DLA CLIFFE DEKKER HOFMEYR

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CARBON CREDITS (AND A LITTLE VAT FRAUD)!

What may be fascinating to those of us who write for the Tax Alert may be stunningly boring for some of our readers.

Fortunately we have a broad spectrum of readers and hopefully some of the more esoteric articles may be of interest to those of you who have esoteric interests.

In July 2012, a matter came before Sir Andrew Morritt in the Chancery Division in England, concerning the trading in carbon credits in the European Union. The case was referenced as *Bilta (UK) Ltd (In Liquidation) v Nazir [2012] EWHC 2163 (Ch)*. Bilta, a company incorporated in England and registered as a vendor for the purposes of VAT, traded in the purchase and sale of carbon credits on the Danish Emissions Trading Agency. It bought and sold in excess of 5,7 million carbon credits for a total amount of about €294 million during 2009. The purchases were from traders carrying on business outside the United Kingdom, including a company called Jetivia, incorporated incorporated in Switzerland. The purchases were therefore zero rated for the purposes of VAT. They then sold these carbon credits to persons in the United Kingdom who were registered for VAT, none of which businesses had a use for carbon credits and these supplies were subject to VAT at the standard rate. The price payable by the purchasers net of VAT was less than that paid by Bilta to Jetivia and the other suppliers and was paid to them in full directly or through Bilta. Consequently Bilta was unable to pay the VAT due on its supplies because it had made no profit and the proceeds of its sales had been paid away to the overseas traders.

Accordingly Her Majesty's Revenue and Customs (HMRC) raised eight assessments on Bilta for VAT in an amount of £38 million. Accordingly the company went into liquidation. The first and second defendants were the directors of Bilta, Mr Nazir and Mr Chopra. Mr Chopra owned all of the shares in Bilta. The sixth and seventh defendants were the company Jetivia and its sole director Mr Brunschweiler.

The amended particulars of claim alleged that the defendants conspired to injure and defraud Bilta, and were knowingly parties to the carrying on of the business of Bilta with the intent to defraud the creditors of Bilta and other fraudulent purposes, and thus sought to recover £38.7 million with compound interest and costs. The allegations in the pleadings were that Jetivia and Brunschweiler had agreed to supply Bilta with carbon credits and to enter into documentation which showed Jetivia having supplied Bilta with carbon credits that had in fact been transferred to a different company for onward sale, knowing that Bilta would not be paying the VAT due on its onward sales. Bilta would then sell the carbon credits or produce paper work showing the carbon credits to have been sold on at a price inclusive of VAT. The pleadings alleged that the pattern of trading by Jetivia with or involving Bilta was not *bona fide* or consistent with legitimate commercial trading, and it should be inferred was undertaken in furtherance of the conspiracy. At all material times, Mr Nazir and Mr Chopra were the directing will and mind of Bilta and failed to file any VAT returns in the relevant period of 2009 nor have they caused Bilta to account to HMRC for any sum in respect of the VAT charged on the sales.

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The case then turned on the principle well known in our law, of *ex turpi causa non oritir actio* (namely that he with dirty hands should not approach the Court for relief; see *Jajbhay v Cassim 1939 AD 537*). The question then became, based on this principle, whether Jetivia and Mr Brunschweiler could approach the court or whether their application was barred by the principle the Court or was their application barred by the principle of *ex turpi causa*?

Sir Andrew Morritt's judgment was that the defence of *ex turpi causa* would not be available to Mr Nazir and Mr Chopra as a defence to any of the claims made against them or on those who dishonestly conspired with them to break the law. Accordingly Jetivia and Mr Brunschweiler also could not avail themselves of this defence.

With regard to the VAT debt, it is a well known principle of private international law that the Courts of England have no jurisdiction directly or indirectly to enforce the revenue law of a foreign state. The judge assumed that the law of Switzerland would be the same. Counsel for Jetivia and Mr Brunschweiler alleged that the claim made in this action by Bilta and the liquidators was essentially seeking to enforce the claim of HMRC for VAT under the VAT Act. The judge rejected this submission. He said that the claim was not the enforcement direct or indirectly of a revenue claim. The liquidators were seeking to recover compensation for a conspiracy to defraud the company with the means to pay HMRC, and any other creditor which may be paid a dividend in respect of their debts. Even if it is a revenue claim, it is the claim of HMRC and not of the revenue authorities of a foreign state. The judge said that there was no reason to refuse to enforce the proper claims of HMRC in the Courts of England and Wales whether it was based on comity in international law or otherwise. The claimants were not seeking to enforce the revenue laws of Switzerland.

Alastair Morphet

BINDING PRIVATE RULING 133

In a recent Binding Private Ruling (BPR 133), SARS was asked to rule on the capital gains tax, transfer duty and dividends tax consequences arising from the proposed transfer of a residence to a qualifying natural person pursuant to the provisions of paragraph 51A of the Eighth Schedule to the Income Tax Act, No 58 of 1962 (Act).

