17 OCTOBER 2019

TAX & EXCHANGE CONTROL **ALERT**

IN THIS **ISSUE**

The tax exemption for foreign employment income – SARS releases FAQ and Draft Interpretation Note

It has been widely publicised that on 1 March 2020, changes to the exemption for foreign employment income in s10(1)(o)(ii) of the Income Tax Act, No 58 of 1962 (Act), will come into effect.

Customs & Excise Highlights

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

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE
FOR MORE INSIGHT
INTO OUR EXPERTISE
AND SERVICES

The tax exemption for foreign employment income – SARS releases FAQ and Draft Interpretation Note

Until 29 February 2020, foreign employment income earned by a South African tax resident will be exempt in the resident's hands to the extent that the person meets the requirements of s10(1)(o)(ii). From 1 March 2020 onwards, only the first R1 million of such foreign employment income earned will be exempt in terms of s10(1)(o)(ii).

It has been widely publicised that on 1 March 2020, changes to the exemption for foreign employment income in s10(1)(o)(ii) of the Income Tax Act No 58 of 1962 (Act), will come into effect.

Until 29 February 2020, foreign employment income earned by a South African tax resident will be exempt in the resident's hands to the extent that the person meets the requirements of s10(1)(o)(ii). From 1 March 2020 onwards, only the first R1 million of such foreign employment income earned will be exempt in terms of s10(1)(o)(ii).

Draft Interpretation Note and FAQ Document

On 7 October 2016, SARS released a Frequently Asked Questions document dealing with amendments to s10(1)(o)(ii) (FAQ Document) and at about the same time, it released draft Interpretation Note 16 (Issue 3) (Draft IN), which deals with, amongst other things, the application of s10(1)(o)(ii) after the amendment referred to above comes into effect.

The Draft IN states that the key requirements to qualify for the exemption in s10(1)(o)(ii) are the following:

- The taxpayer in question must be a South African tax resident;
- The taxpayer must earn one of the forms of remuneration listed in the section;
- There must be an employment relationship between the taxpayer and the person for whom or on whose behalf the services are rendered;
- The remuneration must be received for services rendered; and
- The services must be rendered outside the Republic of South Africa, for at least 183 full days during any 12-month period and for a continuous period exceeding 60 full days during the same 12-month period.

Regarding the calculation of the exempt portion of the remuneration, example 2 of the Draft IN explains that from 1 March 2020, where a person earns R1.5 million for services rendered outside South Africa, only R1 million of the remuneration can be exempt under s10(1)(o)(ii) and the remaining R500,000 will be taxable in South Africa.

The FAQ Document contains similar information to that contained in the Draft IN, but states that it is aimed at giving the public at large clarity and to ensure consistency on certain practical and technical aspects related to the amendment to s10(1)(o)(ii). The FAQ Document is available on the SARS website.

One of the important issues the FAQ Document touches on is how to avoid double taxation, where the portion of the foreign employment income above R1 million income is taxable in both South Africa and the foreign country. In that case, the taxpayer concerned can claim a tax credit in terms of s6quat of the Act, on the portion of the income that is taxable in both countries. If one were to use Example 2 referred to in the Draft IN above, the taxpayer can therefore make use of s6quat so that he does not pay tax on the amount of R500,000 in both South Africa and the foreign country.

CDH
CLIFFE DEKKER HOFMEYR

The tax exemption for foreign employment income – SARS releases FAQ and Draft Interpretation Note

...continued

According to the FAQ Document, completing the aforementioned financial emigration process is merely one factor that will be taken into account to determine whether a person ceased to be a South African tax resident.

Another interesting issue dealt with by the FAQ Document is the issue of tax residence. Regarding the issue of financial emigration and its impact on a person's tax residence, the FAQ Document states the following: *"Acquiring approval from the South African Reserve Bank to emigrate from a financial perspective is not connected to an individual's tax residence. Financial emigration is merely one factor that may be taken into account to determine whether or not an individual broke his or her tax residence. An individual's tax residence is not automatically broken when he or she financially emigrates. The deciding factor remains whether or not an individual ceased to be ordinarily resident in the Republic."*

Comment and practical issues to consider

Many South African residents working abroad have been concerned about the potential impact of the amendment to s10(1)(o)(ii), especially those residents who are not liable for income tax in the countries where they are working. To avoid being affected by the amendment, many South African expatriates have considered financially emigrating and ceasing to be tax residents in South Africa. In practice, this is done by means of an application to SARS to confirm one's tax compliance status for purposes of emigration, followed by the submission of an application to the South African Reserve Bank to emigrate from an exchange control perspective. Upon emigration, taxpayers will be subject to an exit tax in terms of s9H of the Act.

