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TAX & EXCHANGE CONTROL ALERT

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INCOME TAX EXEMPTION FOR BODY CORPORATES, SHARE BLOCK COMPANIES AND ASSOCIATIONS: CLARIFICATION IN SARS' LATEST ISSUE OF INTERPRETATION NOTE 64

On 13 November 2018 the South African Revenue Service (SARS) published the fourth issue of Interpretation Note 64 (Interpretation Note) which seeks to provide guidance on the application and interpretation of s10(1)(e) of the Income Tax Act, No 58 of 1962 (Act).

CRUEL ACCRUAL? AN IMPORTANT JUDGMENT FOR TAXPAYERS IN THE PROPERTY DEVELOPMENT INDUSTRY

It is an established tax law principle that an amount will form part of a person's gross income, in the year of assessment in which the amount accrues to that person. However, as illustrated by a recent judgment, where property-related transactions are concluded, the parties must consider whether s24(1) of the Income Tax Act, No 58 of 1962 (Act) applies to their agreement.

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INCOME TAX EXEMPTION FOR BODY CORPORATES, SHARE BLOCK COMPANIES AND ASSOCIATIONS: CLARIFICATION IN SARS' LATEST ISSUE OF INTERPRETATION NOTE 64

The section exempts from income tax the levy income generated by a body corporate, a share block company, and an association of persons.

Body corporates, share block companies or associations of persons referred to in s10(1)(e) are qualifying entities, provided that they are not party to a "prohibited transaction".

On 13 November 2018 the South African Revenue Service (SARS) published the fourth issue of Interpretation Note 64 (Interpretation Note) which seeks to provide guidance on the application and interpretation of s10(1)(e) of the Income Tax Act, No 58 of 1962 (Act).

The exemption

The section exempts from income tax the levy income generated by a body corporate, a share block company, and an association of persons. It also provides these qualifying entities with a basic exemption from income tax on receipts and accruals outside of levy income, to the extent that the aggregate of the income does not exceed R50,000. The Interpretation Note makes it clear that this exemption is applied to the total receipts and accruals, excluding the levy income, which are taxable and not to each separate source of income.

The *aa, bb, cc* of Qualifying Entities

Body corporates, share block companies or associations of persons referred to in s10(1)(e) are qualifying entities, provided that they are not party to a "prohibited transaction".

Body Corporates (s10(1)(e)(i)(aa))

Those of us living in complex developments or apartment blocks will be all too familiar with body corporates which govern the separate ownership of individual units (the particular section and undivided share in common property) within a development scheme consisting of buildings and land.

The body corporate is established by the Sectional Titles Act, No 95 of 1986 (Sectional Titles Act) to enforce the rules of a particular development scheme, and the members of the body corporate, being the individual owners of the units, are required to pay levies as a contribution to the costs incurred in the running of the common property in the development scheme.

Share block companies (s10(1)(e)(i)(bb))

Share block companies are less renowned than body corporates but also involve immovable property and levies. They are defined in the Share Blocks Control Act, No 59 of 1980 (Share Blocks Control Act) as "a company the activities of which comprise or include the operation of a share block scheme", and share block schemes are defined in the same act as "any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property".

Shareholders that own shares in a share block company acquire the right of use and occupation of a specific unit/portion owned in the share block, but are expected to contribute to the levy fund established by the share block company. Similar to body corporates, the levies contributed by shareholders are used in maintaining and administering the immovable property, as well as the share block company itself.

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SARS also clarifies in the Interpretation Note that a "company" as defined in the Companies Act, as well as any co-operative, close corporation or trust are specifically excluded as associations of persons and do not qualify for the exemption.

An association of persons (s10(1)(e)(i)(cc))

Though it may seem simple to qualify as an association of persons, the exemption will only be applicable to "non-profit companies" as defined in the Companies Act, No 71 of 2008 (Companies Act) and, as set out in the Interpretation Note, to a "voluntary association of members founded on a basis of mutual agreement whose intent and objectives are usually set out in a formal founding document". SARS also clarifies in the Interpretation Note that a "company" as defined in the Companies Act, as well as any co-operative, close corporation or trust are specifically excluded as associations of persons and do not qualify for the exemption.

In order to qualify as an exempt association of persons in terms of s10(1)(e)(i)(cc) of the (Income Tax) Act, the Commissioner must also be satisfied that the association has been formed solely to manage the collective interests common to its members and that the association of persons is not permitted to distribute any of its funds to any person other than a similar association of persons.

