1 FEBRUARY 2019

TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

WHEN MUST A REPORTABLE ARRANGEMENT BE DISCLOSED TO SARS?

Under the Tax Administration Act, No 28 of 2011 (TAA) persons who enter into certain types of transactions must report the details of those transactions to SARS. These types of transactions are called "reportable arrangements".

CUSTOMS & EXCISE HIGHLIGHTS

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

CDH
CLIFFE DEKKER HOFMEYR

WHEN MUST A REPORTABLE ARRANGEMENT BE DISCLOSED TO SARS?

Section 38 of the TAA sets out the information which a taxpayer must submit to SARS when reporting an arrangement.

To determine by when information must be disclosed one must first establish at what time an arrangement can be said to "qualify as a reportable arrangement".

Under the Tax Administration Act, No 28 of 2011 (TAA) persons who enter into certain types of transactions must report the details of those transactions to SARS. These types of transactions are called "reportable arrangements".

The list of transactions that must be reported are set out in s35(1) of the TAA, and in s35(2) of the TAA as read with a SARS notice issued pursuant to that provision.

The term "reportable arrangement" is defined in s34 of the TAA as "an 'arrangement' referred to in section 35(1) or 35(2) that is not an excluded 'arrangement' referred to in section 36".

The term "arrangement" is defined in s34 of the TAA as "any transaction, operation, scheme, agreement or understanding (whether enforceable or not)".

The term "participant" is defined in s34 of the TAA, simply put, as a person who promotes the arrangement, a person who may obtain a tax benefit by virtue of the arrangement, or a party to an arrangement as listed in a public notice under s35(2) of the TAA.

Section 38 of the TAA sets out the information which a taxpayer must submit to SARS when reporting an arrangement.

Section 37(1) of the TAA is the important provision for purposes of this contribution. It reads as follows:

> The information referred to in section 38 in respect of a 'reportable arrangement' must be disclosed by a person who:
>
> (a) is a 'participant' in an 'arrangement' on the date on which it qualifies as a 'reportable arrangement', within 45 business days after that date; or
>
> (b) becomes a 'participant' in an 'arrangement' after the date on which it qualifies as a 'reportable arrangement', within 45 business days after becoming a 'participant'.

Section 37(5) of the TAA states that SARS may grant an extension for disclosure for a further 45 business days, if reasonable grounds exist for the extension.

To determine by when information must be disclosed one must first establish at what time an arrangement can be said to "qualify as a reportable arrangement".

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WHEN MUST A REPORTABLE ARRANGEMENT BE DISCLOSED TO SARS?

CONTINUED

Unfortunately, the TAA is not clear at all on when the clock for the 45-day period starts ticking.

For example, if an agreement which could give rise to a reporting requirement in principle is subject to a suspensive condition, will the agreement "qualify as a reportable arrangement" at the time the agreement is concluded or at the time the suspensive condition is fulfilled?

Unfortunately, the TAA is not clear at all on when the clock for the 45-day period starts ticking.

Initially, before its amendment with effect from 20 January 2015, s37(4) of the TAA required participants to disclose the arrangement within 45 days of the date that any amount was first received by or accrued to a participant under the arrangement, or the date that an amount was paid or incurred by a participant under the arrangement. By implication, in the case of an agreement subject to a suspensive condition, in most cases, that date would at the earliest have been the date when the condition was fulfilled.

On the other hand, the term "arrangement" does not require an agreement to be "enforceable" to fall within the definition. However, in my view, the word "enforceable" should be understood to mean legally binding between the parties, that is, an agreement which, for example, is not rendered void by statute.

The prescribed SARS form for disclosing reportable arrangements (RA01) does require participants in Part 3 headed "Information regarding the reportable arrangement" only to disclose the "[d]ate [the] reportable arrangement was entered into".

In my view, however, one should adopt a common sense approach. The effect of a suspensive condition is to suspend the full operation of obligations and renders the obligations dependent on an uncertain future event. An agreement which is subject to a suspensive condition is valid from the moment of its conclusion. However, non-fulfilment of a suspensive condition renders the contract void retrospectively. (See *The Law of South Africa* Volume 9 Third Edition at paragraph 362; and Bradfield, GB *The Law of Contract in South Africa* Seventh Edition at page 171.)

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.

WHEN MUST A REPORTABLE ARRANGEMENT BE DISCLOSED TO SARS?

CONTINUED

Taxpayers should perhaps err on the side of caution and ensure that reportable arrangements are disclosed within 45 days of the conclusion of the relevant agreements, despite the fact that the agreements may be conditional.

For example, one type of arrangement that is a reportable arrangement is one that does not "result" in a reasonable expectation of "pre-tax profit" (s35(1)(d) of the TAA). Clearly, an agreement that is subject to a suspensive condition will only actually "result" in an outcome if the condition is fulfilled.

If a participant is required to report a conditional agreement within 45 days of the date of conclusion of the agreement, it would mean that a participant would be required to report an arrangement which may never take effect. It is unlikely that it could have been the intention that agreements that are void due to non-fulfilment of conditions should be reported.

It would be useful if clarity was provided through a change to the law or a guidance note from SARS, particularly in light of the stiff penalties that are imposed for late disclosure in terms of s212 of the TAA.

In the meantime, taxpayers should perhaps err on the side of caution and ensure that reportable arrangements are disclosed within 45 days of the conclusion of the relevant agreements, despite the fact that the agreements may be conditional.

