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TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

THE RESIDENCY REQUIREMENTS IN AUSTRALIA: A "HARD" KNOCK FOR THE TAXPAYER IN A DECISION MADE BY THE FEDERAL COURT OF AUSTRALIA

On 8 June 2018, the Federal Court of Australia handed down its decision in *Harding v Commissioner of Taxation* [2018] FCA 837. In this matter, Mr Harding (Applicant), pursuant to Part IVC of the Taxation Administration Act, 1953 (TAA), appealed against an objection decision made by the Commissioner of Taxation (Commissioner) in which the Commissioner disallowed the Applicant's objection to a notice of amended assessment (Objection Decision).

CUSTOMS AND EXCISE HIGHLIGHTS

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

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CLIFFE DEKKER HOFMEYR

THE RESIDENCY REQUIREMENTS IN AUSTRALIA: A "HARD" KNOCK FOR THE TAXPAYER IN A DECISION MADE BY THE FEDERAL COURT OF AUSTRALIA

In terms of the Ordinary Concepts test, if it is found that you reside in Australia, you will be considered an Australian resident for tax purposes and do not need to apply any of the other residency tests.

The period of time in which is spent in Australia is not, by itself, decisive in determining a person's residency status.

On 8 June 2018, the Federal Court of Australia handed down its decision in *Harding v Commissioner of Taxation* [2018] FCA 837. In this matter, Mr Harding (Applicant), pursuant to Part IVC of the Taxation Administration Act, 1953 (TAA), appealed against an objection decision made by the Commissioner of Taxation (Commissioner) in which the Commissioner disallowed the Applicant's objection to a notice of amended assessment (Objection Decision).

System of taxation followed in Australia

The primary test of tax residency is called the "resides test", referred to below as the Ordinary Concepts test. In terms of the Ordinary Concepts test, if it is found that you reside in Australia, you will be considered an Australian resident for tax purposes and do not need to apply any of the other residency tests.

In terms of the "resides test", due to the fact that the term reside is not defined within income tax legislation, the courts and the Australian Tax Office (ATO) have made use of the normal definition provided for in the Oxford English Dictionary, which is defined as:

> To dwell permanently, or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place.

The ATO has indicated that in order to reside in Australia, you are required to display behaviour over a period of time, such as:

- a degree of continuity;
- routine; or
- habit.

Therefore, it follows that the period of time in which is spent in Australia is not, by itself, decisive in determining a person's residency status. In the event that a person does not satisfy the "resides test", he will still be regarded as a tax resident of Australia if he meets one of the following three statutory tests:

- the "**domicile test**": in terms of the ATO, a person is considered to be an Australian resident if their domicile (broadly the place which is his permanent house) is in Australia, unless the ATO is satisfied that his permanent place of abode is outside Australia;
- the "**183-day test**": if a person is present in Australia for more than half of the income year, whether continuously or with breaks, the person may be said to have a "constructive residence" in Australia, unless it can be shown that the person has his usual place of abode outside Australia and further has no intention of taking up residence in Australia; or
- the "**superannuation test**": this test is only applicable to Australian government employees working at Australian posts overseas and who are members of specific schemes, such as the Commonwealth Superannuation Scheme or Public Sector Superannuation Scheme.

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The critical issue to consider in this matter was whether the Applicant was a resident in Australia for purposes of s6(1) of the Income Tax Assessment Act, 1936 (ITAA) for the relevant year.

Facts

The Applicant is an Australian national, as well as an Australian citizen who holds an Australian passport. The Applicant also holds a British passport and is an aircraft engineer who lived in Saudi Arabia from the period 1990 until 2006. Although the Applicant remained in Saudi Arabia until 2006, the Applicant's wife and children returned to Australia in 2004, due to unrest in the Middle East at the time. In the Applicant's wife's affidavit, she stated that the move to Australia was intended to be temporary in nature and it was always the Applicant's and her intention to relocate to the Middle East when the security situation improved.

Upon the arrival of the Applicant's wife and children in Australia in 2004, the Applicant and his wife built a house in close proximity to the Applicant's parents and siblings. The Applicant moved into the family home in Australia in 2006 and commenced employment in Australia with a significantly reduced salary to that when he was working in Saudi Arabia. Despite this, the Applicant remained in Australia for three years until receiving an employment offer from a UK based company in 2009, in terms of which the Applicant would be required to work in Saudi Arabia.