The applicant, a company resident in South Africa, proposed to distribute as a dividend *in specie* its only asset, a residential property to it sole shareholder, a company resident in a foreign country (Company 1). In turn, it was proposed that Company 1 distributes the residence to the sole shareholder of Company 1, a natural person who is a resident of South Africa for tax purposes but who lives abroad (Individual).

Material to the application was the fact that from 11 February 2009 to 31 May 2012, the Individual rented out the residence for an aggregate number of days representing 40% of such period of time. It appears that during the other 60% of the time period the Individual had the right to use and occupy the residence but did not actually do so.

In this regard, it is noted that the capital gains tax relief provided for in paragraph 51A of the Eighth Schedule to the Act does not apply *inter alia* unless on or before 31 December 2012, the residence is ultimately acquired by one or more natural persons who mainly used the residence for domestic purposes during the period commencing on 11 February 2009 and ending on the date of disposal. The term 'mainly' has been interpreted by the courts to mean a quantitative criterion of more than 50% (*SBI v Lourens Erasmus (Edms) Bpk 28 SATC 233*). Given that the residence was only rented out for 40% of the relevant period, it was contended by the Applicant that the residence had been used mainly for domestic purposes during such period, despite the fact that the Individual did not actually use or occupy the residence during the remaining 60% of the period. SARS agreed.

SARS ruled that the proposed transaction qualified for the amnesty relief. In this regard, SARS confirmed that the Applicant and Company 1 must be treated as having disposed of the residence for an amount equal to the base cost thereof, resulting in no capital gains tax being triggered in respect of either the distribution to Company 1 or the subsequent distribution to the Individual. Further, SARS

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ruled that having complied with the provisions of paragraph 51A of the Eighth Schedule to the Act, the Applicant, Company 1 and the Individual will be treated as one and the same person with regard to:

- the date of acquisition of the residence by the Applicant;
- the amount and date of incurral by the Applicant of any expenditure in respect of the residence allowable under paragraph 29(4) of the Eighth Schedule to the Act; and
- any valuation of the property effected by the applicant under paragraph 29(4) of the Eighth Schedule to the Act to determine the market value of the residence on the valuation date (ie 1 October 2001).

SARS ruled further that no dividends tax will be payable either in respect of the distribution of the residence by the Applicant to Company 1 or in respect of the distribution of the residence by Company 1 to the Individual. As regards the initial distribution to Company 1, the exemption contained in s64FA(1)(c) applies as the distribution constitutes a disposal as contemplated in paragraph 51A of the Eighth Schedule to the Act. In respect of the distribution of the residence by Company 1 to the Individual, no dividends tax is payable as Company 1 is a foreign company the shares in which are not listed on the Johannesburg Stock Exchange and furthermore the dividend paid in respect of such shares consists of the distribution of an asset *in specie* (the residence).

By virtue of s9(20) of the Transfer Duty Act, No 40 of 1949 SARS also ruled that no transfer duty is payable on either of the distributions.

It is important to appreciate that the opportunity to take advantage of the amnesty relief provided for in paragraph 51A of the Eighth Schedule to the Act is no longer available as it is specifically required that the disposal/distribution must have taken place by 31 December 2012 (see paragraph 51A(6)(b)).

For those who timeously entered into the relevant agreement and/or passed the relevant resolutions to record and authorise the disposal of the residence held by a company, close corporation or trust, there is another important requirement which should be borne in mind. To qualify for the amnesty relief, steps must be taken to either deregister or liquidate the company or close corporation, or in the case of a trust, to terminate the trust, within six months of the date of disposal (see paragraph 51A(6)(a)). For this reason, it is imperative that a conveyancing attorney be appointed as soon as possible after the date of disposal to transfer the residence in the appropriate deeds office but in any event within a period of six months of the date of disposal, to allow for the deregistration/liquidation/termination steps to be taken timeously.

Andrew Seaber and Nicole Paulsen

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
Director
National Practice Head
T +27 (0)11 562 1063
E emil.brincker@dlacdh.com

Alastair Morphet
Director
T +27 (0)11 562 1391
E alastair.morphet@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@dlacdh.co

Johan van der Walt
Director
T +27 (0)11 562 1177
E johan.vanderwalt@dlacdh.com

Ruaan van Eeden
Director
T +27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Andrew Lewis
Senior Associate
T +27 (0)11 562 1500
E andrew.lewis@dlacdh.com

Andrew Seaber
Senior Associate
T +27 (0)11 562 1768
E andrew.seaber@dlacdh.com

Danielle Botha
Associate
T +27 (0)11 562 1380
E danielle.botha@dlacdh.com

Heinrich Louw
Associate
T +27 (0)11 562 1085
E heinrich.louw@dlacdh.com

Tessmerica Moodley
Associate
T +27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Carmen Moss-Holdstock
Associate
T + 27 (0)11 562 1614
E carmen.moss-holdstock@dlacdh.com

Nicole Paulsen
Associate
T + 27 (0)11 562 1386
E nicole.paulsen@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com