20 APRIL 2018

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

SARS SPEAKS UP: SOME CLARITY PROVIDED ON THE TAXATION OF CRYPTOCURRENCIES IN SOUTH AFRICA

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CUSTOMS & EXCISE HIGHLIGHTS

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

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On 6 April 2018, the South African Revenue Service (SARS) announced that it will continue to apply normal income tax rules to cryptocurrencies and will expect affected taxpayers to declare cryptocurrency gains or losses as part of their taxable income.

Was this move expected by SARS?

Since the growing popularity of cryptocurrencies in South Africa and following the absence of legislation relating to the taxation and regulation of cryptocurrencies, also referred to as 'virtual currencies', the decision taken by SARS to address the taxation of cryptocurrencies has been anticipated.

During December 2017, SARS indicated that it was in discussions with top technology companies in the world regarding methods to track cryptocurrency trades more efficiently. The aforesaid discussions with global technology companies, and the recent statement by SARS, suggests that SARS is scrutinising the taxation of cryptocurrencies and cryptocurrency transactions.

The position taken by SARS in relation to that of foreign revenue collection authorities

In light of the taxation of cryptocurrencies in countries such as the United States (US), India and Canada, it does appear that the way in which South Africa has chosen to tax virtual currency is in line with most internationals trends.

1. The US Internal Revenue Service (IRS) treats virtual currency as property and existing tax principles find application to virtual currency transactions. Four key rights are attributed to property rights and include:

   (1) The right to use the good,

   (2) The right to earn income from the good,

   (3) The right to transfer the good to others, and

   (4) The right to enforce property rights.

   It follows that should a taxpayer dispose of virtual currency, the disposal will trigger either a capital gain or a capital loss. The same regime is followed in South Africa, whereby any gain or loss derived from a capital asset, such as property held for investment purposes, will be taxed in accordance with the provisions contained in the Eighth Schedule to the Income Tax Act, No 58 of 1962 (Act). However, in the US, should a taxpayer "mine" virtual currency, such as Bitcoins for example, the IRS requires that the fair market value be included in the taxpayer's taxable income. This provision is similar to South Africa's tax system, which requires that an asset held on revenue account be included in that taxpayer's taxable income.

2. In India, virtual currency is deemed a capital asset if it is purchased for investment purposes. Therefore, any gain arising because of the disposal of virtual currency shall be taxed in terms of the provisions dealing with capital gains, a principle which South Africa

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also follows and is in accordance with SARS's recent statement. However, should transacting with virtual currency become frequent, it could be said that the taxpayer is trading in virtual currency, and the income generated from such trade must be included in the taxpayer's taxable income. Once again, this is in line with the South African tax system.

3. The Canadian Revenue Authority (CRA) requires that where virtual currency is used to pay for goods or services, the amount required to be included in the taxpayer's income will be the amount, which the taxpayer would have ordinarily charged. In the event that virtual currencies are traded like a commodity, the tax consequences will depend on whether the transaction is of an income or capital nature. Where the virtual currency is acquired for investment purposes, a capital gains tax (CGT) liability will arise. Alternatively, where the virtual currency is acquired to realise a profit, this will result in an income tax liability for the taxpayer.

Despite the similarities between South Africa's taxation of virtual currencies and that of the US, India and Canada, the taxation of virtual currencies in Australia is quite different to that of South Africa.

- The Australian Taxation Office (ATO) views virtual currency as an asset for capital gains purposes. ATO also provides an exemption should a taxpayer predominantly use virtual currency to purchase goods or services for personal use and in doing so the capital gain or loss which arises is less than A$10,000.
- A further distinction is made in Australia between the purchase of goods and services for personal use, as opposed to a business transaction taking place with the use of virtual currency. In the latter, the value of the virtual currency must be recorded as ordinary income in A$.

General remarks

SARS indicated in its statement that cryptocurrency transactions are subject to the general principles of South African tax law. This means that any revenue received, gains made or losses incurred in respect of cryptocurrency transactions, may either be

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Looming security threats due to a lack of a central authority should a technical error arise, or a transaction involving a deceitful dealer.

regarded as revenue in nature and included in the taxpayer's income, alternatively as capital in nature and subject to CGT in terms of the Eighth Schedule to the Act.

The test to determine the nature of the cryptocurrency transaction and whether the transaction is of a revenue or capital nature, must include taking into account the taxpayer's intention when acquiring the cryptocurrency and must be decided considering the facts and circumstances of each case. South African courts have decided that the primary intention at the time when the asset has been acquired is conclusive in determining whether the asset is held on revenue or capital account, unless other factors exist that show that the asset has been sold in the scheme of profit making. If it was the intention of the taxpayer to obtain the cryptocurrency for the specific purpose of profit-making, the asset will be considered to be "trading stock" and of a revenue nature and the income derived therefrom is required to be included in the taxpayer's taxable income.

