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TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

THE CLOUD OF DOUBT NO LONGER HANGING OVER DOUBTFUL DEBTS?

Following on from our previous tax alerts regarding the various proposed amendments pursuant to the draft Taxation Laws Amendment Bill, 2018 (draft TLAB) published for public comment on 17 July 2018, we discuss in this Tax Alert another significant proposed legislative amendment, specifically related to the allowance for doubtful debts set out in s11(j) of the Income Tax Act, No 58 of 1962 (Act).

CUSTOMS & EXCISE HIGHLIGHTS

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

CDH
CLIFFE DEKKER HOFMEYR

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In 2015, various discretionary powers afforded to the Commissioner of the South African Revenue Service (Commissioner) in the context of assessment provisions contained in the Act were removed in order to formalise the move towards income tax self-assessment in South Africa. This re-alignment was undertaken against the backdrop of international research performed as part of the study on the transition to income tax self-assessment, which confirmed that the international trend was to move away from administrative income tax assessment towards self-assessment and voluntary compliance.

One of the provisions which has been impacted by this was the doubtful debts allowance contained in s11(j) of the Act. Section 11(j) of the Act provides for a deduction of such amount that represents debts which are doubtful. The allowance is only made in respect of debts which would have been allowed as a deduction had they become bad. Importantly, s11(j) of the Act afforded the Commissioner a discretion to decide whether the debt was doubtful. Historically, the Commissioner in practice generally provided for an allowance of 25 per cent of the face value of doubtful debts. At times, this percentage may have been increased depending upon the facts and circumstances of the specific taxpayer.

Despite this long-standing practice, the key issue has always been how to manage the pressing need for certainty and equality of treatment within this area of the law given the discretionary powers afforded to the Commissioner. In particular, there has often been debate in respect of how one treats taxpayers with different facts and circumstances warranting different doubtful debt allowance percentages. For example, taxpayers who engage in various moneylending activities are in a different position to clients who do not engage in any credit lending activities with their customers.

In line with the removal of the remnants of the administrative assessment system, the Commissioner's discretion in respect of the doubtful debt allowance under s11(j) of the Act was to be deleted with effect from a date to be determined by the Minister of Finance. The intention behind the deletion and substitution of an amended s11(j) was that, in future, the allowance would be claimed according to certain criteria set out in a public notice issued by the Commissioner. The draft TLAB now proposes specifically inserting into the Act, certain criteria for determining the doubtful debt allowance as opposed to publishing the criteria by way of public notice.

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THE CLOUD OF DOUBT NO LONGER HANGING OVER DOUBTFUL DEBTS?

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This has recently become a hot topic of discussion and remains one of the most contentious areas of tax law.

The proposed amendments interestingly envisage separating the tax treatment between two defined categories of taxpayers, namely those using International Financial Reporting Standards (IFRS) 9 accounting standard for financial reporting purposes and those companies not using IFRS. Broadly this relates to a delineation between listed and unlisted companies, given that most public companies are obligated to utilise IFRS, although many private companies also utilise IFRS voluntarily in compiling their accounts.

In respect of companies utilising IFRS it is proposed that 25 per cent of the loss allowance relating to impairment as contemplated in IFRS 9, excluding lease receivables contemplated in IFRS 9 (because a deduction may be allowed for the lessor of leased assets in terms of s11(e) of the Act), be allowed as deduction if recognised for financial reporting purposes.

In respect of all other companies it is proposed that an age analysis of debt be used in this regard. As a result, it is proposed that 25 per cent of the face value of doubtful debts that are 90 days past due date be allowed as deduction. The allowances allowed in a year of assessment must be added back to income in the following year of assessment.

The further proposed amendments to the doubtful debts provisions build upon the insertion of a new s11(jA) of the Act dealing with doubtful debt allowances for "covered persons" defined in s24JB of the Act (in essence banks). Section 11(jA) of the Act provides for a more favourable doubtful debt allowance in the case of banks which range from an 85 per cent allowance down to a 25 per cent allowance depending on the level of impairment, in accordance with IFRS. The proposed amendment certainly brings clarity and certainty to this doubtful area of the law; however, it remains to be seen what the practical impact may be on various different taxpayers given different industries and facts and circumstances.

