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TAX & EXCHANGE CONTROL **ALERT**

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High Court litigation against SARS: Changes coming?

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Customs & Excise Highlights

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

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High Court litigation against SARS: Changes coming?

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On 17 September 2019, the South African Revenue Service (SARS) released a Media Statement regarding the steps that SARS has taken in implementing the Nugent Commission (Commission) recommendations (Media Statement).

The Media Statement indicates that the Commissioner for SARS, Mr Edward Kieswetter, in a comprehensive presentation to Parliament's Standing Committee on Finance (SCOF) regarding the progress made in implementing the Commission's recommendations, highlighted certain actions that had been taken, including the fact that SARS will re-constitute its High Court Litigation Unit. The Media Statement notes that according to the Commissioner, SARS's High Court Litigation Unit had been broken up into regional entities, hampering the pace at which the unit functioned and that the process of re-constituting it would be activated in October 2019.

The announcement regarding the re-constitution of the High Court Litigation Unit, comes hot on the heels of a proposal made in the draft Tax Administration Laws Amendment Bill, 2019 (Draft TALAB), which was released on 21 July 2019. In terms of the Draft TALAB, it was proposed that the notice requirement in s11(4) of the Tax Administration Act, No 28 of 2011 (TAA) should be amended. The notice requirement must be met before taxpayers can institute proceedings against SARS in the High Court.

We discuss the current position and matters related to the proposed amendment below.

Current position

In terms of s11(4) of the TAA, unless the court otherwise directs, no legal proceedings may be instituted in the High Court against SARS unless the applicant has given SARS written notice of at least one week of the applicant's intention to institute legal proceedings.

Proposed amendment and reason

In terms of clause 25 of the Draft TALAB, it is proposed that s11(4) of the TAA is amended to change the period of "one week" to "21 business days".

The Memorandum on the Objects of the Draft TALAB (Memorandum) states that the *"...one week notice period has proven to be impractical in practice to give effect to the rationale for the notice, i.e. to enable SARS an opportunity to investigate the matter further and to decide how to resolve the dispute, for example by exploring a dispute resolution process, thereby avoiding litigation at the public's expense. The proposed amendment increases the current one week period to 21 business days in order to afford SARS sufficient time to investigate the matter to see if it can be resolved without resorting to litigation, unless a competent court directs otherwise, for example in the case of urgency. In comparison, for example, the Institution of Legal Proceedings Against Certain Organs of State Act, 2002,* [Act 40 of 2002] *provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state six months written notice, from the date the debt became due, of his or her or its intention to institute the legal proceedings in question."*

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High Court litigation against SARS: Changes coming?*...continued*

CDH's Tax & Exchange Control Practice made submissions to National Treasury regarding the proposed amendment.

Problems with the proposed amendment

Considering the provisions of the TAA and what is occurring in practice, the proposed amendment could potentially create a number of problems. CDH's Tax & Exchange Control Practice made submissions to National Treasury regarding the proposed amendment.

In practice and based on existing case law, it appears that the High Court is mostly approached in cases where SARS has rejected an application to suspend payment of tax in terms of s164 of the TAA (SOP Application) or has refused to pay a refund in terms of s190 of the TAA. An example of a case where SARS refused to pay a refund is the matter of *Top Watch (Pty) Ltd v The Commissioner for the South African Revenue Service:* 80 SATC 448, which we discussed in our Tax & Exchange Control Alert of 13 July 2018.

In the case of a SOP Application being rejected, s164 of the TAA states that SARS may institute enforcement proceedings to recover a tax debt, once 10 business days have passed since the date the application was rejected. Therefore, it is crucial that a taxpayer whose SOP Application has been rejected, has the option to institute urgent proceedings in the High Court to review SARS's decision before the period of 10 business days has elapsed. Within this context, changing the period in s11(4) of the TAA to 21 business days would render the section superfluous and useless, as SARS might have already by that time issued a third-party instruction in terms of s179 of the TAA, pursuant to which funds would be automatically deducted from the taxpayer's bank account.

Within the context of refunds and applications in terms of s190 of the TAA, the issue is that any delay in the receipt of a refund could have a significant adverse effect on a taxpayer's cash flow and ability to conduct business. As stated in the Memorandum, the justification for the longer notice period is based on the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, which provides for a six-week notice period.

Despite what is stated in the Memorandum, there is a fundamental difference between litigation against the State outside the context of tax proceedings and the institution of High Court proceedings against SARS. The Memorandum acknowledges that in terms of Act 40 of 2002, it is the creditor that must give notice before proceedings are instituted against the State. However, in the context where a SOP Application is rejected, SARS is the creditor that is seeking payment of the tax debt, and not the taxpayer which seeks to review SARS's decisions.

