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TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

TRUSTS – THE NEW POSITION

On 19 January 2017 the Taxation Laws Amendment Act, No 16 of 2016 (2016 Amendment Act) came into effect. The 2016 Amendment Act introduced s7C into the Income Tax Act, No 58 of 1962 (Act) which provision will come into effect on 1 March 2017. Section 7C will bring about some important changes to the tax dispensation applicable to trusts.

CUSTOMS AND EXCISE HIGHLIGHTS

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

TRUSTS – THE NEW POSITION

From 1 March 2017 s7C will apply to any loan, advance or credit provided directly or indirectly to the trust by certain persons.

In terms of s7C(2) no deduction, loss, allowance or capital loss may be claimed in respect of a disposal, including by way of a reduction or waiver, or in respect of the failure to claim payment of any loan, advance or credit.



On 19 January 2017 the Taxation Laws Amendment Act, No 16 of 2016 (2016 Amendment Act) came into effect. The 2016 Amendment Act introduced s7C into the Income Tax Act, No 58 of 1962 (Act) which provision will come into effect on 1 March 2017. Section 7C will bring about some important changes to the tax dispensation applicable to trusts.

Circumstances under which s7C will apply

From 1 March 2017 s7C will apply to any loan, advance or credit provided directly or indirectly to the trust by certain persons. The persons referred to are any natural person who is a connected person in relation to the trust or a company that is a connected person in relation to that natural person, ie a company in which that natural person, either individually or together with a connected person or persons, holds an interest of at least 20%.

Treatment of loans where s7C applies

In terms of s7C(2) no deduction, loss, allowance or capital loss may be claimed in respect of a disposal, including by way of a reduction or waiver, or in respect of the failure to claim payment of any loan, advance or credit referred to above. In terms of the Explanatory Memorandum to the Taxation Laws Amendment Bill 17B of 2016 (Explanatory Memorandum), this provision has been introduced to prevent persons from cancelling or waiving the loan, which had the effect of reducing the asset base of the lender for estate duty purposes.

Another anti-avoidance provision is s7C(3), which states that if a loan is made to the trust interest-free or at a rate lower than

the official rate of interest as defined in paragraph 1 of the Seventh Schedule to the Act (Official Interest Rate) (the rate is currently 8%), an amount equal to the difference between the interest charged by the lender or holder of the loan and the Official Interest Rate will be treated as a donation made to the trust by the lender or holder of the loan. In terms of the Explanatory Memorandum, the interest forgone by the lender or holder of the loan will be treated as an ongoing and annual donation made to the trust on the last day of the trust's year of assessment. Section 7C(4) deals with the situation where the advance, loan or credit was provided by a company at the instance of a shareholder who is a connected person in relation to that company.

Circumstances under which s7C will not apply

Section 7C(2) and s7C(3) of the Act will not apply under the following circumstances:

- where the trust is an approved public benefit organisation in terms of s30(3) of the Act or a small business funding entity approved by the Commissioner in terms of s30C of the Act;

TRUSTS – THE NEW POSITION

CONTINUED

Where s7C applies to a loan provided to the trust, from 1 March 2017 the trust will incur interest in terms of s7C(3) of the Act.



- in the case of a vesting trust (bewind trust), where the loan is made by a trust beneficiary to a vesting trust, provided that the four requirements of s7C(5)(b) are met;
- if the trust is a special trust created solely for the benefit of minors with a disability as defined in paragraph (a) of the definition of "special trust" in s1 of the Act;
- where the loan, advance or credit constitutes an affected transaction as defined in s31(1) of the Act (which deals with transfer pricing);
- where the loan, advance or credit was provided to that trust in terms of an arrangement that would have qualified as a sharia compliant financing arrangement as contemplated in s24JA of the Act, had the trust been a bank as defined in that section;
- if the loan, advance or credit is subject to the anti-value extraction provisions of s64E(4) of the Act; and
- where the trust used that loan, advance or credit wholly or partly to fund the acquisition of a residence that is used by that person or their spouse as their primary residence, to the extent to which that loan, advance or credit was used to fund the acquisition.