According to the FAQ Document, completing the aforementioned financial emigration process is merely one factor that will be taken into account to determine whether a person ceased to be a South African tax resident. While neither the FAQ Document nor the Draft IN (pursuant to the publication of the final version) are binding, if an individual employed abroad foresees that he will earn more than R1 million per year and that he will be affected by the amendment, he should carefully consider whether financial emigration is the best option to follow in his particular situation, to avoid being affected by the amendment. To determine whether a person is a South African tax resident, one must consider the definition of "resident" in s1 of the Act and whether the person will be a resident under the "ordinarily resident" or "physical presence" tests in s1.

Even if a person has financially emigrated to avoid being affected by the amendment to s10(1)(o)(ii), the statement in the FAQ Document seems to suggest that SARS could still dispute whether the person is a South African tax resident. To avoid such a dispute from arising, which may take time and resources to resolve, any person considering financial emigration to avoid being affected by the amendment, should obtain professional tax advice before deciding to financially emigrate. This will also help to prevent adverse tax consequences from arising if the person's residence is disputed by SARS and at worst, the dispute is resolved in SARS' favour.

Louis Botha

CLIFFE DEKKER HOFMEYR

Customs & Excise Highlights

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 the Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):

1. Draft rules in terms of s58A(5) of the Act were published for public comment for purposes of the intended commencement of anti-forestalling measures.

   Duty forestalling means the practice of entering excisable goods for home consumption in quantities exceeding the quantities determined during a period leading up to an anticipated increase in the rate of excise duty, thereby avoiding the payment of the increased rate of duty when that increase becomes effective.

   Comments can be submitted to: C&E_legislativecomments@sars.gov.za by 1 November 2019.

2. Amendment to the rules under s38 – Southern African Customs Union (SACU) Unique Consignment Reference (UCR) number.

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

In Schedule 2 to the Act, the deletion of various anti-dumping items under item 215.02 and insertion of new anti-dumping items under item 215.02 in order to amend the applicable tariff headings liable to anti-dumping duty for wire ropes and cables.

The Department of Agriculture, Land Reform and Rural Development has published the following notices (certain sections quoted from the notices):

1. Continuation of statutory measure: Registration by abattoirs and exporters of live pigs:

   The purpose and aims of this statutory measure are to compel abattoirs slaughtering pigs and exporters of live pigs to register with the levy administrator.

   The statutory measure shall come into operation on 1 November 2019 and will expire on 31 October 2022.

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

Customs & Excise Highlights...*continued*

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

2. Continutation of statutory measure and determination of guideline price: Levies relating to pigs:

   The levy imposed in terms of this notice shall be –

   - paid to the abattoir by the owner at slaughter of such pig and the abattoir will then pay it over to the levy administrator; and
   - payable by the exporter of live pigs at the point of exit and paid over to the levy administrator.

   The statutory measure shall come into operation on 1 November 2019 and will expire on 31 October 2022.

3. Procedures for the application, administration and allocation of export quotas under the economic partnership agreement between the European Union and Southern African Development Community for the year 2020:

   The Economic Partnership Agreement (EPA) between the Southern African Development Community (SADC) and European Union (EU) was signed by both parties on 10 June 2016 and came into effect on 1 October 2016. The SADC-EU EPA package contains agricultural products to be exported by SA into the EU market under the Tariff Rate Quota (TRQ) regime. The SADC-EU EPA TRQ package offers SA enhanced market access for certain agricultural products.

Petr Erasmus

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

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

Emil Brincker
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

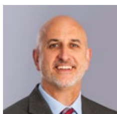
Mark Linington
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com

Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

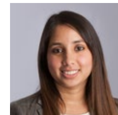
Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com

Mareli Treurnicht
Director
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

Jerome Brink
Senior Associate
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com

Louis Botha
Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com

Louise Kotze
Candidate Attorney
T +27 (0)11 562 1077
E louise.Kotze@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2019 8405/OCT