6 MARCH 2020

TAX & EXCHANGE CONTROL **ALERT**

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Relaxation of exchange control rules on externalising intellectual property

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Essentially, exchange control is governed by the Exchange Control Regulations, 1961 (Regulations) issued under the Currency and Exchanges Act 9 of 1933.

Regulation 10(1)(c) states that "*no person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose... enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic*".

For many years the term "capital" was interpreted widely to include essentially any form of property including, in particular, intellectual property (IP).

In the case of *Oilwell (Pty) Ltd v Protec International Ltd and Others* 2011 (4) SA 394 (SCA), which involved the transfer of intellectual property rights by a resident to a non-resident, the Supreme Court of Appeal held that the term "capital" in this context must be interpreted restrictively to mean cash and money; the term must not be interpreted to include goods, in particular, IP. The court also held that IP is not capable of being "exported".

The government was clearly perturbed by the judgment in *Oilwell* as it meant that South Africans became free to transfer IP abroad without exchange control approval being required. On 8 June 2012 the President added Regulation 10(4) which reads as follows:

> *"For the purposes of sub-regulation [10(1)(c)]–*
>
> *(a) "capital" shall include, without derogating from the generality of that term, any intellectual property right, whether registered or unregistered; and*
>
> *(b) "exported from the Republic" shall include, without derogating from the generality of that term, the cession of, the creation of a hypothetic or other form of security over, or the assignment or transfer of any intellectual property right, to or in favour of a person who is not resident in the Republic."*

In other words, since the introduction of that provision, owners of IP in South Africa were prohibited from transferring IP abroad without exchange control approval.

In Annexure E to the 2020 Budget Review issued pursuant to the Budget Speech of the Minister of Finance on 26 February 2020, it is stated that the National Treasury proposes "*modernising the foreign-exchange system*". Essentially, the exchange control rules will be amended to allow all foreign currency transactions, save for those which are specifically regulated.

In particular, it proposes that no approval will be required for the export of IP for fair value to non-related parties. It is possible that some form of documentation will still be required, for example, a valuation stating what the fair value is and some proof that the party acquiring the IP is not related.

This is great news. It will now likely be much simpler for residents of South Africa who create IP to commercialise their IP.

Approval will presumably still be required for the export of IP to a related party, for example, by a subsidiary of a local company to its holding company abroad.

Ben Strauss

CLIFFE DEKKER HOFMEYR

The additional medical expenses tax credit: The Tax Court finds that strict compliance is required

In the recent 2020 Budget Review released by National Treasury an increase in the value of the medical tax credits that can be claimed by individuals was announced.

In the recent 2020 Budget Review released by National Treasury and on which CDH reported in its Special Edition Budget Speech Alert 2020, an increase in the value of the medical tax credits that can be claimed by individuals was announced. The 2020 Budget Review notes that the increase in the medical scheme fees tax credit by 2.8%, which is below the rate of inflation, is in line with the announcement in the 2018 Budget Review *"...to help fund the rollout of national health insurance over the medium term."* Aside from the medical scheme fees tax credit that individuals can claim and which is determined by their medical aid contributions, certain taxpayers can also claim the additional medical expenses tax credit available under section 6B of the Income Tax Act 58 of 1962 (Act), provided they meet the requirements of the section.

In the recent judgment of *Z v Commissioner for the South African Revenue Service* (IT4412) [2019] ZATC 13 (26 August 2019), the Tax Court considered the appeal of Mr Z (Taxpayer) against SARS' decision to disallow the additional medical expenses tax credit claimed, relating to the alleged treatment for his disability.

Facts

- In his 2015 income tax return, the Taxpayer claimed an additional medical tax credit (Additional Credit) for expenditure allegedly related to his treatment of mercury poisoning, which caused his multiple sclerosis and peripheral polyneuropathy. These conditions resulted in him being wheelchair bound.
- Based on the information in the Taxpayer's return, SARS issued an original assessment indicating that he was due for a tax refund in the amount of R103,358.62.
- The additional medical expenses incurred by the Taxpayer included the costs of purchasing X machine in order to self-treat the mercury poisoning and therefore his disability. He also claimed the costs of consultations with a homeopath and a herbalist.
- However, SARS subsequently audited the Taxpayer and issued a revised assessment disallowing the Additional Credit of R95,571, claimed under section 6B of the Act.
- The Taxpayer objected against the revised assessment and SARS partially allowed the objection by allowing him to claim an amount of R5,594 of the Additional Credit claimed. It disallowed the remaining R89,977.
- Dissatisfied with the outcome, the Taxpayer appealed to the Tax Board, which upheld the revised assessment. He subsequently appealed to the Tax Court.

