

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

HEIRS, IMMIGRANTS, EXPATRIATES AND INVESTORS TAKE NOTE: PERIOD FOR ADMINISTRATIVE RELIEF OUTSIDE OF THE EXCHANGE CONTROL SPECIAL VOLUNTARY DISCLOSURE PROGRAMME EXTENDED

On 13 July 2016, the South African Reserve Bank's (SARB) Financial Surveillance Department (FinSurv) issued Exchange Control Circular No. 6/2016 (First Circular). The First Circular sets out the exchange control (Excon) relief that will be available for all South African persons who are residents from an Excon perspective (Excon residents) and who wish to regularise their offshore assets from an Excon perspective.

CUSTOMS AND EXCISE HIGHLIGHTS

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

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In this article we discuss the circumstances under which Section C Relief is available.

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On 13 July 2016, the South African Reserve Bank's (SARB) Financial Surveillance Department (FinSurv) issued Exchange Control Circular No. 6/2016 (First Circular). The First Circular sets out the exchange control (Excon) relief that will be available for all South African persons who are residents from an Excon perspective (Excon residents) and who wish to regularise their offshore assets from an Excon perspective. It contains the rules applicable to applications for Excon relief under the Special Voluntary Disclosure Programme (Excon SVDP). Section (C) of the First Circular (Section C), which has received less attention than the Excon SVDP, provides for administrative relief outside the SVDP under certain circumstances (Section C Relief). This means that no levy will be payable if use is made of Section C. In this article we discuss the circumstances under which Section C Relief is available.

Persons to whom Section C Relief is available, requirements and period of application

Section (C)(a) of the First Circular makes provision for certain natural persons to qualify for Section C Relief, namely immigrants, certain persons who inherited offshore assets from resident or non-resident estates and persons who received foreign income prior to 1 July 1997. A person who wishes to make use of Section C Relief, must bring such an application via an Authorised Dealer (AD) in foreign exchange, such as a bank, to FinSurv. Disclosures made in terms of Section C will in most instances not attract a levy in terms of Regulation 24 of the Exchange Control Regulations (Excon Regulations), but merely require "a full disclosure declaration" to an AD. The disclosure must include, but is not limited to, confirmation of the source of all unauthorised foreign assets, details of the manner in which assets were transferred and retained abroad as well as proof of the market value of the unauthorised foreign assets as at 29 February 2016.

Section (C)(b) of the First Circular sets out the circumstances under which Section C Relief will be available to corporate entities and approved foreign investments.

In the First Circular, it is stated that Section C Relief will only be available until 31 March 2017. Although two subsequent circulars were issued by FinSurv, namely Exchange Control Circular No. 8/2016 (Second Circular) and Exchange Control Circular No. 4/2017 (Third Circular), in terms of which the Excon SVDP window period was extended to 30 June and 31 August 2017 respectively, the Second and Third Circulars made no reference to Section C. During our engagement with the SARB-SVDP Unit, it has come to our attention that the extended period which applies to the Excon SVDP, also applies to Section C. This means that applications for Section C Relief can now be brought until 31 August 2017, but not thereafter. A successful application for Section C Relief will regularise the Excon resident's possession and retention of the offshore assets, without having to any levy being payable.

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Immigrants

The First Circular states that in terms of section B.2(F) of the Excon Rulings (the Excon Rulings were subsequently replaced by the Currency and Exchanges Manual for Authorised Dealers on 1 August 2016), immigrants were required declare to an AD whether they were in possession of any foreign assets and if so, were required to give an undertaking to the effect that they will not place such foreign assets at the disposal of any third party normally resident in South Africa. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets, but must be made before 31 August 2017.

Persons who received foreign inheritances and legacies from non-resident estates

Excon residents, who became entitled to a foreign inheritance from a *bona fide* non-resident estate (excluding South African estates with foreign assets), prior to 17 March 1998, were required to declare such foreign assets via an AD to FinSurv to be exempt from the provisions of Regulation 6 and/or 7 of the Exchange Control Regulations, 1961 (Excon Regulations). Regulations 6 and 7 of the Excon Regulations state that as a general rule, a person who becomes entitled to an amount of foreign currency or a foreign asset, must declare that foreign currency or foreign asset to an AD within 30 days of becoming entitled thereto. Excon residents who have not yet made such declarations

via an AD may do so before 31 August 2017 and such declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

Persons who received foreign inheritances and legacies from resident estates with foreign assets

According to the First Circular, Excon residents who became entitled to a foreign inheritance from the estate of another Excon resident, not in compliance with the Excon Regulations, may declare such foreign assets and apply for exemption from Regulations 6 and/or 7. The FinSurv will grant approval to retain such foreign assets abroad subject to the condition that the foreign assets may not be placed at the disposal of other residents or used to create "loop structures". No levy will be payable by the Excon resident beneficiary.