Furthermore, where the dispute pertains to the payment of a refund in terms of s190, one is dealing with a liquidated debt that is not paid, but which is a claim that has already been proven, unless it is being verified by SARS in terms of s190(2). On the contrary, Act 40 of 2002 mostly applies in cases where the damages suffered first need to be proven by the relevant individual and one is mostly not dealing with a liquidated claim and the individual is not entitled to any relief, until the claim in question has been proven.

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High Court litigation against SARS: Changes coming?*...continued*

Whilst the proposal to revise the notice period to 10 business days is better than the original proposal to amend the notice period to 21 business days, it may still not be ideal.

Submissions by the public and response

Following receipt of written submissions from the public on the Draft TALAB, workshops hosted by National Treasury regarding the proposed amendments in the Draft TALAB and parliamentary hearings that took place on 10 September 2018, National Treasury gave a presentation to the SCOF (Presentation).

The Presentation dealt with, amongst other things, comments received from the public regarding the proposed amendment to s11(4) of the TAA and National Treasury's response thereto. It appears that National Treasury has heeded some of the public comments received on the proposed amendment as according to the Presentation, National Treasury has decided to revise the one-week notice period to a notice period of 10 business days and indicates that "the situation will be monitored".

What next?

Whilst the proposal to revise the notice period to 10 business days is better than the original proposal to amend the notice period to 21 business days, it may still not be ideal. In the case of SOP Applications that are rejected, the issues highlighted above may still arise. However, it should be noted that the proposed amendment will only come into effect if it is retained in its current form and passed by Parliament.

SARS's announcement regarding the re-constitution of its High Court Litigation Unit places the proposed amendment to s11(4) of the TAA in a different context. Considering the issues that the proposed amendment may still cause, one has to question why the amendment was proposed while in the background, SARS was already taking steps to address the issues raised in the Memorandum.

It remains to be seen whether the revised proposal to amend the notice period will become law, but the situation will certainly be monitored closely.

Louis Botha

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Customs & Excise Highlights

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:

Amendments to the Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):

1. The insertion of draft rule 107A aims to ensure control of the supply chain in the tobacco industry. The rule provides requirements in respect of tobacco leaf threshers. Tobacco leaf threshers are required to register their factories with the Commissioner and keep records for purposes of inspection by the Commissioner.

   The following forms are included in the draft:

   - DA 185; and
   - DA 185.4A17.

   Due date for comments is 27 September 2019 and may be sent to C&E_legislativecomments@sars.gov.za.

2. Regarding the environmental levy in respect of carbon tax imposed in terms of the Carbon Tax Act, No 15 of 2019 (Carbon Tax Act), the following was published:

   2.1 DA 185 – Application form: Registration / licensing of customs and excise clients;

   2.2 DA 185.4B2 – Licensing Client Type 4B2: Manufacturing Warehouse;

   2.3 DA 180 – Environmental Levy Return for Carbon Tax;

   2.4 DA180.01A.1 – Fuel combustion stationary source;

   2.5 DA180.01A.2 – Fuel combustion non-stationary source;

   2.6 DA 180.01B1 – Fugitive (Oil and natural gas);

   2.7 DA 180.01B2 – Fugitive (Coal Mining and Handling);

   2.8 DA 180.01C – Industrial process source;

   2.9 DA 180.02 – Allowances;

   2.10 Completion notes to form DA 180 and annexures; and

   2.11 Comment sheet.

   Explanatory Note: Draft rules have been inserted for implementation of the carbon tax, to provide details on the envisaged carbon tax administration, including the registration of clients, licensing of emissions facilities, carbon tax environmental levy accounting and application of allowances as rebates, all of which need to be synchronised with the essential systems development.

   The secondary carbon tax legislation will therefore be concluded before the obligations of taxpayers will arise in respect of licensing in early 2020 and submission of accounts and payments in July 2020. The effective date of this legislation will nonetheless be applied retrospectively to 1 June 2019 when the carbon tax took effect.

   Comments can be submitted to C&E_legislativecomments@sars.gov.za, which are due on 11 October 2019.

3. Amendment to rules 49A.01, 49B.10(9)1 and 49B.10(9)9 in relation to preferential tariff treatment of goods.

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Customs & Excise Highlights...*continued*

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

1. Regarding the environmental levy in respect of carbon tax imposed in terms of the Carbon Tax Act:
   - 1.1 Draft amendment to Part 1 of Schedule No. 1 – in order to insert the provision of carbon emissions tax;
   - 1.2 Draft amendment to Part 3F of Schedule No. 1 – to provide for the environmental levy on carbon emissions; and
   - 1.3 Draft amendment to Part 6 of Schedule No. 6 – to provide for rebates and refunds on carbon tax.

