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TAX & EXCHANGE CONTROL **ALERT**

IN THIS **ISSUE**

Tax clearance certificates and tax compliance status: Changes on the tax and exchange control fronts

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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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Tax clearance certificates and tax compliance status: Changes on the tax and exchange control fronts

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Recently, the South African Revenue Service (SARS) announced that it would no longer be issuing printed tax clearance certificates (TCCs). The announcement was not unexpected as SARS had already indicated in 2015 when the tax compliance status (TCS) system was implemented, that it would cease issuing printed TCCs at a future date.

From a practical perspective, SARS' announcement regarding TCCs does not change a lot. Prior to SARS ceasing to issue TCCs, a taxpayer applying to confirm its TCS would be issued with a letter confirming its TCS as compliant, including a pin that could be provided to third parties to verify this, and a TCC. Going forward, only the letter confirming the taxpayer's TCS as compliant will be issued and third parties will have to verify that a taxpayer's TCS is compliant by using the pin provided.

Effect of the change regarding TCCs on exchange control issues

Pursuant to SARS' decision regarding TCCs, the South African Reserve Bank's Financial Surveillance Department (FinSurv) issued Circular 23/2019 and Circular 24/2019 on 12 November 2019. These circulars deal with, among other things, the effect of the announcement regarding TCCs on individuals who wish to emigrate for exchange control purposes or who wish to transfer funds abroad, using their foreign investment allowance (FIA). We discussed the way in which individuals can use their FIA and the rules pertaining to its use in our Tax & Exchange Control Alert of 10 May 2019.

In Circular 23/2019, FinSurv announced several changes, including the following, which are reflected in the amended version of the Currency and Exchanges Manual for Authorised Dealers (AD Manual):

- Section B.2(B)(i)(d) of the AD Manual, which deals with the FIA and previously made reference to the TCC, now states that when an authorised dealer allows a taxpayer to transfer funds abroad using her FIA, authorised dealers must use the TCS PIN to verify the taxpayer's TCS via SARS eFiling prior to effecting any transfers. Authorised dealers must ensure that the amount to be transferred does not exceed the amount approved by SARS. Authorised dealers should note that the TCS can expire and should authorised dealers find that the TCS PIN has indeed expired, then the authorised dealer must insist on a new TCS pin to verify the taxpayer's tax compliance status;
- Section B.2(B)(i)(m) of the AD Manual, which deals with applications by individuals to invest in excess of the annual FIA limit of R10 million abroad in a calendar year, now states that authorised dealers must use the TCS PIN to verify the taxpayer's TCS via SARS eFiling prior to effecting any transfers. Authorised dealers should note that the TCS PIN can expire and should authorised dealers find that the TCS PIN has indeed expired, then the authorised dealer must insist on a new TCS PIN to verify the taxpayer's compliance; and

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Tax clearance certificates and tax compliance status: Changes on the tax and exchange control fronts

...continued

Individuals who wish to make use of the FIA or who wish to emigrate for exchange control purposes in future, should take note of the changes in the AD Manual and that TCCs will no longer be issued or provided.

- Section B.4(G)(i)(d) of the AD Manual, which deals with the use of the FIA in the case of a South African resident temporarily abroad. This section states substantially the same to what is in section B.2(B)(i)(d) of the AD Manual, referred to above. (We discussed the exchange control rules applicable to residents temporarily abroad in our Tax & Exchange Control Alert of 29 September 2017.