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The additional medical expenses tax credit: The Tax Court finds that strict compliance is required...*continued*

Second, where the taxpayer alleges that the expenses were incurred in respect of his/her disability, it must be a "*disability*", as defined in section 6B(1) of the Act.

Judgment

Firstly, the Tax Court held that in terms of section 102(1)(b) of the Tax Administration Act 28 of 2011 (TAA), the onus rests with the taxpayer to prove that he is entitled to claim the full Additional Credit.

Second, where the taxpayer alleges that the expenses were incurred in respect of his/her disability, it must be a "*disability*", as defined in section 6B(1) of the Act. The provision requires the disability to be diagnosed by a duly registered medical professional. Further, the said diagnosis must have lasted or have a prognosis of more than a year.

Third, the Tax Court posited that based on the definition of "*qualifying medical expenses*" in section 6B(1) of the Act, the following factors ought to be considered when assessing a claim for an additional medical expenses tax credit:

(a) *the relevant amount must be paid to a duly registered, inter alia, medical practitioner, a homeopath and/or a herbalist for professional services rendered or medicines supplied by a duly registered pharmacist for medication prescribed by any of the abovementioned persons;*

(b) *relevant professionals must be registered with the Professional Health Professions Council of South Africa (HPCSA) and or the Allied Professional Health Professions Council of South Africa (AHPCSA);*

(c) *the expenditure must be prescribed by the Commissioner as necessarily incurred and paid by a taxpayer in consequence of any, inter alia, physical impairment or disability suffered by the person or any dependant of the person.*

Together with meeting the requirements as set out above, a taxpayer must submit a Confirmation of Diagnosis of Disability (ITR-DD) form, which must be completed and signed by a medical practitioner registered with the HPCSA or AHPCSA. The Taxpayer submitted that the ITR-DD form was completed and signed by a medical practitioner.

SARS disallowed the Taxpayer's objection on the basis that:

- The medical professionals he consulted, namely the homeopath, herbalist and medical practitioner, are not duly registered with the HPCSA, AHPCSA or any other governing body. In consequence, the Taxpayer failed to meet the requirements of section 6B(1)(a) of the Act, in respect of "*qualifying medical expenses*" in that the medical expenses were not incurred with a duly registered medical professional. Additionally, the medical expenses do not relate to medical treatment prescribed by a duly registered medical professional.

The additional medical expenses tax credit: The Tax Court finds that strict compliance is required*...continued*

In finding in favour of SARS, the Tax Court found that the Taxpayer failed to prove that he had a disability, as diagnosed by a registered medical practitioner and that his claim did not fall within the scope of *"qualifying medical expenses"*.

- The Taxpayer failed to prove his alleged disability as defined in section 6B(1)(b) of the Act, in that he failed to present medical reports by a duly registered medical professional that concludes that his disability was caused by mercury poisoning. The Taxpayer had personally conducted investigations that led him to conclude that his disability is caused by mercury poisoning.
- The Taxpayer did not meet the requirements of section 6B(1)(c) in respect of qualifying medical expenses, in that the cost of the X machine was not incurred in consequence of his disability and was not prescribed by a duly registered medical professional.

In his defence, the Taxpayer contended that he provided SARS with invoices as evidence that services were rendered by registered medical professionals. The Taxpayer further contended that the invoices submitted to SARS are sufficient to shift the onus to SARS to show that the invoices were rendered by professionals who fall outside the scope of section 6B(1).

The Tax Court further stated that the invoices submitted by the Taxpayer as proof that services were rendered by registered medical professionals, did not suffice. The invoices do not constitute sufficient evidence of a medical professional's registration and other corroborating evidence is required. At most, invoices evidenced the amount charged by a specified service provider for a specified service. Therefore, the Tax Court held that the Taxpayer failed to prove that services were rendered in respect of his alleged disability by a registered medical professional.

In finding in favour of SARS, the Tax Court found that the Taxpayer failed to prove that he had a disability, as diagnosed by a registered medical practitioner and that his claim did not fall within the scope of *"qualifying medical expenses"*.

Comment

It is well-known that private medical care can be expensive. While one certainly feels sympathy for the Taxpayer in the matter under discussion, the judgment illustrates the importance of ensuring compliance with section 6B(1) of the Act, to avoid that a claim for additional medical expenses incurred in respect of a disability is not rejected by SARS.

Ndzalama Dumisa and Louis Botha

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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

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

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

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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

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