

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

ACCRUAL OF AMOUNT ON CESSION OF RIGHT TO DIVIDENDS

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CUSTOMS & EXCISE HIGHLIGHTS

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

ACCRUAL OF AMOUNT ON CESSION OF RIGHT TO DIVIDENDS

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Dividends are exempt from income tax even if a person receives the dividend by virtue of a cession to that person of the right to receive the dividend. A notable exception to this principle is that, if a shareholder cedes only the right to receive dividends (that is, without transferring the other rights attaching to the underlying shares) to a company, then the dividend accruing to the company is subject to income tax, in terms of paragraph (ee) of the proviso to s10(1)(k) of the Income Tax Act, No 58 of 1962.

However, what are the tax implications of the right to receive a dividend in the hands of the cessionary (that is, the person to whom the right is ceded)?

That question was the subject matter in the case of *CSARS v KWJ Investments Service (Pty) Ltd* (142/2017) [2018] ZASCA 81 (31 May 2018).

The facts of the case were relatively complex. Put simply, the taxpayer made an investment with a bank. The return on the investment was that the bank ceded rights to dividends on listed shares to the taxpayer antecedently, that is before the entitlement to the dividends themselves arose. The question that arose is whether the dividend right constituted "an amount" that accrued to the taxpayer.

SARS contended that where rights to dividends are ceded to a taxpayer there are two distinct accruals in the hands of the taxpayer: first, there is an accrual of

the *dividend right*; and second, there is an accrual of the *dividend* when the company actually declares the dividend. The taxpayer contended that while the mode of delivery (the cession) was unconditional, the right ceded was conditional on the dividends being actually declared by the companies and the taxpayer therefore merely held a contingent right.

On this point, the court found in favour of SARS. It held that the right to the dividends to be declared in future cannot be classified as dividends and, accordingly, the right was a separate amount. That right has a monetary value despite the fact that the entitlement to dividends was conditional and, hence, was an amount that accrued to the taxpayer.

Ultimately, the taxpayer won the case on a separate technical point, namely, that SARS had raised the additional assessment after the statutory prescription period.

The takeaway from the case is this: Where a taxpayer acquires the right to receive dividends, the taxpayer must account for tax separately on two distinct receipts: first, on the accrual of the amount of dividends if and when declared by the relevant company; and, second, on the accrual of the amount of the right to the dividend. As pointed out above, the first accrual may, depending on the circumstances, be subject to, or exempt from income tax or dividends tax in the hands of the taxpayer.

ACCRUAL OF AMOUNT ON CESSION OF RIGHT TO DIVIDENDS

CONTINUED

As to the second accrual, the incidence of tax will depend on the transaction giving rise to the receipt.



As to the second accrual, the incidence of tax will depend on the transaction giving rise to the receipt. For example, if a taxpayer transfers a revenue asset (for instance, trading stock) to a person, and that person in exchange transfers the right to receive a dividend to the taxpayer, then the taxpayer would need to include the amount of the dividend right as gross income for income tax purposes. If a taxpayer transfers a capital asset to a person and that person in exchange transfers the right to receive a dividend

to the taxpayer, then the taxpayer would, for capital gains tax purposes, need to include the amount of the dividend right as proceeds on disposal of the capital asset.

What the case also shows again is that the incidence of tax on the cession of the rights to dividends is a minefield, and taxpayers should exercise great caution when entering into transactions of this kind.

Ben Strauss

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.



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 to Schedules to the Customs & Excise Act, No 91 of 1964 (Act):
 - 1.1 Schedule 1 Part 1:
 - 1.1.1 The substitution of tariff heading 1205.10 and insertion of tariff subheading 1205.10.20 and 1205.10.90 to make provision for the reduction of the rate of customs duty on canola seed;
 - 1.1.2 The substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10 and 1101.00.90 to increase the rate of customs duty on wheat and wheaten flour from 29,38c/kg and 44,06c/kg to 43,72c/kg and 65,59c/kg respectively, in terms of the existing variable tariff formula;
 - 1.2 Schedule 4:
 - 1.2.1 The substitution of rebate items 405.04/00.00/01.00 and 405.04/00.00/02.00 in order to review the wording providing for goods for disabled persons or for the upliftment of indigent persons;
 - 1.3 Schedule 6:
 - 1.3.1 The insertion of various items under rebate item 621.08 in order to make provision for a rebate of full duty in respect of ethyl alcohol by-product that has been used for industrial purposes or for the manufacture of other non-liquor products; and
 - 1.4 Schedule 8:
 - 1.4.1 The substitution of items 820.05 and 820.10 in order to extend the validity period for licenses for pot stills.
2. SARS issued a circular dated 21 May 2018 wherein external stakeholders were advised that the prior circular stating that SARS would impose penalties for not declaring proof of origin is withdrawn and no further penalties in this regard will be imposed.

CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

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



3. The International Trade Administration Commission has (certain sections quoted from the notice):

3.1 Issued Notice 282 of 2018, stating as follows:

"The Commission hereby notifies all interested parties that, unless a duly substantiated request is made by or on behalf of the Southern African Customs Union (SACU) industry, indicating that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury, the following anti-dumping duties will expire during 2019:

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Manufacturers in the SACU of the subject products listed above, who wish to submit a request for the duty to be reviewed prior to the expiry thereof, are requested to do so not later than close of business on 25 June 2018.

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Enquiries may be directed to the Senior Manager: Trade Remedies I, Ms Carina Janse van Vuuren, at telephone (012) 394-3594 or at fax (012) 394-0518".

The notice has regard to the following products:

1. Frozen Potato Chips from Belgium and the Netherlands;
 2. Wire ropes from China, Germany and the United Kingdom;
 3. Gypsum Plasterboard from Indonesia and Thailand; and
 4. Soda Ash from the USA.
4. The following notices were published in the Government Gazette by the Department of Agriculture, Forestry and Fisheries:
- 4.1 Notice 265 of 2018, stating as follows:

"On 15 May 2018, Macadamia South Africa Non Profit Company (SAMAC), applied on behalf of directly affected groups in the macadamia industry, to the Minister of Agriculture, Forestry and Fisheries, for the continuation of statutory measures (levies, registration and record & returns) on macadamia nuts, husk, kernels or in-shell, trees (both in nurseries and in the field), in terms of the Marketing of Agricultural Products Act, 1996 (Act, No 47 of 1996) (MAP Act). The current statutory measures will lapse on 14 November 2018.

CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

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SAMAC applied for the following statutory measures and it is proposed that the statutory measures be implemented for a new four year period (from 15 November 2018 to 14 November 2022):

STATUTORY MEASURE	PRODUCT	DIRECTLY AFFECTED GROUPS
A levy of R0.50/kg Dry-Nut-In-Shell (DNIS) (excluding VAT)	Macadamia nuts	Producers; processors; traders; and importers.
Registration with SAMAC	Macadamia nuts; and macadamia products for sales as nut in-shell	Producers; Processors; traders; importers; persons who consolidate macadamia nuts; and nurseries.
Keeping of records and submitting of returns to SAMAC	Macadamia nuts (in-shell and kernel); and macadamia trees	Producers; Processors; traders; importers; persons who consolidate macadamia nuts; and nurseries.

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ENQUIRIES: National Agricultural Marketing Council Mr. Elekanyani Nekhavambe E-mail: enekhavambe@namc.co.za
Tel no.: 012 341 1115
Fax no.: 012 341 1911".

4.2 Notice 543 dated 1 June 2018, stating as follows:

"AMENDMENTS TO THE REGULATIONS RELATING TO THE GRADING, PACKING AND MARKING OF POTATOES INTENDED FOR SALE IN THE REPUBLIC OF SOUTH AFRICA.

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INVITATION FOR PUBLIC COMMENTS

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invite all interested parties to submit comments and any

representations concerning the proposed regulations in writing within (5) five weeks from the date of publication of this Notice to the following address:

Executive Officer: Agricultural Product Standards

Department of Agriculture, Forestry and Fisheries

Private Bag X343, Pretoria, 0001, 30 Hamilton Street, Harvest House Building, Room 152

Tel. no. 012 319 6171 or 6291
Fax no. 012 319 6265
Email: VictorMa@daff.gov.za or CarolineL@daff.gov.za".

5. Please advise if additional information is required.

Petr Erasmus

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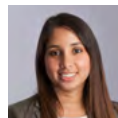
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