

# TAX AND EXCHANGE CONTROL ALERT

## IN THIS ISSUE

### THE DONATIONS TAX CONSEQUENCES OF A TRANSACTION TO INTRODUCE A BEE SHAREHOLDER INTO A GROUP

On 19 October 2016, the South African Revenue Services (SARS) issued a binding private ruling (BPR 253) which deals with the donations tax consequences in respect of a transaction which has the effect of introducing a Black Economic Empowerment (BEE) shareholder into a group of companies in order to benefit all the entities within the group in respect of their BEE scorecard ratings and increase the profitability of the Applicant (X), a South African resident company.

### CUSTOMS AND EXCISE HIGHLIGHTS

Selected highlights in the Customs and Excise environment since our last instalment.

# THE DONATIONS TAX CONSEQUENCES OF A TRANSACTION TO INTRODUCE A BEE SHAREHOLDER INTO A GROUP

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*The other parties to the proposed transaction are the Seller (Y), a South African resident trust that holds all of X's shares, Company A (A) a South African resident non-profit company and the Acquirer (Acquirer), a South African resident company whose shares are wholly-owned by A.*

On 19 October 2016, the South African Revenue Services (SARS) issued a binding private ruling (BPR 253) which deals with the donations tax consequences in respect of a transaction which has the effect of introducing a Black Economic Empowerment (BEE) shareholder into a group of companies in order to benefit all the entities within the group in respect of their BEE scorecard ratings and increase the profitability of the Applicant (X), a South African resident company.

The other parties to the proposed transaction are the Seller (Y), a South African resident trust that holds all of X's shares, Company A (A) a South African resident non-profit company and the Acquirer (Acquirer), a South African resident company whose shares are wholly-owned by A.

SARS had to decide whether the disposal of Y's shares in X at a discounted price and the subsequent acquisition of the shares by Y in the Acquirer at a nominal subscription price, in order to introduce the acquiring company into Y's existing group structure for BEE purposes, constitutes a donation in terms of the Income Tax Act, No 58 of 1962 (the Act).

The proposed transaction can be described as follows:

Prior to the transaction the Acquirer possesses no assets or liabilities. Y and the Acquirer propose to enter into the following transactions as an indivisible transaction:

- While the Acquirer is still a wholly-owned subsidiary of A, Y will dispose of 26% of the issued equity shares in X to the Acquirer for a purchase price which is the lower of:

- the market value of the shares at the date of disposal less a 10% discount; or
- a capital sum of 40% of X's future dividends that will either be received by or accrue to the Acquirer over the eight year period following the disposal.

Furthermore, Y's outstanding claim for the capital amount of the purchase price shall be payable in interest free instalments over the eight year period. In addition, immediately after Y's disposal of 26% of the issued equity shares held in X to the Acquirer as part of the same indivisible transaction, Y will subscribe for 49% of the issued equity shares in the Acquirer at a nominal subscription price.

Having considered the facts of the proposed transaction and the wording of the relevant sections of the Act, SARS ruled that:

- Firstly, neither the disposal by Y of 26% of X's issued equity shares to the Acquirer at a discounted price (as contemplated above) nor the subsequent acquisition by Y of 49% of the equity shares in the Acquirer at a nominal subscription price will constitute a "donation" as defined in s55(1) of the Act.



# THE DONATIONS TAX CONSEQUENCES OF A TRANSACTION TO INTRODUCE A BEE SHAREHOLDER INTO A GROUP

CONTINUED

*SARS ruled that the ruling is subject to the additional condition and assumption that Y and the Acquirer are independent parties dealing at arm's length.*

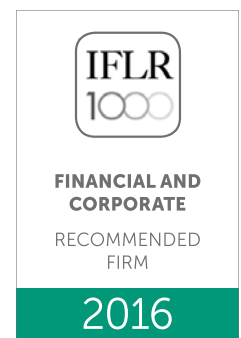
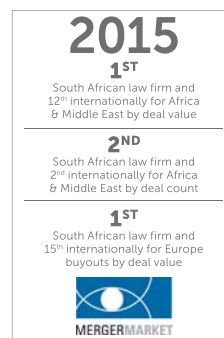
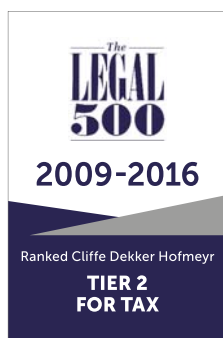
- Furthermore, neither of these transactions will be deemed to be a donation as envisaged in s58(1) and s57 of the Act will not be applicable to the proposed transaction.

SARS ruled that the ruling is subject to the additional condition and assumption that Y and the Acquirer are independent parties dealing at arm's length.

Section 55 of the Act defines a donation as any gratuitous disposal of property including any gratuitous waiver or renunciation of a right. As a brief comment to BPR 253, it should be noted that in *Welch's Estate v C*: SARS 2005 (4) SA 173, the Supreme Court of Appeal held that the legislature did not eliminate from the statutory definition of "donation" the common law requirement

that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a *quid pro quo* of some kind from whatever source it may come. As the disposal of X's equity shares to the Acquirer will take place to improve the BEE scorecard ratings of the group, amongst other things, the donation is not motivated by pure liberality or disinterested benevolence and it is done for self-interest and with the expectation of a *quid pro quo*. It is most likely for this reason that SARS ruled that the transactions did not constitute a "donation" as defined in the Act.

*Heinrich Louw, Mark Morgan and Louis Botha*



# CUSTOMS AND EXCISE HIGHLIGHTS

*Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.*

*In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.*

**Herewith below selected highlights in the Customs and Excise environment since our last instalment:**

1. Amendments of Rule 49A to the Customs and Excise Act, No 91 of 1964, per Government Notice R.1874 of 8 December 1995 relating to the SADC EPA states of the one part and the European Union and its member states of the other part and substitution of the following forms: DA 185, DA 185.4A2, DA 185.4A7, DA 185.4A11, DA 185.4B9 and DA 185.4B10 (with effect from 10 October 2016).
2. The SARS: Customs Processing Division has issued a communication regarding submissions which may be made regarding repetitive stops of cargo. A minimum of 5 cases must be provided for the same trader, country of origin, supplier, commodity and tariff heading where no contraventions were detected.

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**Petr Erasmus**



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