

# TAX & EXCHANGE CONTROL ALERT

## IN THIS ISSUE

### RECENT DEVELOPMENTS IN THE PBO ARENA - TAX COMPLIANCE IN THE RELIGIOUS SECTOR AND GENERAL TAX PROVISIONS APPLICABLE TO PBOS

On 26 January 2018 the South African Revenue Service (SARS) issued a media release (Media Statement) regarding its intention to investigate possible tax non-compliance in the religious sector. In this article we will discuss the issues raised by SARS in the Media Statement as well as some of the relevant legal provisions that have to be met in order for organisations, including religious organisations, to be approved as a public benefit organisation (PBO).

### CUSTOMS HIGHLIGHTS

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

# RECENT DEVELOPMENTS IN THE PBO ARENA – TAX COMPLIANCE IN THE RELIGIOUS SECTOR AND GENERAL TAX PROVISIONS APPLICABLE TO PBOs

*Religious organisations may apply to SARS to be exempt from income tax in terms of s10(1)(cN) of the Income Tax Act, No 58 of 1962 (Act), by being approved as a PBO in terms of s30 of the Act.*

*It is important to note that a religious organisation, or any organisation which seeks to be tax exempt as a PBO, will only be exempt from tax, once such PBO approval has been granted.*



On 26 January 2018 the South African Revenue Service (SARS) issued a media release (Media Statement) regarding its intention to investigate possible tax non-compliance in the religious sector. In this article we will discuss the issues raised by SARS in the Media Statement as well as some of the relevant legal provisions that have to be met in order for organisations, including religious organisations, to be approved as a public benefit organisation (PBO).

## Issues raised in the Media Statement

In the Media Statement, SARS states that its decision to investigate follows its own preliminary investigation, its meeting with the CRL Rights Commission and general reports suggesting that certain religious organisations and leaders are not in compliance with tax laws, and may be enriching themselves at the expense of tax compliance and their altruistic and philanthropic purpose. However, SARS also acknowledged that a number of religious organisations are indeed complying with their tax obligations.

The Media Statement then refers to the fact that religious organisations may apply to SARS to be exempt from income tax in terms of s10(1)(cN) of the Income Tax Act, No 58 of 1962 (Act), by being approved as a PBO in terms of s30 of the Act. The Media Statement goes on to reference the criteria of s30 of the Act, which contains, among others, the following requirements applicable to PBOs:

- Activities must be conducted in a non-profit manner with an altruistic or philanthropic intent;
- No such activity must be intended to directly or indirectly promote the economic self-interest of any person

other than by way of reasonable remuneration paid for services rendered; and

- Religious institutions are prohibited from directly or indirectly distributing funds to any person other than in carrying out their religious activities.

SARS also raised concerns about, among other things, the payment of taxes on trading activities unrelated to religious activities and the issuing of receipts to donors in terms of s18A of the Act, which donations are not deductible from income tax in a donors' hands, where the funds are donated towards the carrying out of religious activities. Finally, SARS also encouraged religious organisations whose tax affairs are not in order, to regularise their tax affairs by applying for relief under the SARS voluntary disclosure programme (VDP).

## The requirements to become an approved PBO

It is important to note that a religious organisation, or any organisation which seeks to be tax exempt as a PBO, will only be exempt from tax once such PBO approval has been granted. In addition to the requirements of s30 of the Act that are referred to in the Media Statement,

# RECENT DEVELOPMENTS IN THE PBO ARENA – TAX COMPLIANCE IN THE RELIGIOUS SECTOR AND GENERAL TAX PROVISIONS APPLICABLE TO PBOS

CONTINUED

*If an organisation, including a religious organisation, wishes to become an approved PBO, it must submit an application to the SARS Tax Exemption Unit.*



there are a number of other criteria that an organisation must meet in order to become an approved PBO. Section 30 of the Act lists, among other things, the following additional requirements:

- The organisation must be a non-profit company as defined in s1 of the Companies Act, No 71 of 2008, or a trust or an association of persons that has been incorporated, formed or established in South Africa;
- It must carry on public benefit activities, listed in Part I of the Ninth Schedule to the Act;
- The organisation's founding document, such as its trust deed or memorandum of incorporation, must stipulate the following, among other things:
  - It must require the organisation to have at least three persons who accept fiduciary responsibility for the organisation;
  - It may use its funds solely for the object for which it has been established;
  - It may not accept donations that are revocable at the instance of the donor, unless certain specified circumstances are present;
  - The remuneration paid to an employee or other office bearer will not be excessive, having regard to what is generally considered reasonable in the sector; and
  - It will not use its resources directly or indirectly to support, advance or oppose any political party.

If an organisation, including a religious organisation, wishes to become an approved PBO, it must submit an application to the SARS Tax Exemption Unit, which will consider whether the organisation meets all the requirements of s30 of the Act. An organisation may also be approved retrospectively as a PBO, where SARS is satisfied that the organisation complied with the requirements of a PBO prior to submitting its application for PBO approval.

