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TAX & EXCHANGE CONTROL ALERT

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Published! The 2019 Draft TLAB, Draft TALAB and the comparable tax exemption for CFCs

On 21 July 2019, National Treasury (NT) and the South African Revenue Service (SARS) published the 2019 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2019 Draft Tax Administration Laws Amendment Bill (Draft TALAB), for public comment.

Prices advertised or quoted must include VAT

Have you ever shopped around and then made a decision to purchase something or utilise the services of a service provider because, as the saying goes "the price is right", only to find that somewhere in all the marketing blurb and enticing imagery, that you missed the fine print stating that the price *does not include VAT*? Just like that, there's an extra 15% payable that you did not budget for.

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On 21 July 2019, National Treasury (NT) and the South African Revenue Service (SARS) published the 2019 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2019 Draft Tax Administration Laws Amendment Bill (Draft TALAB), for public comment. According to the media statement accompanying the publication of the bills (Media Statement), the Draft TLAB and the Draft TALAB provide the necessary legislative amendments required to implement more complex tax announcements made in Chapter 4 and Annexure C of the 2019 Budget Review. We discussed these announcements in the 2019 Budget Review in our [Special Edition Budget Speech Alert 2019](#).

According to the Media Statement, the Draft TLAB gives effect to a number of key proposals announced in the 2019 Budget Review, including the following:

- Aligning the effective date of tax neutral transfers between retirement funds with the effective date of annuitisation for provident funds;
- Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions;
- Clarifying the interaction between corporate reorganisation rules and other provisions of the Income Tax Act, No 58 of 1962 (Act);
- Refining the tax treatment of long-term insurers;
- Limiting the allowable deduction for investors investing in a venture capital company;

- Reviewing the controlled foreign company (CFC) comparable tax exemption and addressing the circumvention of the anti-diversionary rules; and
- Reviewing s72 of the VAT Act, No 89 of 1991 (VAT Act).

The Media Statement further states that the Draft TALAB gives effect to certain tax administration proposals in the 2019 Budget Review, including proposals regarding tax compliance certificates and tax-free investments.

In this article we briefly discuss the proposal regarding the CFC comparable tax exemption.

CFCs - general principles

in terms of s9D of the Act, where a South African tax resident holds more than 50% of the participation rights or can exercise more than 50% of the voting rights in a foreign company, either alone or together with other South African tax residents, that foreign company will be regarded as a CFC. To determine whether the 50% threshold is exceeded, one must take into account directly and indirectly held participation rights and voting rights that are directly and indirectly exercisable.

If a foreign company is a CFC in relation to a South African tax resident, a portion of the CFC's income, known as its net income, will be taxed in the hands of the resident, unless an exception applies. One of these exceptions is the comparable tax exemption, which is dealt with in s9D(2A) of the Act.

Published! The 2019 Draft TLAB, Draft TALAB and the comparable tax exemption for CFCs...continued

“It is proposed that the comparable tax exemption threshold be reduced to 67.5% from the current percentage of 75%.”

The comparable tax exemption and the rationale behind it

The Explanatory Memorandum on the Draft TLAB (Memorandum), which was released with the Draft TLAB, states that the comparable tax exemption makes provision for CFCs operating in foreign countries where tax payable in that foreign country is at least 75% of what would have been payable inside South Africa, had the South African tax rules applied, to exclude the foreign business income from the net income calculation of the CFC. The Memorandum further states that the main aim of this exemption is to reduce the compliance burden of South African multinationals from being taxed on foreign business profits and thereafter claiming credit against South African income tax. In addition, the exemption seeks to protect the South African tax base whilst providing the need for South African multinational entities to be competitive offshore by disregarding all tainted, passive and diversionary CFC income if little or no South African tax is payable.

Proposed amendment and reason for change

According to the Memorandum, in the context of the global trend towards lower corporate tax rates, in 2018, the Minister of

Finance announced in the Budget Review the intention to review the comparable tax exemption in order to determine whether an amendment is warranted. Based on the above-mentioned statement, a review was conducted and it came to light that the current 75% threshold is no longer comparable. As a result, it provides little or no assistance to cater for South African CFCs in the current world order. Based on this, it is proposed that the comparable tax exemption threshold be reduced to 67.5% from the current percentage of 75%.

