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TAX ALERT

IN THIS ISSUE

CHANGES TO THE INCOME TAX RETURN FOR TRUSTS

The South African Revenue Service (SARS) has amended the ITR12T form, (i.e. the Income Tax Return for Trusts) with effect from 12 October 2015.

IS DIVIDENDS TAX PAYABLE ON THE DISTRIBUTION OF DIVIDENDS TO EMPLOYEES THROUGH A DISCRETIONARY TRUST?

The South African Revenue Service (SARS) released Binding Private Ruling 209 (BPR 209), on 21 October 2015, which deals with whether dividends tax must be withheld from dividends distributed in cash by a company to a discretionary trust that in turn distributes such dividends to the beneficiaries of the trust. The beneficiaries of the trust are either employees of the company or its subsidiaries.

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CHANGES TO THE INCOME TAX RETURN FOR TRUSTS

According to the SARS website, these changes arise from the implementation of system changes by SARS.

The South African Revenue Service (SARS) has amended the ITR12T form, (i.e. the Income Tax Return for Trusts) with effect from 12 October 2015.

The form has been amended to include:

- certain changes to legislation;
- mandatory fields and sections which were previously optional; and
- automatic calculations.

According to the SARS website, these changes arise from the implementation of system changes by SARS to cater for the processing of collective investment scheme (CIS) registrations and value-added tax (VAT) voluntary registrations in respect of vendors who have not yet made taxable supplies exceeding R50,000.00 per annum.

New sections have been introduced to the ITR12T to cater for legislative changes.

As a result of these changes:

- any CIS will be able to register as either a trust or a company for income tax purposes;
- any CIS in securities will be allowed to select any month as their financial year-end; and
- registration rules have been amended to allow a CIS in property or outside South Africa to register as a company for income tax purposes, and to obtain a company registration number.

A summary of the amendments to the ITR12T, as it appears on the SARS website, is set out below:

- New sections have been introduced to the ITR12T to cater for legislative changes in respect of:
  - taxable income received from real estate investment trusts (REITs);
  - allowable tax deductions for donations in terms of s18A to an approved public benefit organisation;
  - allowable tax deductions for expenditure incurred in exchange for venture capital company (VCC) shares; and
  - recoupment in respect of VCC shares sold, for which a tax deduction to the trust was previously allowed.
- Mandatory fields that were previously optional fields are:
  - all fields in the 'Statement of Assets and Liabilities' section of the ITR12T;
  - all fields in every section of 'Local and Foreign Income' on the ITR12T;

CLIFFE DEKKER HOFMEYR

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CONTINUED

SARS published an updated Comprehensive Guide to the ITR12T return for Trusts dated 16 October 2015.

- certain fields in the 'Schedule of Local Capital Gains and Losses' and 'Schedule of Foreign Capital Gains and Losses'; and
- details of all persons that transacted with the trust. If 50 persons or less transacted with the trust, the details of every person and the related transactions must be provided. If more than 50 persons transacted with the trust, then the consolidated details of all the transactions must be provided, as well as the details of every person where the aggregate of the transactions were in excess of R500,000.00 (limited to the top 50 persons) based on aggregated transactional value.
- Automatic calculations were added for:
  - the Statement of Assets and Liabilities;
  - Local income;
  - Foreign income;
  - Schedule of Local Capital Gains and Losses; and
  - Schedule of Foreign Capital Gains and Losses.

SARS also published an updated Comprehensive Guide to the ITR12T return for Trusts dated 16 October 2015, as well as a Step-by-Step Guide to complete your Trusts Return via eFiling dated 12 October 2015. Both these guides can be found on the SARS website.

Mareli Treurnicht

IS DIVIDENDS TAX PAYABLE ON THE DISTRIBUTION OF DIVIDENDS TO EMPLOYEES THROUGH A DISCRETIONARY TRUST?

In terms of the trust instrument, the trustees may not make any distribution to a beneficiary who is an employee, unless the purpose of such distribution is to either incentivise the employee or to retain his or her services within the Applicant or its subsidiaries, pursuant to the BEE initiative.

The South African Revenue Service (SARS) released Binding Private Ruling 209 (BPR 209), on 21 October 2015, which deals with whether dividends tax must be withheld from dividends distributed in cash by a company to a discretionary trust that in turn distributes such dividends to the beneficiaries of the trust. The beneficiaries of the trust are either employees of the company or its subsidiaries.

By way of background, s1 of the Income Tax Act, No 58 of 1962 (Act) defines a trust as '... any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person'. Where such person acting in a fiduciary capacity exercises their discretion to vest the trust assets (income or capital) in the beneficiaries, the trust is referred to as a discretionary trust.

In BPR 209, a Black Economic Empowerment (BEE) trust, hereinafter referred to as the Co-Applicant, was established by a private company incorporated in and resident of South Africa referred to as the Applicant. The Co-Applicant was established for the pursuance of BEE initiatives, through the provision of financial and other assistance to the beneficiaries of the Co-Applicant.

In terms of the trust instrument, the trustees may not make any distribution to a beneficiary who is an employee, unless the purpose of such distribution is to either incentivise the employee or to retain his or her services within the Applicant or its subsidiaries, pursuant to the BEE initiative. Furthermore, the trustees were prohibited from making a distribution which replaced the normal compensation and benefits that such beneficiaries would otherwise have received in their capacity as employees within the Applicant or its subsidiaries.

Section 10(1)(k)(i)(ii) of the Act provides, among others, that dividends received by, or accrued to any person (including a trust) shall be exempt from normal tax unless such dividend is received by, or accrues to a person in respect of services rendered, or to be rendered, or in respect of, or by virtue of employment, or the holding of office.

In terms of the proposed transaction, the Applicant intends to distribute dividends in cash to the Co-Applicant and the Co-Applicant in turn, will distribute such dividends to its beneficiaries.

Section 10(1)(k)(i)(ii) of the Act provides, among others, that dividends received by, or accrued to any person (including a trust) shall be exempt from normal tax unless such dividend is received by, or accrues to a person in respect of services rendered, or to be rendered, or in respect of, or by virtue of employment, or the holding of office.

Section 64F(1)(l) of the Act in turn provides that there shall be exempt from dividends tax any dividend paid to any person to the extent that the dividend constitutes income of that person, provided that the dividend does not consist of a dividend *in specie*.

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IS DIVIDENDS TAX PAYABLE ON THE DISTRIBUTION OF DIVIDENDS TO EMPLOYEES THROUGH A DISCRETIONARY TRUST?

CONTINUED

The Applicant will not be required to withhold dividends tax from the dividends to be paid to the qualifying beneficiaries

SARS made the following ruling with regards to the proposed transaction:

- the ruling only applies to dividends to be distributed to the following qualifying beneficiaries:
  - black employees of the Applicant or its subsidiaries; and
  - the trustees of the Co-Applicant who are also black employees of the Applicant or its subsidiaries;
- the dividends to be received by the qualifying beneficiaries will not be exempt from normal tax as s10(1)(k)(i)(ii) of the Act will apply;
- the dividends to be distributed to the qualifying beneficiaries will be exempt from dividends tax under s64(F)(1)(l) of the Act;

Therefore, the Applicant will not be required to withhold dividends tax from the dividends to be paid to the qualifying beneficiaries, provided that the necessary declarations and written undertakings as contemplated in s64G(2)(a) of the Act, have been provided timeously to the Applicant.

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