23 JUNE 2017

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

READY OR NOT, HERE COMES CRS IMPLEMENTATION

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CUSTOMS HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment since our last instalment.

CLIFFE DEKKER HOFMEYR

READY OR NOT, HERE COMES CRS IMPLEMENTATION

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The Global Forum on Transparency and Exchange of Information for Tax Purposes monitors the standards on tax transparency and the exchange of tax information, namely exchange of information on request (EOIR); and automatic exchange of information (AEOI).

During 2014, the OECD, together with the G20, developed the Standard for Automatic Exchange of Financial Account Information in Tax Matters (Standard). The Standard draws extensively on earlier work of the OECD in the area of AEOI. It incorporates progress made within the European Union, as well as global anti-money laundering (AML) standards, with the intergovernmental implementation of the Foreign Account Tax Compliance Act (FATCA) having acted as a catalyst for the move towards AEOI in a multilateral context.

The Standard extends and accelerates implementation of the OECD standard on AEOI; and requires substantial compliance by all Global Forum member countries with the standards of transparency required for EOIR. The OECD simultaneously proposed intensifying cooperation on transparency with regard to beneficial ownership – a proposal that was indubitably prompted by the revelations contained in the Panama papers that were leaked in April 2016.

The Standard is also known as the OECD's Common Reporting Standard (CRS). It requires jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis, the intention being to reduce inter-jurisdictional tax evasion. It is also envisaged that the annual automatic exchange of third party information will enhance domestic tax compliance within the participating jurisdictions.

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South Africa is an early adopter of AEOI, which includes both the initiative stemming from South Africa having signed an Inter-Governmental Agreement (IGA) with the United States' (US's) Internal Revenue Service (IRS) regarding their FATCA, as well as the CRS.

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The South African Revenue Service's (SARS's) FATCA and CRS filing season opened on 15 May 2017.

The South African Revenue Service's (SARS's) FATCA and CRS filing season opened on 15 May 2017. Financial institutions required to report include South African banks and custodians, brokers, asset managers, private equity funds, certain investment vehicles, long-term insurers and other participants in the financial system.

The combination, among other things, of the OECD's and G20's Base Erosion and Profit Shifting (BEPS) Project, data leaks, FATCA, AEOI, beneficial ownership registers, and CRS; and numerous actions by governments to curb tax leakage is causing international tax planning to change dramatically and at an accelerated pace quite uncharacteristic for change on a global scale, which usually occurs gradually. Tax avoidance structures that once formed part of common business practice are now being dismantled or given a wide berth; either because they risk being challenged by tax authorities, or they expose the relevant taxpayer to reputational risk. Tax havens are now frowned upon in some quarters and low-tax jurisdictions are becoming less popular with large corporates. Instead, simpler, more substantive structures are trending. Although legal tax avoidance through profit shifting, using nominal tax rate differentials, legitimate tax deductions and special tax regimes, will remain crucial for limiting the tax liabilities of taxpayers, the sceptre of reputational risk and corporate responsibility weigh heavily upon them in this global environment of greater transparency.

Interesting then, that as financial institutions scramble to file their first reports with tax authorities in compliance with the CRS, loopholes in the global measure are appearing, and being exploited no less; making it possible for some taxpayers to remain undetected by obtaining second passports to hide their assets.

Although the CRS was developed to diminish tax evasion by imposing financial transparency initiatives, it is generating unintended consequences. Some financial institutions and their clients are spurring last ditch attempts to exploit the gaps left by the global initiative by purchasing so-called 'fake residency' certificates available in certain jurisdictions so that taxpayers' details are not globally exchanged. Bulgaria, Granada, Hungary, Ireland, Latvia, Singapore, Spain, St Kitts and Nevis, Switzerland and the United Arab Emirates are examples of the jurisdictions offering residency programmes, which are capable of current exploitation; at least until the stated jurisdictions commit or begin exchanging financial data under the CRS.

John Christensen, chair of the Tax Justice Network (TJN) in the United Kingdom (UK), has reported that there has been an increase in the offering of 'vague' residencies by certain jurisdictions, which he believes is in response to the CRS's information exchange processes. He observed that the range of residency alternatives appeared to be growing, with bankers and accountants increasingly recommending them to their clients.

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The possibility of obtaining a 'fake residency' certificate may arise in a secrecy jurisdiction which offers tax residency on extremely low minimum stay terms; or where it offers citizenship and residence in exchange for money or investments.

Christensen goes on to observe that although the CRS aims to increase information flows and catch tax evaders, without the full participation of major economies, the information trail will terminate with non-compliant jurisdictions. This potential obstacle is exacerbated by countries such as the US refusing to commit to the CRS, on the basis that FATCA is sufficient.

As should be apparent from the foregoing, the issue with CRS implementation hinges on the definition of 'residency'. Differences in the meanings of and threshold requirements for establishing tax residency across jurisdictions are creating challenges in the rollout of the CRS. Thus the possibility of obtaining a 'fake residency' certificate may arise in a secrecy jurisdiction which offers tax residency on extremely low minimum stay terms; or where it offers citizenship and residence in exchange for money or investments as a way to raise revenues without requiring a minimum stay in the jurisdiction at all.

