

# TAX & EXCHANGE CONTROL ALERT

## IN THIS ISSUE

### WHAT IS MEANT BY 'FIT AND PROPER'? THE AUSTRALIAN FEDERAL COURT SHEDS SOME LIGHT

The concept of a 'fit and proper' person is a fundamental one in many professions, jurisdictions and organisations as it is used to determine a person's honesty, integrity and reputation in order to confirm that they are fit and proper for the role they are undertaking. There is, however, no single infallible test regarding what constitutes a 'fit and proper' person and in some instances, this requirement is not defined in legislation.

### CUSTOMS & EXCISE HIGHLIGHTS

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

# WHAT IS MEANT BY 'FIT AND PROPER'? THE AUSTRALIAN FEDERAL COURT SHEDS SOME LIGHT

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*An interesting decision was handed down by the Federal Court of Australia (Federal Court) on 2 November 2018 in the case of *Ham v Tax Practitioners Board* [2018] FCA 1652 where the Federal Court confirmed the high ethical and professional standards expected of trusted advisers such as tax practitioners.*



The concept of a 'fit and proper' person is a fundamental one in many professions, jurisdictions and organisations as it is used to determine a person's honesty, integrity and reputation in order to confirm that they are fit and proper for the role they are undertaking. There is, however, no single infallible test regarding what constitutes a 'fit and proper' person and in some instances, this requirement is not defined in legislation.

For example, in the case of *General Council of the Bar of South Africa v Jiba and others* [2016] 4 All SA 443 (GP), it was stated that in determining whether a person was a 'fit and proper' for the legal profession, such person should have integrity, dignity, the possession of knowledge and technical skills, a capacity for hard work, respect for legal order and a sense of equality or fairness. Whereas in the older case of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, the concept of 'fit and proper' was described more aptly, as follows:

The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not

occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

More recently, an interesting decision was handed down by the Federal Court of Australia (Federal Court) on 2 November 2018 in the case of *Ham v Tax Practitioners Board* [2018] FCA 1652 where the Federal Court confirmed the high ethical and professional standards expected of trusted advisers such as tax practitioners. The relevant facts, arguments made by the respective parties and decision of the Federal Court are discussed in further detail below.

## **Facts**

Mr Phillip Ham (Appellant), an accountant for Mr Trevor Holzapfel (Mr Holzapfel) and his various entities for many years, advised Mr Holzapfel to establish the Holzapfel Property Trust (HPT) in July 1991. HPT was a discretionary trust, the beneficiaries of which were Mr Holzapfel, members of his family and companies controlled by them.

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*The Supreme Court stated that Canehire acted in breach of its fiduciary duty and breach of trust by paying away the profits derived from the sale of the land.*



A shelf company which had the Appellant as its sole director and shareholder, Canehire Proprietary Limited (Canehire), was appointed as the trustee of HPT.

In September 1993, Canehire acquired the lessee's interest over a specific piece of land. Mr Holzapfel was interested in acquiring the freehold title to this land from the Department of Natural Resources (DNR). However, Canehire (as trustee of HPT) was unable to settle the purchase price sought by the DNR and instead, obtained a renewal of the lease to December 2002.

Until 2002, Mr Holzapfel exercised control over the land and negotiated with the DNR for Canehire's acquisition of the freehold title. During November 2002, Canehire accepted an offer by the DNR to acquire the freehold title to the land. The purchase consideration was settled from an advance made by a property development company, South East Property Developments Proprietary Limited (SEPD), controlled by the Appellant and his business partner. A deed of grant of the land was registered in February 2003 in favour of Canehire, however, no reference was made to HPT.

Following improvements to the land, the land was sold by Canehire in October 2008 for \$4,892,030. A portion of the proceeds was used to discharge the debt owing by Canehire to SEPD and other lenders. No part of the proceeds was paid to HPT or any of its beneficiaries.

After Mr Holzapfel became aware of the sale of the land, legal proceedings were instituted against Canehire and the Appellant in the Queensland Supreme Court (Supreme Court). Mr Holzapfel contended that there was an agreement between him and the Appellant for Canehire to acquire the freehold title on behalf of HPT. However, the Appellant contended that the agreement was such that Canehire purchased the freehold title in its own right.

## **Findings of Supreme Court**

In finding for Mr Holzapfel, the Supreme Court stated that Canehire acted in breach of its fiduciary duty and breach of trust by paying away the profits derived from the sale of the land. Furthermore, it was held that the Appellant, as the controlling mind of Canehire, had acted dishonestly in paying away the proceeds of the sale.