The Applicant accepted the offer and relocated permanently to Bahrain in March 2009 and travelled daily to Saudi Arabia. The Applicant's wife would remain in Australia for a further two years due to their son finishing the last two years of his high school education. When the Applicant relocated, the Applicant indicated that it was never his intention to reside in Australia and further he expected that his wife and youngest son would join him in Saudi Arabia in 2011. In support of this intention, the Applicant sold his personal possessions in Australia, such as his boat and car.

The Applicant returned to Australia each year to visit his wife and children. However, from March 2009 until February 2015 he lived in Saudi Arabia following an employment contract he signed. Whilst on the face of it, the employment contract was for a period of 12 months, it is apparent that the contract was varied and extended over time, despite only signing one employment contract. Initially, the Applicant lived in a two-bedroom apartment in Bahrain, due to the living conditions being substantially more comfortable than that of Saudi Arabia.In 2011 when his marriage broke down, he moved into a one-bedroom apartment until starting a new relationship in 2012 whereafter he decided to move into a two-bedroom apartment again. The nature of the apartments in which the Applicant resided is relevant when considering the question of whether the Applicant had established a permanent place of abode in Bahrain. The Applicant claimed that the apartments which he stayed in over the 6-year period had become his home.

The Applicant's divorce was finalised in March 2014, and in 2015 the Applicant moved to Oman for work purposes, where he met his current wife.

Facts in dispute

The critical issue to consider in this matter was whether the Applicant was a resident in Australia for purposes of s6(1) of the Income Tax Assessment Act, 1936 (ITAA) for the relevant year. From the Objection Decision, it was clear that the

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Consideration is often given to the subjective intention of the taxpayer in order to ascertain whether the departure from one place and the relocation to another is, on the one hand, short-lived or temporary, or, on the other, permanent.

Commissioner regarded the Applicant as an Australian resident in terms of both the "Ordinary Concepts" test and "Domicile" test and as a consequence, the Commissioner regarded the Applicant's overseas-earned income as taxable in Australia and issued a notice of amended assessment (Amended Assessment) on that very basis.

The Applicant challenged the Amended Assessment by stating that he was not a Australian resident in the relevant year under any of the statutory tests.

Legislation and arguments put forward

The definition of "Australian resident" is found in s6(1) of the ITAA. In terms of considering the residency of the Applicant in the current instance, the parts of the definition of 'resident" according to what is known as the "Ordinary Concepts" test and according to "the Domicile" test are relevant. Both of these are found in the following:

> "resident or resident of Australia" means:
>
> *(a) a person, other than a company, who resides in Australia and includes a person:*
>
> *(i) whose domicile is in Australia, unless the Commissioner is satisfied that the persons' permanent place of abode is outside Australia*

The Applicant's argument focused on the Ordinary Concepts test, whereas the Commissioner focused its attention on the Domicile test.

Issues to consider

The Ordinary Concepts test

In terms of the Ordinary Concepts test, the term "reside" is not defined. According to Australian case law, it has been accepted that in ordinary parlance, the word "reside" follows the normal definition provided for in the Oxford English Dictionary as indicated above. Although the test appears relatively straight forward, the application becomes problematic when it comes to the characterisation of a person as a resident of one country or another for purposes of the ITAA. The difficulty arises when a person works in one place yet retains a house and a family in another. It has been noted in Australian case law that the cause of the difficulty stems from the common law test of "residency", which lacks precision and is dependent upon the uncertain task of ascertaining the subjective intention of the person involved.

Following the above, consideration is often given to the subjective intention of the taxpayer in order to ascertain whether the departure from one place and the relocation to another is, on the one hand, short-lived or temporary, or, on the other, permanent. In this regard, the Applicant's counsel did not agree with the judgment of Wilcox J in the case of *Hafza v Director-General of Social Security* [1985] FCA 164 where Wilcox J accepted that the concept of residency had two elements. The first being physical presence in a particular place, as well as the intention of the person to treat that place as a home, at least for the time being. Wilcox J noted that the "physical presence and intention will coincide most of the time...Once a person has established a home in a particular

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The Commissioner submitted that maintaining a house is normally very significant when ascertaining the residency of a person in accordance with the "Ordinary Concepts" test.

place, a person does not necessarily cease to be resident there because he or she is physically absent. The test is whether the person has retained a continuity of association with the place". It is this very statement that the Applicant's counsel disagreed with as it was not consistent with the meaning of "resident".