Also pertaining to immovable property in some respects, associations of persons as contemplated in this section will manage the expenditure, and financial and administrative affairs applicable to the common immovable property of its members by collecting levies from said members. The Interpretation Note highlights that homeowners' associations are often included as qualifying entities, as well as associations formed to control and manage the maintenance, security or appearance of the immovable property common to the members. The Interpretation Note also provides examples of the members of these associations, citing residents or owners of security estates and gated communities, or tenants of shopping malls. Typically, associations will therefore be centred on either common ownership of immovable property or a shared responsibility to maintain common facilities.

No exemption for prohibited transactions

Though they meet the requirements of "qualifying entities" within s10(1)(e), where the body corporate, share block company or association of persons is party to a transaction, operation or scheme with the sole purpose of reducing, postponing or avoiding any tax, levy or duty otherwise payable by any person in terms of the (Income Tax) Act or any Act administered by the Commissioner for SARS, the exemption will no longer be applicable to the entity.

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Body corporates and share block companies are automatically exempt from income tax in respect of levy income and are not required to apply for the exemption in s10(1)(e)(i)(aa) and (bb).

The exemption in s10(1)(e)(i) will still be applicable to an entity that was not knowingly a participant in a prohibited transaction as described above, however, the Interpretation Note sets out that this rule applies irrespective of whether the entity itself, or any other person i.e. a shareholder or unit holder, benefitted from the reduction, postponement or avoidance of any applicable tax.

Application for exemption

Body corporates and share block companies are automatically exempt from income tax in respect of levy income and are not required to apply for the exemption in s10(1)(e)(i)(aa) and (bb). The Tax Exemption Unit (TEU) need not be involved and these qualifying entities are merely required to register at a SARS branch office and submit annual income tax returns, even if they do not appear to have an income tax liability. Body corporates and share block companies will find that the levy income exemption and the basic exemption are automatically applied during assessment.

Involving the Tax Exemption Unit

An association of persons will be fully taxable on all of its income, unless it gains approval from the Commissioner by lodging an application in this regard with the TEU. The most recent details for the TEU are provided in the Interpretation Note, with email address included as follows: teu@sars.gov.za.

The TEU will decide whether the association of persons meets the requirements in s10(1)(e)(i)(cc) based on the founding document lodged in the application by the association of persons. SARS recommends in the Interpretation Note that the application includes confirmation that the sole object of the association of persons is to manage the collective interests common to all of its members, which interests include expenditure related to the common immovable property and the collection of levies in this regard for which members are liable. It is further recommended in the Interpretation Note that the application includes clarification that the association of persons is not permitted to distribute funds to any person other than to a similar association of persons and that, upon dissolution of the association of persons, its remaining assets will be distributed to a similar association of persons also exempt from income tax in terms of s10(1)(e).

When making application to the TEU, the association of persons should also bring to the Commissioner's attention any amendments that have been made to the association's founding documents and submit the amended documents to the TEU.

Defining the "levy"

The term "levy" is not defined in the Act. As such, further clarification is needed when considering s10(1)(e) which exempts "levy income". As set out in the Interpretation Note, the levies accrued to or received by qualifying entities in s10(1)(e) are the amounts collected by the qualifying entities from their members in order to pay certain expenditure which arises from the management of the collective interests of the members.

A useful means to distinguish a levy has been included in the Interpretation Note as follows: "the members would be responsible for paying and administering their share of the expenditure if it were not for the qualifying entities that

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SARS explains in the Interpretation Note that, in determining whether an amount is a levy, regard must be had to the true nature of the transaction.

manage their collective interests". SARS explains in the Interpretation Note that, in determining whether an amount is a levy, regard must be had to the true nature of the transaction.

Types of exempt levies

Examples of levies that will be exempt from income tax when received by or accrued to qualifying entities in terms of s10(1)(e) are provided in the Interpretation Note. Most common of these is the "general levy", which covers every-day running or maintenance costs, and the "special levies" which may be raised to pay for capital improvements such as paving or security upgrade, or as part of the creation of a reserve fund for future capital expenditure envisioned by the qualifying entity.