According to Pascal Saint-Amans, director at the OECD's Centre for Tax Policy and Administration, the residency loophole is well known and identified, and action is being taken to monitor and possibly neutralise it if it is used. However, Saint-Amans has stated that at present, there is no evidence that the residency loophole is going to be used because the application of CRS is based on residency. Furthermore, most of the citizenship by investment programmes grant citizenship and not residency to persons. He has, however, not discounted the risk altogether and is of the view that once the first exchanges of information begin among tax administrations, the analysis of the data will highlight the gaps. As authorities analyse the quality of the data and match it up with the corresponding information which they hold, he believes the issues will emerge and be addressed and countered appropriately.

Chris Orchard, former Her Majesty's Revenue and Customs (HMRC) policy lead responsible for the implementation of the CRS in the UK, holds that one can never guarantee there will not be any loopholes when designing new standards. As stated above, the CRS draws on the OECD's earlier work on automatic information exchange and incorporates several features employed in FATCA. Orchard states that jurisdictions are required to implement an anti-avoidance rule to ensure that anybody trying to circumvent the CRS, can be prohibited from so doing. He goes further, observing that the whole of the CRS is governed by the treaty network. All the exchanges under the CRS take place under exchange of information articles in treaties and treaties themselves have definitions of what residency means for purposes of the relevant treaty. It appears that anomalies that arise between treaty definitions and domestic definitions of residency, may potentially trigger further problems.

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On 5 May 2017, the OECD launched a facility to disclose CRS avoidance schemes, which allows interested parties to report potential schemes to circumvent the CRS.

While it is envisaged that tackling the tax residency loophole will be an arduous process, the CRS seems to have shone a spotlight on it, which in turn may facilitate its resolution. The CRS requirements are closely affiliated with AML and know-your customer (KYC) requirements, and will undoubtedly evolve in parallel with the AML and KYC regulations. Other options also exist to combat this loophole, including blacklisting non-compliant jurisdictions, and/or employing the growing number of beneficial ownership registers to detect those exploiting dual residency or residency programmes for tax evasion purposes.

It remains to note that on 5 May 2017, the OECD launched a facility to disclose CRS avoidance schemes, which allows interested parties to report potential schemes to circumvent the CRS. Perhaps the OECD is not prepared to just sit back and wait for the issues to emerge?

Lisa Brunton

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 since our last instalment, (the Customs & Excise Act, No 91 of 1964 will be referred to herein as "the Act").

1. The SARS Annual Performance Plan 2017/2018 was released on the SARS website in mid-June 2017. Relating to Customs, the plan appears to focus on the following:

   1.1 Enforcement and increased activity relating to tariff classification, rules of origin and valuation; and

   1.2 In respect of the new customs Acts, it appears that the current financial year is earmarked to implement the first stage, being registration, licensing and accreditation as well as cargo reporting. We quote from the plan:

   > During the 2017/18 fiscal period, SARS will continue with the design and development of the necessary processes, policies, procedures and systems in preparation for the implementation of the provisions of the new customs Acts. The focus of SARS activities during 2017/18 will be on ensuring an effective and efficient process for registration, licensing and accreditation, and reporting conveyance and goods.

2. We quote from the International Trade Administration Commission: Custom Tariff Applications - List 05/2017 (which is self-explanatory):

   Increase in the rate of duty on:

   Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of biaxially oriented polymers of propylene (excluding that which is self-adhesive on both sides), in rolls of width not exceeding 25mm and of value for duty purposes exceeding 1300c/m^2, classifiable in tariff subheading 3919.10.41, from free of duty to 20% ad valorem; and

   biaxially oriented polymers of propylene (excluding that which is self- adhesive on both sides), of a width not exceeding 200mm, classifiable in tariff subheadings 3919.10.43 and 3919.10.47, from free of duty and 10% ad valorem, respectively, to 20% ad valorem, by amending the scope of tariff subheading 3919.10.43 to the following: Of biaxially oriented polymers of propylene (excluding that which is self-adhesive on both sides) and amend the description of tariff subheading 3919.10.47 to the following: Other biaxially oriented polymers of propylene, self-adhesive on both sides.

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CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

The duty on self-adhesive biaxially oriented polymers of propylene will remain unchanged at free of duty for 3919.10.47.

[Ref: 29/2016 Enquiries:
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Reason for the application:

As a reason for the application, the applicant indicated, among others, the following: "Similar products which do not add value to the SACU market, are imported at cheaper prices. Some of the similar products are imported under a tariff subheading which is free duty."

3. The guide "Understanding the Customs and Excise Transitional Provisions" relating to the Customs & Excise Act 1964, the Excise Duty Act 1964, the Customs Control Act 2014 and the Customs Duty Act 2014 has been published. The document can be accessed here.

4. Regarding the proposed sugar tax, National Treasury indicated during a recent meeting with Parliament's Finance Standing Committee, that it will make the following tax design changes, following comments and input from the public:

   4.1 A threshold will be introduced in terms of which 4g/100ml is exempt (only sugar content above 4g/100ml will be taxable); and

   4.2 The tax rate was lowered slightly from 2.29c/g to 2.1c/g.

Petr Erasmus

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