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TAX & EXCHANGE CONTROL **ALERT**

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Tax amendments to enable the modernisation of the foreign exchange control system

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Tax amendments to enable the modernisation of the foreign exchange control system

The 2020 Draft Taxation Laws Amendment Bill (Draft TLAB), published for public comment on 31 July 2020, proposes the insertion of a new section 9K in the Income Tax Act 58 of 1962 (Act) to ensure efficient application of the law when the SARB approval requirement is removed.

In the 2020 Budget Review, it was indicated that the current South African exchange control rules would be reviewed and that the current exchange control regime would be replaced by a capital flow management framework. It was stated that this new framework is aimed at:

1. Promoting investment;
2. Reducing unnecessary burdensome approvals by the South African Reserve Bank (SARB); and
3. Providing a modern, transparent and risk-based approvals framework for cross-border flows.

Pursuant to the objective of reducing unnecessary burdensome approvals by the SARB, it has been proposed that the existing requirement for prior SARB approval when a South African resident individual or company that owns a listed domestic security wishes to export that listed security abroad, be phased out. Such prior approval is currently required under South Africa's exchange control regime. The export of the security essentially involves the removal thereof from the register of the South African exchange, the endorsement of the security in physical form as "*non-resident*" and thereafter dematerialising the security directly to the person's account on the exchange outside South Africa.

The 2020 Draft Taxation Laws Amendment Bill (Draft TLAB), published for public comment on 31 July 2020, proposes the insertion of a new section 9K in the Income Tax Act 58 of 1962 (Act) to ensure efficient application of the law when the SARB approval requirement is removed.

The proposed section deals with the tax implications of listing a security on an exchange outside South Africa and states that there will be a deemed disposal and reacquisition when a person holding a security that is listed on an exchange (as defined in section 1 of the Financial Markets Act 19 of 2012), delists that security and subsequently lists it on an exchange outside South Africa. In such an event, the person will be deemed to have disposed of the security at the market value of that security on the day that it is listed on the exchange outside South Africa, and then reacquired that security on the same day, at a cost equal to that market value.

Depending on whether the South African individual or company holds the listed securities on revenue or capital account, the delisting from a South African exchange and the subsequent listing of the securities on an exchange outside South Africa will give rise to normal income tax or capital gains tax consequences, as the case may be. Where the delisting and subsequent listing of the securities takes place in conjunction with a change in the tax residency status of the individual or company, then there will be no further South African tax consequences in respect of those securities. However, if the person holding the securities remains a South African tax resident, such person will be liable for income tax if there is a gain on the subsequent sale of the securities.

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Tax amendments to enable the modernisation of the foreign exchange control system*...continued*

It is apparent that the transfer of securities from a South African exchange to an exchange outside South Africa will in future have adverse tax consequences, as a result of removing the requirement for prior SARB approval.

It is proposed that section 9K comes into operation on 1 January 2021 and will apply in respect of any security that is listed on an exchange outside South Africa on or after that date.

Comment

In light of the proposed amendment, it is apparent that the transfer of securities from a South African exchange to an exchange outside South Africa will in future have adverse tax consequences as a result of removing the requirement for prior SARB approval. It is unclear how prevalent this practice was, but based on what was stated in the 2020 Budget Review, the proposal gives effect to National Treasury's intention to remove exchange control rules that were aimed at preventing tax avoidance, and instead aim to prevent tax avoidance by inserting anti-avoidance provisions in the Act. It also means that SARS will become responsible for enforcing compliance with the anti-avoidance provision.

Based on the proposed wording of section 9K, it is required that the delisting from the South African exchange must be followed up by the subsequent listing of the share on the exchange outside South Africa. In other words, one must distinguish this type of situation from one where a South African shareholder merely holding a listed security, has their security delisted, as a result of the company delisting from the South African exchange. The mere delisting, in and of itself, will not result in section 9K being applicable.

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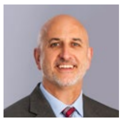

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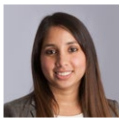

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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