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TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

SARS issues binding class ruling regarding unbundling transaction

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Customs & Excise Highlights

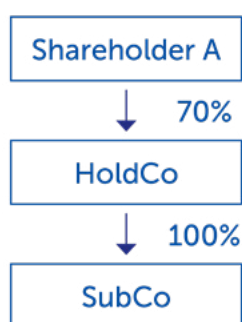
This week's selected highlights in the Customs & Excise environment since our last instalment.

SARS issues binding class ruling regarding unbundling transaction

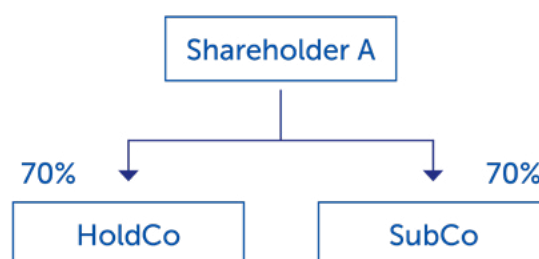
Section 46 of the Income Tax Act, No 58 of 1962 (Act) provides tax relief where a company (Unbundling Co) wishes to unbundle its shareholding in a subsidiary (Unbundled Co), to the company's own shareholders. The Unbundling Co's shareholders' indirect shareholding in the Unbundled Co is converted to a direct shareholding, in proportion to their shareholding in the Unbundling Co.

BCR 066 provides the income tax consequences and applicability of s46 to the receipt of shares in a listed company by resident and non-resident shareholders, following an unbundling of that company by its listed parent company.

Bundled Structure



Unbundled Structure



Where an unbundling takes place outside the scope of s46 of the Act, as set out above, several tax consequences would ordinarily apply:

- Shareholder A would receive the shares in SubCo as a dividend in specie, which may result in liability for dividends tax under Part VIII of the Act;
- The disposal of the shares in SubCo, would constitute a disposal under the Eighth Schedule to the Act, potentially leading to a capital gain for HoldCo; and
- Securities transfer tax (STT) would be payable on the transfer of all the shares under the Securities Transfer Tax Act, No 25 of 2007.

On 24 May 2019, the South African Revenue Service (SARS) published Binding Class Ruling 066 (BCR 066). BCR 066 provides the income tax consequences and applicability of s46 to the receipt of shares in a listed company by resident and non-resident shareholders, following an unbundling of that company by its listed parent company. It is binding only on the parties to the ruling.

The ruling dealt, among other things, with the following aspects of s46:

- The definition of "unbundling transaction" in s46(1)(a); and
- The anti-avoidance provisions in s46(3)(a)(v).

SARS issues binding class ruling regarding unbundling transaction

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BCR 066 explains that because of the distribution of unbundled shares to the applicant's shareholders holding unlisted shares, it could result in such shareholders holding fractional entitlements.

Facts

The applicant in BCR 066 was a listed company with both listed and unlisted shares. A new company (NewCo) was to be formed and its single class of shares listed prior to the proposed unbundling. The shareholders in the applicant would upon the unbundling receive one NewCo share for each listed share they held in the applicant. In line with the participation rights attached to unlisted shares in the applicant, holders of these unlisted shares would receive one NewCo share for every five unlisted shares held in the applicant. In addition, some of the non-resident shareholders in the applicant were not able to take receipt of the unbundled shares, due to being "restricted overseas shareholders" in their jurisdiction.

BCR 066 explains that because of the distribution of unbundled shares to the applicant's shareholders holding unlisted shares, it could result in such shareholders holding fractional entitlements. It was proposed that rather than transferring these fractional entitlements, they be rounded down to a whole number and the aggregated excess fractions to which a shareholder would otherwise have been entitled will not be transferred to the shareholder but will instead be sold on behalf of the shareholder.

A similar mechanism was proposed in relation to the non-resident shareholders who could not receive transfer of the NewCo shares, with the NewCo shares being sold on their behalf and the proceeds paid to them upon completion of the transaction.