In the High Court case of *Koitaki Para Rubber Estates Limited v Federal commissioner of Taxation* [1941] HCA 13, Williams J stated that the place of a individual's residence is determined by where the person eats and sleeps and has his settled or usual abode and not by the situation of some business or property. This concept was identified by the Full Court in the *Harding* matter as applicable when determining whether a person is resident under the Ordinary Concepts test.

The Domicile test

Residency under the "Domicile" test is an expanded test for residency and provides that a person is resident in Australia if they have an Australian domicile, "unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia".

In addition to the problematic common law test for residency, s6 of the ITAA expands upon the definition of "resident" which makes use of concepts of domicile and a "permanent place of abode". Taking into account the permanent place of abode principle, the consequence creates inconsistencies due to the fact that if a person has established a permanent residence outside of Australia, it is said that they must have lost their domicile in Australia.

Arguments put forward and judgment

The Ordinary Concepts test

1. **House in Australia**

   The Commissioner relied upon the Applicant maintaining a continuous association with Australia, such as his house in Australia. The Commissioner submitted that maintaining a house is normally very significant when ascertaining the residency of a person in accordance with the "Ordinary Concepts" test. Although in agreement with the Commissioner's argument that in most circumstances maintaining a house is significant, the judge in *Harding*, Derrington J, recognised that in this particular case, it is not as important and the fact that the Applicant had removed his personal belongings from the house was of significance.

   The Commissioner further relied upon the fact that when the Applicant returned to Australia that he stayed in the house in which his wife and children were living. Derrington J stated that this cannot warrant any conclusion that he resides in Australia as these visits were for short periods in order to spend time with his wife and children.

2. **Passenger cards**

   The Commissioner further relied upon passenger cards which the Applicant completed for the purpose of international travel. On the outgoing passenger card for the period from July 2010 until July 2015, the Applicant had indicated that he was an "Australian resident

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The Commissioner argued that the Applicant's presence in the Middle East for work purposes was dependent upon his current employment, being somewhat tenuous and the fact that the Applicant's employment could be terminated given four months' notice.

departing temporarily". On the incoming passenger cards, the Applicant reflected that he was a "resident returning to Australia". However, the Applicant had also clearly indicated on the passenger cards that he did not "intend to live in Australia for the next 12 months". Taking these passenger cards into account on face value, Derrington J stated that this could only mean that the Applicant was at all times an Australian resident, or at the very least, that the Applicant was resident in two places. The Commissioner argued that the passenger card constituted an admission made by the Applicant that he was an Australian resident between 2009 and 2015. However, Derrington J noted that the admission was outweighed by other evidence presented.

3. **Employment**

   Counsel for the Applicant argued that the courts have always treated the location of full time work as a paramount factor for determining a person's settled and usual place of abode. Although Derrington J did not agree with this statement, he was of the view that it is apparent that the place where a person engages in full time employment can be significantly relevant when determining residency, although it is only one factor for consideration. In *Harding*, the place where the Applicant worked was not the place where he resided as he travelled daily from Bahrain to Saudi Arabia, however, the fact that the Applicant worked in Saudi Arabia on a full-time basis was said to add weight to the conclusion that the Applicant had ceased to be resident in Australia.

   The Commissioner argued that the Applicant's presence in the Middle East for work purposes was dependent upon his current employment, being somewhat tenuous and the fact that the Applicant's employment could be terminated given four months' notice. Although Derrington J accepted the Commissioner's argument in this regard, he stated that this was not the Applicant's first time moving to the Middle East for work purposes and the reason for the Applicant's return to Australia was due to unrest in the Middle East at the time. In addition, due to the skills that the Applicant held and which were highly sought after in the Middle East, even if the Applicant lost his position with his current employer, it was said to be unlikely that he would not obtain further sponsorship.

