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TAX AND EXCHANGE CONTROL ALERT

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CLIFFE DEKKER HOFMEYR WELCOMES PETR ERASMUS

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SUCCESSIVE CORPORATE REORGANISATION TRANSACTIONS

The South African Revenue Service (SARS) released Binding Private Ruling No 230 (Ruling) on 4 May 2016, which deals with successive corporate reorganisation transactions. The Ruling concerns the tax consequences of the disposal of an asset in terms of an 'asset-for-share' transaction as defined in s42(1) of the Income Tax Act, No 58 of 1962 (Act) within 18 months of its acquisition in terms of an 'intra-group transaction' as contemplated in s45(1)(a) of the Act. The Ruling concerns the tax consequences of the disposal of an asset in terms of an 'asset-for-share' transaction as defined in s42(1) of the Income Tax Act, No 58 of 1962 (Act) within 18 months of its acquisition in terms of an 'intra-group transaction' as contemplated in s45(1)(a) of the Act.

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PETR ERASMUS
Tax and Exchange Control

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Petr specialises in customs and excise law. With 20 years' experience in the field, Petr has a solid track record in customs and excise litigation.

Petr joins CDH from Shepstone & Wylie attorneys where he served as a partner. Before joining Shepstone & Wylie, he held a range of positions at SARS, and was employed at a number of customs offices in different environments, including Licencing and Registrations, Law Enforcement, Import teams, Excise, Auditors, Risk Analysis and the Customs Litigation section.

Petr has dealt with intricate matters both for and against SARS, and has been able to achieve noteworthy results for his clients. He is able to assist with the full scope of customs and excise matters including licencing and registration, dispute resolution (internal remedies and litigation), opinions and audits.

We continue to sharpen and harness our capability in our Tax and Exchange Control practice. We are confident that Petr's knowledge and breadth of experience will be invaluable to our firm.

We are proud to have him on board.

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SUCCESSIVE CORPORATE REORGANISATION TRANSACTIONS

Section 42 of the Act applies to an 'asset-for-share' transaction and provides certain tax 'roll-over' relief.

The South African Revenue Service (SARS) released Binding Private Ruling No 230 (Ruling) on 4 May 2016, which deals with successive corporate reorganisation transactions. The Ruling concerns the tax consequences of the disposal of an asset in terms of an 'asset-for-share' transaction as defined in s42(1) of the Income Tax Act, No 58 of 1962 (Act) within 18 months of its acquisition in terms of an 'intra-group transaction' as contemplated in s45(1)(a) of the Act. The Ruling concerns the tax consequences of the disposal of an asset in terms of an 'asset-for-share' transaction as defined in s42(1) of the Income Tax Act, No 58 of 1962 (Act) within 18 months of its acquisition in terms of an 'intra-group transaction' as contemplated in s45(1)(a) of the Act.

Section 45 of the Act provides for the deferral of tax when assets are moved between companies forming part of the same 'group of companies', as defined in s41 of the Act.

By way of background, s42 of the Act applies to an 'asset-for-share' transaction and provides certain tax 'roll-over' relief. Generally, such a transaction entails the disposal of an asset by a person to a company and the issue of new shares by that company to the person, as consideration. Section 45 of the Act provides for the deferral of tax when assets are moved between companies forming part of the same 'group of companies', as defined in s41 of the Act.

The facts of the Ruling are relatively simple: The applicant is a tax resident company and is the sole shareholder of both companies A and B, which are both tax residents of South Africa. In addition, the applicant holds an equity interest in company C, which is also a tax resident of South Africa.

Prior to the proposed transaction contemplated by the parties, company A held an equity interest in company C as a capital asset. Such asset was transferred to the applicant at market value, in terms of a s45-intra-group transaction, resulting in the applicant holding the shares in company C on capital account.

It was proposed that in order to streamline the corporate and operational structure of the group in South Africa, the applicant would transfer its shareholding in company C to company B by way of an 'asset-for-share' transaction in terms of s42 of the Act, within 18 months of the s45 transaction.

Section 45(5)(a)(i) provides that where a transferee company disposes of an asset within a period of 18 months after acquiring that asset in terms of a s45 transaction, and that asset constitutes a capital asset in the hands of the transferee company:

> so much of any capital gain determined in respect of the disposal of that asset as does not exceed the amount that would have been determined had that asset been disposed of at the beginning of that period of 18 months for proceeds equal to the market value of that asset as at that date, may not be taken into account in determining any net capital gain or assessed capital loss of that transferee company but is subject to paragraph 10 of the Eighth Schedule for purposes of determining an

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SARS ruled that the disposal by the applicant of the shares in company C, in terms of the proposed transaction, will not result in a capital gain.

amount of taxable capital gain derived from that gain, which taxable capital gain may not be set off against any assessed loss or balance of assessed loss of that transferee company.

In other words, s45(5) of the Act seeks to, among other things, ring-fence capital gains and losses from the disposal of a capital asset, where it is disposed of within 18 months after acquisition under an intra-group transaction.

SARS ruled that the disposal by the applicant of the shares in company C, in terms of the proposed transaction, will not result in a capital gain as contemplated in s45(5)(a)(i) of the Act.

Taxpayers implementing corporate restructurings with multiple transactional steps should take cognisance of the rulings made by SARS in relation to successive corporate reorganisation transactions. However, it should be appreciated that binding private rulings are only binding between SARS and the applicant to the ruling.

Gigi Nyanin and Nicole Paulsen

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