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TAX & EXCHANGE CONTROL ALERT

IN THIS
ISSUE

MONEY IN THE BAG – AN INTERESTING JUDGMENT ABOUT THE CARRYING OF FOREIGN CURRENCY

In terms of South African law, if a person is carrying foreign currency on his person while entering or leaving South Africa, there are certain rules and regulations he must abide by.

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MONEY IN THE BAG – AN INTERESTING JUDGMENT ABOUT THE CARRYING OF FOREIGN CURRENCY

In terms of the application, the Applicant applied for an order that the South African Revenue Service (SARS) return to the Applicant an amount of US Dollars (approximately USD525,000) that had been seized from the Applicant at the Oliver Reginald Tambo International Airport (OR Tambo).

By way of explanation, the Applicant advised that the Foreign Currency was intended to purchase cell phones in Dubai for the purpose of his trade.

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On 20 July 2018, in the matter of *Faisal Abid v The South African Revenue Services* (Case No: 51313/2017) (as yet unreported), the Gauteng Division of the High Court, Pretoria (Court) handed down judgment in an urgent application brought by Faisal Abid (Applicant). In terms of the application, the Applicant applied for an order that the South African Revenue Service (SARS) return to the Applicant an amount of US Dollars (approximately USD525,000) that had been seized from the Applicant at the Oliver Reginald Tambo International Airport (OR Tambo).

In its judgment, the Court referred to various pieces of legislation, including the Customs and Excise Act No 91 of 1964 (CEA) and the Exchange Control Regulations, 1961 (Excon Regulations), which were promulgated in terms of the Currency and Exchanges Act No 9 of 1933. The main focus of this article is on how the Court took into account South Africa's exchange control rules in reaching its judgment although a large part of the judgment is focused on the customs and excise rules that the Applicant had to comply with. Pursuant to our discussion of the case, we also discuss some of South Africa's exchange control rules that one should keep in mind when carrying foreign currency and when importing goods from abroad.

Facts

On 5 July 2017, the Applicant was detained at OR Tambo by officials in the employ of SARS.

The Applicant had intended to board a flight to Dubai (after having arrived at OR Tambo from Mozambique) and whilst in transit (commonly known as "no man's land"), the Applicant was questioned regarding the contents of the luggage he carried with him. In response to the questioning, the Applicant indicated that he was in possession of USD100,000. He subsequently changed his version, firstly saying that he had USD200,000 on his person and then saying he had USD300,000. Following further questioning, a resultant search of the Applicant's luggage and a physical counting of the amount he was carrying, it transpired that the Applicant had in his possession USD501,332 (Foreign Currency).

By way of explanation, the Applicant advised that the Foreign Currency was intended to purchase cell phones in Dubai for the purpose of his trade. The Applicant also contended that he was under no obligation to declare the Foreign Currency to the South African customs officials as it was in transit and therefore had never entered South Africa.

MONEY IN THE BAG – AN INTERESTING JUDGMENT ABOUT THE CARRYING OF FOREIGN CURRENCY

CONTINUED

In terms of Regulation 3(1) of the Excon Regulations...no person shall, without permission granted by Treasury or a person authorised by the Treasury...take or send out of the Republic any bank notes, gold, securities or foreign currency.



The currency was seized by the SARS official in terms of s88(1)(a) and s113(8)(a) of the Customs and Excise Act, No 91 of 1964 (CEA) and the Applicant was handed over to the South African Police Services (SAPS) and detained at the Germiston Police Station. The National Prosecuting Authority (NPA) halted the Applicant's prosecution pending further investigation by the SAPS and the Applicant brought an urgent application seeking an order to compel SARS to release the Foreign Currency that had been seized.

Judgment

In coming to its finding on whether or not to grant the order sought by the Applicant, the Court considered the following pieces of legislation:

- The CEA;
- The Excon Regulations;
- The Prevention of Organised Crime Act, No 121 of 1998 (POCA);
- The Customs Control Act, No 31 of 2014 (CCA);
- The Customs and Excise Amendment Act, No 32 of 2014 (CEAA); and
- Legislation in Mozambique and Dubai pertaining to the carrying and declaration of foreign currency on one's person, when entering or leaving that country.

Pursuant to considering the above, the Court stated that, among others, the following legal principles had to be considered:

- Every person who enters South Africa is required to declare, amongst others, goods that are prohibited and goods

that were purchased abroad and in respect of which no duty has been paid. Furthermore, any person who leaves South Africa is required to declare all goods which are intended to be taken beyond the borders of South Africa.

