

Business Law & Tax Review

SOMETHING TO DECLARE

Royalty charges paid from SA invite tax consequences



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For duty purposes, the price payable for goods must be adjusted by adding royalties and licence fees in respect of such imported goods

IT IS a lesser known fact that certain royalty charges paid out of SA in respect of imported goods should, for customs duty purposes, be added to the value of the goods imported to SA.

This will have an effect on the import duty and value-added tax (VAT) paid upon import of the goods into the country.

Section 66 of the Customs and Excise Act provides that the transaction value (that is the price or cost) of any imported goods shall, for duty purposes, be the price actually paid or payable for the goods, but adjusted in terms of section 67.

Section 67 of the act provides that in ascertaining the transaction value of any imported goods in terms of section 66 there shall be added to the price actually paid or payable for the goods, royalties and licence fees in respect of the imported goods, including payments for patents, trade marks and copyright and for the right to distribute or resell the goods

due by the buyer directly or indirectly as a condition of sale of the goods for export to the Republic, to the extent that such royalties and fees are not included in the price actually paid or payable, but excluding charges for the right to reproduce the imported goods in the Republic.

SA is a signatory to the World Trade Organisation (WTO) valuation agreement. The provisions of article 8 of the WTO agreement have been used as the basis for the sections in the act that deal with valuation issues.

The commentary and notes to the WTO agreement are therefore relevant for the purpose of interpreting section 66 and section 67 of the act. According to the commentary to article 8, the charges for the right to reproduce imported goods in the country of importation shall not be added to the price paid or payable. For a royalty amount to be included in the price paid or payable the royalty must be:

■ In respect of imported goods;

■ Due by the buyer;
 ■ Directly or indirectly as a condition of sale of the goods for export to SA;
 ■ Not included in the price paid or payable for the goods; and
 ■ Must be for the right to distribute or resell the imported goods (section 67(1)(c)).

The royalty payment in terms of, for example, a licence for the right to use a particular trade mark and to market, distribute and sell the imported goods will be included as part of the price paid or payable in terms of section 67(1)(c)).

A royalty amount that is still to be paid because it stands to be determined at a future date as it is calculated on net sales would therefore still be included in the dutiable value of the goods, provided that the other requirements set out above are met. Even where the royalty amount is not known at the time of importation it would still fall to be taxed as the dutiable value of the goods, and in practice this would entail the taxpayer approaching the

South African Revenue Service (SARS) to account for the duty at the time that the royalty amount is determined.

Should SARS investigate and uncover an undervaluation due to nonpayment of duty, the taxpayer could face a full investigation that could result in interest and penalties also being levied. Further, the act allows SARS to call for duty for up to two years prior to the date on which an investigation against a taxpayer began. If there is evidence of fraud or misrepresentation on the part of the taxpayer the two-year prescriptive period would fall away.

Taxpayers are therefore alerted that there are tax consequences that must be considered, other than income-tax consequences, of paying royalties out of SA. Your customs duty bill could be significantly increased if such royalties are in respect of imported goods.

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