## **Who's Who Legal**

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory & Controversy for 2018.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

Ludwig Smith has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

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*It is important to note that the Board's case before the Tribunal was not based on the findings of the Supreme Court, but rather on the Appellant's failure to disclose the decision of the Supreme Court and the PCT findings to the Board, prior to the disclosure being made by CAANZ.*



The Appellant was aware of the fact that the proceeds lawfully belonged to the beneficiaries of HPT and that Mr Holzapfel had not consented to Canehire distributing the proceeds to any other party.

### **Impact of Supreme Court decision**

The Appellant was registered with the Chartered Accountants Australia and New Zealand body (CAANZ) and as a tax agent in terms of the Tax Agent Services Act 2009 (TAS Act). Based on the findings of the Supreme Court, the CAANZ revoked the Appellant's membership following a hearing by the CAANZ Professional Conduct Tribunal (PCT), on the basis that the Appellant's conduct breached certain CAANZ by-laws. In addition, the CAANZ sent a copy of the PCT's findings to the Tax Practitioners Board (Board), which administers the system set out in the TAS Act for the registration of tax agents.

In May 2016, the Board sought a written explanation from the Appellant in respect of the PCT's findings. This process was overtaken by the need for the Appellant to renew his registration as a tax agent. The Appellant's application for renewal of registration as a tax agent (Application) was considered by a committee of the Board. The committee rejected the Appellant's Application on the basis that he was not a 'fit and proper person' as required by the provisions of the TAS Act. The Appellant approached the Administrative Appeals Tribunal (Tribunal) to review the decision of the Board, which decision was ultimately upheld by the Tribunal. The Appellant then appealed to the Federal Court.

It is important to note that the Board's case before the Tribunal was not based on the findings of the Supreme Court, but rather on the Appellant's failure to disclose the decision of the Supreme Court and the PCT findings to the Board, prior to the disclosure being made by CAANZ. Also, the Tribunal accepted that the conduct of the Appellant (ie breach of fiduciary duties) (Relevant Conduct) that led to the findings was not related to his conduct as a tax agent.

### **Appeal to Federal Court**

The relevant provisions of the TAS Act that govern the criteria and procedure for registration as a tax agent are as follows:

- an individual, who is 18 years or older, is eligible for registration as a tax agent if the Board is satisfied that, *inter alia*, the individual is a fit and proper person;
- in deciding whether it is satisfied that an individual is a fit and proper person, the Board must have regard to, *inter alia*:
  - whether the individual is of "good fame, integrity and character";
  - whether the individual has been convicted of a serious taxation offence, an offence involving fraud or dishonesty or sentenced to a term of imprisonment; or
  - whether the individual has been penalised for being a promoter of a tax exploitation scheme.

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*The Federal Court found that it was not irrelevant for the Tribunal to have taken the Relevant Conduct into account, even though none of that conduct constituted an event in terms of the TAS Act.*



The Appellant contended that the Relevant Conduct was neither in respect of the provision of tax services to the public nor did it relate to any breach of standard of professional or ethical conduct as a registered agent. In other words, unless the Relevant Conduct fell within one of the categories as set out in the TAS Act, it was not relevant for the Tribunal to consider when deciding whether the Appellant was a 'fit and proper' person. Further, other than the allegations arising from the Relevant Conduct, the Appellant reiterated that there was no evidence of any other lack of "good fame, integrity and character" on his part.

Contrary to the above, the Board's position was that the construction of the TAS Act was such that it was necessary for the Board to consider the Relevant Conduct in deciding whether the Appellant was a 'fit and proper' person. The Tribunal stated that "the Relevant Conduct need not occur directly in the course of professional practice as a tax agent to impact adversely on the agent's fitness...Acts may be 'sufficiently closely connected' with the actual practice that they demonstrate the presence of qualities (such as dishonesty or deception) that are inconsistent with fitness and propriety to practice as a registered tax agent".

## Findings of Federal Court

The Federal Court found that:

- having regard to the provisions of the TAS Act, the eligibility for registration as a tax agent is not dependent upon the existence of particular criteria, but rather upon the Board's satisfaction as to the existence of those criteria. It does not mean that, to the extent that a specific criterion which affects registration is not present, the Board must be satisfied that an applicant is person of good fame, integrity and character and thus a 'fit and proper' person; and
- it was not irrelevant for the Tribunal to have taken the Relevant Conduct into account, even though none of that conduct constituted an event in terms of the TAS Act.

The Appellant was found not to be a 'fit and proper' person as "his conduct was inconsistent with the qualities of moral soundness, uprightness and honesty that one would expect of a tax agent. Such conduct was, and is, incompatible with the 'atmosphere of mutual trust' which underpins the relationships which tax agents have with their clients...While the conduct was concerned with dealings



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.