4. **Where the Applicant slept, ate and had his settled place of abode**

   Derrington J agreed that the Applicant had established a place to live in Bahrain, and his living arrangements reflected this. The Applicant's activities included grocery shopping and preparing and cooking meals in his home. The apartments in Bahrain were also the place where he did his laundry and watched television.

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Derrington J therefore held that the Applicant was not a resident under the "Ordinary Concepts" test.

5. **Return trips to Australia**

   The Applicant made return trips to Australia to visit his family which the Commissioner argued indicated his maintenance of a residence in Australia (the continuity of association principle). Derrington J, maintained that although this would normally have an impact, when the Applicant in this matter left Australia in 2009, he had a strong and fixed intention to leave Australia and make a new home in the Middle East. The property in Australia was merely a temporary place for his wife to remain whilst his son finished high school. Given this intention, his visits back to Australia were regarded by Derrington J solely for the purposes of seeing his family.

6. **Financial matters**

   The Commissioner contended that due to the following financial matters, the Applicant maintained a continuity of association with Australia:

   (i) the Applicant had an Australian bank account with which he maintained and supported his family;

   (ii) the Applicant and his wife purchased an investment property in Australia;

   (iii) the Applicant maintained his Australian private medical insurance; and

   (iv) the Applicant made two substantial investments in Australia in 2013.

Derrington J accepted that the Applicant's financial affairs remained substantially in Australia despite his relocation in 2009. Ordinarily this would have significant weight against a taxpayer. However, in these circumstances, it had been established that when the Applicant left Australia in 2009, he did so with the expectation that his wife and youngest son would join him. Taking this into account, financial arrangements would have to be put in place subsequent to his departure. In addition, it had been held that the fact that the Applicant made investments in Australia should carry little weight on where a person is said to reside.

Conclusion of the Ordinary Concepts test

Although factors were noted which are suggestive of the Applicant retaining residency in Australia, the factors noted were not indicative of the Applicant's intention, which was to reside in the Middle East. Derrington J therefore held that the Applicant was not a resident under the "Ordinary Concepts" test.

The Domicile test

The Domicile test will apply to a person who is found not to be a resident in Australia in accordance with the Ordinary Concepts test.

1. **Taxpayer's concession to Australian domicile**

   The Applicant made the concession that he retained his Australian domicile, which may have been reflective of the Applicant's long-term intentions with respect to his future presence in

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Derrington J agreed with the construction of the Domicile test advanced by the Commissioner who indicated that it must be shown that the person claiming not to be a resident has established a new home that has a necessary quality of permanence to it.

Australia and the fact that he had not formed any intention of making his home permanently in the Middle East as he was content to move around from one Middle Eastern country to another depending on the availability of work. In addition, at the time of the dispute arising with the ATO, he had ceased to be resident of Bahrain and had moved to Oman.

Section 10 of the Domicile Act, 1982 provides that the "intention that a person must have in order to acquire a domicile of choice in a country is the *intention to make his or her home indefinitely in that country*". In this case, Derrington J stated that the Applicant had failed to form the required intention of making Bahrain or Saudi Arabia his home indefinitely. If the Applicant had made such a choice, he would have lost Australian domicile.

2. The Australian authorities

The court found that relatively few Australian authorities have dealt with the meaning of "permanent place of abode outside Australia" as used in s6(1) of the ITAA. Sheppard J, in what is said to be an important judgment, in *Applegate v FCT*, considered whether the taxpayer, who had not abandoned his domicile of origin in Australia had nevertheless acquired a permanent place of abode outside of Australia.

Sheppard J held that:

(i) s6(1) did not operate or apply to persons who had left Australia with the intention of never returning to live but who had not formed the necessary intention to acquire a domicile of choice. Specifically, what is required for purposes of s6(1) is that there must be a permanent place of abode outside of Australia;

(ii) the word "permanent" must be used in a comparative sense, meaning that it's is not used in the sense of "everlasting" but rather in contradistinction to words such as "temporary"; and

(iii) "place of abode" may mean the house in which a person lives, or the country, city or town in which they can be found. Therefore, a person may have a place of abode in a particular place, although they move from house to house.