#### **Public benefit activities and the issuing of receipts in terms of s18A of the Act**

One of the requirements to become a PBO in terms of s30 of the Act is that an organisation must conduct public benefit activities (PBAs) listed in Part I of the Ninth Schedule to the Act. The PBAs in Part I are divided into the following 11 categories:

- Welfare and humanitarian;
- Health care;
- Land and housing;
- Education and development;
- Religion, belief or philosophy;
- Cultural;
- Conservation, environment and animal welfare;
- Research and consumer rights;
- Sport;
- Providing of funds, assets or other resources; and
- General.

# RECENT DEVELOPMENTS IN THE PBO ARENA – TAX COMPLIANCE IN THE RELIGIOUS SECTOR AND GENERAL TAX PROVISIONS APPLICABLE TO PBOS

CONTINUED

*Although an organisation will not pay any understatement penalties pursuant to a successful VDP application, it will still have to pay tax on the income declared, including interest on such tax.*



Under each of these categories, there are subparagraphs listing the type of activities that will constitute PBAs. In order for an entity to issue receipts to donors in terms of s18A of the Act, which would entitle donors to deduct their donations for income tax purposes, such entity must conduct activities listed in Part II of the Ninth Schedule to the Act. Only activities listed in the categories welfare and humanitarian, health care, land and housing, education and development, and conservation, environment and welfare, referred to above, constitute PBAs in terms of Part II of the Ninth Schedule to the Act.

#### **Is all income received by a PBO tax exempt?**

In terms of s10(1)(cN) of the Act, any receipts or accruals of an approved PBO, that are derived from anything other than a business undertaking or trading activity, are exempt from income tax.

However, where the PBO derives income from a business undertaking or trading activity, such income will only be tax exempt under very specific circumstances listed in s10(1)(cN)(ii) of the Act. A PBO will therefore have to pay income tax on any income from a business undertaking or trading activity that is not derived under the specific circumstances listed in the Act.

Furthermore, SARS has also issued Interpretation Note 24 (Issue 4) on 12 February 2018, which sets out SARS's view on how s10(1)(cN) should be applied.

#### **Comment and practical considerations**

Any entity that conducts PBAs, including religious activities, is not automatically exempt from income tax. It must first apply to SARS to be approved as a PBO although such approval can be granted retrospectively. A non-profit company is also not automatically exempt from paying income tax. Based on our recent experience, it can take quite a few months, or longer, before an application for PBO approval is granted.

Where an organisation is a PBO or wishes to become a PBO, including a religious organisation, and has already received income prior to becoming a PBO, but has not declared such income to SARS, it must consider declaring such income in terms of a VDP application. The provisions regarding the VDP are contained in the Tax Administration Act, No 28 of 2011. It should be noted that although an organisation will not pay any understatement penalties pursuant to a successful VDP application, it will still have to pay tax on the income declared, including interest on such tax.

*Louis Botha*

## **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 Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):
  - 1.1 Draft rules under s64E – Accreditation:

Section 64E of the Act allows the Commissioner to confer accredited client status on applicants who meet certain criteria. In return, the Commissioner confers benefits to reward the traders that meet the criteria. In 2011, the rules to s64E were amended to provide for a Level 2 Accreditation status. The proposed draft inserts two additional benefits to Level 2 Accreditation. The draft also includes amendments to the proforma agreement to make it applicable to Level 2 Accreditation.
  - 1.2 Draft forms under rule 8 – reporting of conveyances and goods, as follows:
    - 1.2.1 DA 8 – Sea cargo;
    - 1.2.2 DA 8A – Air cargo;
    - 1.2.3 DA 8B – Rail cargo; and
    - 1.2.4 DA 8C – Road cargo.
  - 1.3 Draft rules under s63 and s116 relating to stills and manufacture of excisable goods for own use, and to Schedule No. 8, as follows:

Draft rule amendments address the stills capacity that is allowed, records to be kept by still makers and importers, and obligations upon receipt of unmarked stills. Amendments to relevant items in Schedule No. 8 that relate to stills are also proposed and draft forms DA104 and DA105 are proposed.

New draft rules are proposed to regulate the manufacture of excisable goods solely for use by the manufacturer thereof. The updated draft form DA185 provides for the registration of such manufacturers of excise goods for own use.

Due date for comments is 20 March 2018.
- 2 Health Promotion Levy (certain sections quoted from the SARS website):
  - 2.1 The Rule Amendment Notice and related forms, scheduled for publication in the Government

# CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

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



- Gazette, relate to the amendments to the Health Promotion Levy on Sugary Beverages, as follows:
- 2.1.1 DA 63 – Application for refund – Export for trade purposes of imported duty paid goods;
  - 2.1.2 DA 64 – Application for drawback/refund;
  - 2.1.3 DA 66 – General Application for drawback/refund;
  - 2.1.4 DA 179 – Health Promotion Levy Return for Sugary Beverages; and
  - 2.1.5 DA 185.482 – Licensing client type 4B2 – manufacturing warehouse.
- 2.2 The Tariff Amendment Notices, scheduled for publication in the Government Gazette, relate to amendments to:
- 2.2.1 Schedule 1 Part 7A to align it with the revised rules;
  - 2.2.2 Schedule 4 Part 6 to amend General Note 3, as well as to delete Schedule 4 Part 7;
  - 2.2.3 Schedule 5 Part 6, as follows:
    - 2.2.3.1 Note 3 is amended to indicate that prescribed form must reflect the item applicable and the tax type code; and
- 2.2.3.2 Refund item 561.03 is inserted to provide for a refund instead of a rebate (ex499.02) from Schedule 4 to align with the DAS principles;
- 2.2.4 Schedule No. 5 as follows:
- 2.2.4.1 Note 8 is amended to include the reference to s54J in order to apply to the Health Promotion Levy; and
  - 2.2.4.2 Note 3 in Schedule 5 Part 5 is amended as a consequence to the amendment of Schedule 5 Part 6; and
- 2.2.5 Schedule No. 6 Part 5, as follows:
- 2.2.5.1 Rebate item 690.01 has been amended to remove the reference to “(b) are being removed in bond”

# CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

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



in line with DAS principles where no in-bond movements are allowed;

- 2.2.5.2 Rebate item 690.02 has been deleted as a rebate item and inserted as a refund item 691.05 to allow for HPL goods to be used in the manufacture of HPL or other goods where after a refund can be claimed on a DA 66;
  - 2.2.5.3 Rebate item 691.02 has been amended to align with similar provisions for perishable goods to allow for reprocessing or destruction and also to add the necessary control measures such as customs supervision, documentary evidence, etc.; and
  - 2.2.5.4 As a result of the amendment to rebate item 691.02, rebate item 691.03 has become redundant and will be deleted.
- 3 SARS issued a circular dated 2018/02/26 wherein external stakeholders were advised as follows (certain sections quoted from the circular):
    - 3.1 SARS is on the verge of implementing the first phase of the Reporting of Conveyances and Goods (RCG) project which falls under the New Customs Acts Programme (NCAP).
    - 3.2 The new Cargo Processing System (CPS) to be implemented under the RCG project reflects the new legislative framework in respect of cargo reporting, as set out in the Customs Control Act, 2014, and significantly improves cargo management and supply chain security.
    - 3.3 In order to facilitate the transition to the new legal dispensation, a decision was taken to implement the first phase of RCG under the rules for s8 of the Act. Under RCG, it is mandatory for all cargo reporters in the air, sea, rail and road industries and involved in the movement of international cargo to submit reports to SARS electronically.
    - 3.4 It has, in fact, been mandatory to submit electronic cargo reports to SARS since 2009, but this has not been strictly enforced in order to give industry the opportunity to develop the necessary capability to report electronically.
    - 3.5 In order for the CPS system to function as intended, it is vital that all road, rail, sea and air cargo reports are submitted electronically, in full and in the correct format.

# CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

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



- 3.6 All land, sea and air cargo reporters are therefore urged to ensure compliance in terms of data submission in the correct format before the implementation of RCG, currently earmarked for 20 April 2018.
- 3.7 SARS has published specific Message Implementation Guides (MIGs) relating to the various conveyance and electronic cargo UN/EDIFACT messages to be submitted to SARS and held detailed technical discussions with software developers on system development requirements.
- 4 The International Trade Administration Commission has (certain sections quoted from the notice):
- 4.1 Received the following application concerning the Customs Tariff (notice dated 16 February 2018):
- Increase in the rate of duty on phosphoric and polyphosphoric acids classifiable under tariff subheading 2809.20, from free of duty to 10 per cent ad valorem, by way of creating an additional 8-digit tariff subheading, which reads as follows: "Diphosphorus Pentoxide; Phosphoric Acid;
- Polyphosphoric Acids, Whether Or Not Chemically Defined: Of a phosphorous content of 78 per cent or more".
- For enquiries contact:  
Mr C Sako, tel: (012) 394 3669,  
e-mail: [csako@itac.org.za](mailto:csako@itac.org.za)  
or Ms T Morale,  
tel: (012) 394 3694,  
e-mail: [tmorale@itac.org.za](mailto:tmorale@itac.org.za)
- Representations should be submitted to ITAC within four (4) weeks of the date of the notice.
- 5 The following notice was published in Government Gazette 41489 on Friday, 9 March 2018:
- It is hereby notified that the amendments to the "Explanatory Notes to the Harmonised Commodity Description and Coding System" in accordance with Amending Supplement Nos 1 and 2 issued by the Customs Co-operation Council in Brussels shall, in terms of s47(8) of the Customs and Excise Act, 1964, become effective in the Republic on 9 March 2018.
- 6 Please advise if additional information is required.

*Petr Erasmus*



CHAMBERS GLOBAL 2018 ranked our Tax & Exchange Control practice in Band 1: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017- 2018 in Band 1: Tax: Consultants.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2018 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)



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



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



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



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



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



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

©2018 2255/MAR

