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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

EVERY HOUSE HAS A STORY: DOES EMPLOYER-PROVIDED ACCOMMODATION ALWAYS CONSTITUTE A FRINGE BENEFIT?

On 14 April 2016, the South African Revenue Service (SARS) issued Binding Private Ruling 229 (Ruling), which dealt with provisions in the Seventh Schedule to the Income Tax Act, No 58 of 1962 (Act). The Seventh Schedule to the Act (7th Schedule) sets out the tax treatment of employee fringe benefits, referred to as taxable benefits. The Ruling dealt specifically with the provision of accommodation by an employer to its employees.

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The term 'remuneration proxy' is defined in s1 of the Act and refers to the remuneration that the employee will be deemed to have received in the preceding year of assessment.

The legal framework

Paragraph 2(a) of the 7th Schedule provides that an employee is deemed to have received a taxable benefit from his employer, if he acquires any asset consisting of property of any nature from the employer either for no consideration or for a consideration less than the value of such asset, as determined under paragraph 5(2) of the 7th Schedule. The employee will be taxed on the 'cash equivalent' of the fringe benefit, which forms part of a person's gross income in terms of paragraph (i) of the 'gross income' definition in s1 of the Act.

Paragraph 5(2) states that the value to be placed on the asset acquired is the market value of the asset, when it is acquired by the employee. In terms of paragraph 5(1), the value of the taxable benefit will be the difference between the consideration paid by the employee and the market value of the asset. There are a number of exceptions to this general rule, one of which is contained in paragraph 5(3A), which states that no value shall be placed on immovable property acquired in terms of paragraph 2(a), provided that none of the following conditions are present:

- the remuneration proxy of the employee exceeds R250,000 in the year of assessment when the immovable property is acquired;
- the market value of the immovable property exceeds R450,000 on the date of acquisition; or
- the employee is a connected person in relation to the employer.

The term 'remuneration proxy' is defined in s1 of the Act and refers to the remuneration that the employee will be deemed to have received in the preceding year of assessment, where such employee was only employed by the current employer for a portion of or not at all during the preceding year of assessment.

The facts pertaining to the Ruling

The applicant is a mining company, whose activities are regulated by, *inter alia*, the Mineral and Petroleum Resources Development Act, No 28 of 2008 (MPRDA) and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter). Under certain provisions of the MPRDA and the Mining Charter, the applicant is obliged to improve the housing standards of its employees. To comply with these obligations, the applicant intends selling vacant stands to certain of its employees (qualifying employees). One of the terms of these sale agreements, is that qualifying employees will be obliged to erect a house on the stand at the employee's own cost within a specified

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time period. The purchase price of each stand will be less than its market value.

SARS' decision

Based on the facts and legal position set out above, SARS ruled that the stands constitute 'immovable property' as envisaged in paragraph 5(3A), but that the tax relief under this paragraph will only apply if the employee's remuneration proxy is below R250,000, the market value of the immovable property is below R450,000 and the employee and employer are not connected persons, as indicated above.

Comment

Paragraph 5(3A) of the 7th Schedule came into effect on 1 April 2014. According to the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013 (Explanatory Memorandum), one of the reasons for the introduction of this provision, was to assist employers in industries where employer-provided housing is customary, such as employers in the mining sector, who are compelled to provide accommodation to their employees in terms of the Mining Charter. The Explanatory Memorandum acknowledges that in industries where employer-provided housing is customary, such housing is often sold at below market value, but that the potential tax levied on the fringe benefit that could arise from this below-market value transfer "...effectively hinders the viability of these schemes." The relief provided by this provision was further aimed to encourage "...employer-assisted housing as part of Government's anti-poverty objectives..."

Considering the challenges and uncertainty currently faced by the South African mining industry, the Ruling should be seen in a positive light. Furthermore, as there is currently no interpretation note setting out SARS' position regarding paragraph 5(3A) of the 7th Schedule, the Ruling is helpful and provides some indication of the kinds of employer-provided housing schemes, which will qualify for the relief that paragraph 5(3A) intends to provide.

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