In Circular 24/2019, FinSurv announced further changes, including the following, which are reflected in the amended version of the AD Manual:

- Section B.2(J)(i)(b) of the AD Manual, which deals with emigration by individuals for exchange control purposes and previously made reference to the TCC, now states that all emigration applications must be accompanied by a duly completed Form MP 336(b) signed by the applicant, together with a printed TCS verification result obtained via the SARS TCS system reflecting the compliance status of the applicant(s) including a breakdown of the remaining capital assets held in South Africa. All subsequent transfers by emigrants will depend on the current TCS at the date and time the TCS PIN is used. A TCS PIN will be issued where the remaining value of the assets on emigration are above the limits outlined in subsection B.2(J)(ii)(a) of the AD Manual and a TCS PIN Good Standing will be issued where the remaining value of the assets on emigration are within the limits outlined in subsection B.2(J)(ii)(a);
- Sections B.2(J)(v)(a)(hh) and B.2(J)(v)(a)(ii) of the AD Manual, which deal with the transfer of an individual's assets abroad pursuant to an individual's emigration for exchange control provision, also now refer to providing the TCS information to the authorised dealer instead of a TCC; and
- A new provision, namely section B.2(J)(v)(a)(ll), which also deals with emigration and which states that pursuant to a person's emigration, all previously undeclared assets, excluding where the assets represent an inheritance and/or insurance policies, must be referred to SARS for a tax directive. Subsequently, an application must be submitted to FinSurv accompanied by a printed TCS verification result obtained via the TCS system reflecting the compliance status of the applicant(s) including the value of the capital assets declared to and approved for transfer by SARS.

Observation

Individuals who wish to make use of the FIA or who wish to emigrate for exchange control purposes in future, should take note of the changes in the AD Manual and that TCCs will no longer be issued or provided. Hopefully, the transition from using the TCC to using the TCS PIN will be seamless and will not cause any delays to the process of transferring funds abroad using one's FIA or when emigrating for tax and exchange control purposes.

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.

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

New authority case law (certain sections quoted from the judgments):

1. *Flordis South Africa (Pty) Ltd v Commissioner for the South African Revenue Service* (61689/2015) [2019] ZAGPPHC 546 (17 October 2019) in the High Court of South Africa (Gauteng Division, Pretoria. The judgment states (*inter alia*) as follows:

   "In essence, the Applicant contends that its imported product, Ginsana, is a 'medicament' and qualifies to be classified as such under a specific tariff heading in terms of the Customs and Excise Act, 91 of 1964 ('the Act'). The Commissioner for the South African Revenue Service ('the Commissioner') determined otherwise. The Commissioner contends Ginsana is to be classified under the tariff heading 'food preparation not elsewhere specified or included'.

   .....

   The principal dispute between the two parties centers around the divergent contentions as to whether the Ginsana product was a 'foodstuff' or a 'medicament'. This was the dispute they successfully contended could not be determined by way of motion proceedings and which had been referred to oral evidence ...

   .....

   The criticism of Prof Du Toit's evidence raised in cross examination centered around her reliance on the use of Ginsana without knowledge of the measure of efficacy thereof. Counsel for the Commissioner repeatedly stated that one might then as well be using 'Smarties' (a wellknown brand of candy-coated chocolate sweets). Conversely, Prof Blockman was criticized for being adverse to the use of complimentary medicines irrespective of the benefits thereof simply because their exact clinical efficacy has not yet been established.

   .....

   In the end, the determination of the correct tariff heading is a decision of the court, not the experts.

   .....

   In the present instance, the meaning of the words used in the tariff heading are reasonably clear and a 'sensible' meaning, leading to a 'businesslike result' appears to be that substances which are put up for retail sale in measured doses and which are used as medicines, remedies or for medical treatment, be it therapeutic or prophylactic (i.e. curative or preventative) fall under this heading.

   .....

   The Commissioner put much stock in the contention that the test to be applied in classifying goods or products is by objectively determining their nature and that the subjective intention of the designer, manufacturer or importer of the products as to their use is irrelevant. As a general proposition, this is entirely correct.

   .....

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Customs & Excise Highlights...*continued*

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In all these cases, the court considered evidence indicating the use of the products to cure, limit or prevent 'ailments' as indicative of the characteristics of the products.

.....