   Comments can be submitted to technicaltariff@sars.gov.za, which are due on 11 October 2019.
2. The amendment of General Note G to Schedule 1 to insert the abbreviation and symbol "CO^2e" to mean CO^2 equivalent. The abbreviation of "t" as currently contained in General Note G is expanded to read as ton/tonne. The tonne is amended to align with the wording within the Carbon Tax Act.
3. The following amendments to Schedule 1 Part 1:
   - 3.1 Fish classifiable in tariff subheadings 0302.13, 0302.14, 0303.14 and 0305.41, in Section A, Annex II, listed as staging category "B*" is reduced to a preference margin of 17% of the most favoured nation (MFN) rate of duty;
   - 3.2 Fish in Chapters 3 and 16, in Section A, Annex II, listed as staging category "C*" is reduced to a preference margin of 50% of the MFN rate of duty;
   - 3.3 Requests from the South African Pecan Nut Producers Association for the creation of separate tariff subheadings to provide for Pecan Nuts classified in tariff subheading 0802.90;
   - 3.4 Requests from the Western Cape Tourism, Trade and Investment Promotion Agency for the creation of separate tariff subheadings for Rooibos tea classifiable in tariff subheading 1212.99;
   - 3.5 Request from PG Bison (Pty) Ltd for the creation of new tariff subheadings for particleboard, medium density fibreboard and surface-decorated paper classifiable in tariff subheadings 4410.11, 4411.12, 4411.13 and 4811.59;

Customs & Excise Highlights...*continued*

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3.6 Request from the South African Footwear and Leather Industries Association for the creation of separate tariff subheadings for footwear classifiable in Chapter 64; and

3.7 Request from the Southern African Customs Union for the creation of 8-digit tariff subheadings classifiable under tariff subheadings 7104.20 and 7104.90 to differentiate between rough or synthetic diamonds and other synthetic gemstones.

4. The following amendments to Schedule 4:

4.1 Note 5 in Schedule 4 is being amended to substitute the reference to form DA 331 which was replaced with form TC-01 as published in Government Gazette No. 35259 dated 20 April 2012. Form TC-01 is a traveller card used by travellers at ports of entry to declare personal and household effects; and

4.2 As a consequence of the merging of departments, rebate items 409.00, 460.01/03.04/01.04, 460.01/04.00/01.02, 460.01/04.09/01.04, 460.02/00.00/01.00, 460.02/1001.9/0105, 460.02/12.05/01.04, 460.03/0207.14.9/01.07 and 460.25 are being amended to change the name of a government department from the Department of Agriculture, Forestry and Fisheries to Department of Agriculture, Land Reform and Rural Development.

5. In Schedule 5, provisions relating to the Motor Industry Development Programme (MIDP) were replaced with the Automotive Production and Development Programme (APDP) that came into effect on 1 January 2013. The provisions of MIDP were in place from 2005 up to and including 31 December 2012. Refund items 537.00 and 537.02/87.00/01.02 are being deleted, as they were applicable to MIDP.

6. The following amendments to Schedule 6:

6.1 Note (l)(iii) in Part 3 of Schedule 6 is being amended to change the name of a government department from the Department of Mineral and Energy Affairs to the Department of Mineral Resources and Energy; and

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Customs & Excise Highlights...*continued*

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6.2 Rebate items 672.01, 672.01/105.10/01.01 and 672.01/105.10/02.01 are being deleted as they have become redundant. The new multi-purpose products pipeline government project was in place until 31 March 2012.

The amendments to Schedules 1, 4, 5 and 6 of the Act are for implementation on 1 January 2020.

Notice issued by the Economic Development Department

1. The Economic Development Department has published a notice on 16 September 2019 providing as follows (certain sections quoted from the notice):

   1.1 The purpose of these regulations is to prescribe administrative fees that are payable by an applicant when applying to Import and Export Control for a permit.

   1.2 The initial amounts of the administrative fees payable by an applicant for a permit issued by Import and Export Control are as follows:

   1.2.1 Import permit: R900; and

   1.2.2 Export Permit: R900.

   1.3 Comments to be submitted to: Ms Linda Herbst at LHerbst@economic.gov.za within 14 days from the date of publication of the notice.

SARS notice

SARS advised that applications for renewal of licences (including removers in bond and clearing agents) can now be done at the Alberton office. The application for renewal should reach SARS 30 days prior to the expiry date of the licence and the turnaround time for renewal applications is 10 business days.

Notice issued by the Department of Trade and Industry

1. The Department of Trade and Industry issued the following notice on 6 September 2019, effective within 6 months thereof in terms of the National Regulator for Compulsory Specifications Act, No 5 of 2008, as amended by the Legal Metrology Act, No 9 of 2014. It states, *inter alia,* as follows:

   1.1 Application for official inspection and approval of the product(s) shall be made to the NRCS for every consignment of canned meat products which are imported into South Africa;

   1.2 In the case of imported products, a factory/processing number/code applicable in the country of origin shall be made available to the NRCS; and

   1.3 Imported canned meat products must originate from a facility approved for export in the country of origin and have the applicable permits as required by Department of Agriculture.

Please advise if additional information is required.

Petr Erasmus

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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