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TAX & EXCHANGE CONTROL ALERT

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The 2020 Draft TLAB and Draft TALAB are in! An overview and the issue of wilful conduct

On 31 July 2020, National Treasury (NT) and the South African Revenue Service (SARS) published for public comment the 2020 Draft Taxation Laws Amendment Bill (Draft TLAB), and the 2020 Draft Tax Administration Laws Amendment Bill (Draft TALAB). These draft bills deal with the legislative amendments proposed in Chapter 4 and Annexure C of the 2020 Budget Review and are separate from the COVID-19 tax bills that were published in June 2020, which dealt with the exceptional tax measures implemented to combat the effects of the pandemic.

Broadening the scope of application: tax laws reaching further into the crypto-sphere

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On 31 July 2020, National Treasury (NT) and the South African Revenue Service (SARS) published for public comment the 2020 Draft Taxation Laws Amendment Bill (Draft TLAB), and the 2020 Draft Tax Administration Laws Amendment Bill (Draft TALAB). These draft bills deal with the legislative amendments proposed in Chapter 4 and Annexure C of the 2020 Budget Review and are separate from the COVID-19 tax bills that were published in June 2020, which dealt with the exceptional tax measures implemented to combat the effects of the pandemic.

The media statement accompanying the publication of the bills (Media Statement) indicated that the Draft TLAB gives effect to various key tax proposals, including:

- The introduction of export taxes on scrap metals;
- Tax measures required as a result of the modernisation of the foreign exchange control system;
- Aligning the carbon tax fuel levy adjustment with the Carbon Tax Act;
- Addressing an anomaly in the tax exemption of employer provided bursaries;
- Allowing a carbon tax "pass through" for the regulated liquid fuels sector; and
- Clarifying rollover relief for unbundling transactions.

The Media Statement also specified the key tax proposals contained in the Draft TALAB, such as:

- The amendments enabling the proposed introduction of an export tax on scrap metals;

- The refusal by SARS to authorise a refund where returns are outstanding under the Skills Development Levies Act and the Unemployment Insurance Contributions Act; and
- The withholding of a refund pending a criminal investigation.

In this article, we briefly look at one of the proposed amendments in the Draft TALAB that could have serious consequences for taxpayers.

Removal of the element of wilful conduct in respect of tax related offences

Barring very specific circumstances, it is a commonly accepted principle in South African law that in order to secure a conviction in respect of a criminal offence, fault (either in the form of intent or negligence) on the part of the accused must be demonstrated.

There are various provisions in the tax Acts which provide that specified types of conduct by a taxpayer will constitute an offence, in respect of which the taxpayer may be liable for a fine or imprisonment. Among these provisions are:

1. Paragraph 30 of the Fourth Schedule to the Income Tax Act 58 of 1962;
2. Section 58 of the Value Added Tax Act 89 of 1991; and
3. Section 234 of the Tax Administration Act 28 of 2011 (TAA).

Previously, each of these provisions required that a taxpayer must commit the relevant act "wilfully and without just cause" before the taxpayer could be found guilty of the offence. The Draft TALAB

The 2020 Draft TLAB and Draft TALAB are in! An overview and the issue of wilful conduct...*continued*

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 31 August 2019.

proposes to amend the wording of these three provisions by removing the term "wilfully" from the legislation, thereby removing the obligation on SARS to prove intent before a taxpayer can be found guilty of one of these offences.

The Draft Memorandum on the Objects of the TALAB, 2020 (Draft Memorandum) that was published with the Draft TALAB explained that the reason for the proposed amendment is that the term "wilfully" denotes only intention on the part of the taxpayer and does not encapsulate the other type of fault, being negligence. It is NT's objective to hold taxpayers liable for either their wilful or their negligent conduct that may lead to an offence in terms of the aforementioned provisions, and not just the conduct that is wilful.

From the explanation provided in the Draft Memorandum, it appears that the intention of NT and SARS is not to relieve SARS of its obligation to prove fault on the part of the taxpayer, but rather to specify that the element of fault (as it applies to

these provisions) includes both intent and negligence. As such, at least one of these components of fault must be proven before a taxpayer may be found guilty of an offence. Given this rationale, it remains to be seen whether the current wording of the proposed amendment will be adjusted to make the intention of NT more readily apparent.

