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TAX & EXCHANGE CONTROL ALERT

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Binding Private Ruling: Roll-over relief can also apply to transactions involving non-resident companies

The Income Tax Act, No 58 of 1962 (Act) provides for roll-over relief in respect of any capital gains that would normally be realised pursuant to the disposal of an asset, provided the requirements of the relevant roll-over relief provision in the Act are met.

Customs & Excise Highlights

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

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Binding Private Ruling: Roll-over relief can also apply to transactions involving non-resident companies

The interplay between the provisions in the Act pertaining to roll-over relief and those provisions regarding the imputation of tax to resident companies in respect of the income and capital gains of related foreign companies was recently considered in Binding Private Ruling 325 (Ruling).

The Income Tax Act, No 58 of 1962 (Act) provides for roll-over relief in respect of any capital gains that would normally be realised pursuant to the disposal of an asset, provided the requirements of the relevant roll-over relief provision in the Act are met. For example, in terms of s47 of the Act, transactions relating to the liquidation and winding-up of companies, can qualify for roll-over relief so that the capital gains liability that may arise in the normal course of the transaction will be deferred and no capital gains tax (CGT) will be payable at the time that the transaction is concluded.

The interplay between the provisions in the Act pertaining to roll-over relief and those provisions regarding the imputation of tax to resident companies in respect of the income and capital gains of related foreign companies was recently considered in Binding Private Ruling 325 (Ruling), issued by the South African Revenue Services (SARS) on 23 August 2019. The Ruling examined both a liquidation distribution (in terms of s47 of the Act) and an amalgamation transaction (in terms of s44 of the Act) between non-resident companies. We discuss the liquidation distribution aspect of the Ruling below.

The Group Structure

The applicant in the Ruling is a company that is resident in South Africa (Applicant). The Applicant is a 100% limited partner in a foreign registered limited partnership (Partnership A), which in turn, is a 100% limited partner in a further foreign registered limited partnership (Partnership B).

Both partnerships constitute "foreign partnerships" as contemplated in paragraph (a) of the definition of "foreign partnership" in s1 of the Act. Therefore, they are fiscally transparent for South African tax purposes and any income received by or accruing to them is taxable in the hands of the Applicant.

Partnership B holds 100% of the shares in two non-resident companies, Company A and Company B, and Company A holds 100% of the shares in another non-resident company, Company C. Companies A, B and C are all controlled foreign companies (CFCs) in relation to the Applicant in terms of s9D of the Act.

The Proposed Liquidation Distribution Transaction

In an attempt to rationalise its offshore investments so as to have only one operating company in the foreign jurisdiction, the Applicant proposed a two-step transaction. The first of these steps involved a liquidation distribution.

It was proposed that Company A would dispose of its shareholding in Company C, as well as its business undertaking as a going concern, to Partnership B. All of Company A's assets and liabilities would be transferred to Partnership B and no consideration would be paid in respect of the disposal.

Following the disposal, Company A would be wound-up and dissolved and its shares would be cancelled.

It was intended that the disposal qualified as a "liquidation distribution" as provided for in paragraph (b) of the definition contained in s47(1) of the Act.

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Section 47(1)(b) of the Act defines a “liquidation distribution” in respect of a CFC, thereby providing the requirements that must be met in order to qualify for the roll-over relief contemplated in this section.

Applicable Principles

Section 47(1)(b) of the Act defines a “liquidation distribution” in respect of a CFC, thereby providing the requirements that must be met in order to qualify for the roll-over relief contemplated in this section. These requirements can be summarised as follows –

1. There must be a disposal of assets to the company’s shareholders in anticipation of, or in the course of, the liquidation of the company;
2. The shareholders to whom the assets are disposed must constitute a holding company which is either –
 - (i) a resident company which forms part of the same group of companies; or
 - (ii) a CFC in relation to any resident company;
3. Immediately before the transaction, each of the shares in the liquidating company that are held by the holding company must be held as capital assets;
4. Immediately after the transaction, where the holding company is a CFC, more than 50% of the equity shares in the holding company must be directly or indirectly held by a resident; and
5. The liquidating company must, within 36 months after the date of distribution, take the necessary steps to wind-up or deregister the company.