In a similar vein, SARS details in the Interpretation Note that "stabilisation fund levies", being levies for the purposes of subsidising future expenditure or to create a reserve for capital improvements or unforeseen expenditure, will be regarded as a levy, provided that the founding document of the qualifying entity makes provision for a levy stabilisation fund. This type of fund aims to mitigate undue increases in levies by creating a buffer for any extra costs. Stabilisation fund levies are usually paid as fixed, once-off payments and are often in the form of an "entry levy" when a member purchases a unit, or an "exit" or "departure levy" when an owner disposes of a unit. In order to qualify as levy income, the stabilisation fund levies must be provided for in the founding documents of the qualifying entity and the rules relating to governance of the stabilisation fund must be included as well.

The Interpretation Note is expansive as to the requirements for exemption of stabilisation fund levy income, stating that the founding document of the stabilisation fund must contain the methodology under which the levy will be payable to the fund, and stipulate that the levy income is used only to defray expenditure on common immovable property governed by the qualifying entity. The stabilisation fund levy must also be a charge imposed by the qualifying entity and, if the levy is payable by the owner on alienation of a unit, the founding document must specify that the amount to be paid is a liability due, though only payable upon alienation.

What about time-share levies?

It is clear from the Interpretation Note that time-share exchange entities are non-qualifying entities. Though immovable property is involved similar to body corporates and share block companies

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Qualifying entities in s10(1)(e) fall within the definition of "company" in s1(1) of the Act. They are therefore treated as companies for income tax purposes and pay tax at the company rate on their taxable income.

or qualifying associations of persons, members of a time-sharing arrangement do not own the common immovable property, nor are they responsible for maintenance, repairs, improvements or bond repayments on the immovable property. They are merely owners of time-share points. As such, according to the Interpretation Note, unless the entity selling time-share interests in holiday accommodation to members of the public qualifies as a body corporate in terms of the Sectional Titles Act, or as a share block company in terms of the Share Blocks Control Act, the time-share exchange entity will not qualify for the exemption under s10(1)(e).

Are building penalty levies taxed?

"Building penalty levies" are described in the Interpretation Note as qualifying for exemption as a levy. These levies are typically expressed as a multiple of a general levy and are primarily aimed at recovering additional costs incurred by the qualifying entity as a result of delayed construction. Members of qualifying entities will be made to pay a building penalty levy when they have failed to commence or complete building activities within the prescribed period, so as to cover costs of, for example, repairing damages caused by construction vehicles on the roads. Provided that the building penalty levy is distinguishable from a penalty or a fine, the levy will be exempt from income tax in terms of s10(1)(e).

Distinction between a levy, a penalty and a fine

SARS puts forth the view in the Interpretation Note that qualifying entities will not enjoy the exemption if the income in question is received by or accrued to them by way of penalties and late payments. Though penalties, fines and levies are conceivably intertwined, it is clarified in the Interpretation Note that fines, for example, do not qualify as levy income. Fines are identifiable in that they are put in place to discourage certain non-desirous behaviour and often occur as a result of a member's conduct or lack thereof. Where a member is obliged to pay an additional amount over and above any exempt levies that is not related to expenditure incurred or to be incurred in relation to the qualifying entity's common immovable property, such receipt by the qualifying entity does not represent an amount collected with the intention of funding expenditure related to the common immovable property and therefore does not qualify as exempt levy income.

Important to note in this respect is that late payment penalties and interest charged on outstanding levies receive similar treatment and do not qualify as exempt levy income.

Tax Rate

Qualifying entities in s10(1)(e) fall within the definition of "company" in s1(1) of the Act. They are therefore treated as companies for income tax purposes and pay tax at the company rate on their taxable income.

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Ultimately, the Interpretation Note serves as a welcome update to the previous issue thereof in 2015.

Impact on taxable income

Whilst levy income is exempt from income tax, expenditure incurred by a qualifying entity in relation to the management of the collective interests of members which is funded by member levies is not allowable as a deduction in determining taxable income, because it is incurred in the production of exempt income and therefore cannot be set off against other income.

The basic exemption contained in s10(1)(e) should not be ignored. Examples of the receipts and accruals outside of levy income that will qualify for the basic exemption are provided in the Interpretation Note and include investment income, amounts charged on unpaid levies, rental income from letting portions of immovable property such as parking bays, fees charged for the use of facilities on immovable property such as tennis courts or entertainment halls, and fines paid for not adhering to conduct rules. Though the scope for exemption of receipts and accruals outside of levy income is ostensibly wide, the basic exemption limits the aggregate of the qualifying income in this respect to R50,000 only.

Exemption for Provisional Tax, Donations Tax, Dividends Tax and CGT

Qualifying entities are excluded from the definition of "provisional taxpayer" and are not required to submit provisional tax returns or make provisional tax payments.

