold to any transformational process which may change the purity, quality or form of the gold in any way. Where these requirements are met, the vendor may claim a notional input tax deduction in respect of the goods consisting solely of gold which are acquired from a non-vendor who is a South African resident.

## **Gold coins**

A vendor will not be entitled to claim a notional input tax deduction in respect of second-hand goods comprising of gold coins issued by the South African Reserve Bank, including Kruger Rands, Protea and the R1 series. There are no exceptions to this exclusion.

## **Other goods containing gold**

"Other goods containing gold" include all goods containing gold which do not fall under the first two categories discussed above. In terms of BGR43, this will include, for example, gold jewellery including 9 and 18 carat gold items; foreign gold coins that consist of less than 99% gold such as the American Eagle series; certain computer components; medical equipment and electronic appliances.

In order to claim a notional input tax deduction in respect of second-hand goods comprising of goods containing gold, the vendor must acquire such goods for the sole purpose of supplying those goods in the 'same or substantially the same state' to another person in the course or furtherance of such vendor's enterprise. In terms of BGR43, this means that the principal essentials of the gold contained in the goods must not be altered or transformed. A vendor may therefore change a small or nominal detail of the goods containing gold, and will not be precluded from deducting notional input tax. However, where a vendor changes the nature of the goods containing gold, for example melting a gold ring to make gold earrings, no notional input tax deduction will be allowed in respect of the acquisition of the gold ring.

# THE GOLDEN RULE: SARS CLARIFIES A VENDOR'S ENTITLEMENT TO CLAIM INPUT TAX IN RESPECT OF SECOND-HAND GOLD

CONTINUED

*Where a vendor claims an input tax deduction in respect of which the vendor did not qualify for, SARS may impose penalties and interest on the prohibited input tax claimed.*



BGR43 accordingly provides that where a vendor smelts (or intends to smelt) the gold acquired under a non-taxable supply, the gold will not qualify as 'second-hand goods' due to the transformational nature of the process. BGR43 also provides specific examples of goods containing gold which are supplied in 'substantially the same state'; these include, for example, the resizing of a gold ring or replacing a precious stone in a gold ring before resale and upgrading faulty parts before reselling medical equipment.

#### **Effect of BGR43**

Where a vendor claims an input tax deduction in respect of which the vendor did not qualify for, SARS may impose penalties and interest on the prohibited input tax claimed.

BGR43 is effective from 1 April 2017 and serves to clearly set out the considerations and circumstances under which a vendor will be entitled to claim a notional input tax deduction in respect of the acquisition of second-hand gold for the purpose of consumption, use or supply in the course of making taxable supplies. Vendors who carry on an enterprise in the second-hand gold industry should accordingly carefully consider their intention and purpose at the time of acquiring the second-hand gold as well as the processes which they intend to undertake in respect of such gold, before claiming any notional input tax deduction in respect of the acquisition thereof.

*Varusha Moodaley*

CHAMBERS GLOBAL 2011 - 2017 ranks our Tax and Exchange Control practice in Band 2: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2017 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017 in Band 1: Tax.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 in Band 3: Tax.



## 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)



**Gerhard Badenhorst**  
Director  
T +27 (0)11 562 1870  
E [gerhard.badenhorst@cdhlegal.com](mailto:gerhard.badenhorst@cdhlegal.com)



**Candice Gibson**  
Senior Associate  
T +27 (0)11 562 1602  
E [candice.gibson@cdhlegal.com](mailto:candice.gibson@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)



**Varusha Moodaley**  
Senior Associate  
T +27 (0)21 481 6392  
E [varusha.moodaley@cdhlegal.com](mailto:varusha.moodaley@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)



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



**Nandipha Mzizi**  
Candidate Attorney  
T +27 (0)11 562 1741  
E [nandipha.mzizi@cdhlegal.com](mailto:nandipha.mzizi@cdhlegal.com)

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

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 1902/SEPT

