

18 JULY 2019

TAX & EXCHANGE CONTROL ALERT

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A sporting decision: SARS issues ruling regarding a conversion by way of an amalgamation transaction

On 6 June 2019, the South African Revenue Service (SARS) published Binding Private Ruling 320 (BPR 320), which deals with the income tax, value-added tax (VAT), transfer duty and securities transfer tax (STT) consequences, where an unincorporated *universitas* is converted to a newly formed private company. BPR 320 also deals with matters related to the conversion.

Customs & Excise Highlights

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

A sporting decision: SARS issues ruling regarding a conversion by way of an amalgamation transaction

One of the consequences of the rollover relief is that the amalgamated company does not incur a capital gains tax (CGT) liability as a result of the disposal. Instead, the resultant company steps into the shoes of the amalgamated company in respect of the asset disposed of and a CGT liability is only incurred when the resultant company disposes of the asset.

On 6 June 2019, the South African Revenue Service (SARS) published Binding Private Ruling 320 (BPR 320), which deals with the income tax, value-added tax (VAT), transfer duty and securities transfer tax (STT) consequences, where an unincorporated *universitas* is converted to a newly formed private company. BPR 320 also deals with matters related to the conversion.

BPR 320 is quite lengthy and therefore the purpose of this article is not to provide a detailed discussion of the ruling, but to only refer to some of the interesting issues addressed in the ruling.

Roll-over relief in terms of an amalgamation transaction and related tax relief

In terms of s44(1)(a) of the Income Tax Act, No 58 of 1962 (Act), an amalgamation transaction means any transaction –

- in terms of which any company (amalgamated company) which is a resident disposes of all of its assets (excluding certain assets referred to below) to another company (resultant company) which is a resident, by means of an amalgamation, conversion or merger; and
- as a result of which the existence of that amalgamated company will be terminated.

One should note that in concluding the amalgamation transaction, the amalgamated company need not dispose of assets it chooses to use to settle any debts incurred by it in the ordinary course of its trade, or assets required to satisfy

any reasonably anticipated liabilities to any sphere of government of any country and costs of administration leading to liquidation or winding-up.

If the above requirements are met and a capital asset is disposed of in terms of the amalgamation transaction, the amalgamated company will qualify for rollover relief if on the date of disposal, the market value of the asset is higher than its base cost. One of the consequences of the rollover relief is that the amalgamated company does not incur a capital gains tax (CGT) liability as a result of the disposal. Instead, the resultant company steps into the shoes of the amalgamated company in respect of the asset disposed of and a CGT liability is only incurred when the resultant company disposes of the asset. The CGT liability is therefore deferred or rolled-over until the resultant company disposes of the asset.

Where a transaction meets the requirements of s44 of the Act, it is also possible to qualify for tax relief in respect of VAT, transfer duty and STT. In order to qualify for relief in respect of these taxes pursuant to the amalgamation transaction, the provisions of the VAT, transfer duty and STT legislation also need to be met.

Facts of BPR 320

The relevant facts are as follows:

- The applicant in BPR 320 is an unincorporated *universitas* that is a resident (Applicant);
- It intends to convert to a company using the provisions of s44 of the Act. To this end, the following transaction steps will be implemented:

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The Applicant constitutes a "company", as defined in s1 of the Act by virtue of paragraph (d) of the definition of "company", which includes any "association... formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public..."

- The Applicant will incorporate another company (Newco) as a subsidiary and subscribe for one share (Incorporation Share) at a nominal amount;
- It will transfer its business assets (including the contracts) as a going concern to Newco, in exchange for an issue of 32 shares by Newco (Consideration Shares) and the assumption of the Applicant's liabilities by Newco;
- To the extent that capital assets, allowance assets and trading stock are transferred by the Applicant to Newco, they will not change their usage and will be acquired by Newco as capital assets, allowance assets and trading stock;
- Newco will buy back the Incorporation Share for a nominal amount;
- The 32 Consideration Shares will be distributed by the Applicant to the 32 clubs that are members of the Applicant immediately before the proposed transaction takes place; and
- The Applicant's existence will be terminated;
- The Applicant, which consists of two leagues, is organised in ascending tiers, whereby 16 clubs compete in a higher league and 16 clubs compete in a lower league;
- The Applicant qualifies as a *universitas* in that it is a separate legal entity that has perpetual succession, existence independent from that of its members, the capacity to own property and the right to sue and be sued in its own name;
- The Applicant constitutes a "company", as defined in s1 of the Act by virtue of paragraph (d) of the definition of "company", which includes any "association... formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public..."
- The Applicant currently pays income tax at the corporate rate and is also a registered VAT vendor;
- It pays monthly grants and preparation fees to its 32 member clubs for services rendered by the clubs, which services include participation by the clubs in league matches. The Applicant accounts for VAT on the amounts paid to member clubs; and
- It is intended that Newco will continue the business of the Applicant seamlessly after the implementation of the proposed conversion. To this end, Newco's draft Memorandum of Incorporation contains certain limitations, including restrictions on the transferability of its shares, which shares may not be transferred without approval in terms of a board resolution.

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One of the interesting aspects of BPR 320, is that it involves an entity that is not a company in terms of the Companies Act, No 71 of 2008, which is a party to an amalgamation transaction and qualifies for rollover relief.