Public consultation process

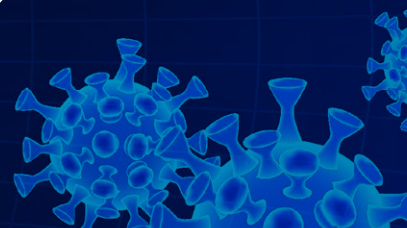
The public now has an opportunity to submit comments to NT and SARS regarding this proposed amendment and any other proposed amendments in the Draft TLAB and Draft TALAB. The deadline for public comments is 31 August 2019. The Media Statement indicates that due to the national lockdown regulations, further information will be provided regarding the manner and platform of public engagements to discuss the written comments, which in prior years took place in person.

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

Louise Kotze

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Broadening the scope of application: tax laws reaching further into the crypto-sphere

In the South African tax context, the authorities have previously considered, to a large extent, only the tax treatment of cryptocurrencies.

The use of cryptocurrencies and other crypto assets are becoming increasingly popular, especially in an economic climate in which fiat currency exchange rates are unsteady and volatile. In the South African tax context, the authorities have previously considered, to a large extent, only the tax treatment of cryptocurrencies. To this end, the intended tax treatment of cryptocurrencies has manifested in three distinct ways:

1. The South African Revenue Service (SARS) announced, in a media statement issued on 6 April 2018, that it will apply normal income tax rules to cryptocurrencies, in terms of which specific regard will be had to the revenue or capital nature of the cryptocurrencies held;
2. The Income Tax Act 58 of 1962 (ITA) was amended to include cryptocurrencies in the definition of "financial instrument". The ITA was further amended to provide, in terms of section 20A, that the acquisition or disposal of cryptocurrencies will constitute a trade in respect of which any losses that are incurred will be ring-fenced; and
3. The Value Added Tax Act 89 of 1991 (VAT Act) amended the definition of financial services to include the issue, acquisition, collection, buying or selling or transfer of ownership of any cryptocurrency.

Given the renown of the concept of cryptocurrencies and their growing popularity, it is unsurprising that the lesser known types of crypto assets have received much less consideration from the tax authorities. However, there are, at present, mainly four types of crypto assets, specifically:

- Cryptocurrencies;
- Platform tokens or cryptocommodities;
- Utility tokens; and
- Transactional tokens.

Each of these types of crypto assets utilise cryptography and a public ledger to regulate the creation of new crypto asset units, to verify transactions, and to secure those transactions through the use of peer-to-peer networking, thereby eliminating the need for a "middleman".

There has been significant speculation regarding how these other crypto assets will be treated for tax purposes and whether the tax treatment will be the same as that of cryptocurrencies. Many international jurisdictions have drawn no distinction between the various types of crypto assets and it appears from the 2020 Draft Taxation Laws Amendment Bill (Draft TLAB), which was published on 31 July 2020, that National Treasury (NT) has elected to follow suit. The Draft TLAB has proposed amendments to both the definition of financial instrument and section 20A of the ITA, which provisions will now make reference to the wider concept of crypto assets, rather than just cryptocurrencies.

Broadening the scope of application: tax laws reaching further into the crypto-sphere...*continued*

However, while the Draft TLAB has proposed amendments to the provisions of the ITA with regards to the taxation of crypto assets, there has been no proposed amendment to the definition of financial services in the VAT Act.

The statutory inclusion of all crypto assets in the relevant provisions of the ITA suggests that the normal tax treatment that is to be applied to cryptocurrencies as per the media statement issued by SARS will apply equally to all types of crypto assets.

However, while the TLAB has proposed amendments to the provisions of the ITA with regards to the taxation of crypto assets, there has been no proposed amendment to the definition of financial services in the VAT Act. This has the effect that the ITA will be widely applicable to all crypto assets, while the exemption provided for in the VAT Act

will apply only to transactions pertaining to cryptocurrencies and not to those transactions utilising the other types of crypto assets.

It is uncertain whether this was an unintended oversight or whether it is intended that the exemption from VAT provided for in respect of financial services in the VAT Act be limited only to cryptocurrencies. Clarity will have to be provided by NT in this regard and written public comment in respect of the proposed amendments in the TLAB may be submitted until 31 August 2020.

Louise Kotze

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Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 1: Tax: Indirect Tax.

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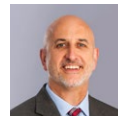
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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