Although taking into account various judgments and opinions provided in case law, Derrington J stated that there is no straightforward answer to the expression of "permanent place of abode". Derrington J agreed with the construction of the "Domicile" test advanced by the Commissioner who indicated that it must be shown that the person claiming not to be a resident has established a new home that has a necessary quality of permanence to it. This construction gives the critical words "permanent place of abode" their natural meaning.

However, and as noted above, this construction would involve an inconsistency in that if a person has established a permanent home in another country, they would also lose their Australian domicile as there could never be a person who has an Australian domicile and a permanent place of abode outside Australia.

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It was held that the Applicant did not have a permanent place of abode in the sense required under the "Domicile" test. It was therefore held that the Applicant was a resident of Australia under the "Domicile" test.

Derrington J stated that "place of abode" ought to have its natural meaning such that it refers to a house or place of accommodation or a house or place to live. It must also be kept in mind that there is a difference between a person's intention to make a home in a country on a permanent or indeterminate basis, in which case they will acquire domicile there and lose domicile in Australia, on the one hand, and on the other, the person's intention as to the quality of their accommodation whilst living in a foreign country. It has been said to be the latter context to which the "Domicile" test is directly concerned.

Derrington J concluded that a person is not taken to be a "resident" for tax purposes in the following circumstances, among others:

(i) the person has remained domiciled in Australia, such that they have not been present in another country with the intention to remain there;

(ii) the person is not resident under the "Ordinary Concepts" test;

(iii) the person has a physical place of abode being an actual physical place of accommodation in which they live outside Australia;

(iv) the person has lived in that accommodation with the intention that whilst living there that that place will be the permanent place where they live;

(v) the person will be in the place of accommodation "permanently" whilst they are living in the locality even if their presence there is indefinite; or

(vi) the person might move from one permanent place of abode to another whilst living in a particular locality, but it will not prevent them from having a permanent place of abode for the purpose of the "Domicile" test.

Therefore, the court held that the evidence supported the conclusion that the Applicant was not a resident under the "Domicile" test due to the fact that when he left Australia in 2009, he left to live and work in the Middle East permanently or indefinitely and according to the Applicant's affidavit, he had no fixed intention of when he would return to Australia. Derrington J held that, during the relevant period, it appeared that the Applicant was not living in Bahrain with the intention of living their indefinitely, and therefore he retained his domicile in Australia.

Conclusion of the Domicile test

It was held that the Applicant did not have a permanent place of abode in the sense required under the "Domicile" test. Therefore, the Applicant was regarded as a resident of Australia and as a result, the appeal against the Objection Decision was dismissed.

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In South Africa we first determine whether the natural person meets the requirements to be regarded as ordinarily resident, and if not, the physical presence test is applied.

Comments

In terms of South African domestic law, the concept of residence is also important as South Africa follows the residence-based system of taxation. When determining the residence of a natural person, the definition of resident as provided for in s1 of the Income Tax Act, No 58 of 1962 requires that in order for a natural person to be regarded as a resident, the natural person must be ordinarily resident, alternatively meet the requirements of the physical presence test. Similarly, as is the case in Australia with the Ordinary Concept and the Domicile tests discussed above, in South Africa we first determine whether the natural person meets the requirements to be regarded as ordinarily resident, and if not, the physical presence test is applied. Once it has been determined that a person meets the requirements and is regarded as either ordinarily resident, alternatively physically president in South Africa, that person is regarded as a resident and is taxed on their worldwide income, irrespective of where the income was earned.

In *Harding*, the court's decision that the Applicant is regarded as a resident in Australia and therefore liable for tax in Australia as opposed to that of the Middle East, was largely decisive on the fact that the Applicant was willing to move around within the Middle East depending on his employment, without the degree of permanence which the courts appear to require.

Candice Gibson

Who's Who Legal

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.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2018

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

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017- 2018 in Band 1: Tax: Consultants.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Tax.

