

# TAX AND EXCHANGE CONTROL ALERT

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### EMPOWERMENT: AN INTERESTING RULING REGARDING A BEE TRANSACTION

In 2016, the BEE regulatory landscape has seen a number of changes introduced. These include the final regulations that were issued under the Broad-Based Black Economic Empowerment Act, No 53 of 2003 (BBBEE Act), the release of the Black Industrialists Policy and the publication of draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000 (PPPFA).

### CUSTOMS AND EXCISE HIGHLIGHTS

This week's selected highlights in the Customs & Excise environment.

# EMPOWERMENT: AN INTERESTING RULING REGARDING A BEE TRANSACTION

*Binding Private Ruling 241 deals with an award received for a BEE training initiative, which was issued by the South African Revenue Service (SARS) on 13 June 2016 and deals with a number of aspects in the Income Tax Act, No 58 of 1962 (Act).*

*SARS ruled on a number of aspects of this transaction, including the capital gains tax consequences arising from the *in specie* distributions made by SPVCo to Trust A and by Trust A to the Applicant.*



In 2016, the BEE regulatory landscape has seen a number of changes introduced. These include the final regulations that were issued under the Broad-Based Black Economic Empowerment Act, No 53 of 2003 (BBBEE Act), the release of the Black Industrialists Policy and the publication of draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000 (PPPFA). In light of these developments, it is fitting to discuss Binding Private Ruling 241 (Ruling) dealing with an award received for a BEE training initiative, which was issued by the South African Revenue Service (SARS) on 13 June 2016 and with a number of aspects in the Income Tax Act, No 58 of 1962 (Act).

## Facts of the proposed transaction

Company A, a South African resident listed company, implemented a BEE initiative and for this purpose SPVCo was incorporated and it acquired 10% of Company A's issued ordinary shares at market value. The Applicant is a South African resident private company that was incorporated by BeeCo, a South African resident private company and Company B, a South African resident public company, for the purpose of recruiting, appointing and training individuals to become economically independent (training initiative). Trust A, a South African resident trust of which the Applicant is a beneficiary, holds 49% of the ordinary shares in SPVCo. SPVCo funded its acquisition of Company A shares with third-party funding and will settle this debt by using dividends received from the Company A shares and the proceeds from the disposal of some or all of these shares.

Once this debt has been settled, SPVCo must distribute the remaining shares as a dividend *in specie* to its shareholders. In terms of Trust A's trust deed, a number of units were created which would give the holders (most likely the beneficiaries of the trust) thereof the right to participate in the trust fund, which trust fund vests in these holders when SPVCo distributes the

remaining shares to Trust A. The trustees of Trust A must make an *in specie* distribution of the trust fund. The Applicant's memorandum of incorporation and shareholders agreement limit its activities to that of conducting a training initiative, and provide that the benefits received from Trust A are used only for this purpose. The Applicant will dispose of a sufficient number of shares annually to fund its operations and until it is in a position to do so, its shareholders or a company within the group will provide bridging finance. It will not operate to generate a profit or earn any income for its shareholders and will use all amounts generated through its operations for the training initiative. The Applicant received an award of units from Trust A which was made unconditional, free of charge and subject to the terms and conditions of the trust fund and entitles the Applicant to participate in the trust fund.

## Ruling

SARS ruled on a number of aspects of this transaction, including the capital gains tax consequences arising from the *in specie* distributions made by SPVCo to Trust A and by Trust A to the Applicant, which are regulated by paragraphs 11, 13, 20, 38, 75 and 80 of the Eighth Schedule to the Act. With regard to the award of Trust A's units

# EMPOWERMENT: AN INTERESTING RULING REGARDING A BEE TRANSACTION

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*It is interesting to note that SARS ruled that the award of Trust A's units gives rise to the inclusion of an amount as gross income in the Applicant's hands. No mention was made of the losses that might be triggered pursuant to the cancellation of the units following the distribution of the shares and any surplus cash.*

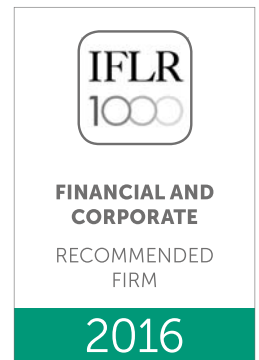
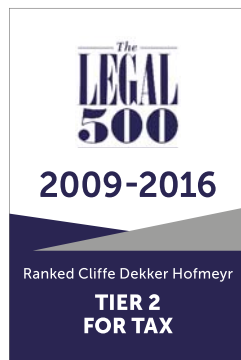
to the Applicant and expenditure incurred by it, SARS ruled as follows:

- The award of Trust A's units gives rise to an amount that must be included in the gross income of the Applicant.
- The Applicant will qualify for an allowance in respect of future expenditure under s24C against the amount referred to in the previous bullet to be included in gross income. The amount of the allowance in each year of assessment remains subject to the discretion of SARS.
- The cancellation of the units following the distribution of the shares and any surplus cash will not give rise to any capital gains tax in the Applicant.

## Comment

One should always be cautious when interpreting a SARS ruling, as SARS does not provide all the facts at its disposal when issuing rulings. However, it is interesting to note that SARS ruled that the award of Trust A's units gives rise to the inclusion of an amount as gross income in the Applicant's hands. No mention was made of the losses that might be triggered pursuant to the cancellation of the units following the distribution of the shares and any surplus cash.

*Louis Botha and Dries Hoek*



# 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.*



## This week's selected highlights in the Customs & Excise environment.

Amendment of Schedule 1 Part 1 to the Customs and Excise Act No. 91 of 1964 (Act) – increase in rate of duty for tariff headings of sub-headings:

1. 1001.9 (*Wheat and meslin ... Other*) to 159,14c/kg; and
2. 1101.00 (*Wheat or meslin flour*) to 238,71c/kg.

Amendment of Schedule 1 Part 1 to the Act relating to headings 87.03 and 87.04:

To reduce the rate of customs duty on diesel goods vehicles not exceeding 1 100 kg; petrol and electric passenger vehicles not exceeding 800 kg and electric goods vehicles not exceeding 800 kg, from 25% to free of duty" (ref: SARS website).

Of interest, Note 4 to the Additional Notes to Chapter 87 has been added as follows:

The vehicles classifiable in tariff subheadings 8703.21.75, 8703.31.85, 8703.90.31, 8704.21.77, 8704.31.77 and 8704.90.35, *shall have steering wheels fitted on the left-hand side* of the vehicle and may not be operated on a public road in terms of the National Road Traffic Act (Act 93 of 1996) (own emphasis added).

As a result of the above amendments, Schedule 1 Part 2B and Schedule 6 (Part 2) has also been amended.

Draft amendment of Rules under s46A of the Act relating to the Generalised System of Preferences for the Russian Federation. The explanatory note provides as follows:

SARS administers the Generalised System of Preferences offered by the Russian Federation in terms of rule 46A3. The rules are being amended to align it to the new enactments of the Russian Federation received from the South African Embassy in Moscow. The amendments entail word changes but the administration remains unchanged. Some of the rule amendments include the addition of 'least developed countries', change in numbering to the rules of determination of the origin of goods, replacement of the term 'Russian Federation' with 'Member State' and 'common customs territory'.

Due date for comments: 6 September 2016  
[[C&E\\_legislativecomments@sars.gov.za](mailto:C&E_legislativecomments@sars.gov.za)].

*Petr Erasmus*

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