

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

CLIFFE DEKKER HOFMEYR WELCOMES GERHARD BADENHORST

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NEW SARS RULING PERTAINING TO THE RESTRUCTURING OF A PROPERTY PORTFOLIO UNDER THE CORPORATE RULES

On 11 April 2017, the South African Revenue Service (SARS) issued a new Binding Private Ruling (BPR 270) setting out the tax consequences of a restructuring of the unlisted property portfolio of a long-term insurer in terms of s42 of the Income Tax Act, No 58 of 1962 (ITA).

CUSTOMS AND EXCISE HIGHLIGHTS

Selected highlights in the Customs and Excise environment since our last instalment.

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GERHARD BADENHORST
Tax and Exchange Control

CDH is proud to announce the appointment of Gerhard Badenhorst as a Director in the Tax and Exchange Control practice in Johannesburg.

Gerhard is a Chartered Accountant (SA) who specialises in value added tax (VAT), and has been practising as a tax professional for 26 years. He advises on a wide range of VAT matters in various industries and has been recognised by a number of international publications as a leading VAT advisor.

He is a member of the South African Institute of Chartered Accountants VAT sub-committee and is also an ad-hoc member of the VAT sub-committee of the Davis Tax Committee. Gerhard is a guest lecturer on VAT for various tax courses presented at the University of Pretoria and the University of the Witwatersrand, and is

the co-author of the commentary section of the LexisNexis® publication Value-Added Tax in South Africa.

Gerhard is able to assist with the full scope of VAT matters, including dispute resolution, opinions, rulings and training.

We are confident that his appointment will enhance our award-winning Tax and Exchange Control practice and that Gerhard's in-depth knowledge and experience in his area of speciality will be invaluable to our firm, and more importantly, our clients.

We are thrilled to welcome him on board.

NEW SARS RULING PERTAINING TO THE RESTRUCTURING OF A PROPERTY PORTFOLIO UNDER THE CORPORATE RULES

BPR 270 considered the application of sections 25BB(4) (the taxation of Real Estate Investment Trusts (REITs)), 29A, 40CA and 42 of the ITA and paragraph 20(1)(a) of the Eighth Schedule to the ITA to the facts in question.

The Applicant and the First Co-Applicant proposed to transfer a portion of their undivided interests in the property portfolio and Property X respectively to the Second Co-Applicant.



On 11 April 2017, the South African Revenue Service (SARS) issued a new Binding Private Ruling (BPR 270) setting out the tax consequences of a restructuring of the unlisted property portfolio of a long-term insurer in terms of s42 of the Income Tax Act, No 58 of 1962 (ITA).

BPR 270 considered the application of sections 25BB(4) (the taxation of Real Estate Investment Trusts (REITs)), 29A (the taxation of long-term insurers), 40CA (the acquisition of assets in exchange for shares or debt issued) and 42 (asset-for-share transactions) of the ITA and paragraph 20(1)(a) of the Eighth Schedule to the ITA (base cost of assets) to the facts in question. It further ruled on the application of s9(1)(l)(i) of the Transfer Duty Act, No 40 of 1949 (TDA) (exemptions from transfer duty) to the facts.

The parties to the transaction were as follows:

- The applicant is a listed company incorporated and resident in South Africa (Applicant). The Applicant carries on business as a long-term insurer.
- The first co-applicant is a company incorporated and resident in South Africa and is 100% owned by the Applicant (First Co-Applicant).
- The second co-applicant is a corporate REIT to be listed on the Main Board of the Johannesburg Stock Exchange (Second Co-Applicant).

The background to the transaction was as follows:

The Applicant held unlisted prime real estate with the objective of delivering long-term returns and matching policyholder liabilities. The Applicant owned a 100% undivided interest in certain

of the properties and less than 100% in the others. The First Co-Applicant owned a 25% undivided interest in a property described as 'Property X'.

The Applicant's funds established and maintained in accordance with s29A of the ITA exposed to the property portfolio were:

- the untaxed policyholder fund;
- the individual policyholder fund;
- the risk policy fund; and
- the company policyholder fund.

The Applicant and the First Co-Applicant proposed to transfer a portion of their undivided interests in the property portfolio and Property X respectively to the Second Co-Applicant. The proposed transaction steps were as follows:

- The Applicant would dispose of a portion of its undivided interest in the property portfolio, which included associated letting enterprises, to the Second Co-Applicant in exchange for units in the Second Co-Applicant (the REIT).
- As the Applicant and Second Co-Applicant would become co-owners of the property portfolio they would, in instances where they own a 100% undivided interest in properties, create a separate unincorporated joint venture for purposes of conducting the letting enterprises of the property portfolio.

NEW SARS RULING PERTAINING TO THE RESTRUCTURING OF A PROPERTY PORTFOLIO UNDER THE CORPORATE RULES

CONTINUED

The First Co-Applicant had not claimed any of the allowances referred to in s25BB(4) of the ITA prior to the proposed transfer of a portion of its undivided interest in Property X to the Second Co-Applicant.



- The First Co-Applicant would dispose of a portion of its undivided interest in Property X, including the associated letting enterprise, to the Second Co-Applicant in exchange for units in the Second Co-Applicant.
- As the Second Co-Applicant would become a co-owner of Property X, the Second Co-Applicant would be integrated into the pre-existing unincorporated joint venture for purposes of conducting the letting enterprise of Property X.
- The units in the Second Co-Applicant would be proportionally allocated by the Applicant to the relevant funds in accordance with s29A of the ITA.