Comment

Where s7C applies to a loan provided to the trust, from 1 March 2017 the trust will incur interest on any amounts still outstanding on loan account, in terms of s7C(3) of the Act.

With regard to newly established trusts, where s7C applies a person may only donate R100,000 to the trust in any specific year of assessment. Any amount donated in excess of this will be subject to donations tax. However, this amount will not be owed on loan account and no interest will be incurred by the trust.

Louis Botha

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:

- 1 Amendment of Rule 202 to the Customs and Excise Act, No 91 of 1964 (Act) to provide for form DA178 (environmental levy return for tyres) and its annexures. Further, substitution of form DA 185.4B2 (licensing of manufacturing warehouse) to include the manufacture of tyres (effective from 1 February 2017).
- 2 Reduction of duty for heading 17.01 (cane or beet sugar and chemically pure sucrose, in solid form) to a free rate.
- 3 In a judgment dated 3 February 2017 in the High Court of South Africa, Pretoria (*JM Da Encarnacao N.O. and another vs CSARS*, Case number: 33302/2014) rebate item 412.09 in Schedule 4 to the Act (Rebate Item) was considered by the honourable Prinsloo, J.
The Rebate Item provides as follows:

Goods, excluding goods contemplated in rebate item 497.02, in respect of which the customs duty, together with the fuel levy (where applicable), amounts to not less than R2 500, proved to have been lost, destroyed or damaged on any single occasion in circumstances of vis major or in such other circumstances as the Commissioner deems exceptional while such goods are:

 - (a) in any customs and excise warehouse or in any appointed transit shed or under the control of the Commissioner;
 - (b) being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of this Act; or
 - (c) being stored in any rebate storeroom, provided:
 - (i) no compensation in respect of the customs duty or fuel levy on such goods has been paid or is due to the owner by any other person;
 - (ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty; and
 - (iii) such goods did not enter into consumption.

Cigarettes while in a customs and excise bonded warehouse were stolen by way of armed robbery. SARS demanded full duty thereon and the applicant relied on the Rebate Item for a rebate of full duty, which SARS refunded.

It was held that:

- In both sets of circumstances (namely "vis major" and "such other circumstances as the Commissioner deems exceptional") and all three situations [namely (a) to (c)], all three provisos [namely (i) to (iii)] must be met.

CUSTOMS AND EXCISE HIGHLIGHTS

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Additional information is available upon request.



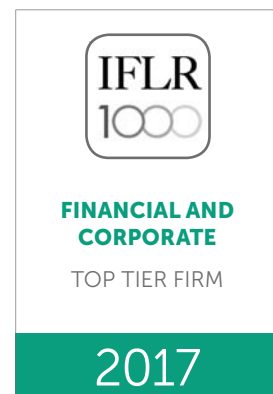
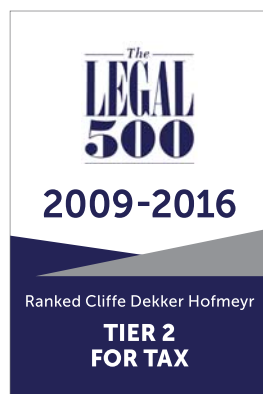
- Vis major [according to *Wille's Principles of South African Law*, (9th ed, page 849) does not only include "acts of nature, vis divina or "act of God", but also the acts of man"] in a proper case can include armed robbery.
- The third proviso (namely "provided ... such goods did not enter into consumption") must be interpreted to mean that the goods did not enter into consumption at the time of the (in this case) armed robbery, meaning the "operative and relevant time appears ... to

be before the robbery and not thereafter". This has the effect that even if the goods were robbed and thereafter sold into the South African market, that the Rebate Item may still find application as the goods did not yet enter consumption at the time of the robbery.

At this stage there is uncertainty as to whether SARS will appeal the decision.

- 4 Additional information is available upon request.

Petr Erasmus



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