The risks associated with the use of virtual currencies

1. SARS does not view cryptocurrencies as a form of legal tender issued by government in the form of coins or notes and as such, should companies or individuals agree to make use of a form of cryptocurrency in exchange for goods or services and something subsequently goes wrong, no legal recourse will be available to a government or entity.
2. Looming security threats due to a lack of a central authority should a technical error arise, or a transaction involving a deceitful dealer. In addition, cryptocurrency accounts are also being targeted by hackers.
3. The unpredictability of cryptocurrencies should be considered by consumers and cryptocurrency traders. This begs the question as to the reasons behind their volatility:
    - Cryptocurrencies do not have any intrinsic value, meaning they do not sell any products, earn revenue or provide employment. They generally also do not return dividends and only a small amount of the total value of the currency is used to develop the cryptocurrency. Cryptocurrencies are therefore difficult to value and decisions made to purchase cryptocurrencies are based on the market sentiment at the time;
    - There is a lack or regulatory oversight in respect of cryptocurrencies despite government's attempt(s) to clamp down on the industry. This lack of regulation allows for market manipulation, which introduces the volatility and discourages institutional investors who are simply not willing to take the risk of investment in cryptocurrencies without any assurance that their investment is protected and secure;
    - Investment from institutional investors could soften the market volatility, however, due to the lack of institutional investors, the cryptocurrency market remains unpredictable.

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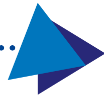
Despite the announcement made by SARS regarding the taxation of cryptocurrencies, the novelty thereof guarantees that various uncertainties remain.



How will the tax consequences of cryptocurrencies be calculated?

Since cryptocurrency transactions are subject to the general principles of South African tax law, depending on whether the cryptocurrency is held on revenue or capital account, the income tax or CGT calculation in respect of cryptocurrency transactions will be the same as for any other revenue or CGT calculation.

SARS indicated that a taxpayer is permitted to deduct expenses incurred in respect of cryptocurrencies, such as Bitcoin trading tax for example, provided they meet all the requirements of the Act.

Clarity provided by SARS

Following SARS's statement, taxpayers have now been provided with clarity in respect of the tax treatment of cryptocurrencies, placing the onus on the taxpayer to declare the income made in terms of the general principles of South African tax law. Taxpayers are, therefore, required to declare income derived from cryptocurrencies in their income tax return in the year in which that income accrued. Failure to do so correctly could result in understatement penalties of up to 200%, as well as the imposition of interest.

Despite the announcement made by SARS regarding the taxation of cryptocurrencies, the novelty thereof guarantees that various uncertainties remain. In this regard, taxpayers may seek guidance from SARS on the taxation of specific cryptocurrency transactions by means of Binding Private Rulings.

Candice Gibson

CHAMBERS GLOBAL 2018 ranked our Tax & Exchange Control practice in Band 1: Tax.

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Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

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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:

1. Amendments to Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website/government gazette)

    1.1 With effect from 1 April 2018:

        1.1.1 The substitution of Rule 47.03(a)(v);

    1.2 With effect from 20 April 2018:

        1.2.1 Rule 8 to the Act has been replaced entirely dealing with reports of cargo;

        1.2.2 Amendment of Rule 64G.13 and 64G.16 to accord with the above substitution;

        1.2.3 Amendment of rule 101A.01A;

        1.2.4 Substitution of forms DA 8, DA 8A, DA 8B and DA 8C with the following forms:

            1.2.4.1 DA 8 Application for registration to submit reports – Sea cargo;

            1.2.4.2 DA 8A Application for registration to submit reports – Air cargo;

            1.2.4.3 DA 8B Application for registration to submit reports – Rail cargo;

            1.2.4.4 DA 8C Application for registration to submit reports – Road cargo; and

        1.2.5 Amendment of Rule 64E.12 and 64E.14.

2. Amendments to Schedules to the Act (certain sections quoted from the SARS website):

    2.1 Schedule 1 Part 1:

        2.1.1 The substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10 and 1101.00.90 to reduce the rate of customs duty on wheat and wheaten flour from 71,63c/kg and 107,45c/kg to 39,49c/kg and 59,23c/kg respectively.

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CUSTOMS AND EXCISE HIGHLIGHTS

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3 SARS issued a circular dated 13 April 2018 wherein external stakeholders were (*inter alia*) advised as follows (certain sections quoted from the circular):

3.1 The first phase of RCG, which will provide for customs control of all vessels, aircraft, trains, vehicles, goods and persons entering or leaving South Africa, will be implemented on Friday, 20 April 2018.

3.2 Customs clients impacted by the RCG implementation include shipping lines, airlines, the national rail carrier, road hauliers, freight forwarders, port and airport authorities, terminal operators, wharf operators, transit shed operators, licensees of depots and registered agents.

3.3 All land, sea and air cargo reporters were recently reminded in correspondence from SARS to ensure compliance in terms of data submission in the correct format before the implementation of Phase 1 of RCG on 20 April 2018.

As SARS has to drive electronic submission compliance, it will be obliged to impose penalties for non-compliance as part of its consequence management process. As a result, penalties for non-compliance may be imposed from 1 August 2018.

3.4 Cargo reporters currently submitting reports to the MPR system and who are not yet in a position to switch to RCG reporting by 20 April must continue to submit their current MPR reports to SARS.

3.5 During the go-live, SARS will have an Operations Support Centre which will assist clients with any issues. SARS will provide clients with more details on this closer to the time. In the meantime, if clients need help to prepare for the go-live, send an e-mail to NewCustomsActs@sars.gov.za.

4. Please advise if additional information is required.

Petr Erasmus

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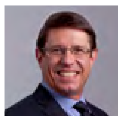
OUR TEAM

For more information about our Tax & Exchange Control practice and services, please contact:



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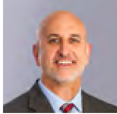

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