The First Co-Applicant had not claimed any of the allowances referred to in s25BB(4) of the ITA prior to the proposed transfer of a portion of its undivided interest in Property X to the Second Co-Applicant.

SARS issued the following ruling in connection with the proposed transaction:

- The disposal of the portion of the undivided interest in the property portfolio (including the rights attaching to the property portfolio and the letting enterprises) by the Applicant to the Second Co-Applicant will qualify

as an "asset-for-share transaction" as defined in paragraph (a) of that definition in s42(1) of the ITA. However, s42 will not apply insofar as it relates to the untaxed policyholder fund.

- Insofar as the disposal of the portion of the undivided interest in the property portfolio relates to the untaxed policyholder fund, the Second Co-Applicant will obtain a base cost for the relevant portion of the undivided interest in the property portfolio (including the relevant portion of the rights attaching to the property portfolio and the letting enterprises) equal to the market value of the Second Co-Applicant's units issued to the Applicant immediately after acquiring the portion of the undivided interest in the property portfolio.
- Insofar as the disposal of the portion of the undivided interest in the property portfolio relates to the untaxed policyholder fund, the Applicant will obtain a base cost for the units acquired in the Second Co-Applicant equal to the market value of the relevant portion of the undivided interest in the property portfolio (including the relevant portion of the rights attaching to the property portfolio and the letting enterprises) disposed of.

CHAMBERS GLOBAL 2011 - 2017 ranks our Tax and Exchange Control practice in Band 2: Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2017 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017 in Band 1: Tax.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 in Band 3: Tax.



NEW SARS RULING PERTAINING TO THE RESTRUCTURING OF A PROPERTY PORTFOLIO UNDER THE CORPORATE RULES

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BPR 270 is valid for a period of two years from 29 March 2017.



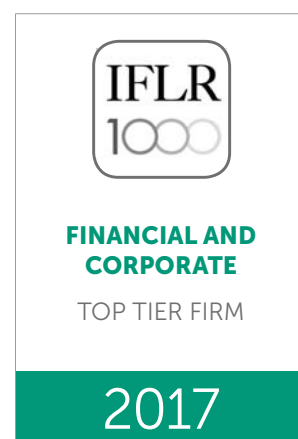
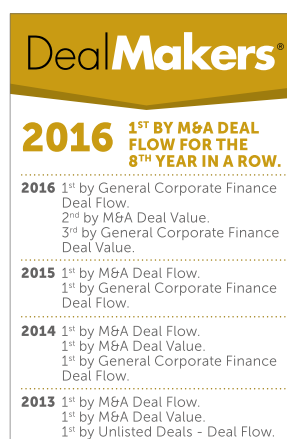
- The Second Co-Applicant will not be liable for transfer duty as s9(1)(l)(i) of the TDA (which exempts a company acquiring property in terms of an asset-for-share transaction in terms of s42 of the ITA from transfer duty) will apply to the acquisition of the portion of the undivided interest of the Applicant in the property portfolio. However, the public officer of the Second Co-Applicant must make a sworn affidavit or solemn affirmation confirming that the transaction complies with the section.
- The disposal of the portion of the undivided interest in Property X (including the rights attaching to the property and the associated letting enterprise) by the First Co-Applicant

to the Second Co-Applicant will qualify as an “asset-for-share transaction” as defined in paragraph (a) of the definition of “asset-for-share transaction” in s42(1) of the ITA.

- The Second Co-Applicant will not be liable for transfer duty as s9(1)(l)(i) of the TDA will apply to the acquisition of the portion of the undivided interest of the First Co-Applicant in Property X. However, the public officer of the Second Co-Applicant must make a sworn affidavit or solemn affirmation confirming that the transaction complies with the section.

BPR 270 is valid for a period of two years from 29 March 2017.

Mareli Treurnicht



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. The third draft of the Customs Control Rules made under the Customs Control Act, No 31 of 2014 was published by the South African Revenue Service (SARS) for sight only. Please note that the draft has been "frozen" for purposes of SARS systems development and is not published for public comment. We quote from the SARS explanatory note to the publication:

"The amendments made to the second draft of the Rules include changes occasioned by external stakeholder comments received, internal feedback and SARS operational requirements, changes to give effect to amendments and proposed amendments of the Customs Control Act, 2014, (as contained in the Tax Administration Laws Amendment Act, 2016, and to be contained in the Tax Administration Laws Amendment Bill, 2017), as well as the technical

review of the draft as a whole. Technical amendments include the correction of errors, the moving of provisions, the adaptation of wording to ensure consistency of similar provisions throughout the text, the insertion of provisions inadvertently omitted, the insertion of general provisions applicable to all the Chapters and the consequential deletion or adaptation of provisions in the various Chapters.

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Please note that Chapters 2 and 37 of the draft Rules will be published for public comment at a later stage when these Chapters have been finalised".

2. Please advise if additional information is required.

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Petr Erasmus

Disclaimer

Please note that this is not intended to be a comprehensive study or list of the amendments, changes, occurrences, etc. in the Customs & Excise environment, but merely selected highlights which may be of interest. In the event that specific advice is required, kindly contact us in order to research and provide.

Although all care is taken to ensure that the above is 100% correct, CDH cannot be held liable for any inaccuracies, be it as a result of misinterpretation, finger-trouble or otherwise. This is for information purposes only and must not be used as is. Please contact us to verify information provided before acting upon it (petr.erasmus@cdhlegal.com/082 576 5260).

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