Where it is disclosed that the foreign assets inherited were held by the deceased in a manner contrary to the provisions of the Excon Regulations, including "loop structures", such assets must be reported to FinSurv via an AD and no levy would be payable if the assets are repatriated. If such assets are, however, to be retained abroad a levy of 10% will be payable to FinSurv and any existing "loop structures" must be terminated. Furthermore, the retention abroad of such assets is subject to the condition that the assets may not be placed at the disposal of other Excon residents or used to create any "loop structure". If the Excon resident beneficiary

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Excon residents with approved foreign investments which have been approved by FinSurv and/or an AD, but who have not done one of the following prior to 29 February 2016 may also apply for Section C Relief before 31 August 2017.



held the assets abroad in contravention of the Regulations, for example where he/she created the "loop structure" after inheritance, the person will not be exempt from paying a levy and must apply for relief under the Excon SVDP. A declaration made before 31 August 2017 will regularise the Excon resident's possession and retention abroad of such foreign assets.

Persons who earned foreign income

Section (C) of the First Circular states that Excon residents who earned income abroad prior to 1 July 1997 were required to repatriate such foreign earned income to South Africa, in terms of Regulation 6 of the Excon Regulations. Those residents who have not repatriated foreign income earned prior to 1 July 1997, may declare such income via an AD to FinSurv before 31 August 2017, which would regularise the qualifying resident's possession and retention abroad of such foreign assets.

Corporate entities and approved foreign investments

Excon residents with approved foreign investments which have been approved by FinSurv and/or an AD, but who have not done one of the following prior to 29 February 2016 may also apply for Section C Relief before 31 August 2017:

- Submitted to FinSurv on an annual basis, financial statements and progress reports with regard to such approved foreign investments;

- Lodged share certificates in respect of such approved foreign investments with AD's (unless exempted from so doing);
- Placed on record, with FinSurv, the expansion of their approved foreign investments;
- Declared dividends and repatriated such dividends to South Africa prior to 26 October 2004; and
- Placed on record, with FinSurv, the disposal of all and/or part of an approved foreign investment (which includes the dilution of the Excon resident's interest in such foreign investment by the issue of new shares to a non-resident or other Excon resident) and/or where the proceeds of such disposal have not been repatriated to South Africa.

Section (C)(b)(bb) of the First Circular details the requirements that must be met to regularise each one of these contraventions. Where certain contraventions have taken place with respect to foreign investments, the Excon resident will have to apply for relief under the Excon SVDP.

Comment

Where an asset was derived from funds or assets which can be regularised in terms of Section C and funds which have to be regularised in terms of the Excon SVDP, the applicant would have to submit two

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The most important thing to take note of is that the window period within which applications for Section C Relief may be made, has been extended until 31 August 2017.



separate applications – one to the SARB-SVDP Unit via eFiling and one to FinSurv via an AD. Any levy that is imposed in terms of the Excon SVDP, will only apply to the portion of the asset that is regularised through the SVDP and not to all the assets. Excon residents who decide not to apply for Section C Relief or for relief under the Excon SVDP and who make a disclosure directly to FinSurv after 31 August 2017, could face a levy of

between 10% and 40% at the discretion of FinSurv on the current market value of the unauthorised foreign assets.

The most important thing to take note of is that the window period within which applications for Section C Relief may be made, has been extended until 31 August 2017.

Louis Botha

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

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

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

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



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:

1. The Schedules to the Customs and Excise Act No. 91 of 1964 have been amended as follows:
 - 1.1 Schedule 1 Part 1:
 - 1.1.1 The substitution, insertion and deletion of various tariff subheadings under tariff headings 39.07 to align the 8-digit tariff subheading structure for Poly (ethylene terephthalate) with the Harmonized System (HS) for 2017;
 - 1.2 Schedule 2:
 - 1.2.1 Deletion and insertion (relating to heading 39.07 of Schedule 2) as a consequence to the changes made under tariff heading 39.07 due to the implementation of the Harmonized System (HS) for 2017;
2. We have noted that there were delays in payments of value-added tax (VAT) claims for many of our clients. Certain delays were also noted in payments of customs duties, etc. The office of the Tax Ombudsman received the greenlight to investigate certain of the SARS systems. Although the investigation is expected to revolve around VAT, it is hoped that the delays in paying customs refunds will also improve. We remain available to assist relating to delays in paying customs refunds.

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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



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



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



Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



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



Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



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



Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com



Louis Botha
Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Jerome Brink
Associate
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Gigi Nyanin
Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com

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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.

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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

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

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