To the extent that the transaction pertains to a foreign company, two further provisions of the Act must be considered:

- Section 9D of the Act requires the imputation of the net income of a foreign company to a resident company to the extent that the foreign company is a CFC in relation to the resident company.
- Section 9H of the Act provides for the emigration of companies, including where a non-resident company constitutes a CFC prior to a transaction and subsequently is no longer a CFC. This section deems such company to have disposed of all of its assets on the date immediately prior to the day on which the CFC ceases to be a CFC and to have reacquired such assets the following day. This deemed disposal may result in CGT being payable by the resident company to whom the income of the now former CFC is imputed.

The Ruling

The Ruling that SARS issued was subject to the following conditions and assumptions –

- 1) The shares held in Companies A, B and C are all held as capital assets by the respective shareholders of these companies;
- 2) The shares in Company C that will be acquired in this step of the transaction will be acquired as capital assets;

Binding Private Ruling: Roll-over relief can also apply to transactions involving non-resident companies...continued

Based on the assumptions, SARS ruled that, in terms of step one of the proposed transaction, the roll-over relief provided for in terms of s47 of the Act applies and that no tax liability arises in terms of s9D and s9H of the Act.

- 3) The base cost and tax costs of the assets that will be transferred by Company A to Partnership B (other than the shares held in Company C) will not be less than the market values of the assets at the time of the implementation of the transaction;
- 4) The liabilities assumed by Partnership B will consist of qualifying debt only;
- 5) The deemed profit distribution that will arise under the foreign jurisdiction's law between Company A and Partnership B will not be deductible by Company A in the determination of its tax on income; and
- 6) Company A will, within a period of 36 months after the date of the liquidation distribution, or such further period as the Commissioner may allow, take the steps as contemplated in s41(4) to liquidate, wind-up or deregister.

Specifically, SARS found that neither Company A nor the Applicant will be subject to tax as a consequence of the implementation of step one of the proposed transaction and that the imputing provisions of s9D and the deeming provisions in s9H do not apply.

Comment

This Ruling illustrates how the roll-over relief provided for in s47 of the Act may apply to liquidation distributions involving non-resident companies, such as CFCs. The application of s47 to the disposals of the CFC and the fact that no CGT liability arises as a result of s9D and s9H of the Act, garners a significant benefit for the resident company that no longer holds shares in the non-resident company that was formerly a CFC in relation to it.

Louise Kotze and Louis Botha

Based on the assumptions, SARS ruled that, in terms of step one of the proposed transaction, the roll-over relief provided for in terms of s47 of the Act applies and that no tax liability arises in terms of s9D and s9H of the Act.



Customs & Excise Highlights

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

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

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

1. In Schedule 4, the substitution of rebate item 460.03/0207.14.9/01.07 in order to increase the annual quota for bone-in cuts of the species *Gallus Domesticus*, frozen and imported from or originating in the United States of America;
2. Draft amendments to Schedules 4 and 6 to the Act and Schedule 1 to the Value Added Tax Act, No 89 of 1991 (VAT Act):
 - 2.1 The draft amendments are proposed to rebate and refund items 412.09/00.00/01.00, 495.00/00.00/01.00, 497.01/00.00/01.00, 624.50/00.00/01.00, 634.03/00.00/01.00, 670.10/00.00/01.00, 680.02/00.00/02.00 and 690.01/00.00/01.00 in Schedules 4 and 6 to the Act, to exclude duty rebates in circumstances where damage, destruction or loss of goods as contemplated in those items occurs due to robbery or theft. SARS states that these are in line with an international tendency to not allow duty rebates in cases of robbery or theft, the rationale being that the amount of any duty payable should be covered by an insurance policy;

- 2.2 Amendment to item no. 412.09/00.00/01.00 of Schedule 1 to the VAT Act as a consequence of the amendment of rebate item 412.09/00.00/01.00 in Schedule 4 to the Act;
- 2.3 The draft amendment is likely a result of the judgment in *SARS v Encarnacao N.O.* (543/2017) [2018] ZASCA 71 (29 May 2018) in the Supreme Court of Appeal reported earlier in relation to what occurrences fall within *vis major* and the meaning of 'such goods did not enter into consumption' in the current item(s); and
- 2.4 Due date for comments is 11 September 2019 and may be sent to technicaltariff@sars.gov.za.

