DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

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NEW BINDING PRIVATE RULING: TRANSFER OF DEBTORS BOOK

The South African Revenue Service (SARS) released Binding Private Ruling 154 (ruling) on 3 September 2013.

The ruling deals with the transfer of a debtors book as part of a transaction in terms of s45 of the Income Tax Act, No 58 of 1962 (Act) and to what extent a transferee may claim allowances for doubtful debts in terms of s11(j) of the Act.

The facts on which the ruling is based were as follows:

The applicant (transferee) and another company (transferor) formed part of the same group of companies. The two companies would agree that the transferor transfers to the transferee a business unit as a going concern in terms of s45 of the Act. The transfer would include the transfer of a debtors book of the business unit.

The purchase consideration would remain outstanding on loan account. Specifically, the debtors book would be transferred at its tax value.

It appears that uncertainty arose as to whether s45(3)(a)(ii) of the Act would apply to the transaction, specifically in respect of any allowances claimed or to be claimed in terms of s11(j) of the Act.

Generally, s45(3)(a) of the Act provides that where an allowance asset is transferred in terms of an intra-group transaction, no recoupment will arise in the hands of the transferor, and the transferee will be able to calculate allowances and any recoupments as if it were the transferor.

Section 11(j) of the Act provides that an allowance may be claimed by a taxpayer in respect of doubtful debt. Doubtful debt is essentially debt that has not yet become bad but for which an allowance would have been claimable had it actually become bad, such as in terms s11(i) of the Act.

SARS confirmed in its ruling that s45(3)(a) of the Act would apply to the transaction, provided that it constitutes an intra-group transaction for purposes of s45 of the Act. Specifically, SARS ruled that the transferee would be entitled to the same doubtful debt allowances in terms of s11(j) as the transferor was entitled to in respect of the debtors book. SARS also ruled that the transferee could use the 'historical financial information' of the transferor to calculate the allowance.

Heinrich Louw

VAT INVOICE: THE IMPORTANCE OF A COMPLIANT TAX INVOICE

South Africa operates a value-added tax (VAT) system whereby the VAT charged by suppliers is subtracted from the VAT charged to customers to calculate the VAT payable or refundable. This system was established to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities.

In such a system, the most important document is the tax invoice. Section 20(4) of the Value-Added Tax Act, No 89 of 1991 (VAT Act) prescribes that a tax invoice must contain certain details about the taxable supply as well as the parties to the transaction before it can be used by a trader to claim an input tax deduction in respect of the purchases made by the trader for his enterprise.

In the recent case of *Petroma Transport SA and Others v Belgium* [2013] All ER (D) 145, the issue regarding the importance of a compliant tax invoice and the consequences ensuing should the tax invoice be non-compliant and incomplete, was referred by the Belgian appeal court to the Court of Justice of the European Union (Second Chamber) (Court of Justice) for consideration.

By way of background, Petroma Transports (taxpayer) was the main company in a group of companies and provided numerous services to other companies within that same group. During inspections conducted from 1997 onwards, the Belgian tax authority questioned the inter-company invoices and the resultant deductions, since the 1994 year of assessment, on the basis that the tax invoices were incomplete and did not comply with the provisions of Article 3(1)(1) of Royal Decree No.3 of 10 December 1969. The fact that the tax invoices were incomplete made it impossible for the tax authority to determine the exact amount of tax collected.

Accordingly, the tax authority disallowed the deductions made by the companies receiving the services on the basis that the tax invoices did not comply with the provisions of the Belgian tax law, concerning the details that are required on a tax invoice. The companies subsequently provided additional information but it was not accepted by the tax authority as being sufficient.

Proceedings ensued, in which the court of first instance ruled in favour of the taxpayer in respect of certain invoices but also upheld the tax authority's decision to disallow the deduction of VAT in respect of the companies receiving services. The service providers subsequently lodged an appeal and the appeal court decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling.

The request for the preliminary ruling by the Belgian appeal court concerned consideration of the following issues:

- To ascertain whether the provisions of the EC Counsel Directive 77/388 ('Sixth Directive') had to be interpreted as precluding national legislation, such as that at issue, under which the right to deduct VAT could be refused to taxable persons who were the recipients of services and who were in possession of invoices which were incomplete, in the case where those invoices were subsequently supplemented by additional information which seeks to prove the essential elements of the transaction; and

- Whether the principle of fiscal neutrality had to be interpreted as precluding a tax authority from refusing to refund the VAT paid by a company providing services, in the case where the right to deduct VAT on those services had been denied to the companies receiving those services by reason of incomplete invoices issued by the service provider.

On the first consideration, the Court of Justice held that common system of VAT did not prohibit the correction of non-compliant and incomplete tax invoices. Accordingly, where the taxpayer supplements the irregular tax invoice with additional information

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before the tax authority takes the decision to disallow the input tax deduction, the benefit of that right could not, in principle, be refused on the basis that the original tax invoice contained irregularities. However, in the present case the information necessary to complete and regularise the tax invoices was only provided to the tax authority after the tax authority made the decision to disallow the deduction of the input tax.

Accordingly, the court held that the provisions of the Sixth Directive had to be interpreted as not precluding national legislation, under which the right to deduct VAT may be refused to taxable persons who were the recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by additional information proving the occurrence, nature and amount of the transaction invoices, after a decision to disallow the deduction has been made.

On the second consideration, the court held that the principle of fiscal neutrality does not preclude the tax authority from refusing to refund the VAT paid by the company providing services, in the case where the right to deduct VAT levied on those services had been denied to the companies receiving those services by reason of incomplete invoices issued by the service provider.

In light of the above, it is important to note that the provisions of the South African VAT Act are similar to the provisions highlighted in the case above in that a trader is allowed an opportunity to supplement his original invoice in order to complete and regularise such an invoice for purposes of claiming an input tax deduction. However, similar to what is stated above, the trader must supplement the irregular invoice before the South African Revenue Service (SARS) takes a decision to disallow the input tax deduction.

It is however important to note that in the South African context, the trader is given an opportunity to object to the decision of SARS regarding the refusal to allow an input tax deduction.

It will be interesting to see how South African case law will develop on this particular topic.

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