

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

“SUGAR TAX” TO BE INTRODUCED WITH EFFECT FROM 1 APRIL 2018

SARS recently confirmed by way of an announcement that it will begin collecting a new Health Promotion Levy, also known as the Sugary Beverages Levy (SBL) or “sugar tax”, with effect from 1 April 2018. The SBL is designed to support the Department of Health’s deliverables to decrease diabetes, obesity and other related diseases in South Africa.

ANOTHER RULING ON SHARE SCHEMES, BUT QUESTIONS REMAIN

The South African Revenue Service (SARS) published Binding Private Ruling 290 (Ruling) on 24 January 2018. The Ruling deals with the application of paragraph 38(1) of the Eighth Schedule to the Income Tax Act, No 58 of 1962 (Act), to the distribution of shares by a trust to certain beneficiaries in the context of an employee share scheme.

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The SBL was initially announced by National Treasury and the Minister of Finance in the February 2016 National Budget speech. After an extensive public consultative process with all relevant stakeholders, the SBL was formally legislated and forms part of the Rates and Monetary Amounts and Revenue Laws Amendment Act, No 14 of 2017 as passed in Parliament on 5 December 2017.

The rate pursuant to the SBL is fixed at 2.1 cents per gram of the sugar content that exceeds 4 grams per 100ml. The first 4 grams per 100ml are therefore levy free. In practice, SARS states that it will be paid in addition to any other customs and excise duty payable and imports will not be declared on separate bills of entry.

Importantly, sugar content means both the intrinsic and added sugar and other sweetening matter. Sugar content will be calculated on the sugar content as certified on a recognised test report from a testing facility accredited with the South

African National Accreditation System (SANAS) or the International Laboratory Accreditation Cooperation.

In the absence of such a valid test report, a deemed sugar content of 20 grams per 100 ml will be assumed. For powder and liquid concentrates, sugar content will be calculated on the total volume of the prepared beverage.

The next step in the rolling out of the SBL is the licensing and registration of those relevant manufacturers and producers who will be liable to pay it over to SARS. SARS has announced that the licensing and registration of manufacturers of sugary beverages will take place from February 2018. Importantly, only commercial manufacturers that produce sugary beverages with a total annual sugar content in excess of 500kg per year need to be licensed and pay the SBL. SARS states that non-commercial producers below this threshold will be expected to register but will not be subject to the SBL.

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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CONTINUED

We will have to wait and see whether the "sugar tax" has the intended positive effect in South Africa or whether it will merely act as another revenue collection apparatus.



While the stated intentions behind the introduction of the sugar tax are certainly to be commended, it will be interesting to monitor whether the introduction of the tax will have any actual material effect on consumer use patterns and concomitantly on the reduction of non-communicable diseases (NCDs) which it wishes to tackle. In this regard, the Policy Paper issued by National Treasury on 8 July 2016 titled "Taxation of Sugar Sweetened Beverages" expresses the opinion that it should have a positive effect and states as follows:

Globally, fiscal measures such as taxes are increasingly recognised as effective complementary tools to help tackle the obesity epidemic at a population level. Taxes/levies can play a key role

in correcting for market failures and act as a price signal that could influence purchasing decisions of consumers.

It should be noted that many countries have introduced a similar tax with mixed results and we will have to wait and see whether the "sugar tax" has the intended positive effect in South Africa or whether it will merely act as another mechanism for revenue collection. Further information regarding the SBL can be found at this link on the SARS website:

<http://www.sars.gov.za/ClientSegments/Customs-Excise/Excise/Pages/Sugary-Beverages-Levy.aspx>

Jerome Brink

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ANOTHER RULING ON SHARE SCHEMES, BUT QUESTIONS REMAIN

Paragraph 38 of the Eighth Schedule to the Act applies to disposals made by way of donation, disposals between connected persons that do not reflect an arm's length price and disposals where the consideration is not measurable in money.

In this Ruling, SARS unequivocally stated that paragraph 38(1) is not applicable to the distribution of the shares by the Trust to its beneficiaries.



The South African Revenue Service (SARS) published Binding Private Ruling 290 (Ruling) on 24 January 2018. The Ruling deals with the application of paragraph 38(1) of the Eighth Schedule to the Income Tax Act, No 58 of 1962 (Act), to the distribution of shares by a trust to certain beneficiaries in the context of an employee share scheme.

It appears from the Ruling that the applicant, being a local trust (Trust), held shares in a certain special purpose vehicle (SPV), being a local company. The SPV in turn held certain shares in a locally listed company (ListCo).

The beneficiaries of the Trust are employees of ListCo and its subsidiaries, as part of a scheme to facilitate participation of historically disadvantaged employees in owning shares in ListCo.

After the expiry of a certain lock-up period, and the repayment of the acquisition funding, the SPV distributed shares in ListCo to the Trust.

In terms of the rules of the scheme, the Trust was obliged to distribute the ListCo shares to the beneficiaries on certain vesting dates.

It appears to have been accepted that, upon distribution of the ListCo shares by the Trust to the beneficiaries, the market value of the shares would be included in their income in terms of s8C of the Act.

Without providing any specific details about the nature of the Trust, and the rights of the beneficiaries in respect of the income, assets or gains of the

Trust, the Trust appears to have been concerned about the possible application of paragraph 38(1) of the Eighth Schedule to the Act upon distribution of the ListCo shares to the beneficiaries.

Paragraph 38 of the Eighth Schedule to the Act applies to disposals made by way of donation, disposals between connected persons that do not reflect an arm's length price and disposals where the consideration is not measurable in money. Essentially, it deems the proceeds upon disposal in these circumstances to be equal to the market value of the asset.

On general principles, and specifically in terms of paragraph 11(1)(d) of the Eighth Schedule, the vesting by a trust of an asset in a beneficiary constitutes a disposal. Also, trusts and their beneficiaries are "connected persons" in terms of the definition in s1 of the Act. It is therefore in principle possible for paragraph 38 to apply where assets are distributed by a trust to its beneficiaries.

In this Ruling, SARS unequivocally stated that paragraph 38(1) is not applicable to the distribution of the shares by the Trust to its beneficiaries.

ANOTHER RULING ON SHARE SCHEMES, BUT QUESTIONS REMAIN

CONTINUED

Companies wanting to set up employee share schemes should seek expert advice in order to reduce the risk of incurring taxes at multiple levels of the structure.

This matter is, however, complicated because of the interaction between s8C of the Act and the rules contained in the Eighth Schedule (specifically paragraph 80). Over the past few years a number of changes have been made to the Act in order to provide for the interaction between s8C and the capital gains tax rules in the context of employee share schemes.

Companies wanting to set up employee share schemes should seek expert advice in order to reduce the risk of incurring taxes at multiple levels of the structure.

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Heinrich Louw and Louise Kotze



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