Donations made by or to a qualifying entity are exempt from donations tax under s56(1)(h) of the Act.

In respect of capital gains tax (CGT) implications of the exemption, SARS submits in the Interpretation Note that it would be unusual in practice for a body corporate, share block company or association of persons to derive a capital gain during the normal course of its operations. Per the Interpretation Note, movable depreciable assets are unlikely to yield capital gains. Unit holders would have to account for capital gain or loss on the sale of a portion of common property and the body corporate would therefore have no CGT consequences. The transfer of immovable property in a share block company to a holder of shares in the company will not give rise to a capital gain or a capital loss in the company as per paragraph 67B(3)(a) of the Eighth Schedule to the Act.

SARS addresses dividends tax in the Interpretation Note by confirming that cash dividends paid to a qualifying entity are exempt from dividends tax under s64F(1)(a) of the (Income Tax) Act, and dividends *in specie* declared and paid by a share block company that comprises a disposal contemplated in paragraph 67B(2) of the Eighth Schedule would be exempt from dividends tax under s64FA(1)(d).

Ultimately, the Interpretation Note serves as a welcome update to the previous issue thereof in 2015. With the rising prevalence of complex developments, security estates, shopping malls, wellness compounds and high-rise apartment buildings in South Africa, body corporates, homeowners' associations and share block companies are commonplace and clear guidelines as to the taxation of these entities is imperative.

Jessica Carr

CLIFFE DEKKER HOFMEYR

CRUEL ACCRUAL? AN IMPORTANT JUDGMENT FOR TAXPAYERS IN THE PROPERTY DEVELOPMENT INDUSTRY

The Taxpayer was appealing against the Tax Court's judgment, which court found that the purchase price of the properties accrued to the Taxpayer in its 2013 year of assessment, even though payment was only received in its 2014 year of assessment.

SARS contended that the purchase price had accrued to the Taxpayer in the 2013 tax year, or alternatively that it was deemed to have accrued to the Taxpayer in terms of s24(1) of the Act.

It is an established tax law principle that an amount will form part of a person's gross income, in the year of assessment in which the amount accrues to that person. However, as illustrated by a recent judgment, where property-related transactions are concluded, the parties must consider whether s24(1) of the Income Tax Act, No 58 of 1962 (Act) applies to their agreement.

On 20 November 2018, the Supreme Court of Appeal (SCA) handed down judgment in the matter of *Milnerton Estates Ltd v CSARS* (1159/2017) [2018] ZASCA 155 (20 November 2018). The SCA had to consider whether Milnerton Estates Ltd (Taxpayer) had to include the purchase price of immovable properties sold in its 2013 or 2014 tax year of assessment. The Taxpayer was appealing against the Tax Court's judgment, which court found that the purchase price of the properties accrued to the Taxpayer in its 2013 year of assessment, even though payment was only received in its 2014 year of assessment. We reported on this judgment in our Tax and Exchange Control Alert of 14 July 2017.

Facts

In 2013, the Taxpayer concluded 25 sale agreements of erven in the Parklands Residential Estate. The purchasers were required to pay a nominal deposit of R5,000 and the balance of the purchase price was payable against transfer. Although conditions regarding payment of the purchase price were not the same in all the sale agreements, in all 25 cases the purchase price was fully secured before the end of the 2013 tax year.

In terms of each agreement, the Taxpayer could only give possession of the property to the purchaser once it had obtained the approval of the local authority, to permit the passage of vehicular traffic on the completed roads in the development. In all 25 cases, the local authority's approval was obtained before the end of the 2013 tax year, although in some cases possession was only given in the subsequent tax year. At the end of the 2013 tax year, the Taxpayer had not yet transferred the 25 stands to the purchasers. Therefore, it omitted the purchase price of each of the stands from its gross income for the 2013 year of assessment. However, SARS contended that in each instance, the purchase price had accrued to the Taxpayer in the 2013 tax year, or alternatively that it was deemed to have accrued to the Taxpayer in terms of s24(1) of the Act. It therefore issued an assessment in terms of which the Taxpayer was taxed on an amount of R6.8 million.

Issue

The SCA stated that two issues were raised in the appeal:

- Firstly, whether the Taxpayer's right to receive the purchase price under the 25 sale agreements accrued to it during the 2013 tax year?
- Secondly, in any event, whether the deeming provision in s24(1) of the Act deemed those amounts to have been received by the Taxpayer during the 2013 tax year?