The International Trade Administration Commission (ITAC)

1. ITAC has received the following applications concerning Customs Tariff (notice dated 24 August 2019) (certain sections quoted from the notices):
 - 1.1 Rebate of customs duty on sodium hydroxide (caustic soda), in aqueous solution, classifiable in tariff subheading 2815.12, for the manufacture of semi-chemical fluting paper, in rolls or sheets, classifiable in tariff 4805.11, in such quantities, at such times and under such conditions as the International Trade Administration may allow by specific permit.

Customs & Excise Highlights...continued

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

[Ref no: 27/2017, Enquiries: Email: Ms. Elizabeth Kekana, Fax: (012) 394 4668, email: ekekana@itac.org.za, and Mr Nkulana Phenya, Fax: (012) 394-4677; Email: nphenya@itac.org.za].

- 1.2 Review of the general rate of customs duty on coated steel, classifiable under tariff subheadings 7210.41, 7210.49, 7212.30, 7210.61, 7210.90, 7225.99, 7210.70 and 7212.40.

Ref: 13/2019, Enquiries: Mr. Njabulo Mahlalela/Ms. Lufuno Maliaga. Tel: (012) 394-3684/3835 or email nmahlalela@itac.org.za/lmaliaga@itac.org.za.

Representations should be submitted to ITAC within four weeks of the date of the notice.

2. ITAC has published a notice (dated 23 August 2019) in relation to:
 - 2.1 Initiation of an investigation into the alleged circumvention through country hopping from Saudi Arabia and the United Arab Emirates (UAE) to Egypt of clear float glass with a thickness of 3mm to 6mm classifiable under tariff subheadings 7005.29.17, 7005.29.23, 7005.29.25 and 7005.29.35.

The Applicant alleged that subsequent to the imposition of the provisional anti-dumping duties on imports of clear float glass of a thickness of 3mm to 6mm originating in or imported from Saudi Arabia and the UAE, the major importer in the original investigation has shifted sourcing of the subject products from Saudi Guardian International Float Glass Co Ltd in Saudi Arabia and Guardian Zoujaj International Float Glass Co. LLC in the UAE to its related company in Egypt.

The Senior Manager: Trade Remedies I, 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 questionnaire was received. The said letter shall be deemed to have been received seven days after the day of its dispatch.

For queries, please contact: Mr Zuko Ntsangani at (012) 394-3662 and Mr Thabelo Tshikomba at (012) 394-3638 and fax number (012) 394-0518.

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

Customs & Excise Highlights...continued

SARS communication

1. SARS published a communication to trade stating as follows:

"SARS recently hosted roadshows around the country to discuss the new Registration, Licensing and Accreditation (RLA) system and process. During the roadshows it was mentioned that the first release of the new system – which included introducing eFiling as a registration channel for certain client types – was expected to take place during September 2019.

However, a decision has been made by SARS to postpone the release until early in 2020. This is to enable us to fine-tune various technical issues in order to ensure a smooth implementation".

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

Department of Agriculture, Land Reform and Rural Development

1. The Department of Agriculture, Land Reform and Rural Development has published notices in relation to the following commodities intended for sale in South Africa, including imported items (certain sections quoted from the notices):
 - 1.1 Coffee, chicory and related products; and
 - 1.2 Tea and related products.
2. The draft regulations deal with the following topics:
 - 2.1 Types of regulated products and standards;
 - 2.2 Requirements for containers and outer containers;
 - 2.3 Marking requirements;
 - 2.4 Sampling and inspection; and
 - 2.5 Offences and penalties.

Please advise if additional information is required.

Petr Erasmus

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Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 3: Tax.

Mark Lington ranked by CHAMBERS GLOBAL 2017- 2019 in Band 1: Tax: Consultants.



OUR TEAM

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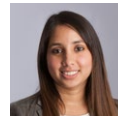
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