Therefore, the tariff headings are interpreted to mean that if a product is put up in measured doses which are used for therapeutic or prophylactic purposes, it would constitute a medicament. On the other hand, if the product is used to be taken in by humans to maintain life or provide nourishment or is used to prepare such products, it is a foodstuff or food preparation.

.....

Were ... the term 'medicament' to be interpreted to refer to only products of which exact clinical efficacy has scientifically been established it would lead to an 'unbusinesslike' result. No such standard has been suggested by the tariff heading or the explanatory notes.

.....

Objectively, the product is packed in dosaged capsules, for use by patients and healthcare practitioners in therapeutic or prophylactic circumstances. No evidence has even been suggested by the Commissioner (or by Prof Blockman) that the product is used as anything but 'a remedy' or a medicament. Counsel for the Commissioner argued that the Applicant has failed to present evidence of use of ginseng (in the same fashion as evidence had been presented in the Canadian appeal referred to earlier), but the whole bundle of articles relied on, repeatedly and extensively dealt with the issue of use of ginseng in preventing or curing various ailments. No other uses have been demonstrated. I therefore find this, on a balance of probabilities to constitute sufficient evidence of the use of ginseng.

.....

In my view the contents of paragraph 8 above conclusively indicate that Ginsana G 115 capsules, being the product in question, do not constitute a 'food preparation'.

.....

In laymen's terms: Ginsana is to be classified as a 'medicament' and not a 'foodstuff'."

It appears that a classification of a product as a medicament has been relaxed in this judgment. It is currently uncertain whether SARS has/will appeal the matter to the Supreme Court of Appeal.

2. *The Commissioner of the South African Revenue Service and Another v Naude* (51712/2017) [2019] ZAGPPHC 55 (6 March 2019) in the High Court of South Africa (Gauteng Division, Pretoria. The judgment states (*inter alia*) as follows:

   "SARS did not file its answering affidavit when it became due. As a result, the applicant set the main application down on the unopposed roll on 19 December 2017. On the date of the hearing, the parties agreed, which agreement was made an

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Customs & Excise Highlights...*continued*

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order of court by Baqwa J that SARS would file its answering affidavit on 22 January 2018, together with an application for condonation if any, failing which the applicant would be entitled to set the matter down on the unopposed roll.

.....

Although SARS's answering affidavit was signed and commissioned on 22 January 2018, it was filed on 30 January 2018, six days later than it was due in terms of the agreed court order. The answering affidavit was filed without an application for condonation.

.....

On 19 March 2018, the applicant's attorneys of record, Messrs Malan & Nortje Attorneys, addressed a letter to the State Attorney in which it was indicated inter alia that unless they received SARS's application for condonation for the late filing of its answering affidavit within 14 (fourteen) days thereof, they will proceed to set the matter down for hearing on the unopposed roll.

.....

Counsel for the applicant argues that Mr Mashabela's version is that on 22 January 2018, he was in possession of a signed answering affidavit, together with all the necessary annexures but gives no explanation as to why he did not arrange with the applicant's attorneys to serve the affidavit by email.

.....

I totally agree with the sentiments expressed by Bosielo J and agree that SARS and the State Attorney were indifferent to the consequences of their failure to attend to this case diligently and timeously.

.....

In my opinion, SARS has fully explained the reasons for its delay in filing the answering affidavit, showing that it was not due to delaying tactics. Given the merits of the case as summarized above, and in the interest of justice, SARS should be given the opportunity to present its case. This will allow the applicant to file a replying affidavit and to explain the pertinent issues raised by SARS in its answering affidavit. I am therefore satisfied that SARS had demonstrated that prima facie there are sufficient reasons to entitle it to the Court's indulgence.

.....

Rules of court are meant to be observed by the parties at all material times. No one party should be allowed by his own indolence, to treat the rules of court with disdain. In casu, SARS disregarded and ignored the compliance with the court order. There is no justifiable reason why SARS should be allowed to disregard the rules and order of this court with no consequences. The usual rule is that the party seeking indulgence must pay the wasted costs. I have taken into consideration the circumstances of this case, weighed the various issues and the conduct of the parties and I am of the view that it is just and fair that SARS should pay the costs for the application".