Notwithstanding the proposed amendments, there is also still some uncertainty as to what amounts to a "bad debt" as per s11(i) of the Act which is inextricably linked to the doubtful debt allowance set out in s11(j) of the Act. This has recently become a hot topic of discussion and remains one of the most contentious areas of tax law. Notwithstanding some of the case law already pronounced on this issue, there appears to be differences in interpretation of what constitutes a "bad debt" and clarification and certainty in this regard would also be most welcomed by many taxpayers.

Jerome Brink

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.

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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.

Herewith below selected highlights in the Customs & 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 Section 38 and s120, by the insertion of Rule 38.14A after Rule 38.14 with effect from 27 July 2018 relating to Southern African Customs Union Unique Consignment References;

2. Amendments to the Schedules to the Act (certain sections quoted from the SARS website):

    2.1 Schedule 4:

        2.1.1 The substitution of rebate item 460.03/0207.14.9/01.07 to increase the annual quota for bone-in cuts for the species Gallus Domesticus, frozen, classifiable in tariff item 0207.14.9 imported from or originating in the United States of America;

3. The Department of Agriculture, Forestry and Fisheries published the following notices in the Government Gazette:

    3.1 On 20 July 2018, which provide for establishments of statutory measures relating to:

        3.1.1 Number 734: "RECORDS AND RETURNS BY EXPORTERS, IMPORTERS, PROCESSORS AND PURCHASERS OF COTTON";

        3.1.2 Number 735: "REGISTRATION OF EXPORTERS, IMPORTERS, PROCESSORS, PRODUCERS AND PURCHASERS OF COTTON"; and

        3.1.3 Number 736: "DETERMINATION OF GUIDELINE PRICES: LEVY RELATING TO COTTON LINT".

    3.2 Number 747 on 27 July 2018, stating that the standards and requirements regarding control of the export of fresh cut flowers and fresh ornamental foliage is amended and shall come into operation seven days after publication of the notice;

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

4. The Department of Justice and Constitutional Development, by way of Notice 425 of 2018 issued by the Commissioner of the Commission of inquiry into tax administration and governance by the South African Revenue Service, has extended the deadline of the call for submissions to 31 August 2018.

   All interested parties were invited to direct written submissions, in hard copy or by email by no later than 31 August 2018, to the Secretary of the Commission at the address below:

   The Commissioner
   SARS Commission of Inquiry
   Hilton House, 2nd floor
   Brooklyn Bridge
   570 Fehrsen Street
   Brooklyn, Pretoria
   Email: commission@inqcomm.co.za
   Telephone: (012) 647 9486

5. SARS issued a circular dated 23 July 2018 wherein external stakeholders were advised as follows:

   "Customs introduced the CSK [Customs Sufficient Knowledge] programme for various Reporting of Conveyances and Goods (RCG) client types on 11 May 2018. The CSK is a Customs Control Act (CCA) requirement for certain client types for registration and/or licensing purposes.

   As the CCA has not yet been operationalised, clients were informed that the test was not mandatory and that they were encouraged to take part in the process in order to familiarise themselves with the new legislation.

   However, this week Customs leadership decided to place the CSK programme on hold until such time as the CCA goes live".

6. Notice 417 of 2018 was published in the Government Gazette on 27 July 2018 by the Department of Trade and Industry. It states, among other things, the following:

   "Emanating from the Economic Partnership Agreement (EPA) between the European Community and its Member States, of the one part, and the Southern African Development Community (SADC) EPA States, of the other, Article 34 of the EPA provides for safeguard action in defined circumstances.

   The International Trade Administration Commission of South Africa (the Commission) has drafted the attached reference and procedural guide pertaining to the application for safeguard action in terms of Article 34 of the EPA.

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CUSTOMS & EXCISE HIGHLIGHTS

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

All interested parties are invited to comment on the draft guidelines within 10 calendar days of the date of publication of this notice. The Commission will finalise the guidelines after considering all comments received.

Comments can be submitted to the Chief Commissioner, International Trade Administration Commission of South Africa, Private Bag X 753, Pretoria or delivered by hand to the DTI Campus (Block E), 77 Meintjies Street, Sunnyside, Pretoria, 0002.

Further information can be obtained from the Senior Manager: Trade Remedies I, Ms Carina Janse van Vuuren, at (012) 394 3594".

7. Please advise if additional information is required.

Petr Erasmus

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OUR TEAM

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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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