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TAX AND EXCHANGE CONTROL ALERT

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AMENDMENTS TO THE SPECIAL VOLUNTARY DISCLOSURE PROGRAMME

On 24 February 2016 the Minister of Finance announced the Special Voluntary Disclosure Programme (SVDP) as part of the 2016 Budget Speech. On the same date, the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (First Draft Revenue Laws Bill) and the draft Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill were released. These bills contained the proposed provisions in respect of the SVDP.

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VALUE-ADDED TAX: SARS TAKES AWAY ON TAKE-AWAY

The taxpayer (D) was a registered VAT vendor. It operated a foods delivery business. D contracted with food outlets and restaurants to advertise their menus in booklets which D had printed and delivered to households.

Recently the Cape Tax Court handed down an important judgment about value-added tax (VAT).

The taxpayer (D) was a registered VAT vendor. It operated a foods delivery business. D contracted with food outlets and restaurants to advertise their menus in booklets which D had printed and delivered to households.

Customers who wished to place orders for food phoned an operator at D's premises who took the orders. D's staff would then pass the details of the order to the relevant food outlet and despatch a driver to collect and pay for the food that had been ordered. The driver then delivered the food to the customer. D's branding was on the drivers' uniforms.

In the process, two amounts were charged:

- First, D charged the food outlets a commission calculated as a percentage of the price of the food bought by D for the customers.
- Second, on delivery, the drivers charged the customers a charge called "driver's petrol money". The drivers essentially were entitled to keep that money for themselves.

D duly charged VAT to the food outlets on the commission.

However, D charged no VAT on the delivery charges. The South African Revenue Service contended that D was obliged to charge VAT on the delivery charges on the basis that the delivery of the food was a supply of services by it.

D's case was that it was not making the supplies for VAT purposes; the supplies were made by the drivers who were independent contractors and not employees of D.

D's case was that it was not making the supplies for VAT purposes; the supplies were made by the drivers who were independent contractors and not employees of D. It contended that the only supplies it made were the administrative services of receiving the call, placing the order with the food outlet, and communicating the order to the drivers. D's clients were not the customers who placed the orders; D's clients were the food outlets to whom it charged the commission.

The court carefully analysed a number of foreign VAT cases that dealt with similar issues. The court then held that, based on the facts, a contract did arise between D and the customers who placed the orders.

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VALUE-ADDED TAX: SARS TAKES AWAY ON TAKE-AWAY

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The court found that D had supplied services to the customers in the course of its enterprise for consideration and, so, was liable to charge VAT on the delivery charges.

The position was not affected by the question of whether or not the drivers were independent contractors. The customers expected delivery by D, not a third party. The driver had no legal right to exact payment of the delivery charge from the customer; only D had that right. D provided the delivery services to the customers using sub-contracted drivers. It financed the delivery by recouping the delivery charges from the customers.

Accordingly, the court found that D had supplied services to the customers in the course of its enterprise for consideration and, so, was liable to charge VAT on the delivery charges.

The judgment particularly affects franchisees who often sub-contract drivers to do deliveries. However, it also sounds a warning to VAT vendors generally to ensure that they account for VAT correctly on all supplies, even if the ultimate consumer is removed from the vendor's operations.

Ben Strauss

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AMENDMENTS TO THE SPECIAL VOLUNTARY DISCLOSURE PROGRAMME

National Treasury released the amended draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Second Draft Revenue Laws Bill) and the amended draft Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill (Second Draft Revenue Laws Administration Bill) on 19 July 2016.

On 24 February 2016 the Minister of Finance announced the Special Voluntary Disclosure Programme (SVDP) as part of the 2016 Budget Speech. On the same date, the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (First Draft Revenue Laws Bill) and the draft Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill were released. These bills contained the proposed provisions in respect of the SVDP.

50% of the highest value of the aggregate of all assets situated outside South Africa between 1 March 2010 and 28 February 2015 that were derived from undeclared income will be included in the taxable income of a person and subject to tax in South Africa.

Following input from the public, National Treasury released the amended draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Second Draft Revenue Laws Bill) and the amended draft Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill (Second Draft Revenue Laws Administration Bill) on 19 July 2016. An Explanatory Memorandum and a media statement on the SVDP accompanied these bills.

In terms of s2 of the Second Draft Revenue Laws Administration Bill, an application under the SVDP must be made under Part B of Chapter 16 of the Tax Administration Act, No 28 of 2011 and must be received by the South African Revenue Service (SARS) between 1 October 2016 and 31 March 2017. An application may not be made on behalf of a trust or in respect of receipts and accruals from which an asset that has been disclosed to SARS under an international tax agreement was wholly or partly derived.

According to the Explanatory Memorandum, a person may not apply for the SVDP if that person is aware of a pending audit or investigation in respect of foreign assets or foreign taxes or if such an audit or investigation has commenced. However, the Explanatory Memorandum makes it clear that, if the scope of an audit or investigation is in respect of other assets (ie assets other than foreign assets or foreign taxes, for instance if the audit or investigation relates to payroll taxes), a person may still qualify for relief under the SVDP.

According to the Explanatory Memorandum and the media statement, 50% of the highest value of the aggregate of all assets situated outside South Africa between 1 March 2010 and 28 February 2015 that were derived from undeclared income will be included in the taxable income of a person and subject to tax in South Africa. The value referred to is the market value of the asset determined in the relevant foreign currency and translated into South African rand at the spot rate at the end of the tax period in which the highest value fell. The provisions in this regard are set out in s15 and s16 of the Second Draft Revenue Laws Amendment Bill. As pointed out in the media statement, the calculation now consists of one amount instead of two different amounts (ie seed capital and investment returns), as was the case under the First Draft Revenue Laws Bill.

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SARS will not pursue criminal prosecution against an applicant for a tax offence where an application under the SVDP is successful.

The Explanatory Memorandum also points out that the undeclared income that originally gave rise to the offshore-held assets will be exempt from income tax, donations tax and estate duty liabilities that arose in the past. However, future income will be fully taxed and assets declared will remain liable for donations tax and estate duty in the future, should the applicant donate these assets or pass away while holding them.

Any non-compliance with taxes and levies such as value-added tax, payroll taxes, the skills development levy and unemployment insurance fund contributions will not qualify for the SVDP.

The Explanatory Memorandum and media statement also state that, where taxpayers disposed of any foreign assets prior to 1 March 2010, such taxpayers may also apply for the SVDP. In such instance, where the value of the assets cannot be determined, the Commissioner may agree to accept a reasonable estimate of the value. The provisions in this regard are contained in s15 of the Second Draft Revenue Laws Bill.

The Explanatory Memorandum further states that no understatement penalties will be levied where an application under the SVDP is successful. SARS will further not pursue criminal prosecution against an applicant for a tax offence where an application under the SVDP is successful.

The proposed SVDP will be deemed to have come into effect on 1 October 2016 and will apply for a period of six months ending on 31 March 2017.

Mareli Treurnicht and Louis Botha

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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