- The failure to truthfully declare the aforementioned goods constitutes an offence.
- An official is empowered to detain any goods while such goods are under customs control in order to establish whether they are liable for forfeiture.
- In terms of Regulation 3(1) of the Excon Regulations, subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by Treasury or a person authorised by the Treasury, and in accordance with such conditions as the Treasury or such authorised person may impose, take or send out of the Republic any bank notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere. One should note that the South African Reserve Bank (SARB) is a person authorised by the Treasury.
- According to the Court, under Mozambican law, where a person carries currency worth more than USD5,000 in cash or travellers' cheques, he must declare the currency to the customs authorities of Mozambique. Furthermore, Mozambican law also states that where foreign currency is used to make payment for imports, it must

MONEY IN THE BAG – AN INTERESTING JUDGMENT ABOUT THE CARRYING OF FOREIGN CURRENCY

CONTINUED

The Court ultimately held that the customs officials had acted within the scope of their powers when the currency was seized and that the Applicant had failed to show sufficient cause for the Foreign Currency to be released.”



be done with the authorisation of the competent authority in Mozambique, if it is legally required.

- According to the Court, under the law of the United Arab Emirates (UAE), passengers travelling out of or entering the UAE with more than AED100,000 (one hundred thousand dirham) in cash or an amount equivalent to this in any other currencies or other financial instruments, must declare the amount at customs.

The Court found that the Applicant and the Foreign Currency were subject to customs control and that the customs officials were entitled to approach him and search his luggage, when they suspected that he was acting unlawfully.

As the Applicant was found with USD501,332 and the considering the Mozambican laws referred to above, in the Court's view, the Applicant would have been required to declare the currency to customs officials in Mozambique. However, it became apparent that the Applicant had failed to make such a declaration as he was unable to provide the documentary proof to support any contention that the declaration had been made. The Applicant's failure to produce evidence of his compliance with the

Mozambican regulations also created doubt regarding his intention to declare the Foreign Currency upon entering Dubai as such a declaration would likely be impossible without the supporting documentation from Mozambique.

The Court ultimately held that the customs officials had acted within the scope of their powers when the currency was seized and that the Applicant had failed to show sufficient cause for the Foreign Currency to be released. The Applicant's application was accordingly rejected.

Discussion and practical issues to consider

Although the Applicant in this matter had originally departed Mozambique for Dubai as opposed to originally departing from South Africa, the facts of the matter provide a useful reminder of South Africa's exchange control laws that would have to be complied with where a person carries foreign currency on his person when travelling abroad, or where a person intends to import goods to South Africa.

In its capacity as a person authorised by the Treasury to issue exemptions to the Excon Regulations, the SARB has issued the Currency and Exchanges Manual for Authorised Dealers (AD Manual), which

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MONEY IN THE BAG – AN INTERESTING JUDGMENT ABOUT THE CARRYING OF FOREIGN CURRENCY

CONTINUED

Where a person wishes to import goods to South Africa and payment for such goods takes place in foreign currency, the person must comply with sB.1 of the AD Manual.



sets out, among other things, when an exemption to Regulation 3(1) of the Excon Regulations applies. In terms of sB.11(B) of the AD Manual, residents, including foreign nationals, non-residents and visitors are permitted to export up to R25,000 when leaving South Africa, but the AD Manual does not expressly state whether a person may also export foreign bank notes equal to the value of R25,000. It simply states that authorised dealers may only export foreign bank notes to their correspondents abroad, if they obtain prior approval from the SARB.

In practice, where a person makes use of their annual R1 million single discretionary allowance (SDA) to purchase or acquire foreign currency for a specific purpose, it is possible that an authorised dealer will be unwilling to provide the person with bank notes worth more than R25,000, pursuant to what is stated in sB.11(B) referred to above. We discussed the rules pertaining to the SDA in our [Tax and Exchange Control Alert of 6 October 2017](#).

Where a person wishes to import goods to South Africa and payment for such goods takes place in foreign currency, the person must comply with sB.1 of the AD Manual. In respect of payment for imports, the AD Manual states that foreign currency may be provided by an authorised dealer to a person to pay for the following:

- The actual price of imported goods;
- *bona fide* freight charges;
- insurance cover;

- buying commissions and retainer fees due to agents, provided that the rate of commission or fee is normal in the particular trade concerned;
- other incidental charges incurred in the purchase and shipment of the goods and/or cancellation of orders, but not included in the actual price; and/or
- interest payments of up to the applicable base rate plus 3 per cent for credit extended shorter than one year.

Authorised dealers will provide importers with foreign currency to make the above payments, where the importer can provide the authorised dealer with the requisite documentation, including commercial invoices issued by the foreign supplier and a consignee's copy of the prescribed SARS Customs Declaration.

Importers must also keep in mind that they have obligations under Regulation 12 of the Excon Regulations. Regulation 12 states, among other things, that if the purchased goods have not been consigned to South Africa within four months from the date on which payment was made, the person must within 14 days after expiry of the four month period, declare to the SARB that the goods have not been consigned, pursuant to which the SARB may instruct the person to assign his right to the said goods, to the SARB. The person will be paid an amount for the assignment, which will not be less than the amount realised, after deducting the costs of realisation.

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