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*The above discussion, this judgment and the proposed amendments to the TAA confirm the universal notion that tax services are to be provided to the public in accordance with the appropriate standards of professional and ethical conduct.*



with the same property over an extended period of time, it is an oversimplification to describe the offending conduct as an isolated instance of lapse or error of judgment”.

#### **Conclusion**

It is interesting to note that, from a South African perspective, the 2018 Tax Administration Laws Amendment Bill has proposed an amendment to s240 of the Tax Administration Act, No 28 of 2011 (TAA) (which deals with the registration of tax practitioners) to include an additional requirement.

The proposed amendment provides that where a registered tax practitioner has not been tax compliant for an aggregate period of at least 6 months during the preceding 12 months and has failed to (i) demonstrate that he or she has been compliant for that period, or (ii) remedy the non-compliance, within the period specified in a notice delivered by the South African Revenue Service, the practitioner will be deregistered as a tax practitioner.

The above discussion, this judgment and the proposed amendments to the TAA confirm the universal notion that tax services are to be provided to the public in accordance with the appropriate standards of professional and ethical conduct. It is therefore imperative for a tax practitioner to be a person with competence and integrity, such that the public may entrust their tax affairs to him or her.

*Gigi Nyanin*



CDH's latest edition of  
**Doing Business in South Africa**  
**CLICK HERE** to download our 2018 thought leadership

# CUSTOMS & 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 & Excise environment since our last instalment:

1. Amendments to Schedules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):  
Schedule 2:  
The substitution of safeguard item 260.03/72.08/01.04, to exclude rebate items 460.15/7208.51/02.06 and 460.15/7208.51/03.06 from being subject to safeguard duty applicable to primary flat rolled steel classifiable in tariff subheading 7208.51 (up to and including 10 August 2019); and The substitution of safeguard item 260.03/72.08/01.04, to exclude rebate items 460.15/7208.51/02.06 and 460.15/7208.51/03.06 from being subject to safeguard duty applicable to primary flat rolled steel classifiable in tariff subheading 7208.51 (11 August 2019 up to and including 10 August 2020).  
Schedule 4:  
The insertion of rebate items 460.15/7208.51/02.06 and 460.15/7208.51/02.06 in order to create a rebate facility on primary flat rolled steel classifiable in tariff subheading 7208.51.
2. In our [Tax & Exchange Control Alert of 16 November 2018](#) we reported as follows:  
*"SARS issued a circular wherein external stakeholders were, among other things, advised*

*as follows (certain sections quoted from the circular):*

*SARS will be changing the IP addresses for AS2 and AS3 communication in live and test environments. The date for this has now been confirmed as 30 November 2018. The switchover is expected to take place from 22:00 and will last for approximately three hours.*

*The public DNS hostname for the SARS EDI Gateway connection will remain "EDIB2B.SARS.GOV.ZA".*

*For any support leading up to or during the changeover, you can email Carl Wilbers on [cwilbers@sars.gov.za](mailto:cwilbers@sars.gov.za) or call him on 012 422 4007.*

*It was later revealed that the implementation date and time has been changed from 30 November 2018 at 22h00 to 1 December 2018 at 10am for approximately 3 hours".*

It has now been revealed that the implementation time (not date) has been changed from 1 December 2018 at 10am to 1 December 2018 at 6pm for approximately three hours.

# CUSTOMS & 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 a notice dated 23 November 2018 that it has drafted amended Guidelines pertaining to the administration of rebate item 460.03/0207.14.9/01.07, which provides for a quota-linked rebate of the full anti-dumping duty on frozen bone-in cuts of the species Gallus Domesticus, classifiable in tariff subheading 0207.14.9, imported from or originating in the United States of America.

ITAC invited interested parties to submit comments on the Amended Guidelines.

ITAC encourages interested parties to familiarise themselves with the proposed changes in the Amended Guidelines and to submit comments during the comment period commencing on the publication date of the notice and ending on 21 December 2018. The intention of ITAC is to have the Amended Guidelines in effect for the new quota year (1 April 2019).

Enquiries: Mrs Amina Varachia, at Tel: (012) 394-3732, e-mail: [avarachia@itac.org.za](mailto:avarachia@itac.org.za); or Mr Alexander Amrein at Tel: (012) 394-3711, e-mail: [aamrein@itac.org.za](mailto:aamrein@itac.org.za).

3.2 Issued a notice on 23 November 2018 that it received the following applications concerning the Customs Tariff:

3.2.1 Notice 403 of 2018 (List 05/2018) was published in Government Gazette No. 41781 on 20 July 2018, for a review of the description of tariff subheading 6210.10.20 in Schedule 1 Part 1 to the Act, which reads as follows: "Disposable panties of fabrics of heading 56.03".

