DLA CLIFFE DEKKER HOFMEYR

TAX

ALERT

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IN THIS ISSUE

REPORTABLE ARRANGEMENTS AND RETROSPECTIVITY

The South African Revenue Service (SARS) recently issued an updated Draft Notice listing transactions that constitute reportable arrangements for purposes of s35(2) of the Tax administration Act No 28 of 2011 (TAA).

The Draft Notice, once finalised, is intended to replace any previous notices issued in respect of reportable arrangements under s80M(2)(c) and s80N(4) of the Income Tax Act No 58 of 1962 (ITA).

The Draft Notice lists arrangements that may, in SARS's view, give rise to an 'undue tax benefit'. Excluded arrangements in terms of s36(2) of the TAA are also listed.

The reportable arrangements listed in the Draft Notice include the following:

- any arrangement in respect of services rendered to a non resident in excess of R5 million;
- share buy-backs for an aggregate amount of at least R10 million, if the company issued any shares within 12 months of entering into the buy-back agreement;
- any arrangement that is expected to or has given rise to a foreign tax credit exceeding an aggregate amount of R5 million;
- an arrangement in which a resident contributes to or acquires a beneficial interest in a non-resident trust, where the value of contributions or payments to the trust exceed R10 million, with certain exclusions;
- an arrangement where one or more persons acquire a controlling interest in a company that has or expects to carry forward an assessed loss exceeding R20 million from the preceding year of assessment or expects an assessed loss exceeding R20 million in the year of assessment in which the relevant shares are bought; and
- an arrangement involving payments by a resident to an insurer exceeding R5 million, if any amounts payable to any beneficiary are determined with reference to the value of particular assets or categories of assets held by or on behalf of the insurer or another person.

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It is interesting to note that, in terms of paragraph 2.2 of the Draft Notice, the provisions are to have retrospective effect. That is, any of the listed arrangements have to be reported to SARS within 45 days of the date of publication of the final notice, whether or not the arrangements were entered into before publication of the notice.

In this regard taxpayers need to take into account the penalties that could be imposed under the TAA if a listed arrangement is not reported. In terms of s212 of the TAA, where a participant or promotor of a reportable arrangement fails to disclose or report the arrangement, a monthly penalty can be imposed, for up to 12 months. The monthly penalty is R50,000 in respect of a participant and R100,000 in the case of a promotor. Where the anticipated tax benefit exceeds R5 million, the penalty is doubled and in circumstances where the benefit exceeds R10 million, the penalty is tripled.

Fortunately the Draft Notice excludes all arrangements where the actual, potential or assumed tax benefit does not exceed R5 million.

The Draft Notice has not yet been finalised and as such does not have the effect of law. The period for the submission of comments has already closed on 23 June 2014, and it will be interesting to see whether SARS will insist on retrospectivity in the final notice.

Carmen Holdstock

DONATIONS MADE BETWEEN SPOUSES

Sections 54 to 64 of the Income Tax Act, No 58 of 1962 (Act) provide for the imposition of donations tax on the value of any property disposed of by way of a donation.

Donations tax is levied at a rate of 20% of the value of the asset or the amount of money donated, and the donor is generally liable for payment.

A donation is defined as 'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right'. Also, in terms of s58 of the Act, the disposal of any property for an inadequate consideration can be deemed to be a donation.

Section 56 of the Act lists various exemptions in respect of donations tax. One such exemption is for donations between spouses. That is, persons who are married to each other may freely donate assets or money to each other (or for the benefit of each other), irrespective of the marital property regime that applies to them, without triggering donations tax. This exemption does however not apply to spouses who are legally separated.

A further exemption applies to donations made between spouses under a duly registered ante-nuptial or post-nuptial contract or under a notarial contract in terms of s21 of the Matrimonial Property Act No 88 of 1984.

Despite the general exemptions from donations tax that apply to spouses, it is important to appreciate the income tax consequences that the anti-avoidance rules contained in s7 of the Act (which are mainly aimed at income splitting) may have in respect of donations.

In terms of s7(2) of the Act, any income received by or accrued to a person married in or out of community of property will be deemed to be income accrued to that person's spouse, if the income was derived by the person in consequence of a donation made by the person's spouse, and the sole or main purpose of the donation was the reduction, postponement or avoidance of the donor's liability for any tax which would otherwise have become payable by the donor.

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If a person has made a donation to any other person (including a spouse or a trust of which the spouse is a beneficiary), which donation is subject to a stipulation that the other person will not receive the income under such donation until the happening of a future event, the income that would otherwise have accrued to the beneficiaries as a result of the donation, will be deemed to have accrued to the person (s7(5) of the Act).

If a deed of donation contains a stipulation that the right to receive any income under such donation may be revoked or conferred on someone else, the income received by or accrued to the donee under such donation will be deemed to be the income of the donor (s7(6) of the Act).

If a person donates (by way of cession or otherwise) his or her right to receive rent, dividends, interest, royalties or other income in respect of any property to another person (such as a spouse, or a third party for the benefit of the spouse), and the donor retains an interest in the property, including a reversionary interest, the rent, dividends, interest, royalties or other income will be deemed to be that of the donor (s7(7)(a) of the Act). The same applies to the donation of a beneficial interest in a trust (s7(7)(b) of the Act).

For the purposes of these anti-avoidance provisions, the disposal of an asset for consideration that is less than its market value, will be deemed to be a donation (s7(10) of the Act).

Even though donations between spouses are generally exempt from donations tax, married persons should be careful when making donations to each other, especially where the result of the donation is that income is diverted from the donor to the donee.

Taxpayers are obliged in terms of s7(10) of the Act to disclose such donations to the South African Revenue Service when submitting their tax returns.

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