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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):
   - Substitution in item 202.00 of the Schedule to the rules for form DA 179 relating to amendments to the Health Promotion Levy on Sugary Beverages.
   - Schedule 2:

     Substitution of safeguard item 260.03/72.08/01.04 and 260.03/7225.40/01.06 to exclude rebate item range 460.15/7208.5/01.05 to 460.15/7208.5/07.05 and 460.15/7225.40/01.06 to 460.15/7225.40/09.06 in order to exclude certain hot-rolled steel from being subject to safeguard duty, with effect from 29 June 2018 up to and including 10 August 2018;

     Substitution of safeguard item 260.03/72.08/01.04 and 260.03/7225.40/01.06 to exclude rebate item range 460.15/7208.5/01.05 to 460.15/7208.5/07.05 and 460.15/7225.40/01.06 to 460.15/7225.40/09.06 in order to exclude certain hot-rolled steel from being subject to safeguard duty, with effect from 11 August 2018 up to and including 10 August 2019;

     Substitution of safeguard item 260.03/72.08/01.04 and 260.03/7225.40/01.06 to exclude rebate item range 460.15/7208.5/01.05 to 460.15/7208.5/07.05 and 460.15/7225.40/01.06 to 460.15/7225.40/09.06 in order to exclude certain hot-rolled steel from being subject to safeguard duty, with effect from 11 August 2019 up to and including 10 August 2020;
   - Schedule 4:

     Insertion of various rebate items applicable to heading 72.08 and tariff heading 7225.40 respectively in order to create a rebate facility on certain hot-rolled steel;
2. SARS has published the "South African Revenue Service – Service Charter". It provides [relating to customs and excise (*inter alia*)] the following:
   - Customs registrations will be finalised within 5 business days where no inspection is required and where an inspection is required, the application will be finalised within 21 business days;
   - Customs declarations will be processed within 4 hours of receipt and where an inspection is required, within 48 hours;

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- Customs and excise refunds will be paid within 30 business days of finalising the application and refunds will be paid into the same deferment account, provided that the original payment was also made from this deferment account;
- When application is made for deferral or suspension of payment and all the requirements have been met, SARS will endeavour to consider the request within 21 business days of receipt of the complete application;
- Finalise and communicate the outcome of the Determination of Tariff/Valuation/Origin within 90 days of receipt of all required information/documentation (excluding cases of escalation or exceptional cases, ie World Customs Organisation or legal referrals); and
- Comments can be e-mailed to Oocregistration@sars.gov.za.

Most of the timeframes appear to have been reduced, but whereas earlier tariff applications took approximately 2 months to complete, which now may take much longer, such as 4 to 7 months (or longer), it appears that currently it may take around 3 months.

3. The Department of Trade and Industry published:
   - Government notice number 627 dated 22 June 2018 in Government Gazette number 41722. It provides for the intended amendment of the compulsory specification (in terms of the National Regulator for Compulsory Specification Act, No 5 of 2008) for the safety of lighters. The notice relates to not only manufacture, but also the import of lighters. Comments are due within 2 months from the date of the publication.
   - Government notice number 628 dated 22 June 2018 in Government Gazette number 41722. It provides for the amendment of the compulsory specification (in terms of the National Regulator for Compulsory Specification Act, No 5 of 2008) for canned fish, marine molluscs, crustaceans and products derived therefrom with effect from 6 months from the date thereof. The notice relates to not only production, manufacture, processing and treatment of these products, but also import and export thereof.
4. The Department of Agriculture, Forestry and Fisheries published government notice number 631 dated 22 June 2018 in Government Gazette number 41723. It provides for Regulations relating to the grading, packing and marking of fresh fruits intended for sale in South Africa (which may include importation thereof) in terms of the Agricultural Product Standards Act, No 119 of 1990 and will come into operation in 30 days after the publication thereof.

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

5. New case law/authority – *The Commissioner for the South African Revenue Service v The South African Breweries (Pty) Ltd* (442/2017) [2018] ZASCA 101 (27 June 2018) in the Supreme Court of Appeal:

   The judgment provides as follows:

   > "[1] This appeal concerns the correct classification of certain products for purposes of excise duty payable under the Customs and Excise Act, No 91 of 1964 (the Act). The products, known as 'flavoured alcoholic beverages or FABs', are manufactured by the respondent, the South African Breweries... , a manufacturer and distributor of alcoholic beverages.
   >
   > .....
   >
   > [2] ... In the determination ... the FAB's were classified under tariff heading TH2208.90.22 ... An appeal by SAB ... against the determination, was upheld by the ... High Court ... In effect the high court found that, as had been contended by SAB, the FAB's were classifiable under TH2206.00.85.
   >
   > .....
   >
   > [12] ... With effect from 27 February 2013 item 2206.00.85 was amended to read: 'Other mixtures of fermented fruit beverages or mead beverages and non-alcoholic beverages, unfortified, with an alcoholic strength of at least 2,5 per cent by volume but not exceeding 15 per cent by volume'.
   >
   > .....
   >
   > [16] In classifying the FAB's under TH22.08, the Commissioner relied on explanatory note 14 in that heading which provides for the inclusion of 'alcoholic lemonade' thereunder. The expert evidence established that the FABs would qualify as 'alcoholic lemonade' as that term is understood in the trade ... Further, for the FABs to qualify for classification under TH2206.00.85 (as contended for by SAB) each of the components (alcoholic and non-alcoholic) had to be beverages in their own right. In this case the FABs were not a mixture of two main components; they were merely flavoured alcohol produced by adding ingredients (eg flavourants, colourants, sweeteners) to the base alcohol. Instead of a true non-alcoholic component as contemplated in TH22.02, the non-alcoholic components were only a preparation as contemplated in TH21.06 (read with explanatory note 7 in the relevant sub-heading).
   >
   > .....

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CUSTOMS AND EXCISE HIGHLIGHTS

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[17] SAB on the other hand contended that the FABs were fermented alcoholic beverages which could only be properly classified under TH22.06 ... The argument was that the FABs were mixtures of a fermented beverage and a non-alcoholic beverage and should thus be classified under TH2206.00.85 until 27 February 2013 and under TH2206.00.90 thereafter ...

.....

[23] As stated above this court held in Distell that the headings are the first and paramount consideration in determining classification between headings. Where, as in this case, the distinctive feature (fermented beverage) of an FAB is clearly provided for in the tariff, it is impermissible to ignore the appropriate heading. While in this case the FABs may be capable of being classified under two headings, that would only serve to make Rule 3(a) of application and that rule would direct us to TH22.06. So, whether classification is under GRI 1, on the footing that the FABs do not resort under TH22.08, or under Rule 3(a) on the basis that they may possibly fall under both 22.06 and 22.08, the outcome is the same.

[24] General Rule of Interpretation 4, on which the Commissioner also relies, finds no application in this case.

.....

It is clear that this Rule becomes relevant only when application of the preceding Rules (1, 2, and 3) does not yield any classification results. That is not the case here.

.....

[25] The main basis on which the Commissioner seeks to classify the FABs under TH22.08 (that is, the inclusion, under this heading, of 'alcoholic lemonade') creates a false conflict between heading TH22.08 and note 14 thereto. In Thomas Barlow, Miller AJA and Trollip JA postulated instances of direct and irreconcilable conflict between an Explanatory Note and the terms of a relevant heading. But, it must be stressed that even in Thomas Barlow the conflict was hypothetical. In the end, the following principles enunciated by Trollip JA in that case have prevailed for almost five decades:

'... Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not

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to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although s47(8)(a) of the Act says that the interpretation of the Schedule shall be subject to 'the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail'.

.....

[28] Tariff heading 22.08 for which the Commissioner contends, provides for spirits, liqueurs and other spirituous beverages. Spirits are by their nature, a concentrate and are made by a process of distillation. The FABs in question bear neither of these qualities. They do not have the qualities of or essence of distilled FABs. And they are clearly not liqueurs. Neither the ascertainment of the meaning of the words used in TH22.08, nor the characteristics of the FABs, result in classification under that tariff heading.

.....

[32] ... the FABs can only be correctly classified under 'other' (2206.00.90) in both Part 1 and Part 2A of the Schedule.".

It therefore appears that the SCA confirmed that if there is a dispute between the explanatory notes and the terms of the headings, that the terms of the headings are paramount.

6. The Freight and Trade Weekly reported yesterday that SARS has appointed a new acting Chief Officer, Customs & Excise. Mr. Beyers Theron (previously Executive: Customs and Excise Centre of Excellence) replaces Mr. Teboho Mokoena, who will return to his position as Chief Officer: Human Capital and Development.

Petr Erasmus

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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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