Ben Strauss

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2nd by BEE Deal Flow and Deal Value.
2016 1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.
2015 1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

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CUSTOMS & 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 & Excise environment since our last instalment:

Amendments to Rules to the Customs & Excise Act, No 91 of 1964 (Act):

Draft Rules for sugary beverages levy to provide for the following (comment period extended to 7 February 2019, contact C&E_legislativecomments@sars.gov.za):

- Deletion of the registration requirement for a commercial manufacturer of sugary beverages;
- Issuing of source documents in respect of sugary beverages removed from a customs and excise warehouse;
- Declaration of the amount of sugar content;
- Determination of the sugar content of any concentrate or preparation for the making of sugary beverages; and
- Insertion and amendment to the registration and licensing forms, being the following:
  - DA 185;
  - DA 185.4A14; and
  - DA 185.4B2.

Proposed amendments to Rules 38A and 59A to facilitate full implementation of the requirement of the unique consignment reference (UCR) on clearance declarations by including clearance declarations of importers and exporters who are not located in the Republic and who qualify to utilise the 70707070 code.

Amendments to Schedules to the Act:

Schedule 1 Part 1:

- The substitution of tariff subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 to reduce the rate of customs duty on sugar from 460.86c/kg to 369.57c/kg;
- To implement the revised Tariff Rate Quota in terms of the Economic Partnership Agreement (EPA) (retrospectively from 1 September 2018 up to 31 December 2018);
- To implement the revised Tariff Rate Quota in terms of the Economic Partnership Agreement (EPA) (with effect from 1 January 2019); and
- To implement changes to the rates of customs duties in terms of the Economic Partnership Agreement between the European Union and the Southern African Development Community EPA States for 2019 and other miscellaneous amendments (with effect from 1 January 2019).

Schedule 1 Part 2A:

- To delete tariff items (within 106.20) as a consequence to a deletion in Schedule 1 Part 1 (with effect from 1 January 2019);

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CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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

Schedule 1 Part 7A:

- Draft amendment relating to the Health Promotion Levy on Sugary Beverages, as follows (comment period extended to 7 February 2019, contact mmaphosa@sars.gov.za/ ampanza@sars.gov.za):
  - Note 5 is amended to include the reference to grams per 100 millilitres; and
  - Note 6 is amended to indicate how the sugar content of powders and concentrates or other preparations for the making of sugar beverages will be calculated.

Schedule 2:

- The substitution of safeguard item 260.03/72.08/01.04, to exclude rebate items 460.15/7208.51/02.06 and 460.15/7208.51/03.06 from being subject to safeguard duty applicable to primary flat rolled steel classifiable in tariff subheading 7208.51 (up to and including 10 August 2019); and
- The substitution of safeguard item 260.03/72.08/01.04, to exclude rebate items 460.15/7208.51/02.06 and 460.15/7208.51/03.06 from being subject to safeguard duty applicable to primary flat rolled steel classifiable in tariff subheading 7208.51 (11 August 2019 up to and including 10 August 2020);

Schedule 3:

- To delete rebate item 315.05/7308.90.90/01.01 in Schedule 3 as a consequence to a deletion in Schedule 1 Part 1 and to insert rebate item 315.05/7308.90.99/01.01 (with effect from 1 January 2019); and
- To delete Note 10 to rebate item 317.03, which covered the transitional note for the migration from the Motor Industry Development Programme ("MIDP") to the Automotive Production and Development Programme ("APDP") as it has become redundant (with effect from 1 January 2019).

Schedule 4:

- The insertion of rebate items 460.15/7208.51/02.06 and 460.15/7208.51/02.06 in order to create a rebate facility on primary flat rolled steel classifiable in tariff subheading 7208.51; and
- To delete rebate item 460.02/12.06/01.04 and rebate item 460.07/39.19/01.04 as they have become redundant (with effect from 1 January 2019).

Schedule 5:

- To delete Note 1 to rebate item 537.00 applicable to MIDP and Note 2 is renumbered as Note 1, to remove the reference to rebate item 317.04 applicable to MIDP (with effect from 1 January 2019);

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CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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- To delete refund items 537.01, 537.01/8701.20/01.06, 537.01/87.02/01.04, 537.01/87.03/01.04, 537.01/87.04/01.04 and 537.01/87.06/01.04, as they were applicable to MIDP (with effect from 1 January 2019); and
- To delete refund item 538.00/00.00/02.00 applicable to MIDP (with effect from 1 January 2019).

Schedule 6:

- The insertion of Note 7 as well as rebate items 620.25; 620.25/604.15.21/01.01 and 620.25/604.15.23/02.01 to create a rebate provision for unfortified wine used in the manufacture of foodstuff; and
- To delete rebate items 623.27/105.10/01.01 and 623.27/105.10/02.01 as they have become redundant (with effect from 1 January 2019).

The following notices have been published in the Government Gazette:

- No. R. 1420 of 21 December 2018, confirming that the new Rules in relation to internal administrative appeals (s77H of the Act, which has been dealt with in a previous newsletter), will replace the existing Rules from 1 April 2019; and
- No. 22 of 21 January 2019 (in terms of the National Environmental Management: Waste Act, No 59 of 2008) regarding the control of the import and export of waste. Its purpose is to establish procedures and control measures for the import, export and transit of waste; and also to ensure cradle-to-cradle management in the transboundary movement of waste.

The International Air Transport Association has published its 2019 Lithium Battery Guidance Document relating to the "Transport of Lithium Metal and Lithium Ion Batteries".

Petr Erasmus

Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory & Controversy for 2018.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

Ludwig Smith has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

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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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