Ruling and discussion

Ordinarily, under s46, shareholders of the Unbundling Co will receive transfer of a proportionate number of equity shares in the Unbundled Co. SARS decided on the facts of the ruling, that despite the shares being sold on behalf of the two types of shareholders, rather than the shares themselves being transferred, the transaction still fell within the definition of "unbundling transaction" in s46(1)(a). It is possible that SARS accepted this due to the specific facts of BCR066. For example, in BCR066, it is stated that the board resolution authorising and detailing the unbundling transaction provided that the entitlement to the NewCo shares would vest in the non-resident and unlisted shareholders and that ownership would transfer upon the unbundling.

Section 46(3)(a)(v) of the Act neutralises the tax value discrepancies which would occur where an indirect shareholding is unbundled into a direct shareholding.

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To facilitate the restructuring of interests held within a group of companies, the indirect shareholding in a company can be unbundled to the shareholders of a parent company, without adverse tax consequences or significant economic distortion.

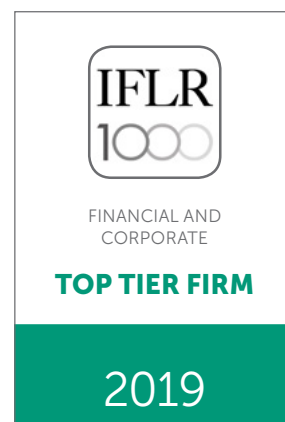
Essentially, it provides that the tax values – market value and expenditure as defined – of the unbundled shares, must be re-determined with reference to the market values of the unbundled and unbundling shares, at the end of the day that the distribution takes place.

In BCR 066, SARS ruled that s46(3)(a)(v) applied to both the holders of fractional entitlements and non-resident shareholders. This meant that the proportionate adjustment of the expenditure and market value of the shares to be sold on behalf of the

abovementioned shareholders would be calculated at the record date. This would determine the amount they would be entitled to following the sale of the NewCo shares on their behalf.

BCR 066 is a good illustration of the underlying principles of the roll-over relief provided by s46 of the Act. To facilitate the restructuring of interests held within a group of companies, the indirect shareholding in a company can be unbundled to the shareholders of a parent company, without adverse tax consequences or significant economic distortion.

Tsanga Mukumba and 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):

Rule 47.03, dealing with "*the order and periods for submissions of applications for tariff determinations in respect of the classes or kinds of alcoholic beverages*" has been amended.

The period for "*Alcoholic beverages for which no tariff determination was issued prior to 1 April 2015 ... All other classes or kinds of alcoholic beverages not mentioned above*" (wine) has been extended to "*after a period of 48 months, but within a period of 60 months*".

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

Schedule 1 Part 1:

The substitution of tariff headings 1001.91 and 1001.99 as well as 1101.00.10, 1101.00.20, 1101.00.30 and 1101.00.90 to increase the rate of customs duty on wheat and wheaten flour from 67.51c/kg and 101.26c/kg to 95.80c/kg and 143.69c/kg, respectively.

3. The International Trade Administration Commission has issued the following notice (certain sections quoted from the notice):

Extension of the Price Preference System on the Exportation of Ferrous and Non-Ferrous Waste and Scrap

On 10 May 2013 the Minister of Economic Development issued a trade Policy Directive to the International Trade Administration Commission of South Africa, for ITAC to exercise its powers to regulate the exportation of ferrous and non-ferrous scrap metal. ITAC established a Price Preference System (PPS) pursuant to which it would not authorise the exportation of ferrous and non-ferrous scrap metal unless it had first been offered for sale for domestic beneficiation, to the domestic consuming industry, for a period and at a price discount or other formula determined by ITAC.

The Minister has extended the Policy Directive for a period of 9 months. The Amended Export Control Guidelines on the Exportation of Ferrous and Non-ferrous Waste and Scrap are herewith extended and will remain in force, in accordance with the Minister's Policy Directive, until 31 March 2020.

Petr Erasmus

CHAMBERS GLOBAL 2019 ranked our Tax & Exchange Control practice in Band 1: Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2019 in Band 1: Tax.

Gerhard Badenhurst ranked by CHAMBERS GLOBAL 2014 - 2019 in Band 1: Tax: Indirect Tax.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 3: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017- 2019 in Band 1: Tax: Consultants.



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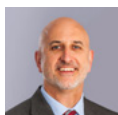
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