

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

NEW PUBLIC NOTICE PUBLISHED IN RESPECT OF MANDATORY DOCUMENTATION REQUIRED FOR TRANSFER PRICING TRANSACTIONS

Section 29(1)(b) of the Tax Administration Act, No 28 of 2011 (TAA) provides that a person must keep records, books of account or documents that are specifically required by the Commissioner of the South African Revenue Service (SARS) by public notice. On 28 October 2016, the long-awaited final public notice (Public Notice) regarding the record keeping requirements pertaining to transfer pricing transactions was published under the powers afforded to SARS in s29(1)(b) of the TAA.

CUSTOMS AND EXCISE HIGHLIGHTS

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

NEW PUBLIC NOTICE PUBLISHED IN RESPECT OF MANDATORY DOCUMENTATION REQUIRED FOR TRANSFER PRICING TRANSACTIONS

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Section 29(1)(b) of the Tax Administration Act, No 28 of 2011 (TAA) provides that a person must keep records, books of account or documents that are specifically required by the Commissioner of the South African Revenue Service (SARS) by public notice. On 28 October 2016, the long-awaited final public notice (Public Notice) regarding the record keeping requirements pertaining to transfer pricing transactions was published under the powers afforded to SARS in s29(1)(b) of the TAA.

Previously there was some uncertainty as to whether there was a formal requirement to keep prescribed transfer pricing documentation, however, with the issue of the Public Notice it has become compulsory for certain organisations to prepare and keep on record certain transfer pricing documentation in respect of years of assessment commencing on or after 1 October 2016. This is not an overly onerous legislative requirement and is rather in keeping with international standards. While the Public Notice therefore provides clarity regarding the additional record keeping requirements for transfer pricing transactions, such requirements may increase the compliance costs of certain taxpayers while also placing themselves at risk to the extent that SARS audits the taxpayer and such records have not been kept in accordance with the Public Notice.

The Public Notice has been through an extensive public consultation process resulting in several drafts, various workshops and submissions to National Treasury in respect of concerns raised by various interested parties. One of the main points of discussion was the qualifying factors required for persons specified in the Public Notice to comply with the additional record keeping requirements.

Initially, the draft public notice applied broadly to taxpayers with a consolidated South African turnover of R1 billion or more. As a result of a round of public consultations and discussions the threshold was revised to rather include only persons who have entered into a "potentially affected transaction" and the "aggregate of the person's potentially affected transactions for the year of assessment exceeds or is reasonably expected to exceed the higher of 5% of the person's gross income or R50 million".

After further public consultations and discussions, the qualifying factors were further revised. Paragraph 2 of the Schedule to the Public Notice is therefore important as it sets out the final parameters of persons required to keep the specified records, books of account or documents stipulated in the Public Notice. Paragraph 2 in its final form specifically states that:

A person must keep the records specified in paragraph 3 and 4 if the person:

- (a) has entered into a potentially affected transaction; and
- (b) the aggregate of the person's potentially affected transactions for the year of assessment, without offsetting any potentially affected transactions against one another, exceeds or is reasonably expected to exceed R100 million.

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During the consultation process, industry role players raised concerns regarding the interaction between Practice Note 7, which was issued several years after the introduction of the transfer pricing rules into South African tax legislation, and the new Public Notice.



While the qualifying threshold has been revised several times during the public consultation process it remains to be seen the extent to which, in practice, taxpayers will fall within the ambit of the s29 notice.

While the documentary requirements of the Public Notice are extensive, some of the requirements pertaining to the taxpayer's structures and operations include:

- a description of the person's ownership structure as well as a description of all foreign connected persons with which that person is transacting and the details and nature of the connection; and
- a summary of the person's business operations including a description of the business, and organogram showing the details of the senior management team, the major economic and legal issues affecting the profitability of the person and the industry.