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Customs & Excise Highlights...*continued*

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It appears that the Court granted condonation for late filing of an answering affidavit, even though it was found that "*... SARS and the State Attorney were indifferent to the consequences of their failure to attend to this case diligently and timeously ...*", as "*... SARS has fully explained the reasons for its delay in filing the answering affidavit, showing that it was not due to delaying tactics*". However, the judge awarded a costs order against SARS.

Amendments to Schedules to the Customs and Excise Act, 91 of 1964 (Act) (certain sections quoted from the SARS website)

1. Schedule 1

   1.1 General Note G to Schedule No. 1 was amended to insert the abbreviation and symbol "CO_2e" to mean CO_2 equivalent as well as amend note G. 47 to read as ton/tonne in the abbreviation to align with the wording in the Carbon Tax Act.

2. Schedule 1 Part 1

   2.1 The substitution of Note 1(a) and Note 1(b) in Chapter 11 of section II to Part 1 of Schedule No. 1 as a consequence to the statement issued by the President of South Africa on 29 May 2019 regarding the merging of Government Departments.

   2.2 To implement changes to the rates of customs duties in terms of the Economic Partnership Agreement between the European Union and the Southern African Development Community EPA States for 2020 and other miscellaneous amendments; and

   2.3 The substitution of tariff subheading 8517.62.20, in order to exclude two-way radios from *ad valorem* excise duties.

3. Schedule 1 Part 2B

   3.1 The substitution of item 124.37.11, in order to exclude two-way radios from ad valorem excise duties.

4. Schedule 1 Part 5A

   4.1 The substitution of fuel levy item 195.20.01 in order to rectify the rate of fuel levy on biodiesel from 170,5c/kg to 170,5c/li (with retrospective effect from 5 June 2019).

5. Schedule 4

   5.1 Note 5 in Schedule No. 4 was amended in order to substitute the reference to form DA 331 to form TC-01 which refers to a traveller card used at ports of entry to declare personal and household effects; and

   5.2 The substitution of item 409.00 as a consequence of the statement issued by the President of South Africa on 29 May 2019 regarding the merging of Government Departments resulting in the Department of Agriculture, Forestry and Fisheries to be changed to Department of Agriculture, Land Reform and Rural Development.

6. Schedule 5

   6.1 The deletion of refund items 537.00 and 537.02/87.00/01.02 as they were applicable to MIDP up to and including 31 December 2018. They have now become redundant.

Customs & Excise Highlights...*continued*

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7. Schedule 6

   7.1 The deletion of rebate items 672.01, 672.01/105.10/01.01 and 672.01/105.10/02.01 as they have become redundant.

Media statement issued by the Department of Trade and Industry on 30 October 2019 (certain sections quoted from the statement):

"The Portfolio Committee on Trade and Industry has considered and approved the SACUM-UK Economic Partnership Agreement (EPA) and it will now go to the National Assembly for ratification. SACUM-UK consist of the Southern African Customs Union (SACU) Member States, Mozambique and the United Kingdom (UK). The SACU Member States are Botswana, Eswatini, Lesotho, Namibia and South Africa.

Current trade between UK and SA is governed by the SADC-EU Economic Partnership Agreement. Once completion of the withdrawal process from the EU ('Brexit'), the UK will not be part of the SADC-EU EPA. To avoid trade disruption, SACU, Mozambique and UK have decided to roll-over the EPA into a standalone trade agreement. The SADC-EU EPA provides for the tariff arrangements applicable to trade between SACU, Mozambique and the 28 European Union (EU) member states. A number of products are duty free and there are detailed trade rules set out in the EPA to make trade easier between ourselves".

It appears that the new agreement hopes to ensure continuation of the current agreement should the UK exit the EU.

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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