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The Taxpayer referred to s24(2) of the Act and tried to argue that the effect of s24(2) is to remove an agreement from the ambit of s24(1), to which s24(1) would otherwise apply.

Judgment

With reference to the issues raised in the appeal, the SCA stated that it was unnecessary to consider the first question, that is, whether there was an accrual in accordance with ordinary principles. It held that the matter should be decided with reference to s24(1) of the Act.

Section 24(1) of the Act states the following:

> Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.

SARS contended that the requirements of s24(1) had been met in that:

- the Taxpayer;
- had entered into agreements with other persons, being the purchasers of the erven;
- in respect of immovable property, being the erven;
- the effect of which agreements was that transfer would be passed from the Taxpayer to the purchasers; and
- upon or after the Taxpayer receiving the whole of the amount payable to it under the agreements.

In response, the Taxpayer raised various arguments. Firstly, it argued that s24(1) is not concerned with cash sale agreements of this type, but only with agreements for the sale of immovable property on credit. Essentially, the Taxpayer sought to distinguish between cash sales and sales of immovable property, where the purchase price was to be paid in instalments over time, with transfer only being given once the full purchase price had been paid. It argued that this argument was supported by the opening words "subject to the provisions of s24J" in s24(1). The SCA rejected this argument.

Secondly, the Taxpayer referred to s24(2) of the Act and tried to argue that the effect of s24(2) is to remove an agreement from the ambit of s24(1), to which s24(1) would otherwise apply. Although the SCA rejected this argument, it accepted that this is a factor that together with other factors may suggest that s24(1) should be interpreted restrictively when considering the range of agreements to which the section may apply.

Thirdly, the Taxpayer argued that as the heading of s24 refers to credit agreements and debtors allowances, but the agreements concluded by the Taxpayer with the purchasers were not credit agreements, s24(1) did not apply. The SCA found that there was some merit in this argument, but ultimately rejected it. The SCA reasoned that the heading was amended to read "Credit agreements and debtors allowances" after the judgment in Secretary for Inland Revenue v Silverglen Investments (Pty) Limited 1969 (1) SA 365 (A) (Silverglen), which is binding authority on s24(1), without any corresponding amendment to exclude the current case from s24(1)'s ambit.

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The SCA held that even if the four arguments above are taken collectively, it would not justify a restrictive interpretation of s24(1), so that its application is limited to agreements that are specifically called "credit agreements".

Fourth, the Taxpayer argued that in interpreting the Act, the court should adopt a practical approach and that the provisions in the Act should be construed having regard to their situation in the statute so that they "take colour from their surroundings". This argument was also rejected.

The SCA held that even if the four arguments above are taken collectively, it would not justify a restrictive interpretation of s24(1), so that its application is limited to agreements that are specifically called "credit agreements". The section should be interpreted to apply to all sale agreements where ownership passes to the purchaser "upon or after receipt by the taxpayer of the whole or a certain portion of the purchase price".

Finally, the Taxpayer tried to argue that the requirement in s24(1) that ownership should only pass "on or after" receipt of the purchase price, had not been met as ownership could only pass after transfer took place in the Deeds Registry, which had not taken place in the 2013 tax year. The SCA rejected this argument in light of the judgment in Silverglen where this argument was previously rejected. Considering the agreements concluded and that the guarantees provided by the purchasers to the Taxpayer constituted payment, which payment is concurrent with transfer of ownership in the Deeds Registry, the agreements provided for ownership to pass to the purchasers upon or after receipt of the whole of the purchase price in terms of s24(1). This meant that s24(1) was applicable and that the entire purchase price in each instance was deemed to be received in the 2013 tax year, when the agreements were concluded and not in the 2014 tax year, when payment was in fact made. This was also the decision in Silverglen, which in the SCA's view was correctly decided.

Accordingly, the SCA dismissed the Taxpayer's appeal with costs.

Comment

The judgment confirms that where an agreement for the sale of immovable property contains a suspensive condition whereby transfer of ownership in the Deeds Registry is delayed until payment of any portion of the purchase price, the purchase price is deemed to accrue in the tax year that the agreement was concluded. Property developers should therefore take note of this judgment and s24(1) of the Act and ensure that where a sale agreement falls within the scope of this provision, they declare the income from the sale in the tax year that the agreement was concluded, even if payment of the purchase price and transfer of ownership only takes place in the following tax year.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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