Paragraph 4 of the Public Notice sets out further detailed documentary requirements for a 'qualifying person' in respect of any potentially affected transaction that exceeds or is reasonably expected to exceed R5 million in value. Paragraph 5 of the Public Notice is a further broad requirement placing the obligation on a person who has entered into a potentially affected transaction to which paragraph 4 does not apply (ie does not exceed the monetary

threshold) to keep certain records that enable the person to ensure, and SARS to be satisfied, that the transaction has been conducted at arm's length. Paragraph 6 deals with records kept by connected persons and paragraph 7 provides for SARS' discretion to allow a taxpayer to make alternative record keeping arrangements in respect of certain specific high-volume transactions.

During the consultation process, industry role players raised concerns regarding the interaction between Practice Note 7, which was issued several years after the introduction of the transfer pricing rules into South African tax legislation, and the new Public Notice. Practice Note 7 specifically set out certain guidelines pertaining to the documentary requirements regarding transfer pricing transactions. In this regard a Briefing Note was published together with the Public Notice which states that the Schedule to the Public Notice will override the existing Practice Note 7.

A further concern raised was that the Public Notice failed to make any reference to the Master and Local File requirements as prescribed by the OECD. The Briefing Note provides some clarity in that it states that such documentation will be submitted in terms of s25 of the TAA and that country-by-country reports will also be submitted under s25 of the TAA, read with regulations to be published by the Minister of Finance. We should therefore anticipate further publications regarding this aspect in the future.

NEW PUBLIC NOTICE PUBLISHED IN RESPECT OF MANDATORY DOCUMENTATION REQUIRED FOR TRANSFER PRICING TRANSACTIONS

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It is important for taxpayers to seek professional advice and avail themselves of the details of the Public Notice to ensure that to the extent that they fall within its application, they comply with the additional record keeping requirements.



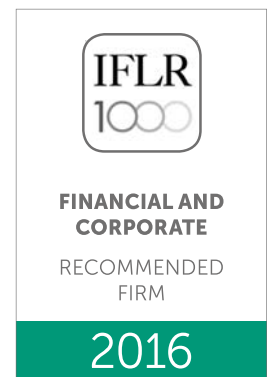
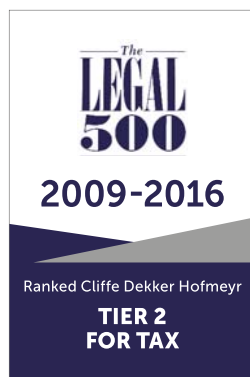
Taxpayers should be aware of the risk that SARS will make the necessary transfer pricing adjustments as per s31 of the Income Tax Act, No 58 of 1962 (Act) in the event that taxpayers cannot produce sufficient documentation to prove that transactions were conducted at arm's length. While currently there does not appear to be the possibility of the imposition of an administrative non-compliance penalty in the event that a taxpayer does not comply with the Public Notice, s234(e) makes it a criminal offence where taxpayers fail or neglect to retain records as required in the TAA. It is therefore important for

taxpayers to seek professional advice and avail themselves of the details of the Public Notice to ensure that to the extent that they fall within its application, they comply with the additional record keeping requirements.

The Public Notice can be accessed at this link:

<http://www.sars.gov.za/AllDocs/LegalDoclib/SecLegis/LAPD-LSec-TAdm-PN-2016-05%20-%20Notice%201334%20GG%2040375%2028%20October%202016.pdf>

Jerome Brink



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 and Excise environment:

- Draft amendments of forms DA260 for OS, SOS and SVM relating to excise duty on wine. The explanatory note provides as follows:

South Africa is a Contracting Party of the Convention on the Harmonized Commodity Description and Coding System (HS Nomenclature) elaborated under the WCO and has an obligation to adopt and implement the amendments to it. As a signatory to the HS Convention, South Africa implements the amendments in terms of section 48(1)(c) of the Customs and Excise Act, 1964.

Due to amendments to Schedule 1 Part 2A of the Act, the DA 260 excise accounts for wine require changes to tariff items and subheadings.

Due date for comment:
14 November 2016.

Send comments to:

C&E_legislativecomments@sars.gov.za

- Correction notices published for Schedule 1 Part 1 as they relate to the preferential trade agreement between MERCOSUR and SACU.

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