Ruling

Subject to certain conditions and assumptions SARS ruled, among other things, that –

- the proposed transaction will qualify as an “amalgamation transaction” as defined in paragraph (a) of the definition of that term in s44(1) of the Act;
- the Applicant may disregard, for purposes of determining its taxable income or assessed losses, the disposal of the Consideration Shares in Newco to the current 32 clubs, in terms of s44(8) of the Act;
- the Applicant will be regarded as having taken the necessary steps to terminate its corporate existence as required by the definition of an “amalgamation transaction” in s44(1), read with s44(13) and s41(4) of the Act, provided that –
 - it passes a special resolution authorising its dissolution as envisaged in its founding document;
 - it submits copies of the aforementioned resolution to SARS;
 - all returns or information required to be submitted or furnished to SARS in terms of any Act administered by SARS, by the end of the relevant period within

which the aforementioned steps must be taken, are submitted, or arrangements are made to the satisfaction of SARS for the submission of any outstanding returns or information; and

- the aforementioned steps are taken within 36 months of the date of the proposed transaction, or within such further period as SARS may allow;
- no donations tax, VAT, transfer duty or STT will be payable pursuant to the amalgamation transaction; and
- the monthly grants and fees paid by Newco to the 32 clubs will constitute “gross income”, as defined in s1(1) of the Act, in the hands of the clubs. It will accrue to them when the relevant resolution to pay is made.

Comment

One of the interesting aspects of BPR 320, is that it involves an entity that is not a company in terms of the Companies Act, No 71 of 2008 (Companies Act), which is a party to an amalgamation transaction and qualifies for rollover relief. BPR 320 suggests that, where an entity is a “company”, as defined in s1(1) of the Act, but not a company in terms of the Companies Act, it can potentially qualify for rollover relief, provided the requirements of the relevant rollover relief provision, such as s44 of the Act, are met.

Louis Botha

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:

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

- Draft amendment to Rule 49A & 49B in relation to Rules of Origin:

The amendment aims to improve the administration of trade agreements. It generally affects exporters who are not producers and clarifies the issuing of producer declarations.

The due date for comments is 22 July 2019 and may be sent to C&E_legislativecomments@sars.gov.za.

- Draft amendment to Rule 38.14A in relation to Unique Consignment Reference Numbers (UCR):

The UCR is a unique reference number assigned to a consignment of goods for the purpose of tracking the goods throughout the supply chain from origin to destination. The current UCR is being amended to a Southern African Customs Union UCR which will create a platform for exchange of customs information between SARS: Customs and the Customs Administration of Botswana.

The due date for comments is 22 July 2019 and may be sent to C&E_legislativecomments@sars.gov.za.

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

- Schedule 1 Part 1:
 - The substitution and insertion of various items under Chapter 73 to increase the rate of customs duty on certain tubes, pipes and hollow profiles, seamless, of iron (excluding cast iron) or steel (effective from 12 July 2019); and
 - The substitution of tariff subheading 8511.30.30 in order to reduce the rate of customs duty on distributors and ignition coils identifiable for use solely or principally with motor vehicles, engines (effective from 12 July 2019).
- Schedule 2:
 - The substitution of anti-dumping items 215.11/8201.10.10/01.08, 215.11/8201.30.03/01.08, 215.11/8201.30.90/01.08 and 215.11/8201.90.20/01.08 to review the rate of anti-dumping duty on garden spades and shovels, rakes and picks originating in or imported from the People's Republic of China (effective from 12 July 2019).
- 3. SARS issued a circular wherein external stakeholders were advised as follows (certain sections quoted from the circular):
 - The SARS Large Business Centre (LBC) is moving into its new home at the end of July 2019.
 - The move to Woodmead North Office Park, 54 Maxwell Drive, Jukskeiview, Woodmead is expected to take place over the last weekend in July. The LBC will open the doors to its new home on Monday, 29 July 2019 and will be fully operational from 1 August 2019.

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Customs & Excise Highlights...continued

- The LBC was re-established at the end of 2018 to provide a differentiated and improved service to large business and high net-worth individuals as part of its commitment to facilitate and improve cooperation with its taxpayers. An interim LBC structure was announced while the final structure is still under review.
- 4. The Department of Agriculture, Forestry and Fisheries published the following notices in the Government Gazette (certain sections quoted from the notices):
 - Dated 5 July 2019, advising that the Pomegranate Association of South Africa (POMASA) applied for the continuation on domestically produced and imported pomegranates (fresh as well as processed) of the following statutory measures for a new four-year period to be implemented from 1 January 2020:
 - Payment of levies in terms of s15 of the Marketing of Agricultural Products Act, No 47 of 1996 (MAP Act);
 - Keeping of records and returns in terms of s18 of the MAP Act; and
 - Registration of persons in terms of s19 of the MAP Act.

Directly affected groups in the pomegranate industry were kindly requested to submit any comments regarding support or objections relating to the proposed continuation of statutory measures to the National Agricultural Marketing Council in

writing before or on 26 July 2019, to enable the Council to finalise its recommendation to the Minister in this regard.

Enquiries:

National Agricultural Marketing Council
Mr. Elekanyani Nekhavhambe
Tel.: (012) 341 1115 / (072) 636 2428
Fax.: (012) 341 1911
E-mail: ENekhavhambe@namc.co.za

- Dated 5 July 2019, advising that the Executive Officer: Agricultural Product Standards intends to request the Minister of Agriculture, Land Reform and Rural Development to repeal the Regulations relating to the Grading, Packing and Marking of Dehydrated Vegetables intended for sale in the Republic, published in Government Notice No. R.396 of 13 March 1970.

All interested parties are invited to submit comments and representations concerning the intention to repeal the above-mentioned regulations in writing within 30 days from the date of publication of the notice to the following address:

Executive Officer: Agricultural Product Standards

Department of Agriculture, Land Reform and Rural Development

Private Bag X343, Pretoria, 0001
30 Hamilton Street, Harvest House Building, Arcadia, Room 154
Tel. no. 012 319 6388
Fax no. 012 319 6265
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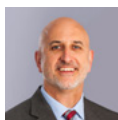
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