Comment

While in principle South African multinational entities should benefit from this proposed amendment, it remains to be seen to what extent they will benefit from it. Of course, the proposed amendment is not yet final. The public now has an opportunity to submit comments to NT and SARS regarding this proposed amendment and any other proposed amendments in the Draft TLAB and Draft TALAB. The deadline for public comments is 23 August 2019.

In the coming weeks, we will discuss some of the other proposals in the Draft TLAB and Draft TALAB.

Louis Botha

Prices advertised or quoted must include VAT

Advertisers are required to comply with the guidelines as set out in the Code of Advertising Practice when advertising goods or services to consumers.

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Enter the Advertising Regulatory Board (ARB). The ARB administers the widely-accredited Code of Advertising Practice (Code) which regulates the content of South African advertising. Advertisers are required to comply with the guidelines as set out in the Code of Advertising Practice when advertising goods or services to consumers.

The ARB recently issued two separate decisions in respect of complaints lodged by consumers regarding advertisements which misled such consumers as to the affordability of the supplies advertised. In the first complaint lodged against a travel website, the complainant lodged a complaint on the basis that a holiday adventure package advertised on the website only listed the VAT exclusive price. The website operator submitted that it had addressed the issue with the

supplier who had provided the content of the advertisement, and that it had since corrected the advertising in question to reflect the VAT inclusive price. In the second complaint lodged against a supplier of office furniture, the complaint was in respect of the advertising of office chairs reflecting only the VAT exclusive price. The supplier agreed to correct its advertising to reflect the VAT inclusive price. In making its decisions requiring the advertisers to address the complaints, the ARB, in both instances, had regard to the Code which states that ‘when an indication of cost is given in an advertisement, regard should be had to s65 of the VAT Act’.

Section 65 of the VAT Act requires that all prices advertised or quoted in respect of a taxable supply of goods or services must include VAT, or alternatively, that the advertisement or quotation must reflect the VAT cost, the VAT exclusive price and the VAT inclusive price. Section 65 goes on to require that where an advertisement reflects the VAT inclusive and VAT exclusive price, both prices must be displayed with equal prominence and impact.

It follows that in terms of s65 of the VAT Act, all price tags, catalogues, advertisements and quotations, must, as a matter of course, include the VAT payable in respect of the supply. We note

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Prices advertised or quoted must include VAT...*continued*

It is a criminal offence not to reflect the VAT inclusive amount when advertising or quoting a price in respect of any taxable supply made by a vendor as required in terms of s65 of the VAT Act.

however, that with regard to retailers, s65 provides that the price tags displayed on goods in-store do not need to contain a 'VAT-inclusive' statement, provided however, that this fact is prominently displayed at all entrances to the premises in which the business is carried on, and at all pay points where payments are made. Section 65 also gives the Commissioner for SARS the authority to approve any other method of displaying prices where he deems necessary. In this regard, the Commissioner has directed, in SARS Binding General Ruling 28 (Issue 2), that an electronic services supplier may advertise or quote the price of its electronic services exclusive of VAT, if it has a statement on its website indicating that VAT will be levied on supplies of electronic services to an electronic services recipient as contemplated in the VAT Act.

Although the ARB is not empowered to impose any punitive measures in respect of the contravention of the Code, it is important to note that in terms of s58(e) of the VAT Act, it is a criminal offence not to reflect the VAT inclusive amount when

advertising or quoting a price in respect of any taxable supply made by a vendor as required in terms of s65 of the VAT Act. SARS previously confirmed that a publisher cannot be held liable for incorrect advertisements or quotations contained in its advertisers' advertisements (SARS Ruling No 49). In that instance, it would therefore be the advertiser, and not the publisher, who would be in contravention of s65 of the VAT Act.

Although a seemingly simple requirement of the VAT Act, many vendors nevertheless find themselves in contravention of the requirements of s65 of the VAT Act, whether intentionally or not, as evidenced by these recent ARB decisions. Even though suppliers may be tempted to adopt a marketing strategy aimed at luring potential customers by means of displaying the lower VAT exclusive price; vendors are reminded, as discussed above, that it is a criminal offence not to reflect the VAT inclusive amount when advertising or quoting prices in respect of its supplies. Suppliers should accordingly carefully review their advertisements and quotations to ensure compliance with the VAT Act.

Varusha Moodaley

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