The review was initially published with a view to consider amending the abovementioned description of tariff subheading 6210.10.20, provided there are no local manufacturers. Newly submitted information at ITAC's disposal indicates that there is at least one local manufacturer of disposable underwear.

This notice serves to notify interested parties of the republication of the review, with an intention to amend the description of tariff subheading 6210.10.20 as follows: "Disposable underwear of fabrics of heading 56.03" and increase the rate of duty from free of duty to 40 per cent ad valorem.



# CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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



Representations should be submitted within four (4) weeks of the date of the notice.

Enquiries: Ref: 33/2017, Mr Chris Sako, at Tel: (012) 394-3669, Email: [csako@itac.org.za](mailto:csako@itac.org.za) or Mrs Ayanda Gandhi, at Tel: (012) 394-3672, Email: [endou@itac.org.za](mailto:endou@itac.org.za).

### 3.2.2 Increase in the general rate of customs duty on:

Flat-rolled products of iron or non-alloy steel, plated or coated with tin (tinplate), classifiable under tariff subheadings 7210.11, 7210.12.10, 7210.12.90, and 7212.10, from free of duty to 10% ad valorem.

Written representations must be made within four (4) weeks of the date of the notice.

Enquiries: Ref: 09/2018, Mr Njabulo Mahlalela, Ms P Busika, and Mrs N Mokou, Tel: 012 394 3684/3595/3627 or email: [nmahlalela@itac.org.za](mailto:nmahlalela@itac.org.za)/[pbusika@itac.org.za](mailto:pbusika@itac.org.za)/[nramphabana@itac.org.za](mailto:nramphabana@itac.org.za).

### 3.2.3 Increase in the rate of customs duty on certain tubes, pipes and hollow profiles, seamless of iron or steel classifiable under tariff subheadings 7304.19, 7304.23 and 7304.29.

Representations should be made within four (4) weeks of the date of the notice.

Enquiries: Ref: 09/2018, Mr. Tshepiso Sejamoholo, Mr. Mashudu Lukhwani, Tel: (012) 394 1605/3661 or email [tsejamoholo@itac.org.za](mailto:tsejamoholo@itac.org.za)/[mlukhwani@itac.org.za](mailto:mlukhwani@itac.org.za).

### 3.3 Issued a notice of initiation of an investigation into the alleged dumping of polyethylene terephthalate imported from the People's Republic of China dated 23 November 2018. It states (*inter alia*) as follows:

3.3.1 The International Trade Administration Commission accepted an application alleging that polyethylene terephthalate (PET) imported from the People's Republic of China (PRC) is being dumped in the Southern African Customs Union (SACU) market, causing material injury and threatening to cause material injury to the SACU industry concerned.

3.3.2 The applicant submitted sufficient evidence and established a prima facie case to enable ITAC to arrive at a reasonable conclusion that an investigation should be initiated on the basis of dumping, material injury, threat of material injury and causality.

# CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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



- 3.3.3 The product allegedly being dumped is PET, classifiable under tariff subheading 3907.6 originating in or imported from the PRC.
- 3.3.4 The period of investigation for purposes of determining the dumping margin is from 01 July 2017 to 30 June 2018. The period of investigation for purposes of determining the material injury is from 01 July 2015 to 30 June 2018.
- 3.3.5 In order to obtain the information it deems necessary for its investigation, ITAC will send non-confidential versions of the application and questionnaires to all known importers and exporters, and known representative associations. The trade representative of the PRC has also been notified. Importers and other interested parties are invited to contact ITAC as soon as possible in order to determine whether they have been listed and were furnished with the relevant documentation. If not, they should immediately ensure that they are sent copies. The questionnaire has to be completed and any other representations must be made within the time limit set out below.
- 3.3.6 The Senior Manager: Trade Remedies II, should receive all responses, including non-confidential copies of the responses, not later than 30 days from the date of the notice, or from the date on which the letter accompanying the abovementioned questionnaire was received. The said letter shall be deemed to have been received seven days after the day of its dispatch.
- 3.3.7 Late submissions will not be accepted except with the prior written consent of ITAC. ITAC will give due consideration to written requests for an extension of not more than 14 days on good cause shown (properly motivated and substantiated), if received prior to the expiry of the original 30-days period. Merely citing insufficient time is not an acceptable reason for extension. Please note that ITAC will not consider requests for extension by the Embassy on behalf of exporters.
- 3.3.8 Enquiries may be directed to the investigating officer, Mr Siphumelele Mkwanzazi at +27 12 394 3742 or Ms Portia Mathebula at +27 12 394 1456.

*Petr Erasmus*

## OUR TEAM

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



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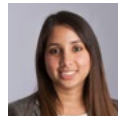
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